UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a/ PAR FUNDING, et al.,

_____/

PLAINTIFF'S RESPONSE TO DEFENDANTS JOSEPH LAFORTE, LISA MCELOHE, AND JOSEPH COLE BARLETA'S MOTION TO STRIKE OR VACATE

I. INTRODUCTION

Throughout this case, Defendants Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta (collectively, the "Defendants") have attempted to avoid accountability for defrauding investors by blaming the Securities and Exchange Commission. Now is no different. In a desperate bid to unravel the Judgments to which they previously consented, the Defendants make myriad false assertions that ignore the Consents and consent Judgments to which they are bound, the history of this case, and the law. Contrary to their assertions, the Defendants got precisely what they bargained for, and they are in fact explicitly prohibited by the Judgments to which they voluntarily consented from challenging the validity of the Consents and Judgments. Yet that is precisely what they are doing. In fact, each of the Defendants' arguments attacks exactly what the Defendants agreed to in their Consents, which are incorporated in the Judgments entered against them.

THE DEFENDANTS' ARGUMENTS	THE DEFENDANTS' ARGUMENTS ARE AGAINST WHAT THEY AGREED TO IN THE CONSENTS
That the Consents and the consent Judgments should be vacated	**"Defendant may not challenge the validity of this Consent or the Judgment."** Consent at ¶ 5(b).
That the SEC engaged in a "bait-and-switch" in connection with the Consents and Judgments	**"Defendant enters into this Consent voluntarily and represents that no threats, offers, promises, or inducements of any kind have been made by the Commission…."** (Consent ¶ 8)
That consideration of the SEC's arguments will result in finding Defendants liable on new counts	The Consents and Judgments resolve liability on the Complaint counts, and the only matters at issue are remedies. (Consents & Judgments).

THE DEFENDANTS' ARGUMENTS	THE DEFENDANTS' ARGUMENTS ARE AGAINST WHAT THEY AGREED TO IN THE CONSENTS
That the SEC argues and attaches evidence that are improper because they are outside of the Complaint allegations	The Consents/Judgments provide no such limitation, and instead state that the *Complaint allegations* are deemed as true and additional evidence can be filed: **"Solely for the purposes of such motion, the allegations of the Complaint shall be accepted as and deemed true by the Court**" *Id.* at ¶ 5(c) **"The Court may determine the issues raised in the motion [to set monetary relief amounts] on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence"** *Id.* at ¶ 5(d).
That the Defendants are deprived of due process because they cannot respond to the arguments and evidence in the SEC's motion	The Defendants consented to this process and may seek discovery, file exhibits, and respond to the motion: **"Solely for the purposes of such motion, the allegations of the Complaint shall be accepted as and deemed true by the Court**" *Id.* at ¶ 5(c) **"In connection with the SEC's motion for disgorgement and/or civil penalties, the parties may take discovery, including discovery from appropriate non-parties."** *Id.* at ¶ 5. **"The Court may determine the issues raised in the motion [to set monetary relief amounts] on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence"** *Id.* at ¶ 5(d). Defendants sought and received an extension of time to conduct discovery and respond [ECF No.1220].
That the SEC's motion requires an evidentiary hearing and claim they will require "days if not weeks" of evidentiary hearings, despite explicitly agreeing that there will be no evidentiary hearing and that the issues will be decided on a *Motion*	The Defendants agreed the Court will determine monetary relief based on *motion practice*: **"The Defendant agrees that, upon motion of the Commission, the Court shall determine [whether to impose disgorgement and penalties and if so, the amounts thereof]"** ***Id.*** **at** ¶ 5. **"The Court may determine the issues raised in the motion [to set monetary relief amounts] on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence"** *Id.* at ¶ 5(d).

The SEC's filing complies precisely with what the Consents and Judgments provide for and to exactly what the parties agreed. In stark contrast, the Defendants have filed a Motion that is explicitly prohibited by the Consents and Judgments, supported by nothing more than their own self-serving declarations after having previously asserted Fifth Amendment rights, and that raises arguments that ignore the Consents and Judgments to which they voluntarily bound themselves. The Defendants argue a wild menagerie of arguments:

(i) That the SEC's arguments add new counts to the Complaint, despite the fact that the SEC argues facts relevant to remedies on existing counts, does not seek liability on any new count, and the SEC's arguments and evidence are relevant to the counts in the Complaint. In fact, the Court denied the Defendants' motion *in limine* to preclude the SEC from making these same arguments at trial *on the counts alleged in the Complaint* [ECF No. 1019];

(ii) That the SEC engaged in a "bait-and-switch," despite the fact that the Defendants stated in their Consents that the SEC made no promises or inducements in connection with the Consents and Judgments;

(iii) That the SEC "ambushed" the Defendants with never-before-raised arguments that Par Funding was barely breaking even and used investor funds to pay other investors their purported investment returns, despite the following facts:

- Whether Par Funding is a Ponzi scheme has argued since no later than August 2020;
- By December 2020, the Receiver concluded Par Funding was a Ponzi scheme;
- On February 11, 2021 the SEC notified the Defendants that the SEC had concluded its forensic analysis and determined that Par Funding was a Ponzi scheme;
- The SEC and Defendants hired expert witnesses to opine on this issue;
- In August 2021 the SEC provided the Defendants with an expert report opining that Par Funding could not have paid investors without other investor monies;
- The Defendants filed a motion *in limine* – which the Court denied – to preclude the SEC's expert witness from testifying at trial *on the counts in the in the Complaint,* about Par Funding's use of investor money to pay other investors; and
- Perhaps most spectacularly, these same Defendants filed **about 1,000 pages of filings** where they addressed Par Funding being a "Ponzi scheme" (Exhibit A).

- And yet the Defendants now come before this Court claiming surprise. The Defendants go on to argue:

(iv) That the monetary remedies must be decided based solely on Complaint allegations, despite the Consents and Judgments stating that the parties can seek discovery and file evidence;

(v) That the SEC's arguments should be limited and stricken, despite the Consents and Judgments providing limitations only on what the Defendants can argue and none on the SEC;

(vi) That the SEC's evidence will require evidentiary hearings lasting "days – if not weeks," despite the Consents and Judgments providing that monetary remedies will be determined based on motion practice and the filing of evidence; and

(vii) That the Defendants are being denied due process, despite the fact that they consented to this process and have the opportunity to respond to the SEC's evidence of unpled facts with their own counter-evidence.[1]

In reliance on the Consents and consent Judgments, the SEC did not proceed to trial against the Defendants during the December 2021 trial in this case. For the reasons set forth more fully below, the Defendants cannot meet their burden for limiting the SEC's arguments, which would amount to a modification of the Consents and Judgments, or vacating the consent Judgments. Accordingly, the Court should deny the Defendants' Motion.[2]

II. RELEVANT PROCEDURAL BACKGROUND

A. The SEC's Complaint Alleges Securities Fraud Against the Defendants For Making Misrepresentations and Omissions, and Engaging in a Fraudulent Scheme and Course of Business, In Connection with the Purported Success of Par Funding

On July 24, 2020, the SEC filed a Complaint against the Defendants, alleging that the Defendants made misrepresentations and omissions to investors about, among other things, the success and profitability of Par Funding, and that the Defendants engaged in a fraudulent scheme and fraudulent course of business [ECF No 1]. The SEC charged the Defendants with seven Counts of violations of the registration and anti-fraud provisions of the federal securities laws. *Id.*

[1] The Consents and consent Judgments prohibit the Defendants from challenging or denying the Complaint allegations and permit the parties to conduct discovery and file evidence concerning monetary remedies. Thus, the Defendants are not prohibited from responding to evidence or argument concerning unalleged facts, and can engage in discovery and file evidence about them.

[2] Defendant Michael Furman filed a Notice stating only that he joins in the Defendants' Motion to Strike or Vacate the Consents. Furman did not execute a Consent, his arguments are unknown, and therefore we will address Furman's arguments at the May 19, 2022 hearing on the Defendants' motion if and when he articulates them.

On August 10, 2020, the SEC amended the Complaint to correct the name of the Relief Defendant [ECF No. 119].

B. The August 21 and 25, 2020 Hearings

The Court ordered expedited discovery and that the Receiver could obtain all Par Funding books and records [ECF Nos. 42, 36 Expedited Discovery Order and Order Appointing Receiver]. The Court held hearings in August 2020, including a two-day preliminary injunction hearing. During the August 21, 2020 hearing and in their July and August 2020 filings, the Defendants argued that Par Funding was not a Ponzi scheme. During the August 21, 2020 hearing, the SEC stated that the SEC had not yet determined "if it's a Ponzi scheme because we're just now getting access to some of the corporate records that are required for that," and went on to present evidence that based on what the SEC had received as of that time Par Funding was a Ponzi scheme. (Exhibit B, August 21, 2020 hearing, at pdf page 203, Line 16 – pdf page 205, Line 12).

During the August 25, 2021 hearing, the SEC notified the Court that "evidence shows that this was operating as, you know, what's commonly referred as a 'Ponzi scheme' in the sense that they were paying investors with new investor money" (Exhibit C at pdf page 83, Lines 21-24), and that Par Funding's operation as a Ponzi scheme "is relevant to our allegations about the representations made to investors about its success and that it was a meritorious company," *id.* at pdf page 84, Lines 21-24. During this same hearing, the Defendants argued that Par Funding was not a Ponzi scheme. (Exhibit C). Beyond these hearings, the Defendants litigated and argued in their briefs throughout this case that Par Funding is not a Ponzi scheme.

C. Expert Witness Reports Concerning The Success of Par Funding and Whether Payments To Investors Included Other Investor Funds

In December 2020, the Receiver reported to the Court that Par Funding operated as a Ponzi scheme. On February 11, 2021, the SEC notified defense counsel that the SEC had concluded its review of Par Funding's books and records and had determined that Par Funding was a Ponzi scheme. In August 2021, the SEC provided defense counsel and subsequently filed with the Court an expert report that included, among other things, the opinion that Par Funding commingled investor funds and could not have made payments to investors without the inclusion of other investors' money. The Defendants hired their expert witness who issued declarations and an expert report opining to the contrary.

D. Defendants' Motions in Limine To Regarding Expert Testimony That Par Funding Made Payments To Investors Using Other Investor Funds

In advance of the trial date, Defendants LaForte, McElhone, and Barleta filed motions to exclude from trial evidence that Par Funding could not have paid investors their returns without the use of other investors' funds. For example, these Defendants filed a motion to preclude the SEC's expert witness from testifying about this finding at trial on *Daubert* grounds [ECF No. 803]. In denying that Motion, the Court ruled:

> Upon careful review of the record, the Court is not persuaded that Davis's testimony is either unreliable or would serve to mislead the jury. Defendants primarily argue that Davis's opinion, insofar as she finds that Par Funding's cash flow from Merchant Advances was insufficient to pay promised investor returns and operational expenses, is unreliable testimony is either unreliable or would serve to mislead the jury.

[ECF No. 952].

In their Omnibus Motion in Limine, the Defendants sought only to preclude the SEC from uttering the phrase "Ponzi scheme" because the Defendants believe that phrase is pejorative. [ECF No. 926 at p.3]. They did not seek to exclude evidence that they paid investors using other investor funds (i.e., what a so-called "Ponzi scheme" is). Until now, when they make a disingenuous representation in their current motion that they are shocked to hear that the SEC is arguing Par Funding operated as such.

E. The Defendants' Consents on the Eve of Trial

On the eve of trial, the Defendants executed Consents to Judgments. [ECF Nos. 1002-2, 1004-1, 1016-2]. The Defendants' counsel signed the Consents approving the form of the Consents. *Id.* The Court granted the consent Judgments against the Defendants [ECF Nos 1007, 1009, 1017]. The Judgments incorporate the Consents [ECF Nos 1008, 1010, 1018]. In the Consents and consent Judgments, the Defendants agreed and the Court ordered, among other things, as follows:

- **"[U]pon motion of the Commission, the Court shall determine whether it is appropriate to order disgorgement of ill-gotten gains and/or a civil penalty pursuant to Section 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)] and, if so, the amount(s) of the disgorgement and/or civil penalty."** *Id.* at ¶ 5.

Thus, the Defendants consented to the Court determining disgorgement and penalty amounts based on a *motion*. The Consents go on to provide:

- **"Defendant will be precluded from arguing that he did not violate the federal securities laws as alleged in the Complaint."** Id. at ¶ 5(a).

Thus, the only parties precluded from argument are the Defendants. And even then such preclusion is only as to the *Complaint allegations*. In the Consents, the Defendants further agreed:

- **"Defendant may not challenge the validity of this Consent or the Judgment"** *Id.* at ¶ 5(b).

Thus, the Defendants are precluded from challenging the Consent or Judgment – precisely what they attempt to do in their instant Motion. The Defendants further agreed:

- **"Solely for the purposes of such motion [to set disgorgement and penalty amounts], the allegations of the Complaint shall be accepted as and deemed true by the Court."** *Id.* at ¶ 5(c).

Thus, the *allegations of the Complaint* are deemed as true and not, as the Defendants imply, additional facts and arguments presented in the SEC's Motion that were not alleged. The Defendants also agreed:

- **"The Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules."** *Id.* at ¶ 5(d).

Thus, the Defendants agreed that the Court would determine disgorgement and penalties based on additional evidence filed with the Court.

The Consents are incorporated in the Judgments the Court entered, by the Defendants' explicit consent, and these Judgments remain in effect. [ECF Nos. 1008, 1010, 1018, Judgments].

III. THE DEFENDANTS' MOTION TO STRIKE

The Defendants seek an Order striking the SEC's argument that Par Funding used investor funds to pay other investors their purported returns, and in the alternative seek an Order vacating the consent Judgments against them. The SEC addresses each request for relief separately, beginning with the request to strike the SEC's Motion argument.[3]

[3] Throughout the Defendants' Motion, the Defendants make myriad allegations about the SEC's and Receiver's conduct that have already been rejected by the Court or that are currently the subject of the Defendants' interlocutory appeal. The Defendants do not ask the Court to reconsider those prior orders rejecting their arguments, and therefore the SEC understands that we are not re-litigating them in this response. The SEC's silence on the numerous statements in the Motion that

A. Standard of Review for a Motion to Strike

The Defendants do not cite any Rule pursuant to which they seek to strike the SEC's motion. The Court is treating the Defendants' Motion to Strike as an expedited matter, with expedited briefing and a hearing scheduled. The SEC respectfully requests that the Defendants be required to identify the rule or law pursuant to which they seek to strike the SEC's Motion so that the SEC can respond within the proper legal framework and address the burden of proof and standard of review. Because this remains a mystery as of the date of this filing, the SEC assumes the Defendants seek to strike the SEC's Motion pursuant to Federal Rule of Civil Procedure 12(f).

Pursuant to Rule 12(f), a court "may order stricken from any *pleading* any insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." (emphasis added). As Rule 12(f) explicitly states, the Rule applies to *pleadings*.

B. The Defendants' Motion to Strike the SEC's Argument or Motion Is Procedurally Improper and Should Therefore Be Denied

A motion is not a pleading. Therefore a motion to strike a motion (which is what the Defendants have filed) is improper and subject to denial as a matter of law. *See* Fed. R. Civ. P. 12(f). Accordingly, the Court must deny the Defendants' motion as procedurally improper and bereft of legal support. *Jallali v. Am. Osteopathic Ass'n,* No. 11–60604–CIV, 2011 WL 2039532, at *1 (S.D. Fla. May 25, 2011) (Cohn, J.) (denying motion to strike language from motion to dismiss because "motions are not pleadings within the definition of Rule 7(a)"); *Weiss v. PPG Indus., Inc.*, 148 F.R.D. 289, 292 (M.D. Fla. 1993) ("A motion is not a pleading, and thus a **motion to strike a *motion*** is not proper under 12(f).") (emphasis in the original)); *Ramos v. Tomasino*, Case No. 16-CV-80681, 2016 WL 8678546 (S.D. Fla. Aug. 25, 2016) (denying a motion to strike a motion because a motion is not a pleading under Rule 12(f)). Accordingly, the Court should deny the Defendants' motion to strike the SEC's argument or motion.

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relate to matters already adjudicated should not be read to reflect anything other than the SEC's understanding that the Court has already ruled on them and they are not properly before the Court. If the Court finds it helpful to hear from the SEC again on these previously-litigated matters, the SEC asks that we be permitted to address any such issues at the hearing on Defendants' motion.

C. Even if There Was Authority to Strike an Argument from a Motion – And the Defendants Have Identified None - The Defendants' Motion Would Fail

Without waiving its argument that there is no legal basis for striking an argument in a motion and that the Defendants have cited no basis, the SEC will address the Defendants' arguments in the order in which the Defendants present them [ECF No. 1224 at pp. 6-11].

1. The Defendants' Due Process Argument is Wrong

The Defendants argue that their due process rights are violated because the SEC argued facts in connection with remedies that were not alleged in the Complaint. They cite no case law that is on point, because there is none. Under the Defendants' theory, they would be precluded from presenting any argument, fact, or evidence that they did not plead in their Answers to the Complaint. Obviously, that is not what occurs. There is no question what occurs, because the parties agreed to the process already. The Defendants and their counsel signed Consents agreeing that the parties could conduct discovery and file evidence in connection with the litigation at the remedies phase concerning the appropriate disgorgement and civil penalty amounts.

Procedural due process guarantees a person notice and an opportunity to be heard "at a meaningful time and in a meaningful manner." *Catron v. City of St. Petersburg*, 658 F.3d 1260, 1266 (11th Cir. 2011). Here, the Defendants agreed in their Consents to a procedure where the SEC would file a Motion for Final Judgment and the parties could present evidence and argument [Consents at ¶5]. The SEC's motion complies with the procedure to which the parties agreed, the Defendants have an opportunity to file a response with their own evidence and argument, and therefore there is no procedural due process issue.

The Defendants next claim that there is a due process violation because they did not have notice that the SEC would argue that the Defendants paid investors using other investors' money [ECF No. 1228 at 6]. In support, the Defendants cite case law for the general proposition that "it is fundamental that 'a judgment may not be based on issues not presented in the pleadings and not tried with the express or implied consent of the parties.'" *Id.* However, this argument is entirely misplaced. The SEC is not seeking liability for a violation of paying investors with other investor money - the liability phase is over and we are now in the remedies phase, where both parties agreed to the filing of evidence and arguments. As such, the cases the Defendants rely on are inapposite to the situation here, and specifically as follows:

- *Kipu Sys., LLC v. ZenCharts, LLC*, No. 17-CV-24733, 2020 WL 9460639, at *9 (S.D. Fla. Nov. 24, 2020): In this case, a new claim was added during trial that was never pled, the claim

was included in the jury instructions, and a judgment for liability was made on this unpled claim. This case is inapposite. The SEC is not adding a claim for liability. The SEC is merely presenting a fact and evidence that not only supports the claims in the Complaint but also is relevant to the disgorgement calculation and penalties - just as the parties agreed.

- *Cioffe v. Morris*, 676 F.2d 539, 541 (11th Cir. 1982)): In this case, the complaint alleged breach of contract, and at trial the defendant was found liable under a different claim that was not pled. That is not the case here, where the liability phase is over and there is no additional claim presented for which the SEC is seeking liability.

- *Doe #6 v. Miami-Dade Cty.*, 974 F.3d 1333, 1335 (11th Cir. 2020)): A group of sex offenders filed a motion under Fed. R. Civ. P. 15 to amend their Complaint to add a claim based on evidence presented at trial. As with the other cases, this case is inapposite because we are not seeking to amend the Complaint.

The SEC is not seeking to add a new charge or claim, or violation. We are simply presenting the facts and evidence necessary for a proper disgorgement and penalty calculation – just as the Consents and Judgments direct. The Defendants expressly consented that evidence could be filed in connection with the Motion for Final Judgment, and even that *discovery* into new facts could be taken [ECF Nos.1002-2, 1004-1, 1016-1, Consents, at ¶5].

Next, the Defendants' claim due process violations on grounds they did not have notice that the SEC would raise the fact that Par Funding is a Ponzi scheme. This is simply false. The Defendants have been actively litigating whether Par Funding is a Ponzi scheme since August 2020. In fact, they filed numerous briefs concerning that issue (Exhibit A), hired an expert witness to opine about it, received the SEC's expert witness report concerning it, were told on February 11, 2021 that the SEC had concluded that Par Funding is a Ponzi scheme, and filed two motions in *limine* about it. The Defendants raised the Ponzi scheme issue with the Court themselves from the time they learned about this case until a week before they settled it. As set forth above, the Ponzi scheme issue was raised repeatedly, in hearings and filings, and the Defendants themselves first presented the issue of whether it was a Ponzi scheme, and before the preliminary injunction even occurred.

Accordingly, the Defendants' due process arguments fail.

2. The Defendants' Argument That the SEC's Motion is an Improper Attempt to Amend the Complaint is Wrong

The Defendants' second but related argument is that the SEC is improperly adding a Count to the Complaint that the Defendants operated a Ponzi scheme. [ECF No. 1228 at pp. 6-7]. As an initial matter, the Defendants do not articulate what additional count is supposedly being added to

the Complaint, and undersigned is unaware of any. Rather than articulate a count that is supposedly being added for liability purposes on a simple motion to set the remedies in this case, the Defendants simply throw out this confusing concept of a supposed Ponzi scheme law the SEC is trying to add. They do not articulate a missing Count in the Complaint because there is none.

Regardless, as discussed more fully in Section II(B)(1) above, the SEC is not adding any new Count to the Complaint. The SEC is not pleading – or even arguing – that any additional section or rule of the securities laws was violated. The liability phase is *over*. We are now in the remedies phase of the case. Here, the SEC's Complaint charged the Defendants with making misrepresentations and omissions about, among other things, the success of Par Funding and with engaging in a fraudulent scheme and course of business in connection with that and other alleged misrepresentations and omissions [ECF No. 119]. The issue of using investor money to pay other investors is directly relevant to the SEC's claims and the scienter, and the Defendants know that: Their motion *in limine* to exclude this expert witness evidence at trial was denied [ECF No. 952].

As set forth in Section III(B)(1) above and in the SEC's Motion, evidence that the Defendants paid investors using other investors' money, or could not have paid investors their returns without using other investors' money, is relevant to: (1) calculating disgorgement and (2) determining appropriate civil penalties.

3. The Defendants' Argument That They Must Admit to the Evidence and Argument Concerning the Use of Investor Funds to Pay Investors Is Wrong

The Defendants next claim that the Court must strike the SEC's argument and evidence because it is unfair to require the Defendants to admit to that evidence. The Defendants are confused, because no such restriction exists. Pursuant to the Consents and Judgments, the Defendants are prohibited from denying the *allegations in the Complaint*, and the *allegations in the Complaint* are deemed as true for purposes of the SEC's Motion to set the monetary remedy amounts [Consents at ¶5]. The SEC has never argued that the Defendants must admit the facts or arguments the SEC makes outside of the Complaint.

In fact, the Consents and Judgments very clearly provide that the parties may file evidence for the Court's consideration, and the Defendants are entitled to respond to the SEC's Motion. The Defendants know that. They previously filed a Motion asking for additional time to file that response, on grounds they require time to conduct discovery and file their response brief, and the Court has granted that Motion giving them until July 1, 2022 to do so. The Defendants' instant

arguments that they are prohibited from responding and presenting their own evidence is, at best wrong.

4. The Defendants' Argument That The SEC Is Presenting A New Theory of Liability Is Wrong

Defendants argue that the SEC is introducing a new theory of liability [ECF No. 1228 at pp. 7-8]. Again, the SEC did not do that. Liability is over; this is the remedies phase and the Parties agreed the Court can look beyond the Complaint to determine the appropriate dollar amounts for the relief. The Defendants spend two pages citing eight cases that are wholly inapposite and involve breach of contract claims and types of claims where *liability* can be determined based on different theories the plaintiff sought to add after discovery. *Id.* None of those cases are remotely relevant to the situation here where: liability has been determined; the case law for the unique statutory remedies at issue lists and details what the Court must consider; the SEC is providing that evidence; and the Defendants simply do not like it.

5. The Defendants' Argument About a "Bait and Switch" Is Wrong

The Defendants' claim that the SEC engaged in a "bait-and-switch" is false.[ECF No. 1228 at pp. 8-9]. Contrary to the Defendants' assertion that the SEC is "ambushing the Defendants" by the arguing that they paid investors using other investor money and were barely breaking even, this issue has been litigated extensively and the Defendants even hired an expert witness and filed his reports and opinions about this issue. Those facts are set forth above and so we do not repeat them here again. Further, in the Consents, the Defendants represented to this Court that the SEC made no promises, offers, or inducements in connection with the Consents and Judgments [ECF Nos. 1002-1, 1002-2, 1004-1, 1003-1, 1016-1, 1016-2 at ¶8 and Section III]. And that is because no promises were made. The Defendants assertion that they just assumed the SEC would not argue the flow of money when seeking monetary relief is – even if believed – not a basis for striking the SEC's argument.

6. The Defendants' Argument About the Need for Extensive Discovery Is Wrong

The Defendants' assertion that they will have "an extremely limited period in which to take discovery" is absurd. [ECF No. 1228 at p.9]. The Defendants *did* engage in this discovery, they hired an expert witness, they deposed the SEC's expert witness, and they already did their analysis and filed it with the Court last year claiming Par Funding did not pay investors using other investors' money.

It is not a complex issue – do the bank records show commingled money and could investor payments have been made without new investor money? That is what the SEC argues about it in its Motion. The Receiver, the Defendants, and the SEC all presented reports to the Court on this a year ago. What discovery could possibly occur about the flow of money that has not already occurred? The Defendants' expert filed 2 declarations and a final expert report opining about it, the Defendants deposed the SEC's expert witness about it, and the Defendants were prepared to address this at trial three months ago and the Court even entered an Order that the Defendants could cross examine the SEC's expert witness at trial about the use of investor money to pay other investors. So what extensive discovery needs to occur now, after nearly two years of discovery about that issue and after three Defense expert filings about it? The Defendants do not articulate what discovery must occur, because there is no conceivable discovery left to conduct about the flow of money. Regardless, they are entitled to it and have until July 1 to complete it.

7. The Defendants' Argument About The Need for Lengthy Evidentiary Hearings is Wrong

The Defendants contend that *t*he SEC's assertion that Par Funding could not have made payments to investors without new investor money will require "days, if not weeks," of evidentiary hearings. However, the Defendants are not entitled to any evidentiary hearing at all. Pursuant to the Consents and consent Judgments, the Court will determine the monetary relief based on the *motion*. The reason for that language is precisely to avoid evidentiary hearings and mini-trials. The Defendants agreed to have the Court determine the issues on a motion, and they cannot now change it.

As set forth above, the Defendants' arguments are wrong and are in direct contrast to the terms of their Consents and the Judgments. The Court must deny their Motion to Strike.

IV. THE DEFENDANTS' MOTION TO VACATE THE CONSENTS AND CONSENT JUDGMENTS

A. Rule 60(b) Generally

The Defendants seek to vacate their Consents and the consent Judgments entered against them pursuant to Rules 60(b)(1), (3), (5), and (6) of the Federal Rules of Civil Procedure [ECF No. 1224 at pp. 4, 12]. Specifically, Rule 60(b) and its relevant subsections provide that the Court may relieve a party from an Order for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (3) fraud, misrepresentation, or misconduct by an opposing party; (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has

been reversed or vacated; or applying it prospectively is no longer equitable; or (6) any other reason that justifies relief. Fed. R. Civ. P. 60(b).

Rule 60(b) is "extraordinary judicial relief" and can be granted "only upon a showing of exceptional circumstances." Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986); *accord* United States v. Bank of New York, 14 F.3d 756, 759 (2d Cir. 1994). "The desirability for order and predictability in the judicial process speaks for caution in the reopening of judgments." *Griffin v. Swim-Tech Corp.,* 722 F.2d 677, 680 (11th Cir.1984). To this end, Rule 60(b) "must be carefully interpreted to preserve the delicate balance between the sanctity of final judgments and the 'incessant command of the court's conscience that justice be done in light of all the facts.' " *Id.* (citation omitted); *see also Cano v. Baker,* 435 F.3d 1337, 1339-40 (11th Cir.2006) (observing the need to balance equitable considerations against the need for finality of judgments). Thus, to prevail, the movant "must demonstrate a justification so compelling that the district court [is] required to vacate its order." *Thompson v. Hicks,* 213 Fed. Appx. 939, 941 (11th Cir.2007) (quoting *Solaroll Shade & Shutter Corp. v. Bio-Energy Sys., Inc.,* 803 F.2d 1130, 1132 (11th Cir.1986)). That is, movants must show that absent such relief, an extreme and unexpected hardship will result." *Galbert v. W. Caribbean Airways,* 715 F.3d 1290, 1294 (11th Cir.2013) (internal citation and quotation marks omitted). "Even then, whether to grant the requested relief is a matter for the district court's sound discretion." *Cano v. Baker,* 435 F.3d 1337, 1342 (11th Cir.2006) (quotation and alteration marks omitted). To prevail, an appellant must "demonstrate a justification so compelling that the court was required to vacate its order." *Cavaliere v. Allstate Ins. Co.*, 996 F.2d 1111, 1115 (11st Cir. 1993).

B. <u>Standard Where a Defendant Wishes to Vacate a Consent Judgment</u>

" Where a defendant 'wishes to disturb a consent judgment,' this standard is 'even harder to reach.'" *SEC v. NIR Group, LLC*, Case No. 11-cv-4723, 2022 WL 900660 at * (E.D.N.Y. Mar. 28, 2022) (citing *SEC v. Alexander*, No. 06–CV–3844, 2013 WL 5774152, at *2 (E.D.N.Y. Oct. 24, 2013)); *see also Sampson v. Radio Corp. of America*, 434 F.2d 315, 317 (2d Cir. 1970) ("[A] motion under Rule 60(b) cannot be used to avoid the consequences of a party's decision to settle the litigation.").

C. The Defendants Cannot Meet Their Burden For Vacating the Consent Judgment

1. Rule 60(b)(1)

In support of their Motion to vacate the consent Judgments pursuant to Rule 60(b)(1), the Defendants claim only that "the Defendants never anticipated, and had no reason to anticipate, that the SEC would accuse them of being Ponzi-schemers, or that the SEC would use such allegations as the cornerstone of its request for an enormous disgorgement award and an extraordinarily large penalties in the post-Judgement proceedings." [ECF No. 1224 at p.12]. The Defendants assert that as a result, the consent Judgments should be vacated "based on mistake, inadvertence, surprise or excusable neglect, pursuant to Rule 60(b)(1)." *Id.* Accordingly, the SEC addresses mistake, inadvertence, surprise, and excusable neglect as construed within the context of a Rule 60(b)(1) motion.

The sum of Defendants' argument is that they are shocked to learn that the SEC argues they used investor money to pay other investors and that Par Funding was barely breaking even while they engaged in their securities law violations. As set forth in Sections II and III above, this contentions is false. The Defendants knew, they litigated that issue extensively, and they have an expert witness solely for that purpose. Accordingly, the premise of their claim for relief under Rule 60(b)(1) is false and must be denied.

2. Rule 60(b)(3)

A court may entertain an independent action to "set aside a judgment for fraud on the court." Fed.R.Civ.P. 60(d)(3). "To obtain relief from a judgment under Rule 60(b)(3), the movant first must 'demonstrate misconduct-such as fraud or misrepresentation-by clear and convincing evidence.' " *Tabarestani v. Walmart Inc.*, 2020 WL 5790972, at *9 (S.D. Fla. Aug. 29, 2020) (quoting *Hutchins v. Zoll Med. Corp.*, 492 F.3d 1377, 1385-86 (Fed. Cir. 2007)); *see also Council v. Am. Fed'n of Gov't Emps. (AFGE) Union*, 559 F. App'x. 870, 872 (11th Cir. 2014) (citing *Cox v. Nuclear Pharmacy, Inc. v. CTI, Inc.*, 478 F.3d 1303, 1314 (11th Cir. 2007)). Second, the movant must show "that the misconduct foreclosed full and fair presentation of his case." *Tabarestani*, 2020 WL 5790972, at *9 (quoting *Hutchins*, 492 F.3d at 1385-86.

The Defendants do not meet either element. As to the first element, the alleged misconduct of a "bait-and-switch" did not occur, as the Defendants agreed in their Consents, the SEC made no promises or inducements of any kind to the Defendants in connection with the Consents. The SEC did not promise not to argue certain facts or present certain evidence with the motion for

monetary relief, and the Consent permits the parties to present evidence and does not contain any such prohibitions whatsoever on what the SEC can present. The Defendants do not – and cannot – argue that the SEC promised the Defendants that the SEC would not argue the facts with which they now take issue, and they present no evidence of a bait-and-switch. To the contrary, as set forth above, the Defendants have known about the evidence and arguments concerning the movement of investor funds for more than a year and these facts have been litigated throughout this case. Notably, the Defendants – represented by an army of sophisticated lawyers who approved the Consents – never asked the SEC if the SEC would exclude any argument or evidence at the remedies phase.

As to the second element, the Defendants cannot prove that there has been any foreclosure of the full and fair presentation of the facts regarding the movement of investor funds and the financial status of Par Funding. Pursuant to the Consents the Defendants executed, the Defendants have an opportunity to conduct discovery, file evidence, and file a written response to the SEC's motion. The Defendants explicitly agreed to this procedure in the Consents. The Defendants agreed to a settlement that does not restrict the SEC in what the SEC can present to the Court, and they never asked to exclude evidence or argument about facts outside of the Complaint, or the Ponzi scheme facts of which they were very much aware. *Armstrong v. The Cadle Co*., 239 F.R.D. 688, 695 (S.D. Fla. 2007) ("A party cannot successfully bring a Rule 60(b)(3) Motion where the 'pursuit of the truth was [not] hampered by anything except the [movant's] own reluctance to undertake an assiduous investigation."); *Echeverria v. Bank of Am., N.A.*, 632 F. App'x. 1006, 1010 (11th Cir. 2015) ("Parties seeking relief from a judgement on grounds of fraud must show that their own 'negligence or oversight, however innocent' did not contribute to the judgment.") (internal citations omitted).

3. Rule 60(b)(5)

"When a party invokes Rule 60(b)(5) to seek alteration of a judgment that has been entered upon consent, that party must establish that 'a significant change in circumstances warrants the modification.' " *SEC v. Longfin Corp.*, No. 18-CV-2977, 2020 WL 4194484, at *2 (S.D.N.Y. July 21, 2020), aff'd sub nom. *SEC v. Altahawi*, 849 F. App'x 323 (2d Cir. 2021), cert. denied, 142 S. Ct. 594 (2021) (quoting *Barcia v. Sitkin*, 367 F.3d 87, 99 (2d Cir. 2004)). "This burden may be met by showing that there has been a significant change either in factual conditions or in law." Barcia, 367 F.3d at 99.

The Defendants present no evidence of any change in factual conditions or in law. The SEC presenting evidence of facts litigated throughout this case is not a change in factual conditions, and the Defendants do not cite any change in the law. As set forth above, the evidence and arguments the SEC presented are not new, but even if they were new this would not be a basis for vacating a Judgment where the Defendants agreed to the filing of evidence, the discovery of new evidence, and settled to Judgments that do not bar the SEC's arguments or evidence in any way. The Defendants, with the advice and assistance of counsel, entered into Consents voluntarily that set forth the agreed procedures and that provide the Defendants an opportunity to respond. Thus, as set forth above, there is no due process violation and no basis for vacating the Consents and Judgments under Rule 60(b)(5).

4. Rule 60(b)(6)

"Federal courts grant relief under Rule 60(b)(6) only for extraordinary circumstances." *Frederick v. Kirby Tankships, Inc.,* 205 F.3d 1277, 1288 (11th Cir., 2000). Rule 60(b)(6) "applies only to cases that do not fall into any of the other categories listed in parts (1)-(5) of Rule 60(b)," *United States v. Real Prop. & Residence Located at Route 1, Box 111, Firetower Rd., Semmes, Mobile County, Ala.,* 920 F.2d 788, 791 (11th Cir.1991). Defendant's vague and conclusory assertions do not present the type of extraordinary circumstances warranting such relief, and their arguments fall within the other categories of Rule 60(b). First, there are no extraordinary circumstances present here, where there is no suggestion that the Defendant did not sign the final Consents to Judgment. Second, as noted above, the Defendants have an opportunity to file evidence and a response to the motion. Third, the Defendants agreed to the process for determining monetary relief on a motion and filing evidence beyond the Complaint allegations. And fourth, the Defendants were aware of the evidence with which they now take issue, agreed to settlements with no prohibition on what the SEC can present, and agreed in their Consents that no promises or inducements were made by the SEC.

Defendant's arguments to the contrary, supported by nothing more than their own self-serving Declarations that they never would have settled had they known the SEC would present the arguments and evidence the SEC filed in its motion, simply do not rise to the level of extraordinary circumstances contemplated by Rule 60(b)(6). The Defendants have no right – and articulate none – to know in advance what the SEC will seek, argue, or cite in their legal briefs, including the motion to set monetary relief.

The simple fact is that the Defendants now want a do-over. However, under Rule 60(b)(6), a defendant's mere "failure to properly estimate the loss or gain from entering a settlement agreement is not an extraordinary circumstance that justifies relief." *Bank of New York*, 14 F.3d at 760. "To hold otherwise would undermine the finality of judgments in the litigation process." *Id.*

V. THE COURT MUST STRIKE THE DEFENDANTS' DECLARATIONS

In support of their Motion, the Defendants filed their own sworn declarations. LaForte and McElhone have asserted the Fifth Amendment since the outset of this case. About four months ago, LaForte filed a motion to waive his Fifth Amendment rights and testify, and the Court denied that motion. Barleta has also asserted his Fifth Amendment rights, arguing before this Court just weeks ago that he should not have to produce evidence in response to a subpoena form the Receiver because it violates his Fifth Amendment rights. And yet incredible, all three Defendants file a sworn declaration in support of their Motion. If the Court permits these declarations to remain filed, then the SEC will depose the Defendants and issue discovery pursuant to the consent Judgments, which explicitly provide for discovery in the remedies phase, and the Court should permit the SEC to file a supplement to the Motion for Final Judgment. The SEC has attempted to obtain discovery from LaForte and McElhone since August 2020, to no avail. The Receiver has been engaged in discovery disputes with Barleta based on his assertion of the Fifth Amendment. They cannot turn it off and on when it suits them, and the Court should not permit it.

VI. CONCLUSION

For the reasons set forth herein, the Defendants' Motion is not only meritless but also prohibited by the terms of the Consents and Judgments to which the Defendants voluntarily agreed and upon which the SEC relied. The Court should deny the Motion, award fees, and direct the Defendants to file a response to the SEC's motion to determine monetary relief.

May 13, 2022

Respectfully submitted,

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SECURITIES AND EXCHANGE COMMISSION
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IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

vs.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al.,

Defendants.

DECLARATION OF JOEL D. GLICK

1. Pursuant to 28 U.S.C. Section 1746, the undersigned states as follows:

2. My name is Joel Glick. I am over the age of 18 years and I make this declaration based upon my personal knowledge of the facts set forth herein.

3. I practice in the areas of forensic accounting and economic damages.

4. I have testified as an expert witness in both State and Federal courts. See attached Exhibit 1.

5. I am a Certified Public Accountant licensed in Florida, since 1994, and Certified in Financial Forensics, since 2008. Both credentials are through the American Institute of Certified Public Accountants.

6. I am a Certified Fraud Examiner credentialed through the Association of Certified Fraud Examiners since 2010.

7. I am a Director of Forensic and Advisory Services at Berkowitz Pollack Brant Advisors + CPA's ("BPB").

8. BPB was retained by the law firm of Fridman Fels & Soto, PLLC to assist with their

EXHIBIT
A

representation of Complete Business Solutions Group, Inc., d/b/a Par Funding ("CBSG").

9. I have supervised and been extensively involved in the analysis to date of CBSG's books and records.

10. No statements in this declaration are intended to render any legal opinions or conclusions.

11. The goal of the Court was *"that every piece of data that Mr. Sharp used to prepare this affidavit*[1] *be provided, pursuant to the guidelines [it] put in place, to a defense expert."*[2] As of the signing of this declaration, it is unclear what the entirety of the data DSI reviewed and relied on to prepare their declaration is and, therefore, it is unclear whether they complied with the Court's wishes.

12. We understand that although most of the activity from January 1, 2020 through July 27, 2020 had been entered into QuickBooks, the books had not yet been fully reconciled as of the date the Receiver took control. DSI has indicated they will update their analysis once the books are reconciled.

13. Based on the foregoing, and as discovery is ongoing, I reserve the right to update this declaration as more data becomes available.

14. I reviewed the following information:

    a. Various docket entries (DE) filed in this matter:

        i. RECEIVER RYAN K. STUMPHAUZER'S INTERIM STATUS REPORT DATED OCTOBER 6, 2020 (DE 305)

        ii. DEFENDANTS' JOINT RESPONSE TO RECEIVER'S INTERIM STATUS REPORT DATED OCTOBER 6, 2020 [DE 305] (DE 355)

[1] DECLARATION OF BRADLEY D. SHARP (DE 426-1)
[2] Transcript of the December 15, 2020 Status Videoconference Before The Honorable Rodolfo A. Ruiz, II 60:18-21.

iii. RECEIVER RYAN K. STUMPHAUZER'S MOTION AND MEMORANDUM OF LAW TO EXPAND RECEIVERSHIP ESTATE (DE 357)

i. Exhibits E, F, G & L - Declarations of Melissa Davis

iv. RECEIVER RYAN K. STUMPHAUZER'S NOTICE OF FILING QUARTERLY STATUS REPORT PURSUANT TO PARAGRAPHS 53 AND 54 OF THE AMENDED RECEIVERSHIP ORDER (DE 358)

v. RECEIVER RYAN K. STUMPHAUZER'S NOTICE OF FILING REPORT ON OPERATIONS IN CONNECTION WITH STATUS CONFERENCE TO BE CONDUCTED ON DECEMBER 15, 2020 (DE 426)

i. Exhibit 1 DECLARATION OF BRADLEY D. SHARP (DE 426-1)

vi. DEFENDANTS' MOTION TO COMPEL THE RECEIVER TO PRODUCE DOCUMENTS RESPONSIVE TO DEFENDANT LISA MCELHONE'S REQUESTS FOR PRODUCTION OF DOCUMENTS (DE 459)

vii. RECEIVER RYAN K. STUMPHAUZER'S QUARTERLY STATUS REPORT DATED FEBRUARY 1, 2021 (DE 482)

i. Exhibit 1 STANDARDIZED FUND ACCOUNTING REPORT, dated 02/01/20 (DE 482-1)

ii. Exhibit 2 DECLARATION OF BRADLEY D. SHARP, dated 02/01/20 (DE 482-2)

viii. RECEIVER, RYAN K. STUMPHAUZER'S SECOND APPLICATION FOR ALLOWANCE AND PAYMENT OF PROFESSIONALS' FEES AND REIMBURSEMENT OF EXPENSES FOR OCTOBER 1, 2020 – DECEMBER 31, 2020 (DE 491)

b. Transcript of DECEMBER 15, 2020 STATUS VIDEOCONFERENCE

c. Declaration of James Klenk

d. QuickBooks accounting records for CBSG (inception to July 27, 2020)

e. Bank statements and ACH vendor statements for CBSG

f. CBSG internally prepared spreadsheets (including but not limited to)

   i. Daily Deposit Logs

   ii. Investor Logs

   iii. Bank Activity Log

g. Financial Accounting Standards Board ("FASB") Accounting Standards Codification ("ASC")

h. Any cited material inadvertently excluded from this list.

CONCLUSIONS[3]

15. DSI erroneously alleges CBSG was a Ponzi Scheme. A forensic analysis of the QuickBooks/Bank/ACH accounts, from 2012 through 2019, demonstrates that cash flows from merchants were sufficient to cover principal and interest payments made to investors.

16. DSI's incorrectly use of a cash analysis as a proxy for profitability or earnings disregards U.S. Generally Accepted Accounting Principles ("GAAP").[4] GAAP makes clear that a cash flow analysis alone is not appropriate to determine CBSG's profitability. As set forth below at paragraphs 52-54, any such analysis should have been performed based on the accrual basis method of accounting, which DSI did not do. A forensic analysis of CBSG data using an accrual basis method of accounting reveals that CBSG was profitable, earning hundreds of millions of dollars in top-line revenue that was ignored by DSI.

17. DSI did not present a complete analysis of merchant receivables as they focused on what DSI refers to as an "Exception Portfolio," and appeared to have extrapolated this

[3] I am generally aware that one of the issues in this case is whether the promissory notes issued by CBSG in this case constitute securities. As explained above, no statements in this declaration are intended to render any legal opinions or conclusions, and none are intended by my use of the term "investor" as opposed to "noteholder."

[4] "U.S. GAAP (Generally Accepted Accounting Principles) are accounting standards, conventions and rules. It is what companies use to measure their financial results. These results include net income as well as how companies record assets and liabilities. In the US, the SEC has the authority to establish GAAP. However, the SEC has historically allowed the private sector to establish the guidance. See The Financial Accounting Standards Board." Generally Accepted Accounting Principles (GAAP) | Investor.gov

analysis to the entire portfolio rather than analyzing the entire portfolio. This led to an incorrect analysis of the profitability of the portfolio. In fact, an analysis of 3,900 merchants, as described below in paragraphs 83-88, show a blended factor rate of 1.399.

18. DSI's analysis of the Exception Portfolio relies on several unsupported assumptions:

a. DSI seems to suggest without support that the existence of "reloads" indicates that a merchant will not be able to pay its obligation to CBSG.[5] As discussed below, this assumption is unsupported and speculative.

b. DSI suggests without support that a certain percentage of reloads is "excessive."[6] DSI's suggestion that the percentage of CBSG's receivables carried too high a factor rate is unsupported and they provided no industry data or other support for any of these opinions.

c. DSI suggests without support that increasing reloads is "unrelated to [the merchant's] business operations."[7]

BASIS FOR CONCLUSIONS

Alleged/Implied Ponzi Scheme

19. While DSI does not use the term, it clearly implies CBSG is a Ponzi Scheme. The Court appears to agree with my assessment of DSI's implicit message: *"I was told by the SEC that it was not a Ponzi scheme at the time, that they were uncertain, they were not ready to make that representation, and I will confess that the report from DSI goes to great lengths not to use that term. But looking at the way the snapshot that DSI has prepared, … It seems to me, based upon the report and the fact that some of the payouts or the funds that investors were receiving were essentially generated or the product of new money coming into these investments that we maybe have had a sea change in the true nature of this business and that it is less about factoring and*

[5] Op. cit. FN1 ¶22
[6] Op. cit. FN1 ¶25(a)
[7] Op. cit. FN1 ¶23

due diligence on loans, and more about taking from new investors to pay old investors."[8] *"The affidavit does not go that far, but it makes it clear that this was not a self-funding operation, meaning this operation could not, regardless of COVID-19, regardless of the SEC's involvement, that this was truly not a self-engineered or self-funding enterprise, it thrived off new money being put in from investors."*[9]

20. According to the Receiver, DSI suggests there is not a single definition for a Ponzi Scheme.[10] Having been the lead forensic accountant for the Chapter 11 Trustee (Judge Herb Stettin) in the Rothstein Ponzi Scheme matter,[11] I am keenly familiar with them. While I agree there are multiple definitions that may use slightly different language to define a Ponzi Scheme, they all contain the same common and primary theme in that new investors are funding repayment of returns to prior investors because the underlying business does not generate sufficient revenue to pay existing investors. The Receiver cites both the Ninth Circuit as well as the AICPA as having a definition of a Ponzi Scheme but does not provide such definitions to the Court. For the benefit of the Court, I have included the definitions from the Association of Certified Fraud Examiners ("ACFE"), the Federal Bureau of Investigation ("FBI") as well as the Securities and Exchange Commission ("SEC"):

- *According to the ACFE, Dr. Joseph T. Wells' Encyclopedia of Fraud, Third Edition, describes the characteristics of a Ponzi scheme:*[12] *A Ponzi scheme is an illegal business practice in which new investor's money is used to make payments to earlier investors. In accounting terms, money paid to Ponzi investors, described as income, is actually a distribution of capital. Instead of returning profits, the Ponzi schemer is spending cash reserves, all for the purposes of raising more funds. … There are usually little or no legitimate investments taking place. Most of the funds are used by promoters for expensive lifestyles and transferred into property or offshore accounts.*

[8] Op. cit. FN2 14:13-25, 15:1 – 9.
[9] Op. cit. FN2 15:10-15.
[10] Op. cit. FN2 16:24-25, 17:1 – 9.
[11] Case No. 09-34791-BKC-RBR
[12] Ponzi Schemes | Association of Certified Fraud Examiners (acfe.com)

- *Per the FBI,[13] "Ponzi" schemes promise high financial returns or dividends not available through traditional investments. Instead of investing the funds of victims, however, the con artist pays "dividends" to initial investors using the funds of subsequent investors.*

- *Per the SEC,[14] a Ponzi scheme is an investment fraud that pays existing investors with funds collected from new investors. … Ponzi used funds from new investors to pay fake "returns" to earlier investors.*

  With little or no legitimate earnings, Ponzi schemes require a constant flow of new money to survive. When it becomes hard to recruit new investors, or when large numbers of existing investors cash out, these schemes tend to collapse.

21. As indicated, QuickBooks has not been fully reconciled through July 27, 2020. Nonetheless, a Bank Activity Log maintained by CBSG reflects that approximately $15 million was paid to investors between April and July 2020 (prior to the Receivership). During this same period, no investor funds were received and approximately $100M of merchant payments came in. We are in the process of verifying both the amount of investor principal payments made in 2020 as well as verifying these payments were not made due to maturing obligations. If both are verified it would show new investor dollars are not required to pay old investors. Additionally, CBSG managers forwent the $13.1 million of consulting fees due to them for Q1 of 2020.[15]

22. Further, the SEC warns of Ponzi scheme "red flags"[16] such as:

[13] Ponzi Schemes — FBI
[14] Ponzi Schemes | Investor.gov
[15] As discussed in various pleadings or other documents and is uncontroverted, a 10% fee was paid on new merchant advances. During Q1 of 2020, $131.3M of new merchant advances were made. $131.3M x 10% = $13.1M in consulting fees.
[16] Ibid

- *High returns with little or no risk. Every investment carries some degree of risk, and investments yielding higher returns typically involve more risk. Be highly suspicious of any "guaranteed" investment opportunity.*

- *Overly consistent returns. Investments tend to go up and down over time. Be skeptical about an investment that regularly generates positive returns regardless of overall market conditions.*

- *Difficulty receiving payments. Be suspicious if you don't receive a payment or have difficulty cashing out. Ponzi scheme promoters sometimes try to prevent participants from cashing out by offering even higher returns for staying put.*

23. CBSG raised funds through debt financing not equity financing. As such, it offered an annual rate of interest to note holders as reflected in promissory notes. This is not a promise of high [rates of] returns to investors.

24. Based on the production received to date, we have seen no indication that investor principal or interest payments were missed or late prior to March 2020. CBSG consistently paid note holders the interest rate stated in the promissory notes until a renegotiation of those notes due to Covid-19 economic conditions in March or April 2020. This is not promise of overly consistent [rates of] returns to investors.

25. The Receiver states that the profitability of the underlying business is an additional factor that should be considered in identifying a Ponzi scheme. That factor is evident in the above definitions. However, the Receiver incorrectly states that a cash analysis is a proxy for profitability. It is not. As will be discussed below, accrual basis accounting provides the best and most accurate, and most widely accepted method for analyzing profitability, it is the basis under which CBSG maintained its books, and therefore the proper test for profitability pursuant to GAAP.

26. Likewise, the fact that a company continues to raise capital does not by itself imply that it cannot sustain itself and such does not make it a Ponzi Scheme. Borrowing funds at a cost lower than the expected profit/return to be realized from the use of those funds is known as leverage. Leverage is a universal business concept and

strategy employed by many businesses. For example, a law firm working solely on contingency needs to secure a line of credit or similar financing, secured by its receivables, to operate on a day-to-day basis; a manufacturer needs to borrow funds to purchase inventory; and a real estate professional borrows funds to purchase and renovate a property. The presumption is these ventures will make a profit that exceeds the cost of the borrowing. As explained below, CBSG has historically generated profits on the factoring fees charged to merchants that exceeded the cost of borrowing the money it raised from investors.

27. MCA businesses advance cash to merchants and, in exchange, the MCA records the Right to Receivables ("RTR") from that merchant's future income stream. While it may charge origination fees, late fees, or other ancillary fees,[17] an MCA's main revenue source is from factoring fee income, which is the difference between the cash advanced to the merchant and the RTR. It is a fixed amount (a factor) determined and agreed to by and between the MCA business and the merchant up front. Under GAAP, the ancillary fees would either be recognized in full at the time of the transaction or as they are earned over time. The factoring fee income is recognized over the term of the MCA contract and would be recognized using the effective-yield (interest) amortization method or straight-line method (which follow the matching principle as defined by GAAP), and not by the cost recovery method utilized in the DSI analysis, as discussed below.

28. While the goal is to collect 100% of all amounts due, as with any business, that is not always the case. Some merchants will pay 100% of their obligation while others, for various reasons, pay only a portion. By having a portfolio of merchants paying an average factor rate of 1.34,[18] an MCA does not need to collect 100% of the RTR to be profitable. A chart below reflects the specific analysis of the entire CBSG merchant portfolio and shows that CBSG earned millions of dollars in profits even though it did not collect 100% of RTR.

[17] CBSG charges these same fees which are not included in the analysis below and would only be additive to revenue and net income.
[18] This is based on the average factor rate for the 17,432 deals reflected in the CBSG Funding List and not based on any industry averages. This also does not reflect the impact from compounding as a result of reloads. Such compounding could increase profitability.

29. Factor fee income is no less real than the income created by selling any other type of product or service. Manufacturers sell products, service providers sell their time and MCAs sell cash. Cash is their inventory. If management is doing a good job, it should not have excess inventory – whether it be cars, legal services, or cash. Manufacturers want their products on store shelves rather than in the warehouse; service providers endeavor to keep their staff busy with billable time; and MCAs endeavor to keep their money "on the street"—in the hands of merchants to increase revenue. If the money is sitting in a bank account, it is not generating a return on investment (the stated purpose of the business) and, in fact, if the MCA is not self-funded, it is still incurring a cost to borrow or accept outside funds.

30. If the Receiver's premise for the existence of a Ponzi Scheme is the lack of profitability, he is relying on DSI's flawed analysis which: 1) erroneously focuses on cash flow rather than profit: *"From inception through 2019, CBSG incurred a cash loss from operations…";* and 2) when analyzing the receivables of an exception portfolio, applies an incorrect methodology to the receipt of merchant payments:[19] *From inception through 2019, CBSG generated only $6.6 million in cash from MCA Activity…"*

Commingling

31. It is correct that investor proceeds were commingled with merchant payments in CBSG accounts. Commingled simply means mixed or blended. If not otherwise restricted pursuant to a legal agreement, GAAP does not prohibit commingling of funds which, if restricted, should be reported as such. An example of commingling would be an attorney trust account which contains funds from various clients. While State Bar organizations require attorneys to maintain records separately tracking these funds, the fact they are held in the same bank account means they are commingled. While DSI cites to no such similar requirement, CBSG did maintain a separate record of investor balances.

32. Forensic accountants use tracing to ascertain how commingled funds were used. If the use of these funds is not readily apparent, tracing rules are used, if possible, to identify the source of funds remaining in an account. Commonly accepted tracing

[19] For the sake of clarity, money from merchants as opposed to merchant advances, money to merchants.

methodologies are: First In, First Out (FIFO); Last In, First Out (LIFO); Pro Rata Distribution; and Lowest Intermediate Balance Rule (LIBR).

33. The SEC's forensic accountant, Melissa Davis, has authored an article for the American Bankruptcy Institute ("ABI") on the LIBR method. In her article, she acknowledges these other methods stating: *"Courts have also applied the pro rata method, whereby withdrawals from an account containing commingled funds are attributed to the source in proportion to their respective balances at the time of the withdrawals. …In the "first in, first out" method (FIFO), it is presumed that moneys are paid out in the order in which they were paid in. In the "last in, first out" method (LIFO), it is presumed that the last moneys deposited into an account are the first ones withdrawn, which results in an entirely different outcome.* [20]*"*

34. Due to the nature of the MCA business and the purposes of the cash flow, a LIBR analysis is not applicable in this case. Investors were provided an explanation of the business and that their funds were to be used to make merchant advances.[21] As such, it would be proper to treat investor funds as the first dollars out to merchants.

35. This analysis is also consistent with CBSG's business model. Let us start with some basic premises:

    i. The purpose of a for-profit business is to earn a profit.

    ii. To earn a profit, a business must generate revenue.

    iii. For a business to generate revenue, it must have a product or service to sell.

    iv. To have a product or service to sell, it must have the ability to:

        a. pay the employees who provide the services,

        b. purchase the inventory, machinery & equipment necessary to

[20] Tracing Commingled Funds in Fraud Cases, June 21, 2017 ABI Tracing Commingled Funds in Fraud Cases | ABI (kapilamukamal.com)

[21] Our understanding is Investor funds were a pool of funds to be used for merchant advances. There is not a one-to-one relationship between a specific investor and a specific merchant.

manufacture the products they sell,

c. purchase and/or lease the real estate necessary to house the inventory and machinery.

d. pay other operating expenses or obligations that arise.

v. To pay for the items above, funds are required.[22]

vi. If a business can borrow funds at a lower rate than the return it can generate in the business, it has created leverage. Leverage is an everyday occurrence in the business world.

vii. Once the funds are received the cycle can begin.

36. Applying these basic premises, CBSG's business model was to create leverage using funds borrowed from note holders to advance to merchants who in turn would make the requisite payments back to CBSG thus generating revenue. This is the very model that supports the use of FIFO as a tracing method here.

37. Using the same categories as DSI, we created a schedule of monthly cumulative inflows and outflows from inception (2012) to December 31, 2019. We then created a series of True/False tests. The first test was to determine if monthly merchant payments exceeded monthly principal and interest payments to investors. An answer of True indicated that the money coming in from merchants exceeded the amount necessary to pay investor obligations and, therefore, that new investor dollars were not needed. This first test yielded no instances of a False response, meaning that the merchant cash received by CBSG's business operations exceeded the amount of payments to investors (principal and interest) for every month of CBSG's business life through December 31, 2019 following the first three months of its existence. The second test was to determine if monthly merchant advances exceeded monthly investor dollars received. An answer of True meant that every dollar of investor money

[22] The source of such funds can come from the business owners or be raised through debt or equity financing. Setting aside creative hybrid models, equity financing entitles investors to a share of the profits and exposes them to potential losses. Therefore, such investment comes with higher levels of risk and reward. Debt financing on the other hand provides a stated return in the form of an interest rate on the funds lent to the business.

received would have been subsumed by merchant advances and, therefore, not available to pay principal and interest to other investors. Of the 96 months of CBSG's business life through December 31, 2019, the test returned five (5) false results; three times in 2012, which is and could be expected; once in March 2015 (when the test failed by approximately $39,000); and once in June 2019 (when investor dollars received exceeded merchant advances by $3.9M). Therefore, in these months where investor dollars were not all committed to merchant advances, it is theoretically possible that these uncommitted investor dollars could have been used elsewhere in the business. However, based on the results of the first test, there was sufficient cash returned from merchants to satisfy the payments to investors in March 2015 and June 2019, so investor dollars would not have been needed. Moreover, in those same months, merchant dollars were also sufficient to cover operational expenses and other payments, including commissions paid to merchant brokers and consulting fees to management.[23]

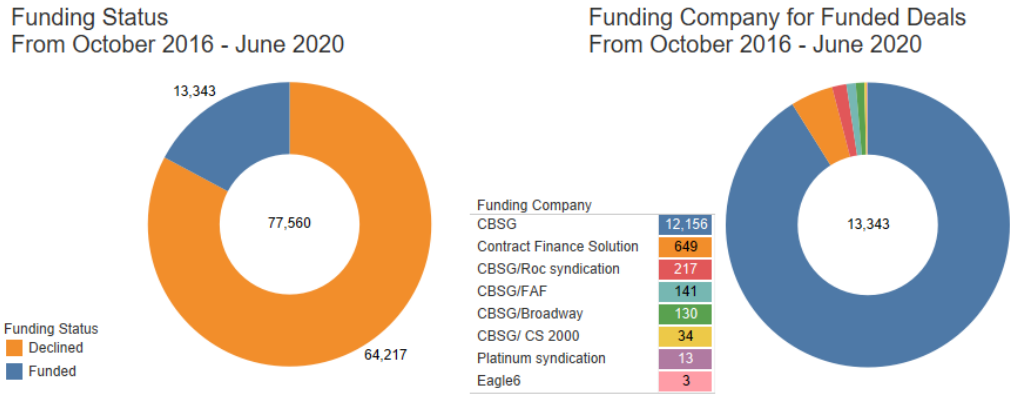
38. This analysis further indicates that CBSG does not meet the above definitions of a Ponzi Scheme and makes the following statement from DSI incorrect: *"CBSG paid $231.0 million to investors, consisting of principal repayments totaling $135.6 million and interest payments totaling $95.4 million. CBSG could not have made principal and interest payments to the investors without additional funds from the investors."*

Underwriting

39. The charts below are based on data provided by the CRM system used by CBSG. These charts demonstrate that CBSG has an underwriting process as it does not accept every request from a merchant for an advance. To the contrary, the charts indicate that only 17% of the requests were approved and funded. According to the U.S. Federal Reserve's 2017 Small Business Credit Survey ("the FRB Survey"), fielded in Q3 and Q4 of 2017, 7% of respondents sought a merchant cash advance as a financing product. Of those in the FRB Survey, 79% of the applicants were

[24] As explained in paragraph 7 of the Declaration of James Klenk, payments to merchant brokers and consulting fees were paid in the quarter after such fees were earned based on new merchant business. These payments were tied to merchant funding and not to investor deposits.

approved.[24] The same survey issued in 2021, and fielded in September and October of 2020, reflects 8% of respondents sought a merchant cash advance as a financing product and of those, 84% of the applicants were approved.[25] CBSG's application approval rating of 17% is significantly lower and would suggest stricter underwriting policies. Moreover, our understanding is that since the complete population of requests for funding by merchants has not yet been provided in discovery, the additional information would reduce this percentage further below 17%. The chart on the right is simply a breakdown of which MCA company provided funding to the accepted merchants.



40. As of the writing of this declaration, BPB has not had access to underwriting files and therefore is unable to review and provide comment on the underwriting process. It is not clear why DSI, who did or could have accessed these records, did not provide any explanation as to the analysis undertaken in reviewing CBSG underwriting procedures when preparing their Exception Portfolio analysis discussed in further detail below.

41. The only reference to underwriting was in the context of one of the five Exception Portfolio groups they defined. *"The documents in the files of CBSG with respect to this merchant do not support credit exposure of more than $20 million and certainly not more than $90 million. CBSG's own Underwriting Profile dated May 12, 2015 recommended a credit limit of $27,600."* This, however, is a statement with no apparent analysis.

[24] 2017 SMALL BUSINESS CREDIT SURVEY | REPORT ON EMPLOYER FIRMS, U.S. Federal Reserve Bank
[25] SMALL BUSINESS CREDIT SURVEY | 2021 REPORT ON EMPLOYER FIRMS, U.S. Federal Reserve Bank

42. Upon a review of the DSI time records, I could only identify the following entries in which they reference an analysis of CBSG underwriting policies and records.

- *REVIEWED AND INDEXED 16 BOXES OF DOCUMENTS SEIZED BY THE FBI, INCLUDING TAX INFORMATION, UNDERWRITING MATERIALS, MODIFICATION AGREEMENTS, AND MERCHANT DEBIT CARD AUTHORIZATION FORMS 14.10 hours on 9/28 & 9/30/20.*

- *Compile questions for Par Funding regarding cash management, information systems, underwriting and collections procedures, etc. 1.10 hours on 08/09/20.*

- *Review emails regarding insufficient and inaccurate underwriting, or MCA decisions conflicting with underwriting. 0.20 hours on 9/8/20.*

- *Discussion with Kevin Young regarding the process for the underwriting of advances and request samples of the analysis done; review the analysis and further discussions with Kevin Young regarding same; e-mail the underwriting package and comments to Brad Sharp; follow-up e-mails with Brad Sharp regarding the analysis used for underwriting and settlements 1.00 hours on 10/23/20.*

- *Research on underwriting practices with regard to top ten merchants in response to Yale Bogen's request; collection supporting documentation and e-mail Yale Bogen 1.20 hours on 11/19/20.*

- *Research on CBSG's underwriting practice regarding Colorado Homes; collect supporting documents for Yale Bogen. For .70 hours on 11/19/20.*

- *Collect underwriting documents for B&T including bank statements .30 hours on 11/24/20.*

Cash Basis vs Accrual Basis Accounting

43. In the first section of the DSI declaration, ***Cash Sources and Uses***, DSI performed an analysis[26] in which they categorized CBSG's sources of cash inflows and uses of cash outflows (collectively "cash flows") for the years 2012 – 2019.[27] As previously indicated and discussed in more detail below, a cash analysis is improper to determine profitability. It should be further noted that the form of the cash analysis that DSI presented does not seem to provide information useful to investors or the Court. The

[26] Op. cit. FN1
[27] We await copies of such updated accounting records from the Receiver and reserve the right to update our analysis through the date on which the Receiver took control.

intent of DSI's presentation of this information, which is inconsistent with GAAP, is unclear to me from an accounting perspective.

Improper Form of Analysis

44. Audited financial statements prepared under GAAP require a cash flow statement. A cash flow statement is divided into three activities, operating, investing, and financing. At a high level, these categories allow the reader to determine if cash increased or decreased because of business operations; if cash increased or decreased as the result of various investments made by the company; or if cash increased or decreased related to debt or equity raises, company stock transactions and owner contributions and distributions. Rather than prepare their analysis in such way that investors or the Court could get a sense of the financial operations comparable to other businesses using the most widely accepted framework, DSI prepared its cash flow analysis with the categories Investor Activity, MCA Activity, Other Related Entity Activity and Operating Expenses. It segregated commissions and consulting fees from all other operating expenses and then further segregated commissions and consulting fees into payments to Related Entities and payments to Other Entities. It is unclear why DSI chose this format as it does nothing to address profitability which, according to the Receiver, is a key factor in determining whether a business is a Ponzi Scheme.

45. Payments to related parties are common and certainly not improper by default. It is unclear why DSI chose to focus on them as a category yet provide no discussion or analysis to the Court as to what investigation they undertook to determine what services these entities may have performed for CBSG, what contracts/agreements may have been executed and whether such agreements were arms-length transactions.

46. The Notes to Financial Statements are an integral part of any set of financial statements and provide information to assist an investor in better understanding certain facts underlying the reported dollars. As relevant here, Note-6 Related Party Transactions in the 2017 audit clearly states the relationship and purpose of payments to Related Entities.

a. Heritage Business Consulting, Inc. ("HBC") is an entity affiliated to CBSG due to common ownership. Beta Abigail and New Field Ventures, LLC, Inc. are owned in part by the Company's Chief Financial Officer and Director of Investor Relations. The amount of consulting expense is based on the gross funding for the quarter, as described in the individual consulting agreements.

b. For Recruiting & Marketing Resources, Inc. ("RMR"), an entity affiliated to CBSG due to common ownership, CBSG is to pay a commission to RMR in the amount of 8% of new funding amounts to clients pursuant to the independent sales organization agreement with RMR.

47. While not listed in Note 6, Full Spectrum Processing ("FSP") is referenced in the 2017 audit at Note-1 Description of Business and Summary of Significant Accounting Policies, as a wholly owned entity of CBSG[28] and that it provides employees and back-office support. During 2017, CBSG stopped processing internally and began to use FSP for such services. An examination of the CBSG income statement reflects that in 2017 processing expenses appeared and payroll expenses (other than officer salaries in later years), disappeared which is consistent with the notes.

48. DSI further aggregates the various categories of payments to Related Parties and specifically states that *"From inception through 2019, CBSG paid more than $144 million to or for the benefit of LaForte, McElhone, Cole and Abbonizio ("Insiders")."*

49. The DSI report is unclear as to the impact of payments to "Insiders" on profitability. As there is no dispute as to identity of the Insiders and their respective ownerships of the Related Entities, the question remains what investigation DSI undertook to determine what services these entities, owned by these Insiders, may have performed for CBSG, what contracts/agreements may have been executed, and whether such agreements were arms-length transactions.

Improper Analysis

50. In arguing to the Court that CBSG is some form of a Ponzi Scheme, the Receiver

[28] While FSP is an affiliated entity, according to CBSG management, it is not wholly owned entity. Additionally, such ownership would be apparent on CBSG's balance sheet.

stated *"You have to consider other factors. So, for example, what was the profitability of the underlying business?"* Regardless of DSI's categorization of cash flows, an analysis of cash flows is not the proper basis to determine an entity's profitability. The Receiver has acknowledged as much twice in the December 15, 2020 transcript of the video status conference. *"Now I should be careful in saying that this is an analysis of cash in and cash out, which is not the same as profit, but it's a good proxy and a measuring stick..."* [29] *"Again, I want to be careful, net cash which is different from profit."*[30] While an analysis of cash flows has its use, it is neither a good proxy nor a measure of profitability. The accrual basis of accounting provides a more accurate measure of a company's profitability and economic performance during an accounting period, and a more accurate picture of a company's financial position at the end of an accounting period. It is the proper methodology to use to determine profitability as is the most widely used and accepted financial reporting framework in the United States.

51. The two main methods of maintaining an entity's accounting books and records are the cash basis and accrual basis methods of accounting. The cash basis method of accounting, as the name suggests, recognizes revenue when cash is received and an expense when cash is paid. Conversely, the accrual basis method of accounting recognizes revenue when earned and expenses when incurred. The accrual basis results in a more accurate financial picture over the long term. Under GAAP, accrual basis accounting is required as it supports the matching principle which pairs revenues and the corresponding expenses incurred to generate such revenues to the period or periods in which they occurred.

52. The following is an example of why the accrual basis method of accounting properly tracks the true profitability of an entity:

Assume that to produce a single widget, it costs the manufacturer $10 to purchase the raw materials and $5 for the labor & overhead to produce the widget. Further assume the manufacturer produces and sells the widget for $25 in December 2019. Under accrual accounting, the revenue and expenses are recorded in 2019 regardless of

[29] FN 1, Op. cit., 18:24-25, 19:1
[30] FN 1, Op. cit., 21:3-4

when cash is exchanged. The profit on the sale of the widget in 2019 is $10 (Sale price $25 – Materials $10 – Labor $5 = Profit $10). While it is certainly possible for the cash basis to match the accrual basis, the cash basis can result in a mismatch of revenue and expense. If the manufacturer receives the $25 sale proceeds and pays its employee the $5, and pays the $10 for the raw materials, all in 2019, the profit recognized under a cash basis is $10, the same as would be under the accrual basis. However, if the manufacturer pays $10 for the raw materials in December 2019 but does not pay its employee the $5 or receive the $25 sale proceeds until January 2020, under a cash basis, the manufacturer will record a $10 cash loss in 2019 and a $20 cash profit in 2020 ($25 Sale proceeds - $5 Labor). While the net of the two years results in the same $10 profit, the revenues and expenses are not properly matched, and the financial condition of the business as of each period end is distorted and erroneously stated. Unless each CBSG investor was an investor for the entirety of 2012 to 2019, a cash flow analysis for an 8-year period[31] using seemingly meaningless categories does not properly measure profitability or provide any beneficial analysis of economic performance.

53. In addition to GAAP requirements for the accrual basis, the Internal Revenue Service ("IRS") requires accrual basis reporting.[32] Both the 2017 and 2018 CBSG tax returns, Form 1120, reflect the accounting method as accrual. DSI seems to have ignored that CBSG's tax returns and tax obligations were, as required by the IRS, prepared using the accrual accounting method.

54. It should be further noted that the 2017 CBSG audit cites the same revenue recognition rules promulgated by the Financial Accounting Standards Board (FASB), ASU 2016-13 Measurement of Credit Losses on Financial Instruments (Topic 326).[33] These are the same rules which were required to be adopted by CCUR Holdings, Inc. and Enova International, Inc., two publicly traded companies having subsidiaries in the MCA/RPA (Receivables Purchase Agreement) business. ASU 2016-13 was to

[31] Exhibit A to the Declaration of Bradley Sharp [DE 482-2] was inadvertently omitted from the original [DE 426-1]. Exhibit A separates the original summary by year but suffers the same improper format for which to assess profit.
[32] Internal Revenue Code § 448 Limitation on use of cash method of accounting.
[33] ASU 2016-13 will require changes to the terminology. References to allowance and provision for loan losses will be revised to reflect that ASU 2016-13 covers all financial assets and not just loans.

replace the existing incurred loss methodology affecting financial assets. As of the issuance of the audit, the new guidance was to be effective for annual reporting periods beginning after December 15, 2020. Early adoption was permitted, but not prior to fiscal years beginning after December 15, 2018.

Data Analysis

55. In its October 30, 2020 letter to the Receiver,[34] DSI indicated they examined and compiled approximately an eight-year period of information prior to his appointment which consisted of approximately forty-one bank and ACH accounts and over 1,250,000 transactions.

56. BPB has likewise reviewed the same eight-year period and concurs with the number of bank and ACH accounts.

57. BPB reviewed and consolidated the following:

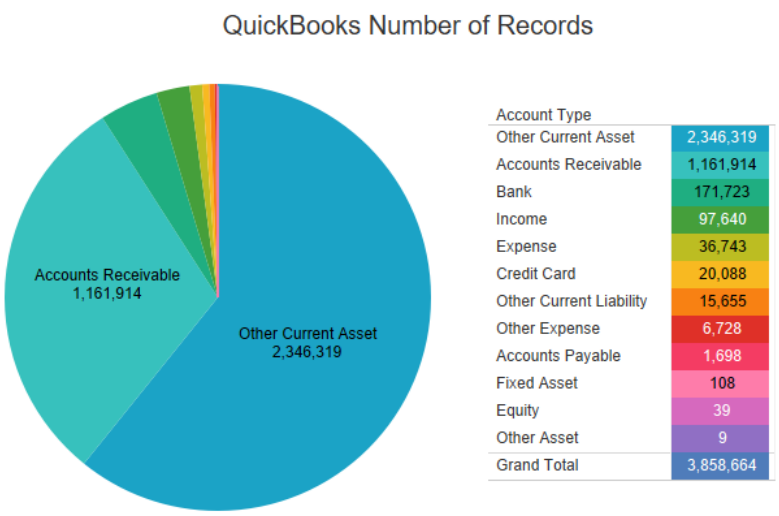
    a. Using Microsoft Excel and Alteryx, BPB created a Daily deposit log transaction database containing approximately 1M records. CBSG maintained a monthly spreadsheet with a tab for each business day of the month. These tabs tracked what ACH debits were supposed to come in and those that did. The daily totals for each ACH processor was then booked into QuickBooks in batch entries.

    b. Using specialized software, BPB created an ACH vendor transaction database containing approximately 1M records.

    c. Using specialized software, BPB created a bank account transaction database containing approximately 100K records.

    d. Using Microsoft Excel, Alteryx and Tableau, BPB created a transaction database of QuickBooks data containing approximately 3.8M records.

[34] Case 9:20-cv-81205-RAR Document 358-1 Entered on FLSD Docket 10/30/2020



58. We agree with DSI's overall analysis of cash, in that CBSG started with zero dollars and at the end of 2019 had approximately $44.4M in cash. Again, because cash is inventory for an MCA business, carrying as low a reserve of cash as is necessary to cover expenses, and funding new merchant activity was the goal of the company.

59. Due to the merchant advances having a shorter-term than the investor promissory notes, it was possible for CBSG to advance and collect merchant funds more than once before any investor principal obligations matured. This difference in maturity allows CBSG to circulate the investor's cash through MCA funding contracts before it must be repaid. While this might appear to account for the growth of the $479.3 of investor funds into more than $1.1 billion of merchant cash flow, it does not. First, the full $479.3 million was not available on day one to start advancing to merchants. It was invested over an 8-year period and, per DSI's Exhibit A, $256.8 million of these funds were not received until 2019. Second, based on DSI's own analysis, CBSG incurred significant expenses, such as investor interest payments, operating expenses, and other disbursements. When merchant funds were repaid to CBSG, the amount available for future advances from investor deposits would continue to decrease as such CBSG expenses were paid and required significantly more turns of the dollars than time would allow. Put simply, the only way the investor dollars could have generated the volume of merchant cash flow seen in the bank accounts is through CBSG's collection of factoring fees (i.e., profits) from merchants in additional

to the amounts the merchants were advanced, as further shown in paragraphs 85-88 below.

Analysis of the Merchant Receivables Portfolio and CBSG Profitability

60. The second section of the DSI declaration, ***Portfolio Analysis***, devotes 11 pages of the 21-page declaration to the analysis of the CBSG merchant portfolio. DSI conducted a detailed cash analysis of a subset of CBSG merchants which they refer to as the Exception Portfolio. It is unclear whether their analysis includes post Receivership activity because they indicate that "*[t]he following table provides a summary of the activities with respect to the Exception Portfolio from the inception of the relationship to November 2020.*" For the sake of clarity, the Receivership began on July 28, 2020, so it would be improper to include any activity from that date forward in their analysis. This would also be inconsistent with their cash analysis which ended in 2019: *"Our preliminary conclusions summarized above are based on our analysis of CBSG's cash sources and uses for the calendar years 2012 through 2019."*

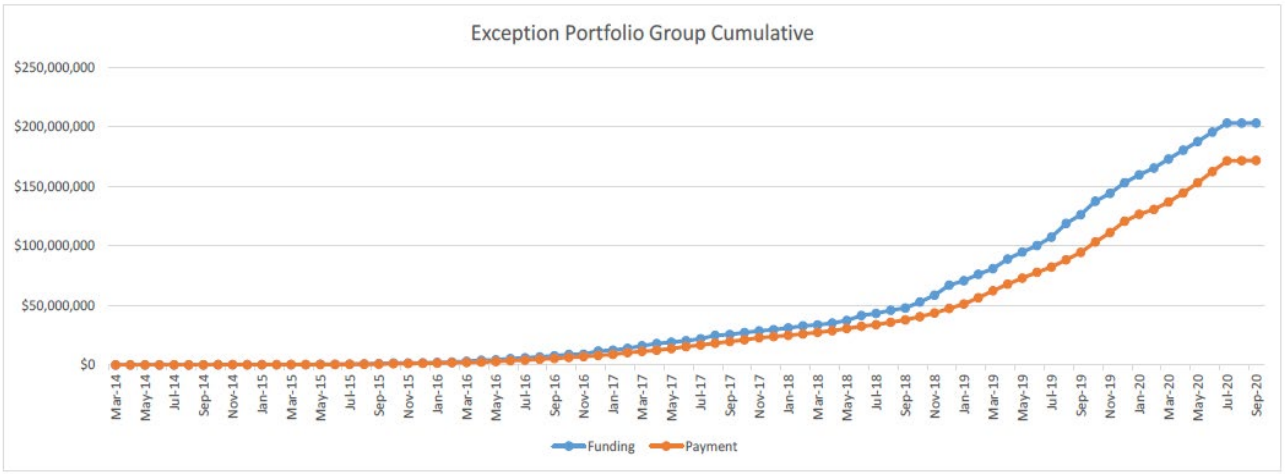
61. The Exception Portfolio represents approximately 46% of the outstanding accounts receivable balance and is comprised of 16 merchants divided into five groups. It is unclear if DSI is suggesting that 100% of the receivable balances related to the exception portfolio is uncollectible, or if they are suggesting that the Exception Portfolio has any impact at all on the remaining 54% of accounts receivable comprised of approximately 3,600 merchants.

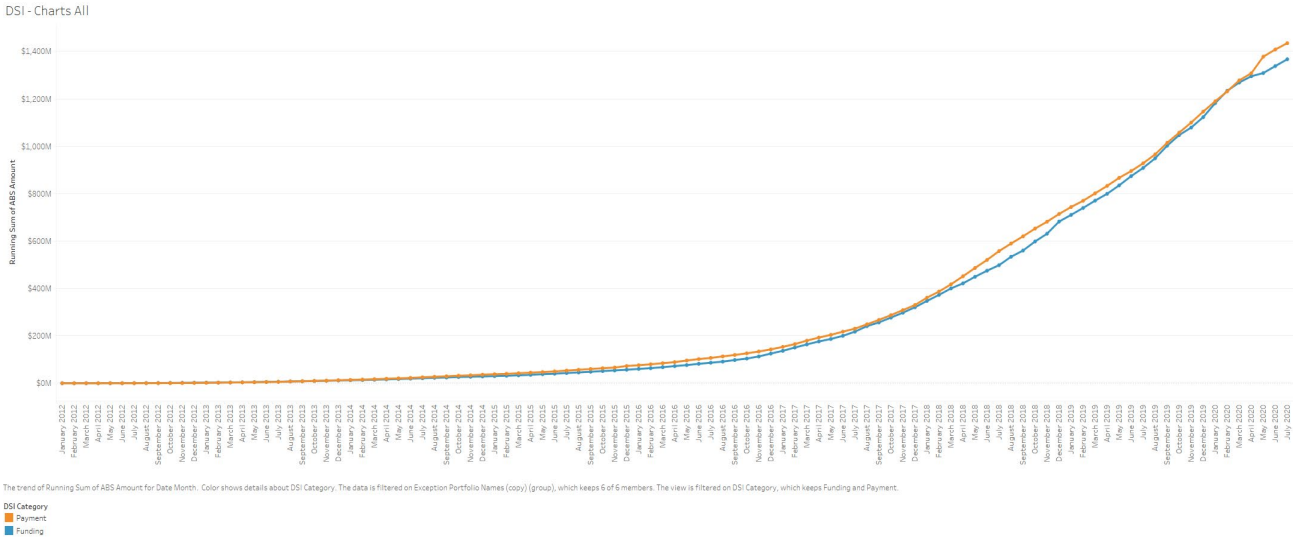
62. The Receiver states: *"As a result of the Defendants' poor underwriting and management of the portfolio, the Par Financial model utilized by the Defendants requires significant additional cash investments to fund additional receivables, as the current portfolio does not generate sufficient cash."*[35] The only reference to underwriting in the DSI report was for one merchant, the B&T group, and that singular reference did not include any apparent analysis to support the Receiver's conclusion regarding collectability.

[35] Page 7, paragraph 3 of Receiver Ryan K. Stumphauzer's Quarterly Status Report Dated February 1, 2021 (DE 482)

63. Additionally, DSI does not address what analysis it undertook related to the existence and value of the collateral securing the MCA funding agreements. In fact, DSI appears to ignore collateral altogether in its conclusions regarding the Exception Portfolio. I reviewed a Surety Agreement, including a Confession of Judgment, signed by the president of B & T. While the April 11, 2019 promissory note attached to the agreement indicates an existing liability of approximately $27.1 million, the Surety Agreement states that: *The term "Liabilities" includes all liabilities of Maker to CBSG, whether now existing or hereafter incurred…" and "The amount of the liability of Undersigned hereunder shall be unlimited*." While I am not rendering legal opinion, this would suggest that if B & T were to default, it is liable for the entire $78 million included in accounts receivable.

64. I have included the graph from page 12 of the DSI report which reflects only the Exception Portfolio. In contrast to the DSI graph (Exception Portfolio Group Cumulative) immediately below, the BPB graph below it reflects the same funding and payment information, with the exception that we have included the entire CBSG portfolio of current receivables. The lower graph, of the entire CBSG portfolio, shows that payments coming in from merchants consistently exceed funding provided to merchants. The proximity of the lines confirms that CBSG is managing their cash inventory.





65. As discussed in paragraphs 40-43 above, it is unclear what, if any, analysis DSI performed as to the review of CBSG's underwriting policies and files. Additionally, there is no indication of any analysis of merchants' ability to repay their contractual MCA obligations.

66. Their conclusions reached are therefore unsupported as to what constitutes "*excessive reloads"* or speculative as to the statement: *"**If** CBSG is only able to collect the Cash Exposure (cash out less cash back) in the Exception Portfolio, CBSG's assets will decline by $165.1 million…."*

67. Further, in arriving at the speculative $165.1 million possible loss assertion (see chart

below), DSI incorrectly applied a cost recovery methodology[36] rather than the GAAP required effective yield[37] or straight-line methodologies.

CBSG Exception Portfolio Merchant Balances and Fees

	Start of Relationship [1]	Cash Out	Cash Back	Net Cash Exposure [2]	Net Balance Transferred	Outstanding Fees and Other Charges [3]	% of Outstanding Balance	Outstanding Balance
B & T Supply	05/15/15	50,485,491	48,567,460	1,918,030	18,838,973	57,227,914	73%	77,984,917
Lifeguard	02/06/20	17,531,669	9,566,636	7,965,033	3,032,210	2,362,567	18%	13,359,810
Yanky Holding Supplies	03/29/16	4,585,877	2,793,427	1,792,450	(4,805,790)	3,013,340	N/A	-
YBT Industries Inc	04/12/16	12,477,305	6,407,979	6,069,327	(10,845,555)	4,776,228	N/A	-
Naki Cleaning Services	04/12/16	6,287,403	4,182,342	2,105,061	(4,462,483)	2,357,422	N/A	-
Anglo China	04/27/20	1,597,595		1,597,595	(1,757,355)	159,760	N/A	-
B & T Group Total		92,965,340	71,517,843	21,447,497	(0)	69,897,231	77%	91,344,728
Colorado Homes	02/05/18	24,533,701	21,212,640	3,321,061	(4,252,726)	20,581,824	105%	19,650,160
United by ECH	08/26/19	3,532,525	2,155,603	1,376,922	1,537,726	2,924,149	50%	5,838,797
CNP Operating	11/04/19	-	93,000	(93,000)	4,480,000	-	0%	4,387,000
Colorado Sky	02/22/19	1,200,000	1,235,000	(35,000)	(445,000)	480,000	N/A	-
Dickinson Wright	01/30/19	1,200,000	-	1,200,000	(1,320,000)	120,000	N/A	-
Colorado Homes Group Total		30,466,226	24,696,243	5,769,983	0	24,105,974	81%	29,875,957
Big Red Express (Big Red Ltl)	10/10/17	5,990,665	4,941,182	1,049,483	6,176,781	11,725,988	62%	18,952,252
Bulova Technologies	03/26/14	5,714,985	4,905,683	809,302	(5,027,611)	4,218,309	N/A	-
Twiss Cold Storage	04/26/16	1,630,505	1,072,904	557,601	(1,149,169)	591,568	N/A	-
Big Red Express Group Total		13,336,156	10,919,769	2,416,386	0	16,535,865	87%	18,952,252
Kingdom Logistics	08/01/18	31,097,243	27,785,333	3,311,910	-	17,604,689	84%	20,916,599
National Brokers Of America	05/07/15	35,313,398	36,993,310	(1,679,912)	-	36,973,530	105%	35,293,618
Grand Total		$ 203,178,362	$ 171,912,498	$ 31,265,864		$ 165,117,289	84%	$ 196,383,154

68. As an example, assume CBSG advances $100K to a merchant with a mutually agreed-upon factor of 1.30. The resulting recorded RTR is $130K. Assuming the RTR is to be repaid in 100 installments, each installment from the merchant would be $1,300.

69. Under GAAP, a portion of every payment should go to repay the initial advance and a portion should be recognized as factor income. As indicated, the effective yield or straight-line method is required by GAAP. Under the straight-line method, $1,000 would be applied against the original advance and $300 would be recognized as income. DSI incorrectly applied the cost recovery methodology and erroneously applied the full $1,300 installment against the $100K advance rather than recognizing the $300 of income and $1,000 return of initial advance. This was wrong and

[36] Applies every dollar received against the initial principal or investment until it is fully repaid at which time income begins to be recognized.
[37] Like a mortgage payment between a bank and a homebuyer. The homebuyer makes a monthly mortgage payment to the bank. From the bank's perspective, each payment received is split into return of investment and return on investment. This is intended as an example only and in no way suggests CBSG is a lender.

inconsistent with GAAP.

70. The flawed DSI methodology is evident in their chart below. National Brokers of America received $35.3M from CBSG. It appears DSI applied 100% of the $37M repaid by National Brokers against this $35.3M resulting in an erroneous declaration of negative cash exposure. It is not possible to have negative cash exposure.

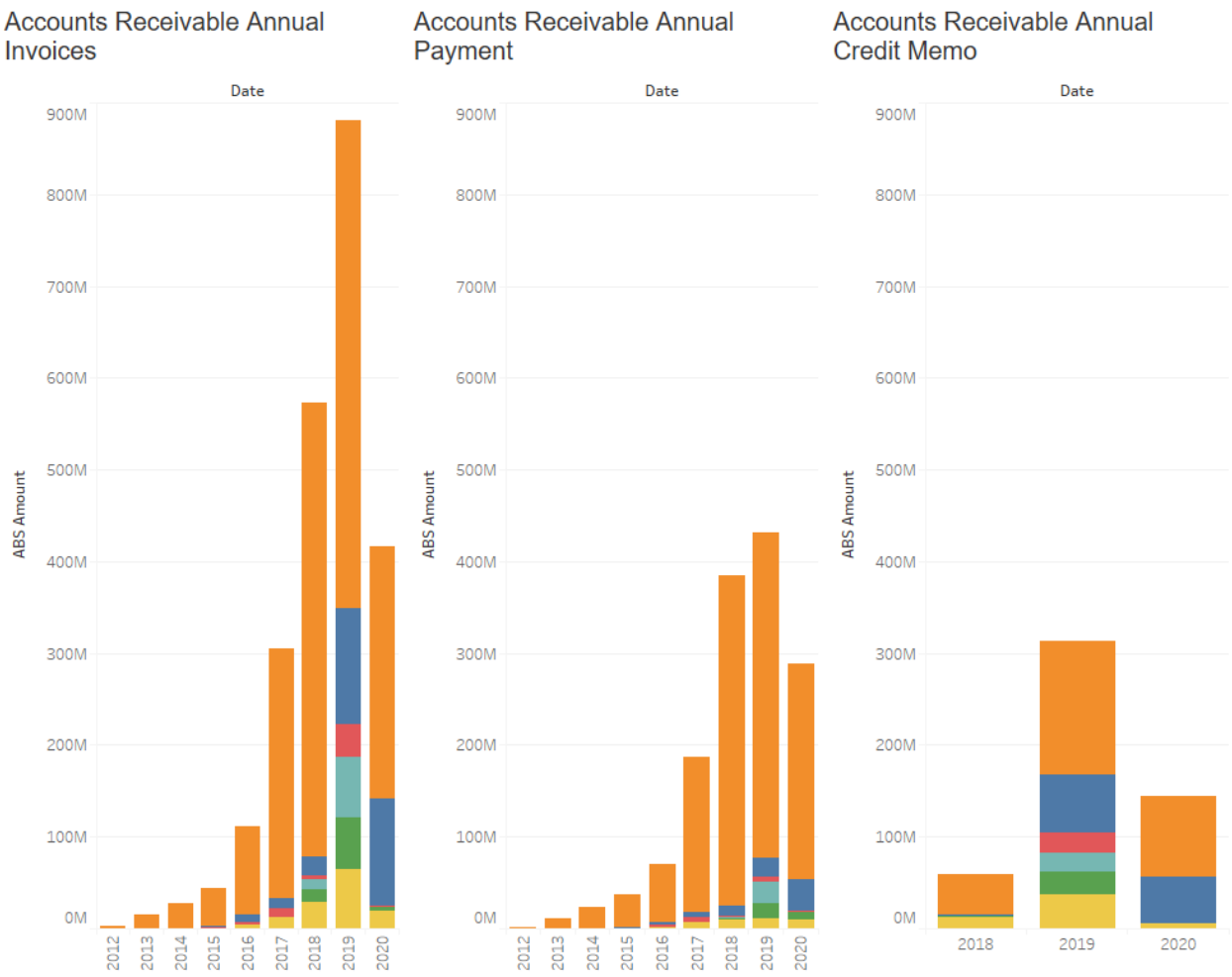
71. It appears that the same circumstances exist for CNP Operating and Colorado Sky, and it also appears that DSI utilized the same flawed methodology throughout, resulting in erroneously understated cash exposure.

72. DSI states that: *"[a] significant amount of the receivable portfolio consists of "factors," fees and expense and not cash advanced."* Based on its flawed cost-recovery methodology, shown above, it is evident that DSI has overstated the amount of "factor" fees contained in outstanding accounts receivable. Its results are inaccurate.

73. The following chart reflects the total number of merchants between 2012 and the date of the Receivership, the number of those merchants who had at least one reloaded deal, and the number of reloaded deals among those merchants.

Group	Number of Distinct Clients per Group	Number of Clients with a Reload	Reload Amount	Number of Reloads	Percentage of Clients with a Reload
Non Exception Portfolio	7,566	1,078	$133,541,765	2,563	14.2%
Exception Portfolio	17	14	230,538,009	179	82.4%
Grand Total	**7,583**	**1,092**	**364,079,774**	**2,742**	**14.4%**

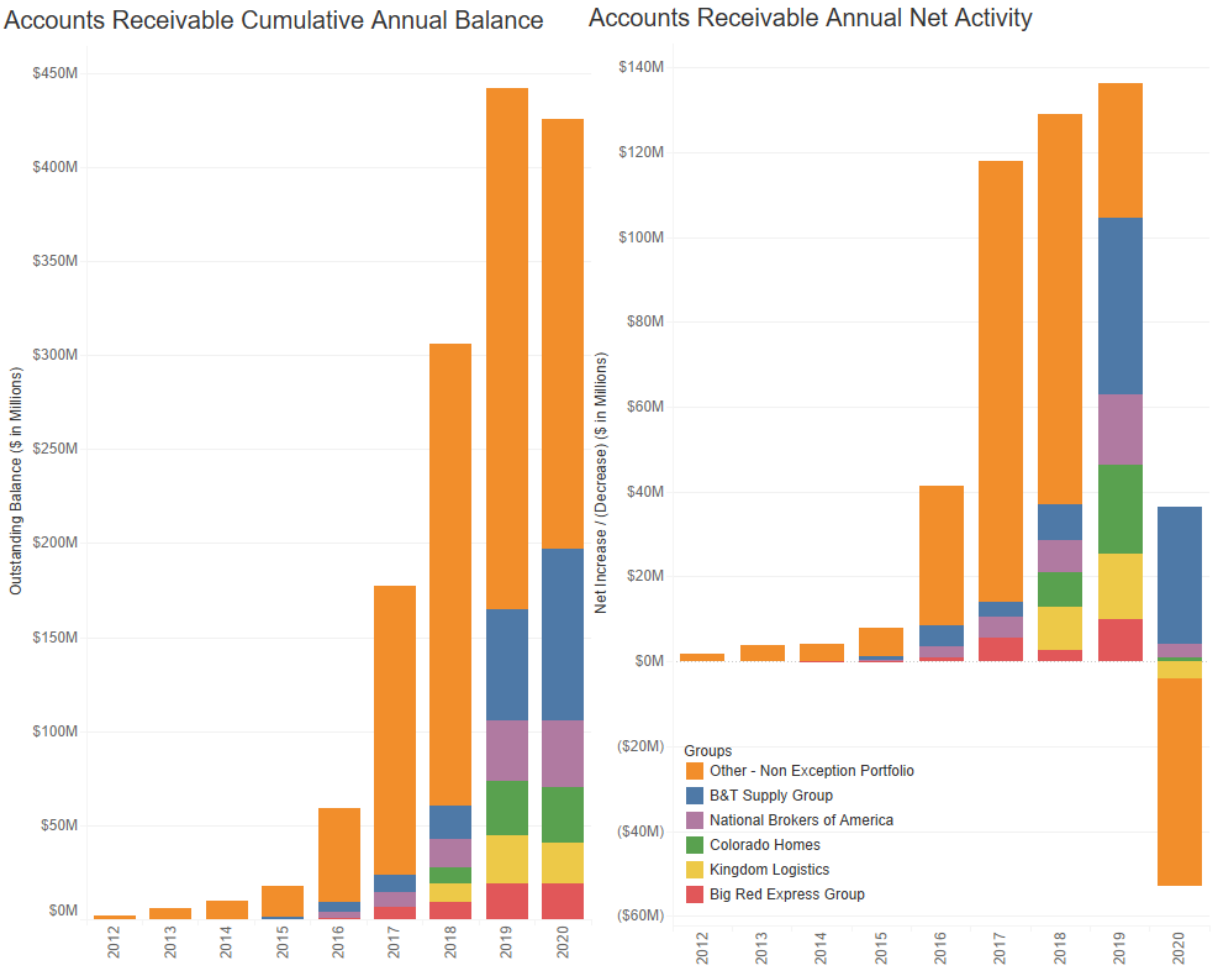
74. The following chart segregates annual accounts receivable activity into various transaction types. Subtracting the payments and credit memos from invoices equals the annual net activity for a given year (See Legend on chart in 76).



75. As an example, in 2019, almost $890 million of RTR was recorded; approximately $440 million payments were received from merchants; and approximately $310 million of credit memos were issued. The credit memos represent either an adjustment to balances related to merchant defaults, agreed upon discounts, or necessary adjustments to avoid double counting of reloaded deals included in the $890 million. The net of these amounts, approximately $136 million, represents the net increase in the $306 million accounts receivable balance at the end of 2018 to the $442 million accounts receivable balance at the end of 2019.

76. The bar chart below left reflects the accounts receivable balance at the end of each year. The chart below right reflects the annual net activity summarized above which impacts each subsequent year-end balance. The 2019 net activity in the chart on the right is the approximate $136 million referenced above (in para. 75) and the 2018 $306

million and 2019 $442 million balances can be seen in the chart on the left. Each chart indicates the portion of the CBSG total merchant portfolio, which is comprised of the non-exception portfolio, as well as that portion of the total merchant portfolio which is comprised of the 5 groupings of Exception Portfolio companies.



77. The negative amount in the chart on the right indicates a net reduction in accounts receivable through collections or adjustments. In other words, CBSG collected more than it funded during 2020.

78. BPB analyzed CBSG accounts receivable based on the cash transactions and accrual entries recorded in CBSG's books. BPB agrees to within .5% of the DSI accounts receivable balances for the merchants identified as the Exception Portfolio. The following chart reflects the net accounts receivable activity as reflected in the QuickBooks records as of July 27, 2020. The balances have been segregated into

those merchants with no outstanding accounts receivable balance and those merchants with an outstanding accounts receivable balance.

Client Group	(1)	2012	2013	2014	2015	2016	2017	2018	2019	2020	Grand Total / Distinct Count (2)
Non Exception Portfolio - A/R Zero Balance (No Credit Memo)	$	1,542,010	2,742,380	2,031,059	4,060,188	17,200,416	43,778,823	(16,281,151)	(17,963,226)	(37,110,500)	-
	#	69	175	179	288	460	893	1,047	1,118	747	**2,707**
Non Exception Portfolio - A/R Zero Balance (With Credit Memo)	$	31,674	205,549	(159,094)	548,744	3,214,409	17,080,111	33,518,198	(7,855,201)	(46,584,390)	-
	#	2	7	8	19	33	96	430	1,022	633	**1,224**
Non Exception Portfolio - A/R Zero Balance - All	$	**1,573,684**	**2,947,929**	**1,871,965**	**4,608,932**	**20,414,825**	**60,858,934**	**17,237,047**	**(25,818,427)**	**(83,694,890)**	-
	#	**71**	**182**	**187**	**307**	**493**	**989**	**1,477**	**2,140**	**1,380**	**3,931**
Non Exception Portfolio - A/R with Balance	$	208,375	873,783	769,673	3,538,337	12,071,867	34,755,018	76,579,836	59,724,341	30,191,926	**218,713,156**
	#	4	10	17	40	64	145	314	911	2,221	**2,265**
Non Exception Portfolio - Syndications	$		84,899	1,409,015	(1,328,637)	584,947	8,246,227	(1,933,511)	(2,339,387)	4,850,630	**9,574,183**
	#		10	427	240	88	138	277	394	583	**1,370**
Exception Portfolio	$			39,100	1,018,417	8,380,213	14,139,633	36,959,933	104,538,276	32,187,204	**197,262,776**
	#			1	4	7	8	9	13	12	**16**
Exception Portfolio - Syndications	$			50	(50)						-
	#			1	1						**1**
Grand Total / Distinct Count (2)	$	**1,782,059**	**3,906,611**	**4,089,803**	**7,836,999**	**41,451,852**	**117,999,812**	**128,843,305**	**136,104,803**	**(16,465,130)**	**425,550,115**
	#	**75**	**202**	**633**	**592**	**652**	**1,280**	**2,077**	**3,458**	**4,196**	**7,583**

(1) $ = U.S. Dollar amount per client group per year
= Distinct number of clients per client group per year
(2) Distinct Count will not agree to annual total, as merchant could be included in multiple years

79. Merchants with outstanding accounts receivable balance were further segregated into Exception and non-Exception Portfolios and then again into Syndication and non-Syndication merchants. The reason for identifying syndication deals is that CBSG is only participating in those deals with another MCA company and therefore has no interaction with the merchant and no ability to control collections.

80. Merchants with no outstanding accounts receivable balance were further segregated into those merchants who had paid the full amount of their outstanding balances, from those merchants for whom, although the account balance was zero, it was the result of a credit memo.

81. While a credit memo could have been issued for various reasons, the impact is still a reduction of income and, depending on whether a deal had been fully funded or not, the Funding Obligation[38] is reduced.

82. Over the 103-month period, CBSG had just under 7,600 merchant clients and, of those, approximately 3,900 (52%) of those merchants have no outstanding accounts receivable balance ("Zero Balance merchants").

[38] Based on our review of CBSG QuickBooks and discussion with CBSG, what is labeled as Funding Receivables in QuickBooks should in fact more correctly be referred to as Funding Obligations.

83. Of the Zero Balance merchants, approximately 2,700 (69%) have paid off their entire balance and approximately 1,200 (31%), have no balance but did not pay in full.

84. The following chart is a continuation of the previous chart and reflects the merchant groups previously described and the corresponding accounts receivable balance. We identified all of the merchant deals within each of these groups. We calculated the aggregate cash advanced and the actual factoring fees earned, as well as those with the potential to be earned, based on current accounts receivable.[39]

Client Group	Total Number of Clients	Advances to Merchants	Factoring Fees	(1)	Factor
Non Exception Portfolio - A/R Zero Balance (No Credit Memo)	2,707	$ 312,436,375	$ 129,974,236	A	1.416
Non Exception Portfolio - A/R Zero Balance (With Credit Memo)	1,224	192,602,935	71,572,374	A	1.372
Non Exception Portfolio - A/R Zero Balance - All	3,931	505,039,310	201,546,610	A	1.399
All A/R with Balance	3,652	730,902,092	279,931,995	P	1.383
Non Exception Portfolio - A/R Zero Balance - All	**7,583**	**1,235,941,403**	**481,478,605**		

(1) A Actual Factor, A/R has zero balance
P Potential Factor, A/R with balance

85. Of the approximately 2,700 Zero Balance merchants having paid off their entire balance, CBSG recognized an overall factor of 1.416. ((Advances to Merchants $312,436,375 + Factoring Fee Revenue $129,974,236) ÷ Advances to Merchants $312,436,375).

86. Of the approximately 1,200 Zero Balance merchants having had some portion of their obligation reduced, CBSG recognized an overall factor of 1.372. ((Advances to Merchants $192,602,935 + Factoring Fee Revenue $71,572,374) ÷ Advances to Merchants $192,602,935). Like the Exception Portfolio, this group of merchants had reloads.

87. For the 3,900 Zero Balance merchants, CBSG recognized $201.5M in revenue and an overall blended factor of 1.399. This further demonstrates why the DSI analysis of $6.6 million of cash is incorrect and misleading. DSI presented its analysis as a simple math problem of 2 + 2 = 4 but neglected to explain or provide an analysis of what comprises each of the “2s”, which, in this case, includes revenue and ultimately, profit. The overall blended factor rate of 1.399 proves the profitability of the 3,900 Zero

[39] This does not include other fees and revenue sources.

Balance merchant funding agreements.

88. The chart below was generated from the CBSG QuickBooks accounting records. Between 2012 – 2019, on an accrual basis, CBSG recognized factoring fee revenue totaling $408.8 million and an additional $25.8 million of ancillary fee income totaling $434.6 million. Accrual basis net income during this period was $64 million. For the sake of clarity: the expenses of CBSG as detailed in the P&L chart below; $104.7 million in investor interest expenses; $133.6 million of commission and consulting expenses; and recognition of $106.1 million of factoring losses - all have been deducted in arriving at this net income amount.[40]

[40] While both DSI and BPB agree as to the cash transactions recorded, BPB has not audited or otherwise independently verified the accuracy of these CBSG internally prepared income statements.

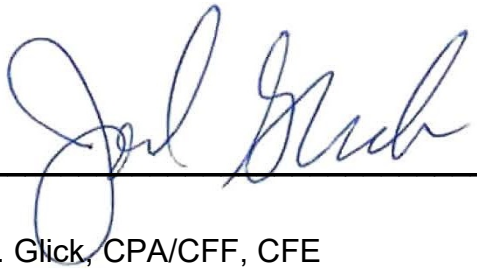
	Dec 31, 12	Dec 31, 13	Dec 31, 14	Dec 31, 15	Dec 31, 16	Dec 31, 17	Dec 31, 18	Dec 31, 19	TOTAL
Income									
Factoring Fee Income	$ 772,499	$ 5,452,417	$ 8,373,426	$ 13,427,522	$ 21,598,989	$ 66,609,332	$ 123,378,492	$ 169,213,496	$ 408,826,174
Interest Income	-	42	-	-	-	-	-	-	42
Merchant Processor Commissions	-	1,182	31,015	4,399	-	-	-	-	36,596
Processing Fee Income	-	-	-	63,583	515,401	758,367	5,599,919	5,081,603	12,018,873
Program Fee Income	-	44,712	182,065	486,839	598,662	1,837,702	4,107,346	4,224,601	11,481,928
Recovered Receivables Income	-	-	-	-	425,993	286,763	454,321	1,101,291	2,268,367
Total Income	772,499	5,498,354	8,586,505	13,982,343	23,139,045	69,492,165	133,540,078	179,620,990	434,631,979
	772,499	5,498,354	8,586,505	13,982,343	23,139,045	69,492,165	133,540,078	179,620,990	434,631,979
Expense									
Advertising & Promotions	2,924	829	17,899	2,876	8,274	100,802	104,199	241,767	479,570
Automobile Expense	605	28,938	65,124	72,933	52,039	53,088	49,559	8,123	330,409
Bank Fees	17,889	15,734	39,688	44,949	114,064	230,244	354,258	536,709	1,353,536
Charitable Donations	-	-	-	-	20,250	-	35,000	15,000	70,250
Computer and Internet Expenses	8,733	35,690	97,915	126,223	138,263	345,460	252,546	138,926	1,143,756
Continuing Education	-	-	4,598	-	-	-	-	-	4,598
Factoring Losses	-	1,264,466	1,696,035	3,262,495	8,713,601	20,580,713	33,944,059	36,684,346	106,145,715
Filing Fee	1,729	4,485	3,790	2,587	6,683	8,984	92,715	799	121,773
Gifts	-	198	-	3,653	51,523	726	1,758	2,857	60,716
Insurance Expense	959	546	3,252	2,781	15,099	19,711	264,413	79,191	385,952
Investment Expense	-	-	108,683	-	-	-	-	-	108,683
Janitorial	2,696	3,418	14,527	16,795	23,262	53,621	4,026	4,026	122,371
Leads	12,525	21,458	5,705	6,920	70,890	71,647	194,351	33,688	417,184
Legal Fees									
Collections Expense	-	-	96,460	162,223	182,427	415,771	434,479	761,904	2,053,264
Legal Fees - Other	10,000	56,523	67,874	79,752	139,917	156,674	285,617	515,005	1,311,362
Total Legal Fees	10,000	56,523	164,335	241,975	322,344	572,445	720,096	1,276,909	3,364,626
Licenses & Fees	244	1,742	1,605	-	-	-	-	-	3,591
Maintenance & Repairs	1,474	683	6,495	21,511	14,287	10,882	15,359	16,373	87,064
Meals and Entertainment	9,996	62,349	62,144	72,008	116,363	138,529	68,154	22,856	552,399
Merchant Account Fees	-	1,237	1,707	1	198	(665)	1,898	1,439	5,814
Moving Expense	-	8,035	1,740	7,152	2,161	2,698	2,163	6,533	30,481
Office Supplies	9,800	19,408	16,351	39,962	71,154	122,007	65,934	18,402	363,017
Total Payroll Expenses	29,608	347,490	329,737	453,129	656,719	-	-	209,939	2,026,622
Postage and Delivery	-	1,038	1,100	2,153	7,051	23,140	18,473	2,875	55,830
Processing Expense	-	-	-	-	-	1,044,568	4,132,093	2,343,240	7,519,902
Professional Fees	114,633	82,842	9,315	745	25,492	74,700	282,313	562,376	1,152,416
Rent Expense	26,849	113,612	159,057	242,548	233,009	152,291	121,954	148,028	1,197,348
Subcontractor Expense									
Commissions	53,626	383,900	830,963	840,713	1,991,539	6,022,587	10,009,278	13,715,364	33,847,970
Total Consulting	74,432	306,521	599,087	821,800	8,640,054	34,453,228	26,606,613	27,636,406	99,138,142
Subcontractor Expense - Other	-	-	37,230	-	49,190	360,387	105,178	19,300	571,285
Total Subcontractor Expense	128,058	690,421	1,467,280	1,662,513	10,680,783	40,836,202	36,721,069	41,371,070	133,557,396
Telephone Expense	1,150	14,899	11,521	13,867	25,650	37,408	56,009	13,644	174,147
Temporary Help	330	-	-	-	-	-	-	-	330
Travel Expense	13,684	10,153	41,271	27,470	58,146	108,354	58,499	65,707	383,282
Uncategorized Expenses	-	-	-	(1)	-	-	-	-	(1)
Underw riting Expense	-	26,077	25,366	34,711	57,320	187,020	358,984	348,758	1,038,236
Utilities	1,917	3,521	11,918	10,610	8,078	15,775	8,725	10,213	70,757
Total Expense	395,804	2,815,791	4,368,157	6,372,564	21,492,702	64,790,350	77,928,609	84,163,794	262,327,771
Net Ordinary Income	376,695	2,682,562	4,218,349	7,609,779	1,646,343	4,701,815	55,611,469	95,457,196	172,304,207
Other Expense									
Amortization Expense	-	-	-	-	6,415	-	-	-	6,415
Depreciation Expense	19,986	47,461	-	18,847	20,985	6,087	6,087	-	119,453
Fines & Penalties Expense	-	-	-	-	-	499,000	-	-	499,000
Interest Expense	110,544	1,047,652	1,511,607	1,621,516	3,613,754	12,384,442	28,278,237	56,085,746	104,653,498
Tax Expense	-	547,053	964,827	2,075,586	136,684	(1,600,544)	(1,786,563)	2,737,491	3,074,534
Total Other Expense	130,530	1,642,166	2,476,434	3,715,950	3,777,839	11,288,985	26,497,761	58,823,237	108,352,901
Net Income	**$ 246,165**	**$ 1,040,396**	**$ 1,741,915**	**$ 3,893,829**	**$ (2,131,496)**	**$ (6,587,171)**	**$ 29,113,708**	**$ 36,633,959**	**$ 63,951,307**

EXPERT COMPENSATION

89. I am being compensated at my standard rate of $495 per hour, while other members of our firm who worked on this engagement are compensated at $85 to $480 per hour.

Neither my compensation nor the compensation of the other BPB personnel who worked on this assignment is contingent on the outcome of this litigation.

90. I declare under penalty of perjury that the foregoing is true and correct, and made in good faith. Executed this 15th day of April 2021.



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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

vs.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al.,

Defendants.

EXPERT REPORT OF JOEL D. GLICK, CPA/CFF, CFE

August 13, 2021

EXHIBIT B

I. BACKGROUND[1]

The Securities and Exchange Commission ("SEC" or "Plaintiff") has brought an action against Complete Business Solutions Group, Inc. ("CBSG") D/B/A/ Par Funding, Full Spectrum Processing, Inc. ("FSP"), ABetterFinancialPlan.Com LLC d/b/a A Better Financial Plan, ABFP Management Company, LLC, f/k/a Pillar Life Settlement Management Company, LLC, ABFP Income Fund, LLC, ABFP Income Fund 2, L.P., United Fidelis Group Corp., Fidelis Financial Planning LLC, Retirement Evolution Group, LLC, Retirement Evolution Income Fund, LLC, f/k/a Re Income Fund, LLC, Re Income Fund 2, LLC, Lisa McElhone ("McElhone"), Joseph Cole Barleta, a/k/a Joe Cole ("Cole"), Joseph W. Laforte ("LaForte"), a/k/a Joe Mack, a/k/a Joe Macki, a/k/a Joe McElhone, Perry S. Abbonizio, Dean J. Vagnozzi, Michael C. Furman, And John Gissas (collectively "Defendants") alleging violation of securities laws.

On July 24, 2020, the SEC filed a complaint which alleged among other things, that McElhone and LaForte operated an investment scheme whereby they raised more than a half billion in funds from 1,200 investors across the country by offering unregistered securities to investors in the form of promissory notes issued by Par Funding. On July 27, 2020, the Court entered an Order appointing a Receiver ("Receivership Order").[2]

II. SCOPE OF ASSIGNMENT

Berkowitz Pollack Brant ("BPB") was retained by the law firm of Fridman Fels & Soto, PLLC to assist with their representation of CBSG. I was asked to review the various declarations filed by the SEC's forensic accountant and provide opinions as to conclusions reached in those declarations. I was also asked to review the declaration filed by the Receiver's financial consultants and similarly provide opinions as to conclusions reached in that declaration. As discovery is ongoing, I reserve the right to update this report as more information is provided. I have issued two previous

[1] DE 1
[2] DE 36

declarations in this matter. I reaffirm those declarations as part of this report. No statements in this report are intended to render any legal opinions or conclusions.

Although most of the activity from January 1, 2020, through July 27, 2020, had been entered into QuickBooks, the books had not yet been fully reconciled as of the date the Receiver took control. The Receiver has subsequently provided what he purported to be a reconciled set of books and records through the date he took control of CBSG. We have verified the cash balances appear to be reconciled. However, as of the date of this report, BPB has not had the opportunity to verify that the recording of these additional cash transactions has been properly coded.

III. QUALIFICATIONS

I am a Director of Forensic Advisory Services at the accounting firm of Berkowitz Pollack Brant. BPB was established in 1980 and today has over 280 employees with offices in Miami, Fort Lauderdale, Boca Raton and West Palm Beach, Florida and New York, New York. I am a Certified Public Accountant (CPA), certified in financial forensics (CFF) both designated by the American Institute of Certified Public Accountants and a Certified Fraud Examiner (CFE), as designated by the Association of Certified Fraud Examiners.

See Curricula Vitae and list of testimony experience, ***Exhibit 1***.

IV. DOCUMENTS CONSIDERED

In forming the opinions expressed herein and the two previously filed declarations, I reviewed and considered the following categories. A full listing of the documents considered can be found in ***Exhibit 2***.

- Various pleadings
- Supporting documentation
- Internally prepared and maintained financial information.
- Any cited material inadvertently excluded from this list.

V. EXPERT OPINIONS[3]

As discussed in greater detail in Section VI – Basis for Opinion, below, my expert opinions are as follows:

1) Based on the nature of CBSG's business and documents reviewed, an analysis of the cash transactions reflects, on a FIFO basis, investor funds were used entirely to fund merchant advances.
2) As a result of investor funds having been used entirely to fund merchant advances, an analysis of the cash transactions reflects, on a FIFO basis, consulting fees were not paid with Investor Funds.
3) My opinions and conclusions included in my previous declarations.

VI. BASIS FOR OPINIONS

A. Melissa Davis Declarations

A. **Davis Was Not Provided All of CBSG's Accounts**.

To date, Melissa Davis ("Davis"), the forensic accountant retained by the Securities and Exchange Commission (the "SEC"), has submitted three declarations. The first two, dated July 23, 2020, and August 4, 2020, address bank accounts for which the SEC asked her to analyze. The list of accounts she was provided to analyze as reflected in her July declaration[4] did not include all bank accounts and did not include any ACH accounts. None of the nine automated clearing house (ACH) payment processors used by CBSG was included in this list. Additionally, five bank accounts used by CBSG were not included in the list she was asked to analyze. The following table is a listing, from CBSG's

[3] I am generally aware an issue in this case is whether promissory notes issued by CBSG in this case constitute securities. As explained above, no statements in this declaration are intended to render any legal opinions or conclusions, and none are intended by my use of the term "investor" as opposed to "noteholder."
[4] Declaration of Melissa Davis, dated July 23, 2020, at ¶3(a)

Statement Review period: 8/14/14 - 06/30/20	
Account Per QuickBooks	**Reviewed by Davis**
TD Bank - Capital 9807	Y
TD Bank - Operating 9790	Y
TD Bank - Payroll 9782	Y
Bancorp - Operating 6442	Y
Bancorp - Capital 6468	Y
Actum ACH	N
Republic Bank - Operating 4126	Y
Republic Bank - Capital 4169	Y
Qualpay	N
Chase - Operating 9100	Y
TD Bank - ACH 9496	Y
Bento Debit Reserve	N
TD Bank - Legal 6895	Y
Merchant Industry	N
Priority Payment System Client	N
BOSJ - Operating 3352	Y
Priority Payment System Prefund	N
Actum ACH Prefund	N
Chase - ACH 9126	Y
Chase - Capital 9118	Y
NMI Payment Gateway	N
Empire - Operating 4825	N
Authorize.Net	N
Empire - Capital 5805	N
FEDChex	N
First Bank Capital - 7823	N
First Bank ACH - 7831	N
First Bank Operating - 7807	N

QuickBooks accounting software, of all bank accounts and ACH processor accounts active during the period for which she was asked to analyze.

B. Davis Is Mistaken Regarding Some of the Transfers

These first two declarations purport to quantify amounts paid to various individuals or entities,[5] from bank accounts which Davis determined contained commingled investor funds. Two of the entities Davis was asked to identify as having received the transfer of commingled funds were Broadway Advance, LLC ("Broadway") and Priority Payments Systems ("Priority"). However, Broadway which received commissions totaling

[5] Lisa McElhone, ALB Management, Beta Abigail, New Field Ventures, LLC, LME 2017 Family Trust, Heritage Business Consulting, Eagle Six Consulting, Inc., Broadway Advance, LLC, Priority Payment Systems.

$1,097,725[6] was an unrelated third-party independent sales organization (ISO). No consulting fees were paid to Broadway.

Priority was an ACH payment processing service used by CBSG to collect the repayment of merchant advances. Davis identified a series of transfers to Priority totaling $109,641,780:[7]

> *"Beginning in December 2019 through February 21, 2020, Par Funding made a series of transfers to Priority Payment Systems totaling $63,650,827 from the Par Funding Accounts containing commingled Investor Funds.*
>
> *"On February 21, 2020, Par Funding began to make transfers out of the Par Funding Accounts which were labeled as "Par Funding Pref." During the period from February 21, 2020, to June 30, 2020, these transfers totaled $45,990,953, of which $20,865,953 occurred during the month of June 2020 from the JP Morgan Chase accounts. Based on my discussions with the SEC, although labeled as Par Funding Pref, these transfers were also payments to Priority Payment Systems from the Par Funding Accounts."*

The Priority account to which these funds were transferred was actually an account controlled by CBSG. The funds transferred to the Priority account were used primarily to make interest and principal payments to investors and make advances to merchants. Priority was the one payment processor that would allow CBSG to send out funds. The former CFO has indicated the fees Priority charged were significantly less expensive than the cost of wiring the funds through a bank account.

C. Davis Identifies Commingled Accounts but Does Not Establish that Payments to Defendants or Related Entities Were Made with Investor Dollars

The third declaration issued on August 26, 2020, responds to the SEC request that Davis provide specific examples demonstrating the LME 2017 Family Trust (the "Trust"), Lisa

[6] Declaration of Melissa Davis, dated July 23, 2020, at paragraph 5
[7] Declaration of Melissa Davis, dated July 23, 2020, at paragraphs 6 and 7

McElhone and other related entities received commingled funds that include investor funds. As stated in her declaration at paragraph 25:

> *"The examples described in, ¶7-¶24 demonstrate that payments made to the LME 2017 Family Trust, Lisa McElhone and other related parties were derived from commingled funds that include Investor Funds, Agent Funds, merchant cash advance activity and other sources. These examples demonstrate the flow of funds and commingling that occurred in the Par Funding Accounts throughout the period of my analysis."*

A. Commingling Simply Means Funds Are Blended, Not Fraudulent or Tainted

While dollars held in CBSG bank accounts and on ACH account were commingled. However, the act of commingling funds does not by definition equate to fraud and Davis does not reach this conclusion. Commingled simply means mixed or blended. Any attorney/law firm who deposits funds from multiple clients into a single trust/escrow account has commingled funds, yet fraud is not assumed. Bar organizations[8] require records be maintained to separately track the clients' funds. Similarly, banks commingle account holder funds. They do not maintain a separate bank account for each of their account holders. Through their accounting systems, banks maintain a record separately detailing an account holders' activity and account balance. As with law firms or banks with commingled funds, CBSG maintained a separate record of investor balances[9].

We had a very meticulously managed ledger to keep track of the noteholder funds and to make sure that we're able to identify on a daily basis what deposits were made from merchants and to reconcile their balances with the company records, rights.

[8] Florida Bar Rule 5-1.1(a) (1) "A lawyer must hold in trust, separate from the lawyer's own property, funds and property of clients or third persons that are in a lawyer's possession in connection with a representation.", Florida Bar Rule 5-1.2(b)(7) "a separate file or ledger with an individual card or page for each client or matter, showing all individual receipts, disbursements, or transfers and any unexpended balance."
American Bar Association (ABA) Rule 1.15(a) "A lawyer shall hold property of clients or third persons that is in a lawyer's possession in connection with a representation separate from the lawyer's own property. Complete records of such account funds and other property shall be kept by the lawyer…"

[9] See transcript from the Remote Videotaped Deposition of Joseph Cole Barleta at Page 90, Lines 9 - 14

Generally Accepted Accounting Principles ("US GAAP") do not prohibit commingling of funds unless such funds are otherwise restricted pursuant to a legal agreement. No such restriction exists in the promissory notes. As such, the commingling of funds in CBSG accounts is not a departure or violation of US GAAP.

B. Tracing Rules Can Be Used to Unwind Commingled Funds

When funds have been commingled and the source and use of such funds is not readily apparent, forensic accountants apply tracing rules to ascertain how funds were used and to assist in determining who may be entitled to funds remaining in an account as a of a certain date. Commonly accepted tracing methodologies are: First In, First Out (FIFO); Last In, First Out (LIFO); Pro Rata Distribution; and Lowest Intermediate Balance Rule (LIBR).

Davis authored an article for the American Bankruptcy Institute ("ABI") on the LIBR method entitled Tracing Commingled Funds in a Fraud Case. The premise of the article is that commingling has occurred as a result of fraud. Tracing is an exercise to help unwind commingled dollars after the existence of fraud has been established. In her article, under the caption Other Tracing Methods, she discusses these tracing methods. *"Courts have also applied the pro rata method, whereby withdrawals from an account containing commingled funds are attributed to the source in proportion to their respective balances at the time of the withdrawals. …In the "first in, first out" method (FIFO), it is presumed that moneys are paid out in the order in which they were paid in. In the "last in, first out" method (LIFO), it is presumed that the last moneys deposited into an account are the first ones withdrawn, which results in an entirely different outcome."*[10]

1) FIFO Is the Appropriate Tracing Method Here

An excerpt from Davis' August 26 declaration, at paragraph 14, states a $240,000 investor deposit on July 17 is included in the $5 million transfer to the Trust made on July

[10] Tracing Commingled Funds in Fraud Cases, June 21, 2017 ABI Tracing Commingled Funds in Fraud Cases | ABI (kapilamukamal.com)

19. It is necessary to understand a business's cash flows in order to choose the appropriate tracing method. Davis used the LIBR method when the FIFO method or specific identification would be more appropriate. In reviewing the bank statements, one can see funds from Actum (ACH payments from Merchants) flow in and out of the account almost immediately. Focusing on the snapshot of the bank statement below, on 7/17, an Actum deposit is received in the amount of $333,041.90. On the same day, the same amount is transferred to the Par Capital account. Even if the 7/17 opening balance of $305,000 was commingled, the Actum funds should not be considered tainted and therefore taint the Par Capital account. In other words, if something can be specifically identified or matched and does not reduce the previous balance, then it should be considered as identified. Following that same logic, the investor deposit of $240,000 on 7/18 and the Actum deposit of $307,981.32 on 7/19 precisely comprise the $547,981.32 transferred to the Par Capital account on the same day. If the $240,000 is matched to that transfer, then it cannot be included in the $5 million transfer.

COMMERCIAL CHECKING 1504126 (Continued)

Activity in Date Order

Date	Description	Credits	Debits	
7/17	ActumPayot Actum Payout CCD 79558808	333,041.90		638,041.90
7/17	Transf to Par Capital Confirmation number 717180289		333,041.90-	305,000.00
7/18	WIRE-IN 20181990020900 NASHI I COMPLETE BUSINESS SOLUTIONS GR	240,000.00		545,000.00
7/18	ActumPayot Actum Payout CCD 79569382	299,565.71		844,565.71
7/18	Trsf from Par Capital Confirmation number 718180296	4,400,434.29		5,245,000.00
7/19	ActumPayot Actum Payout CCD 79581791	307,981.32		5,552,981.32
7/19	Transf to Par Capital Confirmation number 719180306		547,981.32-	5,005,000.00
7/19	Check 1016		5,000,000.00-	5,000.00

14. The $5 million payment to the Trust on July 18, 2018 was comprised of commingled funds sourced from Investors, Agent Funds, merchant cash advance activity and other sources. Notably, only one day prior to making the $5 million payment to the Trust on July 19, 2018, Par Funding received $240,000 from Investor Nashi, Inc. The promissory note for this investment is attached as ***Exhibit E***. Investor Nashi's funds were part of the commingled funds used to make the payment to the Trust.

Davis appears to apply an LIBR method of tracing activity in Republic Bank account

#4126 but does not appear to have done the same analysis for the activity in Republic Bank account #4169 or for any other accounts held at other banks. A review of the bank activity in account #4126 across numerous months will demonstrate that it is, for the most part, a sweep account. Funds from merchants, investors and other sources are deposited in #4126 and then transferred to #4169. Typically, if a payment is made from this account, it is only after funds have been transferred in from #4169. While I agree #4169 contains commingled funds because it had an opening balance of $12.9 million, an LIBR analysis would need to be done on this account which would require more than the July snapshot included in the Davis declaration. Additionally, the July snapshot only addresses intra-bank transfers. It is unclear if account #4169 received funds transferred from another account held at another bank. It is not proper to limit the tracing analysis to one bank if such inter-account transfers exist between banks.

The table below reflects the cash balances reflected in both QuickBooks and bank statements for the 3-day period of Davis' July snapshot. It is clear from the table that

	7/17/2018		7/18/2018		7/19/2018	
	QuickBooks	Bank	QuickBooks	Bank	QuickBooks	Bank
Actum ACH	$ 2,248,856	$ 2,449,032	$ 2,269,379	$ 2,428,032	$ 2,285,447	$ 2,469,993
Kotapay	2,409,567	1,904,623	2,404,964	1,849,399	2,394,724	1,817,704
Bancorp - Capital 6468	126,297	126,297	126,297	126,297	126,297	126,297
Bancorp - Operating 6442	100	100	100	100	100	100
TD Bank - Operating 9790	503,752	787,292	344,074	662,740	880,804	945,040
TD Bank - Capital 9807	4,747,917	4,747,917	4,480,930	4,480,930	4,761,839	4,761,839
Republic Bank - Capital 4169	15,673,770	15,673,770	11,222,816	11,222,816	11,403,727	11,403,727
Republic Bank - Operating 4126	(4,695,000)	305,000	245,000	5,245,000	5,000	5,000
	$21,015,259	$25,994,031	$21,093,560	$26,015,314	$21,857,938	$21,529,700

funds existed in other bank accounts that could have been used to make the $5 million payment to the Trust. Actum and Kotapay received merchant payments and did not receive investor funds. Therefore, those would have been non-commingled funds available to make the payment to the Trust.

Assuming an LIBR analysis was appropriate, it would require looking at all accounts. With respect to payments made to the Trust, as discussed here as well as Lisa McElhone and other entities analyzed in Davis' third declaration, Davis fails to consider all CBSG's

accounts. Instead, an analysis of the cash transactions in all relevant CBSG accounts reflects, on a FIFO basis, that consulting fees were not paid with Investor Funds.

Based on the nature of the MCA business and its cash flows, an LIBR analysis is not appropriate. Investor funds are advanced to merchants[11] and then merchants repay the advances plus a factor (together, the Right to Receivable or RTR). The factor is revenue and the cash available to pay interest and principal to investors, operating expenses, related party payments and distributions. Consequently, a FIFO view of investor funds should be considered.

This view is also consistent with CBSG's business model. Let us start with some basic premises:

i. The purpose of a for-profit business is to earn a profit.

ii. To earn a profit, a business must generate revenue.

iii. For a business to generate revenue, it must have a product or service to sell.

iv. To have a product or service to sell, it must have the ability to:

   a. pay the employees who provide the services,

   b. purchase the inventory, machinery & equipment necessary to manufacture the products they sell,

   c. purchase and/or lease the real estate necessary to house the inventory and machinery.

   d. pay other operating expenses or obligations that arise.

v. To pay for the items above, funds are required.[12]

[11] Investor funds used for merchant advances were from pooled funds. There was not a one-to-one relationship between a specific investor and a specific merchant advance.

[12] The source of such funds can come from the business owners or be raised through debt or equity financing. Setting aside creative hybrid models, equity financing entitles investors to a share of the profits and exposes them to potential

vi. If a business can borrow funds at a lower rate than the return it can generate in the business, it has created leverage. Leverage is an everyday occurrence in the business world.

vii. Once the funds are received the cycle can begin.

CBSG's business model was to create leverage using funds borrowed from note holders to advance to merchants who in turn would make the requisite payments back to CBSG thus generating revenue.

Applying these basic premises, the borrowed funds begin the cycle and are the first dollars used to fund merchant advances to generate the revenue. This is the very model that supports the use of FIFO as a tracing method for investor funds.

Additionally, it is not economically prudent for CBSG to use borrowed investor funds to first pay expenses rather than generate revenue. Prior to the revised interest rates in 2020, CBSG borrowed funds at an average interest rate of 20% per annum. As such, each dollar borrowed costed on average $1.20. Using borrowed funds to pay for operating expenses or make distributions would cost an extra $0.20 per dollar spent. A $1,000 utility bill paid for with borrowed dollars ultimately costs $1,200[13] resulting in an extra $200 outflow. Conversely, assuming an average factor of 1.37[14], every borrowed dollar advanced to a merchant would generate on average $1.37. Using the same $1,000 example, the merchant would receive $1,000 and repay $1,370[15], resulting in an extra

losses. Therefore, such investment comes with higher levels of risk and reward. Debt financing on the other hand provides a stated return in the form of an interest rate on the funds lent to the business.

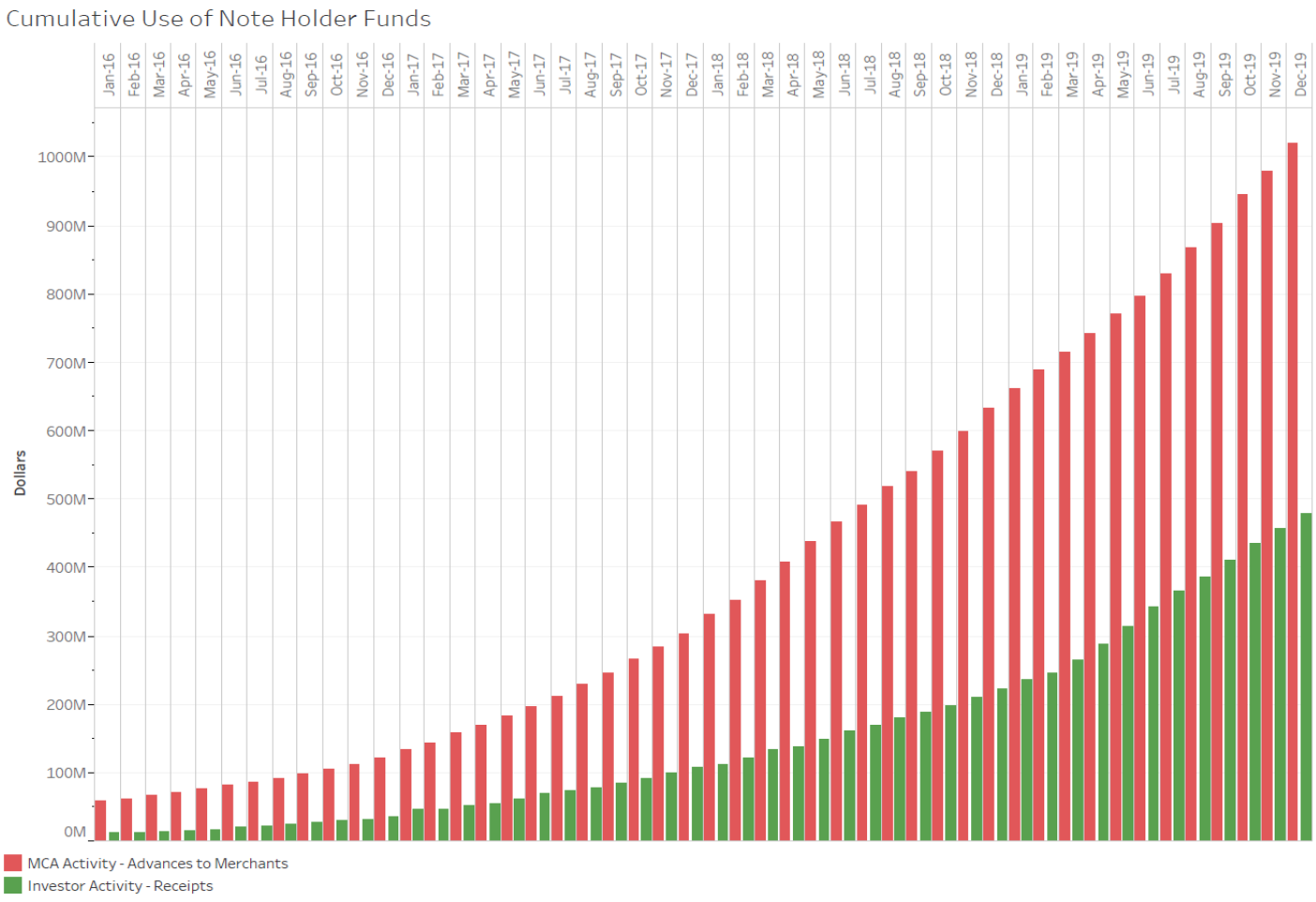
[13] The actual $1,000 x 1.20 = $1,200 or (the $1,000 utility bill + $200 in interest on the investor funds not on the street generating cash flow).

[14] This is lower than the actual average factor calculated in the Declaration of Joel Glick dated April 15, 2021, at paragraph 84.

[15] The actual $1,000 x 1.37 = $1,370 repaid by the merchant less the $200 in interest on the investor funds.

$370 cash inflow. After payment of $200 of interest, there would be a net cash inflow of $170[16], resulting in a $370[17] swing in cashflow.

The following chart compares cumulative merchant advances[18] and cumulative investor receipts monthly from January 1, 2016, to December 31, 2019.[19] The chart reflects the increasing difference between the cumulative merchant advances and the cumulative Investor receipts ("Merchant Advances in Excess of Investor Receipts") over time. Funding of merchant advances outpaced the borrowing of investor funds. By December



[16] Due to the merchant advances having a shorter-term than the investor fixed term promissory notes, it was possible for CBSG to advance and collect merchant funds more than once before any investor principal obligations matured. Therefore, the $1.37 is understated and would result in cashflow in excess of $1.37 and therefore net cashflow in excess of $170.

[17] $170 minus a negative $200 = $370

[18] As merchant advances are outflows and investor receipts are inflows, for purposes of comparing cashflows of opposite direction, the absolute dollar value was used.

[19] Amounts are cumulative from inception however due to size constraints of a bar chart, only 2016 to 2019 is reflected.

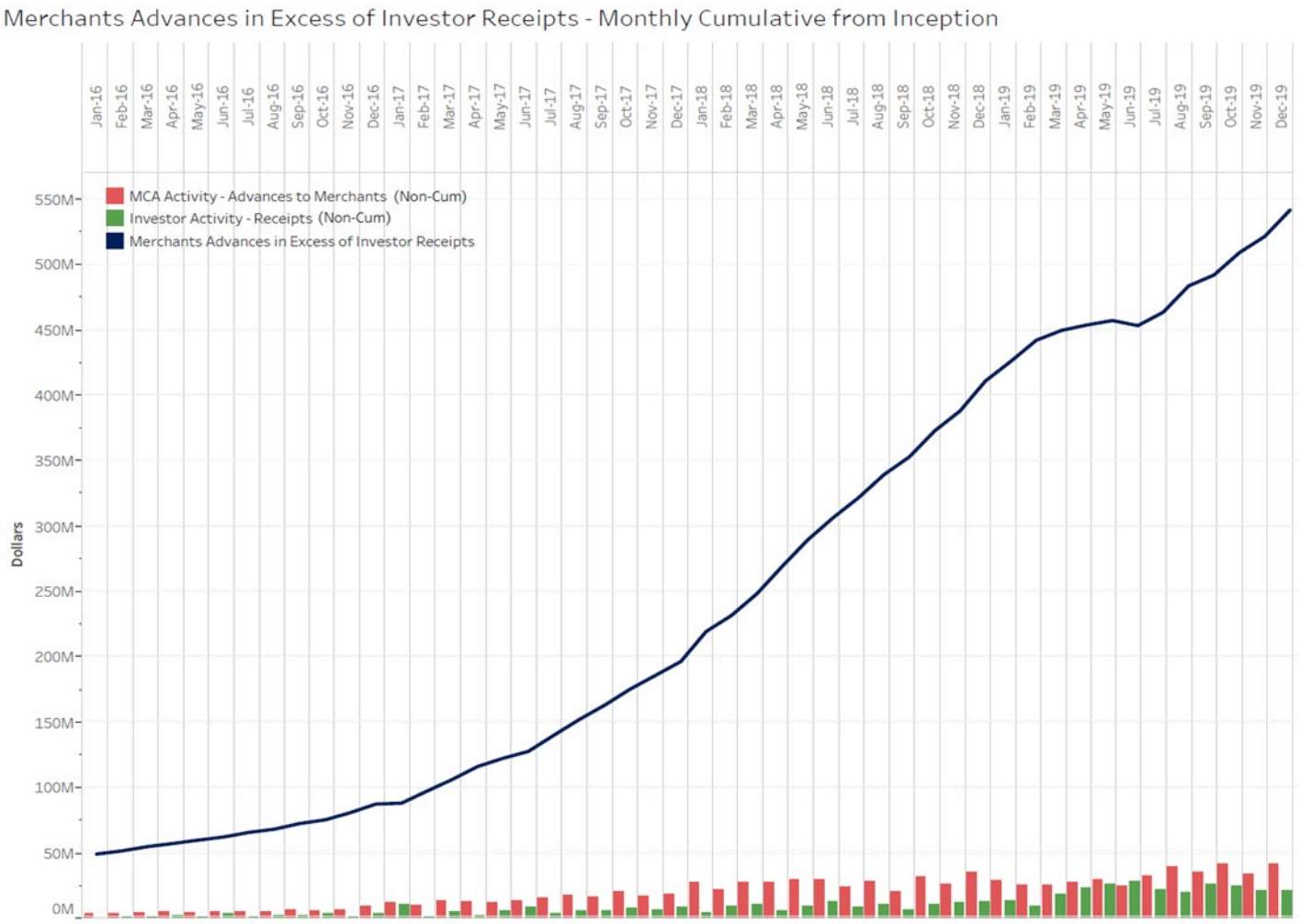
31, 2019, Merchant Advances in Excess of Investor Receipts totaled approximately $542 million.

On a FIFO basis, this chart illustrates investor receipts were subsumed by advances to merchants. As such, no investor funds would be available to pay for operating expenses, consulting fees, payments to related parties or principal and interest payments to investors. During 2018, CBSG began depositing investor funds only twice a month around the 10th and 23rd, or within a day or two of those days, yet continued to fund merchant advances daily. So, although on certain days of the month there were higher influxes of investor funds, as such, as soon as investor dollars came in, they were realistically already earmarked to fund merchant advances. According to the former CFO, Joe Cole, consulting fees were typically paid the first week of the month following the close of a quarter.[20] An analysis of CBSG's financials, on a FIFO basis, demonstrates that investor funds had been exhausted or committed to fund merchant advances, and therefore not available for use to pay consulting fees by the time CBSG was obligated to pay them during the first week of the month following the close of a quarter.

The following chart superimposes Merchant Advances in Excess of Investor Receipts from the previous chart (depicted as the dark blue line) on top of a comparison of monthly merchant advances and monthly investor receipts from January 1, 2016, to December 31, 2019. This comparison depicts the second True/False test described in a previously filed declaration.[21] In each month reflected in this chart, except June 2019, merchant advances exceeded investor receipts. In June 2019, investor receipts exceeded merchant advances by $3.9 million. Because merchant advances are committed to in advance of the receipt of investor funds, on a FIFO basis, the $3.9 million should be applied against

[20] See transcript from the Remote Videotaped Deposition of Joseph Cole Barleta at Page 25, Lines 4 – 9 and Page 143, Line 5 – 8.

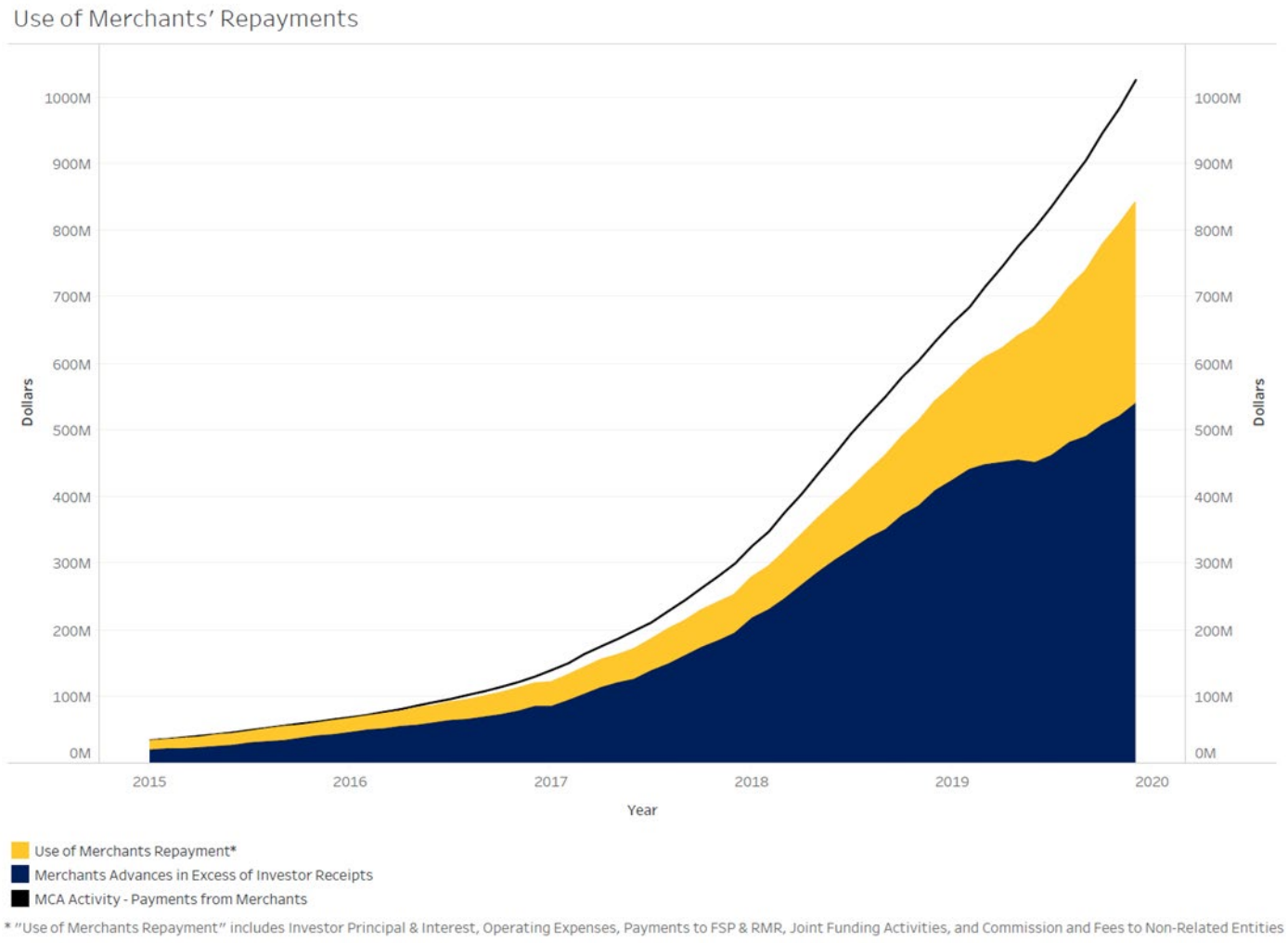
[21] See Declaration of Joel Glick dated April 15, 2021, at paragraph 37. *"The second test was to determine if monthly merchant advances exceeded monthly investor dollars received. An answer of True meant that every dollar of investor money received would have been subsumed by merchant advances and, therefore, not available to pay principal and interest to other investors. Of the 96 months of CBSG's business life through December 31, 2019, the test returned five (5) false results; three times in 2012, which is and could be expected; once in March 2015 (when the test failed by approximately $39,000); and once in June 2019 (when investor dollars received exceeded merchant advances by $3.9M)."* The chart in this declaration only reflects the 48 months through December 31, 2019.



the existing excess advances. As seen above, the impact was to decrease the Merchant Advances in Excess of Investor Receipts from $457.1 million to $453.2 million (the dark blue line) but does not impact the premise all investor receipts were subsumed by merchant advances.

The chart below addresses the use of proceeds from the repayment of merchant advances ("MCA Activity – Payments from Merchants"). It reflects the cumulative MCA Activity – Payments from Merchants, Merchant Advances in Excess of Investor Receipts

and the Use of Merchant Repayments[22,23] from January 1, 2015, to December 31, 2019[24]. The white area under the black line reflects excess cash.

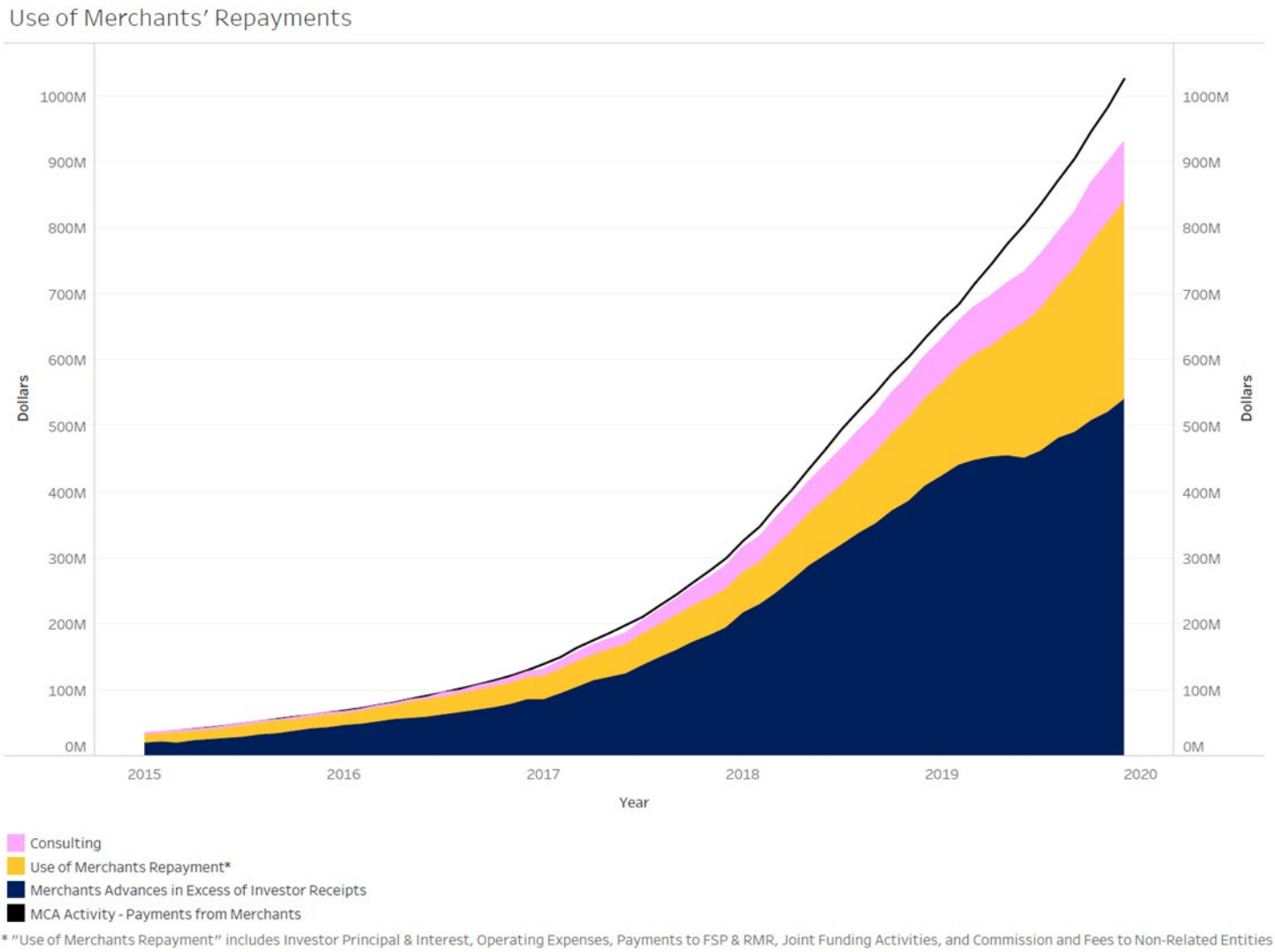


[22] Although separately identified by DSI, commission and fees to non-related parties are considered part of operating expenses. Likewise, although FSP and RMR are related parties, it is our understanding they were providing arms-length services and therefore are also being considered part of normal operating expenses.
[23] As payments from merchants are inflows and the use of such proceeds are outflows, for purposes of comparing cashflows of opposite direction, the absolute dollar value was used.
[24] Amounts are cumulative from inception however due to size constraints, only 2016 to 2019 is reflected.

Attached as compound Exhibit 3 to this declaration are bar charts, for each of the years 2015 through 2019, reflecting weekly merchant repayments received and the average weekly repayments for the year.

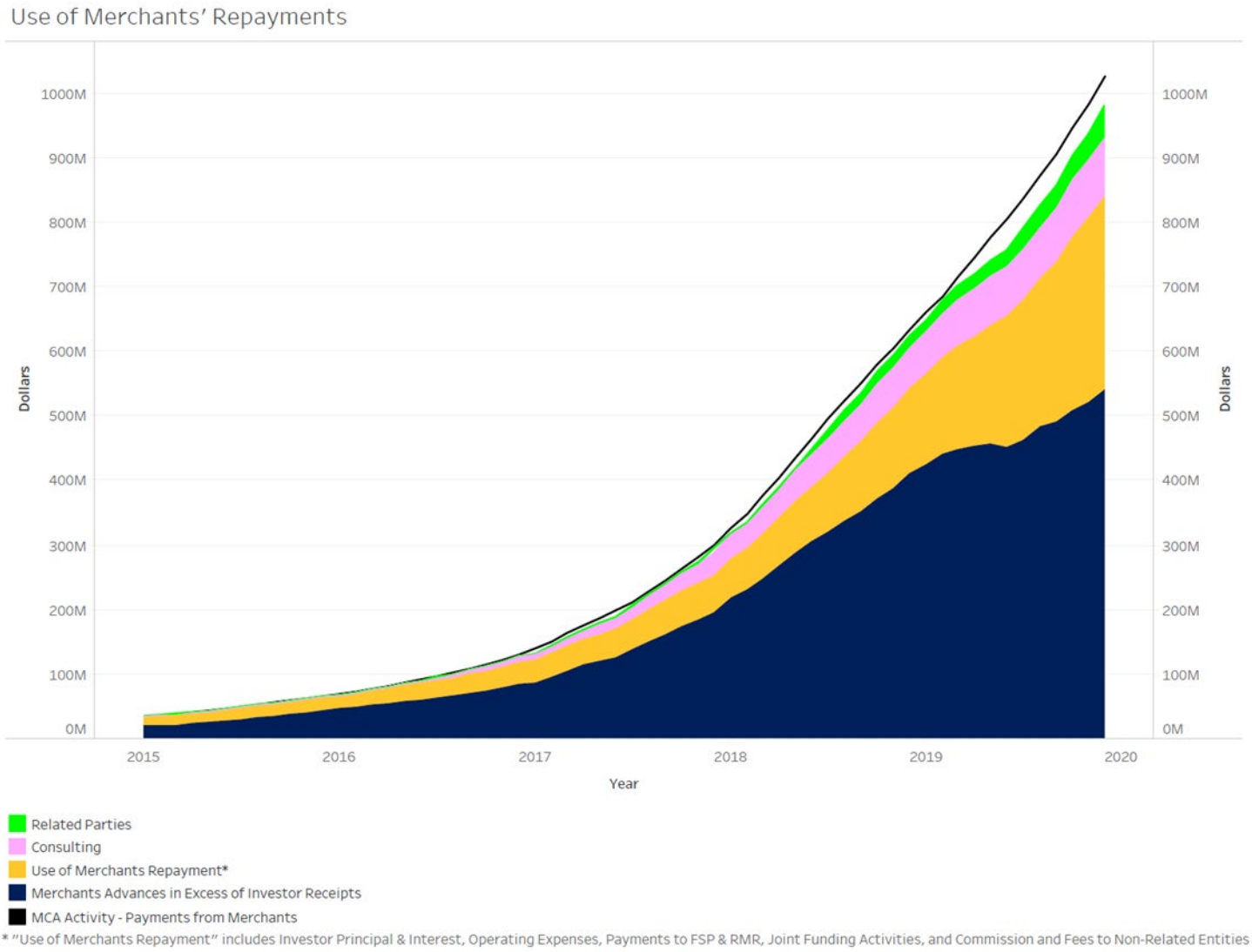
The following chart is identical to the previous[25] however adds cumulative consulting fees paid as a separate layer[26]. The white area under the black line continues to reflect excess cash after the payment of these consulting fees.

[25] As well as each footnote related to the chart or the discussion thereof.
[26] The order in which the use of merchant repayments has been layered is not suggestive of the order in which they were actually paid.



The following chart is identical to the previous[27] however adds cumulative payments to related parties as a separate layer. The white area under the black line continues to reflect excess cash after these payments.

[27] As well as each footnote related to the chart or the discussion thereof.

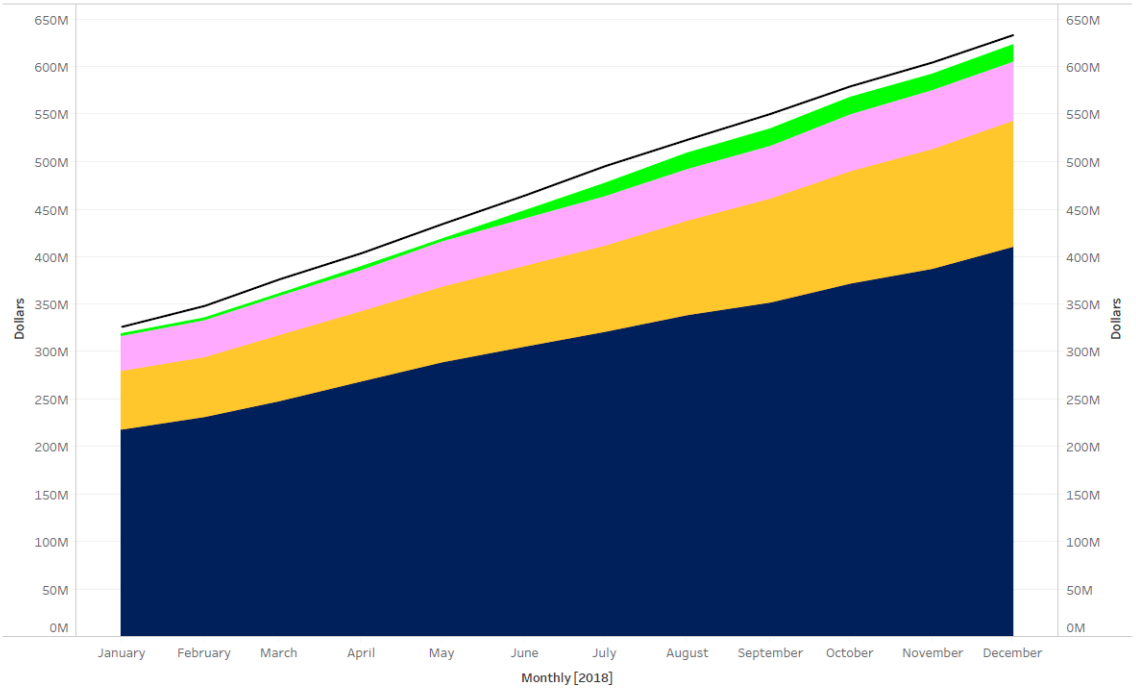


28

The following two charts are excerpts from the previous chart enlarging 2018 and 2019, respectively, the last two years with significant growth in merchant activity.

[28] A data table reflecting the dollars associated with the above chart is attached as Exhibit 5

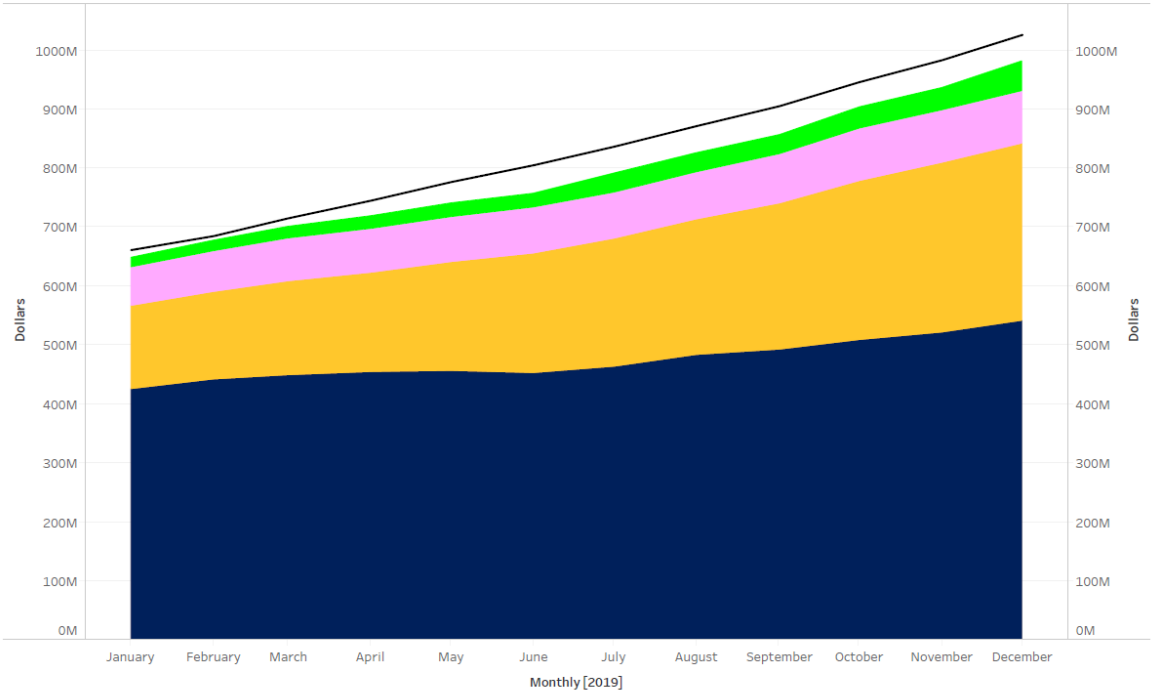
Use of Merchants' Repayments - 2018



Related Parties
Consulting
Use of Merchants Repayment*
Merchants Advances in Excess of Investor Receipts
MCA Activity - Payments from Merchants

* "Use of Merchants Repayment" includes Investor Principal & Interest, Operating Expenses, Payments to FSP & RMR, Joint Funding Activities, and Commission and Fees to Non-Related Entities

Use of Merchants' Repayments - 2019



Related Parties
Consulting
Use of Merchants Repayment*
Merchants Advances in Excess of Investor Receipts
MCA Activity - Payments from Merchants

* "Use of Merchants Repayment" includes Investor Principal & Interest, Operating Expenses, Payments to FSP & RMR, Joint Funding Activities, and Commission and Fees to Non-Related Entities

These charts reflect a relatively stable or increasing cash balance over the two-year period.

It has been criticized that CBSG did not maintain sufficient cash balances. Cash is inventory for an MCA business. Carrying as low a cash reserve as is necessary to cover operating expenses and to fund new merchant activity is the goal of the company.

Attached as compound Exhibit 4 to this declaration are charts for each the years 2015 through 2019 reflecting the weekly cash balance and the average weekly cash balance for the year. The average weekly cash balance for 2018 and 2019 were $13.5 million and $33.1 million, respectively.

EXPERT COMPENSATION

I am being compensated at my standard rate of $495 per hour, while other members of our firm who worked on this engagement are compensated at $85 to $480 per hour. Neither my compensation nor the compensation of the other BPB personnel who worked on this assignment is contingent on the outcome of this litigation.

Joel D. Glick, CPA/CFF, CFE
Berkowitz Pollack Brant Accountants and Advisors LLP
200 South Biscayne Boulevard, Seventh Floor
Miami, Florida 33131

Berkowitz Pollack Brant Advisors +CPAs

CURRICULUM VITAE

JOEL D. GLICK

Joel D. Glick, CPA/CFF, CFE is a Director of the Forensic Advisory Services practice for Berkowitz Pollack Brant Advisors + CPAs, LLP.

Mr. Glick has extensive experience providing forensic and litigation support services in a wide array of matters, as both an expert and a consultant. He has testified as an expert in both Federal and State matters and has been qualified as an expert in U.S. Bankruptcy Court.

Practice areas include:

- Fraud and forensic accounting investigations
  - Ponzi schemes
  - Embezzlement
  - Construction cost investigations
- Bankruptcy, receivership and other insolvency matters
  - Fraudulent transfer and preference analysis
  - Tracing
- Calculation of economic damages
  - Breach of contract
  - Shareholder disputes
  - Non-compete covenants
  - Business interruption
- Litigation support services
- Preparation of prospective financial information, financial forecasts
- Financial consulting and business advisory services

Business Background:

Berkowitz Pollack Brant, Advisors and CPAs, LLP, *Miami and Ft. Lauderdale, FL*	1997 – Present
Mallah, Furman & Company, P.A., *Miami, FL*	1991 – 1997
Dohan, Simon & Company, P.A., *Kendall, FL`*	1990 – 1991

Qualifications

Certified Public Accountant (CPA), 1994 (Florida)
American Institute of Certified Public Accountants

Certified in Financial Forensics (CFF), 2008
American Institute of Certified Public Accountants

Certified Fraud Examiner (CFE), 2010
Association of Certified Fraud Examiners

Educational Background

University of Florida, 1989
Fisher School of Accounting
Bachelor of Science in Accounting

Nova Southeastern University, 1992

Publications

"Is Your Loan in Violation of State Usury Laws?" BPB Firm Article, Miami, FL Berkowitz Pollack Brant Advisors and Accountants, October 2014

"Do You Need a Construction Overrun Investigation?" *Success Magazine, Berkowitz Pollack Brant Year in Review: Volume 3*, 2015

Professional Memberships

American Institute of Certified Public Accountants

Florida Institute of Certified Public Accountants

Association of Certified Fraud Examiners

REPRESENTATIVE ENGAGEMENTS

Bankruptcy, Insolvency and Receiverships

Rothstein Rosenfeldt Adler, PA: Appointed as forensic accountants for the court-appointed Trustee of the estate of Rothstein Rosenfeldt Adler, PA, in connection with, among other things, the forensic investigation of a $1.4 billion Ponzi scheme

Fontainebleau Las Vegas: Retained by Defendants to review claims, valued at nearly $1.0 billion, and the quantification of alleged economic damages associated with the pending bankruptcy of the $3.0 billion resort casino development in Las Vegas, Nevada.

Puig Development: Retained as accountants to Unsecured Creditors Committee in connection with the bankruptcy of a developer involved in the conversion of rental properties into condominium units throughout the state of Florida

Lancer Partners: Appointed as forensic accountants to the court-appointed Receiver for Lancer Partners, Lancer Offshore and Omnifund, a group of hedge funds with reported assets in excess of $1 billion, in connection with an SEC action to investigate the funds' scheme to manipulate trading and subsequently overstate the value of thinly traded securities.

Forensic Investigations

Construction Cost Investigation: Retained by the international owner of a high-end Miami Beach hotel to investigate and analyze the costs associated with a ballooning renovation budget.

Construction Cost Investigation: Retained by the international owner/operator group of a high-end hotel/condominium in South Beach to investigate and analyze the costs associated with a ballooning project budget.

Fraud Investigation / Earn-out Dispute: Retained by Defendant / Counter Plaintiff to refute claims by Plaintiff involving the failure to pay an earn-out in connection with the purchase of a seafood distributor by a publicly traded food wholesaler and to investigate and quantify the impact of pre-acquisition fraud alleged by Defendant / Counter Plaintiff.

Fraud Investigation: Retained by financial partner of a multi-million real estate development project to investigate claims of fraud and self-dealing by the project's operating partner.

Bank Investigation: Retained by the directors of an international bank by order of the Office of Comptroller of the Currency (OCC) to analyze bank account transactions, transactional relationships among account holders, unauthorized loan transactions, as well as potential unauthorized transactions involving the Bank's president and/or loan customers/account holders at the Bank

Alter Ego Investigation: Retained by Plaintiff to conduct investigation into issues that would determine whether Plaintiff could "pierce the corporate veil" in connection with the recovery of a judgment against a subsidiary of the Defendant.

Corporate Investigation: Jointly retained by two parties involved in a contractual dispute to investigate and identify any deviations from terms agreed to by the parties in connection with the

resolution of a disbursement of funds to franchisees by a national fast food chain.

Employee Embezzlement Investigations: Retained by multiple companies in connection with claims of embezzlement or defalcation of corporate assets by employees.

Economic Damages / Lost Profits

Lost Profits / Breach of Contract: Retained by the Plaintiff, a reseller of long distance service, to determine lost profits in connection with a breach of contract by its supplier of international long distance service

Lost Profits / Product Liability: Retained by Defendant, a chemical manufacturer, in connection with a customer claim for lost profits arising from the sale of alleged poor quality chemicals

Lost Profits / Breach of Contract: Retained by Defendant, a cruise line, in a breach of contract action involving a claim for lost profits related to the termination of an agreement with a supplier to provide in-cabin video services.

Lost Profits / Breach of Contract: Retained by Plaintiff to calculate and testify as to damages purportedly suffered by the refurbisher of electronic equipment in connection with a dispute with national distributer of cordless telephones.

Lost Profits / Lender Liability: Retained by a Top 5 commercial bank Defendant in a lender liability lawsuit in which a bedding manufacturer purportedly suffered lost profits as a result its lender's decision to accelerate the collection of a loan that had gone into default.

Lost Profits / Tort Claim: Retained by the Defendant in connection with a claim for lost profits brought by a company in the promotional products industry that was purportedly damaged as a result of the alleged negligent conduct of a computer products manufacturer.

Other Disputes

Post-Acquisition Dispute: Represented the Buyer in a post-acquisition dispute involving the calculation of an earn-out payment purportedly owed to the Seller of an agricultural business.

Post-Acquisition Dispute: Represented the Buyer in a post-acquisition dispute involving the investigation and quantification of amounts owed due to breaches of the seller's representations and warranties of the asset purchase agreement.

Insurance Dispute: Retained by Insurance Company in connection with a claim for lost inventory alleged by a tire recycler in connection with a fire.

Joel Glick
Listing Of Cases Testified In
As An Expert Witness

COURT	JUDGE	CASE NAME/SUBJECT MATTER	REPRESENTED	YEAR
In The Circuit Court of the Twentieth Judicial Circuit In And For Lee County, Florida	Hon. Keith R. Kyle	A&E Adventures, LLC, a Florida limited liability company, Plaintiff v. GCTC Holdings, LLC, a Delaware limited liability company, Defendant Case No. 19-CA-8510 **(Trial)**	A&E Adventures, LLC	2021
In The United States District Court Southern District of Florida	Hon. Aileen M. Cannon	JUST PLAY, LLC, Plaintiff, vs. FITZMARK, INC., Defendant. Case No. 20-80663-CIV **(Deposition)**	JUST PLAY, LLC	2021
In The United States District Court Middle District Of Tennessee Nashville Division	Hon. Eli J. Richardson	AUTOMOTIVE EXPERTS, INC. Plaintiff, vs. KEITH KALLBERG, KATHRYN KALLBERG, KALLBERG EMERGENCY MANAGEMENT, INC., MATTHEW KALLBERG, and LISA KALLBERG Defendants Case No. 19-CA-8510 **(Deposition)**	Keith Kallberg, Kathryn Kallberg, Kallberg Emergency Management, Inc., Matthew Kallberg, and Lisa Kallberg	2020
In The Circuit Court of the Twentieth Judicial Circuit In And For Lee County, Florida	Hon. Keith R. Kyle	A&E Adventures, LLC, a Florida limited liability company, Plaintiff v. GCTC Holdings, LLC, a Delaware limited liability company, Defendant Case No. 19-CA-8510 **(Deposition)**	A&E Adventures, LLC	2020
American Arbitration Association	Hon. Joshua W. Martin, III	U.S. ECOGEN POLK, LLC, a Delaware limited liability company, Claimant and Counterclaim Respondent, vs.DUKE ENERGY FLORIDA, LLC (f/k/a Florida Power Corporation, Inc., a Florida limited liability company), Respondent and Counterclaimant. Case No. 01-19-0001-0249 **(Trial)**	U.S. ECOGEN POLK, LLC	2020
In The United States District Court Southern District of Florida	Hon. Donald M. Middlebrooks	LB Pharma Serves, LLC v KrunchCash, LLC and Jeffrey Hackman 9:20-cv-80141-DMM **(Deposition)**	LB Pharma Service, LLC	2020
In the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, FL	Honorable William Thomas	D.P. Monaco, LLC, a Florida limited liability company, Plaintiff, vs. Chateau Beach, LLC, a Florida limited liability company, and Coastal Construction Group of South Florida, Inc.,a Florida corportatio, Defendants **(Deposition)**	D.P. Monaco, LLC	2019
In the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, FL	Honorable Jacqueline Hogan Scola	SBM ACQUISITION 2, LLC, a Florida limited liability company, as substituted Party Plaintiff to METROPOLITAN MTG. CO. OF MIAMI, a Florida Corporation, Plaintiff, vs. IVOR HANO ROSE and RITA STARR, his wife,MICHAEL A. STERN, an individual; 900 COLLINS 10 AVE., LLC, a dissolved Florida limited liability company; CITY OF MIAMI BEACH, FLORIDA, CITY OF MIAMI, FLORIDA, Defendants **(Deposition)**	METROPOLITAN MTG. CO. OF MIAMI	2018

Joel Glick
Listing Of Cases Testified In
As An Expert Witness

COURT	JUDGE	CASE NAME/SUBJECT MATTER	REPRESENTED	YEAR
In the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, FL	Honorable William Thomas	CRAIG A. FINGOLD, individually and as TRUSTEE of the FINGOLD FAMILY 2004 TRUST u/a/d JUNE 10, 2004, individually and derivatively in the right and for the benefit of KF PROPERTY HOLDINGS, LLC, a Florida Limited Liability CompanyPlaintiffs, vs. R. LEE KRELSTEIN, an Individual, R. LEE KRELSTEIN, as TRUSTEE of the R. LEE KRELSTEIN DECLARATION OF TRUST DATED SEPTEMBER 13, 2007, and L & L INTERNATIONAL I, L.L.C., a Florida Limited Liability Company, Defendants. **(Deposition)**	Craig Fingold	2018
In The Circuit Court, Seventh Judicial Circuit, In And For Volusia County, Florida	None assigned at time of deposition	Exxelia Usa Holding, Inc. And Exxelia-RAF Tabtronics, LLC, Plaintiffs, v. Robert Malkani, James Tabbi, RBM Technologies, Inc., Attractive Technologies, Inc., Defendants. **(Deposition)**	Exxelia Usa Holding, Inc. And Exxelia-RAF Tabtronics, LLC	2018
In the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, FL	Honorable John W. Thornton	JEANETTE RAIJMAN BIBLIOWICZ, Individually and derivatively as Co-Trustee of the 2003 Waserstein Family Trust in the Right of and for the Benefit of the Miami Lakes Office Center, Inc, v. RICHARD WASERSTEIN, and individual, ALAN WASERSTEIN, an individual and as Trustee of the ATS TRUST; CHARLES WASERSTEIN, an individual; MARTA WASERSTEIN, an individual, et al., **(Deposition)**	Jeanette Raijman Bibliowicz	2017
United States District Court Southern District of Florida Miami Division	Honorable Marcia G. Cooke /Honorable Edwin G. Torres	Jonathan B. Kling v. Jon Bourbeau, P.A. and Jon Bourbeau Case no. 15-22439-CIV-Cooke/Torres **(Deposition)**	Jon Bourbeau, P.A. and Jon Bourbeau	2016
In the Circuit Court of the 11th Judicial Circuit in and for Miami-Dade County, FL	Honorable Rosa I. Rodriguez	Matthew Rocca v. Victor Rones individually, as Co-Personal Representative of the Estate of Sidney Boyansky, etc., Irene Boyansky, individually, and as Co-Personal Representatives of the Estate of Sidney Boyansky, etc., and Emile Martin, individually, and as successor Co-Trustee of the Second Restated Sidney Boyansky Revocable Trust, et al Local Case No.11-596-CP-02 **(Deposition)**	Rones, Boyansky & Martin	2015
United States Bankruptcy Court Southern District of Florida, Ft. Lauderdale Division	Honorable Raymond B. Ray	Rothstein Rosenfeldt Adler, P.A., Debtor Chapter 11 Bankruptcy Case No.09-34791-BKC-RBR Adv. No 11-03014-BKC-RBR-A RRA, Stettin as Trustee v Frank Preve et al [ECF No. 67] **(Deposition)**	The Honorable Herbert Stettin as Chapter 11 Trustee	2013
United States Bankruptcy Court Southern District of Florida, Ft. Lauderdale Division	Honorable Raymond B. Ray	Rothstein Rosenfeldt Adler, P.A., Debtor Chapter 11 Bankruptcy Case No.09-34791-BKC-RBR Hearing on Motion to Approve Second Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code Proposed Jointly by the Trustee and the Official Committee of Unsecured Creditors **(Deposition)**	The Honorable Herbert Stettin as Chapter 11 Trustee	2013

Joel Glick
Listing Of Cases Testified In
As An Expert Witness

COURT	JUDGE	CASE NAME/SUBJECT MATTER	REPRESENTED	YEAR
United States Bankruptcy Court Southern District of Florida, Ft. Lauderdale Division	Honorable Raymond B. Ray	Rothstein Rosenfeldt Adler, P.A., Debtor Chapter 11 Bankruptcy Case No.09-34791-BKC-RBR Hearing on Motion to Approve Second Amended Joint Plan of Liquidation Pursuant to Chapter 11 of the Bankruptcy Code Proposed Jointly by the Trustee and the Official Committee of Unsecured Creditors **(Hearing)**	The Honorable Herbert Stettin as Chapter 11 Trustee	2013
United States Bankruptcy Court Southern District of Florida, Ft. Lauderdale Division	Honorable Raymond B. Ray	Rothstein Rosenfeldt Adler, P.A., Debtor Chapter 11 Bankruptcy Case No.09-34791-BKC-RBR Motion to Approve Settlement and Compromise with (i) Centurion Structured Growth LLC, Platinum Partners Credit Opportunities Master Fund LP, Platinum Partners Value Arbitrage Fund LP, and Level 3 Capital Fund LP (the "Funds"); and (ii) Regent Capital Partners LLC, Mark Nordlicht and his wife Dahlia Kalter Nordlicht, Murray Huberfeld and his wife Laura Huberfeld, David Bodner and his wife Naomi Bodner, and the Bodner Family Foundation [ECF No. 3185] **(Deposition)**	The Honorable Herbert Stettin as Chapter 11 Trustee	2012
United States Bankruptcy Court Southern District of Florida, Ft. Lauderdale Division	Honorable Raymond B. Ray	Rothstein Rosenfeldt Adler, P.A., Debtor Chapter 11 Bankruptcy Case No.09-34791-BKC-RBR Hearing on Motion to Approve Settlement and Compromise with (i) Centurion Structured Growth LLC, Platinum Partners Credit Opportunities Master Fund LP, Platinum Partners Value Arbitrage Fund LP, and Level 3 Capital Fund LP (the "Funds"); and (ii) Regent Capital Partners LLC, Mark Nordlicht and his wife Dahlia Kalter Nordlicht, Murray Huberfeld and his wife Laura Huberfeld, David Bodner and his wife Naomi Bodner, and the Bodner Family Foundation [ECF No. 3185] **(Hearing)**	The Honorable Herbert Stettin as Chapter 11 Trustee	2012
United States Bankruptcy Court Southern District of Florida, Ft. Lauderdale Division	Honorable Raymond B. Ray	Rothstein Rosenfeldt Adler, P.A., Debtor Chapter 11 Bankruptcy Case No.09-34791-BKC-RBR Motion to Substantively Consolidate Alleged Debtor Banyon 1030-32, LLC with and Into the Debtor's Bankruptcy Estate Nunc Pro Tunc to November 30, 2009 **(Deposition)**	The Honorable Herbert Stettin as Chapter 11 Trustee	2011
United States Bankruptcy Court Southern District of Florida, Ft. Lauderdale Division	Honorable Raymond B. Ray	Rothstein Rosenfeldt Adler, P.A., Debtor Chapter 11 Bankruptcy Case No.09-34791-BKC-RBR Hearing on Motion to Substantively Consolidate Alleged Debtor Banyon 1030-32, LLC with and Into the Debtor's Bankruptcy Estate Nunc Pro Tunc to November 30, 2009 **(Hearing)**	The Honorable Herbert Stettin as Chapter 11 Trustee	2011

Joel Glick
Listing Of Cases Testified In
As An Expert Witness

COURT	JUDGE	CASE NAME/SUBJECT MATTER	REPRESENTED	YEAR
United States Bankruptcy Court Southern District of Florida, Ft. Lauderdale Division	Honorable Raymond B. Ray	Rothstein Rosenfeldt Adler, P.A., Debtor Chapter 11 Bankruptcy Case No.09-34791-BKC-RBR Hearing on Emergency Verified Motion and Supporting Memorandum of Law of the Plaintiff, Chapter 11 Trustee Herbert Stettin, for Entry of Preliminary Injunction and for other Relief and Request for Judicial Notice [D.E. 47] **(Hearing)**	The Honorable Herbert Stettin as Chapter 11 Trustee	2010

Berkowitz Pollack Brant Advisors +CPAs

Exhibit 2 – Documents Considered

1. Various docket entries (DE) filed in this matter:
    i. COMPLAINT FOR INJUNCTIVE AND OTHER RELIEF (DE 1)
    ii. ORDER GRANTING PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S (DE 36)
    iii. MOTION FOR APPOINTMENT OF RECEIVER
    iv. RECEIVER RYAN K. STUMPHAUZER'S INTERIM STATUS REPORT DATED OCTOBER 6, 2020 (DE 305)
    v. DEFENDANTS' JOINT RESPONSE TO RECEIVER'S INTERIM STATUS REPORT DATED OCTOBER 6, 2020 [DE 305] (DE 355)
    vi. RECEIVER RYAN K. STUMPHAUZER'S MOTION AND MEMORANDUM OF LAW TO EXPAND RECEIVERSHIP ESTATE (DE 357)
        i. Exhibits E, F, G & L - Declarations of Melissa Davis
    vii. RECEIVER RYAN K. STUMPHAUZER'S NOTICE OF FILING QUARTERLY STATUS REPORT PURSUANT TO PARAGRAPHS 53 AND 54 OF THE AMENDED RECEIVERSHIP ORDER (DE 358)
    viii. RECEIVER RYAN K. STUMPHAUZER'S NOTICE OF FILING REPORT ON OPERATIONS IN CONNECTION WITH STATUS CONFERENCE TO BE CONDUCTED ON DECEMBER 15, 2020 (DE 426)
        i. Exhibit 1 DECLARATION OF BRADLEY D. SHARP (DE 426-1)
    ix. DEFENDANTS' MOTION TO COMPEL THE RECEIVER TO PRODUCE DOCUMENTS RESPONSIVE TO DEFENDANT LISA MCELHONE'S REQUESTS FOR PRODUCTION OF DOCUMENTS (DE 459)
    x. RECEIVER RYAN K. STUMPHAUZER'S QUARTERLY STATUS REPORT DATED FEBRUARY 1, 2021 (DE 482)
        i. Exhibit 1 STANDARDIZED FUND ACCOUNTING REPORT, dated 02/01/20 (DE 482-1)
        ii. Exhibit 2 DECLARATION OF BRADLEY D. SHARP, dated 02/01/20 (DE 482-2)
    xi. RECEIVER, RYAN K. STUMPHAUZER'S SECOND APPLICATION FOR ALLOWANCE AND PAYMENT OF PROFESSIONALS' FEES AND REIMBURSEMENT OF EXPENSES FOR OCTOBER 1, 2020 – DECEMBER 31, 2020 (DE 491)
2. Transcript of December 15, 2020 Status Videoconference
3. Declaration of:
    i. James Klenk, dated August 17, 2020

Exhibit 2 – Documents Considered

ii. Melissa Davis, dated:

1. July 23, 2020
2. August 4, 2020
3. August 26, 2020

4. Deposition testimony of:
   a. Joseph Cole Barleta, dated June 2, 2021
   b. James Klenk, dated July 26, 2021
5. QuickBooks accounting records for CBSG (inception to July 27, 2020)
6. Bank statements and ACH vendor statements for CBSG
7. Various noteholder promissory notes
8. CBSG internally prepared spreadsheets (including but not limited to)
   a. Daily Deposit Logs
   b. Investor Logs
   c. Bank Activity Log
9. Financial Accounting Standards Board ("FASB") Accounting Standards Codification ("ASC")
10. CBSG Funding Analysis, also known as the Key Performance Indicators (hereinafter "KPI Report") for the following cumulative periods from January 1, 2013 to:
    a. September 2018
    b. May 2019
    c. June 2019
    d. February 2020
    e. June 2020
11. Consulting Agreements by and between CBSG and:
    a. Isaac Shehebar, dated January 10, 2017
    b. GEMJ Chehebar GRAT, LLC, dated January 10, 2017
    c. Perry Abbonizio, dated February 2017
    d. Lindsey Blake Inc., February 17, 2017
    e. Beta Abigail, Inc., dated January 1, 2018
    f. Eagle Six Consultants, Inc., July 1, 2018

EXHIBIT 3

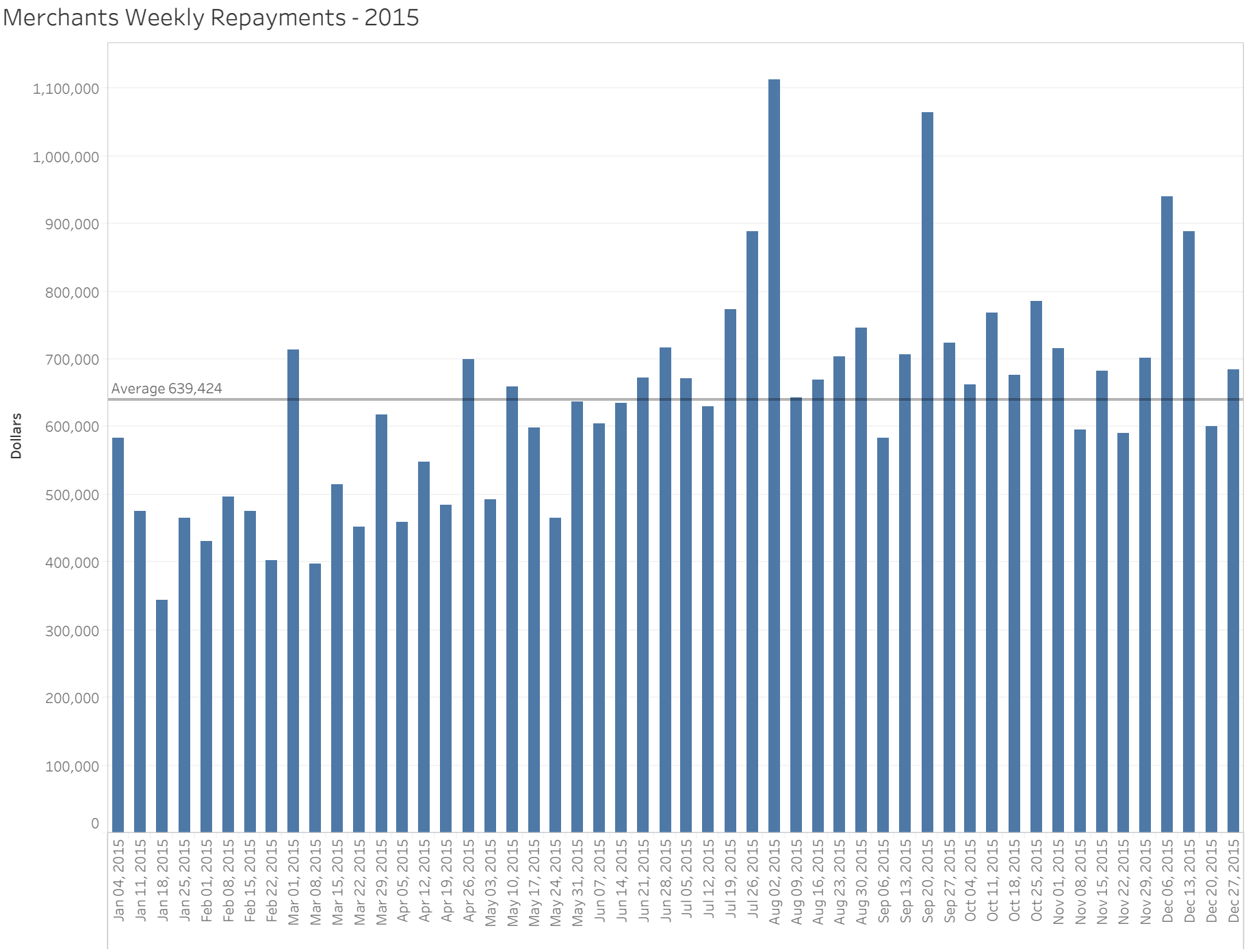

Merchants Weekly Repayments - 2015
Dollars
1,100,000
1,000,000
900,000
800,000
700,000
600,000
500,000
400,000
300,000
200,000
100,000
0
Average 639,424
Jan 04, 2015
Jan 11, 2015
Jan 18, 2015
Jan 25, 2015
Feb 01, 2015
Feb 08, 2015
Feb 15, 2015
Feb 22, 2015
Mar 01, 2015
Mar 08, 2015
Mar 15, 2015
Mar 22, 2015
Mar 29, 2015
Apr 05, 2015
Apr 12, 2015
Apr 19, 2015
Apr 26, 2015
May 03, 2015
May 10, 2015
May 17, 2015
May 24, 2015
May 31, 2015
Jun 07, 2015
Jun 14, 2015
Jun 21, 2015
Jun 28, 2015
Jul 05, 2015
Jul 12, 2015
Jul 19, 2015
Jul 26, 2015
Aug 02, 2015
Aug 09, 2015
Aug 16, 2015
Aug 23, 2015
Aug 30, 2015
Sep 06, 2015
Sep 13, 2015
Sep 20, 2015
Sep 27, 2015
Oct 04, 2015
Oct 11, 2015
Oct 18, 2015
Oct 25, 2015
Nov 01, 2015
Nov 08, 2015
Nov 15, 2015
Nov 22, 2015
Nov 29, 2015
Dec 06, 2015
Dec 13, 2015
Dec 20, 2015
Dec 27, 2015

EXHIBIT 3

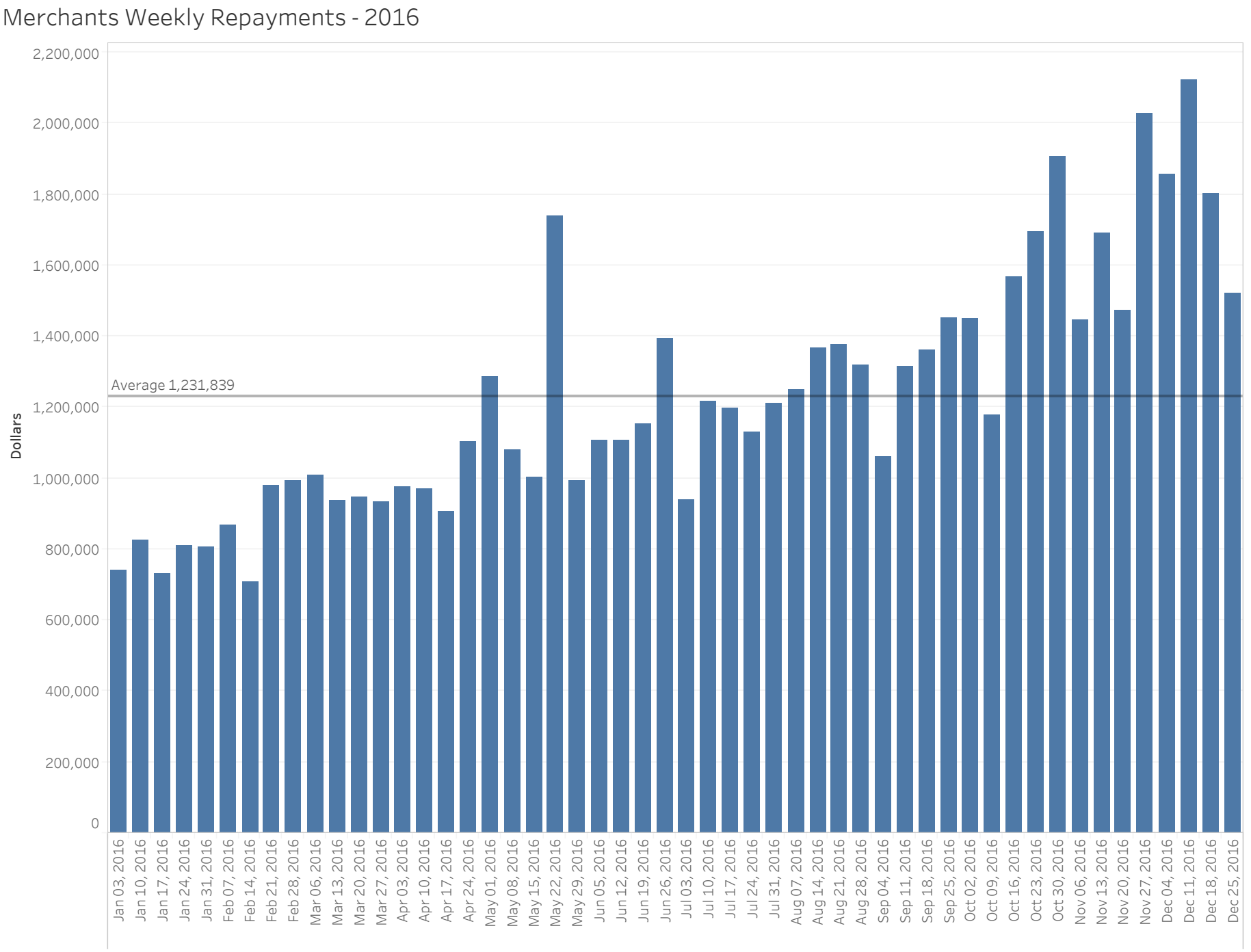

Merchants Weekly Repayments - 2016
Dollars
2,200,000
2,000,000
1,800,000
1,600,000
1,400,000
1,200,000
1,000,000
800,000
600,000
400,000
200,000
0
Average 1,231,839
Jan 03, 2016
Jan 10, 2016
Jan 17, 2016
Jan 24, 2016
Jan 31, 2016
Feb 07, 2016
Feb 14, 2016
Feb 21, 2016
Feb 28, 2016
Mar 06, 2016
Mar 13, 2016
Mar 20, 2016
Mar 27, 2016
Apr 03, 2016
Apr 10, 2016
Apr 17, 2016
Apr 24, 2016
May 01, 2016
May 08, 2016
May 15, 2016
May 22, 2016
May 29, 2016
Jun 05, 2016
Jun 12, 2016
Jun 19, 2016
Jun 26, 2016
Jul 03, 2016
Jul 10, 2016
Jul 17, 2016
Jul 24, 2016
Jul 31, 2016
Aug 07, 2016
Aug 14, 2016
Aug 21, 2016
Aug 28, 2016
Sep 04, 2016
Sep 11, 2016
Sep 18, 2016
Sep 25, 2016
Oct 02, 2016
Oct 09, 2016
Oct 16, 2016
Oct 23, 2016
Oct 30, 2016
Nov 06, 2016
Nov 13, 2016
Nov 20, 2016
Nov 27, 2016
Dec 04, 2016
Dec 11, 2016
Dec 18, 2016
Dec 25, 2016

EXHIBIT 3

Merchants Weekly Repayments - 2017

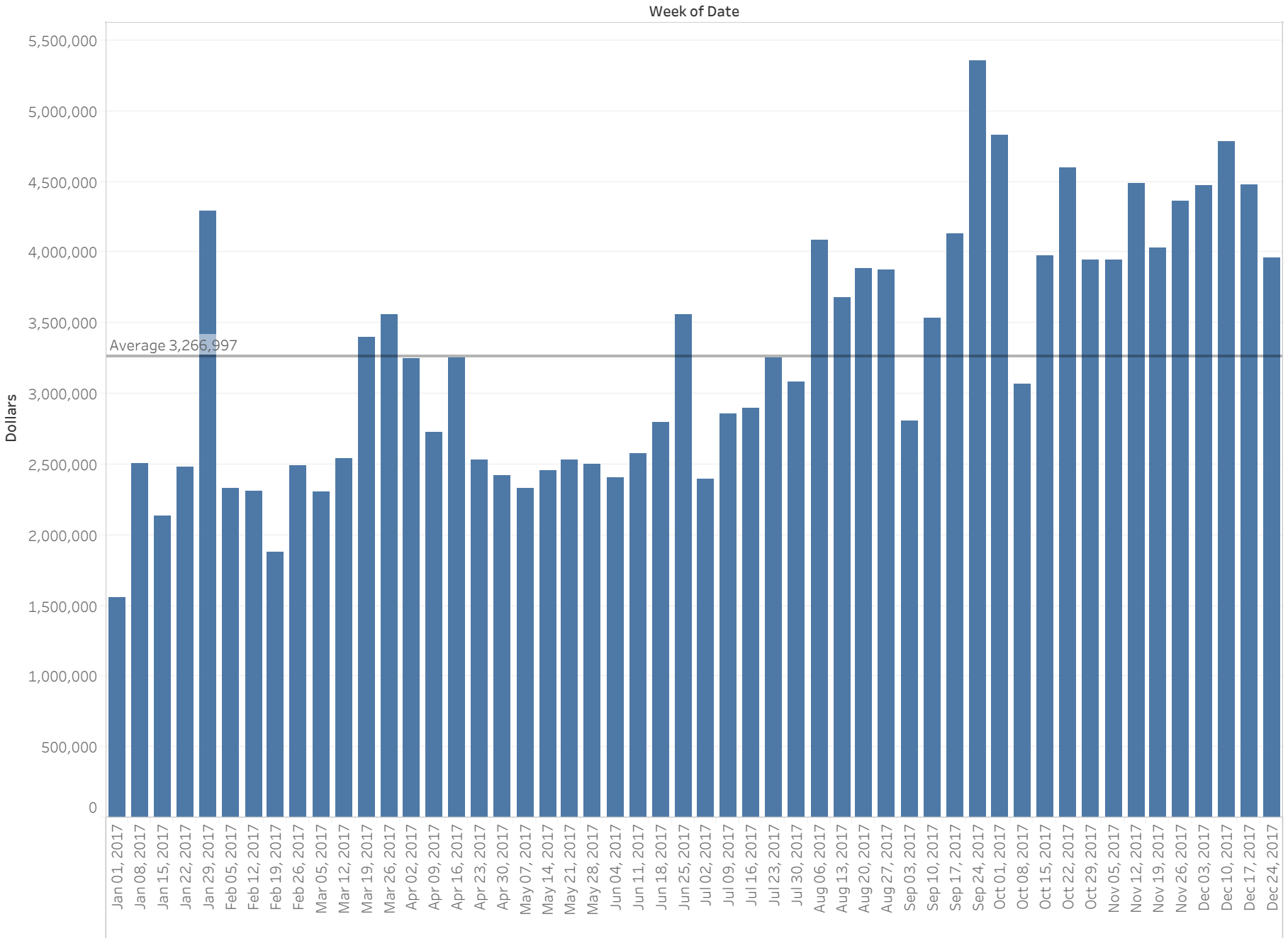


EXHIBIT 3

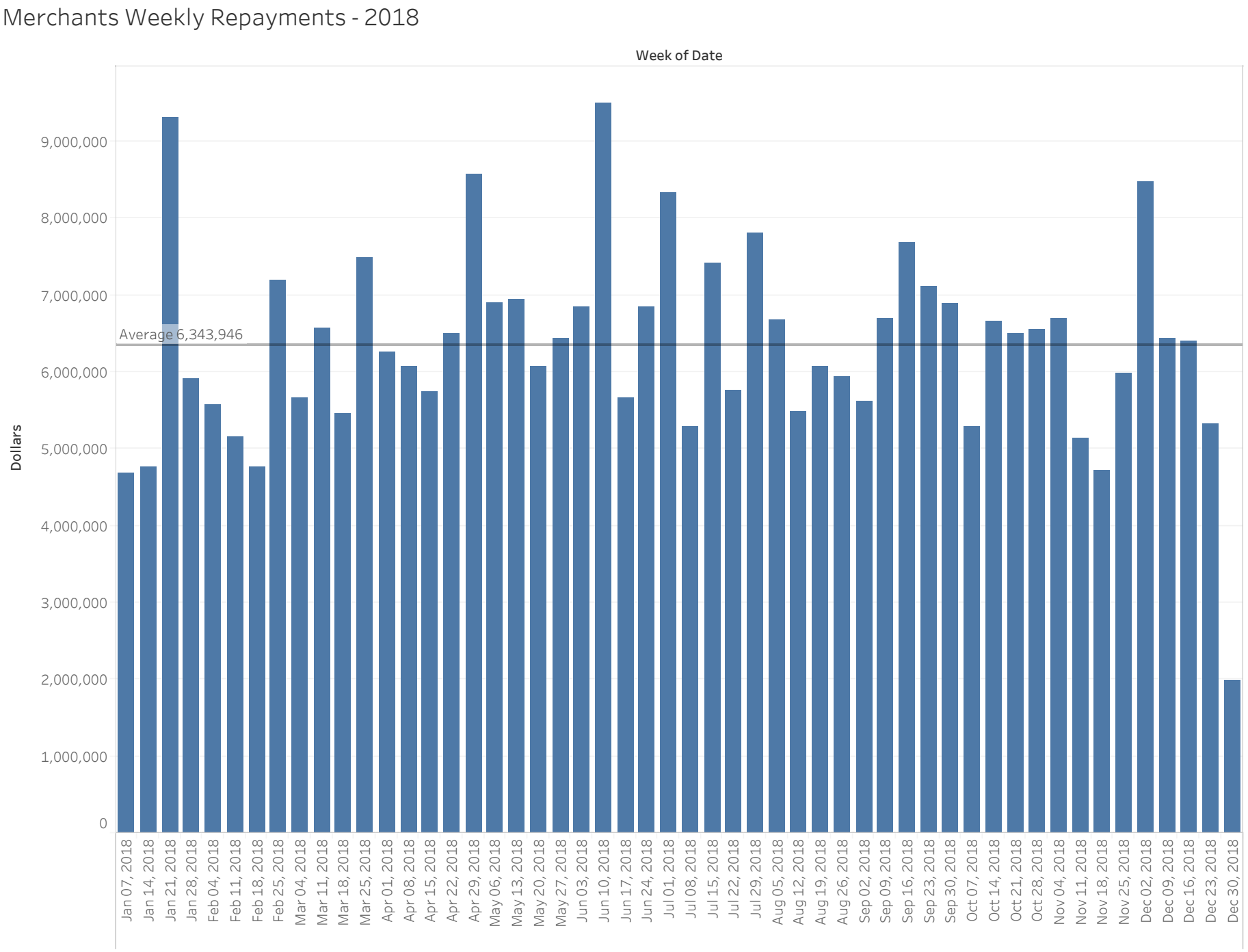

Merchants Weekly Repayments - 2018
Week of Date
Dollars
Average 6,343,946
9,000,000
8,000,000
7,000,000
6,000,000
5,000,000
4,000,000
3,000,000
2,000,000
1,000,000
0
Jan 07, 2018
Jan 14, 2018
Jan 21, 2018
Jan 28, 2018
Feb 04, 2018
Feb 11, 2018
Feb 18, 2018
Feb 25, 2018
Mar 04, 2018
Mar 11, 2018
Mar 18, 2018
Mar 25, 2018
Apr 01, 2018
Apr 08, 2018
Apr 15, 2018
Apr 22, 2018
Apr 29, 2018
May 06, 2018
May 13, 2018
May 20, 2018
May 27, 2018
Jun 03, 2018
Jun 10, 2018
Jun 17, 2018
Jun 24, 2018
Jul 01, 2018
Jul 08, 2018
Jul 15, 2018
Jul 22, 2018
Jul 29, 2018
Aug 05, 2018
Aug 12, 2018
Aug 19, 2018
Aug 26, 2018
Sep 02, 2018
Sep 09, 2018
Sep 16, 2018
Sep 23, 2018
Sep 30, 2018
Oct 07, 2018
Oct 14, 2018
Oct 21, 2018
Oct 28, 2018
Nov 04, 2018
Nov 11, 2018
Nov 18, 2018
Nov 25, 2018
Dec 02, 2018
Dec 09, 2018
Dec 16, 2018
Dec 23, 2018
Dec 30, 2018

EXHIBIT 3

Merchants Weekly Repayments - 2019

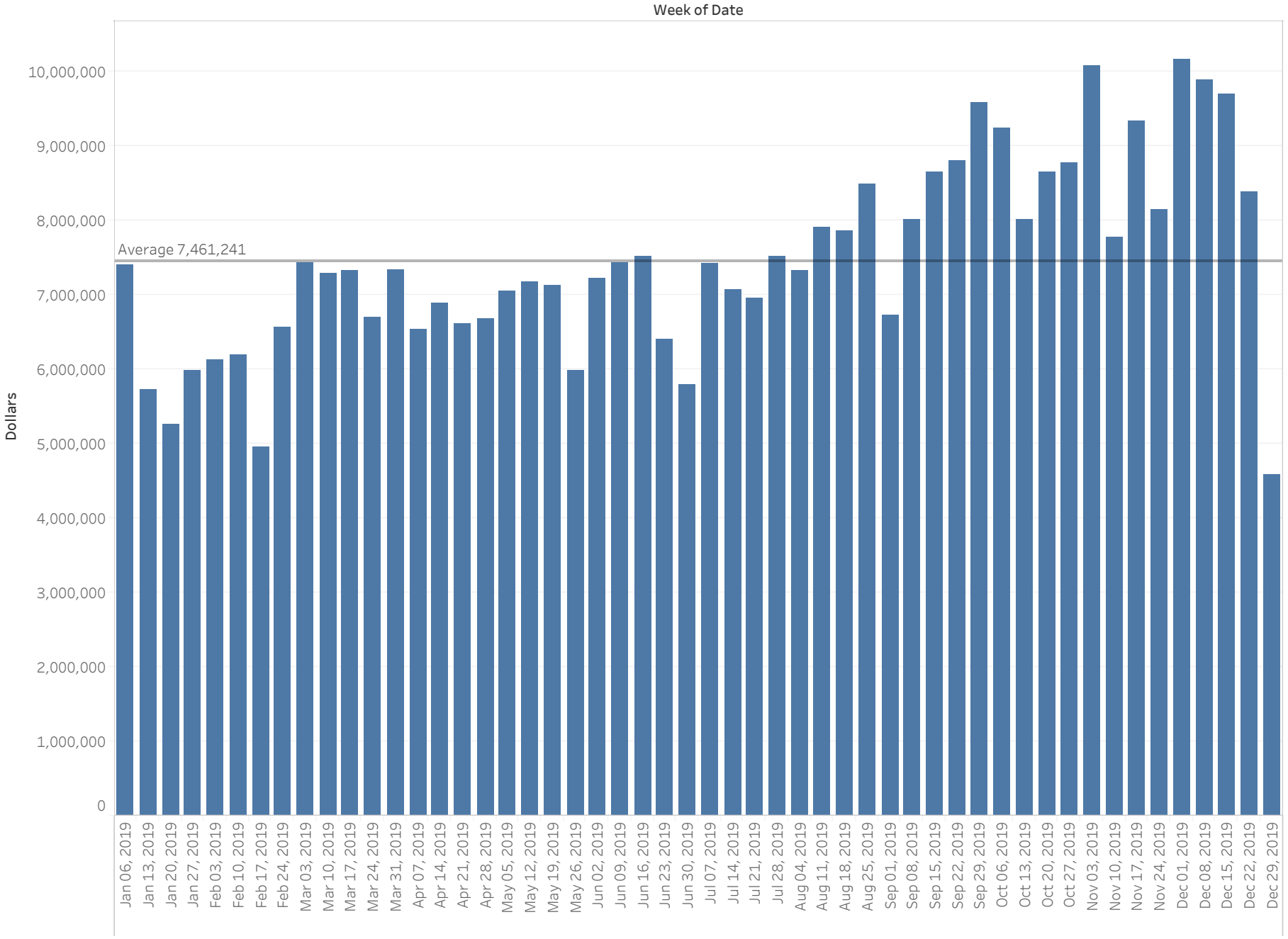


EXHIBIT 4

Weekly Cash Balance - 2015

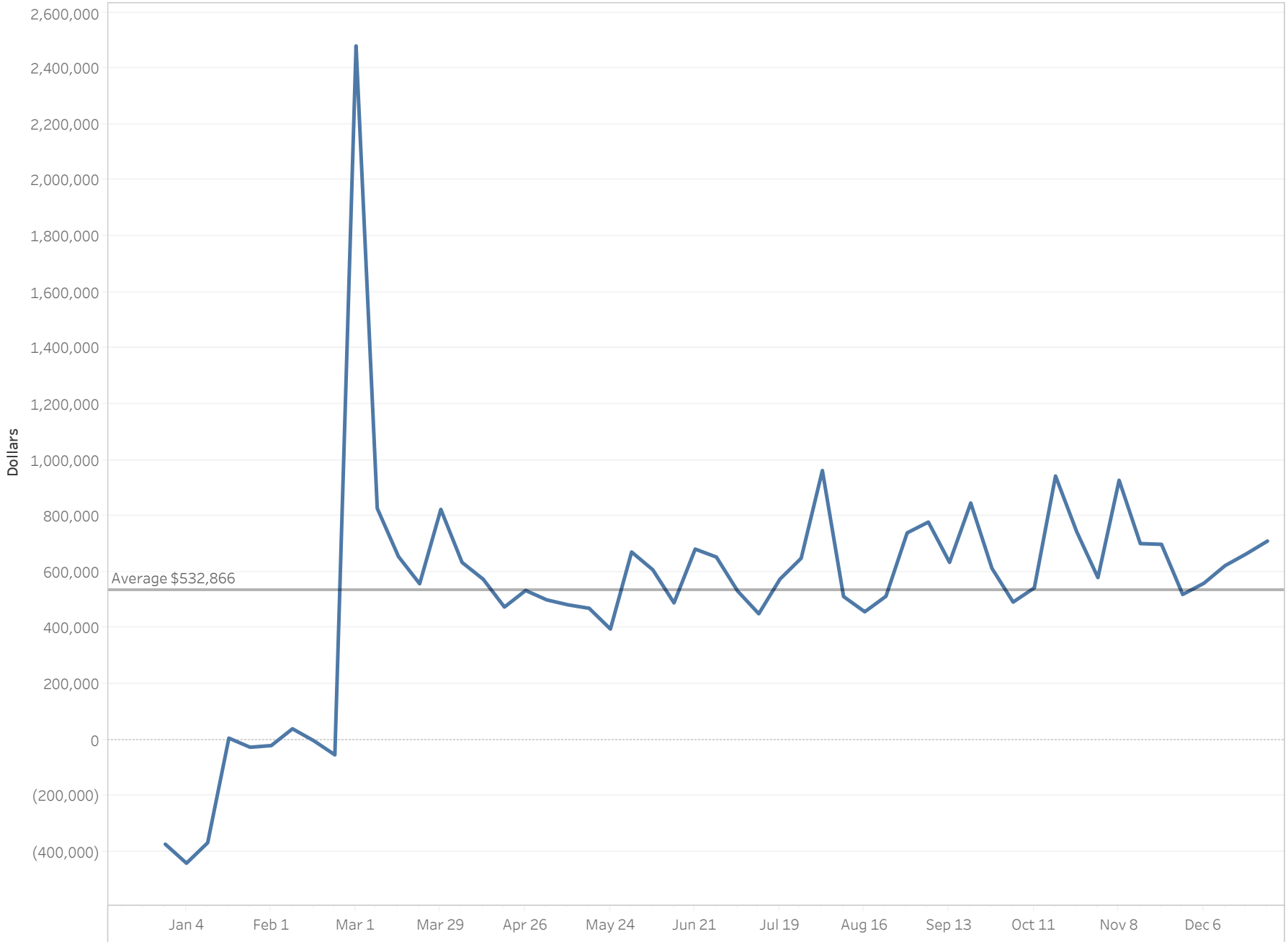


EXHIBIT 4

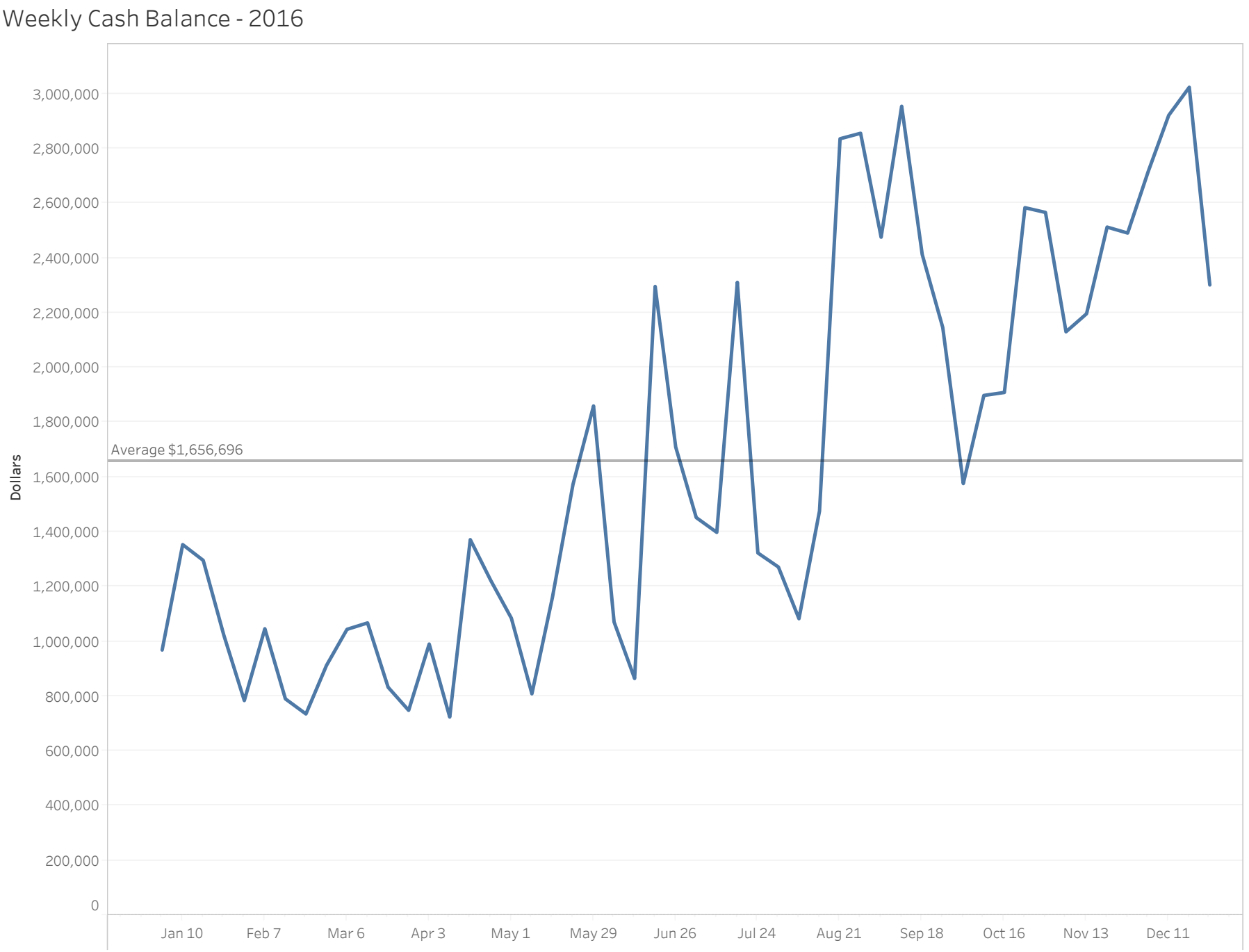

Weekly Cash Balance - 2016
Dollars
3,000,000
2,800,000
2,600,000
2,400,000
2,200,000
2,000,000
1,800,000
Average $1,656,696
1,600,000
1,400,000
1,200,000
1,000,000
800,000
600,000
400,000
200,000
0
Jan 10
Feb 7
Mar 6
Apr 3
May 1
May 29
Jun 26
Jul 24
Aug 21
Sep 18
Oct 16
Nov 13
Dec 11

EXHIBIT 4

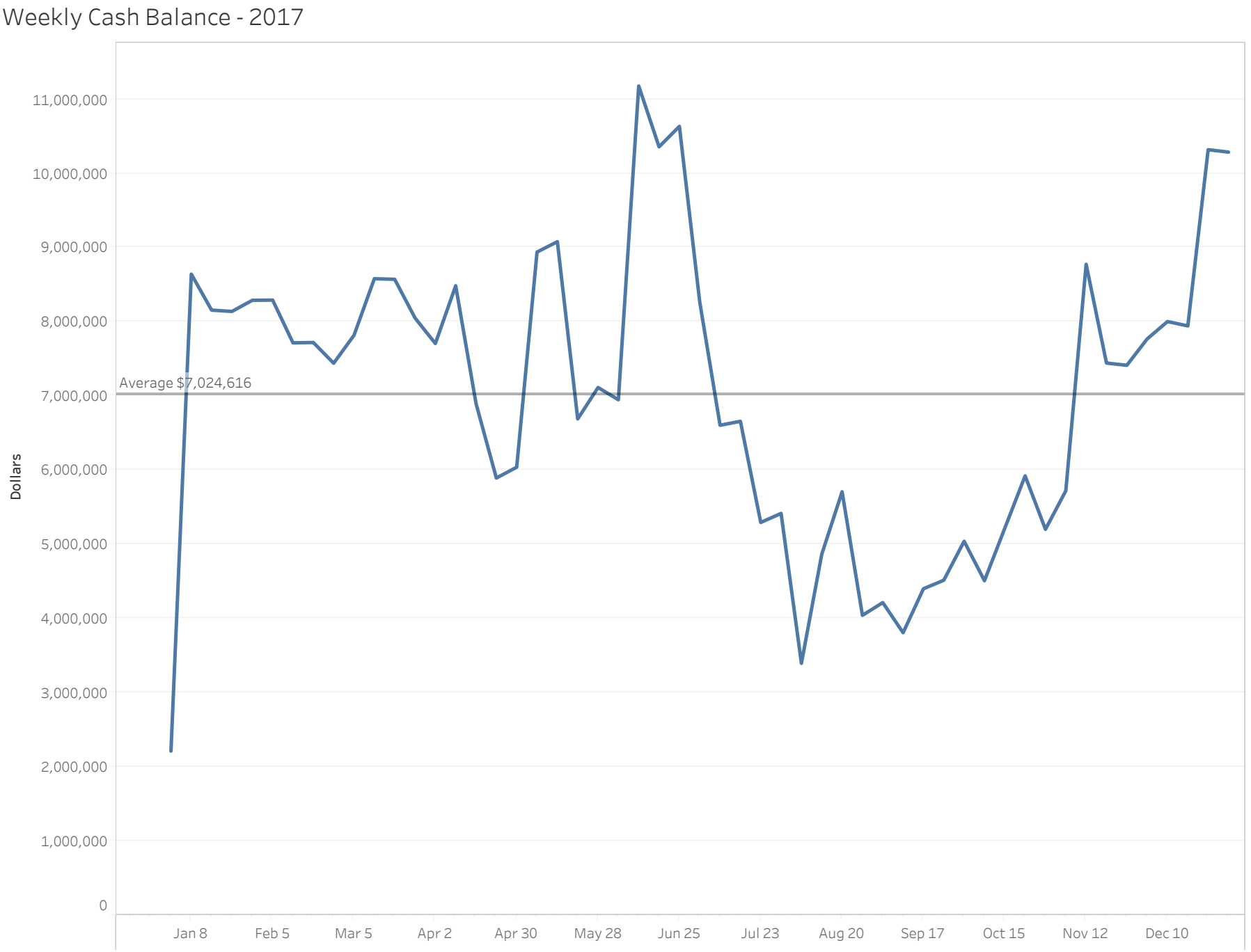
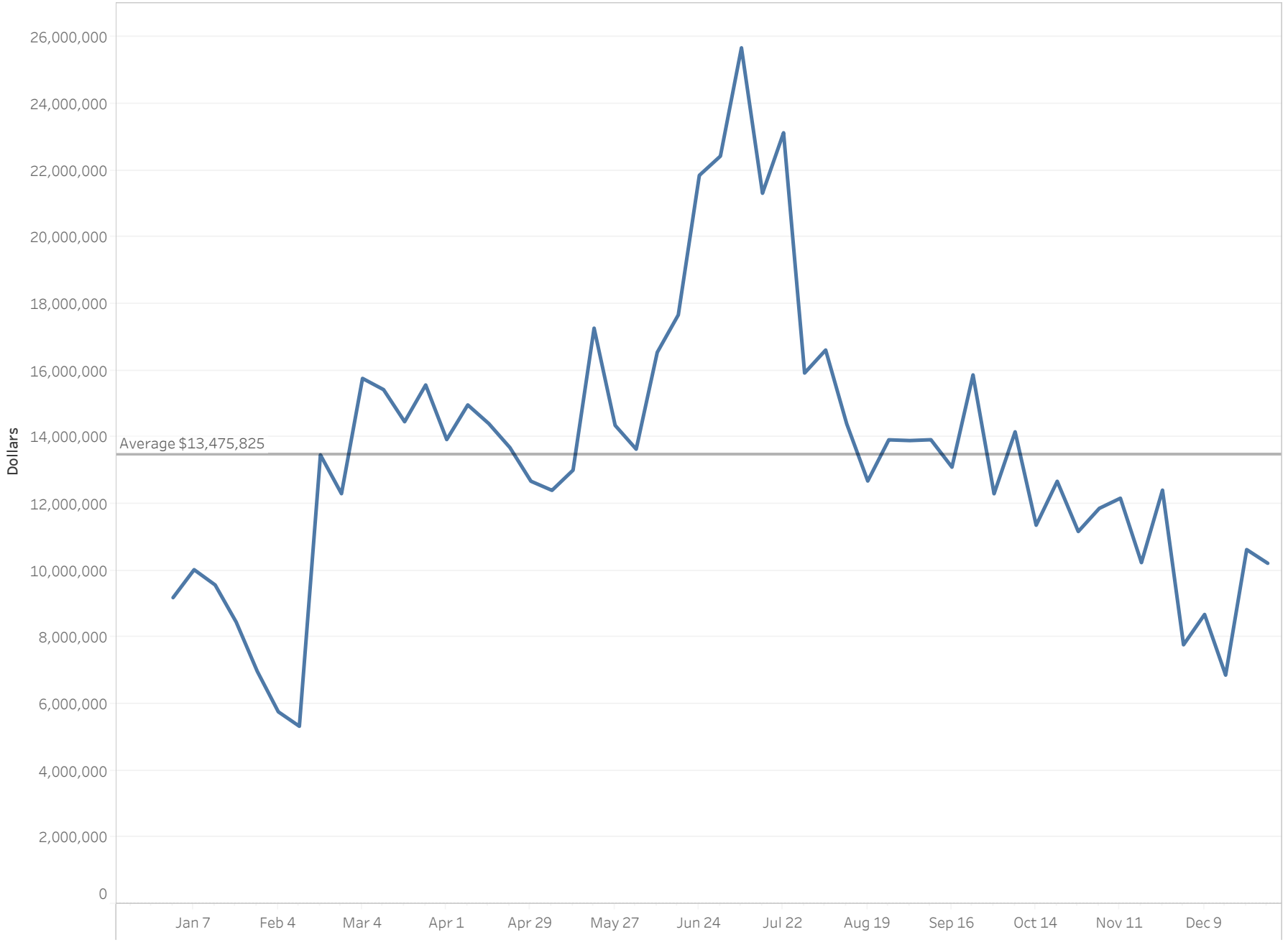

Weekly Cash Balance - 2017
Dollars
11,000,000
10,000,000
9,000,000
8,000,000
7,000,000
6,000,000
5,000,000
4,000,000
3,000,000
2,000,000
1,000,000
0
Average $7,024,616
Jan 8
Feb 5
Mar 5
Apr 2
Apr 30
May 28
Jun 25
Jul 23
Aug 20
Sep 17
Oct 15
Nov 12
Dec 10

EXHIBIT 4

Weekly Cash Balance - 2018



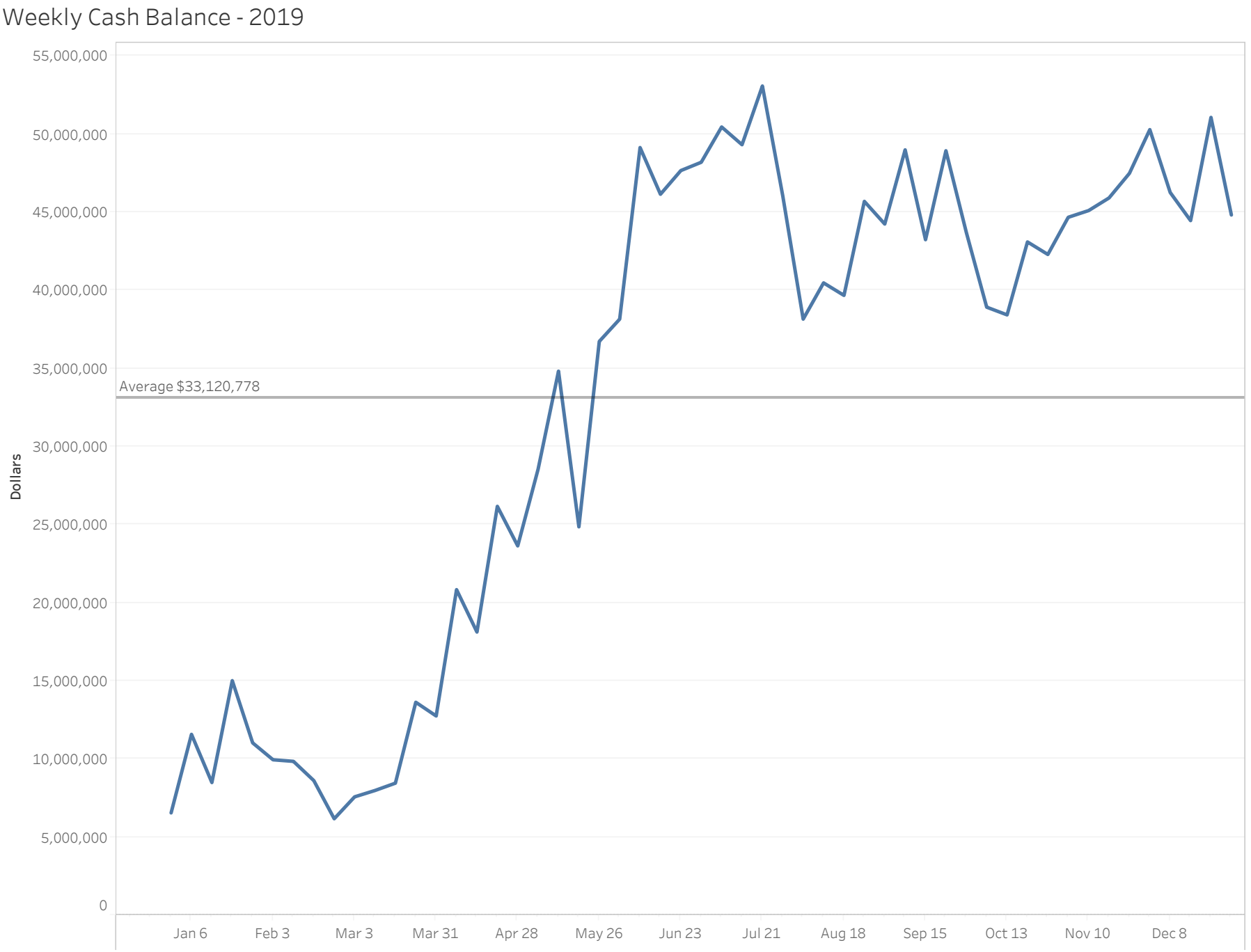

Weekly Cash Balance - 2019
55,000,000
50,000,000
45,000,000
40,000,000
35,000,000
30,000,000
25,000,000
20,000,000
15,000,000
10,000,000
5,000,000
0
Dollars
Average $33,120,778
Jan 6
Feb 3
Mar 3
Mar 31
Apr 28
May 26
Jun 23
Jul 21
Aug 18
Sep 15
Oct 13
Nov 10
Dec 8

EXHIBIT 15

	2011 - 14	2015	2016	2017	2018	2019	Total
Related Parties							
LME Trust	$ 182,168	$ 18,781	$ 27,703	$ 31,000	$ 14,300,000	$ 25,028,713	$ 39,588,365
Eagle Union Quest						6,213,000	6,213,000
HBC			382,374	1,858,804	631,086	2,221,132	5,093,396
Related Parties	**182,168**	**18,781**	**410,077**	**1,889,804**	**14,931,086**	**33,462,845**	**50,894,761**
Consulting Fees							**-**
To Related Entities	230,000	640,000	3,942,273	22,976,965	25,945,559	21,802,638	75,537,435
To Other Entities	738,140	181,800	1,754,011	3,501,726	2,470,518	4,937,635	13,583,830
Consulting Fees	**968,140**	**821,800**	**5,696,284**	**26,478,691**	**28,416,077**	**26,740,274**	**89,121,266**
Use of Merchants Repayment							**-**
Investor Activity - Disbursements - Principal Repayments	2,145,659	2,107,634	1,514,855	3,450,000	39,364,450	86,804,448	135,387,046
Investor Activity - Disbursements - Interest	2,094,073	1,369,729	2,704,417	9,845,738	26,520,213	51,064,663	93,598,833
Commissions to ISOs	648,823	244,298	1,640,360	4,908,993	8,386,292	11,866,115	27,694,881
Commissions to ISOs - RMR	171,938	327,625	1,632,614	2,049,373	635,923	2,557,982	7,375,455
Operating Expenses	2,150,234	1,678,910	2,222,837	2,798,411	9,314,091	8,464,617	26,629,100
Operating Expenses - FSP				965,000	2,967,703	5,040,718	8,973,421
MMCA Activity - Joint Funding and Other Transactions	4,640,062	1,111,316	5,224,930	268,910	(12,042,678)	697,745	(99,715)
Use of Merchants Repayment	**11,850,789**	**6,839,511**	**14,940,013**	**24,286,425**	**75,145,994**	**166,496,289**	**299,559,021**
Total	**$ 13,001,097**	**$ 7,680,092**	**$ 21,046,374**	**$ 52,654,920**	**$ 118,493,157**	**$ 226,699,408**	**$ 439,575,048**

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

vs.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al.,

Defendants.

DECLARATION OF JOEL D. GLICK

1. Pursuant to 28 U.S.C. Section 1746, the undersigned states as follows:

2. My name is Joel Glick. I am over the age of 18 years and I make this declaration based upon my personal knowledge of the facts set forth herein.

3. I practice in the areas of forensic accounting and economic damages.

4. I have testified as an expert witness in both State and Federal courts. See attached Exhibit 1.

5. I am a Certified Public Accountant licensed in Florida, since 1994, and Certified in Financial Forensics, since 2008. Both credentials are through the American Institute of Certified Public Accountants.

6. I am a Certified Fraud Examiner credentialed through the Association of Certified Fraud Examiners since 2010.

7. I am a Director of Forensic and Advisory Services at Berkowitz Pollack Brant Advisors + CPA's ("BPB").

8. BPB was retained by the law firm of Fridman Fels & Soto, PLLC to assist with their

representation of Complete Business Solutions Group, Inc., d/b/a Par Funding ("CBSG").

9. I have supervised and been extensively involved in the analysis to date of CBSG's books and records.

10. No statements in this declaration are intended to render any legal opinions or conclusions.

11. The goal of the Court was *"that every piece of data that Mr. Sharp used to prepare this affidavit*[1] *be provided, pursuant to the guidelines [it] put in place, to a defense expert."*[2] As of the signing of this declaration, it is unclear what the entirety of the data DSI reviewed and relied on to prepare their declaration is and, therefore, it is unclear whether they complied with the Court's wishes.

12. We understand that although most of the activity from January 1, 2020 through July 27, 2020 had been entered into QuickBooks, the books had not yet been fully reconciled as of the date the Receiver took control. DSI has indicated they will update their analysis once the books are reconciled.

13. Based on the foregoing, and as discovery is ongoing, I reserve the right to update this declaration as more data becomes available.

14. I reviewed the following information:

    a. Various docket entries (DE) filed in this matter:

        i. RECEIVER RYAN K. STUMPHAUZER'S INTERIM STATUS REPORT DATED OCTOBER 6, 2020 (DE 305)

        ii. DEFENDANTS' JOINT RESPONSE TO RECEIVER'S INTERIM STATUS REPORT DATED OCTOBER 6, 2020 [DE 305] (DE 355)

[1] DECLARATION OF BRADLEY D. SHARP (DE 426-1)
[2] Transcript of the December 15, 2020 Status Videoconference Before The Honorable Rodolfo A. Ruiz, II 60:18-21.

iii. RECEIVER RYAN K. STUMPHAUZER'S MOTION AND MEMORANDUM OF LAW TO EXPAND RECEIVERSHIP ESTATE (DE 357)

i. Exhibits E, F, G & L - Declarations of Melissa Davis

iv. RECEIVER RYAN K. STUMPHAUZER'S NOTICE OF FILING QUARTERLY STATUS REPORT PURSUANT TO PARAGRAPHS 53 AND 54 OF THE AMENDED RECEIVERSHIP ORDER (DE 358)

v. RECEIVER RYAN K. STUMPHAUZER'S NOTICE OF FILING REPORT ON OPERATIONS IN CONNECTION WITH STATUS CONFERENCE TO BE CONDUCTED ON DECEMBER 15, 2020 (DE 426)

i. Exhibit 1 DECLARATION OF BRADLEY D. SHARP (DE 426-1)

vi. DEFENDANTS' MOTION TO COMPEL THE RECEIVER TO PRODUCE DOCUMENTS RESPONSIVE TO DEFENDANT LISA MCELHONE'S REQUESTS FOR PRODUCTION OF DOCUMENTS (DE 459)

vii. RECEIVER RYAN K. STUMPHAUZER'S QUARTERLY STATUS REPORT DATED FEBRUARY 1, 2021 (DE 482)

i. Exhibit 1 STANDARDIZED FUND ACCOUNTING REPORT, dated 02/01/20 (DE 482-1)

ii. Exhibit 2 DECLARATION OF BRADLEY D. SHARP, dated 02/01/20 (DE 482-2)

viii. RECEIVER, RYAN K. STUMPHAUZER'S SECOND APPLICATION FOR ALLOWANCE AND PAYMENT OF PROFESSIONALS' FEES AND REIMBURSEMENT OF EXPENSES FOR OCTOBER 1, 2020 – DECEMBER 31, 2020 (DE 491)

b. Transcript of DECEMBER 15, 2020 STATUS VIDEOCONFERENCE

c. Declaration of James Klenk

d. QuickBooks accounting records for CBSG (inception to July 27, 2020)

e. Bank statements and ACH vendor statements for CBSG

f. CBSG internally prepared spreadsheets (including but not limited to)

i. Daily Deposit Logs

ii. Investor Logs

iii. Bank Activity Log

g. Financial Accounting Standards Board ("FASB") Accounting Standards Codification ("ASC")

h. Any cited material inadvertently excluded from this list.

CONCLUSIONS[3]

15. DSI erroneously alleges CBSG was a Ponzi Scheme. A forensic analysis of the QuickBooks/Bank/ACH accounts, from 2012 through 2019, demonstrates that cash flows from merchants were sufficient to cover principal and interest payments made to investors.

16. DSI's incorrectly use of a cash analysis as a proxy for profitability or earnings disregards U.S. Generally Accepted Accounting Principles ("GAAP").[4] GAAP makes clear that a cash flow analysis alone is not appropriate to determine CBSG's profitability. As set forth below at paragraphs 52-54, any such analysis should have been performed based on the accrual basis method of accounting, which DSI did not do. A forensic analysis of CBSG data using an accrual basis method of accounting reveals that CBSG was profitable, earning hundreds of millions of dollars in top-line revenue that was ignored by DSI.

17. DSI did not present a complete analysis of merchant receivables as they focused on what DSI refers to as an "Exception Portfolio," and appeared to have extrapolated this

[3] I am generally aware that one of the issues in this case is whether the promissory notes issued by CBSG in this case constitute securities. As explained above, no statements in this declaration are intended to render any legal opinions or conclusions, and none are intended by my use of the term "investor" as opposed to "noteholder."

[4] "U.S. GAAP (Generally Accepted Accounting Principles) are accounting standards, conventions and rules. It is what companies use to measure their financial results. These results include net income as well as how companies record assets and liabilities. In the US, the SEC has the authority to establish GAAP. However, the SEC has historically allowed the private sector to establish the guidance. See The Financial Accounting Standards Board." Generally Accepted Accounting Principles (GAAP) | Investor.gov

analysis to the entire portfolio rather than analyzing the entire portfolio. This led to an incorrect analysis of the profitability of the portfolio. In fact, an analysis of 3,900 merchants, as described below in paragraphs 83-88, show a blended factor rate of 1.399.

18. DSI's analysis of the Exception Portfolio relies on several unsupported assumptions:

a. DSI seems to suggest without support that the existence of "reloads" indicates that a merchant will not be able to pay its obligation to CBSG.[5] As discussed below, this assumption is unsupported and speculative.

b. DSI suggests without support that a certain percentage of reloads is "excessive."[6] DSI's suggestion that the percentage of CBSG's receivables carried too high a factor rate is unsupported and they provided no industry data or other support for any of these opinions.

c. DSI suggests without support that increasing reloads is "unrelated to [the merchant's] business operations."[7]

BASIS FOR CONCLUSIONS

Alleged/Implied Ponzi Scheme

19. While DSI does not use the term, it clearly implies CBSG is a Ponzi Scheme. The Court appears to agree with my assessment of DSI's implicit message: *"I was told by the SEC that it was not a Ponzi scheme at the time, that they were uncertain, they were not ready to make that representation, and I will confess that the report from DSI goes to great lengths not to use that term. But looking at the way the snapshot that DSI has prepared, … It seems to me, based upon the report and the fact that some of the payouts or the funds that investors were receiving were essentially generated or the product of new money coming into these investments that we maybe have had a sea change in the true nature of this business and that it is less about factoring and*

[5] Op. cit. FN1 ¶22
[6] Op. cit. FN1 ¶25(a)
[7] Op. cit. FN1 ¶23

due diligence on loans, and more about taking from new investors to pay old investors."[8] *"The affidavit does not go that far, but it makes it clear that this was not a self-funding operation, meaning this operation could not, regardless of COVID-19, regardless of the SEC's involvement, that this was truly not a self-engineered or self-funding enterprise, it thrived off new money being put in from investors."*[9]

20. According to the Receiver, DSI suggests there is not a single definition for a Ponzi Scheme.[10] Having been the lead forensic accountant for the Chapter 11 Trustee (Judge Herb Stettin) in the Rothstein Ponzi Scheme matter,[11] I am keenly familiar with them. While I agree there are multiple definitions that may use slightly different language to define a Ponzi Scheme, they all contain the same common and primary theme in that new investors are funding repayment of returns to prior investors because the underlying business does not generate sufficient revenue to pay existing investors. The Receiver cites both the Ninth Circuit as well as the AICPA as having a definition of a Ponzi Scheme but does not provide such definitions to the Court. For the benefit of the Court, I have included the definitions from the Association of Certified Fraud Examiners ("ACFE"), the Federal Bureau of Investigation ("FBI") as well as the Securities and Exchange Commission ("SEC"):

- *According to the ACFE, Dr. Joseph T. Wells' Encyclopedia of Fraud, Third Edition, describes the characteristics of a Ponzi scheme:*[12] *A Ponzi scheme is an illegal business practice in which new investor's money is used to make payments to earlier investors. In accounting terms, money paid to Ponzi investors, described as income, is actually a distribution of capital. Instead of returning profits, the Ponzi schemer is spending cash reserves, all for the purposes of raising more funds. … There are usually little or no legitimate investments taking place. Most of the funds are used by promoters for expensive lifestyles and transferred into property or offshore accounts.*

[8] Op. cit. FN2 14:13-25, 15:1 – 9.
[9] Op. cit. FN2 15:10-15.
[10] Op. cit. FN2 16:24-25, 17:1 – 9.
[11] Case No. 09-34791-BKC-RBR
[12] Ponzi Schemes | Association of Certified Fraud Examiners (acfe.com)

- *Per the FBI,[13] "Ponzi" schemes promise high financial returns or dividends not available through traditional investments. Instead of investing the funds of victims, however, the con artist pays "dividends" to initial investors using the funds of subsequent investors.*

- *Per the SEC,[14] a Ponzi scheme is an investment fraud that pays existing investors with funds collected from new investors. … Ponzi used funds from new investors to pay fake "returns" to earlier investors.*

  With little or no legitimate earnings, Ponzi schemes require a constant flow of new money to survive. When it becomes hard to recruit new investors, or when large numbers of existing investors cash out, these schemes tend to collapse.

21. As indicated, QuickBooks has not been fully reconciled through July 27, 2020. Nonetheless, a Bank Activity Log maintained by CBSG reflects that approximately $15 million was paid to investors between April and July 2020 (prior to the Receivership). During this same period, no investor funds were received and approximately $100M of merchant payments came in. We are in the process of verifying both the amount of investor principal payments made in 2020 as well as verifying these payments were not made due to maturing obligations. If both are verified it would show new investor dollars are not required to pay old investors. Additionally, CBSG managers forwent the $13.1 million of consulting fees due to them for Q1 of 2020.[15]

22. Further, the SEC warns of Ponzi scheme "red flags"[16] such as:

[13] Ponzi Schemes — FBI
[14] Ponzi Schemes | Investor.gov
[15] As discussed in various pleadings or other documents and is uncontroverted, a 10% fee was paid on new merchant advances. During Q1 of 2020, $131.3M of new merchant advances were made. $131.3M x 10% = $13.1M in consulting fees.
[16] Ibid

- *High returns with little or no risk. Every investment carries some degree of risk, and investments yielding higher returns typically involve more risk. Be highly suspicious of any "guaranteed" investment opportunity.*

- *Overly consistent returns. Investments tend to go up and down over time. Be skeptical about an investment that regularly generates positive returns regardless of overall market conditions.*

- *Difficulty receiving payments. Be suspicious if you don't receive a payment or have difficulty cashing out. Ponzi scheme promoters sometimes try to prevent participants from cashing out by offering even higher returns for staying put.*

23. CBSG raised funds through debt financing not equity financing. As such, it offered an annual rate of interest to note holders as reflected in promissory notes. This is not a promise of high [rates of] returns to investors.

24. Based on the production received to date, we have seen no indication that investor principal or interest payments were missed or late prior to March 2020. CBSG consistently paid note holders the interest rate stated in the promissory notes until a renegotiation of those notes due to Covid-19 economic conditions in March or April 2020. This is not promise of overly consistent [rates of] returns to investors.

25. The Receiver states that the profitability of the underlying business is an additional factor that should be considered in identifying a Ponzi scheme. That factor is evident in the above definitions. However, the Receiver incorrectly states that a cash analysis is a proxy for profitability. It is not. As will be discussed below, accrual basis accounting provides the best and most accurate, and most widely accepted method for analyzing profitability, it is the basis under which CBSG maintained its books, and therefore the proper test for profitability pursuant to GAAP.

26. Likewise, the fact that a company continues to raise capital does not by itself imply that it cannot sustain itself and such does not make it a Ponzi Scheme. Borrowing funds at a cost lower than the expected profit/return to be realized from the use of those funds is known as leverage. Leverage is a universal business concept and

strategy employed by many businesses. For example, a law firm working solely on contingency needs to secure a line of credit or similar financing, secured by its receivables, to operate on a day-to-day basis; a manufacturer needs to borrow funds to purchase inventory; and a real estate professional borrows funds to purchase and renovate a property. The presumption is these ventures will make a profit that exceeds the cost of the borrowing. As explained below, CBSG has historically generated profits on the factoring fees charged to merchants that exceeded the cost of borrowing the money it raised from investors.

27. MCA businesses advance cash to merchants and, in exchange, the MCA records the Right to Receivables ("RTR") from that merchant's future income stream. While it may charge origination fees, late fees, or other ancillary fees,[17] an MCA's main revenue source is from factoring fee income, which is the difference between the cash advanced to the merchant and the RTR. It is a fixed amount (a factor) determined and agreed to by and between the MCA business and the merchant up front. Under GAAP, the ancillary fees would either be recognized in full at the time of the transaction or as they are earned over time. The factoring fee income is recognized over the term of the MCA contract and would be recognized using the effective-yield (interest) amortization method or straight-line method (which follow the matching principle as defined by GAAP), and not by the cost recovery method utilized in the DSI analysis, as discussed below.

28. While the goal is to collect 100% of all amounts due, as with any business, that is not always the case. Some merchants will pay 100% of their obligation while others, for various reasons, pay only a portion. By having a portfolio of merchants paying an average factor rate of 1.34,[18] an MCA does not need to collect 100% of the RTR to be profitable. A chart below reflects the specific analysis of the entire CBSG merchant portfolio and shows that CBSG earned millions of dollars in profits even though it did not collect 100% of RTR.

[17] CBSG charges these same fees which are not included in the analysis below and would only be additive to revenue and net income.

[18] This is based on the average factor rate for the 17,432 deals reflected in the CBSG Funding List and not based on any industry averages. This also does not reflect the impact from compounding as a result of reloads. Such compounding could increase profitability.

29. Factor fee income is no less real than the income created by selling any other type of product or service. Manufacturers sell products, service providers sell their time and MCAs sell cash. Cash is their inventory. If management is doing a good job, it should not have excess inventory – whether it be cars, legal services, or cash. Manufacturers want their products on store shelves rather than in the warehouse; service providers endeavor to keep their staff busy with billable time; and MCAs endeavor to keep their money "on the street"—in the hands of merchants to increase revenue. If the money is sitting in a bank account, it is not generating a return on investment (the stated purpose of the business) and, in fact, if the MCA is not self-funded, it is still incurring a cost to borrow or accept outside funds.

30. If the Receiver's premise for the existence of a Ponzi Scheme is the lack of profitability, he is relying on DSI's flawed analysis which: 1) erroneously focuses on cash flow rather than profit: *"From inception through 2019, CBSG incurred a cash loss from operations…";* and 2) when analyzing the receivables of an exception portfolio, applies an incorrect methodology to the receipt of merchant payments:[19] *From inception through 2019, CBSG generated only $6.6 million in cash from MCA Activity…"*

Commingling

31. It is correct that investor proceeds were commingled with merchant payments in CBSG accounts. Commingled simply means mixed or blended. If not otherwise restricted pursuant to a legal agreement, GAAP does not prohibit commingling of funds which, if restricted, should be reported as such. An example of commingling would be an attorney trust account which contains funds from various clients. While State Bar organizations require attorneys to maintain records separately tracking these funds, the fact they are held in the same bank account means they are commingled. While DSI cites to no such similar requirement, CBSG did maintain a separate record of investor balances.

32. Forensic accountants use tracing to ascertain how commingled funds were used. If the use of these funds is not readily apparent, tracing rules are used, if possible, to identify the source of funds remaining in an account. Commonly accepted tracing

[19] For the sake of clarity, money from merchants as opposed to merchant advances, money to merchants.

methodologies are: First In, First Out (FIFO); Last In, First Out (LIFO); Pro Rata Distribution; and Lowest Intermediate Balance Rule (LIBR).

33. The SEC's forensic accountant, Melissa Davis, has authored an article for the American Bankruptcy Institute ("ABI") on the LIBR method. In her article, she acknowledges these other methods stating: *"Courts have also applied the pro rata method, whereby withdrawals from an account containing commingled funds are attributed to the source in proportion to their respective balances at the time of the withdrawals. …In the "first in, first out" method (FIFO), it is presumed that moneys are paid out in the order in which they were paid in. In the "last in, first out" method (LIFO), it is presumed that the last moneys deposited into an account are the first ones withdrawn, which results in an entirely different outcome.* [20]"

34. Due to the nature of the MCA business and the purposes of the cash flow, a LIBR analysis is not applicable in this case. Investors were provided an explanation of the business and that their funds were to be used to make merchant advances.[21] As such, it would be proper to treat investor funds as the first dollars out to merchants.

35. This analysis is also consistent with CBSG's business model. Let us start with some basic premises:

    i. The purpose of a for-profit business is to earn a profit.

    ii. To earn a profit, a business must generate revenue.

    iii. For a business to generate revenue, it must have a product or service to sell.

    iv. To have a product or service to sell, it must have the ability to:

        a. pay the employees who provide the services,

        b. purchase the inventory, machinery & equipment necessary to

[20] Tracing Commingled Funds in Fraud Cases, June 21, 2017 ABI Tracing Commingled Funds in Fraud Cases | ABI (kapilamukamal.com)

[21] Our understanding is Investor funds were a pool of funds to be used for merchant advances. There is not a one-to-one relationship between a specific investor and a specific merchant.

manufacture the products they sell,

c. purchase and/or lease the real estate necessary to house the inventory and machinery.

d. pay other operating expenses or obligations that arise.

v. To pay for the items above, funds are required.[22]

vi. If a business can borrow funds at a lower rate than the return it can generate in the business, it has created leverage. Leverage is an everyday occurrence in the business world.

vii. Once the funds are received the cycle can begin.

36. Applying these basic premises, CBSG's business model was to create leverage using funds borrowed from note holders to advance to merchants who in turn would make the requisite payments back to CBSG thus generating revenue. This is the very model that supports the use of FIFO as a tracing method here.

37. Using the same categories as DSI, we created a schedule of monthly cumulative inflows and outflows from inception (2012) to December 31, 2019. We then created a series of True/False tests. The first test was to determine if monthly merchant payments exceeded monthly principal and interest payments to investors. An answer of True indicated that the money coming in from merchants exceeded the amount necessary to pay investor obligations and, therefore, that new investor dollars were not needed. This first test yielded no instances of a False response, meaning that the merchant cash received by CBSG's business operations exceeded the amount of payments to investors (principal and interest) for every month of CBSG's business life through December 31, 2019 following the first three months of its existence. The second test was to determine if monthly merchant advances exceeded monthly investor dollars received. An answer of True meant that every dollar of investor money

[22] The source of such funds can come from the business owners or be raised through debt or equity financing. Setting aside creative hybrid models, equity financing entitles investors to a share of the profits and exposes them to potential losses. Therefore, such investment comes with higher levels of risk and reward. Debt financing on the other hand provides a stated return in the form of an interest rate on the funds lent to the business.

received would have been subsumed by merchant advances and, therefore, not available to pay principal and interest to other investors. Of the 96 months of CBSG's business life through December 31, 2019, the test returned five (5) false results; three times in 2012, which is and could be expected; once in March 2015 (when the test failed by approximately $39,000); and once in June 2019 (when investor dollars received exceeded merchant advances by $3.9M). Therefore, in these months where investor dollars were not all committed to merchant advances, it is theoretically possible that these uncommitted investor dollars could have been used elsewhere in the business. However, based on the results of the first test, there was sufficient cash returned from merchants to satisfy the payments to investors in March 2015 and June 2019, so investor dollars would not have been needed. Moreover, in those same months, merchant dollars were also sufficient to cover operational expenses and other payments, including commissions paid to merchant brokers and consulting fees to management.[23]

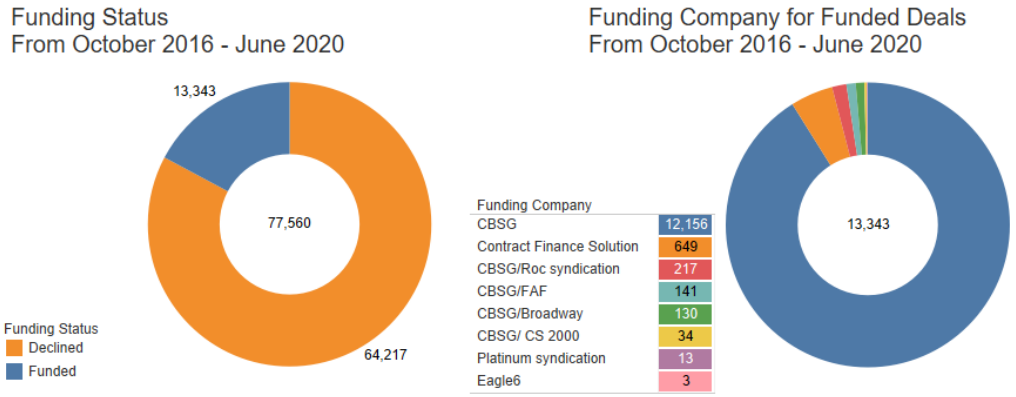
38. This analysis further indicates that CBSG does not meet the above definitions of a Ponzi Scheme and makes the following statement from DSI incorrect: *"CBSG paid $231.0 million to investors, consisting of principal repayments totaling $135.6 million and interest payments totaling $95.4 million. CBSG could not have made principal and interest payments to the investors without additional funds from the investors."*

Underwriting

39. The charts below are based on data provided by the CRM system used by CBSG. These charts demonstrate that CBSG has an underwriting process as it does not accept every request from a merchant for an advance. To the contrary, the charts indicate that only 17% of the requests were approved and funded. According to the U.S. Federal Reserve's 2017 Small Business Credit Survey ("the FRB Survey"), fielded in Q3 and Q4 of 2017, 7% of respondents sought a merchant cash advance as a financing product. Of those in the FRB Survey, 79% of the applicants were

[24] As explained in paragraph 7 of the Declaration of James Klenk, payments to merchant brokers and consulting fees were paid in the quarter after such fees were earned based on new merchant business. These payments were tied to merchant funding and not to investor deposits.

approved.[24] The same survey issued in 2021, and fielded in September and October of 2020, reflects 8% of respondents sought a merchant cash advance as a financing product and of those, 84% of the applicants were approved.[25] CBSG's application approval rating of 17% is significantly lower and would suggest stricter underwriting policies. Moreover, our understanding is that since the complete population of requests for funding by merchants has not yet been provided in discovery, the additional information would reduce this percentage further below 17%. The chart on the right is simply a breakdown of which MCA company provided funding to the accepted merchants.



40. As of the writing of this declaration, BPB has not had access to underwriting files and therefore is unable to review and provide comment on the underwriting process. It is not clear why DSI, who did or could have accessed these records, did not provide any explanation as to the analysis undertaken in reviewing CBSG underwriting procedures when preparing their Exception Portfolio analysis discussed in further detail below.

41. The only reference to underwriting was in the context of one of the five Exception Portfolio groups they defined. *"The documents in the files of CBSG with respect to this merchant do not support credit exposure of more than $20 million and certainly not more than $90 million. CBSG's own Underwriting Profile dated May 12, 2015 recommended a credit limit of $27,600."* This, however, is a statement with no apparent analysis.

[24] 2017 SMALL BUSINESS CREDIT SURVEY | REPORT ON EMPLOYER FIRMS, U.S. Federal Reserve Bank
[25] SMALL BUSINESS CREDIT SURVEY | 2021 REPORT ON EMPLOYER FIRMS, U.S. Federal Reserve Bank

42. Upon a review of the DSI time records, I could only identify the following entries in which they reference an analysis of CBSG underwriting policies and records.

- *REVIEWED AND INDEXED 16 BOXES OF DOCUMENTS SEIZED BY THE FBI, INCLUDING TAX INFORMATION, UNDERWRITING MATERIALS, MODIFICATION AGREEMENTS, AND MERCHANT DEBIT CARD AUTHORIZATION FORMS 14.10 hours on 9/28 & 9/30/20.*

- *Compile questions for Par Funding regarding cash management, information systems, underwriting and collections procedures, etc. 1.10 hours on 08/09/20.*

- *Review emails regarding insufficient and inaccurate underwriting, or MCA decisions conflicting with underwriting. 0.20 hours on 9/8/20.*

- *Discussion with Kevin Young regarding the process for the underwriting of advances and request samples of the analysis done; review the analysis and further discussions with Kevin Young regarding same; e-mail the underwriting package and comments to Brad Sharp; follow-up e-mails with Brad Sharp regarding the analysis used for underwriting and settlements 1.00 hours on 10/23/20.*

- *Research on underwriting practices with regard to top ten merchants in response to Yale Bogen's request; collection supporting documentation and e-mail Yale Bogen 1.20 hours on 11/19/20.*

- *Research on CBSG's underwriting practice regarding Colorado Homes; collect supporting documents for Yale Bogen. For .70 hours on 11/19/20.*

- *Collect underwriting documents for B&T including bank statements .30 hours on 11/24/20.*

Cash Basis vs Accrual Basis Accounting

43. In the first section of the DSI declaration, ***Cash Sources and Uses***, DSI performed an analysis[26] in which they categorized CBSG's sources of cash inflows and uses of cash outflows (collectively "cash flows") for the years 2012 – 2019.[27] As previously indicated and discussed in more detail below, a cash analysis is improper to determine profitability. It should be further noted that the form of the cash analysis that DSI presented does not seem to provide information useful to investors or the Court. The

[26] Op. cit. FN1
[27] We await copies of such updated accounting records from the Receiver and reserve the right to update our analysis through the date on which the Receiver took control.

intent of DSI's presentation of this information, which is inconsistent with GAAP, is unclear to me from an accounting perspective.

Improper Form of Analysis

44. Audited financial statements prepared under GAAP require a cash flow statement. A cash flow statement is divided into three activities, operating, investing, and financing. At a high level, these categories allow the reader to determine if cash increased or decreased because of business operations; if cash increased or decreased as the result of various investments made by the company; or if cash increased or decreased related to debt or equity raises, company stock transactions and owner contributions and distributions. Rather than prepare their analysis in such way that investors or the Court could get a sense of the financial operations comparable to other businesses using the most widely accepted framework, DSI prepared its cash flow analysis with the categories Investor Activity, MCA Activity, Other Related Entity Activity and Operating Expenses. It segregated commissions and consulting fees from all other operating expenses and then further segregated commissions and consulting fees into payments to Related Entities and payments to Other Entities. It is unclear why DSI chose this format as it does nothing to address profitability which, according to the Receiver, is a key factor in determining whether a business is a Ponzi Scheme.

45. Payments to related parties are common and certainly not improper by default. It is unclear why DSI chose to focus on them as a category yet provide no discussion or analysis to the Court as to what investigation they undertook to determine what services these entities may have performed for CBSG, what contracts/agreements may have been executed and whether such agreements were arms-length transactions.

46. The Notes to Financial Statements are an integral part of any set of financial statements and provide information to assist an investor in better understanding certain facts underlying the reported dollars. As relevant here, Note-6 Related Party Transactions in the 2017 audit clearly states the relationship and purpose of payments to Related Entities.

a. Heritage Business Consulting, Inc. ("HBC") is an entity affiliated to CBSG due to common ownership. Beta Abigail and New Field Ventures, LLC, Inc. are owned in part by the Company's Chief Financial Officer and Director of Investor Relations. The amount of consulting expense is based on the gross funding for the quarter, as described in the individual consulting agreements.

b. For Recruiting & Marketing Resources, Inc. ("RMR"), an entity affiliated to CBSG due to common ownership, CBSG is to pay a commission to RMR in the amount of 8% of new funding amounts to clients pursuant to the independent sales organization agreement with RMR.

47. While not listed in Note 6, Full Spectrum Processing ("FSP") is referenced in the 2017 audit at Note-1 Description of Business and Summary of Significant Accounting Policies, as a wholly owned entity of CBSG[28] and that it provides employees and back-office support. During 2017, CBSG stopped processing internally and began to use FSP for such services. An examination of the CBSG income statement reflects that in 2017 processing expenses appeared and payroll expenses (other than officer salaries in later years), disappeared which is consistent with the notes.

48. DSI further aggregates the various categories of payments to Related Parties and specifically states that *"From inception through 2019, CBSG paid more than $144 million to or for the benefit of LaForte, McElhone, Cole and Abbonizio ("Insiders")."*

49. The DSI report is unclear as to the impact of payments to "Insiders" on profitability. As there is no dispute as to identity of the Insiders and their respective ownerships of the Related Entities, the question remains what investigation DSI undertook to determine what services these entities, owned by these Insiders, may have performed for CBSG, what contracts/agreements may have been executed, and whether such agreements were arms-length transactions.

Improper Analysis

50. In arguing to the Court that CBSG is some form of a Ponzi Scheme, the Receiver

[28] While FSP is an affiliated entity, according to CBSG management, it is not wholly owned entity. Additionally, such ownership would be apparent on CBSG's balance sheet.

stated *"You have to consider other factors. So, for example, what was the profitability of the underlying business?"* Regardless of DSI's categorization of cash flows, an analysis of cash flows is not the proper basis to determine an entity's profitability. The Receiver has acknowledged as much twice in the December 15, 2020 transcript of the video status conference. *"Now I should be careful in saying that this is an analysis of cash in and cash out, which is not the same as profit, but it's a good proxy and a measuring stick..."* [29] *"Again, I want to be careful, net cash which is different from profit."*[30] While an analysis of cash flows has its use, it is neither a good proxy nor a measure of profitability. The accrual basis of accounting provides a more accurate measure of a company's profitability and economic performance during an accounting period, and a more accurate picture of a company's financial position at the end of an accounting period. It is the proper methodology to use to determine profitability as is the most widely used and accepted financial reporting framework in the United States.

51. The two main methods of maintaining an entity's accounting books and records are the cash basis and accrual basis methods of accounting. The cash basis method of accounting, as the name suggests, recognizes revenue when cash is received and an expense when cash is paid. Conversely, the accrual basis method of accounting recognizes revenue when earned and expenses when incurred. The accrual basis results in a more accurate financial picture over the long term. Under GAAP, accrual basis accounting is required as it supports the matching principle which pairs revenues and the corresponding expenses incurred to generate such revenues to the period or periods in which they occurred.

52. The following is an example of why the accrual basis method of accounting properly tracks the true profitability of an entity:

Assume that to produce a single widget, it costs the manufacturer $10 to purchase the raw materials and $5 for the labor & overhead to produce the widget. Further assume the manufacturer produces and sells the widget for $25 in December 2019. Under accrual accounting, the revenue and expenses are recorded in 2019 regardless of

[29] FN 1, Op. cit., 18:24-25, 19:1
[30] FN 1, Op. cit., 21:3-4

when cash is exchanged. The profit on the sale of the widget in 2019 is $10 (Sale price $25 – Materials $10 – Labor $5 = Profit $10). While it is certainly possible for the cash basis to match the accrual basis, the cash basis can result in a mismatch of revenue and expense. If the manufacturer receives the $25 sale proceeds and pays its employee the $5, and pays the $10 for the raw materials, all in 2019, the profit recognized under a cash basis is $10, the same as would be under the accrual basis. However, if the manufacturer pays $10 for the raw materials in December 2019 but does not pay its employee the $5 or receive the $25 sale proceeds until January 2020, under a cash basis, the manufacturer will record a $10 cash loss in 2019 and a $20 cash profit in 2020 ($25 Sale proceeds - $5 Labor). While the net of the two years results in the same $10 profit, the revenues and expenses are not properly matched, and the financial condition of the business as of each period end is distorted and erroneously stated. Unless each CBSG investor was an investor for the entirety of 2012 to 2019, a cash flow analysis for an 8-year period[31] using seemingly meaningless categories does not properly measure profitability or provide any beneficial analysis of economic performance.

53. In addition to GAAP requirements for the accrual basis, the Internal Revenue Service ("IRS") requires accrual basis reporting.[32] Both the 2017 and 2018 CBSG tax returns, Form 1120, reflect the accounting method as accrual. DSI seems to have ignored that CBSG's tax returns and tax obligations were, as required by the IRS, prepared using the accrual accounting method.

54. It should be further noted that the 2017 CBSG audit cites the same revenue recognition rules promulgated by the Financial Accounting Standards Board (FASB), ASU 2016-13 Measurement of Credit Losses on Financial Instruments (Topic 326).[33] These are the same rules which were required to be adopted by CCUR Holdings, Inc. and Enova International, Inc., two publicly traded companies having subsidiaries in the MCA/RPA (Receivables Purchase Agreement) business. ASU 2016-13 was to

[31] Exhibit A to the Declaration of Bradley Sharp [DE 482-2] was inadvertently omitted from the original [DE 426-1]. Exhibit A separates the original summary by year but suffers the same improper format for which to assess profit.
[32] Internal Revenue Code § 448 Limitation on use of cash method of accounting.
[33] ASU 2016-13 will require changes to the terminology. References to allowance and provision for loan losses will be revised to reflect that ASU 2016-13 covers all financial assets and not just loans.

replace the existing incurred loss methodology affecting financial assets. As of the issuance of the audit, the new guidance was to be effective for annual reporting periods beginning after December 15, 2020. Early adoption was permitted, but not prior to fiscal years beginning after December 15, 2018.

Data Analysis

55. In its October 30, 2020 letter to the Receiver,[34] DSI indicated they examined and compiled approximately an eight-year period of information prior to his appointment which consisted of approximately forty-one bank and ACH accounts and over 1,250,000 transactions.

56. BPB has likewise reviewed the same eight-year period and concurs with the number of bank and ACH accounts.

57. BPB reviewed and consolidated the following:

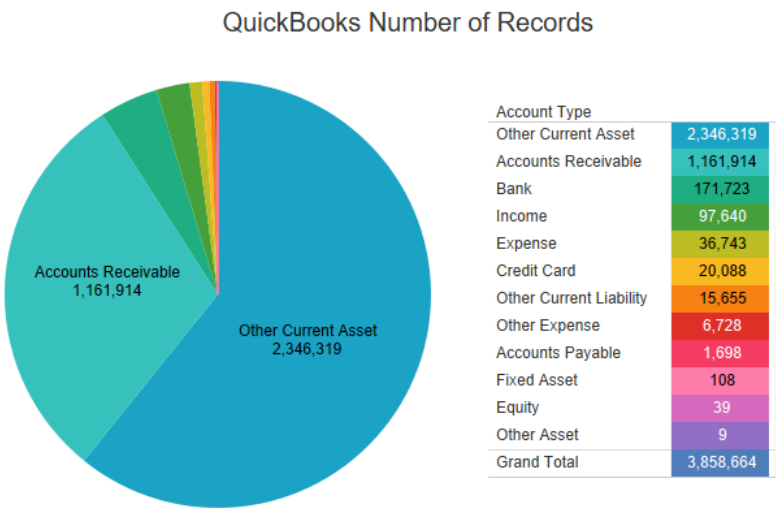
    a. Using Microsoft Excel and Alteryx, BPB created a Daily deposit log transaction database containing approximately 1M records. CBSG maintained a monthly spreadsheet with a tab for each business day of the month. These tabs tracked what ACH debits were supposed to come in and those that did. The daily totals for each ACH processor was then booked into QuickBooks in batch entries.

    b. Using specialized software, BPB created an ACH vendor transaction database containing approximately 1M records.

    c. Using specialized software, BPB created a bank account transaction database containing approximately 100K records.

    d. Using Microsoft Excel, Alteryx and Tableau, BPB created a transaction database of QuickBooks data containing approximately 3.8M records.

[34] Case 9:20-cv-81205-RAR Document 358-1 Entered on FLSD Docket 10/30/2020



58. We agree with DSI's overall analysis of cash, in that CBSG started with zero dollars and at the end of 2019 had approximately $44.4M in cash. Again, because cash is inventory for an MCA business, carrying as low a reserve of cash as is necessary to cover expenses, and funding new merchant activity was the goal of the company.

59. Due to the merchant advances having a shorter-term than the investor promissory notes, it was possible for CBSG to advance and collect merchant funds more than once before any investor principal obligations matured. This difference in maturity allows CBSG to circulate the investor's cash through MCA funding contracts before it must be repaid. While this might appear to account for the growth of the $479.3 of investor funds into more than $1.1 billion of merchant cash flow, it does not. First, the full $479.3 million was not available on day one to start advancing to merchants. It was invested over an 8-year period and, per DSI's Exhibit A, $256.8 million of these funds were not received until 2019. Second, based on DSI's own analysis, CBSG incurred significant expenses, such as investor interest payments, operating expenses, and other disbursements. When merchant funds were repaid to CBSG, the amount available for future advances from investor deposits would continue to decrease as such CBSG expenses were paid and required significantly more turns of the dollars than time would allow. Put simply, the only way the investor dollars could have generated the volume of merchant cash flow seen in the bank accounts is through CBSG's collection of factoring fees (i.e., profits) from merchants in additional

to the amounts the merchants were advanced, as further shown in paragraphs 85-88 below.

Analysis of the Merchant Receivables Portfolio and CBSG Profitability

60. The second section of the DSI declaration, ***Portfolio Analysis***, devotes 11 pages of the 21-page declaration to the analysis of the CBSG merchant portfolio. DSI conducted a detailed cash analysis of a subset of CBSG merchants which they refer to as the Exception Portfolio. It is unclear whether their analysis includes post Receivership activity because they indicate that "*[t]he following table provides a summary of the activities with respect to the Exception Portfolio from the inception of the relationship to November 2020.*" For the sake of clarity, the Receivership began on July 28, 2020, so it would be improper to include any activity from that date forward in their analysis. This would also be inconsistent with their cash analysis which ended in 2019: *"Our preliminary conclusions summarized above are based on our analysis of CBSG's cash sources and uses for the calendar years 2012 through 2019."*

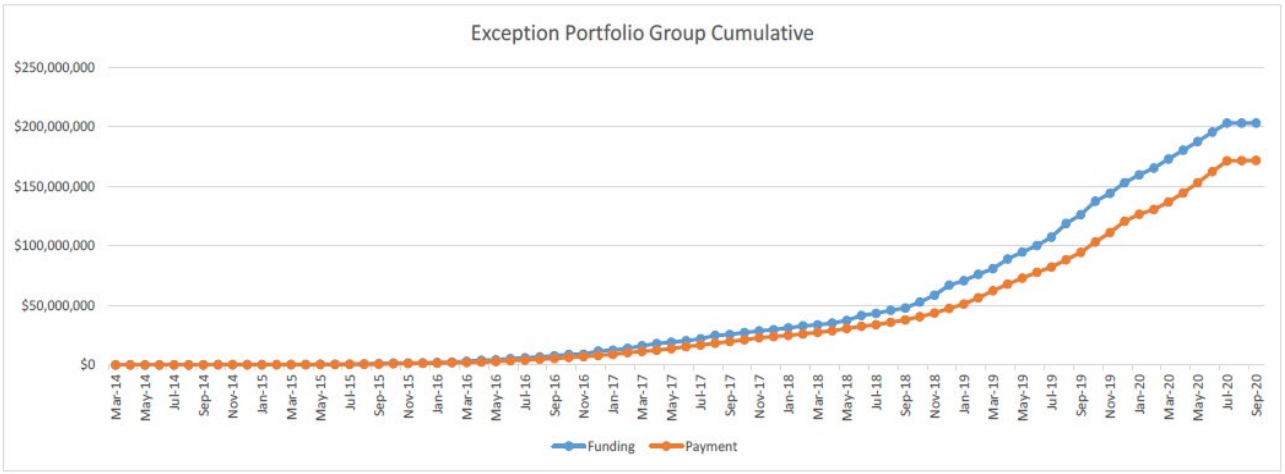
61. The Exception Portfolio represents approximately 46% of the outstanding accounts receivable balance and is comprised of 16 merchants divided into five groups. It is unclear if DSI is suggesting that 100% of the receivable balances related to the exception portfolio is uncollectible, or if they are suggesting that the Exception Portfolio has any impact at all on the remaining 54% of accounts receivable comprised of approximately 3,600 merchants.

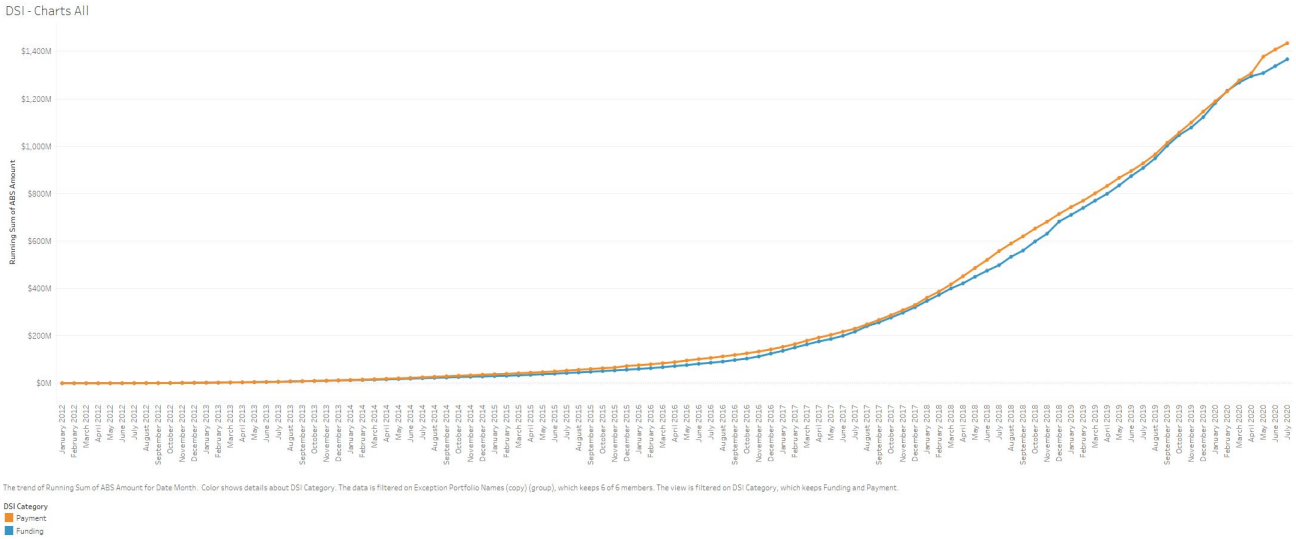
62. The Receiver states: *"As a result of the Defendants' poor underwriting and management of the portfolio, the Par Financial model utilized by the Defendants requires significant additional cash investments to fund additional receivables, as the current portfolio does not generate sufficient cash."*[35] The only reference to underwriting in the DSI report was for one merchant, the B&T group, and that singular reference did not include any apparent analysis to support the Receiver's conclusion regarding collectability.

[35] Page 7, paragraph 3 of Receiver Ryan K. Stumphauzer's Quarterly Status Report Dated February 1, 2021 (DE 482)

63. Additionally, DSI does not address what analysis it undertook related to the existence and value of the collateral securing the MCA funding agreements. In fact, DSI appears to ignore collateral altogether in its conclusions regarding the Exception Portfolio. I reviewed a Surety Agreement, including a Confession of Judgment, signed by the president of B & T. While the April 11, 2019 promissory note attached to the agreement indicates an existing liability of approximately $27.1 million, the Surety Agreement states that: *The term "Liabilities" includes all liabilities of Maker to CBSG, whether now existing or hereafter incurred…" and "The amount of the liability of Undersigned hereunder shall be unlimited*." While I am not rendering legal opinion, this would suggest that if B & T were to default, it is liable for the entire $78 million included in accounts receivable.

64. I have included the graph from page 12 of the DSI report which reflects only the Exception Portfolio. In contrast to the DSI graph (Exception Portfolio Group Cumulative) immediately below, the BPB graph below it reflects the same funding and payment information, with the exception that we have included the entire CBSG portfolio of current receivables. The lower graph, of the entire CBSG portfolio, shows that payments coming in from merchants consistently exceed funding provided to merchants. The proximity of the lines confirms that CBSG is managing their cash inventory.





65. As discussed in paragraphs 40-43 above, it is unclear what, if any, analysis DSI performed as to the review of CBSG's underwriting policies and files. Additionally, there is no indication of any analysis of merchants' ability to repay their contractual MCA obligations.

66. Their conclusions reached are therefore unsupported as to what constitutes "*excessive reloads"* or speculative as to the statement: *"**If** CBSG is only able to collect the Cash Exposure (cash out less cash back) in the Exception Portfolio, CBSG's assets will decline by $165.1 million…."*

67. Further, in arriving at the speculative $165.1 million possible loss assertion (see chart

below), DSI incorrectly applied a cost recovery methodology[36] rather than the GAAP required effective yield[37] or straight-line methodologies.

CBSG Exception Portfolio Merchant Balances and Fees

	Start of Relationship [1]	Cash Out	Cash Back	Net Cash Exposure [2]	Net Balance Transferred	Outstanding Fees and Other Charges [3]	% of Outstanding Balance	Outstanding Balance
B & T Supply	05/15/15	50,485,491	48,567,460	1,918,030	18,838,973	57,227,914	73%	77,984,917
Lifeguard	02/06/20	17,531,669	9,566,636	7,965,033	3,032,210	2,362,567	18%	13,359,810
Yanky Holding Supplies	03/29/16	4,585,877	2,793,427	1,792,450	(4,805,790)	3,013,340	N/A	-
YBT Industries Inc	04/12/16	12,477,305	6,407,979	6,069,327	(10,845,555)	4,776,228	N/A	-
Naki Cleaning Services	04/12/16	6,287,403	4,182,342	2,105,061	(4,462,483)	2,357,422	N/A	-
Anglo China	04/27/20	1,597,595		1,597,595	(1,757,355)	159,760	N/A	-
B & T Group Total		92,965,340	71,517,843	21,447,497	(0)	69,897,231	77%	91,344,728
Colorado Homes	02/05/18	24,533,701	21,212,640	3,321,061	(4,252,726)	20,581,824	105%	19,650,160
United by ECH	08/26/19	3,532,525	2,155,603	1,376,922	1,537,726	2,924,149	50%	5,838,797
CNP Operating	11/04/19	-	93,000	(93,000)	4,480,000	-	0%	4,387,000
Colorado Sky	02/22/19	1,200,000	1,235,000	(35,000)	(445,000)	480,000	N/A	-
Dickinson Wright	01/30/19	1,200,000	-	1,200,000	(1,320,000)	120,000	N/A	-
Colorado Homes Group Total		30,466,226	24,696,243	5,769,983	0	24,105,974	81%	29,875,957
Big Red Express (Big Red Ltl)	10/10/17	5,990,665	4,941,182	1,049,483	6,176,781	11,725,988	62%	18,952,252
Bulova Technologies	03/26/14	5,714,985	4,905,683	809,302	(5,027,611)	4,218,309	N/A	-
Twiss Cold Storage	04/26/16	1,630,505	1,072,904	557,601	(1,149,169)	591,568	N/A	-
Big Red Express Group Total		13,336,156	10,919,769	2,416,386	0	16,535,865	87%	18,952,252
Kingdom Logistics	08/01/18	31,097,243	27,785,333	3,311,910	-	17,604,689	84%	20,916,599
National Brokers Of America	05/07/15	35,313,398	36,993,310	(1,679,912)	-	36,973,530	105%	35,293,618
Grand Total		$ 203,178,362	$ 171,912,498	$ 31,265,864		$ 165,117,289	84%	$ 196,383,154

68. As an example, assume CBSG advances $100K to a merchant with a mutually agreed-upon factor of 1.30. The resulting recorded RTR is $130K. Assuming the RTR is to be repaid in 100 installments, each installment from the merchant would be $1,300.

69. Under GAAP, a portion of every payment should go to repay the initial advance and a portion should be recognized as factor income. As indicated, the effective yield or straight-line method is required by GAAP. Under the straight-line method, $1,000 would be applied against the original advance and $300 would be recognized as income. DSI incorrectly applied the cost recovery methodology and erroneously applied the full $1,300 installment against the $100K advance rather than recognizing the $300 of income and $1,000 return of initial advance. This was wrong and

[36] Applies every dollar received against the initial principal or investment until it is fully repaid at which time income begins to be recognized.
[37] Like a mortgage payment between a bank and a homebuyer. The homebuyer makes a monthly mortgage payment to the bank. From the bank's perspective, each payment received is split into return of investment and return on investment. This is intended as an example only and in no way suggests CBSG is a lender.

inconsistent with GAAP.

70. The flawed DSI methodology is evident in their chart below. National Brokers of America received $35.3M from CBSG. It appears DSI applied 100% of the $37M repaid by National Brokers against this $35.3M resulting in an erroneous declaration of negative cash exposure. It is not possible to have negative cash exposure.

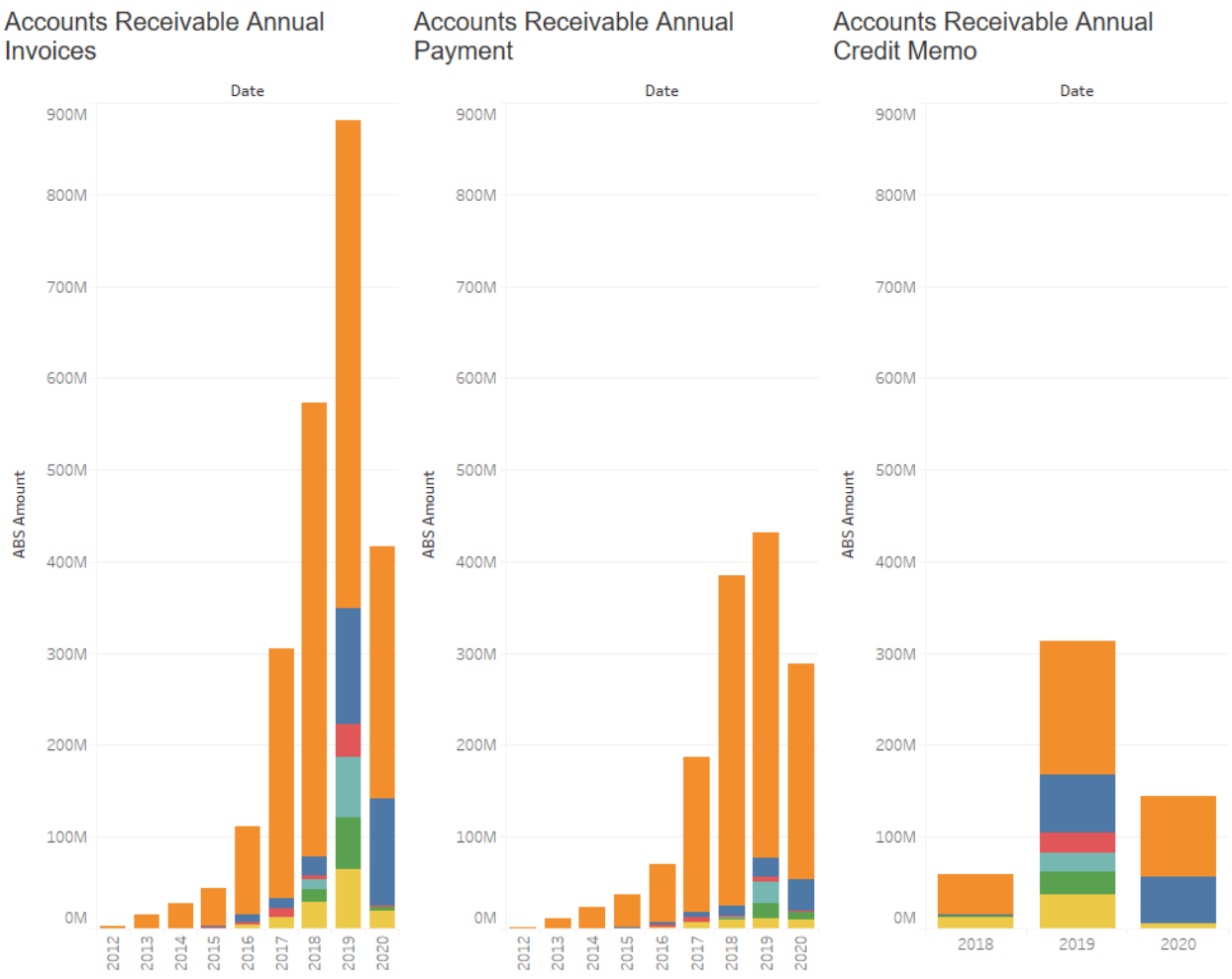
71. It appears that the same circumstances exist for CNP Operating and Colorado Sky, and it also appears that DSI utilized the same flawed methodology throughout, resulting in erroneously understated cash exposure.

72. DSI states that: *"[a] significant amount of the receivable portfolio consists of "factors," fees and expense and not cash advanced."* Based on its flawed cost-recovery methodology, shown above, it is evident that DSI has overstated the amount of "factor" fees contained in outstanding accounts receivable. Its results are inaccurate.

73. The following chart reflects the total number of merchants between 2012 and the date of the Receivership, the number of those merchants who had at least one reloaded deal, and the number of reloaded deals among those merchants.

Group	Number of Distinct Clients per Group	Number of Clients with a Reload	Reload Amount	Number of Reloads	Percentage of Clients with a Reload
Non Exception Portfolio	7,566	1,078	$133,541,765	2,563	14.2%
Exception Portfolio	17	14	230,538,009	179	82.4%
Grand Total	**7,583**	**1,092**	**364,079,774**	**2,742**	**14.4%**

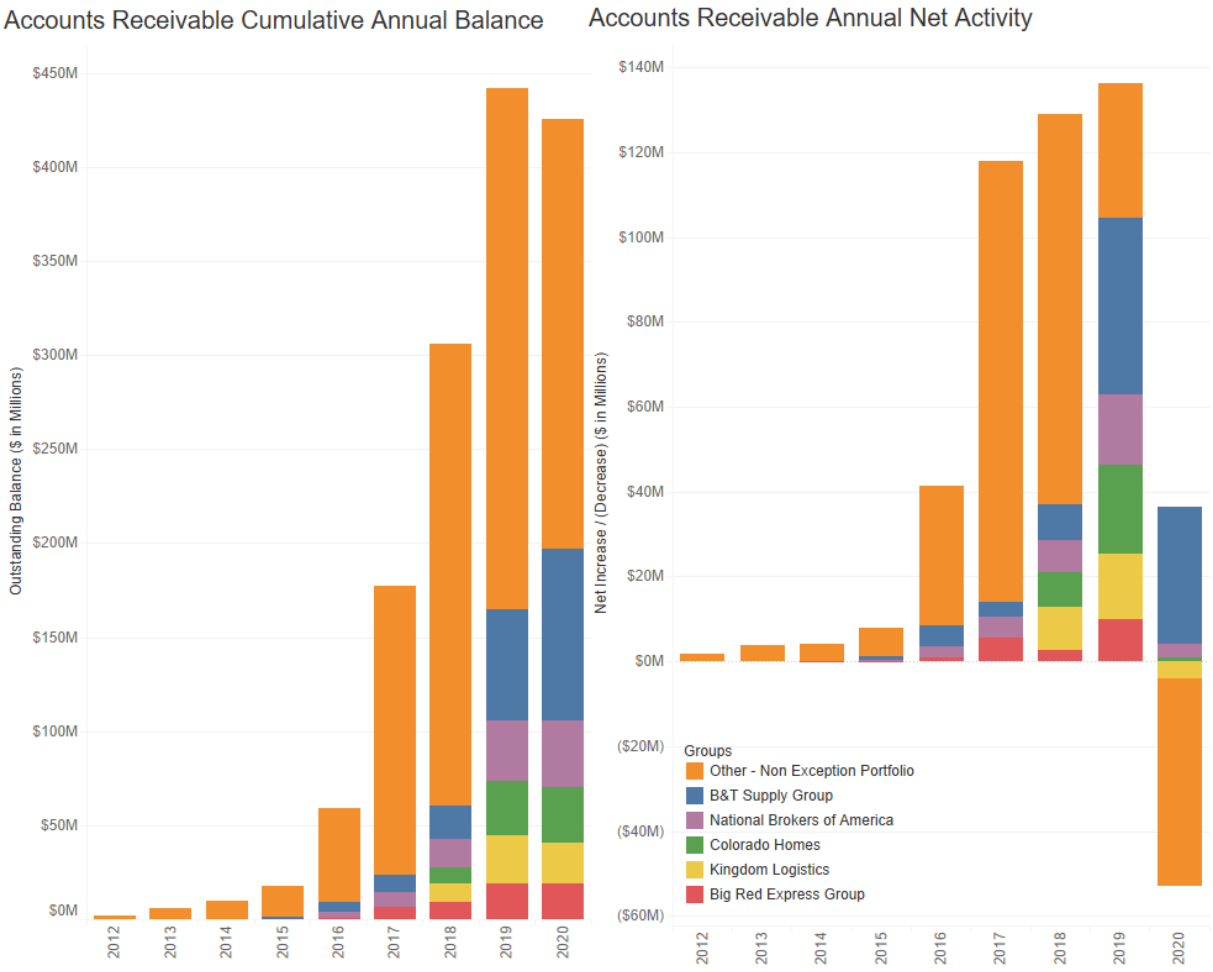
74. The following chart segregates annual accounts receivable activity into various transaction types. Subtracting the payments and credit memos from invoices equals the annual net activity for a given year (See Legend on chart in 76).



75. As an example, in 2019, almost $890 million of RTR was recorded; approximately $440 million payments were received from merchants; and approximately $310 million of credit memos were issued. The credit memos represent either an adjustment to balances related to merchant defaults, agreed upon discounts, or necessary adjustments to avoid double counting of reloaded deals included in the $890 million. The net of these amounts, approximately $136 million, represents the net increase in the $306 million accounts receivable balance at the end of 2018 to the $442 million accounts receivable balance at the end of 2019.

76. The bar chart below left reflects the accounts receivable balance at the end of each year. The chart below right reflects the annual net activity summarized above which impacts each subsequent year-end balance. The 2019 net activity in the chart on the right is the approximate $136 million referenced above (in para. 75) and the 2018 $306

million and 2019 $442 million balances can be seen in the chart on the left. Each chart indicates the portion of the CBSG total merchant portfolio, which is comprised of the non-exception portfolio, as well as that portion of the total merchant portfolio which is comprised of the 5 groupings of Exception Portfolio companies.



77. The negative amount in the chart on the right indicates a net reduction in accounts receivable through collections or adjustments. In other words, CBSG collected more than it funded during 2020.

78. BPB analyzed CBSG accounts receivable based on the cash transactions and accrual entries recorded in CBSG's books. BPB agrees to within .5% of the DSI accounts receivable balances for the merchants identified as the Exception Portfolio. The following chart reflects the net accounts receivable activity as reflected in the QuickBooks records as of July 27, 2020. The balances have been segregated into

those merchants with no outstanding accounts receivable balance and those merchants with an outstanding accounts receivable balance.

Client Group	(1)	2012	2013	2014	2015	2016	2017	2018	2019	2020	Grand Total / Distinct Count (2)
Non Exception Portfolio - A/R Zero Balance (No Credit Memo)	$	1,542,010	2,742,380	2,031,059	4,060,188	17,200,416	43,778,823	(16,281,151)	(17,963,226)	(37,110,500)	-
	#	69	175	179	288	460	893	1,047	1,118	747	**2,707**
Non Exception Portfolio - A/R Zero Balance (With Credit Memo)	$	31,674	205,549	(159,094)	548,744	3,214,409	17,080,111	33,518,198	(7,855,201)	(46,584,390)	-
	#	2	7	8	19	33	96	430	1,022	633	**1,224**
Non Exception Portfolio - A/R Zero Balance - All	$	**1,573,684**	**2,947,929**	**1,871,965**	**4,608,932**	**20,414,825**	**60,858,934**	**17,237,047**	**(25,818,427)**	**(83,694,890)**	-
	#	**71**	**182**	**187**	**307**	**493**	**989**	**1,477**	**2,140**	**1,380**	**3,931**
Non Exception Portfolio - A/R with Balance	$	208,375	873,783	769,673	3,538,337	12,071,867	34,755,018	76,579,836	59,724,341	30,191,926	**218,713,156**
	#	4	10	17	40	64	145	314	911	2,221	**2,265**
Non Exception Portfolio - Syndications	$		84,899	1,409,015	(1,328,637)	584,947	8,246,227	(1,933,511)	(2,339,387)	4,850,630	**9,574,183**
	#		10	427	240	88	138	277	394	583	**1,370**
Exception Portfolio	$			39,100	1,018,417	8,380,213	14,139,633	36,959,933	104,538,276	32,187,204	**197,262,776**
	#			1	4	7	8	9	13	12	**16**
Exception Portfolio - Syndications	$			50	(50)						-
	#			1	1						**1**
Grand Total / Distinct Count (2)	$	**1,782,059**	**3,906,611**	**4,089,803**	**7,836,999**	**41,451,852**	**117,999,812**	**128,843,305**	**136,104,803**	**(16,465,130)**	**425,550,115**
	#	**75**	**202**	**633**	**592**	**652**	**1,280**	**2,077**	**3,458**	**4,196**	**7,583**

(1) $ = U.S. Dollar amount per client group per year
= Distinct number of clients per client group per year
(2) Distinct Count will not agree to annual total, as merchant could be included in multiple years

79. Merchants with outstanding accounts receivable balance were further segregated into Exception and non-Exception Portfolios and then again into Syndication and non-Syndication merchants. The reason for identifying syndication deals is that CBSG is only participating in those deals with another MCA company and therefore has no interaction with the merchant and no ability to control collections.

80. Merchants with no outstanding accounts receivable balance were further segregated into those merchants who had paid the full amount of their outstanding balances, from those merchants for whom, although the account balance was zero, it was the result of a credit memo.

81. While a credit memo could have been issued for various reasons, the impact is still a reduction of income and, depending on whether a deal had been fully funded or not, the Funding Obligation[38] is reduced.

82. Over the 103-month period, CBSG had just under 7,600 merchant clients and, of those, approximately 3,900 (52%) of those merchants have no outstanding accounts receivable balance ("Zero Balance merchants").

[38] Based on our review of CBSG QuickBooks and discussion with CBSG, what is labeled as Funding Receivables in QuickBooks should in fact more correctly be referred to as Funding Obligations.

83. Of the Zero Balance merchants, approximately 2,700 (69%) have paid off their entire balance and approximately 1,200 (31%), have no balance but did not pay in full.

84. The following chart is a continuation of the previous chart and reflects the merchant groups previously described and the corresponding accounts receivable balance. We identified all of the merchant deals within each of these groups. We calculated the aggregate cash advanced and the actual factoring fees earned, as well as those with the potential to be earned, based on current accounts receivable.[39]

Client Group	Total Number of Clients	Advances to Merchants	Factoring Fees	(1)	Factor
Non Exception Portfolio - A/R Zero Balance (No Credit Memo)	2,707	$ 312,436,375	$ 129,974,236	A	1.416
Non Exception Portfolio - A/R Zero Balance (With Credit Memo)	1,224	192,602,935	71,572,374	A	1.372
Non Exception Portfolio - A/R Zero Balance - All	3,931	505,039,310	201,546,610	A	1.399
All A/R with Balance	3,652	730,902,092	279,931,995	P	1.383
Non Exception Portfolio - A/R Zero Balance - All	**7,583**	**1,235,941,403**	**481,478,605**		

(1) A Actual Factor, A/R has zero balance
P Potential Factor, A/R with balance

85. Of the approximately 2,700 Zero Balance merchants having paid off their entire balance, CBSG recognized an overall factor of 1.416. ((Advances to Merchants $312,436,375 + Factoring Fee Revenue $129,974,236) ÷ Advances to Merchants $312,436,375).

86. Of the approximately 1,200 Zero Balance merchants having had some portion of their obligation reduced, CBSG recognized an overall factor of 1.372. ((Advances to Merchants $192,602,935 + Factoring Fee Revenue $71,572,374) ÷ Advances to Merchants $192,602,935). Like the Exception Portfolio, this group of merchants had reloads.

87. For the 3,900 Zero Balance merchants, CBSG recognized $201.5M in revenue and an overall blended factor of 1.399. This further demonstrates why the DSI analysis of $6.6 million of cash is incorrect and misleading. DSI presented its analysis as a simple math problem of 2 + 2 = 4 but neglected to explain or provide an analysis of what comprises each of the “2s”, which, in this case, includes revenue and ultimately, profit. The overall blended factor rate of 1.399 proves the profitability of the 3,900 Zero

[39] This does not include other fees and revenue sources.

Balance merchant funding agreements.

88. The chart below was generated from the CBSG QuickBooks accounting records. Between 2012 – 2019, on an accrual basis, CBSG recognized factoring fee revenue totaling $408.8 million and an additional $25.8 million of ancillary fee income totaling $434.6 million. Accrual basis net income during this period was $64 million. For the sake of clarity: the expenses of CBSG as detailed in the P&L chart below; $104.7 million in investor interest expenses; $133.6 million of commission and consulting expenses; and recognition of $106.1 million of factoring losses - all have been deducted in arriving at this net income amount.[40]

[40] While both DSI and BPB agree as to the cash transactions recorded, BPB has not audited or otherwise independently verified the accuracy of these CBSG internally prepared income statements.

	Dec 31, 12	Dec 31, 13	Dec 31, 14	Dec 31, 15	Dec 31, 16	Dec 31, 17	Dec 31, 18	Dec 31, 19	TOTAL
Income									
Factoring Fee Income	$ 772,499	$ 5,452,417	$ 8,373,426	$ 13,427,522	$ 21,598,989	$ 66,609,332	$ 123,378,492	$ 169,213,496	$ 408,826,174
Interest Income	-	42	-	-	-	-	-	-	42
Merchant Processor Commissions	-	1,182	31,015	4,399	-	-	-	-	36,596
Processing Fee Income	-	-	-	63,583	515,401	758,367	5,599,919	5,081,603	12,018,873
Program Fee Income	-	44,712	182,065	486,839	598,662	1,837,702	4,107,346	4,224,601	11,481,928
Recovered Receivables Income	-	-	-	-	425,993	286,763	454,321	1,101,291	2,268,367
Total Income	772,499	5,498,354	8,586,505	13,982,343	23,139,045	69,492,165	133,540,078	179,620,990	434,631,979
	772,499	5,498,354	8,586,505	13,982,343	23,139,045	69,492,165	133,540,078	179,620,990	434,631,979
Expense									
Advertising & Promotions	2,924	829	17,899	2,876	8,274	100,802	104,199	241,767	479,570
Automobile Expense	605	28,938	65,124	72,933	52,039	53,088	49,559	8,123	330,409
Bank Fees	17,889	15,734	39,688	44,949	114,064	230,244	354,258	536,709	1,353,536
Charitable Donations	-	-	-	-	20,250	-	35,000	15,000	70,250
Computer and Internet Expenses	8,733	35,690	97,915	126,223	138,263	345,460	252,546	138,926	1,143,756
Continuing Education	-	-	4,598	-	-	-	-	-	4,598
Factoring Losses	-	1,264,466	1,696,035	3,262,495	8,713,601	20,580,713	33,944,059	36,684,346	106,145,715
Filing Fee	1,729	4,485	3,790	2,587	6,683	8,984	92,715	799	121,773
Gifts	-	198	-	3,653	51,523	726	1,758	2,857	60,716
Insurance Expense	959	546	3,252	2,781	15,099	19,711	264,413	79,191	385,952
Investment Expense	-	-	108,683	-	-	-	-	-	108,683
Janitorial	2,696	3,418	14,527	16,795	23,262	53,621	4,026	4,026	122,371
Leads	12,525	21,458	5,705	6,920	70,890	71,647	194,351	33,688	417,184
Legal Fees									
Collections Expense	-	-	96,460	162,223	182,427	415,771	434,479	761,904	2,053,264
Legal Fees - Other	10,000	56,523	67,874	79,752	139,917	156,674	285,617	515,005	1,311,362
Total Legal Fees	10,000	56,523	164,335	241,975	322,344	572,445	720,096	1,276,909	3,364,626
Licenses & Fees	244	1,742	1,605	-	-	-	-	-	3,591
Maintenance & Repairs	1,474	683	6,495	21,511	14,287	10,882	15,359	16,373	87,064
Meals and Entertainment	9,996	62,349	62,144	72,008	116,363	138,529	68,154	22,856	552,399
Merchant Account Fees	-	1,237	1,707	1	198	(665)	1,898	1,439	5,814
Moving Expense	-	8,035	1,740	7,152	2,161	2,698	2,163	6,533	30,481
Office Supplies	9,800	19,408	16,351	39,962	71,154	122,007	65,934	18,402	363,017
Total Payroll Expenses	29,608	347,490	329,737	453,129	656,719	-	-	209,939	2,026,622
Postage and Delivery	-	1,038	1,100	2,153	7,051	23,140	18,473	2,875	55,830
Processing Expense	-	-	-	-	-	1,044,568	4,132,093	2,343,240	7,519,902
Professional Fees	114,633	82,842	9,315	745	25,492	74,700	282,313	562,376	1,152,416
Rent Expense	26,849	113,612	159,057	242,548	233,009	152,291	121,954	148,028	1,197,348
Subcontractor Expense									
Commissions	53,626	383,900	830,963	840,713	1,991,539	6,022,587	10,009,278	13,715,364	33,847,970
Total Consulting	74,432	306,521	599,087	821,800	8,640,054	34,453,228	26,606,613	27,636,406	99,138,142
Subcontractor Expense - Other	-	-	37,230	-	49,190	360,387	105,178	19,300	571,285
Total Subcontractor Expense	128,058	690,421	1,467,280	1,662,513	10,680,783	40,836,202	36,721,069	41,371,070	133,557,396
Telephone Expense	1,150	14,899	11,521	13,867	25,650	37,408	56,009	13,644	174,147
Temporary Help	330	-	-	-	-	-	-	-	330
Travel Expense	13,684	10,153	41,271	27,470	58,146	108,354	58,499	65,707	383,282
Uncategorized Expenses	-	-	-	(1)	-	-	-	-	(1)
Underw riting Expense	-	26,077	25,366	34,711	57,320	187,020	358,984	348,758	1,038,236
Utilities	1,917	3,521	11,918	10,610	8,078	15,775	8,725	10,213	70,757
Total Expense	395,804	2,815,791	4,368,157	6,372,564	21,492,702	64,790,350	77,928,609	84,163,794	262,327,771
Net Ordinary Income	376,695	2,682,562	4,218,349	7,609,779	1,646,343	4,701,815	55,611,469	95,457,196	172,304,207
Other Expense									
Amortization Expense	-	-	-	-	6,415	-	-	-	6,415
Depreciation Expense	19,986	47,461	-	18,847	20,985	6,087	6,087	-	119,453
Fines & Penalties Expense	-	-	-	-	-	499,000	-	-	499,000
Interest Expense	110,544	1,047,652	1,511,607	1,621,516	3,613,754	12,384,442	28,278,237	56,085,746	104,653,498
Tax Expense	-	547,053	964,827	2,075,586	136,684	(1,600,544)	(1,786,563)	2,737,491	3,074,534
Total Other Expense	130,530	1,642,166	2,476,434	3,715,950	3,777,839	11,288,985	26,497,761	58,823,237	108,352,901
Net Income	**$ 246,165**	**$ 1,040,396**	**$ 1,741,915**	**$ 3,893,829**	**$ (2,131,496)**	**$ (6,587,171)**	**$ 29,113,708**	**$ 36,633,959**	**$ 63,951,307**

EXPERT COMPENSATION

89. I am being compensated at my standard rate of $495 per hour, while other members of our firm who worked on this engagement are compensated at $85 to $480 per hour.

Neither my compensation nor the compensation of the other BPB personnel who worked on this assignment is contingent on the outcome of this litigation.

90. I declare under penalty of perjury that the foregoing is true and correct, and made in good faith. Executed this 15th day of April 2021.

Joel D. Glick, CPA/CFF, CFE
Berkowitz Pollack Brant Accountants and Advisors LLP
200 South Biscayne Boulevard, Seventh Floor
Miami, Florida 33131

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

COMPLETE BUSINESS SOLUTIONS GROUP, INC., d/b/a PAR FUNDING, *et al.*,

Defendants.
_____/

DECLARATION OF JOEL D. GLICK

1. Pursuant to 28 U.S.C. Section 1746, the undersigned states as follows:

2. My name is Joel Glick. I am over the age of 18 years and I make this declaration based upon my personal knowledge of the facts set forth herein.

3. I practice in the areas of forensic accounting and economic damages.

4. I have testified as an expert witness in both State and Federal courts. See attached Exhibit 1.

5. I am a Certified Public Accountant licensed in Florida, since 1994, and Certified in Financial Forensics, since 2008. Both credentials are through the American Institute of Certified Public Accountants.

6. I am a Certified Fraud Examiner credentialed through the Association of Certified Fraud Examiners since 2010.

7. I am a Director of Forensic and Advisory Services at Berkowitz Pollack Brant Advisors

+ CPA's ("BPB").

8. BPB was retained by the law firm of Fridman Fels & Soto, PLLC to assist with their representation of Complete Business Solutions Group, Inc., d/b/a Par Funding ("CBSG").

9. I have supervised and been extensively involved in the analysis to date of CBSG's books and records.

10. No statements in this declaration are intended to render any legal opinions or conclusions.

11. The goal of the Court was *"that every piece of data that Mr. Sharp used to prepare this affidavit*[1] *be provided, pursuant to the guidelines [it] put in place, to a defense expert."*[2] As of the signing of this declaration, it is unclear what the entirety of the data DSI reviewed and relied on to prepare their declaration is and, therefore, it is unclear whether they complied with the Court's wishes.

12. We understand that most of the activity from January 1, 2020 through July 27, 2020 had been entered into QuickBooks however, as of the filing of this Declaration, we have not received reconciled QuickBooks. As such, it is unclear whether they have yet to be fully reconciled by the Receiver.

13. Based on the foregoing, and as discovery is ongoing, I reserve the right to update this declaration as more data becomes available.

14. I have reviewed the following information:
    a. CBSG bank statements and ACH vendor statements from January 2013 to July 2020.

[1] DECLARATION OF BRADLEY D. SHARP (DE 426-1)
[2] Transcript of the December 15, 2020 Status Videoconference Before The Honorable Rodolfo A. Ruiz, II 60:18-21.

b. CBSG accounting records maintained in QuickBooks (inception to July 27, 2020). As indicated above, the records in our possession have not been fully reconciled through the date of the Receivership.
c. CBSG contemporaneously prepared spreadsheets maintained by accounting personnel. These spreadsheets constitute an integral portion of CBSG's accounting process.
    i. Daily Deposit Logs
    ii. Bank Activity Log
d. CBSG Funding Analysis, also known as the Key Performance Indicators (hereinafter "KPI Report") for the following cumulative periods from January 1, 2013 to:
    i. September 2018
    ii. May 2019
    iii. June 2019
    iv. February 2020
    v. June 2020

Data Analysis

15. BPB has analyzed information for the same approximate eight-year period from January 2013 to June 2020, as reflected in the KPI Report.

16. BPB has reviewed and consolidated the following:
    a. Using the CBSG Daily Deposit Logs ("Deposit Logs"), BPB created a transaction database that contains approximately 1M records. The Deposit Logs are spreadsheets that were created and maintained, in the ordinary course of business, by CBSG on a monthly basis for the purpose of tracking merchant funding activity, merchant defaults, and daily merchant repayments.
        i. The Funding tab was maintained from March 2012 through the date of the Receivership (July 27, 2020) and contains all information regarding the actual merchant deals. It is cumulative and rolled forward to the next consecutive month. Through the date of the Receivership, it contained 17,432 record entries.

ii. The Default tab was maintained from January 2013 through the date of the Receivership (July 27, 2020) and contains all information regarding merchant defaults. It is cumulative and rolled forward to the next consecutive month. Through the date of the Receivership, it contained 1,883 record entries.

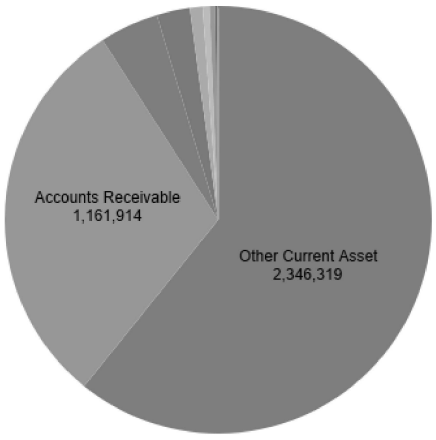
iii. A daily tab was created for each business day beginning January 2016 through the date of the Receivership to track the daily scheduled ACH draws from merchant accounts, wires and other deposits. Individual wires and deposits were deposited directly into CBSG bank accounts and then recorded in QuickBooks whereas the individual ACH debits were processed each day by the third-party ACH processor then, within four to five days, were transferred to CBSG bank accounts in batches. These batches were then recorded in QuickBooks. Through the date of the Receivership, the daily logs contained 1,035,087 record entries.

b. Using specialized software, BPB created an ACH vendor transaction database containing approximately one million records.

c. Using specialized software, BPB created a bank account transaction database containing approximately 96,000 records.

d. Using Microsoft Excel, Alteryx and Tableau, BPB created a transaction database of QuickBooks data containing approximately 3.8 million records.

QuickBooks Number of Records



Account Type	
Other Current Asset	2,346,319
Accounts Receivable	1,161,914
Bank	171,723
Income	97,640
Expense	36,743
Credit Card	20,088
Other Current Liability	15,655
Other Expense	6,728
Accounts Payable	1,698
Fixed Asset	108
Equity	39
Other Asset	9
Grand Total	3,858,664

17. CBSG provided noteholders[3] with an updated KPI Report every month. The KPI Report summarized, on a month-by-month and then consolidated annual basis, certain financial metrics such as:

    a. Number of merchant cash advance ("MCA") deals funded in a given month and/or year, referred to in the KPI as "Funding Count."
    b. Average amount funded per MCA deal for a given month and/or year, referred to in the KPI as "AVG Funding."
    c. Average factor rate[4] per MCA deal for a given month and/or year, referred to in the KPI as "Factor Rate AVG."
    d. Average term of each MCA deal for a given month and/or year, referred to in the KPI as "Avg Term."
    e. Monthly factor percentage[5] for a given month and/or year, referred to in the KPI as "Monthly Factor %."
    f. Funds wired to merchant—the cash actually funded to the merchant per the agreed commitment, referred to in the KPI as "Wire Total."
    g. Funds committed to merchants – the total amount CBSG agreed to fund, referred to in the KPI as "Funded Total." Funds were sometimes disbursed by CBSG in installments rather than in full. Because of this and other, initial fees CBSG charged the merchants, the Funded Total differs from the Wired Total.
    h. The amount of the total committed funds for the period plus the corresponding factor fees, referred to in the KPI as "New AR" ("Accounts Receivable"). This is synonymous with the term Right to Receivable ("RTR") reflected in other client records.
    i. "Factoring Losses"[6] in the KPI refer to the full amount of Accounts Receivable relating to written-off deals.[7]

[3] I am generally aware that one of the issues in this case is whether the promissory notes issued by CBSG in this case constitute securities. As explained above, no statements in this declaration are intended to render any legal opinions or conclusions, and none are intended by my use of the term "investor" as opposed to "noteholder."
[4] As defined in the KPI Report, the average factor rate is the *"Weighted average of factor rate in respective month based on total funding commitment per transaction."*
[5] As defined in the KPI Report, *"The proportionate monthly factor rate average in respective month based on AVG Funding divided by AVG Term."*
[6] As defined in the KPI Report, *"Factoring Losses realized in respective month equal to total AR balance for transactions written off against Factoring Loss reserve."*
[7] I am not rendering any opinion on management decisions regarding factoring losses.

j. "Funding Exposure"[8] in the KPI refers to the cash portion of deals that are written off net of recoveries from previously written off deals. Written off deals are also referred to as deals in default as reflected in the Default Tab of CBSG's Deposit Log.

k. "Total Deposits" in the KPI refer to cash deposits received from merchants, whether from ACH payments, or other means (checks or cash deposits).

l. Gross ACH payments (a subset of Total Deposits), referred to in the KPI as "Total ACH Payment."

m. "Returned ACH Payment Total" in the KPI refers to the total dollar amount of ACH payments CBSG was unable to withdraw during the period per a merchant agreement.

n. "Return %" in the KPI Report refers to the returned ACH payments as a percentage of the total ACH payments debited in a given period.

18. We are not rendering any opinion as to management's decision regarding what information was provided to note-holders or the presentation of such information.

19. The KPI Report calculates the Exposure % by dividing Funding Exposure by the funds wired to merchants. The KPI Report reflects this amount on a period-by-period basis. We have prepared the following tables that reflect the cumulative Funding Exposure from 01/01/2013 – 06/30/2020. Table 1 below is a cumulative analysis prepared using the CBSG KPI Report. Table 2 below is a cumulative analysis prepared using the CBSG Deposit Logs:

[8] As defined in the KPI Report, *"Cumulative exposure, as determined by funding amount minus collected payments, at the time that transactions were written off in the respective month to Factoring Losses."*

Table 1.

Based on CBSG Funding Analysis			
Year	Wire Total	Cumulative Funding Exposure	Exposure %
2013	$ 10,573,755	$ 468,013	4.426%
2014	27,508,501	822,887	2.991%
2015	56,146,068	653,083	1.163%
2016	124,211,932	856,355	0.689%
2017	315,267,992	3,213,406	1.019%
2018	655,850,437	7,959,252	1.214%
2019	1,051,946,128	9,105,980	0.866%
2020 (Jan - June)	$ 1,231,298,330	$ 14,285,812	1.160%

Table 2.

Based on CBSG Deposit Log			
Year	Wire Total	Cumulative Funding Exposure	Exposure %
2013	$ 10,584,848	$ 503,931	4.761%
2014	27,533,686	851,740	3.093%
2015	56,171,253	207,097	0.369%
2016	124,225,458	410,369	0.330%
2017	315,283,386	2,767,420	0.878%
2018	655,865,830	7,704,084	1.175%
2019	1,051,930,639	8,850,812	0.841%
2020 (Jan - June)	$ 1,231,279,740	$ 14,051,811	1.141%

20. Using the transaction database created from the CBSG Deposit Logs, we recreated a KPI Report. The top half of the attached exhibit reflects CBSG's KPI Report[9] which can be compared to the totals from our recreated KPI Report reflected on the bottom half of the exhibit.

21. Using the transaction database created from the CBSG QuickBooks, we quantified the amounts corresponding to certain requested CBSG KPI Report columns. The top half of the attached exhibit reflects CBSG's KPI Report which can then be compared to the totals from our analysis of the CBSG's QuickBooks as reflected on the bottom.

[9] As noted in the schedule, the KPI reflects certain information dating back to 01/01/2013; however, the daily tabs from the Deposit Logs only begin as of 01/01/2016.

22. Both the CBSG Deposit Logs and QuickBooks referenced in this Declaration are the same as those used to prepare my Declaration dated April 15, 2021.

23. The CBSG Deposit Logs were separately maintained Excel spreadsheets, which tracked merchant repayments and were, subsequently reconciled, by CBSG accounting personnel, to the QuickBooks.

24. DSI indicated it independently reconciled the QuickBooks to bank statements and then relied upon the QuickBooks to issue its Declaration dated December 13, 2020.

EXPERT COMPENSATION

25. I am being compensated at my standard rate of $495 per hour, while other members of our firm who worked on this engagement are compensated at $85 to $480 per hour. Neither my compensation nor the compensation of the other BPB personnel who worked on this assignment is contingent on the outcome of this litigation.

26. I declare under penalty of perjury that the foregoing is true and correct, and made in good faith. Executed this 13th day of July 2021.

Joel D. Glick, CPA/CFF, CFE
Berkowitz Pollack Brant Accountants and Advisors LLP
200 South Biscayne Boulevard, Seventh Floor
Miami, Florida 33131

CBSG Funding Analysis
01/01/13 - 06/30/20[6]

Period	Funding Count	AVG Funding	Factor Rate AVG[1]	Avg Term	Monthly Factor %[2]	Wire Total	Funded Total	New AR	AR Total[3]	Factoring Losses[4]	Funding Exposure[5]	Exposure %[4]	Total Deposits	Average Daily Deposit	Total ACH Payment	Returned ACH Total	Return %
2013	358	$29,535.63	1.35	120	6.1%	$ 10,573,755.28	$ 13,881,429.51	$ 18,799,487.42	$ 5,688,670.71	$ 1,300,265.50	$ 468,013.05	4.4%	$ 10,144,412.62	$ 40,519.15	$ 7,774,763.57	$ 501,380.77	6.4%
2014	979	17,298.00	1.33	94	7.4%	16,934,746.07	23,948,076.36	31,918,202.93	9,778,474.37	1,622,534.74	354,874.39	2.1%	21,657,990.43	84,225.44	14,900,902.48	1,073,079.75	7.2%
2015	703	40,736.23	1.35	115	6.3%	28,637,566.39	36,979,392.91	49,800,669.92	17,615,473.88	3,041,476.26	(169,804.75)	-0.6%	33,579,213.04	133,316.47	25,248,409.50	993,864.43	3.9%
2016	1,087	62,618.09	1.34	132	5.4%	68,065,864.62	97,740,554.02	130,981,255.68	59,067,326.39	5,541,535.34	203,272.18	0.3%	64,548,823.71	257,306.77	54,943,260.82	1,795,928.41	3.3%
2017	2,036	93,838.93	1.36	139	5.4%	191,056,059.69	271,633,681.34	370,302,596.53	177,067,138.86	12,564,294.70	2,357,051.07	1.2%	174,600,565.32	700,045.64	135,869,631.33	6,750,035.98	5.0%
2018	3,383	100,674.68	1.36	124	6.1%	340,582,444.82	471,403,953.34	642,192,480.47	305,910,444.75	33,534,406.50	4,745,845.88	1.4%	350,666,989.25	1,397,436.51	251,173,901.67	15,735,352.66	6.3%
2019 - Jan	334	77,437.29	1.34	144	4.9%	25,864,055.52	36,176,265.15	48,385,444.62	313,546,855.41	1,864,994.92	335,018.71	1.3%	27,552,044.52	1,312,002.12	23,643,851.53	1,409,298.88	6.0%
2019 - Feb	293	96,440.57	1.30	120	5.2%	28,257,086.80	36,598,668.58	47,631,070.64	327,228,270.63	1,081,775.31	(93,232.22)	-0.3%	25,197,661.19	1,326,192.69	21,480,118.89	1,331,454.65	6.2%
2019 - Mar	403	70,812.97	1.31	108	5.9%	28,537,625.10	35,395,487.45	46,298,554.32	332,808,186.10	2,271,698.46	9,610.72	0.0%	29,145,670.64	1,387,889.08	24,841,630.20	1,233,001.38	5.0%
2019 - Apr	382	65,177.23	1.38	107	7.4%	24,897,703.18	54,790,870.81	75,593,816.52	342,465,691.48	991,621.12	154,659.34	0.6%	30,296,449.40	1,377,111.34	27,039,451.52	1,171,326.27	4.3%
2019 - May	358	84,598.29	1.31	105	6.2%	30,286,186.06	34,549,293.21	45,342,925.10	344,000,270.70	2,553,917.12	(14,262.84)	0.0%	31,515,625.52	1,432,528.43	28,004,677.68	1,273,984.50	4.5%
2019 - Jun	448	66,554.38	1.32	107	6.2%	29,816,360.59	50,272,532.63	66,205,402.20	350,253,767.37	1,585,887.15	26,413.85	0.1%	27,039,054.73	1,351,952.74	25,344,984.02	1,544,254.31	6.1%
2019 - Jul	414	78,423.95	1.32	104	6.4%	32,467,514.92	40,589,278.65	53,486,821.19	361,976,660.11	2,591,860.57	537,395.64	1.7%	30,292,477.42	1,376,930.79	28,290,298.08	1,239,976.80	4.4%
2019 - Aug	393	92,023.94	1.29	106	5.7%	36,165,409.59	86,508,636.22	111,391,920.86	382,030,257.80	9,033,837.09	718,053.01	2.0%	28,588,170.57	1,299,462.30	31,513,628.86	1,757,649.67	5.6%
2019 - Sep	457	107,197.00	1.34	108	6.5%	48,989,028.80	101,415,205.39	135,772,548.34	412,789,245.16	5,870,130.67	(1,946,110.49)	-4.0%	42,784,608.28	2,139,230.41	29,856,760.48	1,798,086.15	6.0%
2019 - Oct	497	80,794.42	1.33	101	6.8%	40,154,829.14	52,551,508.23	69,935,149.43	423,514,559.10	2,222,330.76	167,075.96	0.4%	40,807,674.25	1,854,894.28	35,711,367.09	1,813,977.58	5.1%
2019 - Nov	527	56,885.40	1.34	97	7.2%	29,978,607.59	63,668,091.09	85,000,457.22	432,400,304.26	5,223,938.48	1,015,324.01	3.4%	37,278,536.15	1,962,028.22	33,548,315.34	2,171,390.47	6.5%
2019 - Dec	585	69,540.66	1.32	95	7.1%	40,681,284.12	51,067,496.28	67,633,578.32	441,728,644.35	3,442,462.16	236,782.49	0.6%	42,717,695.90	2,034,176.00	37,092,755.53	2,154,560.69	5.8%
2020 - Jan	885	61,504.04	1.32	98	6.8%	54,431,075.98	62,940,210.05	83,016,014.59	470,676,683.52	2,113,642.73	(329,616.49)	-0.6%	40,179,540.45	1,913,311.45	35,696,117.94	2,236,913.14	6.3%
2020 - Feb	945	51,126.14	1.32	94	7.0%	48,314,206.31	71,565,901.30	94,198,717.52	486,804,522.38	2,520,421.33	34,942.92	0.1%	41,528,592.00	2,185,715.37	35,689,927.33	1,768,645.73	5.0%
2020 - Mar	476	60,799.24	1.31	93	6.9%	28,940,439.63	42,189,095.57	55,116,974.54	478,940,624.39	3,471,928.32	(275,770.90)	-1.0%	41,636,586.48	1,892,572.11	38,800,651.12	3,349,551.51	8.6%
2020 - Apr	92	122,080.11	1.34	88	8.0%	11,231,369.75	27,277,893.61	33,745,378.17	412,669,652.16	39,588,501.59	4,565,355.67	40.6%	29,155,289.98	1,325,240.45	25,509,683.25	2,037,300.66	8.0%
2020 - May	250	48,416.34	1.33	86	8.0%	12,104,083.89	17,495,968.95	22,802,422.29	400,221,204.89	2,203,312.74	614,491.01	5.1%	27,500,491.83	1,375,024.59	23,377,450.34	711,564.10	3.0%
2020 - June	407	59,781.39	1.32	92	7.2%	24,331,025.68	37,524,490.25	46,395,307.03	402,382,550.85	1,940,496.65	570,429.30	2.3%	29,420,598.68	1,337,299.94	25,978,802.62	1,838,687.42	7.1%
	16,692	**$73,765.78**	**1.33**	**107**	**6.5%**	**$1,231,298,329.52**	**$1,818,163,980.90**	**$2,431,947,195.85**		**$148,177,270.21**	**$14,285,811.51**	**1.2%**	**$1,257,834,762.35**		**$ 1,021,331,341.19**	**$57,691,265.91**	**5.6%**
										CBSG Funding Analysis 01/01/16 - 06/30/20[6.1]			**$1,192,453,146.27**		**$ 973,407,265.64**	**$55,122,940.96**	**5.7%**

[1] *Weighted average of factor rate in respective month based on total funding commitment per transaction.*
[2] *The proportionate monthly factor rate average in respective month based on AVG Funding divided by AVG Term.*
[3] *Reflects month end AR balance not including outstanding funding liabilties or defferal of revenue.*
[4] *Factoring Losses realized in respective month equal to total AR balance for transactions written off against Factoring Loss reserve.*
[5] *Cumulative exposure, as deteremined by funding amount minus collected payments, at the time that transactions were written off in the respective month to Factoring Losses.*

	Funding Count	AVG Funding	Factor Rate AVG	Avg Term	Monthly Factor %	Wire Total	Funded Total	New AR	AR Total	Factoring Losses	Funding Exposure	Exposure %	Total Deposits	Total ACH Payment	Returned ACH Total	Return %
CBSG Deposit Logs[7]					*[A]*						*[B]*	*[C=B/A]*		*[D]*	*[E]*	*[F=E/D]*
	Funding Tab									**Default Tab**			**Daily Tabs**			
	16,804	**Not Calculated**				**$1,231,279,739.93**	**$1,839,227,431.25**	**$2,453,300,627.35**		**$147,999,506.91**	**$14,051,810.75**	**1.1%**	**Not Available for 01/01/13 - 12/31/15[7.1]**		**Not Available**	
										CBSG Daily Deposit Logs 01/01/16 - 06/30/20[7.1]			**$1,134,548,589.45**	**$ 969,300,562.67**	**Not Available**	
QuickBooks Data[8]																
	Not Maintained in QuickBooks					**$1,181,262,221.58**	**Not Calculated**			**Not Calculated**	**$14,051,810.75**	**1.2%**	**$1,252,636,219.60**	**$ 1,021,816,470.00**	**$55,051,327.40**	**5.4%**
										QuickBooks data 01/01/16 - 06/30/20			**$1,191,302,390.82**	**$ 973,870,983.00**	**$52,665,151.18**	**5.4%**

BPB Footnotes:

6 - CBSG Funding Analysis KPI.June2020.pdf

6.1 - Daily deposit tabs do not start until January 1, 2016. BPB calculated the total deposits from these daily deposit logs in order to compare to the KPI

7 - Source: Deposit Log 0720 b CBSG-Receiver-000006048.xlsx. Deposit log is a contemporaneous document maintained by CBSG, on a daily basis and on an individual client/deal level infromation is added in the Funding and Default Tab

7.1 - Funding and Default tabs from Deposit Log information begins in January 2013 however the daily deposit tabs begin with the first full month of January 2016.

8 - Based on the QuickBook data received through and as of July 27, 2020, not yet reconciled by the Receiver.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al,

Defendants.
_____/

DEFENDANTS' EMERGENCY/EXPEDITED PRELIMINARY RESPONSE TO PLAINTIFF'S REQUEST FOR *EX PARTE* RELIEF

Pursuant to Local Rule 7.1 (d), Fed.R.Civ.P. 65(b)(1) and in accordance with *Granny Goose Foods, Inc. v. Brotherhood of Teamsters & Auto Truck Drivers*, 415 U.S. 423, 432-439 (1974), Defendants Complete Business Solutions Group, Inc., d/b/a Par Funding, Full Spectrum Processing, Inc., Lisa Mcelhone, Joseph Cole Barleta and Joseph W. LaForte, and relief defendant L.M.E. 2017 Family Trust, submit this emergency/expedited, preliminary response to Plaintiff's request for *ex parte* relief and state as follows:

On July 24, 2020, Plaintiff filed a Complaint for Injunctive and Other Relief with this Court. That pleading was initially published by the Courthouse News Service. Undersigned counsel learned of the filing of the Complaint and was able to obtain a copy before the file in this matter was sealed.

The Complaint reveals that, among other requested relief, Plaintiff is seeking the imposition of a temporary restraining order, an asset freeze of all of Defendants' assets, and the

imposition of a receiver over Defendants' entire business activities. ECF 1, at pp. 56-57. This relief is the most extraordinary relief that any litigant can seek to impose on an adversary and thus implicates the most fundamental aspects of Due Process.

Defendants do not dispute that Plaintiff is a Government agency, whose duty is to take action to protect interests that it believes are being harmed by the conduct of Defendants. Plaintiff will claim that is not a "typical litigant." But even a Government agency, whose duty it is to protect the public interest, is subject to the same rules and fundamental principles of Due Process that every other litigant must follow. Due Process requires that both sides of an adversary proceeding be heard before relief can be granted. And, when extraordinary relief is requested, those Due Process requirements are more heightened.

Recent cases from Florida District Courts have recognized the importance of conducting a hearing before extraordinary temporary relief can be granted. In *Cummings v. DeSantis*, Case No. 2:20-cv-351, 2020 WL 2512805 (M.D.Fl. May 15, 2020)(Denying Motion for *Ex Parte* Temporary Restraining Order), the Court explained:

> [Rule 65(b)(1) acknowledges] "that informal notice and a hastily arranged hearing are to be preferred to no notice or hearing at all." *Granny Goose Foods, Inc. v. Bhd. Of Teamsters and Auto Truck Drivers Local No. 70 of Alameda Cty*, 415 U.S. 423, 432 n.7 (1974). The Supreme Court has further recognized "a place in our jurisprudence for ex parte issuance, without notice, of temporary restraining orders of short duration" but not "where no showing is made that it is impossible to serve or to notify the opposing parties and to give them an opportunity to participate." *Carroll v. President and Com'rs of Princess Ann*, 393 U.S. 175, 180 (1968). And ex parte TROs "should be restricted to serving the underlying purpose of preserving the status quo and preventing irreparable harm just so long as is necessary to hold a hearing, and no longer." *Granny Goose Foods, Inc. v. Bhd. Of Teamsters and Auto Truck Drivers Local No. 70 of Alameda Cty*, 415 U.S. 423, 439 (1974).

See also Dragados USA, Inc. v. Oldcastle Infrastucture, Inc., Case No. 20-cv-20601,2020 WL 733037 (S.D.Fl. Feb. 13, 2020)(Denying Plaintiff's request for *ex parte* temporary restraining order, relying on *Granny Goose Foods, Inc.*).

The extraordinary relief requested by Plaintiff would be far from preserving the status quo and would not be limited in its scope. Instead, Plaintiff seeks to impose a receiver to take control of a legitimate, operating business and to freeze all of the assets of the Defendants before they can even be heard in response to this request. Undersigned counsel is well aware of cases in this District, involving illegitimate businesses, or Ponzi schemes, where this Court has found it necessary to impose drastic and extraordinary relief in an *ex parte* manner. This is not such a case. Plaintiff is well aware that the Defendants have successfully defended their legitimate business in various courts throughout the United States and before the very state regulators that Plaintiff refers to in an effort to paint the Defendants as miscreants, in order to justify the imposition of extraordinary and destructive "temporary" relief.

It is fortuitous that the Complaint was initially published before it was sealed. Otherwise, Plaintiff would have likely accomplished its stealth imposition of so-called "temporary" relief, that would have led to the unnecessary destruction of a legitimate business. But, the fact is that the Complaint was published and the Defendants are working to respond to the allegations in the Complaint. Undersigned counsel is prepared to appear before this Court to respond to Plaintiff's request for temporary relief as soon as the Court requires our appearance.

Moreover, upon learning of this action, undersigned counsel contacted Plaintiff's counsel, offering to discuss the requested relief so that the interests Plaintiff seeks to protect can be accommodated without unnecessarily destroying a legitimate business. A copy of undersigned counsel's letter to Plaintiff's counsel is attached as Exhibit "A" to this response.[1]

[1] Undersigned counsel has requested that Plaintiff provide us with a copy of all filings that they made in support of their request for temporary relief so that we can prepare a written response to that request and so that we can be more fully prepared for any hearing that this Court would

Pursuant to Local Rule 7.1(d), Defendants have titled this response as an emergency/ expedited response. Although Plaintiff's motion for temporary relief has been sealed, undersigned counsel's experience is that Plaintiff has moved for temporary relief on an emergency *ex parte* basis. Defendants, by titling this response as an emergency/expedited response, seek to have this Court treat this preliminary response with as much urgency as the Court is treating Plaintiff's request for *ex parte* temporary relief.

WHEREFORE, Defendants respectfully request that their Due Process rights to be heard be enforced, that any request by Plaintiff for *ex parte* relief pursuant to Rule 65(b)(1) be denied and that the Court schedule a hearing where Defendants can be heard in response to Plaintiff's request.

Respectfully submitted,

FOX ROTHSCHILD LLP
Attorneys for Complete Business Solutions Group, Inc., d/b/a Par Funding, Full Spectrum Processing, Inc., Lisa Mcelhone, Joseph Cole Barleta and Joseph W. LaForte, and relief defendant L.M.E. 2017 Family Trust
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schedule. If Plaintiff refuses to provide those documents, we will file a motion requesting that the Court order Plaintiff to immediately provide us with those supporting documents.

CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2020, I electronically filed the foregoing with the Clerk of the Court using CM/ECF.

s/Joseph A. DeMaria
Joseph A. DeMaria

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al,

Defendants.
_____/

DEFENDANTS' RESPONSE TO PLAINTIFF'S *EX-PARTE* MOTIONS FOR APPOINTMENT OF A RECEIVER AND FOR AN ASSET FREEZE

Defendants, Complete Business Solutions Group, Inc. d/b/a Par Funding, Full Spectrum Processing, Inc., Lisa Mcelhone, Joseph Cole Barleta and Joseph W. LaForte, and Relief Defendant, L.M.E 2017 Family Trust (together, the "Defendants"), submit this Response to the Securities and Exchange Commission's *Ex-Parte* Motions for the Appointment of a Receiver and for an Asset Freeze of the Defendants, and state as follows:

Introduction

As the Court is well aware, this is a fast-moving case with a unique procedural posture. On July 24, 2020, the Securities and Exchange Commission (the "Commission") filed a Complaint for Injunctive and Other Relief (the "Complaint") against the Defendants and other named defendants. ECF No. 1. The Commission alleges that Defendants are engaged in a business of

making "opportunistic" loans to small business owners across America and that they have funded these loans through a "web of unregistered, fraudulent securities offerings." ECF No. 1 at ¶ 1.

Based on these serious allegations (which the Defendants vigorously dispute), the Commission contended that this Court should impose a temporary restraining order, including the extraordinary relief of appointing a receiver over the Defendants' complete business operations, and a freeze of the Defendants' assets, all on an *ex parte* basis. (The "TRO Motion")

To be clear, for purposes of this Response, Defendants do to contest the SEC's request for the imposition of a TRO that temporarily restrains Defendants from engaging in activities that would constitute a violation of the federal securities laws.[1] Defendants also do not oppose the portion of the TRO that requires Sworn Accountings. *Id.* at Section IV, p. 18, and Records Preservation, *Id.* at Section V, p. 19. With respect to Expedited Discovery, *Id.*, at Section VI, p. 19, Defendants request that such discovery be deferred until after the preliminary injunction hearing so that undersigned counsel can focus their efforts on protecting the Due Process rights at that hearing that they have not been able to protect at this "temporary" stage of the proceedings. Further, if the SEC contends a right to expedited discovery, Defendants should have the equal right to take depositions of the SEC and non-parties on two days' notice. Defendants should have a meaningful right to defend this action once the one-sided nature of the SEC's *ex parte* practice ends with the resolution of the TRO Motion.

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[1] The SEC submitted a proposed TRO to the Court that commences those prohibitions, at Section II, pages 4-11, that Defendants do not contest at this time. Defendants will contest, at the preliminary injunction hearing, the allegation that Notes that are the subject of the SEC's enforcement action are "securities." *See Reves v. Ernst & Young*, 494 U.S. 56 (1990) ("[r]ecognizing that not all notes are securities").

On July 27, 2020, the parties appeared at a telephone status conference before this Court, at which time the Court ordered that Defendants would be allowed to file a response to the SEC's TRO Motion. As undersigned counsel began to review the SEC's TRO Motion and proposed orders granting extraordinary relief, it was apparent that the SEC was proposing anything but temporary relief. Instead, the SEC was proposing the imposition of a broad receivership, to take total control of Defendants' businesses. The SEC was also proposing a total freeze of Defendants assets.

At the July 27 status conference, undersigned counsel expressed our concern that the so-called "temporary" relief that the SEC sought to impose through an all-encompassing receivership and total asset freeze is anything but temporary and is unnecessarily destructive of Defendant's legitimate businesses and their personal rights. Such action will lead to the liquidation of Defendants' legitimate businesses. SEC counsel's response was that the SEC does not use its enforcement powers to liquidate legitimate companies.[2] Nothing could be further from the truth.

The SEC's own Investor Bulletin explains to investors that "Courts typically grant broad powers to receivers, including the authority to sue on behalf of the receivership and to gather, manage and liquidate receivership assets on behalf of potential creditors and harmed investors."[3]

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[2] SEC counsel referred to the *Mutual Benefits Corp.* enforcement action that has been pending in this District for 16 years, as reflecting that the SEC does not liquidate companies. The SEC's own press release at the commencement of that proceeding on May 6, 2004, reflected that the SEC complaint was filed simultaneously with the State of Florida, Department of Financial Services, Office of Insurance Regulation's filing of an emergency cease-and-desist order suspending that business's license. *See* https://www.sec.gov/litigation/litreleases/lr18698.htm. The past 16 years have been a liquidation proceeding.

[3] *See* https://www. Investor.gov/introduction-investing/general-resources/news-alerts/alerts-bulletins/investor-bulletins-87, at Section 3.

The proposed receivership order submitted by the SEC, sealed ECF 4-2, can only be viewed as order that would provide total control to the SEC in liquidating Defendants' operating businesses. The proposed order even contained provisions that would restrict investors from pursuing collection of the very security interests that they were provided with the notes that are the subject of this litigation.

The "*imposition of a receivership on a corporation is a drastic measure, the detrimental business effects of which should be carefully considered*." *SEC v. Spence & Green Chem. Co.*, 612 F.2d 896, 904 (5th Cir. 1980) (emphasis added). Courts in this District and elsewhere, have limited the powers of a receiver at the commencement of a case. Whether called a limited receiver, or a monitor, courts have not allowed the type of expansive, liquidation based receivership outside of the context of a Ponzi scheme or a case of a failed business. *See e.g., In re The Reserve Fund Sec. & Derivative Litig.*, 673 F. Supp. 2d 182, 207 (S.D.N.Y. 2009) (appointing a Monitor to oversee defendants' operations and protect the interests of investors."); *Republic of Philippines v. New York Land Co.*, 852 F.2d 33, 35 (2d Cir. 1988) (affirming the district court's appointment of a monitor after the court found that a receiver was not appropriate and should only be appointed "in the case of clear necessity.").

In *SEC v. Koenig*, 1972 WL 329, at *1 (S.D.N.Y. June 20, 1972), *aff'd sub nom.*, 469 F.2d 198 (2d Cir. 1972), the Commission requested the Court to impose a receiver "to take all necessary actions to protect the interests of Ecological Science Corporation," based on allegations that the defendants were engaged in, or about to engage in, acts and practices constituting violations of Sections 10(b) and 13(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78u(e)m and 78u(f). After the court conducted a hearing and gave the parties an opportunity to be heard, the court

determined a Receiver with *"limited powers"* should be appointed to "preserve the status quo while an accurate picture of what transpired is obtained." *Id.* at *8-9 (emphasis added). On appeal, the Second Circuit Court of Appeals upheld the appointment of a limited receiver with powers tailored to the facts of the case. *Koenig*, 469 F.2d at 202.

In *Hofmann v. EMI Resorts, Inc.*, Nos. 1:09-cv-20526-ASG & 1:09-cv-20657-ASG (S.D. Fla. July 17 2009), this Court authorized the appointment of a Special Master (rather than a Receiver) to "MONITOR over the Elliott Defendants and their financial business affairs." *Id.* at *2 (providing the Monitor with the exclusive power, duty and authority to "examine, review and monitor the business affairs, funds, assets and take necessary action to negotiate (along with defendants) with creditors concerning the preservation or refinance of such assets). The Eleventh Circuit upheld that order on appeal. *Hofmann v. De Marchena Kaluche & Asociados*, 657 F.3d 1184, 1186 (11th Cir. 2011); *see also SEC v. New Day Atlanta, LLC*, 2010 WL 11440935, at *2 (N.D. Ga. May 3, 2010) (appointing an independent Monitor with powers to protect the interests of all persons who have invested in, purchased securities from, and/or loaned moneys to the investors); *CFTC v. Worth Group, Inc.*, No. 13-cv-80796 (S.D. Fla. Jan. 23, 2014) (appointing an independent corporate Monitor with the ability to, *inter alia*, monitor expenditures and perform an assessment of defendants' current procedures); *SEC v. Bivona*, 2016 WL 9021535 (N.D. Cal. Mar. 25, 2016) (appointing an independent Monitor and providing the monitor with, *inter alia*, complete access to the books and records, principals, officers, employees, and agents of defendant as well as the ability to review and monitor all proposed transfers of money or assets).

The courts have warned the SEC against the type of overreaching proposed by the SEC in this case. *See SEC v. American Bd. Of Trade, Inc.*, 830 F.2d 431, 436 (2d Cir. 1987)("we have

warned that 'the appointment of trustees [or receivers] should not follow requests by the SEC as a matter of course." "We are, however, disturbed by the subsequent use of the receivership to effect the liquidation of the ABT entities." "We have in the past criticized the use of receivers to effect the liquidation of a defendant firm in litigation under the Securities Act or the Securities Exchange Act.")

The SEC proposed Ryan K. Stumphauzer, Esq. to be the receiver. Defendants have no objection to the selection of Mr. Stumphauzer to have a role as a neutral party in this case. On July 27, 2020, the Court entered an Order appointing Mr. Stumphauzer as receiver. *See* sealed D.E. 36. That order, while selecting Mr. Stumphaizer to serve, did not at that time authorize him to take any formal action as the receiver. Instead, the Court provided that "If the Court grants Plaintiff's Emergency *Ex Parte* Motion for Temporary Restraining Order and Other Relief," the Receiver will have a list of obligations and duties set out in that Order. As the Defendants understood and accept the provisions of that Order, which will provide the receiver with a fulsome and meaningful oversight function, while permitting Defendants' businesses to continue to operate, undersigned counsel immediately reached out to the SEC and to Mr. Stumphauzer to begin a dialogue on how the receiver could fulfill the role set out in that Order.

Most importantly, the Order appropriately did not contain the liquidation provisions in the SEC's proposed TRO order. If the SEC requests an expansion of the terms of that Order, Defendants will refute, with evidence, any allegation that would support the type of receivership proposed by the SEC in this case. But, if the SEC accepts the Order, and allows the Defendants to operate their businesses without inappropriate restrictions, then the Parties can move on to the remaining issue in the TRO Motion – the requested asset freeze.

The SEC Has Not Met Their Burden for the Imposition of an Asset Freeze in the TRO

The SEC submitted a proposed TRO that includes a total asset freeze of these Defendants and others. *Is.*, at Section III, pps. 11-13 and 16-18. Defendants submit that the SEC has not met the heightened requirements to be able to impose a total asset freeze on their TRO motion. Further, the SEC has blatantly ignored recent Supreme Court law that limits the disgorgement that they may seek in this case, and thus limits the asset freeze that is predicated on that claim of disgorgement. Section III should be omitted from the TRO and the issue of an asset freeze should be further and more fully addressed at the preliminary injunction hearing.

With respect to the Commission's request for an asset freeze, courts are permitted to freeze assets pending trial "as a means to preserv[e] funds for the equitable remedy of disgorgement." *SEC v. ETS Payphones, Inc.*, 408 F.3d 727, 734 (11th Cir. 2005). The Commission must prove a reasonable estimate of defendants' ill-gotten gains. *Id.* at 735. When a Court is asked to consider the imposition of an asset freeze over a defendant's assets, each defendant must be considered individually.

The Commission's Complaint alleges that a half billion dollars has been raised over a period of 8 years. ECF No. 1 at ¶ 1. Later, the Commission alleges that as of December 2017, Par Funding raised $97 million through promissory notes. *Id.* at ¶ 61. Then, the Commission alleges that one of the co-Defendants raised $22,309,000 and $6,332,500 since 2018. *Id.* at ¶ 107. Further, the Commission alleges that another co-Defendant raised $5,838,000 since 2018. *Id.* at ¶ 114. Additionally, it is alleged that a separate co-defendant raised $5.5 million since 2018. *Id.* at ¶ 123. In its remedies section, *Id.* at pg. 56, the Commission then lumps all the defendants together in the request for an asset freeze irrespective of the allegations or claims.

The SEC's request for a TRO including an asset freeze is set forth at pages 68 -71 of its TRO Motion. After stating general propositions of law, the SEC requests that Par Funding, Ms. McElhone and Mr. La Forte be jointly and severally ordered to disgorge $492,398,894; that Full Spectrum be ordered to disgorge $4,398,535,; that Mr. Cole be ordered to disgorge $165,159,000; and that Relief Defendant L.M.E. 2017 Family Trust be ordered to disgorge $14.3 million. The sole support for this claim of disgorgement, and the asset freeze that must be based on this claim of disgorgement, is that this is "the amount raised from investors from July 2015 through the most recent bank statements available to us." *See* p. 69, note 405. The sole basis to support the amounts set forth by the SEC is a summary Exhibit 13 submitted by a forensic accountant who reviewed bank records.

While the forensic accountant's summary of bank records is a proper "first' step in conducting a disgorgement analysis, what is truly remarkable is that the SEC ignores the Supreme Court's dictates of what they must prove as the additional steps if they seek the equitable remedy of disgorgement, and in this case, an asset freeze to protect a future disgorgement award. The Commission's practice of making broad claims of disgorgement, in support of broad and total asset freezes against all defendants, is contrary to the Supreme Court's recent decision in *Liu v. SEC*, _ U.S. _, 140 S. Ct. 1936 (2020).

Liu addressed a challenge to the Commission's right to employ the equitable remedy of disgorgement. Without the right to seek disgorgement, the Commission would not have a concomitant right to freeze a defendant's assets at a provisional remedy at the outset of a case. The Supreme Court upheld the Commission's power to seek disgorgement. *Id.* at 1940. However,

it imposed significant restrictions on that practice. *Id.* Those restrictions are highly relevant to the temporary relief sought by the Commission in this case.

In *Liu*, the primary challenge to the Commission was that it did not have the right to seek disgorgement at all. *Id.* But, appellants also contended that the Commission's practice of disgorgement was unlawful because it failed to return disgorged funds to investors, improperly imposed disgorgement on a basis of joint and several liability, and failed to deduct business expenses from the award. *Id.* at 1947. While the Supreme Court declined to resolve those issues, it provided guidance to the lower courts. *Id.* at 1947-48

With respect to the first issue, while this case is not at a stage where Defendants have been found liable or a disgorgement award has been entered, the issue of returning funds to investors is relevant to the issue of whether investors are seeking a return of their investment. Defendants will present to the Court evidence regarding the March 2020 Exchange Offer, including investors who knowingly and voluntarily chose not to redeem their notes and who knowingly and voluntarily chose to continue their business with these Defendants. While the Commission acts of behalf of investors in enforcement proceedings, it cannot ignore the goals and desires of investors.

With respect to the second issue, while Ms. McElhone and Mr. LaForte do not contest the fact that as a married couple, they should be considered as one family unit, any other aspect of joint and several liability between and among the named Defendants in this case would be improper. *See Liu,* 140 S. Ct. at 1949. Thus, in seeking an asset freeze that seeks to protect a disgorgement award, each defendant must be considered on an individual basis, and only as to individual amounts of so-called ill gotten gains.

The deduction for business expenses becomes one of the most significant issues in considering an operating business, such as Complete Business Solutions Group, Inc. and Full Spectrum Processing, Inc. As the Supreme Court held, both receipts and payments must be taken into account. *Id.* at 1950. The SEC totally ignored this requirement. They simply totaled all the money raised by investors, and then traced that money to different sources. But, the Supreme Court flatly rejected that approach to determining disgorgement. Defendants will present evidence at the August 4 hearing related to appropriate business expenses and other deductions that must be considered before any asset freeze can be imposed to protect an eventual disgorgement order.

Furthermore, this stage of the proceeding is not an appropriate time to resolve these evidentiary issues. While the SEC is correct that the Court can properly enter a TRO that enjoins the Defendants from violating the securities laws based solely on a *prima facie* submission, the imposition of an asset freeze requires a heightened evidentiary basis. In *Winter v Natural Resources Defense Council, Inc.*, 555 U.S. 7 (2008), the Supreme Court set out a heightened standard for a finding a likelihood of suffering irreparable injury before injunctive relief can be granted. That heightened standard has been applied to the SEC when it seeks an asset freeze. *See SEC v Schooler*, 902 F.Supp.2d 1341, 1359-1361 (S.D. Cal. 2012)(applying *Winter* and rejecting the SEC's arguments for an asset freeze.)

Applying these legal principles, the appropriate remedy is one that is sufficient to protect the Commission's legitimate interest, while affording the Defendants their Due Process rights, including the right to adequately defend this case, and while preventing the destruction of a viable and lawful business. The Court has already set forth an appropriate protection in its July 27 Order appointing Mr. Stumphauzer. Paragraph 4 of that Order authorizes the Receiver to take any other

action as necessary and appropriate … to prevent the dissipation or concealment of … the Receivership Entities' property interests. Undersigned counsel has reached out to Mr. Stumphauzer and is confident that Defendants can agree to a set of protocols that will protect the interests of all involved in this litigation. Nothing more is needed and nothing more should be ordered.

Respectfully submitted,

FOX ROTHSCHILD LLP
Attorneys for Complete Business Solutions Group, Inc. d/b/a Par Funding, Full Spectrum Processing, Inc., Lisa Mcelhone, Joseph Cole Barleta and Joseph W. LaForte and Relief Defendant, L.M.E 2017 Family Trust

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CERTIFICATE OF SERVICE

I hereby certify that on July 28, 2020, I electronically filed the foregoing with the Clerk of the Court using CM/ECF.

/s/Joseph A. DeMaria
Joseph A. DeMaria

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al,

Defendants.

DEFENDANTS' JOINT MEMORANDUM TO THE COURT REGARDING THE SCOPE OF THE RECEIVER'S ACTIVITIES PURSUANT TO THE CURRENT TRO

Defendants Complete Business Solutions Group, Inc. d/b/a Par Funding, Full Spectrum Processing, Inc., Lisa McElhone, Joseph Cole Barleta and Joseph W. LaForte, and Relief Defendant L.M.E 2017 Family Trust, respectfully submit this Joint Memorandum in advance of the August 4, 2020, 3:30 pm conference on the scope of the Receiver's activities under the TRO.[1]

Procedural History

On July 24, 2020, the SEC sought an *ex parte* Order appointing a Receiver claiming that, "for the protection of the investors," the Receiver needed to be vested with "full and exclusive power, duty, and authority to: administer and manage their business affairs, funds, assets, causes of action and any other property of the Companies; marshal and safeguard all of the assets of the

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[1] The Court permitted each party to file a 10-page Memorandum. Rather than burden the Court with multiple filings, we have filed herein a single joint Memorandum of 15 pages.

Companies…" SEC's Motion for the Appointment of a Receiver dated July 24, 2020 (Dkt. No. 4). The Commission proposed an extraordinarily broad order (*see* sealed ECF 4-2), which sought to provide the receiver with all of the "powers, authorities, rights and privileges heretofore possessed by the officers, directors, managers, and general and limited partners of the entity Receivership Entities under applicable state and federal law, by the governing charters, by-laws, articles and/or agreements in addition to all powers and authority of a receiver at equity, and all powers conferred upon a receiver by the provisions of 28 U.S.C. §§ 754, 959 and 1962 and Fed.R.Civ.P. 66." *Id.* at ¶1. The SEC's proposed order would have led to the immediate dismissal of the "trustees, directors, officers, managers, employees, investment advisors, accountants, attorneys and other agents of the Receivership Entities." *Id.* at ¶2. And it would have empowered the receiver to transfer all bank accounts to the receiver's control and, remarkably, to "transfer, compromise, or otherwise dispose of any Receivership Property," ***without further Order of this Court***. *Id.* at ¶¶ 30-34. (Emphasis added).

Defendants did not object to Mr. Stumphauzer to be a neutral party in this case. However, Defendants strenuously objected to the imposition of a receiver that would liquidate and destroy these legitimate businesses and cause unnecessary harm to the very investors that the Commission is charged with protecting. *See* Defendants' July 28 Response, ECF 43, at pages 3-6, citing law limiting the scope of a Receivership Order to prevent the unnecessary liquidation of legitimate businesses. *See also Tucker v Baker*, 214 F.2d 627, 631 (5th Cir. 1954) ("[a] receivership is only a means to reach some legitimate end sought through the exercise of the power of the court of equity; it is not an end in itself."); *In re Wiand*, Case No. 8:10-CV-71-T-17MAP, et al, 2011 WL

4530203 at *7 (M.D. Fl. Sept. 29, 2011)(Receivership proceeding arising out of SEC enforcement action, citing *Tucker*)

On July 27, 2020, the Court entered an Order appointing a Receiver. The Court specifically did not confer the overbroad and sweeping powers sought by the Commission. Instead, the Court provided the Receiver with measured powers to monitor the affairs of these legitimate businesses, without empowering him to immediately displace management and, effectively, liquidate the company. *Id.* at p. 3-4. However, since that Order and as described below, the SEC is effectively causing the demise of an otherwise thriving business, violating its fundamental obligation to "First, do no harm." *See* Comments on Proposed Rule (SEC Release No. IA-1812; File No. S7-19-99, Oct. 28, 1999), 1999 WL 33949884. Without a significant and immediate course correction by this Court, the SEC – not the Defendants – will cause enormous losses to large and small investors as well as hundreds of small businesses across the country.

POINT ONE

Since its Founding, CBSG has Consistently Utilized Excellent Counsel to Identify and Address Compliance Issues

We respectfully suggest that this Court may find relevant that CBSG has always strived for compliance and utilized excellent counsel. In 2014, the law firm Offit Kurman produced CBSG initial promissory note/security agreement (hereinafter "Note" or "Notes") for use in raising capital through third party creditors in the form of debt. The instrument typically provided for monthly interest and principal payments over 12 to 24 months. The notes ranged between $50K - $500K in principal, with some creditors purchasing multiple concurrent notes. Importantly, Offit Kurman issued an opinion letter, dated April 25, 2014, on the legality of the funding business under Pennsylvania law and the purchase and sale of future receivables agreement.

In July 2016, an expert business and securities lawyer at DLA Piper reviewed and edited the Notes. DLA Piper added the language that, "This note has not been registered under the securities act of 1933..." making clear to creditors that the notes were debt instruments and not securities. Impressively, interest rates paid to investors averaged 25% annually.

In December 2017, CBSG retained noted securities regulation expert, Philip Rutledge. Mr. Rutledge has a national reputation in securities regulation and was instrumental in shaping various provisions of significant US financial services legislation, including the Securities Markets Improvement Act of 1996, the *Gramm-Leach-Bliley Financial Modernization Act of 1999*, the *Sarbanes-Oxley Act of 2002*, and the *Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010*. While in government, Mr. Rutledge served as an expert witness on behalf of the Pennsylvania Office of the Attorney General in civil securities litigation and has testified as a securities expert before the United States Senate Permanent Subcommittee on Investigations. Mr. Rutledge was empowered to make any changes in CBSG's business structure in order to address any regulatory concerns. For example, to improve CBSG's compliance, Mr. Rutledge introduced a note purchase agreement and began changing the business structure so that CBSG would not be involved with soliciting and raising capital from creditors. He also registered CBSG in Pennsylvania under SEC 503b for its non-principal debt instruments. In January 2019, CBSG counsel reviewed and filed all state registrations needed for CBSG's current creditors. [2]

[2] Throughout the course of CBSG's ongoing business operations, CBSG retained and worked with nationally known accounting firms such as Clifton Larson Allen, Friedman LLP and Rod Erml Associates to undertake comprehensive reviews and audits of the financial aspects and structure of CBSG's business. In doing so, these respected accounting firms undertook detailed review and analysis of the financials, client receivables and structure of investor notes. This additional detail

In February 2020, CBSG engaged Fox Rothschild LLP to take over the function of serving as primary counsel to assist the company in dealing with litigation concerning defaults by merchants, which included handling existing and new litigation in Philadelphia (as all of the CBSG agreements have Philadelphia venue provisions). Fox Rothschild also was engaged to defend against litigation (albeit meritless) brought by a select group of merchants that instituted litigation by and through one Philadelphia law firm that engaged in a pattern of abusive and aggressive litigation surrounding the merchant defaults.

In early March, Haynes Boone, and key lawyers from that firm with substantial SEC and regulatory experience, were engaged to review and defend against issues raised by the Texas Securities Commission.

In March 2020, at the outset of the COVID-19 pandemic, as experienced by nearly every business in America at the time, issues arose with increased merchant defaults caused by government shut-down orders. As a result of these issues, CBSG sought to engage in a note restructure to address the business-related issues caused by COVID – with the purpose of protecting the investors and the businesses. In doing so, CBSG retained Phil Ruttledge to again review the notes outstanding with investors and to create a comprehensive Exchange Offer that sought to recapitalize the existing debt. In doing so, a formal Exchange Offer was created and sent to all existing investors. (An example of the Exchange offer is annexed hereto as Exhibit 1) This Offer included the issuance of new notes (but did not include any new debt raises as no new debt

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will be provided to the Court as part of the comprehensive brief to be submitted in the coming days.

capital had brought into the business since late January or early February). As part of the Exchange Offer, CBSG provided substantial and significant disclosures regarding the various regulatory actions that had occurred in Pennsylvania, New Jersey and Texas, along with significant disclosures concerning litigation, UCC liens, potential new note offerings, risks associated with the MCA business and other key points. Moreover, as part of the Exchange Offer, Phil Ruttledge filed public disclosure documents with the SEC and various state law blue sky filings.

On the afternoon of July 28, the SEC advised that Mr. Stumphauzer would cause the immediate dismissal of all the employees of the businesses and that no employees of the business would be permitted to enter the premises – leading to over 100 employees being barred from the business premises for the last week despite the fact that thousands of merchants around the country rely on ongoing communication with CBSG to ensure the ongoing viability of their business operations. The SEC further advised that Fox Rothschild would be terminated from representing Defendants' businesses in ongoing litigation and collection work which, in fact, is a part of the process of providing funds for the repayment of the investors. In that regard, the SEC filed another "Urgent" motion regarding the collection litigation and settlements that are a normal aspect of this business. The SEC directed the Receiver to change the locks on the businesses and bar employees from working, along with barring any employees from having any access to CBSG systems, when it is clear that the Receiver has no idea (and could have no idea) how to manage this complex operation. On behalf of CBSG, Fox Rothschild has been attempting to provide information and access to key employees to implore the receiver to take immediate action to begin doing daily ACH draws (which brings in nearly $2 million per day), allow employees access to systems to work with merchants and to continue servicing existing contractual terms on merchant deals and

to work to keep the nearly $500,000,000 of outstanding merchant agreements performing so that the debt to investors can be repaid. To date, not a dollar has been taken in by the Receiver to pay investors, and they have not been paid. The Receiver's and SEC's actions are ruining a business with excellent fundamentals and a strong financial base and essentially putting it into an ineffective liquidation causing huge financial losses. In taking this course of action against a fully operational business, the key fact that has been lost by the SEC, is that their actions are going to unilaterally lead to massive investor defaults. That cannot be the outcome that this Court sought when it appointed a limited receiver based on the *ex-parte* submissions of the SEC.

POINT TWO

The Business of CBSG is Strong and Supported by Large, Sophisticated Investors

Begun in 2012, the business of CBSG and its related business has grown into 150 employees and attracts large, sophisticated investors. CBSG employs 15 accountants, outside auditors and excellent counsel to guide its affairs and ensure compliance. The business model is easy enough to describe, but its operations are extremely complex and require teams of people expert in the particular financial calculations at the heart of the business. In essence, CBSG has two related businesses. On one side is its merchant funding business. CBSG funds merchants and receives a portion of the merchants' receivables. Picking the right merchants by analyzing the creditworthiness and history of the merchant, and gauging the proper terms of the funding, are crucial to the success of this business. Contrary to the suggestion in the SEC's Complaint, this is a perfectly lawful practice as courts have found throughout the country.

An important part of the business is collections. Merchants sometimes do not pay or get into arrears. Lawyers bring actions or reach settlements. There are currently about 1,000 such

collection actions across the country, being handled by Fox Rothschild and other excellent counsel around the country. This is typical for the business.

On the other side of the business is the receipt of investor funds which are used to make the merchant advances. Investors receive Notes reflecting their investment and which provide for a rate of interest on the principle. Although the SEC has attached to its Complaint previously utilized Notes – all drafted by esteemed counsel such as DLA Piper – the Exchange Offer used since March 2020 by a vast majority of the investors are excellent with fulsome disclosures that were understood and agreed to by the existing note holders.

Since CBSG began receiving investor funds in 2012, it has never missed a payment to an investor, but for the short Covid-19-related moratorium in April 2020. And, it has paid interest averaging 15-20% per annum to investors. Because of this, and because of the extraordinarily sophisticated financial models and calculations used to run the business, it has attracted large, sophisticated investors. For example, two brothers conducted a thorough due diligence and invested $40 million. Similarly, another very sophisticated investor conducted a comprehensive due diligence and invested $60 million. And an attorney for a fund invested approximately $10 million into CBSG. In filings we will make this Friday, or whenever our principle opposition filings are due, this Court will see that these investors beseech this Court to permit CBSG to continue in business and squarely refute claims made by the SEC in this action. As one investor writes:

> The Commission has not spoken to me, or anyone at my fund, regarding their current actions, despite their claims of trying to protect us. I am entirely against liquidation or closure of Par as it will not only hurt myself, but also hundreds of investors. In fact, if liquidation were to occur, it is highly likely that many of my investors who are senior citizens would lose much of their life savings and homes.

And that is just one investor fund. The SEC's slow liquidation here will unquestionably wreak financial devastation upon countless innocent investors - in the midst of a pandemic.

POINT THREE

Since its Founding in 2012, and Until the SEC Action and the Involvement of the Receiver, Investors have Made Very Healthy Interest and there Are No Investor Losses. In Just Seven Days, However, the SEC and the Receiver Have Converted their Restraint of this Company into a Slow and Ineffective Liquidation which will Cause Investors and Merchants to Lose Their Money

Since its founding in 2012, and until the SEC's action here and the involvement of the Receiver, CBSG has never missed a payment to investors a pre-Covid-19 and investors have made very healthy interest. Pre and Post-Covid 19, there is zero default on principal payments to an investor. Pre and Post-Covid 19, there is zero default on interest to an investor, although Notes were renegotiated in March 2020 to a lower interest rate due to Covid-19's effect on the economy (after years of 15-20% returns). CBSG has never missed a redemption to an investor.

And the merchant default rates are excellent. Put simply, the merchant cash over cash default exposure is 1.2%. That means that of all merchants receiving $100 in cash from CBSG, only $1.20 (1.2%) is defaulted on. Outside audits to GAAP were performed by Clifton Larson Allen, Friedman LLP and others in 2017, 2018 and 2019 and the most recent audit finished just days ago in July 2020.

Current financials are strong and can survive Covid – until the SEC started its liquidation. At the close of the business day on Tuesday, July 28, 2020, the balance sheet for CBSG - prior to the Receiver taking over - reflected the following:

1. Bank balance – cash on hand was $18 million.

2. Fixed receivables from the merchants for whom CBSG enters into factoring agreements was $413 million.

The company's monthly cash flow from client deposits is approximately $30 million. From this amount, the company sustains its monthly operating costs of $5 million which includes salaries, office rent and other monthly business expenses. Two million is earmarked for interest paid to creditors. With the balance of retained earnings of approximately $25 million, the company funds new factoring agreements after a thorough review of the merchant's businesses. Many of the businesses which enter into factoring agreements with the company include seasonable businesses such as landscaping and certain retail businesses which add new employees during summer or winter months. The company uses best business practices and has a full-time compliance officer on staff. In order to sustain this business, it is imperative that daily active management of its portfolio is maintained to ensure that client payments are consistently received via ACH payments.

The strength of the company portfolio and its growth over the last year is detailed on the Financial Summary attached. The Net Equity line under liabilities shows strong, consistent growth with use of retained earnings. The company went from approximately $85M at the beginning of 2019 to $104M in retained earnings before the Covid-19 crisis reduced a significant amount of the account receivable portfolio due to bad debt. Even then, however, through prudent management, CBSG was able to rebuild its portfolio to a secure a profitable position even after the height of the Covid-19 pandemic. As of July 2020, CBSG was communicating frequently with merchants to renegotiate terms due to Covid-19 interruption of their businesses and income.

In February 2020, CBSG made a decision not to raise any new capital since they anticipated Covid-19 related business closures. CBSG has renegotiated with its creditors as well since the Covid crisis. Prior to the pandemic, creditors were receiving interest rates of approximately 15%. Since Covid-19, rates were reduced to 5% across the board to account for reduced receipt of merchant payments. Indeed, CBSG paid $18M in interest, including through the Covid moratorium from March through May 2020 and, but for the SEC's action, expects to pay approximately $46M in total interest for the year under the restructured notes. Through careful, diligent management, CBSG was able to regrow its equity position during the past two months.

However, once the Receiver, at the direction of the SEC, took over and locked out the employees, the day to day management of the business could not be maintained. Although, through careful stewardship, CBSG was able to navigate the storm of Covid-19, the SEC's actions with the Receiver are cratering the business. To make it absolutely crystal clear, the financial data shows that, for one week that the Receiver has been in place, July 29, 2020 through August 4, 2020, the total loss in ACH payments is approximately $6,592,991.59.

Similarly, Full Spectrum Processing ("FSP") employed approximately 80 people in its two offices in Philadelphia. Since the Covid-19 crises, and just before the Receiver, it employed approximately 60 people and hoped to rehire 10-15 more. FSP provides all of the processing services for CBSG's portfolio. These services include day to day processing of ACH payments, technology services including computer services, collections work and other office services. In addition to CBSG, FSP provides these services for other clients as well, including a solar panel construction company, a physical therapy business, a property management company and other businesses. Acting at the behest of the SEC, the Receiver expelled the employees and closed these

offices and froze the related merchant client bank accounts. These actions have caused these businesses to suffer significant losses. The SEC's actions will close these businesses and their employees will join the ranks of the millions of unemployed. The SEC's actions have also done severe harm to the CBSG's banking and processing relationships. It is time-consuming to organize the merchant cash advance structure pursuant to industry standards. Even if the company's employees return immediately, the general chaos caused by the SEC's actions will take the company time to recover.

As we show next, the SEC's plan, to install a new company (DSI) to start anew on extraordinarily detailed work in which CBSG's employees are expert, is a complete waste of time and money and totally unworkable. It is also totally unnecessary. It will, however, without doubt, result in the demise of CBSG and the loss of over 100 jobs in Pennsylvania, not to mention severe injury to investors and merchants who have long relied on CBSG's operations.

This case is Not 1 Global. The SEC's Plan to Install A New Company to take over CBSG's operations is Totally Unnecessary, Unworkable and will Result in the Demise of CBSG

The SEC may cite to *1 Global Capital, LLC*, 18-19121-RBR. This is a markedly different case. In *1 Global Capital*, the owners of the business filed a voluntary petition for Chapter 11 reorganization in U.S. Bankruptcy Court before the SEC filed its enforcement action. The Debtor remained in lawful possession of its business, and a senior management overseer was appointed with the consent of the Debtor. Only later did the SEC file its securities action, and the Receiver appointed in that case, Jon Sale, Esq., was appointed as an overseer to management. *See* First Amended Disclosure Statement in Support of Liquidation Plan, describing the history of that litigation in Bankruptcy Court and District Court. 18-19121-RBR, ECF 806. In one year, the company appointed in *1 Global*, (the very same professionals that the SEC and

Receiver propose to use in this case), billed $3,339,000 for their "liquidation" plan. (*See* 1 Global, "Plan of Liquidation," annexed hereto as Exhibit 2)

Here, this Court has before it a fully operational, ongoing, 100-plus employee business that is relied upon by investors who have millions of dollars at stake and hundreds of merchants who rely on their relationship with CBSG – a company which has very significant longstanding outside legal and accounting resources. The SEC's erroneous plans will cause millions in losses.

Conclusion

Despite this Court's clear direction to the Receiver ("to take…action as necessary and appropriate for the preservation of the [entities] property interests," and "to prevent the dissipation...of such property interests," and not "interfere or hinder" with "efforts to preserve" the entities property interests), the SEC's direction of the Receiver is, right now, each and every day, destroying this business and with it, hundreds of millions of dollars in value. This gross harm, to a business that just days ago was profitable and paying regularly on every Note, is not being caused by the Defendants – it is unquestionably being caused by the actions of the SEC. The SEC - not the Defendants - are creating hundreds of millions of dollars in potential liability and losses to large and small investors. [3]

[3] Defendants have no objection to the Receiver performing monitoring functions to insure and verify the lawful, proper and compliant operations of CBSG. They will find a house in solid order.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on August 4, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

s/Joel Hirschhorn
JOEL HIRSCHHORN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No.: 9:20-CV-81205

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

vs.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a/ PAR FUNDING, LISA MCELHONE, *et al.*,

Defendants, and

L.M.E. 2017 FAMILY TRUST,

Relief Defendant.
_____/

DEFENDANT LISA MCELHONE'S AND RELIEF DEFENDANT L.M.E. 2017 FAMILY TRUST'S NOTICE OF JOINDER IN DEFENDANT DEAN VAGNOZZI'S BRIEF ON CURRENT SCOPE OF RECEIVERSHIP AND ASSET FREEZE ISSUES (D.E. 82)

Defendant Lisa McElhone and Relief Defendant L.M.E. 2017 Family Trust, by and through undersigned counsel, file this Notice of Joinder in Defendant Dean Vagnozzi's Brief on Current Scope of Receivership and Asset Freeze Issues (D.E. 82) as the same general factual, statutory, and legal arguments presented in said Brief apply to them.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on August 4, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

s/Joel Hirschhorn
JOEL HIRSCHHORN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al.,

Defendants.
_____/

DEFENDANTS' JOINT RESPONSE TO THE RECEIVER'S MOTION TO ENGAGE AN ENTIRELY NEW FIRM TO RUN CBSG;

AND DEFENDANTS' JOINT CROSS MOTION TO HAVE THIS COURT DIRECT THE RECEIVER TO IMMEDIATELY ENGAGE APPROXIMATELY 70 SKILLED, KNOWLEDGEABLE AND EXPERIENCED CBSG EMPLOYEES WHO KNOW THE BUSINESS AND HAVE BEEN OUT OF WORK – FORCED FROM THEIR JOBS SINCE THE TRO AND THE RECEIVER'S APPOINTMENT

Urgent Action is Necessary to Save the Company and 70 Jobs

It is now clear that the SEC had no idea what it was doing when it approached this Court *ex parte* on or about July 24, 2020 to effectively shut down an ongoing business that employs – in the midst of a Pandemic - at least 70 people, provides funding for qualified small businesses, and paid investors regularly since 2012. For an agency charged with protecting investors, the SEC has done the opposite. Now, its actions have caused the longest investor return delay since 2012, save for the first month of the Covid-19 Pandemic in April 2020.

To try and remedy its colossal mistake, the SEC now has the Receiver make an unsupported motion based on entirely inaccurate financial information. Rather than return approximately 70 employees (now out-of-work during the Covid-19 Pandemic), who have been at their jobs for years and are experts in the extraordinarily complex systems that are needed to fund merchants and pay investors – the SEC has the Receiver ask to hire and pay an outside company (and its employees), to try to learn and do the very same jobs that the expert employees with years of experience know how to run today. That this idea makes no prudent business sense is self-evident. These employees are highly skilled accountants, bookkeepers, underwriters and ACH account processors who have been at their jobs for years. Worse, it is squarely at odds with the Receiver's representation to this Court on Tuesday that the Receiver "did not fire anybody" and did not intend to liquidate the company. Worse still, the company it seeks to hire (DBI) is best known for just that - liquidation.

For these reasons, and because Defendants wish to save 70 jobs, provide payments to investors and funding to qualified small businesses merchants who need these funds, Defendants cross move for an Order directing the Receiver to immediately rehire skilled and experienced employees; directing the SEC to unfreeze accounts used to collect receivables and pay investors; and resume operations of the business immediately so that it does not fall into bankruptcy or liquidation.

We request this relief with full knowledge of the concerns raised in the SEC's Complaint, even if we do not agree with the allegations. Accordingly, Defendants are not asking for the Receiver to hire back anyone it deems inappropriate or engage in any practices with which it does not agree. This company has consistently provided interest and return of capital to sophisticated investors and, of equal importance, has provided small businesses with necessary or seasonal

funds. Now, due to the SEC's impetuous actions, the business is shut down. Desperate to get back to work are 70 employees who know how to run this business now. And there is a Receiver and his counsel whom are experienced to oversee and monitor the business. Indeed, counsel for a defendant with vast knowledge of the accounting and financial structures reached out to the Receiver's counsel to say he will help in any way possible.

For these reasons, the Court should direct the Receiver to interview and rehire the highly skilled accountants, bookkeepers, underwriters and ACH account processors who worked at the company prior to being locked out by the Receiver. The Court should also direct the SEC to work with the Receiver and knowledgeable employees to unfreeze those accounts necessary to collect receivables and pay investors in order to stop the dissipation of investor funds – by the SEC. This course of action will stop investor losses that began accumulating upon the TRO. We urge the Court to grant our request, protect investor funds and save 70 jobs in the process.

The Receiver's Motion is Premised on Totally Inaccurate Financial Information

The centerpiece of the Receiver's motion is in paragraphs 10 and 11, specifically the Receiver's claim that Ms. Lau said that Par has $500 million in non-performing agreements. The Receiver, believing that was what he heard (and it was definitely not), got a bit animated and wrote to this Court that, "Based on these numbers, there may be in excess of one billion dollars ($1,000,000,000) of outstanding funds deployed to merchants under Par's Funding's MCA agreements, with as many as fifty percent (50%) of those deployed funds in some stage of 'default.'" Motion at para. 10. But none of that is remotely true. The Receiver either misheard or

misunderstood what Ms. Lau was saying because she never would have made a statement that is so flatly inconsistent with the company's financial records. Further, Ms. Lau's native tongue is Chinese and during the call had no access to the comprehensive financial information accumulated daily by the company's accountants. As is common experience, telephonic conversations with an accented person often get misunderstood.

It is easily demonstrated that the Receiver's suggestion that Ms. Lau said that Par has approximately $500 million in "non-performing" agreements is simply inaccurate. Ms. Lau never said that. And it makes no sense. Company records attached hereto as Exhibits A through E, as well as an Affidavit by Ms. Lau, attached as Exhibit 1, make clear what the current state of the merchant agreements are. As Ms. Lau states:

> I never said anything about $500,000,000 in non-performing MCA Agreements. To the contrary, what I said was that, within the roughly $500,000,000 of outstanding MCA Agreements that are currently "Active", a percentage are in collections. However, I further noted that, without the actual reports in front of me, I could not answer with any precision regarding the exact percentage of MCA Agreements in default.
>
> In fact, CBSG defines past due agreements as "in default" when they are 45 days or more past due. That is why the company has an in house collection department and lawyers – to collect on the "defaulted" agreements. I have checked the documents that I would have preferred to have available during our discussion. In any event, the amount in collections, i.e., default, since 2012, is approximately

> $147,999,506. As of July 28, 2020, the amount of our currently performing merchant accounts receivable (AR) was approximately $421,000,000.
>
> *See* Aida Lau Aff. at paragraphs 9 (b) and (c). (Emphasis added)

Ms. Lau's information here is wholly corroborated by the attached financial records of the company kept in the ordinary course of business. *See* Exhibits A through E to the Lau Aff. Accordingly, the most essential part of the Receiver's Motion is simply not accurate – at all.

But this is not the only blatantly incorrect financial information that has been presented by the SEC to this Court to justify its requested relief. During the conference on Tuesday, August 4, 2020, the SEC represented to the Court that a search of the company's accounts showed "only $2.5 million…not enough to pay the investors." (Tuesday, August 4, 2020) In fact, the SEC lawyer could only have looked at one account. There are six bank accounts at three different banks. And in those accounts, as of July 31, 2020 was the total amount of $18,243,222.30, more than enough to pay investors. *See* Exhibit 2, annexed hereto. In addition, in three ACH accounts was approximately $6 million to $ 7 million dollars. – for total of $24 to $25 million dollars – not $2.5 million. The ACH accounts are used to make payments to businesses, pay investors interest, and pay vendors. There are over 2,500 companies with which there are factoring agreements - which is why the company employs 12 accountants and 58 other employees. How in the world the SEC could make such a huge a financial mistake is mind-boggling. It just proves, once again, that the SEC has no idea how this business works and acted precipitously without any meaningful investigation before it took its ill-advised and damaging *ex parte* action.

The Circumstances Presented in the Receiver's Motion Papers Have Changed

The secondary part of the Receiver's Motion is that none of the individuals with knowledge of company finances have yet spoken to the Receiver. Motion at para's 11-12. The Court may recall that the *ex parte* TRO was suddenly disclosed on or about July 29, 2020, just eight days ago. Thereafter, in addition to asset seizures and notices from all over, was an avalanche of legal filings while the docket was still under seal. Counsel had to be engaged by numerous individual and entity defendants, and they had to learn what this matter was about and, after the docket was unsealed, prepare more legal filings, appear for hearings and respond to discovery demands. Counsel and their clients have been busy.

Nonetheless, as the defense has learned what occurred here and what the facts are, they have begun to engage the Receiver. Yesterday, one defendant's counsel contacted the Receiver to offer information and support – a defendant with perhaps the most knowledge of the accounting systems. Aside from the fact that all of the information on the finances of the company is contained in the very documents now in the possession of the Receiver, individual defendants are willing to help the Receiver understand the business and its systems so that it can reopen immediately and re-employ 70 people who are now, suddenly, out of work.

Conclusion

This Court very recently re-affirmed its commitment that the Receiver's role is "to take…action as necessary and appropriate for the preservation of the [entities] property interests," and "to prevent the dissipation...of such property interests," and not "interfere or hinder" with "efforts to preserve" the entities property interests and, of course, "to do no harm." The principle, essential claim of the Receiver's motion is clearly and demonstrably groundless and inaccurate. There are 70 employees who need to return to their jobs. And, now that the 24/7 legal hurricane is more like a tropical storm, counsel are focused on the Receiver issues. Accordingly, the Receiver's motion should be denied and the company's employees should be immediately rehired.

Respectfully submitted,

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[1] Although Mr. Hirschhorn has informed SEC attorney Amie Riggle Berlin that the SEC filed its Complaint against a non-existent entity, Ms. Berlin has declined to respond to Mr. Hirschhorn's request that she amend the Complaint. As such, Mr. Hirschhorn anticipates filing a Motion to Dismiss based on the SEC's error, which we believe is more than a scrivener's error.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on August 7, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

s/Joel Hirschhorn
JOEL HIRSCHHORN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al,

Defendants.
_____/

DEFENDANTS' COMPLETE BUSINESS SOLUTIONS GROUP, INC. AND FULL SPECTRUM PROCESSING, INC.'S RESPONSE TO PLAINTIFF'S EXPEDITED MOTION TO AMEND RECEIVERSHIP ORDER [ECF 105]

Defendants, Complete Business Solutions Group, Inc. d/b/a Par Funding and Full Spectrum Processing, Inc. ("the Companies") submit this Response to Plaintiff's Expedited Motion to Amend Receivership Order, ECF 105, and states as follows:

There comes a time in every case where the litigation should be conducted in Regular Order, instead of on a constant emergency/expedited basis. That time has come with the SEC's latest Expedited Motion.

After commencing this case on July 24, and insisting on July 27 that the Defendants not be permitted to meaningfully participate at the temporary restraining order stage of this proceeding, and then after ten days of constant pressure on Defendants to respond to the SEC's constant demands, on an immediate basis, Plaintiff filed this Expedited Motion, which seeks to radically

change the structure of the Receivership Order that was entered on July 27 and the TRO Order that was entered on July 28.

The Court should not react immediately and should provide the Defendants with a meaningful opportunity to respond to a request that is a radical departure to the scope of the Receivership Order, that the Court reaffirmed on August 4. The simple fact is that the Court did not grant the SEC the overbroad powers that it sought in its proposed "Model" receivership order. The Court refused to simply rubber-stamp the SEC's "Model" Order.

Rather than working within the confines that the Court set forth in the actual Receivership Order, the SEC has, from July 27 forward, acted as if the Court had granted it the overbroad powers that it sought in the rejected "Model." Now the SEC insists that its "Model" order be imposed on the Defendants, on an expedited basis.

Fox Rothschild files this response because the Expedited Motion is directed, in large part, at this Firm, as counsel for the two entities in this case. *See* Expedited Motion at pp. 4-5. As it relates to Defendant's right to have independent counsel continue to represent their companies, the Motion does not seek a clarification at all. Instead, the SEC seeks, on an expedited basis, a reconsideration of the actual Receivership Order, which is subject to the stringent test that the SEC must establish either changed material circumstances, or that the Court's got it wrong when it entered the Receivership Order. Neither test can be met.[1]

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[1] On August 4, the SEC, throughout that lengthy hearing, argued that the Court did not need to make any decision to related to the scope of the Order. To the SEC, the Order was just fine, and the Court did not make any rulings regarding the scope of the Order despite the valid concerns raised by the Defendants regarding the damage that the SEC was causing to Defendants' businesses. A mere three days later, the SEC now claims that the Receivership Order needs to be reconsidered and its Model Order entered on an expedited basis.

The event that apparently prompted the request for expedited reconsideration of the Receivership Order is a legal issue that Fox Rothschild was required to raise as the SEC continued to insist that this Firm withdraw from all representation in this matter. Yesterday, we filed a Notice of Independent Counsel's Continuing Role for the Companies, ECF 100, in which we explained the communications that we had with the Receiver and the SEC, raising legitimate legal and ethical issues that required either an agreement between the SEC/Receiver and the owners and managers of the businesses, or a ruling of this Court. In support of the legitimate legal issues that concerned this Firm's duties to its existing clients, we cited binding Fifth Circuit legal authority that must be considered by this Court, as well as applicable ethical rules that mandate that this Firm not simply abandon its clients just because the SEC demands it.[2]

We informed the Court that this is a fight between the SEC and the owners of the companies. As we said in our Notice, we raised the issue and are seeking guidance, either through a resolution by the Parties, or an Order of this Court. ECF 100, at p. 5. Late last night, SEC counsel asked one question in response to that Notice; who are the owners of the businesses. We responded that the legal owner is a trust. As a follow-up, SEC counsel has been in communication with counsel who represent the Trust that was named in this case.

That was the sole communication by the SEC before the Expedited Motion was filed. The SEC totally ignored the Court's admonition on August 4 that all the Parties in this case must

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[2]Undersigned counsel's reliance on binding authority and applicable ethical rules is not the complete expression of the legal issues that will need to be considered by this Court on this issue. The Notice was simply a good-faith marker to inform the Receiver and the SEC that Fox Rothschild could not simply walk away from its clients because the SEC demands it. The Defendants have the right to further brief this issue before their counsel is required to terminate our representation in this case.

properly use the Meet and Confer requirements of the Local Rules of this Court. The SEC is bound by those rules as much as the Defendants.[3]

The SEC seeks to litigate an important and complex issue that directly affects rights of the Defendants, such as the right to control the attorney-client privilege and the decision as to whether they have the right to independent counsel for their companies. In a footnote, ECF 105, at n. 6, the SEC addresses this issue to undersigned counsel when the SEC knows full well that it is the Defendants who own and manage the companies who must litigate this issue. It was our ethical and legal duty to raise the issue, but it is not our role to ultimately litigate the issue.[4] In response to Fox Rothschild's reasonable and responsible Notice to this Court, the SEC engages in a barrage of cheap shots against this Firm.[5] The SEC should confine itself to litigating serious issue on the

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[3] The SEC's Certificate of Conferral, ECF 105, at p. 7, only refers to its communications with the Receiver's counsel, who, unsurprisingly, agrees with the requested relief, and with counsel for Mr. Vagnozzi. The SEC did not mention any effort to confer with the Defendants, or with undersigned counsel, because it did not do so. This Court should not reward the SEC for blatantly violating the meet and confer rules.

[4] The SEC also suggests that Fox Rothschild had a conflict of interest because, after the Companies and the Defendants who own and manage the Companies, learned of the filing of the Complaint, they requested this Firm to ask the Court to apply Due Process in considering the TRO and in addressing the scope of the TRO. ECF 105, a pp. 3-4. There was absolutely no conflict of interest in a single Firm representing the Companies, and the owners and managers of the Companies, at that time *See* Florida Rules of Professional Conduct 4-1.13(e). *See* ECF 100, describing the events preceding and succeeding the entry of the TRO.

[5] The SEC attacks this Firm by misstating and distorting events that occurred on the morning of July 28 in a proceeding before another federal District Court. ECF 105, at p. 5. That court called an emergency status conference at the request of the attorney/protagonist, who has been behind all the events leading to this enforcement proceeding. At that status conference, the Court was informed of this enforcement proceeding. The Court ultimately rejected Mr. Heskin's emergency request. A transcript of that proceeding will show this Court precisely what happened at that status conference. As for the claim that a "Receivership entity" was appearing before that Philadelphia Federal Court, the SEC continues to ignore the fact that the Receivership Order, by its express terms, only became effective **if** this Court entered a TRO. The TRO was entered on the evening

merits.[6] Fox Rothschild is not the Defendant in this case. We are a law firm fulfilling our duties properly, and transparently. The SEC is simply trying to drive counsel out of this case, as an adjunct to all the other draconian relief that they insist must be employed to "protect the investors." Due Process is of no regard to the SEC.

The Defendants should be given a reasonable opportunity to respond to relief requested in this Expedited Motion. The Court has scheduled the Order to Show Cause hearing on the SEC's motion for a preliminary injunction for August 18, 2020 and has set forth a briefing schedule for that hearing. As this case is past the temporary restraining order stage, the Defendants should have the right to a reasonable opportunity to respond to this Motion. They are already preparing a response to the Receiver's Expedited Motion of yesterday, ECF 10, that is due today pursuant to the Court's scheduling Order. It is patently unreasonable to allow the SEC and Receiver to tag team the Defendants in a constant barrage of Expedited Motions, especially when there are no exigencies that even require expedited consideration.[7]

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of July 28, twelve hours after the Philadelphia status conference concluded. These distortions are a result of the SEC accepting, without any critical analysis, the protests of an attorney who has been on a litigation mission against these Companies

[6] The SEC asserts that we are improperly holding funds. What the SEC fails to inform the Court, is that immediately after the August 4 hearing, we notified the Receiver's counsel, in writing, of the precise amounts of money legitimately owed to this Firm for work performed prior to July 28, as well as additional funds that were paid in advance for future work that the Firm was required to perform. It was only when the Court subsequently entered an Order staying nationwide litigation that this Firm was relieved of that responsibility. This Firm is well aware of the legal standards governing a law firm's right to be paid for the legitimate work it performed before the TRO was entered, and the obligation to turn over unearned funds. We have no doubt that this issue can be properly resolved with the Receiver, without the need for further Court intervention.

[7] If the Court determines that the SEC's request to add entities related to Mr. Vagnozzi to the TRO must be resolved on an expedited basis, the Court should consider entering an expedited briefing

Finally, the Expedited Motion is not limited to the issue related to Fox Rothschild's continued role, if any, in representing the Companies. The SEC submitted a proposed "Model" Order to the Court, which includes provisions already rejected by the Court, including the power to immediately put these companies in bankruptcy, ECF 105-6, p. 15 of 19. The Receiver agrees with this proposed relief, despite his commitment to the Court on August 4, that he was not looking to put these companies into liquidation. The simple fact is that liquidation is exactly what the SEC demanded from the very first telephone call with undersigned counsel in this case. The SEC may continue to deny making that demand, but its actions establish the intent of this enforcement proceeding. The Receiver has waited a mere three days since making his commitment to this Court to join in this requested relief.

Before this Court entertains a reconsideration of the Receivership and TRO Orders that rejects the carefully balanced Order that the Court entered, award the SEC with the "Model" Order that it has never stopped demanding, all the Defendants should be given a fair opportunity to respond to this Expedited Motion. As for Fox Rothschild, we await further instruction, based on an agreement of the Parties, or an Order of this Court, as to this Firm's continued representation of the Companies.

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schedule for that portion of this Motion. But, the request to expand the receivership to "clarify" the Receiver's powers and duties does not warrant expedited briefing.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on **August 7, 2020**, I electronically filed the foregoing with the Clerk of the Court using CM/ECF.

/*s/Joseph A. DeMaria*
Joseph A. DeMaria

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al.,

Defendants.
_____/

DEFENDANTS' JOINT REPLY TO THE RECEIVER'S RESPONSE TO DEFENDANTS' JOINT CROSS MOTION TO HAVE THIS COURT DIRECT THE RECEIVER TO REHIRE SKILLED, KNOWLEDGEABLE AND EXPERIENCED CBSG EMPLOYEES WHO KNOW THE BUSINESS AND HAVE BEEN OUT OF WORK SINCE THE TRO AND THE RECEIVER'S APPOINTMENT

In its response to Defendants' joint motion to rehire experienced CBSG employees, the Receiver candidly advises that he has no experience with the merchant cash advance industry, is incapable of managing or monitoring the day to day operations of CBSG, and will need guidance on countless issues, including varying state laws and regulations. (Receiver's Corrected Reply at 1-2)[1] We agree with the Receiver that the merchant cash funding business is complicated and

[1] The Receiver's initial motion to retain a professional was premised on two factual claims – an alleged $500 million in defaulted agreements and the inability to speak with knowledgeable CBSG employees. (Receiver's Expedited Motion to Engage a Professional dated August 6, 2020 at para.'s 10-11, Dkt. No. 101) Both of those factual claims were soundly disproved in our Motion to Rehire Employees and are no longer made here. Also not challenged is the proof of the SEC's wildly inaccurate assertion to this Court on August 4, 2020 that CBSG only had $2.5 million in accounts – when it in fact had about $25 million. (*See* Defendants' Cross Motion to Hire Employees at p. 5 and Exhibit 2, August 7, 2020, Dkt. No. 106) This is the problem; both the SEC and the Receiver

requires skilled individuals with expertise in underwriting, accounting, account processing, bookkeeping, ACH processing and the particular platforms and systems that were designed for CBSG. We also agree that the Receiver should have available, individuals with expertise in the state laws and regulations governing CBSG's business, as well as individuals who have detailed knowledge of the litigation, both advanced and defended, by CBSG. One needn't look far for the people who possess this knowledge and expertise—they are right in front of us. Indeed, it is for this very reason that Defendants filed this cross-motion for the Receiver to rehire CBSG employees.

For example, the Receiver wishes to employ someone with insight into CBSG's "underwriting procedures," and whether they are "sufficient." (*Id.* at 2) It is pretty clear that, whatever those procedures are, they have worked extremely well. Since 2012, CBSG has provided factoring agreements for businesses, and paid investors like clockwork, missing an interest payments only in April and May 2020 due to COVID-19's dramatic effect on small businesses, while at the same time maintaining significant reserves in its bank accounts.[2] Since 2012, for the past eight years, the cash over cash default rate is 1.2%—an extraordinarily excellent number, perhaps the best in the industry. Since 2012 investors have generally received interest returns of 10-20%. It is absolutely fair to say that by the time a new person, much less and far worse, a whole new group of people (DSI, for example), understands that the underwriting procedures are

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are acting on very inaccurate information. The Receiver needs to rehire the employees with knowledge immediately and the SEC needs to release funds for him to do so.

[2] CBSG missed payments after the SEC filed its *ex parte* action, froze accounts and requested a Receiver on or about July 25, 2020.

excellent—weeks or months from now—this company will be over and the harm to investors caused by the SEC's actions in this case will be irreparable.[3]

We include herein a **Proposed Action Plan**. (*See* pages 7-8, *infra*.)

The receiver requests advice on whether the portfolio of MCA's should be enforced under their current terms or restructured.[4] (*Id.* at 2) But that is just what CBSG did in response to COVID-19 with their expert employees—employees who know this information now. These very employees, whom worked month after month and year after year to achieve excellent numbers in the past, just repositioned the company to successfully respond to COVID-19.[5] The employees understand that the post-COVID-19 business environment is dramatically altered; it is they who have spent the last three months addressing the COVID-19 fallout and successfully restructured the vast majority of defaults brought on by the pandemic. Indeed, the Exchange Offer in March and April 2020 was instituted because of, driven by, and responsive to, the COVID-19 business environment. CBSG quickly grasped the dramatic and negative consequences of COVID-19 on small businesses and acted immediately by re-aligning the promissory note interest rates with

[3] Not only that, paying hundreds of thousands of dollars to a new group of people to learn, from scratch, a very successful but extremely complicated business with its own relationships with the merchants, which are in contact daily, as well as investors, will accomplish nothing, is wholly unnecessary and will just dissipate assets.

[4] Ironically, and sadly, the SEC criticized just the kind of "restructuring" considered by the Receiver and made it an element of their Complaint, having apparently not the faintest idea that it was done in response to the burgeoning COVID-19 crisis. (*See* SEC Complaint at para.'s 126-141, Dkt. No. 1)

[5] The Receiver expresses concern that defendant Joseph Laforte is one of the employees Defendants seek to be rehired and even attaches his recent indictment. That is just a red herring. Defendants do not request that the Receiver hire Joseph Laforte or Lisa McElhone and made that crystal clear in our cross-motion. Nor will they have access to any of the CBSG bank accounts.

COVID-19 reality and permitting small businesses to make much smaller payments – which was successfully working until the SEC's brazen actions in this case.

This was smart, nimble planning and it enabled CBSG to make regular investment payments – until the SEC's ill-advised *ex parte* actions here. Returning the 70 knowledgeable, experienced professionals who know CBSG's business, its systems, bookkeeping and accounting, will enable CBSG to pay investors and support its merchant customers and stay in business during COVID-19, unlike countless businesses which have closed nation-wide. CBSG was certainly positioned financially and making all payments to investors in June and July 2020 when the SEC stepped in – oblivious to the fact that the April 2020 Exchange Offer restructuring was done to protect investors and the ability of CBSG to continue in the face of a huge economic downturn.[6]

Next, we appreciate that the Receiver candidly advises the Court that he will need expertise on "whether the MCA's are lawfully structured under relevant statutory and regulatory regimes," which vary from state to state. The Receiver will also need expert advice on evaluating non-performing funding agreements to determine whether they should be passed to a collection agency, litigated, or written off. (Receiver's Corrected Reply at 2) Well, that is just what CBSG employees have been doing successfully for eight years – with the assistance of excellent counsel. For eight years, CBSG has been making those precise calls and has, in the process, achieved a 1.2% cash over cash default rate. And, CBSG has achieved a consistent monthly collection/deposit receivable

[6] On May 12, 2020, the Washington Post reported that despite over $700 billion dollars being put into the US economy by Congress, over 100,000 businesses had closed. (*See* Washington Post, May 12, 2020 annexed as Exhibit A) Similarly, a detailed study by the National Academy of Sciences, dated June 23, 2020, found "massive dislocation" among small businesses just several weeks after COVID-19 onset. Across the sample of 5,800 small businesses, 43% had temporarily closed, nearly all due to COVID-19. (*See* The Impact of COVID-19 on Small Business Outcomes and Expectations, annexed hereto as Exhibit B)

rate of 5-10% as a percentage of its AR balances, with an average rate of about 7%. This means that with the current AR balance (about $421 million), CBSG was consistently collecting through litigation, settlements and merchant payments, about $30 million per month. These are excellent numbers which is why, month after month and year after year, the investors were paid and why CBSG was positioned, with the April 2020 restructuring, to survive the COVID-19 pandemic and its economic fallout. And why there were significant cash balances on hand for reserves.

Further, whom better for the Receiver to consult with on the questions of the current litigation around the country (involving hundreds of cases), and the various state laws and rules than the excellent lawyers who have been full-time prosecuting and defending these cases – successfully, we might add – for the last six months. Attorneys from Fox Rothschild know the applicable state law and regulation and have successfully prosecuted and defended CBSG in courts all over the country. And some new firm is supposed to come in now and learn all of these laws and the hundreds of pending cases? Maybe in six months – or even longer if the employees are not immediately brought back. The underwriters and collection staff of CBSG, in addition to Fox Rothschild, have up to date knowledge and information on the Receiver's questions about whether the portfolio of MCA's should be enforced, restructured or litigated that simply cannot be replicated without many months of work that has already been done by professionals. But if months of wholly duplicative work occurs, it will be too late. By that time, the SEC's actions will have irreparably destroyed the business – leading to a catastrophic effect on the investors they claim to be trying to protect in this action.

The Receiver raises some practical concerns at page 3 of its Reply. These can be answered in turn. First, we respectfully request that the Court direct the SEC to lift the freeze on Full Spectrum's six (6) bank accounts and three (3) ACH accounts or, at a minimum, release $210,000

which is four weeks' pay ($90,000 every two weeks) for the 70 employees, plus $30,000 in payroll checks that were not deposited from prior weeks before the freeze of the accounts. (*See* Exh. 2, annexed hereto). Second, Defendants have not objected, and do not object, to the Receiver having discretion to process payroll. Third, the employees can readily restore normal operations while documents continue to be scanned. This happens all the time in businesses that have received information or regulatory requests or subpoenas. There is hardly an entity in the financial world that has not received an all-encompassing document demand from litigators or regulators and continued its business. It happens every single day. Indeed, by the time this motion is decided, the computer hard drives may have already been forensically imaged.

Fourth, the employees have expertise in this business and there is no allegation anywhere that they have done wrong. It is wise for the Receiver to rely upon them. Moreover, Mr. Cole, through his attorney, has offered to speak to and assist the Receiver. In fact, Defendants propose the following **Plan of Action**. While the Defendants do not suggest that the Receiver has concluded that "the receivership should result in a liquidation of the Receivership Entities" (Receiver's Reply at 4), time is of the essence. Unless the Receiver obtains the immediate services, expertise and assistance of these knowledgeable and experienced employees, liquidation will, without doubt, be the end result. Without CBSG professionals and support staff working hard this week to restore the business, there will be no business to restore.

If the 70 professionals and support staff continue to be denied their paychecks for the previous weeks' work, the company will not survive. The daily review of the MCA portfolio and the employee's daily contact with the merchant businesses have made this company successful. Without pay and with the prospect of liquidation, employees will begin to look elsewhere for employment, and the investors will lose their investments. By the time some new "expert"

company even begins to understand the complexities of CBSG's business, much less some of the other topics the Receiver has mentioned, weeks if not months will have passed, and there will be no company to save and no funds with which to pay investors or fund businesses.

PROPOSED ACTION PLAN

This is Where Company Financials Currently Stand due to the July 28, 2020 Freeze

Client/Merchant Deposits: Through Friday, 08/07/20, due to the freeze order, the Receiver has not processed approximately $12 million in merchant payments. These returned deposits would have been used, along with the approximately $22 million in CBSG bank accounts, to secure investor capital with the company. In addition to the approximately $12 million in merchant payments, there are also about $200,000 in recurring daily automatic ACH payments that were not collected due to the freeze on the ACH accounts.

Client/Merchant Returned Payments: The Receiver has not addressed the approximately $231,000 in returned merchant payments, known to the company, since the Receiver took over. He may not be aware of this issue. These are daily matters that Full Spectrum Processing (FSP) employees resolve amicably each and every morning with their client merchants. The FSP employees are on a first name basis with the merchants and, every day, work out modified terms to the factoring agreements in order to assist the merchants.

The freeze on CBSG bank accounts has compounded some of CBSG's merchants' financial problems because, since July 28, 2020, there has been approximately $225,000 in merchant business funding wires that are contractually obligated to be sent by CBSG to its merchants pursuant to current factoring agreements, and have not been paid. These payments are needed by CBSG's merchants to pay operating expenses including payments to the merchants' vendors, staff and rent in order to continue to stay in business. Given COVID-19, these businesses

are dependent on these wires to pay operational expenses to keep their business operating. Assuming the Receiver was even aware of these issues, the Freeze Order prevents him from making the needed payments and is imperiling the survival of these companies.

Investor Payments: The Receiver has missed processing payments to creditors in the amount of $1.4 million due on August 01, 2020, with another $494,000 due on August 10, 2020. Even if the Receiver knew to make these payments, the Freeze order prevents him from doing so.

Vendor Payments: The Receiver has not processed approximately in $80,000 in payments due CBSG's vendors over the past 10 days. The company normally processes vendor invoices weekly on Wednesday and Friday. These payments include payments to vendors for FSP's other clients which are not part of the SEC Complaint. Again, even were the Receiver to learn about these payments due, the Freeze order prevents him from making these payments.

FSP Employee Returned Paychecks: Due to the freeze order, FSP employees who did not cash or deposit their prior weeks' paychecks are now prevented from doing so. FSP has $30,408.42 in outstanding paychecks for employees which include their medical benefits. These paychecks were drafted from the FSP Citizens bank account, which was then frozen, and the paychecks have been returned unpaid.

FSP Employee Payroll Processing: The Receiver has not processed $92,503.23, which is the current payroll for employees for work performed from 07/27/20 to 08/07/20. These employees should be permitted to keep their jobs. However, even if these employees are not rehired, they are entitled to be paid and each employee has paid time off (PTO) accrued. Some employees also have severance pay as part of their termination package.

Solutions to Stem the Damage and the Dissipation of Investor funds.

Company Management: The current department managers will return to work and oversee their department while, at the same time, report all decisions made to the Receiver and ensure that all transactions are related to the business. There will a hold on any salary, distributions or pay going to the owners and directors of CBSG/FSP. As noted in n. 5, neither Mr. Laforte nor Ms. McElhone will have any involvement in CBSG's business or have access to CBSG accounts.

Cash Accounts and Processing: The company will have all deposits and payments processed on a shared account, and the Receiver will have signatory authority on the account. The company will be permitted to process wires, client payments and issue checks, and the Receiver will provide approval before any transactions are carried out by FSP staff.

Data Backup: The company has additional laptops available and it can operate while the company computers are being copied. The company will agree to preserve any new information for the purpose of review by the Receiver and the Receiver can share active, live review of all data files that the employees are managing.

Merchant Communications: The employees have a direct and often a first name basis relationship with the merchant clients. Many of these clients will hesitate to work with unknown third parties who do not understand their business.

Moratorium on New Capital: CBSG has not accepted new capital since March 2020. The company will maintain its moratorium on raising any new capital or introducing new creditors to the business. To be clear this proposal is for the short term to restore and maintain current business. This proposal also serves the shared objective of protecting investors funds, protecting the company's assets, and restoring 70 employees to their jobs at a time when new jobs are scarce.

CONCLUSION

Accordingly, we have no objection to the Receiver getting advice. To the contrary, in order to answer his questions with current, accurate information and save this company, the company's employees should be immediately rehired, and the attorneys engaged and utilized. To accomplish this, we respectfully request that the Court direct the SEC to implement the Proposed Action Plan, lift the freeze on Full Spectrum's six (6) bank accounts and the three (3) ACH accounts which are set forth as Exhibit 2 in our Cross Motion. This will permit the company to rehire employees, restore its income streams and begin to pay its investors. This will fulfill the mission of doing no harm.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on August 9, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

s/Joel Hirschhorn
JOEL HIRSCHHORN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al.,

Defendants.
_____/

DEFENDANTS' JOINT OPPOSITION TO A PRELIMINARY INJUNCTION

STATEMENT OF FACTS

1. AS DEFENDANTS HAVE REPEATEDLY WARNED, INVESTORS ARE BEING TERRIBLY HARMED AND ARE TELLING THIS COURT THAT THE SEC'S ACTION IS GROSSLY MISGUIDED AND EXTREMELY DAMAGING TO INVESTORS

Defendants Lisa McElhone, Joseph Cole Barleta, and Joseph W. LaForte, and Relief Defendant The LME 2017 Family Trust, respectfully submit this Joint Response to the Court's July 28, 2020 Order requiring Defendants to Show Cause Why a Preliminary Injunction Should Not Be Issued.

On August 12, 2020, investor Alan J. Candell, acting *pro se*, filed an application to intervene in this case and be heard. Mr. Candell stated that he is a "senior citizen and financially dependent upon the distributions made by Defendant." He told this Court that "[p]rior to July 24, 2020, Defendant timely delivered all payments ripe, due and owing under the Promissory Note with the exception of March or April 2020 due to conditions arising out of the COVID-19 emergency." He told this Court that he believes there are "a significant number of other senior

citizen investors who rely upon the regular, periodic distributions from Defendant for sustenance and maintenance of their daily life's needs." And Mr. Candell told this Court that, in his view, the SEC is not "adequately representing the substantial interests of Candell and other holders of promissory notes." In fact, he says, "the actions of Plaintiff have [had] an immediate negative and perhaps irreparable impact on the financial interests of Candell, a senior citizen who relies upon the distributions of Defendant." (Motion of Alan J. Candell, *pro se*, to Intervene, August 12, 2020)(DE 128)(annexed hereto as Exhibit G, hereto)

We could not have said it better. In one filing after another,[1] Defendants' have raised the alarm that the SEC's initial *ex parte* presentation to the Court (some of which is still under seal and we have not seen), misled this Court into unnecessary action which, rather than protect investors, has caused havoc and may result in significant investor losses. We have asserted, and it is not rebutted, that CBSG has never lost a dime of investor funds, and has made payments to every single investor like clock-work from its founding in 2012 until the SEC's filings, with the limited exception of April and May 2020 when notes had to be renegotiated due to Covid-19.

Mr. Candell is not the only investor to understand that what the SEC is doing is a travesty and will cause investor losses. Investor Vincent J. Camarda declares that "the Commission has not spoken with me, or anyone at my fund, regarding their current actions, despite their claims of trying to protect us. I am entirely against liquidation or closure as it will not only hurt myself, but also hundreds of my investors." He tells this Court that "if Par is liquidated and not allowed to continue to operate, hundreds of investors…will have their lives completely destroyed….Lives will be affected, people will lose their homes , and those who are already in retirement could lose

[1] *See* Defendants' motions DE 84, 106, 115, 132. These motions and the exhibits annexed thereto are fully incorporated herein in their entirety.

everything." (Declaration of Vincent J. Camarda, dated July 30, 2020, annexed hereto as Exhibit I)

And, an attorney who manages a fund, David R. Alperstein, conducted significant due diligence prior to investing in CBSG. He states that, "the allegations in the Commission's Complaint are false. Disclosures were not withheld, Mr. Laforte's criminal history was not withheld, misrepresentations were not made, and default rates are not promises. Further, as a result of the COVID-19 pandemic, investors were presented with the option of entering into the exchange agreements, and were provided with any answers and supporting documents that they requested…..CBSG is a legitimate business and if a receiver decides to shut it down, it will cause great damage to investors. " (Declaration of David R. Alperstein dated July 29, 2020, annexed hereto as Exhibit H)

There is no basis for a preliminary injunction. Despite the SEC's mischaracterizations, factual errors and hyperbole, this case boils down to a claim that Defendants were not entitled to a Regulation D exemption for a security, a regulatory error easily remedied by filings under the securities laws. This is just what CBSG did before when presented with a regulatory issue. The company hired excellent counsel and fixed it. Not here. For reasons that defy logic, the SEC is effectively asking this Court to take a lawfully operating business - a business with no investor losses - and simply trash it. The SEC's actions have already caused immense harm to investors, employees and businesses. If a Preliminary Injunction is granted, the SEC's actions, not the Defendants,' will be immediate, direct and proximate cause of hundreds of millions of dollars in investor losses.

Indeed, it is not lost on investors like Mr. Candell, who are reading the filings in this case, that the Receiver is bringing in DSI to assist the Receiver, who candidly admits that he

knows nothing about the merchant funding business. Investors are well aware of DSI's history. (*See* Candell Motion to Intervene at para.'s 23-26)("if the past 'success' of DSI is prologue, Candell and the other holders of promissory notes will lose most if not all of their investments.") With recent Receivership orders in place, especially the Amended Order Appointing Receiver, DE 141, filed last night, the Receiver and DSI will take millions of dollars in investor money in fees while a once-thriving company deteriorates into oblivion. On July 24, 2020, when the SEC sought an *ex parte* Order, it said that it needed a TRO "for the protection of the investors." To make that assertion have any resemblance to reality, a Preliminary Injunction should be denied.

2. SINCE ITS FOUNDING, CBSG HAS CONSISTENTLY UTILIZED EXCELLENT COUNSEL TO ADDRESS AND REMEDY COMPLIANCE ISSUES

In prior memoranda to the Court, we have described, simply as a matter of fact, that CBSG has always strived for compliance and utilized ,and was guided by, excellent counsel. (*See* DE 84 at 3-7) We will not repeat those facts here as they are in the record and before the Court. Suffice it to say that further inquiry since August 4, 2020 has confirmed those facts, including that, in addition to all of its outside counsel, Offit Kurman, DLA Piper, Bybel Rutledge, LLP, Fox Rothschild, LLP and Haynes Boone, CBSG employed about 4 in-house lawyers, 15 in-house accountants plus 2 in-house CPA's, as well as outside, independent auditors Clifton Larson Allen, Friedman LLP and Rod Erml Associates. Such a deep bench of professional expertise is hardly the hallmarks of a firm in need of the SEC's radical action.

Just as important for these purposes, CBSG has always demonstrated a willingness and ability to address regulatory issues that are raised. As discussed below, when Pennsylvania regulatory authorities raised an issue of CBSG paying finder's fees, the company hired excellent counsel, carefully reviewed the Pennsylvania concerns, and made significant changes to the structure of the business to ameliorate any issues. Counsel introduced a note purchase agreement

and began changing the business structure so that CBSG would not be paying fees to funds soliciting and raising capital. It also registered CBSG in Pennsylvania under SEC 503b for its non-principal debt instruments. In January 2019, CBSG counsel reviewed and filed all state registrations needed for CBSG's current creditors.

In New Jersey a similar issue was raised, and ameliorative steps were promptly taken to resolve the issue. And in Texas, the company hired excellent counsel and was days away from finalizing an agreement when the SEC sought its *ex parte* order. Had the SEC raised the regulatory concerns in its Complaint with CBSG in the normal course, counsel would have reviewed the matter and, assuming there was merit to the issues raised, promptly remedied them - just as CBSG has done in the other matters. There was simply no basis whatsoever for the radical action that it took *ex parte*.

3. THE BUSINESS OF CBSG IS STRONG AND SUPPORTED BY SOPHISTICATED INVESTORS

In prior memoranda to the Court, we have described in detail CBSG's business and the reasons for its strong balance sheet – corroborated by financial exhibits and affidavits. (*See* DE 84 at 9-11; DE 106 at 3-5; DE 115 at 1-4; DE 132 at 4-5, and the exhibits annexed to these pleadings) We will not repeat those facts here, as they are in the record and before the Court.

But the best proof of its financial worthiness is its track record. Since CBSG began receiving investor funds in 2012, it has never missed a payment to an investor, but for the short Covid-19-related moratorium in April and May 2020. And, it has paid interest averaging 15-20% per annum to investors. Because of this, and because of the sophisticated financial models used to run the business, it has attracted large, sophisticated investors. For example, two brothers conducted a thorough due diligence and invested $40 million. Similarly, another very

sophisticated investor conducted a comprehensive due diligence and invested $60 million. And an attorney for a fund invested approximately $10 million into CBSG.

In Declarations annexed hereto, sophisticated investors conducted serious due diligence and invested substantial sums. This was not because they were foolish or naïve – it is because CBSG has a solid track record with transparent financials. As David R. Alperstein writes, "CBSG provided complete disclosure and allowed a review of their books and records, if needed." Further, "prior to entering any agreements, CBSG provided complete access to their books and answered all of my questions and concerns." (Declaration of David L. Alperstein, Exhibit H) Investor Vincent Camarda writes that, "Par provided me with complete access to its books and financial records and answered every question I posed to it." (Declaration of Vincent J. Camarda, Exhibit I)

4. SINCE ITS FOUNDING IN 2012, AND UNTIL THE SEC ACTION, INVESTORS HAVE MADE HEALTHY INTEREST, AND THERE ARE NO INVESTOR LOSSES

In prior memoranda to the Court, we have described CBSG's strong historical performance – corroborated by financial exhibits and affidavits. (*See* DE 84 at 9-11; DE 106 at 3-5; DE 115 at 1-4; DE 132 at 4-5, and the exhibits annexed to these pleadings) Since its founding in 2012, and until the SEC's action here, aside from the Covid-19 related moratorium in April and May 2020, CBSG never missed a payment to investors and paid very healthy interest. There is zero default on principal payments to an investor and zero default on interest payments to an investor. Notes were renegotiated in April 2020 to a lower interest rate due to Covid-19's effect on the economy (after years of 10-20% returns). About 95% of the investors agreed to the exchange notes. CBSG has never missed a redemption to an investor.

The strength of the company portfolio and its growth over the last year has been detailed in Financial Summary exhibits. The Net Equity line under liabilities shows strong, consistent growth with use of retained earnings. The company went from approximately $85M at the beginning of 2019 to $104M in retained earnings before the Covid-19 crisis reduced a significant amount of the account receivable portfolio. Even then, through prudent management, CBSG was able to rebuild its portfolio to a secure and profitable position - even after the height of the Covid-19 pandemic. As of July 2020, CBSG was communicating frequently with merchants to renegotiate terms due to Covid-19 interruption of their businesses and income.

In February 2020, CBSG made a decision not to raise any new capital since the company anticipated Covid-19 related business closures. Prior to the pandemic, creditors were receiving interest rates of approximately 15%. Since Covid-19, rates were renegotiated to 5% across the board to account for the reduced receipt of merchant payments. Indeed, CBSG paid $18M in interest to investors, including through the Covid moratorium from March through May 2020 and, but for the SEC's action, expected to pay approximately $46M in total interest for the year under the restructured notes.

These are not the financials or hallmarks of a business that necessitates a preliminary injunction.

5. CBSG's MERCHANT CASH ADVANCE BUSINESS IS LAWFUL AND PROVIDES A VALUED AND IMPORTANT FINANCIAL SERVICE TO COMMERCIAL BUSINESSES

A pernicious subtext of the SEC's application for a preliminary injunction is the specious claim that the public-facing part of Defendants' business – merchant funding – is downright unlawful or at least immoral, opportunistic and unworthy of saving from liquidation. Like so many other misconceptions that the SEC has confidently trumpeted in its rush to cripple

Defendants' business, here too, it has misled the Court about what this business does. While the SEC's TRO Motion recognizes, as it must, that this Court's jurisdiction is solely based on the claim that Defendants engaged in the sale of securities (DE 119 at 14), Plaintiff uses the first portion of its TRO Motion to challenge Defendants' business practices in an effort to characterize them as undeserving of the same quality of Due Process as other parties are afforded by the Courts.

Thus, the Commission writes that "since no later than August 1, 2012, Par Funding has been in the business of funding short-term loans to small-sized businesses, which Par Funding refers to as "merchant cash advances." (the 'Loans or MCAs')." "Some of Par Funding's Loans carry interest rates of more than 400%." Since 2013, Par Funding has filed more than 2,000 lawsuits, seeking more than $230 million in missed Loan payments against small businesses who have allegedly defaulted on these Loans." *Id.* at pp. 15-16.[2] We have described Par Funding's MCA business in recent filings (*see* DE 84 at pp 7-12; DE 132 at pp. 5-6 and Exhibit A thereto (Declaration of Norman Valz))

Defendants' business of providing cash advances to commercial business is not only lawful but extremely valuable in the marketplace to offer quick and easy liquidity to thousands of businesses, large and small, across the country. "[P]urchases and sales of future receivables and sales proceeds... are common commercial transactions expressly contemplated by the Uniform Commercial Code." *In re GMI Group, Inc.*, 2019 WL 3774117, at *8 ; (Bankr.N.D.Ga 2019), *quoting N.Y. Capital Asset Corp. v. F & B Fuel Oil Co., Inc.*, 58 Misc.3d 1229(A), at *6 (N.Y. Sup. Ct. 2018). It is not hard to find professional publications describing MCAs as a valuable financial tool for businesses. For example, in a recent report, the Federal Reserve

[2] The SEC submitted a summary list of this pending litigation. *See* Exhibit 73 to the TRO Motion.

Board included a lengthy discussion of merchant cash advances as an important financial tool available to small businesses to provide them with "access to the credit they need to succeed and grow." "*Uncertain Times: What Small Business Borrowers Find When Browsing Online Lending Websites*," Board of Governors of the Federal Reserve System, December 2019, at 1, available at www.federalreserve.gov/publication/default.htm. (Exhibit E) The Federal Reserve Board recognized Merchant Cash Advances (MCAs) as one of two common types of mainstream financing offered to small businesses and plainly indicated that an MCA typically carries the "equivalent" of a high rate of interest.[3] *See also* "*Merchant Cash Advances, an ETA White Paper/Best Practices Guide*, Electronic Transactions Association, March 2008, at 5 (Exhibit F) ("The two biggest advantages that the MCA offers the merchants are no personal liability and ease of funding.") Even top-tier credit companies have entered the merchant funding business. American Express recently announced that it will acquire Kabbage, a merchant funding business. www.bloomberg.com/ news/articles/2020-08-10/amex-said-to-be-in-advanced-talks-to-buy-softbank-backed-kabbage; see https://www.kabbage.com; https://en.wikipedia.org/wiki/ Kabbage.

Because in the merchant funding business merchants default on their payment obligations, the legality of specific MCA's are often challenged in court. If a merchant succeeds in claiming that the transaction is a loan -- rather than a sale of receivables -- the purchaser of the receivables (such as CBSG) may be subject to a finding that the transaction violates applicable state usury laws. "Many trial courts have examined [merchant cash advance] agreements in the

[3] The Federal Reserve Board article provides: Merchant cash advances (MCAs) "entail the sale of future receivables for a set dollar amount, repaid with a set percentage of the business's daily sales receipts. For example, $50,000 in capital is provided in exchange for $65,000 in future receipts, repaid with automatic draws of 10 percent of daily credit card sales. Depending on the speed of repayment, equivalent APRs may exceed 80 percent or even rise to triple digits. MCAs are generally repaid in three to 18 months." (emphasis added)

last several years, and have largely determined that most of them are not loans, but purchases of receivables." *Id.*, *quoting K9 Bytes, Inc. v. Arch Capital Funding*, 56 Misc. 3d 807, 815 (N.Y. Sup. Ct. 2017)("*K9 Bytes*")(citing cases). With appropriate drafting by experienced attorneys, an MCA should withstand a challenge upon a default. Whether or not a particular MCA is an enforceable contract or void as a usurious loan is a question that often turns not on federal law but, rather, on state substantive law and choice of law questions, both of which vary from state to state.[4] *See, e.g. Complete Business Solutions Group v. Thomas Alan Seuss*, Case No. 17-cv-04069, (E.D. Pa. Sept. 12, 2018), ECF 19 (where Pennsylvania recognizes an exception to its usury laws for lenders of business loans while California does not, and Court finds that Pennsylvania law applies, Defendant's defense is unmeritorious); *K9 Bytes*, *supra* ("It has long been settled in this state that criminal usury may only be asserted as a defense by a corporation, and never as a means to seek affirmative relief").

Evidence of the lawfulness of CBSG' factoring business has been provided by Norman M. Valz in a sworn statement. (DE 132, and refiled as Exhibit J, hereto) He is an attorney who was responsible for filing confessions of judgment and litigating on behalf of CBSG from August 2015 through July 2018 and, since then, maintained an involvement in the resolution of cases. His declaration, and the full record now before this Court, makes clear that CBSG has been engaged for several years in a lawful MCA business.

The SEC did not see fit to mention that two courts have rejected as a matter of law challenges specifically directed at Par Funding's business practice. In *Complete Business*

[4] An MCA is not a loan, and certainly not an unlawful usurious loan, unless a court so determines after resolving questions of both choice of law and substantive law under applicable state law. It begs the question, then, why a federal agency, like the SEC, would implicitly ask this Court to consider whether Defendants' business model is unlawful when that determination rests on state law and is routinely resolved by state courts.

Solutions Group, Inc. v. Boreal Water Collection, Inc., Case Nos. 17062692, 17081480, 3372 EDA 2017, 2017 WL 5652572 at *2 (Pa. Ct. of Common Pleas Nov. 2, 2017), defaulted defendants challenged the imposition of a confessed judgment on the grounds that Par Funding was guilty of criminal usury. The defendants in that action, like the SEC here, called the transaction a "loan." That Pennsylvania court found that the transaction was not a loan, and Par Funding was not involved in criminal conduct. Similarly, in *Complete Business Solutions Group v. Thomas Alan Seuss*, Case No. 17-cv-04069, (E.D. Pa. Sept. 12, 2018), the district court rejected the claim that Par Funding's factoring agreement was a loan that violated the usury law.

It is not the SEC's role, or jurisdiction, to take up the claims lodged by civil litigants who have uniformly failed to honor their payment obligations under the MCAs and then failed in challenging Par Funding's business practices as unlawful. Moreover, the litigants helped by the SEC's action are not just any litigants. The Court should be aware that the SEC relies on the specious claims of a self-described expert who was hired by a litigant in one of many actions, pending mainly in Pennsylvania state and federal courts. Businesses that have defaulted on their obligations to Par Funding have filed every sort of claim of misconduct to avoid the consequences of those defaults.[5] The SEC also fails to advise this Court that the attorneys who have led the civil litigation crusade against Par Funding have lost time and time in the courts.

As Mr. Valz states:

> Litigation Involving CBSG's Factoring Agreements
>
> Where merchants have failed to adhere to their contractual obligations, CBSG has confessed judgment based upon its factoring agreement against hundreds of business merchants, without any objection or opposition.
>
> Notwithstanding its lawful and contractual right to confess judgment against merchants in default of its factoring agreements, CBSG has, however, faced a

[5] *See* Exhibit 76 to the TRO Motion.

malicious and personal campaign of litigation to malign and attack the company, degrade, defame, and disparage their principals and agents, grossly misrepresent the nature of Defendants' business and factoring agreements, and intentionally undermine CBSG's lawful business operations and commercial transactions.

In my personal experience in representing CBSG, the majority of the Petitions to Open Judgment or instances of litigation instigated by a merchant were represented by one law firm in particular, White & Williams LLP. The lawsuits against CBSG with White & Williams representation of the Merchant include: : *Thomas Alan Suess v. CBSG*, No. 17-4622 (E.D. Pa.) and No. 19-3243 (3d Cir.); *Fleetwood Services, LLC, et al. v. CBSG*, No. 18-268-JS (E.D. Pa.); *HMC Inc., et al. v. CBSG, et al.*, No. 19-3285-JS (E.D. Pa.); *see also CBSG v. Annie's Pooch Pops, LLC, et al.*, No. 20-724-GEKP (E.D. Pa.); *CBSG v. Capital Jet, Inc., et al.*, No. 20-848-CMR (E.D. Pa.); *CBSG v. Funtime, LLC, et al.*, No. 19-5439-JS (E.D. Pa.); *CBSG v. HMC, Inc., et al.*, No. 19-2777-JS (E.D. Pa.); *CBSG v. HMC, Inc.*, No. 19-4747 (E.D. Pa.); *CBSG v. Knava's Bounce House Rentals, LLC, et al.*, No. 20-779-CDJ (E.D. Pa.); *CBSG v. Legend Adventures, LLC, et al.*, No. 20-1081 (E.D. Pa.); *CBSG v. MH Marketing Solutions Group, Inc., et al.*, No. 20-849-MAK (E.D. Pa.); *CBSG v. NationalRx, Inc.*, No. 20-1072-JS (E.D. Pa.); *CBSG v. NationalRx, Inc.*, No. 20-1073-JS (E.D. Pa.); *CBSG v. Radiant Images, Inc.*, No. 18-4013 (E.D. Pa.); *CBSG v. Sean Whalen, et al.*, No. 19-6181-JS (E.D. Pa.); *CBSG v. Sunrooms America, Inc., et al.*, No. 20-847-TJS (E.D. Pa.); *CBSG v. Thomas Alan Suess*, No. 17-4069-CDJ (E.D. Pa.) and No. 19-2741 (3d Cir.); *CBSG v. American Heritage Billiards, LLC, et al.*, No. 200600078 (June Term 2020) (Phila. Co. C.C.P.); *CBSG v. TourMappers North America, LLC, et al.*, No. 200401028 (April Term 2020) (Phila. Co. C.C.P.); *American Heritage Billiards, LLC v. CBSG*, No. 01-20-0009-6277 (American Arbitration Association); *TourMappers North America, LLC, et al. v. CBSG*, No. 01-20-0005-3591 (American Arbitration Association).

As shown above, those lawsuits were and/or are pending in state and federal courts, as well as arbitration forums. Some of those lawsuits were/are proposed class actions. *See*, *e.g.*, *Fleetwood*, *supra* (seeking to certify a class of Texas merchants and guarantors); *Whalen/Flexogenix*, *supra* (seeking to certify a class of California merchants and guarantors). Often "Class Action" was included in the header of the case without further efforts to actually certify a Class.

The Chief District Judge for the U.S. District Court for the Eastern District of Pennsylvania has held that the disputes between CBSG and certain, few individual business merchants are individual, commercial disputes. He rejected merchants' requests to mark the cases related, finding that each case "is not related to the other cases before this Court because the **issues of fact are different** and the cases **arise from different transactions**"; that "[t]he other

> cases involve Complete Business's relationship with **different merchants** and guarantors under **different merchant agreements from different time periods**"; that "[t]he merchant agreements, although similar, are **separate agreements with separate merchants**"; and that "**this case does not have the same issue of fact as the other cases and does not grow out of the same transaction as the other cases**." *See Annie's Pooch Pops, Capital Jet, Knava's Bounce House, MH Marketing*, and *Sunrooms, supra*.
>
> The merchants in the above-referenced litigation consistently and repeatedly allege all manner of claims including usury, unconscionability, fraud, unfair and deceptive trade practices, and/or purported violations of the Uniform Commercial Code and federal Racketeer Influenced and Corrupt Organizations Act.
>
> Through the date of this Declaration, ***none*** of the proposed classes have been certified and ***none*** of the merchants in the above-referenced litigation, or otherwise, have prevailed against CBSG on the merits of ***any*** of their individual claims.
>
> Instead, federal and state courts have upheld the validity of the CBSG's factoring agreements.

Valz Decl at ¶¶ 12-18 (emphasis in original)(Exhibit J, annexed hereto)

ARGUMENT

A PRELIMINARY INJUNCTION IS NOT WARRANTED IN THIS CASE

1. THE LEGAL STANDARD

A preliminary injunction is "an extraordinary and drastic remedy not to be granted unless the movant clearly established the 'burden of persuasion'" as to each of the four prerequisites. *McDonald's Corp. v. Robertson*, 147 F.3d 1301, 1306 (11th Cir. 1998). To obtain a preliminary injunction, the SEC must first establish, as a threshold matter, that there have been violations of the securities laws. *SEC v. Telecom Marketing, Inc*., 888 F.Supp. 1160, 1166 (N.D.Ga.1995). In analyzing the need for injunctive relief, courts must then focus on whether there is a reasonable likelihood that the defendant, if not enjoined, will again engage in the illegal conduct. *SEC v. Blatt*, 583 F.2d 1325, 1334 (5th Cir.1978). The factors considered are the degree of scienter

involved, the isolated or recurrent nature of the infraction, the sincerity of the defendant's assurances against future violations, and the likelihood, based on the defendant's occupation, that future violations might occur. *SEC v. Bonastia*, 614 F.2d 908, 912 (3rd Cir. 1980).

In its showing of a defendant's reasonable likelihood of future violations of securities laws, it is not enough for the SEC to show mere past violations. Rather, the SEC must move beyond that and offer positive proof of the likelihood of further violations in the future. *SEC v. Warner*, 674 F. Supp. 841, 844 (S.D. Fla. 1987). Moreover, the more onerous the injunction sought by the Commission, the more severe its burden. *See SEC v. Compania Internacional Financiera S.A.*, No. 11 CIV 4904, 2011 WL 3251813, *7 (S.D.N.Y. July 29, 2011) ("Like any litigant, the Commission [is] obliged to make a more persuasive showing of its entitlement to a preliminary injunction the more onerous are the burdens of the injunction it seeks.").[6]

As demonstrated below, the Commission is not entitled to a preliminary injunction here. First, even if the Commission could demonstrate a substantial likelihood of success on the merits, it has not presented and cannot offer positive proof of a reasonable likelihood that Defendants will commit future violations. Absent this evidence, a preliminary injunction cannot be entered against them. *Warner*, 674 F. Supp. at 844.

[6] Even where the Commission makes out a *prima facie case*, the preliminary remedy should be modified to the degree of proof and the harm that it will cause to defendant's business activity. *See S.E.C. v. Unifund* SAL, 910 F.2d 1028, 1043 (2d Cir. 1990(cited by the SEC, ECF 14 n. 363)(where "the Commission has presented a thin case for *any* ancillary relief [it is at most] entitle[d] to an order that provides reasonable security for collecting a judgment" . . . In view of the Commission's meager showing on the merits, it should not be entitled to interfere with the appellants' unrestricted use of their accounts for more than a brief interval").

2. THE COMMISION HAS NOT SHOWN A SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

To prevail on the relief sought, the Commission must demonstrate a substantial likelihood of success that Defendants violated the registration and antifraud provisions of the securities laws cited in the Commission's *ex parte* motion. *See* Pl. Mot. for TRO (ECF 14) at 49. The SEC's claims, however, immediately fail because the promissory notes at issue are not securities. Beyond this, the misrepresentations alleged repeatedly reflect the SEC's mistaken understanding of the operations of the Companies.

a. The Promissory Notes Are Not Securities.

The SEC has no authority to bring an enforcement action unless the action pertains to the offer or sale of securities. *Financial Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1285 (11th Cir. 2007) ("To reach the question of an alleged violation of the anti-fraud provisions of the Securities Acts, the transaction at issue must involve a 'security' as defined in the 1934 Act."). The Court should not grant the preliminary injunction because the promissory notes at issue are not securities.

While the Securities Act and the Exchange Act define "security" to mean "any note," *see* 15 U.S.C. § 77b(a)(1), § 78c(a)(10), not all "notes" should be considered securities for the purposes of these Acts. *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990) ("the phrase 'any note' should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Acts"). Under *Reves*, the Supreme Court enumerated a list of notes that expressly are not securities, and so are exempt from the 1933 and 1934 Acts, including two that are pertinent here: (1) short-term note[s] secured by a lien on a small business or some of its assets; and (2) short-term notes

secured by an assignment of accounts receivable. *Id.* at 65.[7] A note that falls squarely into either of these categories is considered exempt. *Id.*; *First Citizens Federal Sav. and Loan Ass'n v. Worthen Bank and Trust Co.*, N.A., 919 F.2d 510, 515–16 (9th Cir. 1990) (finding that the notes at issue were not securities because they "fit squarely into" one of the exempted categories in *Reves*, and declining to apply the four-factor test). Here, the Par Funding promissory notes fall squarely into both.

The first issue to be considered is whether the PAR Funding promissory notes are "short-term." SEC Exhibit 89 includes examples of an instrument which is captioned as a "Non-Negotiable Promissory Note." The Non-Negotiable Promissory Note was entered into by Par Funding as the "maker" with the other party denominated as the "payee" (the "PAR Notes"). All but one of the PAR Notes submitted to the Court as SEC Exhibit 89 have a maturity of 12 months or less. Since the SEC considers that Treasury bills maturing in one year or less are "short-term," it should follow that the SEC should concede that the PAR Notes appearing in SEC Exhibit 89 also should be considered as short-term. [8]

In addition to being short term, the Par Notes were secured by a lien on the assets of the small businesses with which Par Funding did business. There is no dispute in this case that Par Funding is in the business of providing small and mid-size businesses with various financing options to fund their day-to-day operations and growth.[9] A significant service provided by Par

[7] The *Reves* court determined that it was not appropriate to apply the investment contract test enunciated in *SEC v. W.J. Howey*, 328 U.S. 293 (1946) to notes because the investment contract test was designed for an entirely different variety of instrument. The *Reves* court noted, "Congress was concerned with regulating the investment market, and not creating a general federal cause of action for fraud." *Reves* at 61.

[8] https://www.investor.gov/introduction-investing/investing-basics/investment-products/bonds-or-fixed-income-products/bonds

[9] Indeed, there are no allegations contained in the Complaint for Injunctive and Other Relief filed by the SEC against Par Funding and others in the U.S. District Court for the Southern District of

Funding to these customers is an agreement to advance funds to the customer in exchange for an obligation on the customer to sell future receivables to Par Funding at stated times, otherwise known as merchant cash advances ("MCA"). Par Funding Exchange Offer dated April 8, 2020 at 2. This obligation amounts to a lien on the MCA customer and its assets which would include receivables of that customer occurring after receipt of the advancement of funds from CBSG that are covered by such obligation. This obligation also satisfies a second category of notes that are exempt under *Reves*: short-term notes secured by an assignment of accounts receivable.

The Par Notes were clearly secured by a lien on Par Funding's assets, which included the receivables of Par Funding's MCA customers. The PAR Note provides, "to secure the obligations of the Maker under the Note, Maker has entered into a Security Agreement with Payee, dated as of the date hereof." Simultaneously to executing the PAR Note, the parties enter into a Security Agreement, examples of which are included in SEC Exhibit 89. Section 2 of the Security Agreement grants the payee on the PAR Note a "general continuing lien upon and security interest in, all of the Collateral." The term "Collateral" is defined in Section 1(a) of the Security Agreement.

There is no despite that the *Reves* exemptions apply here. Par Funding is in the business of making merchant cash advances to small businesses which required the small businesses to assign their receivables to Par Funding as security for the MCA. Then, in the Par Notes, Par Funding pledged its collateral—which included the security interest in those same assets and accounts receivable—to the noteholders through a continuing lien. In this way, each Par Funding noteholder's funds were ultimately secured not only by a lien, but by a lien with a corresponding interest in the assets and accounts receivable of the MCAs with which Par Funding does

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Florida on July 27, 2020 that suggests Par Funding engaged in any other business that is not substantially related to the MCA business.

business. Because the Par Funding Notes fall squarely into two categories of exemptions outlined in *Reves*—either one of which would exempt them from the Securities and Exchange Acts—there is no reasonable likelihood that the SEC will prevail on the merits, and the preliminary injunction it seeks should be denied.

b. The Antifraud Claims are Deficient

Counts 1 through 6 allege violations of the Sections 17(a) of the Securities Act of 1933 (the "Securities Act") and Section 10(b) of the Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 thereunder, collectively known as the antifraud provisions of the securities laws. To show a violation under Section 17(a)(1), "the SEC must prove (1) material misrepresentations or materially misleading omissions, (2) in the offer or sale of securities, (3) made with scienter." *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 766 (11th Cir.2007) (citing *Aaron v. SEC*, 446 U.S. 680, 695 (1980)). Similarly, in order to prove a violation under Section 17(a)(2) and (3), "the SEC need only show (1) material misrepresentations or materially misleading omissions, (2) in the offer or sale of securities, (3) made with negligence." Id. (citing *Aaron*, 446 U.S. at 702). To satisfy the scienter element for Section 17(a)(1) claims, the SEC must show "either an 'intent to deceive, manipulate or defraud,' or 'severe recklessness.'" *Mizzaro*, 544 F.3d at 1238 (*quoting Bryant v. Avado Brands, Inc.*, 187 F.3d 1271, 1284 (11th Cir.1999)). In *Aaron v. SEC*, 446 U.S. 680, 701 (1980), the United States Supreme Court held that scienter is a necessary element of a civil enforcement action under section 10(b) of the 1934 Act and Rule 10b-5 promulgated thereunder, as well as a civil enforcement action under section 17(a)(1) of the 1933 Act. Although the Supreme Court has not yet decided whether recklessness satisfies the scienter requirement under those provisions, *see id*. at 686 n.5, the Eleventh Circuit has held that "severe recklessness" can satisfy that requirement. *SEC v. Monterosso*, 756 F.3d 1326, 1335 (11th

Cir.2014) (alterations omitted) (quoting *SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1324 (11th Cir.1982). The Eleventh Circuit, however, limits severe recklessness as follows:

> Scienter may be established by a showing of knowing misconduct or severe recklessness. . . .Proof of recklessness [] require[s] a showing that the defendant's conduct was an extreme departure of the standards of ordinary care, which presents a danger of misleading buyers or sellers that is either known to the defendant or so obvious that he must have been aware of it.

Id. (emphasis added); *see also Garfield v. N.D.C. Health Corp.*, 466 F.3d 1255, 1264 (11th Cir. 2006) ("severe recklessness can be established through deliberate avoidance of 'red flags.'")

To establish a violation of Section 10(b) and Rule 10b-5, the SEC must prove by a preponderance of the evidence that Defendants made "(1) material misrepresentations or materially misleading omissions, (2) in connection with the purchase or sale of securities," and that they "(3) made [them] with scienter." *Merch. Capital*, 483 F.3d at 766 & n. 17 (citing *Aaron* 446 U.S. at 695); *SEC v. Zandford*, 535 U.S. 813, 816 n.1 (2002).

The SEC's Claims of Material Misrepresentations and Omissions do not meet the applicable scienter standards nor do they satisfy the SEC's burden of proof.

i. The Underwriting Process

The SEC claims that Par Funding misrepresented that it conducts on-site inspections as part of a rigorous underwriting process. (*See* de 119, Cpt. ¶¶ 159-167) It identifies a number of businesses that it claims received MCAs without an on-site inspection. (Cpt. ¶¶ 168 - 173) The SEC's examples are but a nominal portion of the 1,200 clients that Par Funding has underwritten, and that does not include successive deals that Par Funding has underwritten with the same client. Notably, the SEC does not claim that Par Funding's literature represents that it conducts on-site inspections 100% of the time.

It should be obvious that a "rigorous underwriting process" does not require an on-site inspection for every merchant or for every funding transaction. It may not be cost effective to physically inspect a business, especially if is remote, or if the deal is small. Once a relationship exists with a merchant, it is not generally necessary to visit the business for subsequent deals. More to the point, depending on the nature of the business, a physical inspection does not provide the most relevant information. A reasonable investor would not attach significance to Par Funding's decision not to inspect businesses with which it has a prior relationship or where the size of the deal would not warrant the expense of a physical inspection.

Par Funding stands by its rigorous underwriting process which focuses on objective evidence of the merchant's business and the risks of entering into a factoring relationship. Before signing any new deal, Par Funding carefully reviews the merchant's pertinent financial and banking information. It also reviews publicly available information online. One can ascertain to a meaningful degree that a business actually exists from, among other things, online reviews like Yelp and Facebook. And the proof is in the pudding, too. Par Funding's underwriting process is clearly rigorous because, as discussed below, it generally identifies companies that have reliable accounts receivables reflecting a likelihood that, as clients, they will satisfy their contractual obligations and pay Par Funding in full. Consequently, the SEC is unlikely to prove that a reasonable investor would attach significance to Par Funding's rate of on-site inspections, particularly given its successful track record in the merchant cash advance industry. *Basic Inc. v. Levinson*, 485 U.S. 224, 231-232 (1988) (*quoting TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976)) (noting materiality is determined by whether the misrepresentations "significantly altered the 'total mix' of information made available".)

ii. The Loan Default Rate

The SEC claims that Defendants have made false and misleading claims to investors that the loan default rate for the MCA transactions was low, i.e. around 1.2%. (ECF 119, pp. 35-38) The SEC has not met its burden. First, Par Funding's books and records do not use the term "default rate." Rather, Par Funding routinely calculates a term it calls the "funding exposure." (*See* "CBSG's Funding Analysis," and footnote 5 thereto, attached as Exhibit A to the Affidavit of Aida Lau, ECF 106-1, and repeated in the Exhibit Binder as Exhibit K)

A review of CBSG's Funding Analysis shows that, since inception, CBSG has provided more than $1.2 billion in funds (*id.*, column 7 - "Wire Total"). Of that $1.2 billion, $148,177,270.21 are losses against the factoring agreements, including both capital and fees that the merchants were obligated to pay. (*Id.*, column 11 - "Factoring Losses"). By contrast, "Funding Exposure" refers to capital that was wired to the merchant and not returned, resulting in a write-off of capital. (*Id.*, column 12 - "Funding Exposure") The total funding exposure for CBSG since inception is $14,285,811.51. Funding Exposure is defined as "Cumulative exposure as determined by funding amount minus collected payments, at the time that transactions were written off in the respective month to Factoring Losses." (*Id.*, footnote 5) The total funding exposure – 14,285,811.51 - out of $1.2 billion in capital wired to CBSG's clients yields an "exposure" of 1.2%. (*See id*, column 13, "Exposure %).

The figures in CBSG's books and records are accurate. A 1.2% rate of "funding exposure" as defined in the books and records is impressive and consistent with the company's proven track record of profitability. The SEC's claim that Par Funding has misrepresented its default rate is simply erroneous. This claim is just one more example of the SEC not understanding Par Funding's actual financial condition in an effort to persuade the Court that

investor money has been mismanaged or worse. (*See* ECF 106 at pp. 3-4: Par Funding does not have $500 million in "nonperforming agreements" but, rather $421,000,000 in currently performing accounts receivables; *id.* at 5-6: Par Funding does not have "only $2.5 million" in its accounts but, rather, between $24 to $25 million.)

iii. Insurance Coverage

The SEC claims that Par Funding misrepresented that it had insurance on its products. (*See* ECF 119, ¶¶ 204 - 212) It identifies a number of small businesses that it claims were not offered insurance by Par Funding. (*Id.*) Par Funding does, in fact, offer insurance to cover losses on its purchase of receivables from some of its merchants. In particular, Par Funding had a policy with the Euler Hermes North America Insurance Company. This was a factoring policy providing insurance coverage for capital lost during a default in receivables or insolvency by some merchants. It covered about $100M in deals which were specifically incorporated into the policy. (*See* Exhibits A, B, C and D relating to Hermes Insurance Policy[10])

iv. Joseph LaForte's Background

The SEC's allegations regarding LaForte's background are not only inaccurate, but internally inconsistent. On the one hand, the SEC alleges that Par Funding made materially misleading statements by omission by "fail[ing] to disclose LaForte's involvement in its filings with the Commission and also during its solicitation of investors." (DE 14, at 41.) On the other, the SEC references several occasions where LaForte's involvement was disclosed to investors, including an event in November 2019 at which Abbonizio "introduced LaForte to the 300 potential investors in attendance." (Id., at 40.) The SEC cannot reasonably argue that Par

[10] Additional documents cannot be provided because the instant action has prevented Defendants from accessing company business records including emails.

Funding is misleading investors by failing to disclose his involvement in the company while suggesting that his involvement was also widely known to investors.

Moreover, the SEC's contention that Par Funding took steps to conceal LaForte's criminal history from investors is simply inaccurate. According to investor Vincent Camarda, Par Funding was "clear and transparent" about LaForte's "prior criminal history and felony convictions." (Camarda Decl. at ¶¶ 7-8, Exhibit I.) "Specifically, Joseph LaForte's felony convictions, which were known from the beginning, did not change my decision to become involved with either Par or Mr. LaForte." (Id. at ¶ 8.) Investor David R. Alperstein echoed Mr. Camarda's comments, stating, "I have known Joseph LaForte for several years . . .I am aware he is also known as Joe Mack, Joe Macki and Joe McElhorn and does not hide his criminal history or his past. While I was already aware of his felony record and convictions before engaging in any business dealings with CBSG, he again disclosed his record to me." (Alperstein Decl. at ¶¶ 4-5, Exhibit H.) Based on this record, the SEC cannot establish a reasonable likelihood of success on the merits of its claim that LaForte knowingly concealed this information from investors. Moreover, the declarations of Messrs. Camarda and Alperstein also make clear that, even if LaForte's background had been omitted, investors did not view the omitted information as material.

v. The Statements In Par Funding's Commission Filings About McElhone and Cole's Receipt of Funds Were not Materially Misleading.

The SEC's allegation that Par Funding made misrepresentations in SEC filings about McElhone and Cole's receipt of funds represents yet another example of its failure to understand Par Funding's operation and cash flows before filing its emergency action. The SEC alleges that Par Funding made two false filings with the Commission regarding how investor funds would be used. Both filings—the first, a Form D Notice of Exempt Securities Offerings filed in August

2019 and the second, an amended Form D notice filed in April 2020 - disclosed investor proceeds raised by Par Funding through 2019. According to the SEC, the representations made in these filings "that Cole and McElhone would not receive any of the gross proceeds of the securities offering are false." (Cpt. ¶¶ 235-239; DE 14, pp. 43-44.)

In support of this allegation, the SEC points to the declaration of Melissa Davis, a forensic accountant hired by the SEC, who had no previous experience with the operations and cash flows of Par Funding. (DE 21-1, ¶3.) Davis states that she reviewed Par Funding bank accounts which received investor funds and "funds from other sources including the Par Funding business operations." (Id.) Based only on Davis's explanation that Par Funding transferred funds from these accounts to McElhone and Cole (through ALB Management Inc.), see id., ¶¶12-13, the SEC argued to this Court that "Par Funding has already dissipated investor proceeds while lying to the Commission in its Form D filings." (DE 14, at p. 75.) Davis' declaration, however, omits several important facts. Consequently, the SEC's theory is woefully flawed.

First, while Davis makes a passing reference to funds in the bank accounts "from other sources including the Par Funding business operations," she says nothing about the significant amount of funds in those omnibus accounts that were generated by business operations ("operational income") and were not investor funds. The fact is, the amounts paid to McElhone and Cole were calculated based on operational income—a percentage of new MCA business generated on a quarter by quarter basis, and were paid from operational income, not investor proceeds. (Affidavit of Aida Lau, dated August 14, 2020, attached hereto as Exhibit Q) Had the SEC bothered to analyze the payments they suggest were made from investor proceeds, they would have realized that Par Funding's accounts *received operational income that, on a quarterly basis, well exceeded the amounts paid to McElhone and Cole.* (Id.). The fact that

McElhone and Cole were paid from operational income and not investor proceeds is clearer still based on the amounts of these payments. An analysis of Par Funding's financial records reveals that these transfers were based on a calculation of (and therefore corresponded directly to) new MCA business assessed on a quarterly basis, and not on investor proceeds. The Declaration of Aida Lau analyzes 6 quarters between Janaury 2019 and June 2020. For each such quarter, the transfers made to McElhone and Cole represented: (1) 10% of new MCA business generated for the quarter, and (2) were far less than the revenues generated. (Id.) Consequently, these transfers drawn from operational income did not include investors proceeds and certainly not could not have "dissipated" investor proceeds.

vi. Alleged Misrepresentations and Omissions about Par Funding's Regulatory History

The SEC's allegations regarding Par Funding's regulatory history do not constitute actionable material misrepresentations and omissions. (DE 14, at p. 41.) To begin with, the SEC's laundry list of statements made by Defendants Perry Abbonizio, Dean Vagnozzi, Michael Furman and John Gissas are not attributable to PAR Funding. Under *Janus Capital Group, Inc. v. First Derivative Traders,* 564 U.S. 135, 142-43 (2011), no defendant can be liable for any alleged misstatements that are not attributable to him, or over which he has no ultimate authority. Here, the SEC is attempting to attribute statements made by third-parties, none of whom owned, managed, or were even employed by Par Funding, to the company. Even before the Supreme Court's decision in *Janus*, courts found that corporations generally were not liable for statements made by third parties on their behalf. *See Raab v. General Physics Corp.*, 4 F.3d 286, 289 (4th Cir.1993) ("The securities laws require [a company] to speak truthfully to investors; they do not require the company to police statements made by third parties for inaccuracies, even if the third party attributes the statement to [the company].") Consequently, without evidence that Par

Funding had ultimate authority over the statements made by Abbonizio, Vagnozzi, Furman, and Gissas, the Court may not determine that Par Funding made the statements and is liable under the antifraud provisions of the securities laws.[11]

Moreover, even assuming that LaForte's statements were attributable to Par Funding, they still do not constitute material misstatements or omissions. An omission is material for purposes of a securities fraud claim if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic*, 485 U.S. at 231-32.

Here, the SEC's theory is that LaForte's statements touting Par Funding's success as a profitable cash advance company are made materially misleading by omission because he failed to disclose that Par Funding "has twice been sanctioned for violating the securities laws." Notably, the SEC does not allege, because it cannot, that Par Funding's cash advance business operations were not profitable. *Fries v. N. Oil & Gas, Inc.*, 285 F. Supp. 3d 706, 719 (S.D.N.Y. 2018) (omitted mismanagement or uncharged criminal conduct is sufficiently material when a defendant makes a statement that can be understood, by a reasonable investor, to *deny* that the illegal conduct is occurring). Nor does it argue that Par Funding had an independent duty to make this disclosure—because it did not. "[The' securities laws do not impose a general duty to disclose corporate mismanagement or uncharged criminal conduct ... a duty to disclose uncharged criminal conduct does arise if it is necessary to ensure that a corporation's statements are not misleading." *MAZ Partners LP v. First Choice Healthcare Solutions, Inc.*, 2019 WL

[11] For these same reasons, other alleged misrepresentations referenced in the SEC's Complaint are not attributable to Par Funding. *See* Furman's Alleged Misrepresentations about NJ Order (Compl., ¶¶233-234); Vagnozzi's Alleged Misrepresentations Regarding His and ABFP's Regulatory History, (Id., ¶¶ 246-261; and Abbonizio's Alleged Misrepresentations Regarding His and ABFP's Regulatory History, (Id., ¶¶ 262-267).

5394011, * 16 (M.D. Fla. Oct. 26, 2019), quoting In re Sanofi Sec. Litig., 155 F. Supp. 3d 386, 403 (S.D.NY 2016) ("Allegations that defendants concealed corporate mismanagement or uncharged criminal conduct are not actionable unless the non-disclosures render other statements by defendants misleading."

Instead, the SEC makes the specious argument that Par Funding's regulatory history renders a representation regarding its profitability misleading by omission. However, absent some evidence that a material reason for its success was the use of the improper busines practices which led to those sanctions, the omission is not material. *Fries*, 285 F. Supp. 3d at 719 (omitted mismanagement or uncharged criminal conduct is sufficiently connected to defendants' existing disclosures when a corporation puts the reasons for its success at issue, but fails to disclose that a material source of its success is the use of improper or illegal business practices).

In fact, the regulatory history of Par/CBSG shows that whenever CBSG (Par Funding) was notified that any of their business activities were not in compliance with other regulatory bodies' standards, they took immediate and significant steps to remediate any issues and address regulatory concerns. The actions the SEC referenced were administrative in nature, and were remediated by the company, with the exception of the Texas matter, which was days away from completion when the SEC interrupted the finalization by its order.

In November 2018, Par and the Commonwealth of Pennsylvania Department of Banking signed a consent agreement to resolve the Commonwealth's accusations that Par was doing business in the Commonwealth and had used finders that were unregistered agents. In addressing this issue, Par terminated those agent agreements and paid a $499,999 administrative assessment to the Commonwealth. Further, those agent businesses were restructured by the agents to address the unregistered finder issue. In that consent agreement (paragraph 10), it

stated that "This order is not intended to indicate that CBSG or any affiliate or current or former employee should be subject to any disqualification contained in the federal securities laws . . . and this Order is not intended to form the basis of any such disqualification."

In December 2018, the State of New Jersey ordered Par to cease selling securities in the state until such time that they registered those securities or were eligible for an exemption. Upon notification of this order, Par immediately communicated with the New Jersey and the issues related to the Order were resolved via correspondence and communication with the New Jersey Bureau of Securities. It was determined and accepted that filing a Form D would satisfy both the federal and state exemptive requirements and resolve the subject of the Order and that no further action on the matter would be required.

In February 2020, Par was grouped into a Cease and Desist order from the Texas State Securities Board in relation to its business with Texas residents. The Cease and Desist order said that they were not to offer any securities in the state until such time that they were registered or exempt from the registration requirement under the Texas Securities Act, and to not engage in any fraud in the offering of securities in the State of Texas. As with the previous state regulatory issues, Par immediately engaged with the TSSB to remediate and resolve the issues and was on the cusp of signing a consent agreement to close the matter when the SEC's actions interrupted that remediation.

3. THE COMMISSION CANNOT OFFER POSITIVE EVIDENCE THAT DEFENDANTS WILL COMMIT FUTURE VIOLATIONS

Even if the Commission were to demonstrate a *prima facie* case of previous violations of the federal securities laws, it is not entitled to injunctive relief because it cannot prove that there is any likelihood—much less a reasonable one—that Defendants will commit these violations again. *See S.E.C. v. Calvo*, 378 F.3d 1211, 1216 (11th Cir. 2004). The Court considers several

factors in analyzing whether a wrong will be repeated: (1) "egregiousness of the defendant's actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved, the sincerity of the defendant's assurances against future violations; (4) the defendant's recognition of the wrongful nature of the conduct; (5) and the likelihood that the defendant's occupation will present opportunities for future violations." Id. (*quoting SEC v. Carriba Air, Inc.*, 681 F.2d 1318, 1322 (11th Cir.1982) (internal citations omitted). These factors weigh against the entry of an injunction in this case.

a. The SEC and the Courts Have Permitted Remediation and Settlement in Cases with Far Worse Facts Than Present Here

The SEC has routinely resolved by consent, violations concerning significantly larger offerings with far more egregious misstatements or omissions of material facts. Often in these cases, the SEC imposed either no penalties or only minor penalties, especially when considering the scope of the active fraudulent statements. For example, in *In the Matter of State of New Jersey, Respondent.*, Release No. 9135 (Aug. 18, 2010), the SEC found that "…the State made material misrepresentations and omissions…" in a $26,000,000,000 (twenty-six billion dollar) debt offering and that the:

> …misrepresentations and omissions created the fiscal illusion that [the underlying entities] were being adequately funded and masked the fact that New Jersey was unable to make contributions to [them] without raising taxes or cutting other services, or otherwise impacting the budget. Accordingly, disclosure documents failed to provide adequate information for investors to evaluate the State's ability to fund [them] or the impact of the State's pension obligations on the State's financial condition.

*Id.*at ¶ 2. Sophisticated investors and institutions were not the only purchasers of this issuance; many unsophisticated retail investors, to whom the disclosures would have been more pertinent, also purchased the issuance. Despite a finding of a violation of Sections 10(b)-5 and various subsections of Section 17(a) of the Securities Act, the SEC declined to impose any draconian

seizure, freeze, or receivership onto the State, opting rather to file a cease and desist order. The State subsequently updated the required disclosures to be compliant.

In its civil action against Goldman Sachs, *SEC v. Goldman, Sachs & Co, and Fabrice Tourre*, Civil Action No. 10 Civ. 3229 (S.D.N.Y. 2010), the SEC alleged that the brokerage firm misled investors through its marketing of a subprime mortgage product just as the U.S. housing market was beginning to collapse. In particular, it claimed that Goldman "misstated and omitted key facts regarding a synthetic collateralized debt obligation (CDO) that hinged on the performance of subprime residential mortgage-backed securities." (SEC Litigation Release, July 15, 2010, included in Exhibit L) In settling the suit, the company acknowledged that its marketing materials to the public omitted that the entity involved in the portfolio selection had an adverse interest to the CDO investors, i.e. ,a short position against the portfolio. (*Id.*) Goldman Sachs agreed to pay $550 million – then the largest penalty of a Wall Street firm - of which $250 million was earmarked for investors harmed by its conduct and $15 million of which was disgorgement. Other terms required remedial action in the company's review and approval of certain securities offerings and additional education and training. (*See* Exhibit L)

Even where there is serious, widespread and blatant fraud – for example the Wells Fargo settlement of 2020 – the SEC has been far less aggressive than it is here. There, the SEC found that Wells Fargo violated Section 10b-5 in that "From 2002 to 2016, Wells Fargo opened millions of accounts or financial products that were unauthorized or fraudulent." *In the Matter of Wells Fargo & Co., Respondent.*, Release No. 88257 (Feb. 21, 2020) at ¶ 5. The SEC further found that that:

> From 2012 to 2016, Wells Fargo failed to disclose to investors that the Community Bank's sales model had caused widespread unlawful and unethical sales practices misconduct that was at odds with its investor disclosures regarding needs-based selling and that the publicly reported cross-sell metric included

> significant numbers of unused or unauthorized accounts. Certain Community Bank senior executives who reviewed or approved the disclosures knew, or were reckless in not knowing, that these disclosures were misleading or incomplete.

Id. at ¶ 5. Notwithstanding the overwhelming number of fraudulent acts, the SEC again declined to impose any seizure, freeze, or receivership on Respondent. Instead, the SEC simply allowed them to set up a fund to compensate depositors of $500,000,000 and Cease and Desist the activity.

Similarly, where the allegations concerned unregistered securities, as they do here, the SEC has entered into settlements without seeking the kind of preliminary relief being sought here. For example, in 2019 in *In the Matter of Block.one, Respondent.*, the SEC alleged that Block.one sold securities in the amount of $4,000,000,000 (four billion dollars) as part of its initial coin offering. Release No. 10714 (Sept. 30, 2019). Those securities were not registered nor qualified for an exemption to the registration requirement. *Id.* As part of the settlement agreement, Block.one was ordered to cease and desist from committing or causing any violations and any future violations of Sections 5(a) and 5(c) of the Securities Act and to pay a $24 million fine. *Id.* The SEC took no further action.

In a similar 2019 action, in *In the Matter of Blockchain of Things, Inc., Respondent.*, the SEC alleged that the respondent, during its initial coin offering, sold securities in the amount of $13,000,000 (thirteen million dollars). Release No. 10736 (December 18, 2019). Those securities were not registered nor were they eligible for an exemption from registration. *Id.* Additionally, the Respondent sold some of the securities overseas but failed to implement a mechanism to prevent foreign purchasers from reselling those securities into the US markets. *Id.* For these violations, the SEC settled with an undertaking for the company to register the securities, pay a $250,000 fine, and offer recission to investors who purchased the unregistered securities. *Id.*

In yet another example, in *SEC v. Shiner*, 268 F. Supp. 2d 1333, 1341 (S.D. Fla. 2003), after a preliminary injunction hearing, the Court found that that while the defendants purported to sell partnerships in telephone companies, they in fact were selling securities and had misrepresented the level of control the investor-partners would have. In fact, the court found that "[a]pproximately eighty-five percent (85%) of the proceeds from investors were transferred almost immediately to entities owned and/or controlled by [certain] Defendants[]. The Court doubts whether the investors could ever successfully run the telephone companies when they controlled only fifteen percent (15%) of the money invested." *Id.* The court held that the fraudulent representations of the defendants were made with scienter, "were relied upon by investors, and that the investors have been injured by those misrepresentations and omissions because the investors would not have invested and lost their money had they not been mislead." *Id.* at 1343.

The Court further held that that the SEC established the likelihood of ongoing violations prong because "Defendants' conduct is egregious; Defendants have repeatedly engaged in such conduct; Defendants knew what they were doing; there have been no assurances that Defendants will not continue to violate federal securities laws in the future; Defendants have not recognized the wrongful nature of their acts; and Defendants present occupations present opportunities for future violations." *Id.* at 1343. Nonetheless, the Court did not order a receiver and noted "that additional discovery will be taken in this matter and that neither party should infer from this preliminary decision that the Court's findings and rulings will remain consistent after a full trial on the merits of this action." *Id at* 1343–44 (S.D. Fla. 2003).

It is where the defedants are conducting flat-out Ponzi scheme and investor moneys are not being invested but rather used to fund defendant's lifestyle, that courts impose draconian

emergency relief. *See SEC v. Bravata*, 763 F. Supp. 2d 891, 911 (E.D. Mich. 2011)(Court found that the business was just a ponzi scheme); *SEC v. Babikian*, No. 14 CIV. 1740 PAC, 2014 WL 2069348, at *1 (S.D.N.Y. Apr. 21, 2014)(Court found that the defendant, whose location was unknown, ran a classic pump and dump scheme stating "[t]here is also a high risk that, unless enjoined, [the Defendant] may commit the alleged fraudulent acts again, given his control of penny stock websites and his aptitude at using anonymous email accounts, alter-ego front companies, and mass email distribution systems.")

This is because the harm caused by injunctive relief is extreme. As one court recognized, on the SEC's motion for reconsideration, the Court refused to "acquiesce in the [SEC's] insistence on an unwarranted injunction," *SEC v. Globus Group, Inc.*, 117 F. Supp. 2d 1345, 1349, 2000 (S.D. Fla. 2000), even though the parties agreed to one. The Court emphasized the potential due process risks should it rule in the SEC's favor, noting that "if a defendant's continued employment or participation in a publicly traded company sufficed to warrant injunctive relief, a drastic remedy would be improperly transformed into an ordinary one." *Id* at 1347-1348. The Court reminded the parties that their consent to an injunction does not relieve the SEC of the requirement for the "proper showing" that the law requires in order for an injunction to be granted. *Id*.

b. There is No Basis for a Preliminary Injunction Here

This case is not in any manner comparable to cases where a Preliminary Injunction has been imposed and, conversely, is far less egregious than those cases presenting huge violations where such relief has not been imposed.

First, there is simply no question that CBSG is engaged in lawful business. The MCA business is lawful according to numerous courts and the Federal Reserve Board, among others.

Investor funds were used to fund merchant clients and the books and records of the company were available for detailed inspection and analysis by an investor or fund. The company had 15 in-house accountants and two in-house CPAs, as well as strong outside counsel and top flight auditors. And it paid principle and interest to investors like clock-work since 2012. No investor lost a dime. And investors are wondering what is going on and why the SEC is destroying their investments. This case is not, in any manner, comparable to those cases justifying emergency radical relief.

Second, the Complaint alleges non-scienter based regulatory violations that are easily susceptible to remediation. It is mystifying that alleged violations such as those alleged here, which are routinely resolved by consent decree and remediation, are the basis for the radical emergency action the SEC sought in this case. Shown above are cases involving egregeious conduct involving massive sums of money that, such in the Wells Fargo case, were simpy stolen from depositors. Even more compelling is that whenever CBSG had a regulatory issue, it hired excellent counsel, studied the issue and remediated the concern. After the Pennsylvania regulatory action, for instance, CBSG restructured its entire investor model and implemented other corrective action. The Texas action was days away from being resolved with a financial penalty and remediative action when the SEC brought its motion for a TRO.

This is what firms are supposed to do. Goldman Sachs, for instance, has a regulatory violations sheet (Form BD) that discloses 350 reportable regulatory events that are described over the course of 600 pages. JP Morgan describes reportable regulatory events over the course of about 750 pages. None of these firms, nor thousands of smaller firms like CBSG which take remediative action when a regulatory violation is alleged, have been subject to the radical and unnecessary action taken here. Simply put, we can find no case like this one.

Since CBSG, with excellent counsel, has taken all remeditive action necessary when a violation is alleged, there is no basis for a finding of threat of future violations. Had the SEC brought its concerns to CBSG in the regular course, CBSG counsel would have carefully considered the allegations and, if concurring that they have merit, CBSG would have taken all steps to remedy the violation. In this case, that would have been easy. An unregistrered security – it would be registered. A non-disclosed person – it would have been disclosed in the materials. These are not complicated or atypical allegations and are easily subject to remediation – had the SEC simply brought a standard action or even less, had it simply written a letter to CBSG counsel setting forth its position on these issues. There was no basis or necessity for the action it took. For all of these reasons, there is no justification or necessity for a preliminary injunction in this case.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on August 14, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

s/Joel Hirschhorn
JOEL HIRSCHHORN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al*.,

Defendants.

DEFENDANTS' MOTION TO AMEND THE COURT'S ORDER DATED JULY 27, 2020, TO CLARIFY THAT DEFENSE COUNSEL CAN RECEIVE A COPY OF THE DOCUMENTS THEY HAVE PROVIDED TO THE RECEIVER IN ORDER TO PREPARE THEIR DEFENSE

Defendants Lisa McElhone (L. McElhone"), Joseph Cole Barleta ("Cole"), and Joseph W. LaForte ("Laforte"), and Relief Defendant The LME 2017 Family Trust (the "Trust") (collectively, "Defendants"), respectfully submit this Motion to Modify the Order Appointing the Receiver (DE 36), dated July 27, 2020 ("the Order"), and the amended Receivership Order dated August 13, 2020 (DE 141)(the "Amended Order"), to clarify that Defendants are entitled to a copy of the Receivership entity documents they produced to the Receiver.

INTRODUCTION

This motion is necessitated by the Receiver's refusal to produce to the defense copies of Defendant Par Funding's company documents that Cole—as Par Funding's CFO—possessed prior to the TRO and subsequently provided to the Receiver. The Receiver maintains that the TRO and subsequent Orders appointing him and amending his authority prohibit Defendants from possessing a copy of these documents and, further, that he will determine at some future date what documents will be provided to Defendants and when. Consequently, Defendants now find

themselves at the mercy of the Receiver and his counsel, who have opposed their repeated requests to retain copies of these documents and, most disconcertingly, justified their refusal with unsubstantiated claims of data breaches against Defendants L. McElhone, Cole and various nonparties whose conduct cannot be attributed to Defendants.

Adding to the frustration, the Receiver and his counsel have refused to provide evidence of the alleged data breaches they now claim as a basis to deprive the defense of the Par Funding company documents. The defense cannot and should not be required to defend itself against the claims brought by the SEC and other claims of so-called data breaches while being kept in the dark.

Notwithstanding our significant efforts to confer and work with the Receiver to obtain a copy of the very documents Defendants provided to the Receiver, including our agreement to receive them pursuant to a protective order, it is now clear that the Receiver will not produce the documents absent Court intervention. We therefore respectfully request that the Court modify the Receivership Order to clarify that defense counsel are to be provided copies of these company documents without further delay.

STATEMENT OF FACTS

1. Counsel for Defendants Have Repeatedly Requested Access to Company Documents and Have Acceded to Every Condition Requested by the Receiver, To No Avail.

The defense has repeatedly asked the Receiver to agree that after he obtained Cole's Par Funding company data, he would return that data to counsel to be used in defense of the case. *See* Exhibits A-C, B. Schein and A. Futerfas e-mails dated August 19 and 27, 2020 (highlighted for ease of review). The Receiver has repeatedly acknowledged that the defense should have a copy of these materials but has deferred a decision after every such conversation.[1] At first, the Receiver

[1] During the preliminary injunction hearing, the Receiver also agreed to produce to the defense a copy of Par Funding's tax returns, including a 2018 tax return which showed that par Funding had

suggested Bates-stamping these documents so that their provenance would be clear, and defense counsel agreed. Later, the Receiver suggested production should occur pursuant to a standard protective order to prevent dissemination of documents to third parties. Exhibit B, A. Futerfas e-mail. Again, defense counsel agreed.

However, instead of producing the documents to defense counsel (or allowing counsel to retain a copy) under terms to which both sides have already agreed, defense counsel have instead been met with unsubstantiated accusations of data breaches. These accusations include allegations against nonparties Jamie McElhone, James Laforte, Jeremiah Ludenni and others—whom we do not represent—which the Receiver is using as a basis to withhold documents that Cole rightfully possessed before the TRO was issued and then turned over to the Receiver. With respect to the accusations against Cole and L. McElhone, counsel has: (1) advised the Receiver that they were not involved in this conduct; (2) provided the G-Suite password to the Receiver and recommended that he change them at once; (3) advised the Receiver to review the user access logs to the Par Funding G-Suite to identify those involved in these alleged data breaches; and (4) agreed to a protective order to prevent dissemination of the data Cole obtained prior to the TRO and disclosed to the Receiver. There is little else defense counsel can do.

2. The Receiver's Unsubstantiated Data Breach Claims.

Over the past several weeks, the Receiver has made allegations of data breaches of Par Funding's Google Cloud (the so-called "G-Suite") against defendants and other nonparties. These allegations have been made without the production of any supporting evidence by the Receiver which would have permitted: (1) the parties to confer before motions were filed, or (2) evaluation by a defense expert in the case of an impasse. We have repeatedly rebutted these allegations,

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paid taxes on $22 million in profits that year. Defense counsel still has not received those documents.

including allegations against Lisa McElhone (and her sister, Jamie) made on Thursday, August 27, 2020.

Counsel for the defense also advised the Receiver that Cole has not accessed Par Funding's G-Suite since this Court issued the Temporary Restraining Order ("TRO") on July 28, 2020. Counsel explained that Cole, as the Chief Financial Officer of Par Funding since 2012, had backups of Par documents prior to the TRO. The Receiver currently has Cole's work computer which contains these documents. Cole also provided his personal laptop to the Receiver's IT expert on August 19, 2020, which had a backup of these same pre-TRO Par documents. Cole also provided to the Receiver, without delay, the passwords needed to access both laptops, which also contained personal and other information unrelated to Par Funding. Additionally, on August 26, 2020, Cole's lawyer and the Receiver's IT expert spent two hours detailing the contents of his personal laptop, including the need to exclude any personal and privileged information. Cole's personal laptop is still in the Receiver's possession. Notably, these documents are copies of what already exists on the Par Funding G-Suite platform as well as on numerous Par Funding computers located in its headquarters.

Moreover, in further compliance with this Court's directives, Cole advised the Receiver on Friday, August 28, 2020, that he had another backup on a G-Suite platform on the cloud. His counsel provided the Receiver access to those documents on August 29, 2020. These are the same documents that he possessed prior to the TRO given his position in the company. The Receiver now has multiple copies of the exact same documents – the books and records of the company prior to the TRO. Cole did not enter the Par Funding G-Suite after the TRO.[2]

[2] Yesterday evening, the Receiver filed an Interim Status Report (DE 215), which included his concerns regarding "unauthorized access to the records of the Receivership Entities." Id., at 5-6. The Receiver's concerns largely involve individuals who are not parties to this action and whose conduct should not be attributed to Defendants. In other words, those allegations should have no bearing on the Defendants' request to receive the documents at issue in this Motion. That aside,

3. The Documents are Essential to the Defense of this Action.

The SEC has placed in issue a host of financial claims that go to its allegations of fraud and misrepresentations as well as the relief it has requested. Defendants have a right to investigate and rebut these allegations with the universe of documentary evidence that exists.

A. Fees Paid to Principals

A key issue in the SEC's case is the allegation that defendants McElhone, LaForte, and Cole were paid fees derived from investor funds. The Amended Complaint alleges that Defendants committed fraud and submitted false filings to the SEC by denying that they were paid fees derived from investor funds. (DE 119, Cpt. ¶¶ 235-243). The SEC has frozen assets of Defendants based upon its claim that these assets contain the proceeds of investor funds that were improperly paid out as consulting fees.

As the Court may recall, the allegations concerning these fees were a hotly contested issue at the preliminary injunction hearing, with the books and records of Par Funding taking center stage. In support of its claims about these fee payments, and other issues, the SEC offered the Declaration of Melissa Davis. (DE 14, 14, n. 110) (citing to Davis Declr, DE 21-1, ¶ 16). According to the financial records relied on by the SEC, between January 2018 and June 2020, Par Funding received $32,054,589 in investor funds and $357,104,247 in agent funds. (DE 21-1, ¶8(b),

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we reiterate our request that we be allowed to address these allegations at least as to Ms. Lau, whose declaration remains at issue. With respect to Mr. Cole, the allegations are inaccurate. First, he does not possess an "external hard drive" of pre-TRO company backup documents. Those documents were on his personal laptop computer, which he provided to the Receiver on August 19, 2020. Those documents were duplicated on a G-Suite cloud drive at the direction of Cole's prior counsel. Cole, through counsel, has already provided the link to this G-Suite to the Receiver (making its reference in the Receiver's Report rather unnecessary.) Most importantly, undersigned counsel has not accessed either the laptop files or this G-Suite cloud file, nor have counsel provided those materials to our forensic accountants. *That is the very reason for the instant motion* – to clarify that counsel can receive a copy of these materials in order to prepare our defense of the action and provide them to our forensic accountants who, to this point, have been unable to review any materials given the stalled negotiations with the Receiver regarding the production of these materials to defense counsel.

9). The SEC offered in its rebuttal the Declaration of James Klenk, dated August 18, 2020, and the 2017 draft financial audit attached thereto (The "Klenk Declaration"). The SEC argued that any payment of fees to principals of Par Funding necessarily derived from investor funds, because investor funds were in a commingled account. Moreover, the Klenk Declaration suggested that Par operated at a loss according to a 2017 draft audit, suggesting that operational funds were insufficient to cover fees paid to the principals.

The defense has a legitimate basis to rebut the SEC's accounting analysis. Namely, while the Davis Declaration only advised the Court of investor fund inflows, it overlooked—or conveniently ignored—$1.257 billion of non-investor funds in Par Funding's operational accounts. Par Funding's books and records show that, on a quarter by quarter basis, the amount of merchant payments deposited into the business—the $1.257 billion dollars deposited over the life of the company—far exceeded the amount of consulting fees paid to owners and executives. (Declaration of Aida Lau, dated August 7, 2020, DE 106-1, Exhibit A [Column 14 entitled "Total Deposits"]). In her Declaration, dated August 24, 2020 (DE 148-19), Lau stated that she had "reviewed Par Funding's financial records between 2017 and 2019," and "for each such quarter, the total amount of Consulting Fees made was less than the operational income generated by the company for the quarter." (Id., ¶ 5). Notably, rather than contesting Lau's accounting analysis or the exhibits attached to her declaration, the SEC asked this Court to assign less weight to her declaration based on an allegation that she was involved in a data breach. We reiterate our request that the Court permit the defense to review evidence of this and other alleged breaches, and allow defense counsel an opportunity to respond, before reaching any conclusion. The defense should not be put in a position where the evidence it adduces in support of a motion is ignored and the documents it requests in discovery are withheld based on allegations it is not given a fair opportunity to rebut.

But unproven allegations of data breaches do not change the books and records of the company – of which the Receiver now has multiple copies from numerous sources. Par Funding's books and records show that its other funds were more than sufficient to serve as the source of the fees transferred to principals because they greatly exceeded the amount of funds received from investors. These facts certainly rebut the SEC's allegations of fraud and misrepresentation with respect to the purported transferring of investor funds to the principals. They would also defeat the basis for the SEC's seizure of assets premised on the claim that Defendants' purchase of these assets is traceable to investor funds.

Separately, Defendants have a right to use Par Funding's financial records to show that the 2017 draft audit attached to the Klenk Declaration does not provide an accurate picture of Par Funding's financial condition in 2017, or at any other time. The suggestion that Par Funding was operating at a loss can be rebutted with documents in the Receiver's possession. These documents show that the 2017 draft audit was fundamentally flawed because the accountants who prepared the 2017 audit overstated losses, thereby creating an inaccurate picture of the company's true financial condition. The accountant's misguided work was the reason that Par Funding selected another accounting firm to complete the 2017 audit—and the reason defense counsel needs to be able to review those records now.

B. Default Rate

The Amended Complaint alleges that Defendants committed fraud and made false representations to investors regarding the default rate of its merchant cash advances. (DE 119, Cpt. ¶¶ 185-203.) The SEC claims that the default rate must be high because of the amount of defaulted repayments that Par Funding has pursued through litigation. (*See* DE 14 at 36) ("These representations are false and misleading. In reality, Par Funding has filed more than 2,000 collections lawsuits against small business borrowers for defaulting on Loans since 2013 alone…

seeking more than $300 million in missed Loan payments.") The SEC makes no attempt to address the successful recovery rate of Par Funding's litigation or, more fundamentally, how this litigation correlates to a cash over cash default rate.

As the SEC has placed the default rate squarely in issue in its allegations of fraud and misrepresentation, Defendants have a right to show that Par Funding did not misrepresent the default rate to investors. Nowhere, in fact, does Par Funding use the term "default rate" in its books and records. Rather, as the Court may recall, Defendants argued in opposition to the preliminary injunction that Par Funding routinely calculates the "funding exposure" instead. This "funding exposure" is 1.2% according to the financial spreadsheet attached to the Affidavit of Aida Lau (*See* "CBSG's Funding Analysis," and n. 5 thereto, attached as Exhibit A to the Affidavit of Aida Lau, dated August 7, 2020, DE 106-1, and repeated in Exhibit K to DE 148 (DE 148-11)). Par Funding's books and records are therefore critical to demonstrating that Defendants have not misrepresented a "default rate" and, moreover, that the SEC's failure to consider the success of the company's litigation over defaulted repayments of cash advances does not correlate with a cash over cash default rate in any meaningful sense.

C. <u>Disgorgement</u>

The Amended Complaint requests equitable relief in the form of disgorgement. (DE 119 at 56). The SEC seeks disgorgement in the amount of $492 million against Par Funding, L. McElhone, and LaForte. (DE 14 at 105). It claims that "[t]his is the number raised from investors from July 2015 through the most recent bank statements available to us." (*Id.* at 104, n. 4). Further, it seeks disgorgement against Cole in the amount of $5.5 million (joint and several with Par Funding, L. McElhone and Laforte.) (*Id.* at 105).

Defendants have every right to challenge the calculations concerning disgorgement. Par Funding's records demonstrate that investors were repaid approximately $180 million of principal

and $100 million of interest for a total of $280 million. The SEC's disgorgement figure does not make any reduction to reflect the amount of funds that were returned to investors. If proven, the repayment of capital and interest to investors nets out to a potential disgorgement of $212 million, not $492 million. Even further, Defendants are also entitled to calculate and deduct operating expenses from the disgorgement amount pursuant to the recent Supreme Court decision in *Liu v. Securities and Exchange Commission*, 140 S.Ct. 1936 (June 22, 2020). For this additional reason—to rebut the SEC's claim for disgorgement—Defendants need the requested documents.

ARGUMENT

1. Counsel Should be Permitted to Have Access to Documents Necessary to the Defense.

Defendants' right to discovery is broad. "Courts in this Circuit have often noted the basic rule that the scope of discovery is broad and that the discovery rules generally favor complete discovery." *S.E.C. v. Wall Street Capital Funding, LLC*, 2011 WL 2295561, at *4 (S.D.FL 2011). The Federal Rule of Civil Procedure "sets forth the permissible parameters of discovery." *S.E.C. v. Huff*, No. 08-60315-CIV, 2010 WL 228000, at *3 (S.D. Fla. Jan. 13, 2010). Indeed:

> Under this Rule, Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party ... [that] appears reasonably calculated to lead to the discovery of admissible evidence ..., [as long as the Court does not find that] (i) the discovery sought is unreasonably cumulative or duplicative, or ... obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues...."

S.E.C. v. Huff, 2010 WL 228000, at *3.[3] The Advisory Committee Notes to Rule 26 indicate the ruled should be read broadly. "[T]he purpose of discovery is to allow a broad search for facts, the

[3] *See also* Fed. R. Civ. P. 26(b) ("Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering

names of witnesses, or any other matters which may aid a party in the preparation or presentation of his case. Indeed, the Advisory Committee Notes approvingly cite language from a case stating that the Rules ... permit fishing for evidence as they should." *S.E.C. v. Huff*, 2010 WL 228000, at *4 *quoting* Adv. Com. Notes, 1946 Amendment, R. 26, Fed.R.Civ.P. (quotations and citations omitted, emphasis in original).

> The courts have long recognized the wide scope of discovery allowed under the Federal Rules of Civil Procedure. As the Eleventh Circuit's predecessor court noted, "The discovery provisions of the Federal Rules of Civil Procedure allow the parties to develop fully and crystalize concise factual issues for trial. Properly used, they prevent prejudicial surprises and conserve precious judicial energies. The United States Supreme Court has said that they are to be broadly and liberally construed."

S.E.C. v. Huff, 2010 WL 228000, at *4 (S.D. Fla. Jan. 13, 2010)(quotation omitted)

Under broad discovery rules, Defendants are absolutely entitled to receive a copy of all the financial records that they have provided to the Receiver in order to rebut a host of allegations pertaining to the finances of Par Funding. This need is urgent. Defendants have engaged forensic accountants to undertake the significant task of assessing the books and records of Par Funding with regard to all of the issues addressed above, among other issues. In a case of this nature, forensic accounting is critical to prepare the defense. This important work cannot even begin until Defendants can provide the necessary material to the accountants. To do that, Defendants must first have clear direction from this Court that they are permitted to receive these documents, to provide copies to their accountants and to use them in preparing a defense.

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the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.")

2. The Receiver Has Failed to Produce Documents to Which Defendants Are Entitled Pursuant to the Court's Expedited Discovery Order.

The TRO issued by this Court on July 28, 2020 was clear. It stated that, "Immediately upon entry of this Order, and while the Plaintiff's request for a Preliminary Injunction is pending, the parties shall be entitled to serve interrogatories, requests for the production of documents and requests for admissions." (DE 42, at 18.) The TRO also directed the parties to "respond to such discovery requests within two days of service," and that service of same "shall be sufficient if made upon the parties by email, facsimile, or overnight courier, and depositions may be taken by telephone or other remote electronic means." (Id.) The Court's orders apply to the Receiver. *See Wiand v. Wells Fargo Bank, N.A.*, 8:12-CV-557-T-27EAJ, 2013 WL 6170610, at *1 (M.D. Fla. Nov. 22, 2013) (granting in part the defendant's motion to compel discovery from the receiver).

Here, defense counsel requested documents from the Receiver while the preliminary injunction was pending.[4] No later than August 19, 2020, defense counsel asked the Receiver to make a copy of the documents Cole produced to the Receiver on his personal laptop (which Cole saved prior to the entry of the TRO). (Exhibit A, B. Schein email). Over the course of the next two weeks, defense counsel had several conversations with the Receiver regarding the parameters for the Receiver's production of these documents. (Exhibits, B-C). During the course of those discussions, the Receiver agreed that defense counsel should have a copy of these documents but asked that they be Bates stamped and produced subject to a standard protective order. (Exhibit B, A. Futerfas e-mail). Defense counsel agreed to both conditions. (Id.)

To date, those documents have not been produced. The Receiver has not provided defense counsel with a good faith basis for its failure to produce the documents as requested. It has not even objected to their production; indeed, it agreed that defense counsel should have the documents

[4] The asset freeze as to the Trust remains pending.

subject to a protective order and bates stamping. In keeping with this Court's direction in the TRO that the parties respond to expedited discovery requests, defense counsel respectfully requests that the Court direct the Receiver to produce a Bates-stamped copy of the documents Cole possessed on his laptop prior to the entry of the TRO.

CONCLUSION

For the forgoing reasons, Defendants' Motion to Amend this Court's Order to clarify that defense counsel should be provided forthwith a copy of the records that Defendants have already provided to the Receiver should be granted.

CERTIFICIATE OF GOOD FAITH CONFERENCE

Pursuant to Local Rule 7.1(a)(3)(A), I hereby certify that counsel for the movant has conferred with the parties who may be affected by the relief sought in this motion in a good faith effort to resolve the issues, but has been unable to resolve the issues.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on September 1, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ Daniel Fridman
DANIEL FRIDMAN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al.,

Defendants.
_____/

DEFENDANTS' JOINT RESPONSE TO RECEIVER'S STATUS REPORT OF SEPTEMBER 8, 2020 (DE 240)

Defendants Joseph W. LaForte, Lisa McElhone and Joseph Cole Barleta respectfully submit this Objection to the Receiver's Notice of Filing Report on Operations (DE 240) ("the Report") regarding certain financial assertions made in the Report and as referenced and amended by counsel for the Receiver during the September 8, 2020 Status Conference.

OMISSIONS MADE IN THE REPORT AND AS AMENDED DURING THE SEPTEMBER 8, 2020 STATUS CONFERENCE CREATED A MISLEADING IMPRESSION OF THE FINANCIAL STATE OF PAR FUNDING PRIOR TO THE TRO

1. **The Financial State of Par Funding Prior to the Order Appointing the Receiver**

The Report, as supplemented and amended by counsel for the Receiver during the conference, erroneously suggested that Par Funding was on unstable financial grounds prior to the TRO and that such grounds are purportedly being revealed through the investigative work of the Receiver. It was also suggested during the September 8, 2020 conference by these same

parties that there may be insufficient monies available to make investors whole. The true facts are otherwise.

Although the figures provided by the Receiver need to be verified by Par Funding documents, the day before the Court granted the SEC's application for a TRO, July 27, 2020, the Receiver reported that $365M was owed to investors. Defendants are confident that Par Funding records will reflect that these same investors have received at least $140M in interest payments over the past 3-4 years. That means that the net principle balance due investors is about $225M.

So that the defense position is clear, in prior filings we have urged the Receiver to reopen the MCA business. Doing so will allow the investors to not only be repaid principle, but also the agreed-upon interest reflected in the new Notes signed by the vast majority of the investors in April and May of 2020. In other words, stated very simply, had the SEC not taken its extreme action in July 2020, interest payments would have continued just as they had since 2012. As shown herein, there is nothing presented in the Receiver's Report, or the statements supplementing the Report made by Receiver's counsel, which changes that fact.

For example, we are quite confident that the books and records of Par Funding and the records of prior counsel for Par, Fox Rothschild, will show that on July 27, 2020, that law firm was collecting on $148M in unpaid merchant receivables. Why Fox Rothschild, which knows more about these cases than any firm on Earth – since they have litigated them – was not immediately pressed into service to continue their collection work is beyond comprehension. Having a new law firm replace Fox Rothschild will be very expensive and it will take that new firm months to understand the MCA business and the state of litigation and the relevant legal rulings around the country. This unnecessary expense and delay will come at a cost to investors,

as merchant collections have always been a significant source of revenue for Par Funding, even if such efforts may take time.

In addition to the unpaid merchant receivables previously being collected by Fox Rothschild, Par Funding holds a whopping $421M in current accounts receivable (AR). This AR includes other large merchants such as HMC (Kara Dipietro) that owes Par Funding $11M. That merchant is represented by Shane Heskins, Esq., at White & Williams, an individual who, despite losing in every court hearing his lawsuits, still erroneously claims that merchant funding agreements – agreements long recognized in the marketplace and by the Federal Reserve – are improper. *See* Declaration of Norman M. Valz, annexed to Defendants' Motion in Opposition to Amend Receivership Order as Exh. A (DE 130).

Moreover, long before and through July 27, 2020, Par Funding was collecting approximately $1.5M per day in merchant ACH and wire payments. After the Receiver was appointed, ACH processing was halted and the defense is unaware whether it has been reactivated. Had this not occurred, Par Funding would have received, from July 27, 2020 to date, another $45M in merchant payments.

If the law firm collection efforts are reactivated ($149M) and had the ACH processing continued to date (another $45M since July 27), the Receiver would be well on the way to collecting the money owed investors. And that is without the $421M in standard AR. In short, properly run, Par Funding has more than double the outstanding merchant debt to repay investor principle and could continue to pay its investors interest. Par Funding certainly was doing so up until July 27, 2020. To be clear, if Par Funding is properly operated, it can make good on the $365M in current liabilities, including interest owed pursuant to the modified Notes. Notably, at the time the Receiver was appointed, Par Funding was holding $25M in its accounts. Thus, when

the SEC sought the TRO, Par Funding had approximately $595M in cash and receivables broken down as follows: $421M in active AR; $149M in collection defaults, defined as 6 weeks without a payment and subject to collection by legal; and $25M in cash at Par Funding.

2. Receiver's Counsel's Supplement to the Report During the Conference Mischaracterized the Meaning and Context of the Largest 10 Merchants

While the Receiver's Report (DE 240) appropriately noted the 10 largest merchants which have received funding from Par Funding,[1] it did not criticize or suggest anything untoward about this circumstance. During the conference, however, counsel for the Receiver amended and supplemented that Report, erroneously suggesting that the purported financial instability of some of these merchants created serious collection concerns for Par Funding. These statements were inaccurate for several reasons. First, Receiver's counsel failed to advise this Court (and the investors and public), that many of these debts are significantly collateralized beyond Par Funding's standard factoring agreement protections. For example, to secure some of these debts, Par Funding has liens against properties and other collateral. Par Funding did not enter into these merchant funding agreements without securing additional protections. Second, these accounts reflect long-standing relationships where significant payments have already been collected and investor principle exposure is actually minimal. In other words, and as we explained during the Preliminary Injunction hearing, because of monies already collected from these same merchants, the debt that remains is largely factoring fees, i.e., profit—*not* investor principle. With a review of Par Funding accounting records (which access by the defense the Receiver and the SEC have opposed), the defense can quantify this figure to the penny. The failure of Receiver's counsel to

[1] The defense recollects that at the time of the TRO, these 10 merchants were in the $421M AR bucket of receivables.

advise this Court and the investors of these material facts may have led this Court and others to draw conclusions which are not supported by the true factual context and accounting.[2]

For example, counsel for the Receiver stated that a $400,000 payment did not clear from B and T Supply and that Joe LaForte responded in an email to the owner of B and T Supply, "I don't give a ****", about a purported loan that B and T said it would obtain. What Receiver's counsel failed to advise this Court, or the investors, or the public, is that Par Funding received replacement payments for that amount by wire shortly after Par received notice of the return payment.

Receiver's counsel also asserted during the conference words to the effect that "B and T Supply doesn't necessarily intend on returning any of that money." Did the Receiver or his counsel speak with B and T? Should we take this to mean that the Receiver has led B and T been led to believe that Par Funding will not aggressively litigate and collect on its agreements? If merchants believe, based on the Receiver or its counsel's actions and statements, that Par Funding agreements will not be enforced and collected, then which merchant in their right mind would pay? For these reasons as well, the discharge of Fox Rothschild makes no sense whatsoever.

Another merchant cited by the Receiver is National Brokers. National Brokers rarely missed a payment and the defense believes that National Brokers has repaid all principle and that the AR for this merchant is all factoring fees, i.e., profit. Again, a review of Par Funding records would show these numbers to the penny.

[2] Someone also provided misleading and inaccurate information to the Philadelphia Inquirer which, as a result, yesterday published a largely inaccurate account of these same matters.

The Receiver also identified Colorado Homes. Receiver's counsel failed to state that their factoring agreement is secured by significant property and assets. This merchant is a large and valuable land development outside Aspen, Colorado. It is secured by multiple deeds of trust with significant equity. The Receiver's counsel did not mention any of this.

Another merchant is Big Red. Par Funding has significant security and collateral on that funding agreement as well, including a farm in New Jersey worth millions of dollars; a valuable Florida property; and other collateral. This information was omitted by Receiver's counsel.

Another merchant funding agreement identified by the Report is Health Acquisition. Again, Par Funding controls collateral on this agreement and, in fact, successfully foreclosed on a piece of property in Florida and now holds the deed. The financials of this company are strong, and the agreement was well underwritten. Fox Rothschild was working on this matter and obtained a settlement offer in mid-July 2020.

The Receiver's Report also identified JRC Paint. Par Funding has been fully repaid the principle it extended and JRC is now paying funding fees, i.e., profit, totaling to date between $1.5 and $2M. JRC had paid on its factoring agreement every day until the Receiver took over and Par Funding helped and supported JRC through Covid-19 with modified payments.

Kingdom Logistics, another merchant identified in the Report, regularly paid Par Funding hundreds of thousands of dollars per week. The defense is not aware of a missed payment although, again, a review of Par Funding records would show these payments to the penny. And, again, Par Funding has property as collateral to backstop this funding agreement.

D19 Liquor, another merchant identified in the Report, paid every day on multiple accounts – at least until the Receiver was appointed. Without access to Par Funding records, the defense does not recall the cash over cash v. funding fees exposure. But a quick review of Par

Funding records would immediately reveal whether, and how much, D19's current payments are a return of investor principle, if any, or funding fees, i.e., profit.

Lastly, another merchant, Dual Diagnostics, settled with Par Funding just days before the TRO was filed. That settlement was favorable to Par Funding and, combined with other arrangements, is likely to recoup Par Funding's investor monies to that merchant.

For some unknown reason, the Receiver, and particularly its counsel, seem intent on suggesting that Par Funding's business, extant since 2012 and paying investors millions in principle and interest, was not real, not sustainable or something – anything to justify ending it. If that is their goal, then they will have harmed investors. Had the SEC not brought in a Receiver, investors *would still be receiving interest*, and merchants would be held accountable for their agreements by Fox Rothschild. For Receiver's counsel to supplement the Report and make public assertions without understanding the collateral backing these agreements, the merchants' payment history, and whether the amounts due now from merchants still encompass investor principle (cash over cash) and, if so, how much; or if these merchants are now paying only funding fees, suggests a significant lack of understanding of the finances and operations of Par Funding's business. This information is readily available from the books and records of Par Funding. Someone simply needed to look at these records before making these statements. Thus, the defense is concerned that materially incomplete information was provided to this Court and to the public and also made its way into national press. As has been requested since the filing of this action, the Receiver must take immediate action to engage in collection activity to protect the investors.

3. **The Receiver has Not "Recovered" $25 million – that Money was in Par Funding's Accounts Before the Order Appointing the Receiver Issued.**

During the September 8, 2020 Status Conference, the Receiver's counsel advised the Court that the Receiver had "recovered" approximately $25M. We are unsure what message Receiver's counsel was trying to convey. But to make clear what the facts are, the Court may recall that during a conference call in early August 2020, the SEC mistakenly asserted that Par Funding had only $2.5M in its accounts when the Receiver took over. We subsequently corrected that statement and advised the Court that the true figure was approximately $25M. (*See* Defense Joint Response and Cross Motion at page 5, dated August 7, 2020 (DE 106)) As we reported then, Par Funding's retained earnings and then-recent ACH activity in Par Funding accounts totaled about $25M as of late July 2020. Consequently, the defense questions whether, aside from the money that was already in Par Funding bank accounts on July 27, 2020, the Receiver or his counsel have collected *any* additional funds from merchants or collections. Such funds should be broken out separately from those funds already in Par Funding accounts at the time of the TRO.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on September 10, 2020, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

s/Joel Hirschhorn
JOEL HIRSCHHORN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al.,

Defendants.
_____/

REPLY IN SUPPORT OF DEFENDANTS' MOTION TO AMEND THE COURT'S ORDER TO CLARIFY THAT THE DEFENSE CAN RECEIVE THE DOCUMENTS THEY HAVE PROVIDED TO THE RECEIVER TO PREPARE THEIR DEFENSE

Defendants Lisa McElhone ("L. McElhone"), Joseph Cole ("Cole"), Joseph Laforte J. "Laforte"), and the 2017 L.M.E. Family Trust ("Trust") (collectively, "Defendants"), file this Reply to the Receiver's Response (the "Response") (DE 260), and ask the Court to Deny Defendants' Motion (DE 220) as moot, as the parties have issued discovery, and offers this Reply only to correct the record regarding representations made in the Receiver's Response.

1. **The Defense Agreed at The September 8, 2020 Conference to Table Its Motion (DE 220) and Proceed with Rule 26 Discovery, Rendering It Moot.**

The object of Defendants' Motion was, quite simply, to obtain through the expedited discovery procedure ordered by this Court a copy of the documents that Joseph Cole obtained in his capacity as CFO of Par Funding prior to the entry of the TRO and Order Appointing the Receiver. There was no nefarious plan. There was no effort to obfuscate and, as discussed below, there would have been no need. Cole volunteered every item of information he—and (somehow) the Defendants—are accused improperly of accessing or possessing. Not only did Receiver's

counsel agree to what Defendants requested in the Motion (before reneging on their agreement and lashing out with unnecessary and unfounded accusations), but the parties agreed during the September 8 status conference to table this issue given that merits discovery would soon begin. Discovery has begun. Defendant L. McElhone has requested the very documents at issue in Defendants' motion through the Rule 26 discovery process. The object of Defendants' Motion is now moot, and Defendants are now forced to prepare this Reply to correct the record, again, unnecessarily. *Metropolitan Delivery Corp. v. Teamsters Local Union*, 769, 2020 WL 5027415, at *4 (S.D. Fla. 2020) (claim becomes moot when the controversy between the parties is no longer alive because one party has no further concern in the outcome).

2. Not a Single Defendant Gained Access to Par Funding Information in Violation of a Court Order.

The Receiver ostensibly filed his Response against his better judgment to oblige Defendants' request for "forensic proof before the Court attributes these breaches to [them]." In truth, the Receiver's Response offers a version of the events that labors to cast blame. Despite headings claiming that "the defendants have violated—and continue to violate—these requirements of the Receivership Orders," not a single word of the Receiver's Response or voluminous exhibits suggests any of the Defendants gained unauthorized access to Par Funding's electronic data. Instead, the Response reveals that Mr. Cole's alleged "violation" involved possessing Par Funding data he obtained *before* the Receivership Order issued (at the direction of prior counsel), and that current defense counsel attempted to work with the Receiver to understand the application of these Orders to this information. The remaining allegations of "data breaches" involve inadvertent access which the Receiver could have prevented if he had simply done his job.

Joseph Cole

The Receiver's allegations with respect to Mr. Cole are as follows. First, Mr. Cole possessed "a personal laptop that contained copies of documents belonging to the Receivership entities." (Response at 11) The Receiver does not mention that Mr. Cole downloaded this information at the direction of Par Funding's corporate counsel prior to the entry of the TRO and Receivership Order on July 27, 2020. In fact, the Response says nothing of the origin of this information even though Mr. Cole's acquisition of this information is clearly recited in counsel for Mr. Cole's August 30, 2020 email:

> We have been attempting to negotiate several matters with you for weeks, primarily: … (2) the production to the Receiver of records *obtained by Mr. Cole prior to the entry of the TRO and Receivership Order related to the operation of Par Funding*.

(DE 270-7.) The Response also omits that Mr. Cole's current counsel volunteered this information to the Receiver and coordinated the transfer of Mr. Cole's laptop to the Receiver for the deletion of the data referenced in the Response. Mr. Cole delivered his laptop to the Receiver on August 19, 2020. Why this voluntary disclosure merits mention in the Response, particularly with these omissions, is unclear.

The Receiver then spends pages describing a new online data storage account on a Google Drive for KnewLogic created by Mr. Cole on July 29, 2020 at the request of Par Funding's prior corporate counsel (Response at 11), and QuickBooks files stored on an account called Summit Hosting (Response at 13). The Response states that defense counsel were provided a "link" to the Google Drive and that Mr. Cole "still maintains control over this Google Drive account…" (Response at 12.)

The Receiver argues that when he "*learned of these violations*, he attempted to reach agreement with the Defendants on a process through which the Defendants would return to the

Receiver all copies of any documents and records belonging to the Receivership Entities." (Response at 6.) The Receiver's deliberate use of the passive voice obfuscates the rather important point that he only became aware of Cole's creation of the G-Suite *because counsel for Cole told the Receiver* about the KnewLogic G-Suite in a specific effort to comply with the Receivership Orders. Counsel further provided a link to the Receiver of all of the data on this G-Suite so that the Receiver could immediately access it. In the email disclosing the G-Suite to the Receiver, Cole's counsel acknowledged her oversight in not disclosing this information sooner, noting that she simply forgot about it because of all the litigation that occurred before the preliminary injunction hearing and, just as importantly, that the parties had discussed moving jointly to modify the existing Receivership Orders to clarify their application to this pre-TRO data:

> With respect to the second item on this list, please recall that one of the reasons we have been coordinating the disclosure of the information held by Mr. Cole to you was that everyone, *including you and the Receiver, acknowledged that the orders did not make clear* whether records relating to Par Funding's operations obtained prior to the TRO and the receivership orders violated the scope of the Court's first receivership order. Recall that we even discussed filing a joint motion to amend the receivership order to clarify this issue and permit the defense team to maintain a copy of such records during the litigation.

(DE 260-7) (emphasis added.)

Clearly, no one was "caught." This was no "violation." While the Receiver attempts to distance himself from the August 30 email in a footnote by suggesting the email contains "inaccuracies," he does not attach an email response to counsel's August 30 email stating that counsel's understanding was in any way "inaccurate"—because there was no such response and there was nothing inaccurate about counsel's email. And, even if a misunderstanding existed regarding the application of the Receivership Orders to Mr. Cole's possession of information and QuickBooks data he obtained prior to the TRO, whether he stored it on a laptop or on a Google

Drive, the facts here demonstrate an effort on the part of defense counsel to work with the Receiver, not violate court orders.

The "link" Mr. Cole provided to defense counsel is the same link defense counsel volunteered to the Receiver. And the documents were not accessed by defense counsel.

This unnecessarily adversarial characterization of an oversight is a waste of the Receiver's, this Court's and defense counsel's time and resources. We would like it to stop, and we would like the Receiver to focus on doing his job. Lobbing bombs at defense counsel is not one of them. *See SEC v. Schooler*, No. 3:12-cv-2164-GPC-JMA, 2015 WL 1510949, at *3 (S.D. Cal. Mar. 24, 2015) citing *Sterling v. Stewart*, 158 F.3d 1199, 1201 n. 3 (11th Cir. 1998) (as an officer of the court, the receiver must remain neutral and impartial between the parties and avoid the appearance of impropriety). [1]

Lisa McElhone

The Receiver's Response with respect to Ms. McElhone's tax returns is an exercise in irony. On the one hand, it devotes pages describing its authority to take control of Par Funding's data and, on the other, it seems to argue that "the Defendants are complaining in the Motion the Receiver has not provided the Defendants with … documents Ms. McElhone already has in her possession." Response at 12-13.) Yes—Ms. McElhone has these documents in her possession, but in an effort to work with the Receiver and stay within the parameters of the Receivership orders, counsel for Ms. McElhone "directed her not to touch the drive [containing the returns] and that we would figure out how to proceed." (*Id.*) Counsel for Ms. McElhone made clear to the Receiver that he had not seen the documents and does not maintain a copy of them. (*Id.*) And for this, Ms. McElhone is being accused of violating court orders?

[1] While the *Schooler* decision cites to footnote 3, the relevant discussion in *Stewart* is found at footnote 2.

To make matters worse, counsel for the Receiver knew about the tax returns before the September 1, 2020 email. In mid-August 2020, counsel for Ms. McElhone advised the Receiver's counsel that she had copies of 2017 and 2018 CBSG tax returns. During that telephone call, the Receiver requested more information regarding whether these returns were in paper form or stored electronically. Counsel advised that he would inquire and, on September 1, 2020, wrote the Receiver to advise that he had learned that the tax returns were contained on a single drive with Ms. McElhone's personal tax documents. (DE 260-12.) Counsel for Ms. McElhone suggested that the parties confer about how to disentangle the documents. (*Id.*) This is precisely what counsel is supposed to do. The Receiver did not reply or respond at all to this email.

Instead, the Receiver, or his counsel, decided to unnecessarily air this non-issue with the Court in its Response. Odder still, because the Receiver refused to even respond to the email invitation to cooperatively extract the Receivership documents from the drive, counsel for Ms. McElhone is now forced to make a discovery request for tax returns she has in her possession. To this day, counsel for Ms. McElhone is still waiting for the Receiver to respond to his September 1, 2020 email and arrange an agreed-upon procedure to separate Ms. McElhone's tax documents from the Receivership entity tax documents.

3. The Google-Suite Access the Receiver Complains of by Former Employees Could Easily Have Been Avoided.

The Receiver devotes pages of its Response unnecessarily reciting its authority to administer and manage the Receivership Entities' business affairs, which includes, among other things, its authority to take custody and control of Receivership Entity records and documents. (Response at 3-5, citing DE 36, 141.) Its description, however, omits two important details, both of which are critical to the issue before this Court: (1) FSP managed a number of Non-Receivership Entities ("NREs") over which the Receiver has no control or authority; and (2) the Receiver failed

to advise the former employees it now alleges gained "unauthorized access" of its authority and what they could and could not do. Just as importantly, the Receiver failed to take the necessary steps to assume immediate control of the G-Suite platform used by Par, FSP and the NREs.

Allegations of "unauthorized access" presuppose, in this case, erroneously, notice to the parties allegedly engaged in this conduct. Data breaches suggest access by an individual who had no access to the data; but in this case, the employees were given this access by the companies to do their jobs. (Exhibit 1, Declaration of G. Campos defining "data breach," ¶¶ 19-20.) One would assume that the Receiver, before sending employees of the Receivership Entities home after taking control of the Receivership Entities, would advise them that a Receivership was in place and what that meant. This is, after all, a duty imposed on the Receiver in the Order:

> Additionally, the Receiver shall promptly give notice of his appointment to all known officers, directors, agents, employees, shareholders, creditors, debtors, managers, and general and limited partners of each Receivership Entity, as the Receiver deems necessary or advisable to effectuate the operation of the receivership.

(DE 36, ¶ 6.) It is also commonly done, immediately, after a receiver assumes control of a receivership entity. (Exhibit 1, ¶¶15-16.) Beyond providing this notice, the receiver evidently should have assumed immediate control of the network. (*Id.*, ¶11.) The Receiver's failure to do this for weeks after assuming control of the Receivership Entities was "unusual." (*Id.,* ¶14.)

Consequently, when the Receiver argues that former Par Funding employees accessed the Par Funding G-Suite after the Court established the Receivership (Response at 7), the characterization reflects a fundamental misunderstanding of the events that transpired after the Receiver took possession of Par Funding's offices, and the understandable confusion that ensued, in part, because the Receiver did not do his job. A bit of background is necessary here.

CBSG / Par Funding was created from just an idea at a table in 2012. Over the next eight years, the founders of Par Funding built a substantial company which paid millions of dollars in

interest to investors and funded thousands of small businesses across the country which were unable to obtain short-term and almost instantaneous funding elsewhere. For eight years, the founders of Par Funding carefully maintained all the books and records of the company, including tax filings. The records were maintained on computers, in cloud servers (the "G-Suite") and backed up on individual computers. In fact, the G-Suite set up by Par Funding personnel can be set to automatically back up files an employee is working on.[2]

The founders of Par Funding had many other businesses, aside from Par Funding, but those records were also maintained on Full Spectrum Processing's ("FSP") platforms on the G-Suite. Part of FSP's business operations was providing back office administrative work for companies that had nothing to do with the Par and CBSG.

On July 27, after the Court issued an Order appointing a Receiver, the Receiver took control of Par Funding's and FSP's offices in Philadelphia with the assistance of the FBI. (Exhibit 2, Declaration of Margaret Clemons, ¶¶ 5-7.) However, as the Receiver's Response makes clear, the Receivership only extends to certain enumerated entities. (DE 260, n 1.) There are over 20 other companies operated by the founders of Par Funding that are *not* Receivership entities that the Receiver has no lawful authority or control over.[3]

Consequently, in the ensuing days, Par Funding and FSP's owners and employees were unsure about how to continue to operate these non-receivership entities. (Exhibit 2, ¶¶ 8-9.) Neither the Receiver nor the agents who took control of the businesses made clear to the employees what their status was, or whether they could continue to access their emails or work documents

[2] Several examples of this can be clearly seen in Exhibit 3 to the Receiver's Response. Many of the items of "access" cited by the Receiver are simply efforts by the system to back-up files, which occurs on or about every 180 seconds. (*See, e.g.,* lines 7-13; 21-22, 23-25, 34-40, 41-63.)

[3] The Receiver was aware of this. In fact, counsel for the Defendants contacted the Receiver to set up a "protocol to separate these non-receivership entities from the G-Suite," which the Receiver agreed was necessary. (DE 220-2, at 1-2.)

remotely. (*Id.*) Many believed that they were still employed and continued working as before, albeit remotely. (*Id.*) During this period, Fox Rothschild, who still represented both Par Funding and the individual Defendants, did not send any emails or communications to Par Funding employees containing or addressing the Receivership Order.

This confusion could have been avoided. Had the Receiver notified employees when it took over Par Funding and FSP's offices of their status and the need to segregate the non-receivership entities from the G-Suite, they likely would not have accessed their work accounts remotely. Alternatively, arrangements could have been made to segregate Receivership Entity data on the G-Suite from NRE data on the G-Suite. (Exhibit 1, ¶ 12.) The exhibits to the Receiver's Response do not segregate Receivership Entity data from NRE data, making it unclear whether the data accessed was Receivership Entity or NRE data. (Exhibit 1, ¶¶ 21-22.) It is unclear why this information was redacted from the exhibits.[4]

As for Aida Lau, the Receiver alleges she accessed the G-Suite to download Par Funding information between July 29 and August 12, 2020. (Response at 6-7; Exhibit 1, ¶18.) It must be noted that Ms. Lau is not a party to this action and was never represented by undersigned counsel. As a former accounting manager for FSP, Ms. Lau understood Par Funding's finances and graciously agreed to provide declarations to defense counsel in advance of the preliminary injunction hearing. For her trouble, she was interviewed repeatedly by the Receiver, accused of wrongdoing and threatened by counsel for the Receiver that the FBI was going to question her and seize her laptop. In the final analysis, however, Ms. Lau is alleged to have used her own FSP

[4] Others employees, such as Jamie McElhone, who worked exclusively for Par Funding, checked their emails because, as defense counsel explained in an email to the Receiver, "In the wake of the TRO, merchants were emailing Jamie seeking information regarding re-load requests, questions about their account status and all manner of related questions." (DE 220-2, at 2.) Jamie McElhone did not respond, but instead took screen shots of the emails to preserve the emails, which counsel offered to produce to the Receiver. (*Id.*)

access to download data without knowing she could not do so. Indeed, the first and only time the Receiver provided notice to Ms. Lau that she could not access and would have to return Par Funding data to the Receiver was on August 17, when the Receiver sent her a copy of docket entry 159. (Exhibit 2, ¶ 17, referencing Exhibit 3, Receiver's email to Lau.) Consequently, it is not only unfair to characterize Ms. Lau's alleged access to the G-Suite during this period as a breach, it should be noted that this could have been prevented if the Receiver had given her notice of the Receivership Order sooner or cut off access to former employees. (Exhibit 2, ¶¶ 11-16 20.)

4. Defendants' Request for Documents Was a Discovery Request—for Documents.

The Receiver states in his Response that "It should be noted the Defendants never served the Receiver with a Request for Production." (Response at 2). In fact, Defendants made a specific request for documents from the Receiver and served that request via email. (DE 220-1.) The TRO permitted the parties to serve discovery while the SEC's request for a preliminary injunction was pending. (DE 42.) The Order made clear that service of discovery requests could be made by e-mail—in other words, in the manner made by defense counsel to the Receiver—and that responses should be provided in two days. (*Id.*) It also should be noted that the Receiver agreed to draft a stipulation and protective order to produce these documents to the Defendants (DE 220-2).

If defense counsel "never served the Receiver with a Request for Production," what can be made of the Receiver's agreement to produce these documents pursuant to a protective order? If the Defendants' discovery request is an attempt to obfuscate their violations of the Receivership Orders, as the Receiver suggests in his Response, then why did the Receiver agree to produce documents? Defendants ask that this Court admonish the Receiver to avoid creating controversy where none exists, and to instead focus on preserving and protecting the assets of the companies the Defendants worked so hard to build.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION

CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al,

Defendants.

DEFENDANTS' MOTION FOR AN ORDER DIRECTING THE RECEIVER TO COMPLY WITH THE ORDER GRANTING RECEIVERSHIP

Defendants Lisa McElhone (L. McElhone"), Joseph Cole Barleta ("Cole"), and Joseph W. LaForte ("Laforte"), and Relief Defendant The LME 2017 Family Trust (the "Trust") (collectively "Defendants"), respectfully submit this Motion for an Order Directing the Receiver to Comply with the Order Granting Receivership, specifically, to relinquish his unauthorized control over non-Receivership entities ("NRE"), including his access to and control over their documents, mail and computer systems, ACH processors, and bank accounts. This should have happened immediately upon the Receiver's assumption of control of the Receivership Entities. Instead, the Receiver's lax approach to this Court's Receivership Orders since the first of those Orders issued eight weeks ago has led to tangible, daily losses for NREs the Receiver has no lawful right to control. Repeated efforts by defendants to productively address with the Receiver this ongoing violation of the Court's Orders have been brushed aside or ignored. Accordingly, in order to correct

this violation of the Court's Order, Defendants respectfully request that the Court direct the Receiver to immediately release all control over the NREs.

STATEMENT OF FACTS AND REQUESTED RELIEF

On July 27, 2020, this Court granted Plaintiff Securities and Exchange Commission's Motion for Appointment of Receiver over the following Receivership Entities: "Complete Business Solutions Group, Inc. d/b/a Par Funding ("Par Funding"), Full Spectrum Processing, Inc., ABetterFinancialPlan.com LLC d/b/a A Better Financial Plan ("ABFP"), ABFP Management Company, LLC f/k/a Pillar Life Settlement Management Company, LLC ("ABFP Management"), ABFP Income Fund, LLC, ABFP Income Fund 2, L.P., United Fidelis Group Corp., Fidelis Financial Planning LLC, Retirement Evolution Group, LLC, RE Income Fund LLC, and RE Income Fund 2 LLC; and the following related entities: ABFP Income Fund 3, LLC, ABFP Income Fund 4, LLC, ABFP Income Fund 6, LLC, ABFP Income Fund Parallel LLC, ABFP Income Fund 2 Parallel, ABFP Income Fund 3 Parallel, ABFP Income Fund 4 Parallel, and ABFP Income Fund 6 Parallel" (collectively "July 27 Receivership Entities.") (DE 36, at 2.)

The Court amended its Receivership-related Orders but the identification of Receivership Entities never changed, save for on September 4, 2020. (*See* DE 238.) On September 4, 2020, the Court granted the Receiver's Expedited Motion to Expand Scope of Receivership to Include Additional Receivership Entities and to Require Dean Vagnozzi To Return Funds (the "September 4 Order.") (DE 238.) There, the Court expanded the Receivership entities "to include: ABFP Multi-Strategy Investment Fund LP; ABFP Multi-Strategy Fund 2 LP; and MK Corporate Debt Investment Company LLC ("MK")." (*See* DE 238 at 1, 2) (the "September 4 Receivership Entities," together with the "July 27 Receivership Entities," are designated collectively herein as "the Receivership Entities").

In every subsequent filing by the Receiver in which he lists the Receivership Entities, including those filed just days ago, the Receiver identifies the Receivership Entities as: Complete Business Solutions Group, Inc. d/b/a Par Funding ("CBSG"); Full Spectrum Processing, Inc.; ABetterFinancialPlan.com LLC d/b/a A Better Financial Plan ("ABFP"); ABFP Management Company, LLC f/k/a Pillar Life Settlement Management Company, LLC; ABFP Income Fund, LLC; ABFP Income Fund 2, L.P.; United Fidelis Group Corp.; Fidelis Financial Planning LLC; Retirement Evolution Group, LLC;, RE Income Fund LLC; RE Income Fund 2 LLC; ABFP Income Fund 3, LLC; ABFP Income Fund 4, LLC; ABFP Income Fund 6, LLC; ABFP Income Fund Parallel LLC; ABFP Income Fund 2 Parallel; ABFP Income Fund 3 Parallel; ABFP Income Fund 4 Parallel; and ABFP Income Fund 6 Parallel; ABFP Multi-Strategy Investment Fund LP; ABFP Multi-Strategy Fund 2 LP; and MK Corporate Debt Investment Company LLC." *See* Receiver, Ryan K. Stumphauzer's Status Report Regarding Motion to Compel the Production of Attorney Work Product from Law Firms. (DE 297 at note 1.) Moreover, the Receiver has repeatedly recognized in correspondence with defense counsel that his authority does not extend to any entity that is not a Receivership Entity.

However, despite the fact that the Receiver is not entitled to control, monitor or access documents, systems or materials that do not belong to the Receivership Entities, and his acknowledgement that he has no such right over NREs, he has repeatedly done so. This unauthorized control continues to this day.

The Defendants control at least twenty (20) NREs. The NREs include going concerns that have employees, bank accounts, receive mail, collect revenue, and have expenses including, *inter alia*, employee payroll, accounts receivable, overdue bills, outstanding invoices, and tax

obligations that have already come due or are imminent. They also have email servers and accounts, websites, and engage in electronic communication and commerce.

Despite counsel's repeated efforts to work with the Receiver to have him segregate and transfer control over the NREs and their systems and documents (*see* Exhibits A-J, annexed hereto), those efforts have been ignored. Consequently, by ignoring these requests and refusing to relinquish control over the NREs, the Receiver—for the past eight weeks and through today's date—is knowingly violating this Court's Receivership Orders and causing real financial impact to these businesses. The Receiver is deliberately accessing, controlling, keeping and exercising dominion over NRE assets including documents, mail, accounts, and electronic data over which he has absolutely no right or entitlement.

These issues are not merely academic – they are having a daily, practical deleterious effect on the NREs. For example, the Trust owns a rental apartment building and a new tenant who works from home is unable to access the Wi-Fi because the building does not have the Verizon bills relating to that apartment. The apartment building's mail is at CBSG's offices, occupied by the Receiver since the TRO. Despite undersigned counsel's multiple requests (s*ee* Exhibits C-F), the Receiver has produced possible Verizon account numbers but not the Verizon telephone bill. As a result of the Receiver's refusal to simply send a Verizon bill for an entity over which he has no lawful authority, a problem arose between the Trust and a tenant which defense counsel was forced to devote time and resources to resolve. This cannot continue.

Of course, the Receiver has no right to maintain control and access <u>any</u> NRE mail. Counsel has repeatedly requested to pick up the mail relating to all the non-Receivership Entities.[1]

[1] Prior to the TRO, non-Receivership mail went to the same building that CBSG and Par Funding are located in, 205 Arch Street, Philadelphia, PA. That building is owned by the Trust. RMR and FSP pay rent. The offices of the NRE have also long been located in that building.

Specifically, undersigned counsel requested "non-Receivership information including all mail, bills, checks, bank tokens, check scanners any other proprietary information or property that belongs to the Non-Receivership entities," and asked, "Can we send someone to pick up those items?" *See* Exhibit E at 1. The Receiver never responded.

In another example, a NRE called RMR pays $15,448.20 a month for the G-Suite used by Par Funding and CBSG and, up until recently, several other NREs. *See* Exhibits A and G. The bill goes to an RMR business credit card. However, the Receiver has exclusive control of the G-Suite, and the NREs cannot access, and derive no benefit from, the G-Suite. Therefore, since only Par Funding, CBSG, and the Receiver derive benefit from the G-Suite, Par Funding and CBSG should pay for the G-Suite. Despite undersigned counsel's repeated requests that the Receiver "please pay the charge tomorrow and then put the monthly charge for the G-Suite on a different credit card[,]" *see* Exhibits A and G, the Receiver has done nothing.

CBSG's corporate credit card is $30,330.64 past due. Despite undersigned counsel's efforts, the Receiver has thus far failed to make payments on that credit card. Because of that failure, American Express has suspended that credit card account. *See* Exhibits A and G. That credit card is under Ms. McElhone's name and is associated to her Social Security Number. The Receiver's failure to pay the credit card puts at risk of suspension all American Express accounts linked to Ms. McElhone and the NREs.

In another example, the Receiver failed to relinquish domain and control of the documents and bills for non-Receivership Entities LM Property Management and Lacquer Lounge, including their email domains. Because of this, the bills were not paid, and the email and e-commerce domains were shut down. *See* Exhibits I and J. The Receiver has no right to withhold and control this information and his failure to abide by this Court's Receivership Orders is resulting in lost

business, unpaid bills, an inability to conduct business and an inability to prepare and meet its tax obligations.

In yet another example, before the Receivership order was entered, all of the entities owned by the defendants used three ACH providers. At some point after the Receivership order was entered, the Receiver changed the names and passwords for the ACH accounts which some of the Receivership Entities, and many of the NREs, use to send and receive transfers of funds. Because NREs cannot access the ACH accounts, the NREs cannot receive payments from their clients or customers. Because of this, some of the NREs have not received a payment in nearly two months. As we have noted above, repeated requests by undersigned counsel to disentangle the Receivership and NREs have been ignored, prompting this motion.

Indeed, we have evidence that the Receiver is actively using NRE documents to create ACH accounts for Par Funding/CBSG MCA customers. *See* Exhibits L, M and N. Simply put, these documents show the Receiver, through someone at Par Funding, using NRE documents and forms – obviously improperly accessed – to open new ACH processing accounts for a merchant. First, prior to the TRO, Par Funding and CBSG had, for eight years, excellent relationships with their ACH processors. Had the Receiver properly managed the three extant ACH accounts at the time it assumed control over the Receivership Entities, there would have been little to no loss of daily cash deposits. Second, and obviously, using NRE businesses to open ACH accounts for Par Funding is a violation of the Court's Receivership Orders. Even worse, it appears that the Receiver's employees are not even aware of what the Receivership Order provides. When the Par employee working under the Receiver spoke to the merchant, he not only spoke disparagingly about all the companies, including the NREs, but repeatedly and emphatically told the merchant

that all the companies, meaning both Par, a Receivership Entity, and all NRE companies, were all the same and under the control of the Receiver.[2]

But beyond this violation, the Receiver's improper efforts may lead to funds meant for Par Funding being transferred to NREs or, conversely, NREs making transfers to Par Funding. The Receiver should not be using their unauthorized access to NRE documents to create ACH accounts to receive payments for Par Funding.

Finally, we have evidence that Receiver's counsel directed an individual who has a mortgage with an NRE, to make his mortgage payment to the Receiver, not to the NRE, at Receiver's counsel's office address. Generously put, this request is mystifying. It also illustrates a seeming total disregard for this Court's Receivership Order.

The relief we are requesting is one of compliance and cooperation. Given the exigency of these issues, we request that the Court direct the Receiver to Comply with the Order Granting Receivership and thus: 1) immediately relinquish control over all NREs; 2) immediately relinquish control over all NREs' mail, tax documents, electronic data, email accounts, processing accounts, payroll accounts and all related and similar mechanisms and systems and provide same to Defendants; and 3) where Receivership Entity and NRE material, information or data is intertwined, direct the Receiver to immediately work with undersigned counsel to segregate documents, systems, and data belonging to NREs from those belonging to the Receivership Entities.

[2] The merchant has an MCA balance due Par of about $140,000. The Par/Receiver employee told the merchant he would give a 99% discount and only requested payments of $100 per week. If that is the direction given by the Receiver to its employees, then its claims of operating Par/CBSG to repay investors are illusory.

CONCLUSION

For the reasons stated herein, the Defendants respectfully request that the Court issue an Order Directing the Receiver to Comply with the Order Granting Receivership.

Dated: October 6, 2020
New York, New York

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CIV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____/

DEFENDANTS' JOINT MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

In accordance with the Court's August 7, 2020 Order [ECF No. 104] requiring a combined response, Defendants Complete Business Solutions Group, Inc., d/b/a Par Funding ("Par Funding"), Lisa McElhone ("Ms. McElhone"), Joseph W. LaForte ("Mr. LaForte"), Joseph Cole Barleta ("Mr. Cole"), Perry S. Abbonizio ("Mr. Abbonizio"), Dean J. Vagnozzi ("Mr. Vagnozzi"), Michael C. Furman ("Mr. Furman"), and Relief Defendant The LME 2017 Family Trust ("Trust") (collectively, "Defendants") jointly move this Court to dismiss the Amended Complaint ("Complaint or Comp.") [ECF No. 119] for failure to state a claim upon which relief may be granted pursuant to Federal Rule of Civil Procedure Rule 12(b)(6) and because the Complaint fails to comport with the heightened standard found in Federal Rule of Civil Procedure Rule 9(b).

I. INTRODUCTION

The SEC's Complaint suffers from myriad deficiencies and is based on allegations that either conflate or abjectly fail to define the roles and conduct of the Defendants in the alleged violations. The SEC asserts eight causes of actions based on securities violations against all

Defendants for allegedly engaging in a fraudulent scheme to raise investor funds through unregistered securities offerings. The result is a group pleading that does not comport with Rule 9(b) and is insufficient as a matter of law. Further, the Complaint: (1) alleges an entire phase of the alleged scheme over which the SEC does not have enforcement authority because the notes at issue are not securities; (2) fails to adequately allege facts to support multiple required elements for a securities fraud claim; (3) constitutes a classic shotgun pleading; and (4) requests relief outside the statute of limitations. Accordingly, the Complaint should be dismissed.

II. SUMMARY OF THE SEC'S ALLEGATIONS

The Commission alleges that Lisa McElhone and her husband, Joseph LaForte, began operating Par Funding in 2011. (Comp. ¶ 11.) "From August 2012 until December 2017," in what the SEC deems "Phase I," Par Funding initially sold "only directly to investors" promissory notes with 12-month terms that granted a security interest to the noteholder in Par Funding's assets, including its accounts receivable. *Id.* at ¶ 49–50, 54. The Commission alleges that "things changed in early January 2018," when Par Funding instead used "Agent Funds" to offer and sell securities. *Id.* at ¶¶ 62–63, 65. The SEC goes on to allege, in conclusory and threadbare assertions, that "*the Defendants*" misrepresented: "(1) the true nature of Par Funding's loan practices; (2) Par Funding's true track record of issuing loans and the default rates of the loans; (3) the safety of investing in Par Funding's loans; (4) LaForte's criminal record, identity, and control of Par Funding; (5) three Cease-and-Desist Orders state securities regulators have entered against Par Funding for violating state securities laws; (6) the true result of the New Jersey Division of Securities' Investigation of Par Funding; (7) the fact that contrary to Par Funding's representations to the Commission in its filings, it diverts investor funds to McElhone and Cole, Par Funding's CFO, and also funnels money to The LME 2017 Family Trust, which is McElhone's family trust; (8) the fact that contrary

to his representations to investors, LaForte has never invested in Par Funding; (9) a Cease-and-Desist Order and sanctions issued against Vagnozzi for violating state securities laws in connection with the Par Funding offering; (10) a Cease-and-Desist Order and sanctions issued against ABFP for violating state securities laws in connection with the Par Funding offering; (11) a Cease-and-Desist Order and sanctions issued against Abbonizio for violating state securities laws in connection with the Par Funding offering." *Id.* at ¶ 8 (emphasis added). Further, the SEC alleges, with no legal basis, that Par Funding "transferred at least $14.3 million, which included investor funds, to the Trust for no legitimate purpose." *Id.* at ¶ 36.

The Commission alleges that Ms. McElhone was the CEO and founder of Par Funding, *id.*, at 16, but tellingly alleges nothing with respect to her involvement in any of the alleged misrepresentations, which comprise the alleged "scheme."[1] The SEC calls Mr. Laforte the *de facto* CEO of Par Funding, *id*. at 17, and confusingly alleges that that he was not identified as part of its management on its website or in its offering materials but did disclose what involvement he had to the investors he had contact with.

The Commission alleges that Messrs. Furman and Vagnozzi operated Agent Funds to raise funds for Par Funding in exchange for commissions, *id.* at ¶¶ 4, 6, 7, and that Mr. Abbonizio "oversees and coordinates" the Agent Funds and "solicits investors." *Id.* at ¶¶ 5–6, 20, 77–80. According to the Complaint, Messrs. Furman and Vagnozzi, through their Agent Funds, engaged in the fraudulent offer and sale of unregistered securities in the form of promissory notes to the investing public while either knowingly or negligently making material misrepresentations and/or omissions. *Id.* at ¶¶ 7–9. According to the Commission, in carrying out those responsibilities Mr.

[1] The SEC distorts Ms. McElhone's role with Par Funding, alleging repeatedly she is its sole employee, *id.* at 11, 15-16, while cryptically acknowledging that Par Funding is operated by Full Spectrum Processing, which the SEC fails to mention had 70 employees who operated Par Funding. *Id.*

Abbonizio made misrepresentations to potential investors—including that Par Funding had a rigorous underwriting process (*e.g., id.* at ¶¶ 155–57, 162–66, 181, 189) and that its merchant loans had a low default rate and were insured (*e.g., id.* at ¶¶ 99, 121, 187, 206).

Yet, when reviewing the Complaint's factual allegations concerning the respective Defendants, which are presumably the culmination of an exhaustive regulatory investigation, the allegations raise far more questions than support for the claims. First, the Complaint alleges an entire phase of the alleged scheme over which the SEC does not have enforcement authority because the notes at issue are not securities. Second, the Complaint impermissibly lumps the defendants together, making it impossible for each respective Defendant to distinguish the alleged conduct ascribed to him from conduct attributable to others. Third, the Commission's claims under the antifraud provisions[2] fail to allege that each respective defendant acted either with the requisite knowledge or intent to deceive, with severe recklessness or negligently when purportedly providing information to investors; or that each defendant understood himself to be participating in a fraudulent scheme. Fourth, the Complaint constitutes an impermissible shotgun pleading that cannot survive the requirement under Rule 9(b). Fifth, the Complaint improperly joins the Trust as a Relief Defendant without sufficiently alleging facts to show that the Trust is a recipient of ill-gotten funds with no legitimate claim to the funds. Sixth, the Complaint requests relief well outside the statute of limitations. For these reasons, the Complaint should be dismissed.

III. STANDARD OF REVIEW: MOTION TO DISMISS UNDER RULE 12(b) and 9(b)

This Court may dismiss the SEC's claims against the Defendants pursuant to Rule 12(b)(6) if it fails to state a claim upon which relief can be granted. *See* Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true,

[2] Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act, and Rule 10b-5 thereunder, are commonly referred to as the "antifraud provisions" of the federal securities laws.

to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (internal citation omitted). However, the Court need not accept unsupported conclusions, unwarranted inferences, or sweeping conclusions cast in the form of factual allegation. *See Aldana v. Del Monte Fresh Produce, N.A., Inc*., 416 F.3d 1242, 1253 (11th Cir. 2005) (commending district court "for remembering that some minimal pleading standard does still exist" and finding that "bald assertions" and "unwarranted deductions of facts" are not accepted as true and will not survive a Rule 12(b)(6) motion to dismiss).

Further, in a complaint alleging fraud, as the SEC's claims, "the circumstances constituting fraud . . . shall be stated with particularity." Fed. R. Civ. P. 9(b). The particularity requirements of Rule 9(b) apply equally to actions initiated by the SEC. *See, e.g.*, *S.E.C. v. BankAtlantic Bancorp, Inc.*, No. 12-60082-CIV, 2012 WL 1936112, at *7–10 (S.D. Fla. May 29, 2012). This heightened standard is particularly fitting in actions brought by the Commission because it has statutory investigative, pre-suit subpoena power.

Notably, Rule 9(b) serves the important purpose of "alerting defendants to the 'precise misconduct with which they are charged' and protecting defendants 'against spurious charges of immoral and fraudulent behavior.'" *Durham v. Bus. Mgmt. Assoc.*, 847 F.2d 1505, 1511 (11th Cir. 1988). As such, a complaint in a securities action that fails to connect the factual allegations to the substantive elements of each alleged count fails to meet the heightened pleading requirement of Rule 9(b). Further, "[e]ven securities claims without a fraud element must be pled with particularity pursuant to Rule 9(b) when that nonfraud securities claim is alleged to be part of a defendant's fraudulent conduct." *S.E.C. v. Solow*, No. 06-81041-CIV, 2007 WL 917269, at *4 (S.D. Fla. Mar. 23, 2007).

Accordingly, to satisfy the requirements under 9(b), the SEC "must allege: (1) the precise statements, documents, or misrepresentations made; (2) the time, place, and person responsible for the statement; (3) the content and manner in which these statements misled the [p]laintiff; and (4) what the defendants gained by the alleged fraud." *BankAtlantic Bancorp, Inc*., 2012 WL 1936112, at *8 (quoting *Garfield v. NDC Health Corp*., 466 F.3d 1255, 1261 (11th Cir. 2006)). In other words, Rule 9(b) is satisfied if the complaint sufficiently pleads the "who, what, when, where, and how of the allegedly false statements" and then generally alleges the requisite intent. *S.E.C. v. Betta*, No. 09-80803-CIV, 2010 WL 963212, at *4 (S.D. Fla. Mar. 15, 2010) (quoting *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1237 (11th Cir. 2008)).

IV. ARGUMENT

To establish a violation of Section 10(b) and Rule 10b-5, the SEC must prove by a preponderance of the evidence that each respective defendant made "(1) material misrepresentations or materially misleading omissions, (2) in connection with the purchase or sale of securities," and that they "(3) made [them] with scienter." *S.E.C. v. Merch. Capital, LLC*, 483 F.3d 747, 766 n.17 (11th Cir. 2007) (citing *Aaron v. S.E.C.*, 446 U.S. 680, 695, 100 S.Ct. 1945, 64 L.Ed.2d 611 (1980)); *S.E.C. v. Zandford*, 535 U.S. 813, 816 n.1 (2002). A complaint alleging claims under Section 10(b) and Rule 10b-5 must satisfy the heightened pleading requirements established under Rule 9(b) of the Federal Rules of Civil Procedure. *S.E.C. v. Strebinger*, 114 F. Supp. 3d 1321, 1329 (N.D. Ga. 2015) (citing *Kammona v. Onteco Corp*., 587 Fed.Appx. 575, 581 (11th Cir. 2014)). To do so, a plaintiff "must state with particularity the circumstances constituting fraud or mistake." Fed. R. Civ. P. 9(b). Scienter must be found with respect to *each* defendant on *an individual basis. Phillips v. Sci.-Atlanta, Inc.*, 374 F.3d 1015, 1017–18 (11th Cir. 2004).

To show a violation under Section 17(a)(1), "the SEC must prove (1) material misrepresentations or materially misleading omissions, (2) in the offer or sale of securities; (3) made with scienter." *Merch. Capital, LLC*, 483 F.3d at 766 (citing *Aaron*, 446 U.S. at 695). Similarly, to show a violation under Section 17(a)(2) and (3), "the SEC need only show (1) material misrepresentations or materially misleading omissions, (2) in the offer or sale of securities, (3) made with negligence." *Id.*

To satisfy the scienter element for Section 17(a)(1) claims, the SEC must show "either an 'intent to deceive, manipulate or defraud,' or 'severe recklessness.'" *Mizzaro v. Home Depot, Inc.*, 544 F. 3d 1230, 1238 (11th Cir. 2008) (quoting *Bryant v. Avado Brands, Inc.*, 187 F. 3d 1271, 1284 (11th Cir. 1999)); *Aaron v. S.E.C.*, 446 U.S. 680, 701 (1980) (concluding that scienter is a necessary element of a civil enforcement under section 10(b) and Rule 10b-5 of the 1934 Act and Section 17(a)(1) of the 1933 Act). The Eleventh Circuit, however, limits severe recklessness as follows:

> Scienter may be established by a showing of knowing misconduct or severe recklessness. Proof of recklessness requires a showing that the defendant's conduct was an ***extreme departure*** of the standards of ordinary care, which presents a danger of misleading buyers or sellers that ***is either known to the defendant or is so obvious that the actor must have been aware of it***.

Id.; see also Garfield v. NDC Health Corp., 466 F.3d 1255, 1264 (11th Cir. 2006) (emphasis added) ("severe recklessness can be established through deliberate avoidance of 'red flags.'").

As described more fully below, the SEC has failed to meet the standards articulated by Rules 12(b)(6) and 9(b) and, as a result, dismissal of Counts I through VI and VIII of the Complaint is appropriate. *See S.E.C. v. Tambone*, 417 F. Supp. 2d 127, 131 (D. Mass. 2006) (dismissing the SEC's complaint based on fraud after applying Rule 9(b) particularity requirements); *S.E.C. v. Yuen*, 221 F.R.D. 631, 634–36 (C.D. Cal. 2004) (dismissing the SEC's complaint because the SEC

failed to comport with the requirements of Rules 12(b) and 9(b)). While Count VII alleges nonfraud violations of Section 5 of the Securities Acts, it is alleged as part of the alleged fraudulent scheme and similarly fails to meet the requirements under 9(b).

1. The Par Funding Notes issued During "Phase I" Are Not Securities

The SEC has no authority to bring an enforcement action unless the action pertains to the offer or sale of securities. *Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1285 (11th Cir. 2007) (citing to *Home Guaranty Ins. Corp. v. Third Fin. Servs., Inc.*, 667 F. Supp. 577, 579 (M.D. Tenn. 1987)) ("To reach the question of an alleged violation of the anti-fraud provisions of the Securities Acts, the transaction at issue must involve a 'security' as defined in the 1934 Act."). As shown below, to the extent this case is based on the period alleged as "Phase I," the Court should dismiss the SEC's entire action regarding any conduct stemming from the alleged offer or sale of promissory notes during Phase I because the notes issued by Par Funding during that time were not securities.

While the Securities and Exchange Acts define "security" to mean "any note," *see* 15 U.S.C. § 77b(a)(1), § 78c(a)(10), not all "notes" should be considered securities for the purposes of these Acts. *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990) ("the phrase 'any note' should not be interpreted to mean literally 'any note,' but must be understood against the backdrop of what Congress was attempting to accomplish in enacting the Securities Acts"). The Supreme Court in *Reves* set forth a four-factor test referred to as the "family resemblance" test to rebut the presumption that a note is a security. *See S.E.C. v. Levin*, No. 1:12-CV-21917-UU, 2014 WL 11878357, *9 (S.D. Fla. Oct. 6, 2014). The *Reves* Court enumerated a list of notes that expressly are not securities, and so are exempt from the 1933 and 1934 Acts, including two that are pertinent here: (1) short-term notes secured by a lien on a small business or some of its assets; and (2) short-

term notes secured by an assignment of accounts receivable. *See Asset Prot. Plans, Inc. v. Oppenheimer & Co.*, No. 8:11-CV-440-T-23MAP, 2011 WL 2533839, at *2 (M.D. Fla. June 27, 2011).

A note that falls squarely into either of these categories is considered exempt, and a court need not employ the "family resemblance" test. *Id.; Lincoln v. Washington Mut. Bank, N.A.*, No. 07-60273-CIV, 2007 WL 9701069, at *2 (S.D. Fla. Aug. 6, 2007) (concluding that there was no need to further discuss the family resemblance test because the note in question fell into one of the exempt categories); *First Citizens Fed. Sav. & Loan Ass'n v. Worthen Bank & Tr. Co.,* , 919 F.2d 510, 515–16 (9th Cir. 1990) (same). Here, the Par Funding promissory notes fall squarely into two exempt categories.

The promissory notes issued by Par Funding during Phase I are comparable to the short-term notes in *Asset Prot. Plans, Inc.*, 2011 WL 2533839, at *2. In *Asset Prot. Plans, Inc.*, an investment business sold promissory notes that provided that the principal interest would be due on demand by the holder between five and a half months and one year after issuance. *Id.* at *1, 3. To secure the notes, the investment business received guarantees from the relevant parties and a lien over the "present and future personal property, accounts, assets . . . and fixtures of" of each guarantor. *Id.* at *4. The court found that the notes in question were characterized as short-term notes because the holder of the notes could not receive any additional interest by holding the notes any longer than one year. *Id.* at 4. Thus, the court concluded that the notes were similar to "short-term note[s] secured by a lien on a small business or some of its assets." *Id.*

Likewise, the promissory notes at issue here are "short-term notes secured by a lien on a small business or some of its assets." *Reves*, 494 U.S. at 65. The Par Funding Notes generally provide that the interest is paid over twelve months, and then the investor's principal investment

is returned in full to the investor. (Comp. ¶ 53.) The Security Agreement states that Par Funding grants a security interest to the investor in substantially all of Par Funding's assets, including its accounts receivable. *Id.* at ¶ 54. The Middle District court in *Asset Prot. Plans, Inc.* explained that such an instrument that provided for repayment of the principal plus interest at a fixed rate could not reasonably be characterized as a "security" for purposes of federal securities laws. *Id.* at *2. As in *Asset Prot. Plans, Inc.*, the PAR Notes were secured by a lien on Par Funding assets, including its accounts receivable.

Once a court determines that the note in question falls squarely within an exempt category, the court is permitted to end the analysis. *See, e.g., Lincoln v. Washington Mut. Bank, N.A.*, No. 07-60273-CIV, 2007 WL 9701069, at *2 (S.D. Fla. Aug. 6, 2007); *Prochaska & Assocs., Inc. v. Merrill Lynch Pierce Fenner & Smith, Inc.*, 798 F. Supp. 1427, 1430 (D. Neb. 1992) (finding that because, the instruments were "short-term note[s] secured by a lien on a small business or its assets" they were not securities, and applied the four-factor test only in the alternative). Accordingly, the Court should find that the PAR notes issued during Phase I fall under the judicial exemption set forth in *Reves*, since they have a short-term duration of 12 months or less and are secured by a lien on Par Funding's assets and accounts receivable.

2. <u>The SEC's Complaint Lumps Defendants Together and Fails to Allege Claims Against Each Defendant with Particularity.</u>

Rule 9(b) does not permit a plaintiff to "merely 'lump' multiple defendants together but 'require[s] plaintiffs to differentiate their allegations when suing more than one defendant . . . and inform each defendant separately of the allegations surrounding his alleged participation in the fraud.'" *Cordova v. Lehman Bros., Inc.*, 526 F. Supp. 2d 1305, 1312–13 (S.D. Fla. 2007), *order aff'd in part, vacated in part sub nom. Puterman v. Lehman Bros., Inc.*, 332 F. App'x 549 (11th Cir. 2009) (quotations and citations omitted).

From the outset of the Complaint, the Commission impermissibly lumps allegations against all Defendants together. As examples, the Commission alleges:

1) "To fuel the Par Funding loans and enrich themselves, **the Defendants** operate a scheme wherein they raise investor money through unregistered securities offerings." (Comp. ¶ 2) (emphasis added);

2) "The fraudulent scheme operates behind multiple veils of secrecy built of **the Defendants'** lies to conceal: (1) the true nature of Par Funding's loan practices . . . (11) a Cease-and-Desist Order and sanctions issued against Abbonizio for violating state securities laws in connection with the Par Funding offering." (Comp. ¶ 8) (emphasis added);

3) "These lies, and the scheme **the Defendants** employ to perpetuate them in the unregistered securities offerings, form the basis of this action. Each Defendant plays a critical and substantial role in the fraudulent scheme to misrepresent and conceal the truth. Each individual Defendant solicits investors to purchase securities – either through an Agent Fund or directly from Par Funding – by scheming and lying. And it continues to this day." (Comp. ¶ 9) (emphasis added); and

4) However, **the Defendants** have failed to disclose [the Pennsylvania and New Jersey Orders] while touting Par Funding. (Comp. ¶ 230).

Clearly, these allegations do not satisfy Rule 9(b)'s heightened pleading requirement. By lumping defendants together, no defendant is able to delineate which conduct is being ascribed to him or her from that attributable to others. *See Durham*, 847 F.2d at 1511.

3. <u>The SEC Has Failed to Establish That Defendants Violated the Antifraud Provisions of the Federal Securities Laws.</u>

First, the Commission's 58-page Complaint fails to sufficiently allege that any of the defendants acted with scienter, which "constitutes an important and necessary element [of both Sections 17(a)(1) and 10(b)] securities fraud violations." *Betta*, 2011 WL 4369012, at *9. The Supreme Court explained that scienter is "a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 193 n. 12 (1976). The SEC must establish that "a defendant made a material misstatement, not merely innocently or negligently, but with *an*

intent to deceive." *Merck & Co., Inc. v. Reynolds,* 559 U.S. 633, 649 (emphasis in original). This standard requires courts to consider "plausible opposing inferences." *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308, 323 (2007); *Betta*, 2011 WL 4369012, at *9.[3]

i. Par Funding, Ms. McElhone, Mr. LaForte, and Mr. Cole

The Complaint compiles a laundry list of conclusory allegations without identifying the "who, what, when, where, and how of the allegedly false statements," specifically, the maker of the statement, how it is materially false, how the speaker knows the statement to be false, and whether the speaker acted with the requisite scienter or, at minimum, negligence in connection with the statement. Examples abound.

1. Par Funding's Loan Practices

With respect to alleged misrepresentations regarding Par Funding's "loan practices," or more accurately stated, its merchant cash advance practices, the Complaint cites no specific allegations that Par Funding, or anyone whose knowledge would be imputed to Par Funding, had authority over the alleged statements or knowledge of their falsity. Notably, the Complaint is devoid of any specific allegations that Ms. McElhone made or authorized any such statements, or that she knew such representations or written materials contained material misrepresentations, omissions, or were part of a deceptive scheme.[4]

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[3] District courts have differed as to whether *Tellabs* applies to SEC enforcement actions. *See, e.g., S.E.C. v. Mannion*, 789 F. Supp. 2d 1321, 1334 (N.D. Ga. 2011), compare with *S.E.C. v. Glob. Dev. & Envtl. Res., Inc.*, No. 8:08-CV-993-T-27MAP, 2008 WL 11338454, at *6 (M.D. Fla. Nov. 26, 2008). The undersigned counsel has not located any cases in which the Eleventh Circuit Court of Appeal has addressed this issue. As a result, *Betta* stands as the most persuasive authority within the Southern District of Florida.

[4] Indeed, even a cursory review of the Complaint makes clear that Ms. McElhone's appearance in it is limited to empty references to her title with absolutely no reference to her involvement in the day-to day operations or the direction or implementation of its policies. She is not alleged to have made any of the statements alleged in the complaint regarding loan practices, default rates, insurance—none of it. And, given the absence of any allegation that she was involved in operating the business, there is nothing in the Complaint that suggests she would have made any such statements with knowledge of their falsity or that she could have done so with the intent to further a fraudulent scheme. *Stevens v. InPhonic, Inc.*, 662 F. Supp. 2d 105, 120 (D.D.C. 2009)(noting that several Circuits have found that alleging that a defendant, as a corporate officer in a company, "should have known" of misleading or fraudulently-made statements based on that person's position with the company is not enough, by itself, to infer scienter); *In re Immune Response*

Instead, the Complaint attributes the alleged misstatements regarding loan practices to Messrs. Abbonizio and Vagnozzi, neither of whose conduct is attributable to Par Funding. *See Thompson v. SendTec, Inc.*, No. 06-61327-CIV, 2007 WL 9700594, at *6 (S.D. Fla. June 12, 2007) (finding that plaintiff failed to plead how individual defendants were corporate directors or officers of the corporate entity, and thus, could not impute the scienter of the individual defendant onto the corporate defendant). Moreover, many of the alleged misrepresentations regarding the underwriting process attributed to Messrs. Abbonizio and Vagnozzi—those indicating that the underwriting process was the "coupe de grace" "exceptional," "exemplary," and the like—constitute mere puffery and opinions "deemed immaterial by a broad spectrum of federal courts." *City of Monroe Employees Retirement Sys. v. Bridgestone Corp.*, 399 F.3d 651, 671 (6th Cir. 2005) ("Statements describing a product in terms of "quality" or "best" or benefitting from "aggressive marketing" are too squishy, too untethered to anything measurable, to communicate anything that a reasonable person would deem important to a securities investment decision.");. *Solow*, No. 06-81041-CIV, 2008 WL 11333854, at *6) (noting that jury instruction for materiality in an SEC enforcement action "conveyed the concept that 'puffing' is not material.")[5] Certainly, the Complaint never alleges that Par Funding or anyone suggested that on-site inspections were done for every merchant applicant, or that they were always completed in 48-72 hours. A reasonable investor would not attach significance to Par Funding's decision not to inspect businesses with which it has a prior relationship or where the size of the deal would not warrant the expense of a physical inspection. With respect to the claim about "merchant liaisons" (Comp., ¶184), the

Securities Litigation, 375 F.Supp.2d 983, 1028-1029 (S.D. Cal. 2005) (refusing to attribute actionable misrepresentations to corporate officers because there was no allegation that they "either participated in the day-to-day corporate activities or had a special relationship with the corporation, such as participation in preparing or communicating group information at particular times.").

[5] This same reasoning would apply to Mr. Laforte's alleged representation that "Par Funding is the most profitable cash advance company in the United States and maybe in the world." (Comp. ¶ 220.) This form of marketing is too untethered to anything measurable to be material.

Complaint is silent as to who made the representation, how it was made, or how the maker knew it was false or made it with scienter.

2. Loan Default Rates

The SEC claims that Messrs. Laforte, Abbonizio, Furman, and Vagnozzi made false and misleading claims to investors regarding the loan default rate for the MCA transactions. (Comp. ¶¶ 185-203.) However, the SEC's allegation of falsity is based solely on *its* preference for a method of calculating a default rate over the method used by Par Funding. (Comp. ¶ 148.) The SEC does not allege that the loan default rate analysis used by Par Funding was contrary to industry standard, nor does it allege that there is even an industry standard for the loan default rate. The SEC also does not allege that the percentage of defaults allegedly reported to investors was false based on Par Funding's method of calculating the default rate, or that it represented a particular method to investors. Rather, the SEC alleges that Par Funding's loan default rate was calculated "differently"—presumably from the method the SEC used. But the SEC's preference for its method over Par Funding's does not prove falsity or scienter. *Lloyd v. CVB Fin. Corp.*, 2012 WL 12883522, at *20-21, 26 (C.D. Cal. Jan 12, 2012) (dismissing complaint because plaintiffs did not allege adequate facts to show that defendants' method of calculating loan loss reserves were false or misleading simply because they differed from the method used by plaintiffs.). Moreover, as to Messrs. Abbonizio, Furman, and Vagnozzi, the Complaint fails to allege how they would even know the statements were false, as they did not work at Par Funding and there is no allegation that they had access to information regarding: (1) Par Funding's actual default rate, or (2) how it was calculated.

3. Insurance on Merchant Fund Advances

The SEC alleges that, "[i]n the brochure Par Funding distributes to potential investors through the Agent Funds, Par Funding claims to offer insurance . . . that protects Par Funding in case of a default or non-payment." (Comp. ¶ 204.) First, the Complaint does not identify the maker of the alleged statement. There is no allegation regarding who drafted or had authority over the statement, the brochure the statements appeared in, or the merchants whose payments it intended to cover. The lack of specificity regarding who is alleged to have made each purported misstatement is particularly fatal to the SEC's 10(b) claims. Under *Janus Capital Group, Inc. v. First Derivative Trader*s, 564 U.S. 135, 142-43 (2011), no defendant can be liable for any alleged misstatements that are not attributable to him, or over which he has no ultimate authority.

Moreover, the allegations of the Complaint *do not support the SEC's claim that the alleged representation was false*. At a minimum, the allegation does not sufficiently meet the heightened pleading requirement of Rule 9(b) to support its falsity. For example, the SEC does not allege that Par Funding *did not obtain insurance* to cover non-payment by a merchant, or that the insurance it obtained would not protect Par Funding in case of non-payment by a merchant. Instead, it alleges that the claim is false because "Par Funding *did not offer small businesses* insurance on the Loans, and thus investor funds were not protected by insurance." Comp. ¶ 207. The SEC's characterization reflects a fundamental misunderstanding of the alleged representation made in the brochure, which, logically speaking, would not require merchants to be advised that Par Funding obtained insurance to cover their failure to pay. Any such insurance would involve an agreement between Par Funding and the insurance carrier to cover nonpayment by the merchant. Because this insurance would neither be *offered to* nor necessarily even disclosed to the merchants, the SEC's theory of falsity crumbles.

Even if the statement were false or misleading, even in the light most favorable to the SEC, a reasonable inference can be drawn from the Complaint that Par Funding, Ms. McElhone, and Messrs. Laforte and Cole would not have prepared a brochure distributed by the Agent Funds. *See Metro. Transportation Auth. Defined Benefit Pension Plan Master Tr. v. Welbilt, Inc.*, No. 8:18-cv-3007-T-30AEP, 2020 WL 905591, *4 (M.D. Fla. Feb. 6, 2020) (In deciding a motion to dismiss, court may consider other inferences that may be drawn from the allegations). There certainly is no allegation that they did. Moreover, the SEC fails to allege how Messrs. Abbonizio, Furman, and Vagnozzi, would know whether Par Funding obtained the insurance or what the insurance coverage entailed because they did not work at Par Funding and there is no allegation that they had access to this information.

4. Payments to Ms. McElhone and Mr. Cole

The SEC's allegation that Par Funding made misrepresentations in SEC filings about McElhone and Cole's receipt of funds represents yet another example of its failure to understand Par Funding's operation and cash flows before filing this case. The SEC alleges that Par Funding made two false filings with the Commission regarding how investor funds would be used. Both filings—the first, a Form D Notice of Exempt Securities Offerings filed in August and the second, an amended Form D notice filed in April 2020—disclosed investor proceeds raised by Par Funding through 2019. (Comp. ¶¶ 235-236.) According to the SEC, the representations made in these filings "that Cole and McElhone would not receive any of the gross proceeds of the securities offering are false." (*Id.* at ¶ 239.)

However, the SEC's allegations fail to adequately specify whether the payments to Ms. McElhone and Mr. Cole represented *gross proceeds* of the offering—in other words, funds deposited by investors—rather than other funds generated by Par Funding's legitimate merchant

cash advance business. This is particularly true given the allegations of the Complaint that Par Funding advanced at least $600 million to merchants and charged "interest" to the merchants they funded (Comp. at ¶¶ 44-46), which obviously generated revenues for Par Funding. *Cordova*, 526 F.Supp.2d at 1319 (S.D. Fla. 2007), *rev'd on other grounds*, 332 Fed.Appx. 549 (11th Cir. 2009) (dismissing complaint alleging securities fraud for failure to satisfy Rule 9(b)'s particularity requirement with respect to the allegation of commingled investor funds after finding that "the allegations are insufficient to show Defendants had a duty to correct any statement attributable to Defendants regarding the segregation of funds."). The SEC's conclusory allegations do not meet the requirements of Rule 9(b) given the reasonable inference that can be drawn from the Complaint that these transfers were made from Par Funding revenues, and not gross proceeds of the of the offering. The SEC cannot simply freeze, for example, the funds from an account without making a reasonable effort to segregate ill-gotten gains from legitimate proceeds. *S.E.C. v. McGinn*, No. 10-CV-457, 2012 WL 1142516 at *5 (N.D.N.Y. Apr. 4, 2012) (assessing various accounts and finding that where illegitimate funds were commingled with legitimate funds, the two categories were severable and limited amount of asset freeze only to the amount of the illegitimate funds).

Notably, the SEC did not allege in its Complaint that Par Funding promised to segregate investor funds from other funds generated by the business. Consequently, the SEC's theory that the mere transfer of funds from an account in which both were held rendered the statements in the Commission filings false is simply inadequate. At a minimum, the SEC would have to allege with more specificity the amounts (of each) held in Par Funding's accounts at the time of the alleged transfers. Also, because no representation regarding the segregation of funds was made to investors, the allegations do not support a finding that the statements made in the Commission filings were false or made with a high degree of scienter.

5. Other Misrepresentations Alleged in the Complaint

The SEC's allegations regarding Par Funding's regulatory history do not constitute actionable material misrepresentations and omissions. (Comp. ¶ 220.) To begin with, the SEC's laundry list of statements made by Messrs. Abbonizio, Vagnozzi, Furman and Gissas are not attributable to PAR Funding. Under *Janus Capital Group, Inc.*, 564 U.S. at 142–43, no defendant can be liable for any alleged misstatements that are not attributable to him, or over which he has no ultimate authority. Here, the SEC is attempting to attribute statements made by third-parties, none of whom owned, managed, or were even employed by Par Funding, to the company. Even before the Supreme Court's decision in *Janus*, courts found that corporations generally were not liable for statements made by third parties on their behalf. *See Raab v. General Physics Corp.*, 4 F.3d 286, 289 (4th Cir. 1993).

Moreover, Mr. LaForte's statements as alleged do not constitute material misstatements or omissions. An omission is material for purposes of a securities fraud claim if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32. Here, the SEC's theory is that Mr. LaForte's statements touting Par Funding's success as a profitable cash advance company are made materially misleading by omission because he failed to disclose that Par Funding "has twice been sanctioned for violating the securities laws."

Notably, the SEC does not allege, because it cannot, that Par Funding's cash advance business operations were *not* profitable. *Fries v. N. Oil & Gas, Inc.*, 285 F. Supp. 3d 706, 719 (S.D.N.Y. 2018) (omitted mismanagement or uncharged criminal conduct is sufficiently material when a defendant makes a statement that can be understood, by a reasonable investor, to deny that

the illegal conduct is occurring). Nor does it argue that Par Funding had an independent duty to make this disclosure—because it did not. "[T]he securities laws do not impose a general duty to disclose corporate mismanagement or uncharged criminal conduct . . . a duty to disclose uncharged criminal conduct does arise if it is necessary to ensure that a corporation's statements are not misleading." *MAZ Partners LP v. First Choice Healthcare Solutions, Inc.*, No. 6:19-cv-619-Orl-40LRH, 2019 WL 5394011, *16 (M.D. Fla. Oct. 26, 2019) (quoting *In re Sanofi Sec. Litig.*, 155 F. Supp. 3d 386, 403 (S.D.NY 2016)) ("Allegations that defendants concealed corporate mismanagement or uncharged criminal conduct are not actionable unless the non-disclosures render other statements by defendants misleading.").

Instead, the SEC makes the specious argument that Par Funding's regulatory history renders a representation regarding its profitability misleading by omission. However, absent some evidence that a material reason for its success was the use of the improper business practices which led to those sanctions, the omission is not material. *Fries*, 285 F. Supp. 3d at 719 (omitted mismanagement or uncharged criminal conduct is sufficiently connected to defendants' existing disclosures when a corporation puts the reasons for its success at issue, but fails to disclose that a material source of its success is the use of improper or illegal business practices).

ii. Allegations Specific to Furman and Vagnozzi

The Commission's allegations that Messrs. Furman and Vagnozzi violated Counts I, II, III, and IV center on their making oral misrepresentations to investors and providing them with Par Funding brochures or materials containing falsehoods. The Complaint, however, is devoid of *any* specific allegations—outside of the impermissibly group pleading addressed above—that Messrs. Furman or Vagnozzi *knew* such representations or written materials contained material misrepresentations, omissions, or were some part of deceptive scheme. Put differently, the

Complaint is fatally flawed because it does not allege that Messrs. Furman and Vagnozzi, individually, made a specific material misstatement, not merely innocently or negligently, but with "*an intent to deceive*" or that he acted with severe recklessness. *Merck & Co., Inc.*, 559 U.S. at 649 (emphasis in original).

Indeed, it is telling that there are no allegations that either had any knowledge that what he purportedly told or gave to anyone was false, misleading, or contained omissions in the Complaint's sections entitled "The Fraudulent Par Funding Securities Offering Scheme" (Comp. ¶ 40) and "Material Misrepresentations and Omissions in Connection with The Par Funding, ABFP, United Fidelis, and Retirement Evolution Offerings." (Comp. ¶ 154). The Complaint further fails to allege that their "conduct was an extreme departure of the standards of ordinary care, which presents a danger of misleading buyers or sellers that is either known to [him] or is so obvious that [he] must have been aware of it." *S.E.C. v. Monterosso*, 756 F.3d 1326, 1335 (11th Cir. 2014).

As examples, these sections of the Complaint assert the following allegations that beg for answers to Mr. Furman and Mr. Vagnozzi's italicized questions:

1) "Defendant Furman also solicited investors to purchase Par Funding Notes. For example, in November 2017 Furman met with potential investors at his firm, United Fidelis, in West Palm Beach, Florida, and recommended the Par Funding investment." (Comp. ¶ 58);

- *When recommending the Par Funding investment, how does Mr. Furman know that Par Funding was purportedly engaged in a scheme?*

2) "Furman told the potential investors that Par Funding made loans to small businesses and charged 36% interest on the loans. Furman distributed Par Funding marketing materials, including a brochure, and touted Par Funding's management expertise and its thorough due diligence in selecting borrowers. Furman also emphasized to the investors that their money would be safe and secure because the default rates on the Loans were 1% or less." (Comp. ¶ 59);

- *How does Mr. Furman know that any information that he told or provided potential investors was supposedly false or misleading? He did not work at Par Funding. (Comp. ¶ 29).*

3) "Furman told the potential investors that the percentage of interest Par Funding would pay on its Notes would depend on the amount invested. He told them the higher the investment amount, the higher the interest rate and thus the return. He explained to the potential investors that if they invested $300,000-$400,000, Par Funding promised to pay the investors an annual return of 12.5% in monthly installments over one year. Furman provided the potential investors with offering materials, including the Par Funding Note." (Comp. ¶ 60);

- *Again, how does Mr. Furman know that any information that he told or provided potential investors was purportedly false or misleading?*

4) "As recently has April 2020, Vagnozzi hosted a Zoom call geared toward recruiting people to start Agent Funds to raise money for Par Funding. Vagnozzi led the call in which he explained that he wanted to teach people how to be 'finders' and not unregistered broker-dealers so that would not get into 'any trouble.' He goes on to talk about Par Funding, describing it as one of the best MCA lenders you can find, touts the 1% default rate, and says you can get commissions and 'you will make money.'" (Compl. ¶ 72);

   - *What is wrong with attempting to get Agent Funds to comply with the federal securities laws? And how did Vagnozzi know that statements about Par Funding were supposedly false or misleading?*

5) "Attendees were given a one-page flyer describing four investment opportunities, one of which was MCAs. The flyer described the MCA investment opportunity has having a 2% default rate and offering between 10-14% returns with principal returned in 1, 2, or 3 years." (Compl. ¶ 96);
   - *Again, how did Vagnozzi know that Par Funding's default rates allegedly were false and misleading?*

6) "Vagnozzi told the attendees that '[w]e have stock market alternative investments that are secure…' and that an investment in Par Funding does not have 'too much risk' and the investment is 'knocking it out of the park.'" (Compl. ¶98);
   - *These statements are mere puffery.*

7) "A mere two weeks later, Vagnozzi and Furman forwarded investors a dramatically different message purporting to be **from Par Funding** that states "Over the past several months, Par Funding, like many other companies across the globe, has been severely impacted by the Coronavirus pandemic." **Par Funding goes on to say** it has "been forced to close our physical offices" and that "virtually all of [Par Funding's Loan

borrowers] have called seeking a moratorium on payments and other restructured payment terms." (Comp. ¶ 126) (emphasis added);

• *How do Messrs. Furman or Vagnozzi know that any information from Par Funding was purportedly false or misleading?*

8) "In this same email message Vagnozzi goes on to discourage investors from filing a lawsuit against Par Funding and tells investors his attorney is working to restructure the investments so payments to investors can resume." (Compl. ¶ 131);

9) In April 2020, Furman emailed investors an email message he claimed was **from Par Funding** indicating that if investors do not accept an offering to replace their current promissory notes with "Exchange Notes" offering significantly less interest and over a longer period of time, then Par Funding would file for bankruptcy. (Comp. ¶ 132) (emphasis added).

• *How do Messrs. Furman or Vagnozzi know that any information from Par Funding was purportedly false or misleading? What is false or misleading about discussing potential default scenarios?*

10) "In a Par Funding brochure that Furman, Abbonizio, and Vagnozzi distribute to potential investors, Par Funding details its supposedly rigorous underwriting process to approve merchant loans, calling it "Exceptional Underwriting Rigor." (Comp. ¶ 158).

• *How do Messrs. Furman or Vagnozzi know that the Par Funding brochure is allegedly false or misleading?*

11) Likewise, on the United Fidelis website, Furman and United Fidelis tout a 1.2% default rate for the "MCA investment" they offer. (Comp. ¶ 191);

• *How does Mr. Furman know that the default rate is purportedly inaccurate?*

12) In Fall 2017, Furman gave a Florida investor a Par Funding brochure claiming that Par Funding had provided "more than $220 million in business funding" since its inception in 2012. (Comp. ¶ 195);

• *How does Mr. Furman know that the Par Funding brochure is supposedly false or misleading?*

13) However, by August 2017, Par Funding had filed more than 240 lawsuits against small businesses for defaulting on their Loans, seeking more than $20 million in missed Loan payments. (Comp. ¶ 196); and

• *How do Messrs. Furman or Vagnozzi know how many lawsuits Par Funding filed against small businesses for defaulting on their loans?*

14) Furman has misrepresented the New Jersey Order to at least one potential investor while soliciting her for the Par Funding investment through Fidelis. For example, on June 16, 2019, Furman told an undercover individual posing as an investor that the state of New Jersey had "retracted" its action against Par Funding and had said Par Funding was "good" and did not need to pay a fine or have any penalties. (Comp. ¶ 233).

• *At the time, how was Mr. Furman aware that the information he told an undercover posing as an investor about the New Jersey Order was allgedly inaccurate?*

Clearly, the Complaint fails to adequately plead the requisite element of scienter in Counts I, II, III, and IV.

Moreover, for Counts V and VI, the SEC has failed to plead with sufficient particularity that Messrs. Furman and Vagnozzi were negligent when they purportedly made material misrepresentations and omissions in connection with the use of Agent Funds. (Comp. ¶¶ 134-141.) The Complaint alleges that Messrs. Furman and Vagnozzi engaged in certain representations based on information provided to them by a licensed attorney. Specifically, paragraph 133 of the Complaint alleges:

> In April 2020, Vagnozzi and Furman emailed investors a video **created on about April 18, 2020, in which Vagnozzi and his attorney – the same attorney who created the turnkey Agent Funds** – tell investors that the attorney reviewed Par Funding's financials and Par Funding is insolvent. Vagnozzi reassures investors he believes Par Funding will rebound, and then Vagnozzi and the attorney recommend that investors not to file lawsuits against Par Funding for defaulting on the promissory notes but to instead accept Exchange Notes through which the investors would receive lower investment returns than they were promised in the promissory notes they had purchased from ABFP and the Agent Funds.

Id. It is not unreasonable (and, thus, cannot support a finding of negligence) to rely on a video in which an attorney recommends, as Messrs. Furman and Vagnozzi allegedly did, to accept the Exchange Notes. At bottom, the Complaint does not assert with any particularity that any

Defendant acted with negligence in connection with the use of Agent Funds. The Court should, as a result, also dismiss Counts V and VI of the Complaint.[6]

iii. Allegations Specific to Mr. Abbonizio

The Commission failed to allege that Mr. Abbonizio made any representation with the intent to deceive or with severe recklessness, or that he understood himself to be participating in a fraudulent scheme. Several examples are illustrative, though by no means exhaustive. Regarding Par Funding's underwriting process, the Commission alleges in part that:

> "In August 2019, Abbonizio told other potential investors during another solicitation event that Par Funding does an on-site inspection of small businesses 100% of the time before approving any Loan. The representations about Par Funding's underwriting process are false. In truth, the underwriting process was not stringent."

Comp. at ¶¶ 164–66.

These excerpted allegations from the Complaint precede the Commission's account of several occasions on which Par Funding allegedly made loans to small businesses without conducting on-site inspections. *See id.* at ¶¶ 170–73. But the Commission does not allege any basis for believing that Mr. Abbonizio was aware that his representations to potential investors were inaccurate. He is not alleged to have been in possession of contrary information, nor is he alleged to have been somehow involved in the on-site inspection process such that he should have known. Thus, even accepting all the Commission's allegations as true, a "plausible opposing inference" to be drawn from the Complaint is that Mr. Abbonizio actually believed, albeit incorrectly, that Par Funding's underwriting process was rigorous.

As another example, regarding the default rate on merchant loans, the Commission alleges in part that:

[6] The remaining allegations as to Mr. Furman do not allege that he made material misrepresentations or omissions to the investing public. *See* Complaint ¶¶ 7, 29, 30, 31, 109-114, 143, and 144.

> "When Abbonizio touted Par Funding's low default rates to an Undercover posing as a potential investor in January 2020, Par Funding had filed more than 1,200 lawsuits seeking more than $150 million in missed payments on defaulted Loans."

Id. at ¶ 200.

However, the Commission does not allege that Mr. Abbonizio was aware of Par Funding's recovery efforts or how the individual merchant defaults underlying those efforts may have been impacting the overall default rate on an aggregated basis—information that can hardly be considered "so obvious that [Mr. Abbonizio] must have been aware of it." Nor does the Commission allege that Mr. Abbonizio was in possession of any other information that contradicted his representations to potential investors about the default rate. Thus, as currently pleaded, the collective allegations in the Complaint are not sufficient to raise a strong inference that Mr. Abbonizio acted with scienter.

Accordingly, as currently pleaded, the collective allegations in the Complaint are insufficient to raise a strong inference that defendants acted with scienter, and as such the claims against each respective defendant in Counts I through IV should be dismissed. *See S.E.C. v. Roanoke Tech. Corp.*, No. 05-CIV-01880, 2006 WL 2470329 (M.D. Fla. Aug. 24, 2006) (dismissing complaint alleging securities fraud violations where the SEC failed to satisfy the pleading requirements for scienter).

4. The SEC Has Failed to Establish That Ms. McElhone Violated the Exchange Act as a "Control Person."

In order to establish derivative liability under § 20(a) of the Exchange Act, a plaintiff must allege that: (1) the controlled person committed a primary violation of the Exchange Act; (2) the defendant had the power to control the general affairs of the primary violator; and (3) the defendant "had the requisite power to directly or indirectly control or influence the specific corporate policy which resulted in primary liability." *Mizzaro*, 544 F.3d at 1237 (quoting *Theoharous v. Fong*, 256

F.3d 1219,1227 (11th Cir. 2001)). "The legislative purpose in enacting a control person liability provision was to prevent people and entities from using straw parties, subsidiaries, or other agents acting on their behalf to accomplish ends that would be forbidden directly by the securities laws." *Dusek v. JPMorgan Chase & Co.*, 132 F.Supp.3d 1330, 1351–52 (M.D. Fla. 2015) (quoting *Laperriere v. Vesta Ins. Grp., Inc.*, 526 F.3d 715, 721 (11th Cir. 2008)).

First, as explained herein, the Complaint fails to allege with a primary violation of the Securities laws against Par Funding. Second, the Complaint is devoid of any facts to support a reasonable inference that Ms. McElhone controlled the general affairs of Par Funding. In fact, the SEC alleges that Mr. Laforte controlled the day-to-day affairs of the business. Comp. ¶¶ 17, 43. The Complaint is nearly silent as to Ms. McElhone and alleges nothing to suggest that she exercised this authority or control over the company. While Ms. McElhone held the title of CEO, "title alone does not suffice to create control person liability" under Section 20(a) of the Exchange Act. *Wafra Leasing Crop., 1999-A-1 v. Prime Capital Corp.*, No. 01 C 4314, 2004 WL 1977572, at *8 (N.D. Ill. Aug. 31, 2004). Consequently, Count VIII should be dismissed as to Ms. McElhone under Rule 12(b)(6) for failure to state a claim.

5. The Commission's Complaint Constitutes an Impermissible Shotgun Pleading

In addition to the foregoing, the Commission's claims against each defendant for violations of the antifraud provisions contained in Counts I-VII do not state with particularity which specific allegations apply to which specific count. Instead, the Complaint states in Counts I through VI that "[t]he Commission repeats and realleges paragraphs 1 through 267 of this Complaint." (Comp. ¶¶ 268, 271, 274, 277, 280, 281, and 286). The Eleventh Circuit has held that this represents a "shotgun pleading" in the context of securities cases where fraud is alleged. *See Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1279 (11th Cir. 2001); *Ferrell v. Durbin*,

311 Fed. App'x 253, 259 (11th Cir. 2009) (unpublished decision). Specifically, "[s]hotgun pleadings are those [like the instant Complaint] that incorporate every antecedent allegation by reference into each subsequent claim for relief or affirmative defense." *Wagner*, 464 F.3d at 1279 (citing *Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001) (per curiam)).

In *Wagner*, the plaintiff did not weave the specific allegations against the defendant into the fraud counts, but rather simply realleged and incorporated by reference the factual allegations into the substantive counts. The *Wagner* court was troubled that the defendants were left "to wonder which prior paragraphs support the elements of the fraud claim." 464 F.3d at 1279. The court further stated that while the allegations were very extensive and specific, structurally there was a "lack of connection between the substantive count and the factual predicates [and]…plaintiffs ha[d] not connected their facts to their claims in a manner sufficient to satisfy Rule 9(b)." *Id*.

Courts in this district have dismissed Commission complaints for failing to comply with the *Wagner* mandates. In *SEC v. Solow*, the Commission filed a lengthy, very detailed complaint against a single defendant. *Solow*, 2007 WL 917269, at *3.The Honorable Donald M. Middlebrooks dismissed the Commission's complaint because the Commission had simply realleged and reincorporated the factual allegations of the complaint, but failed to "state with particularity which specific allegations apply to which specific count, thereby impeding [d]efendant's ability to discern the exact nature of the complaint against him." *Id.* at *3. Hence, notwithstanding the fact that Solow was the *only* defendant in the referenced case, the court still determined that simply realleging and reincorporating dozens and dozens of factual allegations is insufficient to meet the strictures of Rule 9(b). *Id*. ("Plaintiff's claim does not satisfy Rule 9(b) as currently plead.").

The deficiencies that make the Complaint an impermissible shotgun pleading as to Counts I through VI also require that Count VII be dismissed or replead. The SEC incorporated into Count VII all 267 paragraphs from the background section. However, it is improper to include paragraphs alleging fraudulent conduct into counts, such as Count VII alleging Section 5 violations, that do not themselves allege fraud. *See S.E.C. v. Levin*, No. 12-21917, 2013 WL 594736, *9 (S.D. Fla. Feb. 14, 2013)(directing SEC to strike "impertinent, fraud-related factual allegations" from a Section 5 count because, by incorporating all factual allegations into the count "it superfluously links the allegations of fraudulent conduct with the allegations of selling unregistered securities").

Here, the Commission's Complaint has totally ignored the Eleventh Circuit's holding in *Wagner* and the guidance it received from Judge Middlebrooks. Unlike *Solow*, which involved only one defendant, there are multiple co-defendants in the instant matter, making the "shotgun pleading" even more problematic for each defendant. Accordingly, the Court should dismiss Counts I-VII for failing to meet Rule 9(b)'s heightened pleading requirements.

6. The SEC Failed to Plead Sufficient Facts to Allege that the Trust is a Proper Relief Defendant.

A relief defendant is an individual or entity with "no ownership interest in the property that is the subject of the litigation but may be joined in the lawsuit to aid the recovery of relief." *S.E.C. v. Founding Partners Capital Mgmt.*, 639 F. Supp. 2d 1291, 1295 (M.D. Fla. 2009) (citing to *S.E.C. v. Cavanagh*, 445 F.3d 105, 109 n. 7 (2d Cir. 2006)). Though a relief defendant is not accused of any wrongdoing, "a federal court may order equitable relief against such where that person (1) has received ill-gotten funds, and (2) does not have a legitimate claim to those funds." *S.E.C. v. Chemical Trust*, No. 00-8015-CIV, 2000 WL 33231600 (S.D. Fla. Dec. 19, 2000) (citing to *S.E.C. v. Cherif*, 933 F.2d 403, 414 n. 11 (7th Cir. 1991). Further, "[e]ven securities claims without a fraud element must be pled with particularity pursuant to Rule 9(b) when that nonfraud

securities claim is alleged to be part of a defendant's fraudulent conduct." *Solow*, 2007 WL 917269, at *4 (S.D. Fla. 2007). Thus, because the SEC is alleging that Par Funding funneled investor dollars into the Trust, the SEC must plead sufficient allegations with particularity to satisfy both components of the two-part test. *See generally S.E.C. v. Founding Partners Capital Mgmt.*, 639 F. Supp. 2d 1291, 1294 (M.D. Fla. 2009) (finding that, "the Complaint fails to specifically identify factual contentions against [the company]" to demonstrate how the company qualified as a relief defendant); *accord Janvey v. Adams*, 588 F.3d 831 (5th Cir. 2009).

The SEC alleges that "between July 2018 and September 2018, Par Funding transferred at least $14.3 million, which included investor funds, to the Trust." ¶ 36. The SEC's allegation fails to pass muster under Rule 9(b)'s heightened particularity standard. The SEC is strictly prohibited from joining the Trust as a relief defendant without factual support that investor funds were diverted into the Trust. *See Founding Partners Capital Mg.*, 639 F. Supp. 2d at 1295 ("such a sue-first-and-sort-out-the-facts-later-approach is [not] compatible with the Federal Rules or fundamental fairness). The mere recital that Par Funding "funnels money to the LME 2017 Family Trust" is a conclusory allegation, and without more, is an insufficient attempt to support a claim for equitable relief. (Comp., ¶ 8.) *See Wimbley v. Doyon Sec. Servs., LLC*, No. 14-20935, 2014 WL 4376148, at *1 (S.D. Fla. Sept. 4, 2014) ("A complaint cannot rest on "naked assertion[s] devoid of further factual enhancement."). As stated in Section IV.3(i), *infra*, this is particularly true here given the reasonable inference that can be drawn from the Complaint that these transfers were made from Par Funding revenues, and not gross proceeds of the of the offering. Just as the SEC cannot simply freeze funds from an account without making a reasonable effort to segregate ill-gotten gains from legitimate proceeds, *McGinn*, 2012 WL 1142516 at *5, it cannot merely allege in conclusory fashion as it does in the Complaint that the Par Funding transferred funds—

some of which possibly may have been investor funds—to the Trust, and expect that to be enough where their basis for the claim and freezing of Trust assets, is someone else's alleged fraud. Thankfully, Rule 9(b) requires more. *See Solow*, 2007 WL 917269, at *4 (S.D. Fla. 2007).

Accordingly, the Trust is not properly named as a Relief Defendant and should not be subject to any future disgorgement order[7] seeking to recover the Trust's assets.

7. The SEC's Claims are Time Barred.

Much of the SEC's claims are time barred because they are based on conduct that occurred as long as nine years ago, which is outside the five-year statute of limitations period set forth in 28 U.S.C. § 2462. For SEC enforcement actions that seek civil penalties, this "five-year clock begins to tick [] when a defendant's allegedly fraudulent conduct occurs." *Gabelli v. S.E.C.*, 568 U.S. 442, 448 (2013). And, because "[d]isgorgement in the securities-enforcement context is a 'penalty' within the meaning of § 2462, disgorgement actions must be commenced within five years of the date the claim accrues." *Kokesh v. SEC*, 137 S. Ct. 1635 (2017). Consequently, any non-equitable remedies, including penalties and disgorgement, requested by the SEC for conduct arising prior to July 24, 2015, which is five years prior to the date of the Complaint, must be denied.

V. CONCLUSION

For the reasons above, the SEC's claims against Defendants Complete Business Solutions Group, Inc., d/b/a Par Funding, Lisa McElhone, Joseph W. LaForte, Joseph Cole Barleta, Perry S. Abbonizio, Dean J. Vagnozzi, Michael C. Furman, and Relief Defendant The LME 2017 Family Trust should be dismissed.

Dated: November 2, 2020

Respectfully submitted,

[7] Additionally, the disgorgement amount, if any, is limited to the ill-gotten gains less the payouts, less the "legitimate" profits. *See S.E.C. v. Better Life Club of America*, 995 F. Supp. 167, 180 n. 20 (D.D.C. 1998).

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

HEARING REQUESTED

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.

_____/

DEFENDANTS' JOINT RESPONSE IN OPPOSITION TO RECEIVER'S MOTION TO EXPAND RECEIVERSHIP ESTATE

Defendants Lisa McElhone, Joseph Cole Barleta, Joseph W. LaForte, and Relief Defendant The LME 2017 Family Trust (collectively, "Defendants"), file this Response in Opposition to the Receiver Ryan K. Stumphauzer's Motion and Memorandum of Law to Expand Receivership Estate, which was filed on October 30, 2020 (the "Motion to Expand") [D.E. 357]. For the reasons explained herein, there is no basis for expanding the receivership estate and the requested relief, if allowed, would be punitive and not remedial.

I. INTRODUCTION

The Receiver claims that expansion to include several additional non-parties is "necessary and appropriate" because they were "funded with commingled investor proceeds." Mot. at 5. But the mere pooling of investor funds[1] and other funds in an account does not, without more,

[1] Par Funding disputes that the promissory notes issued during "Phase 1" as alleged in the Amended Complaint were securities as defined by the Securities Act of 1933 or the Securities Exchange Act of

constitute a violation of the securities laws, and certainly does not render the entire account subject to disgorgement. Just as the SEC must segregate ill-gotten gains from legitimate funds it seeks to freeze, the Receiver must make the same showing; otherwise, disgorgement takes on the character of a penalty. This is particularly true in this case where, unlike many SEC enforcement actions involving a receiver, Par Funding not only generated operational revenues, but received merchant deposits from MCA operations approximating two and a half times that of investor proceeds. Nevertheless, the Receiver has made no effort to show that the funds transferred to the non-parties he seeks to add to the Receivership are traceable to investor proceeds as opposed to the substantial revenues generated by Par Funding through its MCA business. Instead, the Receiver opts to engage in a lopsided analysis suggesting that every movement of every dollar, whether investor proceeds or merchant deposits from MCA operations, justifies expansion of an already costly Receivership. What's more, the Receiver erroneously argues that any non-party who received funds from Par Funding is somehow an "alter ego" of Par Funding.

Fortunately, equity requires more than conclusory assertions of an "alter-ego" relationship or "commingled" funds to expand a receivership over non-parties and a Relief Defendant who engaged in absolutely no wrongdoing. A "receivership is an extraordinary remedy that should be employed with the utmost caution and is justified only where there is a clear necessity to protect a party's interest in property, legal and less drastic equitable remedies are inadequate, and the benefits of receivership outweigh the burdens on the affected parties." *SEC v. Faulkner*, No. 3:16-CV-1735, 2018 WL 4362729, at *2 (N.D. Tex. Sep. 12, 2018). Those circumstances are not nearly present here.

1934. However, for the sake of brevity, the undersigned will refer to the gross proceeds raised by Par Funding and the Fund Managers as investor funds or investor proceeds.

In addition, there is neither urgency nor necessity justifying the alteration of the current status quo and imposing the heavy costs of a receivership and the burdens it would impose on the businesses involved. Since the inception of this case, no Defendant has transferred or spent *a single dollar* generated by the non-parties listed in the Motion to Expand for anything other than the maintenance of the properties. To prove this, the undersigned has offered the Receiver access to bank statements dating back to the commencement of the Receivership. In the absence of even the slightest evidence of dissipation, an expansion would serve only to disrupt the non-parties and the individuals they employ and diminish the value of the properties, while greatly increasing legal fees and expenses that would otherwise be collected to protect investor funds.

Expansion of the Receivership will also hinder the parties' ability to resolve this case. As of the date of the filing of this Joint Response, the parties have taken steps to resolve this case in its entirety. Expanding the Receivership now will unnecessarily impede the progress of current settlement talks by limiting the options available to the parties to negotiate a settlement. At a minimum, the Court should reserve ruling on the Motion to Expand until the parties have had a full and fair opportunity to attend mediation, which is currently scheduled for December 7, 2020.

II. ARGUMENT

"[T]he power[s] of a securities receiver is not without limits." *Eberhard v. Marcu*, 530 F.3d 122, 132 (2d Cir. 2008). Where a receiver seeks to expand a receivership, the "Receiver must be able to show beyond mere speculation that these entities should be brought within the receivership." *SEC v. Elmas Trading Corp.,* 620 F. Supp. 231, 233 (D. Nev. 1985), *aff'd*, 805 F.2d 1039 (9th Cir. 1986); *see also SEC v. Creative Capital Consortium, LLC*, No. 08-81565-CIV, 2009 WL 10664430 (S.D. Fla. Sept. 21, 2009).

The Receiver argues that expanding the receivership over the Relief Defendant and the non-parties is warranted on two grounds. First, the Receiver erroneously submits that two of the non-parties, CS 2000 and Fast Advance, "are alter egos to CBSG/Par Funding." Mot. at 7. As explained below, the Receiver misapprehends the relationship between the entities, which is based on arms-length syndication agreements. Second, the Receiver erroneously submits that disbursements made by Par Funding from accounts in which investor proceeds were pooled with merchant deposits generated by the MCA business are subject to disgorgement merely because they were "commingled." They are not. Third, the Receiver claims, without a shred of evidence, that disbursements made to pay "consulting fees" are a "sham." For these and other reasons explained below, the Motion to Expand should be denied or, at a minimum, the Court should permit discovery and an evidentiary record from a hearing, as other courts have. In all events, the Court should reserve ruling on this Motion until the parties have had an opportunity to complete mediation, which has already begun.

A. Alter Ego

The expansion of a receivership is appropriate only when the non-party participates in a "course of conduct constituting the abuse of corporate privilege," and thus, a court may not invoke this doctrine to "prejudice an innocent third party." *Elmas Trading Corp.,* 620 F. Supp. at 233. Courts consider various factors to determine whether the alter ego doctrine is appropriate, though no one factor is dispositive. *See id.* at 234 ("the conclusion to disregard the corporate entity does not, however, rest on a single factor, but often involves a consideration of the mentioned factors; the particular situation must generally present an element of injustice or fundamental unfairness"). Two such factors omitted by the Receiver are whether the entities maintained an arm's length

relationship and whether the transfers between the entities were authorized pursuant to a legitimate business purpose.[2] *Id*. Both positive factors are present here.

Conversely, in *Elmas*, the district court found alter ego liability where two negative factors were present: (1) one of the entities received money for performing consulting services for the defendants *without any evidence that services were performed* and (2) one of entities received monetary advances with no interest and no repayment date, and did not otherwise generate any earnings from its operations. *Id*. at 235–40. (emphasis added). Neither negative factor is present here.

Capital Source 2000 (CS 2000) is a merchant cash advance business. CS2000 is owned by Bill Bromley and Joe Cole. It is not owned by Lisa McElhone; it is not owned by the Trust; and it is not owned by Joseph Laforte. CS2000 does not have the same ownership as Par Funding and it does not have the same investors. It is a different company engaged in the same MCA industry. After learning that the Receiver sought to place CS2000 in the Receivership estate, Mr. Bromley's lawyer telephoned the Receiver's counsel, advised him that CS 2000 was owned by Mr. Bromley and Mr. Cole, and provided corporate documents confirming ownership. The Receiver's counsel's sole source of "ownership" is that the company was listed on an emailed financial projection prepared for use during an estate legal consultation. As set forth in detail in Defendants' Joint Response dated October 30, 2020 at pp. 26-28 (DE 355), that document was a rough draft of a hypothetical prediction of possible values 10-15 years from now. It was prepared as a discussion

[2] In *Elmas*, the Receiver found various transactions between the corporate defendant and entities with no explanations for various transfers. This is unlike our case where the money transfers were pursuant to a legitimate syndicate deal.

piece for a first meeting with an estate lawyer and projected a possible financial condition years into the future.[3]

CS2000 has its own investors who invest in CS2000 MCA contracts. CS2000 participates in syndications of some of Par Funding's MCA contracts, a common practice in the MCA industry to leverage and reduce risk. Syndication simply means where one or more MCA companies invest in a group of MCA contracts to reduce risk. CS2000 paid fees to CBSG for processing of those syndication contracts. The fact that the Receiver sees financial transactions between CS2000 and Par funding is no surprise at all. Par Funding paid CS2000 according to the terms of the syndication agreements. There is nothing nefarious about the transfer of funds between CS2000 and Par Funding (DE 357 at pg. 8), since CS2000 participated in some of Par Funding's MCA syndications.[4]

Fast Advance Funding ("FAF") is a very small separate MCA company owned by the Trust. The only and early investors were family and close friends. Its MCA portfolio is different from that of Par Funding. Moreover, most of the early investors in Fast Advance Funding were fully paid all of their principal and interest by early 2019. There are only three investors in FAF today, and none of them are investors in Par Funding.[5]

The transfer of funds between Par Funding, CS2000 and Fast Advance were pursuant to a legitimate business purpose. *Compare Elmas*, 620 F. Supp. at 234. The Receiver asserts that:

> Par Funding received approximately $97.17 million in deposits/credits from CS2000 and made payments totaling $76.67 million to CS2000. Similarly, Par

[3] The estate attorney financial projection listed a number of entities which neither Ms. McElhone nor the Trust own. However, those entities might have been a future source of revenue.
[4] Moreover, the bank account for CS2000 is frozen and no transfer of funds has occurred since late July 2020 or can occur.
[5] The bank account for Fast Advance Funding is frozen and no transfer of funds has occurred since late July 2020 or can occur.

> Funding received approximately $12.5 million in deposits/credits from Fast Advance and made payments totaling $17.09 million to Fast Advance.

Mot. at 7. But as shown herein, this is only half the picture. The Receiver failed to mention the arm's length MCA syndication relationship between Par Funding, CS2000, and Fast Advance which fully explains these transfers. As noted above, in the MCA world, syndications are a standard practice to reduce and leverage risk.

CS2000 and Fast Advance are separate and distinct corporations that provide capital to small businesses. Pursuant to syndication agreements Par Funding had with other merchant cash advance businesses like CS2000 and Fast Advance, each company would fund a select group of merchants defined by the syndication agreement, allowing each to leverage the risk associated with those MCA deals. Because the transfers reflect legitimate arm's length business deals between the entities in which each respective party shared in the risk, they each had a legitimate claim to the funds they received. *Compare Elmas*, 620 F. Supp. at 234 (invoking the alter ego doctrine where various transactions existed between the corporate defendant and entities with no legitimate explanations for the transfers).

The Receiver did not know this and, to our knowledge, did not research the basis for these transactions prior to filing the Motion to Expand. The Receiver defaulted to the conclusion that the transfers were made pursuant to an alleged fraudulent scheme in order to erroneously rely on *Torchia*[6], *Creative Capital Consortium*[7], and *RaPower-3, LLC*.[8] But these cases have no applicability to the actual facts here. For example, the Receiver cites to *Torchia* for the proposition that alter ego liability should attach where there has been a consistent commingling of assets. But

[6] *SEC v. Torchia*, No. 1:15-cv-3904-WSD, 2016 WL 6212002, at *3 (N.D. Ga. Oct. 25, 2016).
[7] *SEC v. Creative Capital Consortium, LLC*, Case No. 08-81565, 2009 WL 10664430, at *1 (S.D. Fla. Sept. 21, 2009).
[8] *United States v. Rapower-3, LLC*, Case No. 2:15-cv-00828-DN, 2019 WL 2195409, at *3 (D. Utah May 3, 2019).

this is only true where the related entities rely on the corporate defendant to fund and operate their businesses without compensation, a fact not present here. *Id.* at 1.

Likewise, the Receiver's reliance on *RaPower-3* is misplaced. In *RaPower-3*, the court found that the corporate defendant: (1) created and controlled the related entities; (2) transferred funds to the related entities as a means of concealing assets; and (3) each of the related entities were subsidiaries of the corporate defendant. Accordingly, in *RaPower-3*, the related entities did not have an independent existence, but instead were created to serve as a conduit to carry out the corporate defendant's fraudulent scheme. There are no similar facts here.

Similarly, the Receiver's reliance on *Creative Capital Consortium* is misplaced. There, the district court found that alter ego liability may attach when the corporate defendants controlled the related entities, had authority to transfer funds between the entities, and shared the same address and corporate officers with the related entities. But those circumstances do not exist here. As stated above, CS2000 and Fast Advance are separate and distinct entities owned by other parties that are not Par Funding; Par Funding has absolutely no authority to authorize transfers between the entities; and the respective entities do not have the same corporate officers.

Because Par Funding has not used either entity to transact its own affairs or conceal any alleged fraudulent behavior, there is no basis to invoke alter ego liability and the Court should not do so. *Johnson v. New Destiny Christian Center Church, Inc.*, 303 F. Supp. 3d 1282, 1288 (M.D. Fla. 2018) (refusing to invoke the alter ego doctrine where the plaintiff's claim that an entity was the alter ego of the corporate defendant was "plainly unsupported" and contradicted by the record).

B. "Commingling" is Not a Securities Violation.

The commingling of investor funds is not actionable absent a material misrepresentation or an omission. *See, e.g.*, *SEC v. LA Trust Deed & Mortg. Exchange*, 186 F. Supp. 830, 852 (S.D.

Cal. 1960); *Cordova v. Lehman Bros., Inc.* 526 F. Supp. 2d 1305, 1315 (S.D. Fla. 2007), *rev'd on other grounds*, 332 Fed. Appx. 549 (11th Cir. 2009) (dismissing plaintiff's complaint for, *inter alia*, failure to identify with particularity any representations that defendants asserted that defendants would keep funds segregated); *Cf. SEC v. George,* 426 F.3d 786, 788-89 (6th Cir. 2005) (concluding that defendants committed securities fraud by telling potential investors that their funds would be invested in certain types of securities, but then commingling the funds and using them "to pay purported profits to other investors or to make extravagant personal purchases"). In short, absent evidence of some wrongdoing, commingling alone is not actionable. *I-Lighter, Inc. v. E-Z Media, Inc.*, No. 07-60843-CIV, 2008 WL 750217, at *2 (S.D. Fla. Mar. 19, 2008) (finding that the plaintiff's allegation that an entity and a corporate defendant "co-mingled assets and transferred assets for inadequate consideration" was insufficient to pierce the corporate veil absent some showing that these actions were rooted in wrongdoing).

Here, neither the Receiver (nor the SEC) has alleged that Par Funding represented to investors that it would keep certain funds segregated or that it commingled assets for some improper purpose. *Compare LA Trust Deed & Mortg. Exchange*, 186 F. Supp. at 852. Because the purpose of appointing a receiver "is to facilitate enforcement of any disgorgement remedy that might be ordered in the event a violation is established at trial," *see SEC v. FTC Capital Markets, Inc.*, No. 09-CIV-4755, 2010 WL 2652405, *3 (S.D.N.Y. June 30, 2012), and the mere commingling of investor proceeds with operating revenues would not alone support disgorgement of those pooled funds, expansion on these grounds is not warranted. *See also U.S .v Puche*, 350 F.3d 1137 (11th Cir. 2003) ("The mere pooling or commingling of tainted and untainted funds in an account does not, without more, render the entire contents of the account subject to forfeiture.")

Moreover, the mere pooling of tainted and untainted funds does not alone support disgorgement of the entire amount of those funds. Rather, a receiver must make a reasonable effort to trace or segregate tainted funds from untainted funds before efforts to secure those funds (or assets purchased with those funds), are warranted.

C. The Receiver Must Make Reasonable Efforts to Trace Tainted Funds

The Receiver's powers are not unlimited.[9] *Eberhard v. Marcu*, 530 F.3d 122, 132 (2d Cir. 2008). Much like the SEC, the Receiver must make a reasonable showing that an asset was purchased with tainted funds, and not merely commingled funds, before seeking to disgorge the asset or include it in the receivership.

With respect to the SEC, several courts have recognized that because "disgorgement may not be used punitively," the SEC "must distinguish between legally and illegally obtained profits." *SEC v. First City Financial Corp.*, 890 F.2d 1215, 1231 (D.C. Cir. 1989); *accord Commodity Futures Trading Comm'n v. British Am. Commodity Options Corp.*, 788 F.2d 92, 93 (2d Cir. 1986) ("generally, where benefits result from both lawful and unlawful conduct, the party seeking disgorgement must distinguish between the legally and illegally derived profits"); *see SEC v. Wills*, 472 F. Supp. 1250, 1276 (D.C. Cir. 1978) ("when the amounts to be disgorged cannot be related with sufficient certitude to defendants' securities law violations, the SEC's disgorgement request takes on the character of a plea for punitive relief."); *SEC v. First City Fin. Corp.,* 890 F.2d 1215, 1231 (D.C. Cir. 1989) ("the court may exercise its equitable power *only* over property causally

[9] In *CFTC v. Sidoti*, 178 F.3d 1132, 1137 (11th Cir. 1999), the district court improperly ordered disgorgement for a period that was not causally connected to any evidence of fraudulent activity. The Eleventh Circuit court noted that "the district court should keep in mind the limitation placed on its equitable powers by this requirement that there be a relationship between the amount of disgorgement and the amount of ill-gotten gain." *See also SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105 (2d Cir. 1972) (finding that the district court improperly included the legitimate profits and income earned in the disgorgement amount, rather than just limit the order to the illicit proceeds).

related to the wrongdoing."); *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105 (2d Cir. 1972) ("ordering the disgorging of profits and income earned on proceeds is in fact a penalty assessment.").

Just as the SEC must segregate ill-gotten gains from legitimate funds it seeks to freeze,[10] the Receiver must make the same showing. *See, e.g.*, *In re Alpha Telcom, Inc.*, No. CV 01-1283-PA, 2005 WL 488675, at *3 (D. Or. Feb. 1, 2005). In *Alpha Telcom*, the Receiver sought disgorgement of the proceeds several sales agents received in connection with the sale of unregistered securities. *Id.* at *3. One such sales agent received $109,360 in commissions but contended that only $61,400 was causally connected to the fraud and that the remaining $47,960 was received for legitimate purposes. *Id.* The Receiver argued that because the funds paid to the sales agent came from "a bank account containing money derived from . . . investors and the operating revenues of the company," *all* funds paid to the sales agent must be disgorged. *Id.*

The district court rejected the Receiver's argument. The court ruled that the Receiver was required to make a showing that the remaining $47,960 the sales agent received in commissions was connected to the sale of the unregistered securities, *i.e.*, the alleged fraudulent activity. *See generally FTC Capital Markets,* 2010 WL 2652405, at *8 (holding that the simple assertion that funds were transferred from one account to another is insufficient to establish that "funds held by entities not alleged to have been involved in any wrongdoing are traceable to fraud").

Like the receiver in *Alpha Telecom*, the Receiver here has done *nothing* to trace the funds transferred out of Par Funding's accounts to investor proceeds as opposed to legitimately earned

[10] *See, e.g.*, *SEC v. McGinn*, No. 10-CV-457 GLS/DRH, 2012 WL 1142516 at *5 (N.D.N.Y. Apr. 4, 2012) (assessing various accounts and finding that where illegitimate funds were commingled with legitimate funds, the two categories were severable and limited the amount of the asset freeze to only the amount of the illegitimate funds).

Par Funding MCA deposits. The Receiver simply contends that the Receivership Entities disbursed funds from accounts containing "commingled proceeds." Mot. at 8. For example, the Receiver suggests that:

- Between July 2015 and July 2020, Par Funding transferred approximately $42,334,600.00 in commingled investor funds to HBC.
- Between July 2015 and July 2020, Par Funding transferred approximately $42, 643,174.00 to Eagle Six.
- Between July 2016 and April 2019, Par Funding transferred approximately $4.9 million in commingled investor funds to Beta Abigail.
- Between February 2017 and November 2019, Par Funding transferred approximately $9.5 million in commingled investor funds to New Field.

Mot. at 9.

Just as tainted and untainted funds received in an account can be segregated before funds from the account are disgorged to avoid a punitive effect, courts have applied various approaches to trace funds in an active account comprised of commingled funds. *See United States v. Banco Cafetero Panama*, 797 F.2d 1154, 1159 (2d Cir. 1986) (discussing the lowest intermediate balance rule, the averaging rule, and "drugs-in, first-out" rule). The lowest intermediate balance rule "attempts to divide tainted and untainted money" when proceeds are commingled with other funds. *SEC v. Kaleta*, No. 4:09-3674, 2011 WL 6016827, at *2 (S.D. Tex. Dec. 2, 2011); *In re Lee*, 574 B.R. 286, 295 n. 52 (Bankr. M.D. Fla. 2017).

The "lowest intermediate balance" rule was employed by the *In re Lee* bankruptcy court in Tampa, Florida to impose a constructive trust on the Florida homestead of debtor and his wife only to the extent that false profits paid to the couple as innocent investors in a Ponzi scheme were traceable to their home. *Id.* The receiver was not entitled to an equitable lien on the entire value of the couple's Florida homestead simply because the $227,126.78 used to purchase it represented tainted funds. A significant concern for the court in selecting an appropriate tracing rule was

avoiding "unjust enrichment" to the receiver of illicit funds (as opposed to a penalty). In relevant part, the *In re Lee* Court stated:

> The "lowest intermediate balance rule" is an acceptable method for treating trust proceeds that have been commingled with other funds: where trust funds are commingled in an account they are considered as undiminished so long as the total account balance is at least equal to the amount of the trust fund deposits. If the aggregate amount of trust deposits exceeds the lowest intermediate balance in the account, they are considered lost. Thus, "the lowest intermediate balance in a commingled account represents trust funds that have never been dissipated and which are reasonably identifiable." This method has been approved by courts in cases requiring the tracing of money through accounts where assets have been commingled.

Id. at 296.

Here, the consulting fees at issue were transferred to Ms. McElhone, Mr. Laforte, and Mr. Cole, among others, on a quarter by quarter basis.[11] On each such occasion, the amount of merchant deposits generated by the MCA business well exceeded investor deposits received for the quarter. Consequently, on a quarter by quarter basis, the total account balance always exceeded new investor deposits even after quarterly consulting fees were distributed.[12]

Moreover, the Receiver's unsupported claim that the consulting fee agreements were "sham" agreements merely because they were paid to insiders is simply wrong. *See Wills*, 472 F.Supp. at 1276 (amounts paid to executives for services rendered are not disgorgeable); *SEC v.*

[11] Prior to 2016, no consultant fees were taken and all profits went back into the business to fund more MCA contracts. By 2016, Par Funding's fourth year, its business had grown and ample interest was consistently paid to investors. A decision was then made to compensate those who built the successful business. DLA Piper was retained to advise on and draft profit sharing and consulting agreements. The consulting fees paid were not pegged to investor funds received but, importantly, to a percentage of MCA contracts and/or retained earnings. In prior filings, Defendants have shown the profitability of Par Funding which easily supported the consulting fees paid. [DE 84, 106, Ex. A, 115, 132, 148, pp. 21, 25].

[12] Defendant Lisa McElhone issued a Request for Production to the Receiver in order to obtain Par Funding's books and records. The Receiver has yet to produce a single document to Ms. McElhone. *See SEC v. Aquacell Batteries*, No. 6:07–cv–608, 2008, WL 2915064, at *1 (July 24, 2008) (permitting non-parties whose property the receiver sought to include in the receivership the opportunity to conduct discovery and an evidentiary hearing thereafter on the receiver's motion.) We request the same opportunity to obtain discovery and a hearing on the Receiver's instant Motion for Expansion.

Boyd, No. 95-CV-03174, 2012 WL 1060034, at *9 (D. Colo., Mar. 29, 2012) (denying SEC's request for disgorgement of compensation received by defendant in securities fraud scheme because there was no evidence that he received the compensation for his participation in the scheme as opposed to legitimate work he provided for the issuer); *SEC v. True North Finance Corp.*, 909 F.Supp.2d 1073, 1126 (D. Minn. 2012) (denying SEC's summary judgment motion requesting disgorgement of Fund CEO's compensation where genuine issue of fact remained regarding whether fees he earned were connected to his efforts to keep the Fund going even though it had defaulted and was speeding towards bankruptcy.)

The Receiver's reliance on *Torchia* for the proposition that the transfer of commingled investor funds alone justifies expansion is also misplaced. As stated above, *Torchia* involved entities that were the alter egos of the corporate defendant, which is not the case (and not even alleged by the Receiver) here.

The Receiver's reliance on *SEC v. Nadel*, No. 8:09-cv-87-T-26TBM, 2013 WL 2291871, at *2 (M.D. Fla. May 24, 2013) and *CFTC v. Hudgins*, 620 F.Supp.2d 790, 793 (E.D. Tex. 2009), is also misplaced. The Receiver cites to *Nadel* and *Hudgins* for the proposition that the Receivership can be expanded to include entities that were funded with "scheme proceeds" from defrauded investors. Mot. at 10. In *Nadel*, the court found that the "vast majority" of the funds at issue were tainted, and *Hudgins* involved a Ponzi scheme, where all of the funds at issue were tainted. In this case, Par Funding's MCA merchant deposits comprised no less than 250% of investor deposits, which is why a tracing analysis is necessary.

For these same reasons, the Receiver has failed to demonstrate whether any investor funds were used to purchase the nineteen real estate properties or Ms. McElhone's personal properties. Mot. at 11-15, 18. *See, e.g.*, *In re Alpha Telcom, Inc.*, 2005 WL 488675, at *3. Just as the Receiver

in *Alpha Telcom* was not entitled to all the proceeds paid from an account containing commingled funds, a receivership expansion over properties solely because they were allegedly purchased with funds from accounts containing commingled funds would be punitive without a careful and thorough tracing analysis. *See also FTC Capital Markets,* 2010 WL 2652405, at *8 (holding that the simple assertion that funds were transferred from one account to another is insufficient to establish that "funds held by entities not alleged to have been involved in any wrongdoing are traceable to fraud").

The Receiver relies on *SEC v. Lauer*[13] to support the proposition that the Receiver may expand the receivership over properties that were allegedly purchased using significant proceeds of the fraud. Mot. at 20. *Lauer*, however, does not stand for this proposition. In *Lauer*, the defendant sought to make the proceeds from the sale of his condominium available to himself for defense fees and costs. *Id.* at *2. The defendant contended that he was entitled to these proceeds because he purchased the property at a time when he did not engage in any fraudulent activity. *Id.* The court found while this may have been true, the defendant also *maintained* the property during the fraudulent period using tainted funds. Accordingly, the court ruled, "for purposes of this case, that when tainted funds are used to pay costs associated with maintaining ownership of the property, the property itself and its proceeds are tainted by the fraud." *Id.* at *3. The court explained, "since [the defendant's] use of tainted funds allowed him to maintain ownership . . . this case does not present a 'mere commingling of tainted and untainted'" funds. *Id.* at *3.

Accordingly, the requirement that the Receiver must make a reasonable effort to separate the alleged ill-gotten gains from legitimate proceeds is valid law and required here. *See generally*

[13] *SEC v. Lauer*, No. 03-80612-CIV, 2009 WL 812719, at *3 (S.D. Fla. Mar. 26, 2009).

Puche, 350 F.3d at 1153 ("the mere pooling or commingling of tainted and untainted funds in an account does not, without more, render the entire contents of the account subject to forfeiture.").

D. Expansion of the Receivership Over the Trust, a Relief Defendant, is Improper

The Receiver also seeks to expand the Receivership over the 2017 LME Family Trust, a Relief Defendant. Mot. at 16. Its only stated reason for this extraordinary request is the baseless claim that the Trust was "an active participant in the fraud scheme" because it used Trust assets to buy real estate. However, the fraud scheme that is "the subject matter of the litigation" is a securities fraud scheme in which the Trust—according to the SEC—played only a passive role. *SEC v. World Capital Market, Inc.*, 864 F.3d 996, 1004 (9th Cir. 2017). The Trust's use of the funds it received to purchase real estate which—by all accounts, remain in the Trust to this day—does not make it an active participant in the securities fraud scheme, or for that matter, any other scheme. The Trust did not hide any assets, conceal the nature or source of the funds it received from Par Funding, or transfer the funds to entities outside the Trust. Moreover, because neither the Receiver nor the SEC has demonstrated that the funds received by the Trust were investor proceeds and not Par Funding's merchant deposits from its MCA business, to which the Trust as Par Funding's owner would be entitled to a share, expansion based on the Trust's use of those proceeds must be denied.

Next, the Receiver claims that the Trust is an "alter ego" of Lisa McElhone, its Grantor. Despite its reliance on *Torchia*, however, the Receiver cites no evidence even suggesting that "money flowed back and forth" between Ms. McElhone and the Trust; that she has any ownership interest in assets purchased by the Trust (she does not); or that Ms. McElhone acted in a manner

inconsistent with her role as its Grantor. 2016 WL 6212002, at * 4. Accordingly, *Torchia* is inapposite and the Receiver's request to include the Trust in the receivership should be denied.[14]

E. Personal Property Purchased by Ms. McElhone

For the reasons stated herein, the Court should deny the Receiver's request to expand the Receivership over the three personal properties identified as the Haverford, Paupack, and Jupiter properties. First, the Receiver has failed to trace the funds Ms. McElhone received to investor funds rather than the income legitimately earned by Par Funding. And, as an owner, Ms. McElhone had a legitimate right to receive compensation pursuant to a consultant agreement with the company. *See Wills*, 472 F.Supp. at 1276 (amounts paid to executives for services rendered are not disgorgeable); *Boyd*, 2012 WL 1060034, at *9 (denying SEC's request for disgorgement of compensation received by defendant in securities fraud scheme because there was no evidence that he received the compensation for his participation in the scheme as opposed to legitimate work he provided for the issuer); *True North Finance Corp.*, 909 F.Supp.2d at 1126 (denying SEC's summary judgment motion requesting disgorgement of Fund CEO's compensation where genuine issue of fact remained regarding whether fees he earned were connected to his efforts to keep the Fund going even though it had defaulted and was speeding toward bankruptcy.) Consequently, the assets Ms. McElhone purchased using the consulting fees she received are not disgorgeable and certainly are not grounds for the drastic remedy of expansion of the receivership over those assets.

F. Expansion of the Receivership over the Real Estate Assets is Not Necessary and Will Result in Diminishment of Their Value as well as Increased Expenses

[14] The Receiver's request for an expansion based on speculation that Trust assets "may be subject to further dissipation," *see* Mot. at 17, should give the Court some pause. Having failed to demonstrate that the Defendants have dissipated any assets since the date of the SEC's Complaint, the Receiver cannot reasonably argue that expansion of the receivership is warranted based on the unfounded and purely speculative assertion that Trust assets *may* be dissipated.

The Receiver seeks to expand the Receivership to add over nineteen real estate entities as well as the Defendants' personal real estate, discussed above. First, there is no basis to expand the Receivership to include these properties. Second, it is wholly unnecessary as the properties are very well managed and are not going anywhere. Third, and perhaps most important, it is of paramount importance to maintain the current *status quo* of these properties in order to protect the residential and commercial tenants, the properties and the surrounding neighborhoods, and the value of these buildings. As we show herein, these properties have not been and will not be transferred or sold and will continue to be maintained and managed by the current property management company. In addition, it is critical for the financial well-being of the properties that its residential and commercial tenants receive uninterrupted services including building cleaning, repairs and maintenance of the properties and their rental units. Adding these properties to the Receivership will do nothing but create additional expenses and legal fees that will detract from the monies available for investors, while doing nothing to preserve, much less add value to the properties.

The Receiver states in footnote 55 that "these properties are overseen by an experienced Philadelphia property manager and if the motion is granted the Receiver anticipates maintaining the property manager's oversight." However, the property manager only makes sure that the rent is paid and shows and rents the apartments and stores to potential tenants.

The most important aspect of maintaining and managing these 26 commercial and residential buildings is providing the essential services for the buildings. And this is not done by the property manager. This work entails hiring and supervising the cleaning staff, completing repairs and doing maintenance, managing staff and being responsive to trouble-shoot any problems that arise. Rapid responses to residential and commercial tenants requires a full-time staff and a

reliable group of handymen, plumbers, custodians and other service people. When a pipe bursts in the middle of the night or a window needs replacement or snow needs to be cleared from the sidewalks, long-standing relationships with repairmen, plumbers and the like are essential. It cannot be done remotely. The relationships with services providers have been built with trust over time and are the key to well-maintained buildings and worry-free tenants. Particularly now with Covid-19 and the attendant cleaning requirements for common spaces, cleaning companies are booked well in advance. It would ill-serve the tenants of these buildings and the public in the neighborhoods where these buildings are located, to have a bunch of lawyers try to manage these buildings remotely. The Defendants have been very hands-on managing these buildings and that is why they are in excellent shape and have contented tenants. It is not just the Defendants who would be impacted by a Receivership over these buildings, but real tenants for whom these buildings are their homes and livelihood.

Were the Receiver to take over, they would have to hire additional staff to manage these buildings and would be starting from square one. The time lag, particularly during the continuing Covid-19 crisis and the upcoming holiday season, would result in serious delays providing services for residential and commercial tenants. Moreover, the Receiver would incur substantial expenses managing these residential and commercial buildings.

Finally, there is absolutely no reason for the expansion. As banking records show decisively, aside from the daily and monthly management costs of running these properties, no funds have left the entity bank accounts. No entity funds have gone to the Defendants. The buildings cannot be sold or transferred. There is thus nothing an expansion will accomplish except diminishing the services provided to tenants; depreciating the value of the buildings; and paying

more legal fees out of the Receivership estate. Beyond that, there is nothing that an expansion will accomplish.

G. Expansion of the Receivership is Neither Necessary nor the Least Drastic Equitable Remedy Available

Even assuming, *arguendo*, that there were a basis for this Court to exercise its equitable authority to add the assets described in the Receiver's Motion to the Receivership, there are far less draconian measures available that would maintain the status quo without the heavy cost of a Receivership and the burdens it would impose on the businesses involved. To begin with, the Court could impose a *lis pendens* on the properties. All of the Defendants are already subject to an asset freeze which prohibits them from transferring or disbursing any assets for their personal benefit. The Defendants have offered the Receiver access to bank statements for each of the non-party entities dating back to the inception of this case (July 28, 2020), to prove that no funds generated by the non-parties listed in the Motion to Expand have been spent for anything other than the maintenance of the businesses and properties. There is no evidence that any of the subject properties have been sold or that any money has been dissipated.

Moreover, the benefits of an expanded receivership in this case are far outweighed by the burdens on the affected parties. *Faulkner*, 2018 WL 4362729, at *3 (declining to expand receivership as to an entity subject to a defendant's control, notwithstanding that the entity had received commingled investor funds from an allegedly fraudulent scheme, because "the benefits of placing [the entity] in receivership are outweighed by appurtenant burdens…") Here, expanding the receivership is neither necessary nor appropriate given the availability of less draconian measures and controls already in place. Moreover, the burden on the parties involved, including the businesses already under contract to manage and maintain the properties, the employees of those businesses, and the tenants who live on the properties, will be significant if the Receiver

takes over managing the companies. As occurred in connection with Par Funding, the transition alone will burden several innocent parties and incur substantial costs. And the efficiencies built into long-standing service relationships will disappear. Moreover, the additional costs associated with managing the properties under a receivership will reduce the value of the properties.

Finally, expansion of the Receivership will hinder the parties' ability to resolve this case fully and finally. The parties are working toward settlement of the SEC's case, and the restrictions imposed through the requested expansion will negatively impact settlement discussions.

III. CONCLUSION

For all of the foregoing reasons, the Receiver's Motion to Expand should be denied. In the alternative, an evidentiary hearing should be granted. Further, in all events, a ruling on the Motion to Expand should be deferred until after the Mediation on December 7, 2020.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CIV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____/

DEFENDANTS' AMENDED JOINT REPLY IN SUPPORT OF MOTION TO DISMISS PLAINTIFF'S AMENDED COMPLAINT

Defendants Complete Business Solutions Group, Inc., d/b/a Par Funding ("Par Funding"), Lisa McElhone ("Ms. McElhone"), Joseph W. LaForte ("Mr. LaForte"), Joseph Cole Barleta ("Mr. Cole"), Perry S. Abbonizio ("Mr. Abbonizio"), Dean J. Vagnozzi ("Mr. Vagnozzi"), and Michael C. Furman ("Mr. Furman") (collectively, "Defendants") file this Reply in Support of their Joint Motion to Dismiss the Amended Complaint ("Amended Complaint or Am. Comp.").[1]

1. **The Par Funding Notes issued During "Phase I" Are Not Securities**

In its Response, the SEC argues Defendants cannot meet their burden of rebutting the presumption that the Par Funding promissory notes issued during "Phase I" were securities. The SEC claims, as a threshold matter, that Defendants are bound by Par Funding's own characterization of the notes as securities. Alternately, the SEC also argues that Defendants have

[1] This Reply has been amended to exclude Relief Defendant The LME 2017 Family Trust ("Trust") as a party joining in the Reply in light of the Court's recent Order expanding the Receivership to include the Trust [DE 436]. However, it should be noted that the Trust joined in the Motion to Dismiss prior to the issuance of the Expansion Order [DE 363]. No other changes have been made to the Reply.

failed to show the notes fall into an exempt category of notes or otherwise pass the "family resemblance" test articulated by the Supreme Court in *Reves v Ernst & Young*. The SEC is wrong on both counts.

a. Par Funding's Form D is not relevant to whether the "Phase I" promissory notes are securities.

The SEC argues that Par Funding self-identified the promissory notes as securities by filing a Notice of Exempt Offering of Securities on Form D, and that Par Funding's characterization of the notes should bind Defendants. *See* Response at 6–7. The SEC is mistaken. Defendants' argument for dismissal focuses on the notes issued by Par Funding during "Phase I," which the SEC separately defined in the Amended Complaint to include *only* the offerings made between August 2012 and December 2017. *See* Am. Compl. at ¶ 49. However, Par Funding filed the referenced Form D in February 2019 (and an amended Form D in April 2020), *see id*. at ¶¶ 235–36, which was *after* Phase I and *after* Par Funding is alleged to have transformed its offerings through the use of Agent Funds. Thus, the Form D has no bearing on the proper characterization of Phase I notes.

b. Defendants have shown the "Phase I" promissory notes fall into exempt categories of notes.

i. Exempt Notes

The SEC first argues the notes are not short-term notes secured by a lien on a small business or some of its assets, or by an assignment of accounts receivable. *See* Response at 8–11. The SEC submits, in summary, that because each MCA merchant would grant Par Funding a security interest in the merchant's assets and assign Par Funding its future accounts receivable, and because Par Funding would grant noteholders a security interest in Par Funding's own assets and accounts receivable, each noteholder would obtain only a small, fractionalized interest in many loans. In

other words, according to the SEC, the notes fall outside the exempt categories because, "to the extent the notes were secured, they were secured by many small assignments of accounts receivable." *Id.* at 10.

To support the distinction the SEC advances, the SEC relies upon and quotes from the court's ruling in *SEC v. 1 Global Capital, LLC*, Case No. 18-CIV-61991, 2012 WL 1670799 (S.D. Fla. Feb. 8, 2019). However, the SEC may be unaware that in a subsequent, pending class action litigation brought by 1 Global's investors, another federal court in the Southern District of Florida found collateral estoppel did not apply to the 1 Global ruling, considered the arguments anew, and disagreed that this part of the inquiry was as clear-cut as the 1 Global court had made it out to be. Specifically, while Bankruptcy Court Judge Robert A. Mark denied dismissal of the class action complaint and found the notes at issue in that case did not fall within an exempt category, he stated that "I don't fully agree that the exception may be limited to notes that are secured by the assets of only a single business." He reasoned, "I can see that you could have a commercial transaction where a business that's loaning money needs a source of funding, and in exchange for the funding, offers specific security interests in [] the loans that that particular business is making." *See* Exhibit 1 (transcript of May 26, 2020 motion to dismiss hearing in *Foster v. Ruderman*, 18-01438-RAM (Bankr. S.D. Fla.)).

Judge Mark found the scenario he contemplated was not before the court in the case before him, in part, because the plaintiffs had alleged that 1 Global had total discretion as to how to use investor funds (i.e., the company was not required to use investor funds for the MCA component of its business, and thus at least a portion of the funds was not secured), and the rate of return on the notes at issue fluctuated based on 1 Global's success in its overall operations.

That is not the case here: According to the Amended Complaint, the Phase 1 noteholders held short-term notes secured by an assignment of substantially all of Par Funding's assets (including its accounts receivable), and those noteholders were provided fixed rate returns in exchange for the funding they provided — funding that the noteholders understood Par Funding would use to advance MCA loans.

The SEC emphasizes that the Amended Complaint does not allege any contact between the noteholders and the MCA merchants, nor does the Amended Complaint allege that noteholders even understood which merchants would receive funding. Given that the "economic reality" of the transaction controls, however, these alleged circumstances should not bear on whether the notes fall within an exempt category; the "reality" is that noteholders obtained a lien and security interest in "substantially all" of Par Funding's assets and accounts receivable, including the merchant assets and accounts receivable that had been assigned to Par Funding. This is true regardless of how allegedly "small" or "fractionalized" those interests were, and regardless of the noteholders' level of interaction with merchants.

ii. The "Family Resemblance" Test

The SEC next argues that Par Funding's promissory notes do not meet any of the factors of the "family resemblance" test. As noted in the Motion, the Court is not required to apply the family resemblance test if it determines the notes fall within an exemption, which they do. *See, e.g., Lincoln v. Washington Mut. Bank, N.A.,* Case No. 07-CIV-60273, 2007 WL 9701069, *2 (S.D. Fla. Aug. 6, 2007) ("Since the note in contention is a mortgage note for a home there is no need to further discuss the family resemblance test."). In any event, the SEC's application of the test is unreliable. As with the SEC's misplaced reliance on the Form D filed by Par Funding, the SEC at times ignores the relevant Phase I time period. *See, e.g.*, Response at 12–13 (citing the

Amended Complaint's allegations about amounts Par Funding had raised by 2019 to show why the second factor of the test allegedly supports a finding that the notes are not securities, even though Phase I extended only through 2017).

Moreover, the SEC fails to acknowledge "risk-reducing factors" and other countervailing considerations, including that the funds Par Funding received from noteholders were collateralized. *See Asset Protection Plans, Inc. v. Oppenheimer & Co., Inc*., Case No. 11-CIV-00440, 2011 2533839, *5 (M.D. Fla. June 27, 2011). And while the SEC includes a lengthy string citation of instances in which Defendants referred to the notes as "investments," "casual semantics fail to govern over applicable law in distinguishing a loan from a security." *Id*. at *4. After all, "[i]n one sense every lender of money is an investor since he places his money at risk in anticipation of a profit in the form of interest." *Id*. at *3 (internal citation and quotation marks omitted).

2. <u>The SEC's Complaint Is A Shotgun Pleading.</u>

The SEC fails to heed the Eleventh Circuit's holding in *Wagner* that admonishes "shotgun pleadings [which] incorporate every antecedent allegation by reference into each subsequent claim for relief or affirmative defense." *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1279 (11th Cir. 2006). Nor does the SEC address the point made in both *Wagner* and *Solow* that the factual allegations must be properly linked to the causes of actions to put the Defendants on notice of the claims against them. *Wagner*, 464 F.3d at 1278; *S.E.C. v. Solow*, No. 06-81041 CIV, 2007 WL 917269, at *3 (S.D. Fla. Mar. 23, 2007).

While the SEC argues in its Response that "[t]he Amended Complaint includes headings identifying sections of the pleading that relate to each of the misrepresentations and omissions…" bold headings do not relieve the SEC of its burden to put the defendants on notice as to what

allegation specifically against them gives rise to each cause of action. *See Dressler v. U.S. Dep't of Educ.*, No. 2:18-CV-311-FTM-99CM, 2019 WL 130348, at *3 (M.D. Fla. Jan. 8, 2019) (dismissing plaintiff's complaint as an impermissible shotgun pleading because "the allegations that follow each heading generally lump the defendants together, which fails to place each defendant on notice of what allegations specifically against them give rise to each cause of action"). Were the SEC's Complaint as clear as it suggests, it would not have had to break out the allegations relating to each defendant as it did in its Response to clarify which of them relate to which defendant. *Wagner* demands more than a few headings and a brief explanation in the SEC's Response referencing *some* of the allegations as to each Defendant. Leaving the Complaint as is will require the Defendants and this Court to sift through its Complaint to assemble the jigsaw puzzle of claims and allegations. The Defendants and the Court should not have to jump back and forth through 267 paragraphs and dozens of pages to determine what factual allegation supports what claim, and which factual allegation is attributable to what defendant. *See S.E.C. v. Levin*, No. 12-21917-CIV, 2013 WL 594736, at *9 (S.D. Fla. Feb. 14, 2013) (requiring the SEC to re-plead its complaint because the SEC failed to specify which misstatements and omissions were the basis of the fraud allegations in each respective count as to each defendant).

3. The SEC Has Failed to Establish That Defendants Violated the Antifraud Provisions of the Federal Securities Laws.

a. Alleged Misrepresentations

In a Section of its Amended Complaint entitled "Material Misrepresentations and Omissions in Connection with the Par Funding, ABFP, United Fidelis and Retirement Evolution Offerings," the SEC lays out the various misrepresentations it suggests violate the securities laws, each of which the Defendants addressed in their Motion to Dismiss. Rather than addressing these arguments, however, the SEC largely ignores or recasts the arguments raised in the Motion to

Dismiss. Failure to respond to arguments regarding particular claims in a motion to dismiss is a sufficient basis to dismiss such claims as abandoned or by default. *See Hooper v. City of Montgomery*, 482 F. Supp. 2d 1330, 1334 (M.D. Ala. 2007) (dismissing claims as abandoned where the plaintiff failed to respond to the defendant's arguments concerning the dismissal of those claims) (citing *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk S. Ry. Co.*, 209 F. Supp. 2d 1301, 1324 (N.D. Ga. 2001) ("When a party fails to respond to an argument or otherwise address a claim, the Court deems such argument or claim abandoned.").

1. Par Funding's Loan Practices[2]

In paragraphs 154 - 184, the SEC alleges that Par Funding made material misrepresentations regarding its loan practices. Notably, the SEC acknowledges through its silence that its Complaint does not allege Ms. McElhone made or authorized any such statements, or that she knew such representations or written materials contained material misrepresentations, omissions, or were part of a deceptive scheme. The SEC is also conspicuously silent regarding the fact that the alleged statements constitute mere puffery and opinions "deemed immaterial by a broad spectrum of federal courts." *City of Monroe Employees Retirement Sys. v. Bridgestone Corp.*, 399 F.3d 651, 671 (6th Cir. 2005). A reasonable investor would not attach significance to Par Funding's decision not to inspect businesses with which it had a prior relationship or where the size of the deal would not warrant the expense of a physical inspection.

2. Loan Default Rates

[2] The Amended Complaint refers to these statements interchangeably as misrepresentations regarding "loan practices" (¶8) and "rigorous underwriting" (¶¶154-184). For simplicity, Defendants will identify them as statements regarding "loan practices."

Rather than address its failure to properly allege this claim, the SEC argues that the Defendants simply cannot argue their position on a motion to dismiss. The SEC is wrong. The SEC must properly allege that the alleged misrepresentations regarding the alleged loan default rates were materially false, and it cannot simply make up its own version of the truth in doing so. The SEC does not allege that the default rate method used by Par Funding was materially misleading. Instead, it argues that an analysis it conjures up on its own, based on information that would have been publicly available to investors—lawsuits—yields a rate different than that used by Par Funding. The SEC does not allege, for example, whether or what percentage of the lawsuits it uses to calculate its version of the default rate were filed after Par Funding had already recovered its principal from the merchants. In short, alleging that Par Funding's loan default rate was calculated "differently" than the SEC's preferred method does not prove falsity or scienter. *Lloyd v. CVB Fin. Corp.*, No. CV-10-06256, 2012 WL 12883522, at *20-21, 26 (C.D. Cal. Jan 12, 2012) (dismissing complaint because plaintiffs did not allege adequate facts to show that defendants' method of calculating loan loss reserves were false or misleading simply because they differed from the method used by plaintiffs.).

3. Insurance on Merchant Fund Advances

The SEC engages in a bit of word play to overcome the deficiency in this allegation. It alleges that a Par Funding brochure "claims to offer insurance . . . that protects Par Funding in case of a default or non-payment." *See* Am. Comp. ¶ 204. Similarly, the SEC alleges that Messrs. LaForte and Abbonizo told investors that Par Funding had insurance to back up investor funds. *Id.,* ¶¶ 205-206. But the SEC does not allege—because it cannot—that Par Funding failed to obtain insurance to cover nonpayment by a small business. Instead, in an odd effort to allege falsity, the SEC alleges that "Par Funding *did not offer small businesses* insurance on the Loans, and thus

investor funds were not protected by insurance." Am. Comp. at ¶ 207. But this does not make any of the alleged statements *false*. Having failed to allege that Par Funding did not obtain this insurance, or that anyone who allegedly made these statements knew when they made them that Par Funding's insurance did not cover investor funds, the SEC's theory fails.

4. Payments to Ms. McElhone and Mr. Cole

Here again, rather than address the insufficiency of this allegation, the SEC hopes the Court will punt this argument to a different procedural stage of the case. But the Defendants' argument—and the SEC's pleading deficiency—is not based on a dispute over facts. The SEC simply did not allege facts to suggest that the statement made in the Form D filings were false or made with scienter. Simply put, the SEC alleges that Mr. Cole and Ms. McElhone would not receive any of the gross proceeds of the securities offering, but fails to allege—because it cannot—that the payments they allegedly received represented funds deposited by investors rather than other funds generated by Par Funding's legitimate merchant cash advance business. At minimum, the SEC's conclusory allegations do not meet the requirements of Rule 9(b).

5. Mr. LaForte's Criminal History

The SEC alleges that Mr. LaForte told investors in November 2019 that he had started Par Funding eight years prior and that he touted both its and his success in the industry. *See* Am. Compl. at ¶¶ 102-103. The Complaint does not allege that any of these statements are false. Instead, the SEC argues that Mr. LaForte's statements were materially misleading because he failed to disclose convictions which the SEC acknowledges were at least 10 years old at the time of the alleged representations to investors. *Id*., ¶ 18. The SEC's own regulations make clear that convictions that are even five years or older need not be disclosed to the investing public. For example, Regulation S–K, which is promulgated by the SEC, requires disclosure of a prior

conviction by a control person only when it is within five years and material to an investment decision. 17 C.F.R.§ 229.401(g). *See also Hoffman v. Estabrook & Co., Inc.*, 587 F.2d 509, 517-518 (1st Cir. 1978) (affirming as "correct" the district's finding that "the omission from a memorandum of [the defendant's] past criminal record was not material" because the investors were attracted to the defendant's idea rather than the defendant's character and integrity).

Moreover, this information was publicly available, and therefore, part of "the 'total mix' of information [already] available" to investors. *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32; *Park Yield LLC v. Brown*, No. 18 Civ. 1947 (GBD) (SN), 2019 WL 6684127, at *8 (S.D.N.Y. December 6, 2019). *Park Yield LLC v. Brown*, No. 18 Civ. 1947 (GBD) (SN), 2019 WL 6684127, at *8 (S.D.N.Y. December 6, 2019).

In *Park Yield*, the court dismissed the plaintiff's claim that the defendant, the controlling shareholder in a limited liability company in which plaintiff invested, materially misled the plaintiff by failing to disclose his prior criminal conviction to the plaintiff. *Id.* The court explained, "[a]s to [the defendant]'s alleged failure to inform plaintiff of his conviction, plaintiff does not demonstrate how any such failure to disclose publicly available information constitutes a material omission." *Id.* Citing *In re Bank of Am. AIG Disclosure Sec. Litig.*, 980 F. Supp. 2d 564, 576 (S.D.N.Y. 2013), aff'd, 566 F. App'x 93 (2d Cir. 2014), the court explained, "[w]here allegedly undisclosed material information is in fact readily accessible in the public domain[,] a defendant may not be held liable for failing to disclose this information." *Id.* Consequently, the court continued, "any alleged failure by [the defendant] to disclose his conviction was immaterial as a matter of law, and Plaintiff's claim under Section 10(b) and Rule 10b-5 must be dismissed."[3] *Id.*

[3] In order to overcome this obvious pleading deficiency, the SEC alleges that Mr. LaForte attempted to conceal his identity from investors and references an email address and business card in support of this claim. However, because there is no allegation that he ever used either in

As a consequence, the SEC's claim that Mr. LaForte acted with scienter in failing to disclose information readily available to the public is nonsensical. *See Hollinger v. Titan Capital Corp.,* 914 F.2d 1564 (9th Cir. 1990) (Broker dealer's failure to disclose to investors that registered representative had 11–year-old felony forgery conviction was not "reckless conduct" that could have satisfied scienter element in civil action under Securities Exchange Act § 10(b) and Rule 10b–5); *Cohen v. Telsey*, No. CIV 09-2033, 2009 WL 3747059, *13 (D.N.J. Nov. 2, 2009) (defendant, an attorney for the issuer, did not act with the requisite intent in omitting control person's conviction because by 2001 the conviction was more than 15 years old).

6. Par Funding's Regulatory History

Once again, the SEC ignores the deficiencies in its Complaint and simply reiterates allegations that fall well short of the mark to properly allege a materially misleading statement in violation of the antifraud statutes. Here, the SEC's theory is that statements touting Par Funding's success as a profitable cash advance company were materially misleading. *See* Am. Compl. at ¶ 227. Notably, however, *the SEC does not allege that Par Funding's cash advance business operations were not profitable*. Instead, it alleges that the statements are misleading because they omit that Par Funding "ha[d] twice been sanctioned for violating the securities laws." *Id.* In these cases, courts must consider whether the omitted conduct is sufficiently connected to the defendant's existing disclosures to be material. *Fries v. N. Oil & Gas, Inc.*, 285 F. Supp. 3d 706, 719 (S.D.N.Y. 2018).

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connection with an interaction with an investor, much less in connection with the offer or sale of a security, this theory fails. More important still, the SEC's claim is also internally inconsistent in that the Complaint also alleges that Mr. LaForte posted videos and articles about himself on Par Funding's website bearing his own name and likeness. Reasonable inferences drawn from the SEC's own version of the events therefore undermine its theory that Mr. LaForte intended to conceal his identity.

In *Fries*, the plaintiff alleged that a public company made materially fraudulent representations and omissions in public filings with the SEC about one of its executives. *Id.* at 719. As the SEC has alleged here, the public company touted the executive's management expertise, but failed to disclose conduct which led the SEC to issue a cease-and-desist order against the executive concerning violations of the antifraud provisions of the securities laws. *Id.* at 712, 714 - 715. The court dismissed the claim, finding that the plaintiff failed to allege an actionable omission about the executive because: (1) the statements touting the executive's experience were not false; (2) none of the statements made about the executive's experience suggested that he was not engaged in the conduct that gave rise to the cease-and-desist order; and (3) the improper conduct was not a material source of the company's or the executive's success. *Id.* at 719 - 720.

For these same reasons, the court should dismiss the SEC 's claim that statements touting Par Funding's success as a profitable cash advance company were materially misleading by omission. First, the SEC did not allege that these statements were false. Second, the alleged statements did not suggest that Par Funding was no longer engaged in the conduct that gave rise to the prior securities violations. And finally, the SEC did not allege that the conduct that gave rise to the prior securities violations was a material source of the company's success (or that it even continued). Consequently, the alleged statements could not have been materially misleading and cannot form the basis of a violation of the securities laws.

b. Allegations Specific to Defendants

i. Ms. McElhone

The SEC's response regarding Ms. McElhone makes two things perfectly clear. First, it does not attribute a single alleged misrepresentation to her directly; it is now clear that she had no knowledge of the falsity of any such statement, did not disseminate or make any such statement to

an investor, and did not act with scienter with respect to any such statement. Second, the SEC is relying exclusively on her title with Par Funding as an improper basis to charge her in Count VIII with a violation of Section 20(a) of the Exchange Act. It is well established that "a plaintiff may not allege 'controlling person' status merely by reciting a corporate officer's title without alleging actual control and the nature of the controlling person's 'culpable participation' in the fraud." *Ellison v. Am. Image Motor Co., Inc*., 36 F. Supp. 2d 628, 642 (S.D.N.Y. 1999); *see, e.g., Craig v. First Am. Capital Res., Inc*., 740 F. Supp. 530, 533, 537 (N.D. Ill. 1990). In *Craig*, the plaintiff alleged that the defendant was liable as a control person simply because the defendant was the President and director of the corporate defendant. *Id.* The district court rejected the plaintiff's argument. The court explained that to attach control person liability under Section 20(a), the plaintiff was required to allege more than just the fact that he was an officer of the corporate defendant. The plaintiff was required to allege that the defendant had "potential for control over the specific activity upon which the primary violation [of securities laws] is predicated." *Id.* (citations omitted). Accordingly, the court granted the defendant's motion to dismiss the control liability claim against him.

Similarly, in *In re Galena Biopharma, Inc. Sec. Litig*., 117 F. Supp. 3d 1145, 1201 (D. Or. 2015), the Court found that the simple allegation that the defendant was a control person because he was the corporate defendant's Chief Operating Officer and Executive Vice-President was insufficient to attach liability under Section 20(a). The court explained that the plaintiff failed to plead any other allegation that would tend to show that the defendant had the "requisite control over [the corporate defendant's] day-to-day operations." *Id.* Thus, the court dismissed the plaintiff's control liability claim against said defendant. *Id.* For those same reasons, the Court should dismiss Count VIII as to Ms. McElhone.

ii. Mr. Laforte

The SEC's case against Mr. LaForte is largely built on the question of whether disclosure of his decade-old criminal history was necessary. It is worth repeating that the SEC is not alleging that Mr. LaForte told investors that he had no prior criminal history. In fact, the evidence will demonstrate that he did, in fact, tell investors and, as is the case for many other aspects of this matter, that he and Par Funding received advice from legal counsel on this issue.

For purposes of the SEC's Complaint, the issue is whether Mr. LaForte's alleged failure to disclose his criminal history to investors renders other statements he made touting his experience materially misleading by *omission*. As explained, *supra*, the sheer age of the convictions rendered them immaterial:

> "The Federal Rules of Evidence ***and the SEC's own internal policies*** both suggest that the probative value of prior bad acts is diminished after ten years. Under the Federal Rules, evidence that a witness in a civil or criminal trial has been convicted of a felony must be admitted within ten years of the conviction; after ten years, the conviction is admissible only if its probative value, "supported by specific facts and circumstances, substantially outweighs its prejudicial effect." Fed. R. Evid. 609(b)(1). Similarly, the SEC's own regulations on reporting for public companies require that directors and officers disclose legal proceedings "material to an evaluation of ... ability and integrity" only from the last ten years."

See SEC v. Jensen, 835 F.3d 1100, 116-1117 (9th Cir. 2016) (emphasis supplied). Moreover, because the information the SEC alleges was publicly available to investors, its alleged omission could not have rendered statements made regarding Mr. LaForte's background materially misleading. Finally, Mr. LaForte could not have acted with scienter in allegedly omitting disclosure of his criminal history to some investors given that this information was both publicly

available and, *by virtue of the SEC's own internal policy*, of "diminished [value] after ten years." *Id.*[4]

iii. Mr. Cole

The SEC's internal policies and regulations that render Mr. LaForte's criminal background immaterial for purposes of public company disclosures by LaForte apply equally as to representations by Mr. Cole. Moreover, because Mr. LaForte's history is publicly available information, Mr. Cole could not have acted with scienter even if he knowingly omitted their disclosure to investors as alleged by the SEC. Finally, for the reasons stated in the Defendants' Motion to Dismiss and Section 3(a)(4), *supra*, the SEC has failed to adequately state a claim with respect to the Form D filings allegedly signed by Mr. Cole.

iv. Mr. Abbonizio

The SEC's Response confirms and underscores the complete insufficiency of the allegations that Abbonizio acted with the requisite scienter to sustain claims against him under Rule 10b-5 of the Exchange Act and Section 17(a)(2) of the Securities Act. With regard to Abbonizio's alleged omissions of LaForte's criminal background, the SEC refers to the allegations that Abbonizio was an owner of Par Funding, that Abbonizio claimed to have founded Par Funding with LaForte, and that Abbonizio introduced LaForte to potential investors. And similarly, with regard to Abbonizio's alleged misrepresentations about Par Funding's underwriting process and loan default rate, the SEC again refers to the vanilla allegations that Abbonizio was an owner,

[4] This argument applies equally to the allegations made against Messrs. Abbonizio and Cole regarding Mr. Laforte's criminal history.

adding that Abbonizio claimed these were "critical" parts of the business that were necessary to its success. *See* Response at 29.

At bottom, the SEC's argument is that, because Abbonizio is an alleged owner of Par Funding and a self-proclaimed co-founder, he therefore must have known or ought to have known the truth about these alleged misstatements and omissions. But even in the light most favorable to the SEC, this attempt to bootstrap the scienter element onto allegations relating to Abbonizio's alleged role with the company are insufficient; there must be something more that specifically addresses Abbonizio's alleged mental state. *See SEC v. Yorkville Advisors*, LLC, 305 F. Supp. 3d 486, 511–12 (S.D.N.Y. 2018) ("Mere allegations that a defendant knew or should have known of fraudulent conduct based solely on his or her corporate title or position are insufficient. . . . It is also insufficient to allege that a defendant 'ought to have known' of the fraud."). Indeed, the Amended Complaint does not include any allegations that give rise to an inference that Abbonizio possessed *any* information contrary to what he relayed to potential investors. As such, the claims against Abbonizio must be dismissed.

v. Mr. Furman

Not surprisingly, of the SEC's 40-page Response, there are only three short paragraphs devoted to Mr. Furman's alleged misrepresentation about a New Jersey regulatory action against Par Funding. *See* Response at 33; Am. Compl. at ¶233. According to the Response (and the Amended Complaint), on June 16, 2019, Mr. Furman falsely told an undercover individual posing as an investor that the State of New Jersey had "retracted" its action against Par Funding and that New Jersey had said that the company was "good" and did not need to pay a fine or have any penalties.

As a threshold matter, the Response (like the Complaint) fails to square with the SEC's filings with this Court. On July 28, 2020, the SEC filed a transcript of an alleged recording of the conversation between the undercover posing as an investor and Mr. Furman about the State of New Jersey action. [*See* ECF No. 41-30]. While the SEC's Response (and Complaint) allege that the recording occurred on **June 16, 2019**, the declaration filed under penalty of perjury before this Court provides that the conversation at issue occurred on **March 5, 2020**. *Id*. at ¶4. Although courts must construe and accept as true the factual allegations in a complaint and inferences reasonably deductible therefrom, courts "need not accept . . . **facts which run counter to facts of which the court can take judicial notice** . . . ." *Response Oncology, Inc. v. Metrahealth Insurance Co.*, 978 F.Supp. 1052, 1058 (S.D.Fla. 1997) (emphasis added) (citations omitted); *see also*, *Howard v. Kerzner Int'l Ltd.*, No. 12-22184-CIV-FAM, 2014 WL 714787, at *5 (S.D. Fla. Feb. 24, 2014) (Moreno, J.). Considering that the SEC's alleged facts in the Complaint "run counter to [facts in the SEC's filing] of which the court can take judicial notice" because it is in the record, the Court need not accept the factual claims as true when deciding the Motion to Dismiss. This alone is enough for this Court to dismiss the Complaint as to Mr. Furman.

Contrary to the Response, the Complaint also fails to sufficiently allege scienter as to Mr. Furman. The SEC's Response (like the Amended Complaint) lacks any specific allegations that Mr. Furman had the intent to deceive when he purportedly provided incorrect information to the undercover about the State of New Jersey action against Par Funding. He was neither a Par Funding employee nor trained to understand state regulatory actions. And the SEC does not allege that Mr. Furman had any specific duty to ensure that the information about New Jersey was accurate.

Moreover, the Response fails to answer *any* of the questions posed in the Defendants' Motion to Dismiss as to how Mr. Furman purportedly knew that *any* of his alleged representations were untrue. [*See* Mo. to Dismiss at pgs. 19 - 24]. The SEC ignores these questions because it cannot allege with any particularity that Mr. Furman acted with the intent to deceive (or that he acted recklessly or negligently). By ignoring Mr. Furman's challenges to the Complaint, the SEC concedes that the Complaint is deficient. *See GolTV, Inc. v. Fox Sports Latin Am. Ltd.*, 277 F. Supp. 3d 1301, 1311 (S.D. Fla. 2017) (Altonaga, J.) (treating argument ignored by plaintiff's brief in response to motion to dismiss as conceded) (citing *Hartford Steam Boiler Inspection & Ins. Co. v. Brickellhouse Condo. Ass'n, Inc.*, No. 16-CV-22236, 2016 WL 5661636, at *3 (S.D. Fla. Sept. 30, 2016) (Gayles, J.) ("[A] plaintiff who, in [its] responsive brief, fails to address [its] obligation to object to a point raised by the defendant implicitly concedes that point.") (citation omitted)). Because the SEC cannot sufficiently allege Mr. Furman's intent, the Complaint lumps Mr. Furman with other defendants in a textbook example of an impermissible "shotgun pleading." *See* Motion to Dismiss at 20-23. As a result, the Court should dismiss all counts alleged against Mr. Furman.

vi. Mr. Vagnozzi

The SEC's Response is most telling for what it does not say about Mr. Vagnozzi, and therefore concedes that dismissal is required. The SEC ignores Mr. Vagnozzi's arguments in the Motion that the Complaint fails to adequately allege scienter as to his alleged misrepresentations regarding Par Funding's default rate and underwriting practices. Motion at 21 - 22. The SEC also ignores Mr. Vagnozzi's arguments regarding the inadequacy of the Complaint's fraud allegations as to the April 2020 exchange offer. *Id.* at 21 - 23. The SEC ignores the rhetorical questions we raised in the Motion because it has no answer. As to Mr. Vagnozzi's dismissal argument that the Complaint fails to allege fraud with regard to the use of "Agent Funds," Motion at 23, the only

thing the SEC can say about that is a boilerplate statement that he "created the new structure" and "train[ed] sales agents." Response at 32.

None of the SEC's concessions is surprising. The Complaint utterly fails to plead any particularity of fraudulent conduct as to Mr. Vagnozzi regarding the Par Funding "business practices" allegations or Mr. Vagnozzi's alleged statements regarding the pros and cons of accepting an exchange offer at the beginning of the pandemic when Par Funding defaulted on its notes. And there is nothing inherently wrong about creating agent funds or engaging in alleged training, so these allegations also are insufficient to state a claim of fraud.

Instead, the SEC focuses mostly on Mr. Vagnozzi's allegedly not disclosing his own regulatory background. In doing so, the SEC first points, again, to statements about Par's business, track record, and successful investment history, without any showing as to how Mr. Vagnozzi knew any of this was allegedly false. Response at 30 - 31. The SEC makes much of him saying that Par Funding had never missed a payment, which of course was absolutely true. But all of these allegations are irrelevant to a claim of fraud with respect to regulatory proceedings. The two things have nothing to do with each other. The SEC similarly points to a statement by Mr. Vagnozzi that he has no criminal record, which is a true statement. *Id.* The best the SEC can point to is that Mr. Vagnozzi allegedly did not disclose his widely-publicized settlement with the Pennsylvania securities regulators based on an investigation they opened in February 2019 regarding Mr. Vagnozzi's conduct prior to the 2018 switch to Agent Funds. At a minimum, that fact does not support any claim of fraud for conduct before that date. More important, the SEC ignores the fact that its own evidence presented in the preliminary injunction hearing contradicts that allegation because Mr. Vagnozzi was recorded advising a prospective noteholder about that settlement with Pennsylvania. *See* [ECF No. 147 ¶ 30].

Finally, the SEC argues that it has stated a claim due to Mr. Vagnozzi's alleged failure to disclose facts about Par Funding's regulatory history. The Complaint has no particularized allegations showing that Mr. Vagnozzi was aware of Par Funding's state regulatory investigations before they were publicly announced. As to Mr. LaForte's criminal background, as we previously pointed out, that is immaterial as a matter of law. His conviction is not material, and the SEC baldly stating otherwise – in direct contravention of its own adopted regulations – does not sufficiently state a claim.

vii. The Trust

In keeping with its "sue first and sort out the facts later" strategy, the SEC merely recites the allegations of the Complaint as to the Trust without responding to the arguments raised in the Motion to Dismiss. Because the SEC is alleging that Par Funding funneled commingled funds into the Trust, the SEC must plead sufficient allegations with particularity to satisfy both components of the applicable two-part test. *See generally S.E.C. v. Founding Partners Capital Mgmt.*, 639 F. Supp. 2d 1291, 1294 (M.D. Fla. 2009) (finding that, "the Complaint fails to specifically identify factual contentions against [the company]" to demonstrate how the company qualified as a relief defendant); *accord Janvey v. Adams*, 588 F.3d 831 (5th Cir. 2009).

First, the SEC has alleged that the Trust owned Par Funding. *See* Am. Compl. at ¶36. The governing jurisprudence requires only an "ownership interest" to preclude an entity from being a proper relief defendant. *Janvey*, 588 F.3d at 834. Par Funding had a legitimate interest in distributions from Par Funding. The SEC did not allege that the transfer to the Trust was a gift. Second, the SEC has not alleged sufficient factual support that investor funds were diverted into the Trust. *Founding Partners Capital Mgmt*., 639 F. Supp. 2d at 1295 ("such a sue-first-and-sort-out-the-facts-later-approach is [not] compatible with the Federal Rules or fundamental fairness).

The allegations of the Amended Complaint create a reasonable inference that distributions were made from Par Funding revenues, and not gross proceeds of the of the offering. If the SEC has evidence that investor proceeds were transferred to the Trust, Rule 9(b) requires that it say so in the Amended Complaint. Until then, the Trust is not properly named as a Relief Defendant and should not be subject to any future disgorgement order seeking to recover the Trust's assets.

CONCLUSION

For the reasons above, the SEC's claims against Defendants Complete Business Solutions Group, Inc., d/b/a Par Funding, Lisa McElhone, Joseph W. LaForte, Joseph Cole Barleta, Perry S. Abbonizio, Dean J. Vagnozzi, Michael C. Furman, and Relief Defendant The LME 2017 Family Trust should be dismissed.

Dated: December 23, 2020

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-CIV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____/

DEFENDANTS' JOINT MOTION TO EXTEND DISCOVERY AND MOTION DEADLINES AND RESET TRIAL DATE

Defendants Lisa McElhone, Joseph Cole Barleta, Joseph W. LaForte, Perry Abbonizio, Dean Vagnozzi, and Michael Furman (collectively, "Defendants") pursuant to Rule 16(b)(4) of the Federal Rules of Civil Procedure, move unopposed[1] to extend the discovery and accompanying deadlines and reset the trial date, and in furtherance thereof, state:

BACKGROUND

1. On September 15, 2020, the Parties filed their Joint Scheduling Conference Report. (ECF No. 261). On September 23, 2020, this Court entered an Order Setting Jury Trial Schedule, Requiring Mediation, and Referring Certain Matters to Magistrate Judge ("Scheduling Order") (ECF No. 279).

[1] As explained below, the SEC does not oppose an amendment of the Scheduling Order but believes a three-month extension of the deadlines would be appropriate rather than the six-month extension of the deadlines Defendants believe is necessary. Counsel for the SEC also indicated that it is difficult at this time to anticipate how much time might be required to complete discovery because the Defendants' Motion to Dismiss remains pending and therefore the SEC has not seen the Defendants' Answers to the Complaint or any affirmative defenses, and the SEC will likely need to conduct discovery concerning any affirmative defenses the Defendants might raise.

2. The Scheduling Order set trial in this matter for the Court's two-week calendar period commencing on August 30, 2021 and set the following deadlines:

a. April 5, 2021 – The parties shall exchange expert witness summaries or reports.

b. April 19, 2021 – The parties shall exchange rebuttal expert witness summaries or experts.

c. May 3, 2021 – All discovery, including expert discovery, shall be completed.

d. May 10, 2021 – The parties must have completed mediation and filed a mediation report.

e. May 17, 2021 – The parties shall file all pre-trial motions, including motions for summary judgment, and *Daubert* motions.

3. While the Parties have been diligent in proceeding with discovery in this case, Defendants have only recently begun receiving documents. In addition to the discovery produced and still being produced by the SEC, Defendant McElhone (on behalf of the other Defendants) has served six Requests for Production of Documents on the Receiver. As described in greater detail below, the Receiver's production of a voluminous number of documents began in early January and document production from both the SEC and the Receiver is not expected to be complete for at least another four weeks. Document production from both the SEC and the Receiver was delayed for almost six months as a consequence of various disputes between the Receiver and Defendants, as well as the Receiver not waiving privilege until mid-January 2021.

4. As a result of the delayed production of documents and the massive volume of document production still underway, Defendants have canceled numerous depositions and have conferred with counsel for the SEC to postpone depositions the SEC has scheduled until document discovery is complete and the parties have had an opportunity to review them.

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5. In light of these delays, defense counsel have discussed their concerns with the SEC regarding the current discovery cutoff date of May 3, 2021. The SEC has proposed an extension of three months, although clearly reserving the opportunity to seek a much longer extension should the Motion to Dismiss be denied in whole or part and the Defense raise affirmative defenses in their Answer. However, three months is insufficient to review the massive volume of document discovery (which is not yet complete) and thoroughly prepare for depositions, much less make the voluminous discovery available to experts for their review and drafting of expert reports.

6. Because Defendants are likely several weeks away from even completing document discovery—much less reviewing it—Defendants have not had a meaningful opportunity to consult with experts in order to meet the current deadlines for expert disclosures and the submission of expert reports. Moreover, because the parties will not be able to complete discovery by the cutoff date, they will not be adequately prepared to file pre-trial motions, including motions for summary judgment and *Daubert* motions, by the current deadlines.

7. Accordingly, the Defendants jointly request that the deadlines below be modified as follows:

a. October 6, 2021 – The parties shall exchange expert witness summaries or reports.

b. October 20, 2021 – The parties shall exchange rebuttal expert witness summaries or experts.

c. November 3, 2021 – All discovery, including expert discovery, shall be completed.

d. November 17, 2021 – The parties shall file all pre-trial motions, including motions for summary judgment, and *Daubert* motions.

e. Trial on or after the two-week calendar beginning February 28, 2022 in accordance with the Court's availability.

8. The Defendants submit that the requested extension of these deadlines is necessary to complete discovery in this matter and adequately prepare for trial. This motion is brought in good faith and not for purposes of delay.

MEMORANDUM OF LAW

The Court has authority to modify the Scheduling Order. Pursuant to Federal Rule of Civil Procedure 16(b)(4), "a schedule may be modified for good cause and with judge's consent." Fed. R. Civ. P. 16(b)(4). *See Keim v. ADF Midatlantic, LLC*, No. 12-80577-CIV, 2019 WL 8262650, at *2 (S.D. Fla. Mar. 18, 2019) ("a party seeking leave to amend a deadline designated in a scheduling order, such as a deadline for the completion of discovery, must demonstrate 'good cause' under rule 16(b) of the Federal Rules of Civil Procedure."). Courts in this District have explained that "this good cause standard precludes modification unless the schedule cannot 'be met despite the diligence of the party seeking the extension.'" *See White v. De La Osa*, No. 07-23381-CIV, 2012 WL 254803, at *2 (S.D. Fla. Jan. 27, 2012) (citing to *Sosa v. Airprint, Sys., Inc.*, 133 F.3d 1417, 1418 (11th Cir. 1998)).

Rule 16(b)(4) empowers this Court to exercise its discretion to enlarge deadlines established by a court order. This Court has routinely done so in the past. *See Keim*, 2019 WL 8262650, at *2 (finding that good cause existed to extend the pretrial deadlines by seventy-five days as well as the trial date under 16(b)(4)); *Jacobson v. City of W. Palm Beach*, No. 16-CV-81638, 2017 WL 11549935, at *2 (S.D. Fla. Feb. 3, 2017) (granting defendant's motion to extend the discovery deadline under Fed. R. Civ. P. 16(b)(4)); *Boney v. Carnival Corp.*, No. 08-22299-CIV, 2009 WL 10712206, at *2 (S.D. Fla. June 4, 2009) (granting motion to extend the final discovery deadline); *Incardone v. Royal Caribbean Cruises, Ltd.*, No. 16-CV-20924, 2018 WL 3696708, at *1 (S.D. Fla. May 14, 2018) (extending the time for completion of expert discovery to an additional six months).

In the instant case, good cause exists to permit this Court to enlarge the discovery deadlines and reset the trial date. Defendants' efforts to obtain documents through discovery are well-documented. Despite their best efforts, Defendants only began receiving documents from the Receiver in January 2021. The Receiver's first production of documents on January 11, 2021 comprised 103,887 pages of documents totaling 27.9 gigabytes of data.[2] Between its second production on January 24, 2021 and 4th production on February 23, 2021, the number of documents increased to 122,740, totaling approximately 32.96 gigabytes of data. Defendants are now awaiting the production of somewhere between three and five million emails comprising roughly two additional *terabytes* of data following Magistrate Judge Bruce Reinhart's March 15, 2021 Order adopting a stipulation by the parties involving the manner of their production (ECF No. 510). Those emails are expected to be produced by the end of this month. In addition, Defendants are conferring with the Receiver regarding the production of Par Funding's underwriting files, which will likely comprise another half-terabyte of data. The timeline for production of these underwriting files is still uncertain but will likely take weeks to process and produce once the Receiver and defense counsel negotiate terms regarding said production, assuming a resolution is possible,[3] and this does not include the time it will take for Defendants to process the data for review once it is received.[4]

The above description does not include the SEC's recent production of electronically stored files comprising the equivalent of 300 boxes of Par Funding files the SEC obtained from the

[2] One such "document" was Par Funding's historical QuickBooks data, which alone comprised over 4.2 million transactions. A gigabyte is generally equivalent to roughly 10,000 pages of documents.

[3] The Receiver and defense counsel have been diligently conferring regarding the production of these files for weeks.

[4] Because of the volume of data involved, the files are typically transferred in zipped format. The unzipping and processing for review upon receipt takes days to permit initial review and additional time is needed, typically a week, in order to make all the files searchable.

Receiver. The SEC began producing these files electronically in tranches to Defendants on February 23, 2021 after the Receiver formally notified the SEC that it was waiving privilege. Defendants received the most recent tranche of data from the SEC on March 18, 2021 and expect at least one more tranche will be necessary which could take another month to produce.

Suffice it to say that massive amounts of data have recently been received by Defendants—and more are on the way—and Defendants and their consultants need time to review these documents to prepare for fact witness and expert disclosures and depositions. As a result of the delay in production and the sheer volume involved, several depositions have already been removed from the calendar and others are in the process of being rescheduled. The parties have agreed that a case of this complexity will require more than the ten depositions permitted per side for fact witnesses pursuant to Fed. R. Civ. P. 30, and Defendants expect to move for leave of Court to exceed ten depositions at the appropriate time. Defendants expect that expert witnesses will play an important role in this case as well. As things currently stand, the parties must exchange expert witness summaries or reports in two weeks, on April 5, 2021, when the exchange of document discovery is not expected to even be complete.

Accordingly, Defendants respectfully request that the Court grant the relief sought in this Joint Motion to Extend the Discovery and Motion Deadlines and Reset Trial Date and order the following new deadlines to be put in place:

a. October 6, 2021 – The parties shall exchange expert witness summaries or reports.

b. October 20, 2021 – The parties shall exchange rebuttal expert witness summaries or experts.

c. November 3, 2021 – All discovery, including expert discovery, shall be completed.

d. November 17, 2021 – The parties shall file all pre-trial motions, including motions for summary judgment, and *Daubert* motions.

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e. Trial on or after the two-week calendar beginning February 28, 2022 in accordance with the Court's availability.

Dated: March 26, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(a)(3)

I HEREBY CERTIFY that counsel for the movant has conferred with all parties or non-parties who may be affected by the relief sought in this motion in a good faith effort to resolve the issues and their respective positions are addressed in this motion.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on the 26th day of March 2021, we electronically filed the foregoing document with the Clerk of the Court using CM/ECF. We also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 9:20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a/ PAR FUNDING, et al.,

Defendants.
_____/

DEFENDANT JOSEPH W. LAFORTE'S ANSWER AND AFFIRMATIVE DEFENSES TO AMENDED COMPLAINT

Defendant Joseph W. LaForte ("Defendant" or "LaForte"), files this Answer and Affirmative Defenses to the Amended Complaint filed by Plaintiff Securities and Exchange Commission ("Plaintiff" or "SEC"), and states as follows:

ANSWER

Defendant denies all allegations contained in the headings and all unnumbered paragraphs in the Amended Complaint and denies any allegations not specifically denied. Defendant answers the remaining allegations of the Amended Complaint as follows:

1. Defendant denies the allegations contained in paragraph 1 of the Amended Complaint.

2. Defendant denies the allegations contained in the first sentence of paragraph 2 of the Amended Complaint. Defendant only admits that Par Funding offered and issued promissory notes from 2012 through 2017.

3. Defendant denies the allegations contained in paragraph 3 of the Amended Complaint. Additionally, Defendant is without sufficient knowledge to form a belief as to the

truth of the allegations contained in the second sentence of paragraph 3 of the Amended Complaint and therefore denies same.

4. Defendant is without sufficient knowledge to form a belief regarding what the Pennsylvania Securities Regulators knew regarding the creation of the Agent Funds and is without sufficient knowledge with respect to the Agent Funds' obligations to its noteholders. Defendant denies the allegations contained in the remainder of paragraph 4 of the Amended Complaint.

5. Defendant denies the allegations contained in paragraph 5 of the Amended Complaint.

6. Defendant is without sufficient knowledge to form a belief as to the truth of the Allegations in paragraph 6 not concerning Defendant and therefore denies same.

7. Defendant is without sufficient knowledge to form a belief as to the truth of the Allegations in paragraph 7 not concerning Defendant and therefore denies same.

8. Defendant denies the allegations contained in paragraph 8 of the Amended Complaint.

9. Defendant denies the allegations contained in paragraph 9 of the Amended Complaint.

10. Defendant denies the allegations contained in paragraph 10 of the Amended Complaint.

11. Defendant admits that he and his wife, Lisa McElhone conceived the idea for Par Funding and that Par Funding had an office in Philadelphia, PA until 2017, when Par moved its office to Florida. Defendant admits that Complete Business Solutions Group has done business as Par Funding since 2013. Defendant admits that The LME 2017 Family Trust ("The LME

Trust") was Par Funding's sole owner and that McElhone was Par Funding's sole employee. Defendant denies the remaining allegations contained in paragraph 11 of the Amended Complaint.

12. Defendant only admits that the Order referenced in paragraph 12 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 12 of the Amended Complaint and therefore denies same.

13. Defendant only admits that the Order referenced in paragraph 13 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 13 of the Amended Complaint and therefore denies same.

14. Defendant only admits that the Order referenced in paragraph 14 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 14 of the Amended Complaint and therefore denies same.

15. Defendant admits that FSP's corporate filings speak for themselves and that McElhone was FSP's sole owner. Defendant denies the remainder of the allegations contained in paragraph 15 of the Amended Complaint.

16. Defendant only admits that the Order referenced in paragraph 16 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant admits that McElhone was the sole owner of Par Funding and denies the remainder of the allegations contained in paragraph 16 of the Amended Complaint.

17. Defendant admits that he is a resident of Philadelphia and that he conceived the idea for Par Funding with his wife, Lisa McElhone, but was never its owner. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 17 of the Amended Complaint and therefore denies same. Defendant only admits that he once held Series 7, 63, and 24 Licenses, and denies the remainder of the allegations contained in paragraph 17 of the Amended Complaint.

18. Defendant only admits that the convictions referenced in paragraph 18 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 18 of the Amended Complaint.

19. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 19 of the Amended Complaint and therefore denies same. Defendant only admits that Cole is a resident of Philadelphia and was employed by Par Funding as CFO until 2017, when Par Funding employees were converted to Full Spectrum Processing ("FSP") employees, and thereafter by FSP as its CFO.

20. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 20 of the Amended Complaint and therefore denies same.

21. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 21 of the Amended Complaint and therefore denies same. Defendant only admits that the Order referenced in paragraph 21 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 21 of the Amended Complaint.

22. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 22 of the Amended Complaint and therefore denies same.

23. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 23 of the Amended Complaint and therefore denies same. Defendant only admits that the agreement referenced in paragraph 23 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 23 of the Amended Complaint.

24. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 24 of the Amended Complaint and therefore denies same.

25. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 25 of the Amended Complaint and therefore denies same.

26. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 26 of the Amended Complaint and therefore denies same. Defendant only admits that the Order referenced in paragraph 26 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 26 of the Amended Complaint.

27. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 27 of the Amended Complaint and therefore denies same.

28. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 28 of the Amended Complaint and therefore denies same.

29. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 29 of the Amended Complaint and therefore denies same.

30. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 30 of the Amended Complaint and therefore denies same.

31. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 31 of the Amended Complaint and therefore denies same.

32. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 32 of the Amended Complaint and therefore denies same.

33. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 33 of the Amended Complaint and therefore denies same.

34. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 34 of the Amended Complaint and therefore denies same.

35. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 35 of the Amended Complaint and therefore denies same.

36. Defendant admits that the LME Trust is Par Funding's owner and that McElhone is its Grantor. Defendant only admits that the Certification of Trust referenced in paragraph 36 of the Amended Complaint speaks for itself and denies the remaining allegations contained in paragraph 36 of the Amended Complaint.

37. Paragraph 37 includes legal conclusions regarding jurisdiction and venue to which no response is required. Defendant only admits that Par Funding has an office in Florida and is registered to do business in Florida, and that McElhone is the owner of FSP. Defendant denies the remaining allegations contained in paragraph 37 of the Amended Complaint.

38. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 38 of the Amended Complaint and therefore denies same.

39. Defendant denies the allegations in paragraph 39 of the Amended Complaint.

40. Defendant denies the allegations in paragraph 40 of the Amended Complaint.

41. Defendant denies the allegations in paragraph 41 of the Amended Complaint.

42. Defendant denies the allegations in paragraph 42 of the Amended Complaint and only admits that Par Funding's corporate filings speak for themselves. Defendant is without sufficient knowledge as to the remaining allegations contained in paragraph 42 and therefore denies them.

43. Defendant denies the allegations in paragraph 43 of the Amended Complaint.

44. Defendant denies the allegations in paragraph 44 of the Amended Complaint.

45. Defendant denies the allegations in paragraph 45 of the Amended Complaint.

46. Defendant denies the allegations in paragraph 46 of the Amended Complaint.

47. Defendant denies the allegations in paragraph 47 of the Amended Complaint.

48. Defendant denies the allegations in paragraph 48 of the Amended Complaint.

49. Defendant denies the allegations in paragraph 49 of the Amended Complaint.

50. Defendant denies the allegations in paragraph 50 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

51. Defendant denies the allegations in paragraph 51 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

52. Defendant admits that McElhone and Cole signed promissory notes issued by Par Funding, and denies the remainder of the allegations contained in paragraph 52 of the Amended Complaint.

53. Defendant denies the allegations in paragraph 53 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

54. Defendant denies the allegations in paragraph 54 of the Amended Complaint and only admits that the agreement referenced in this paragraph speak for itself.

55. Defendant denies the allegations in paragraph 55 of the Amended Complaint and only admits that any agreement referenced in this paragraph speak for itself.

56. Defendant only admits that Defendant Vagnozzi had a Finders Agreement with Par Funding at one point in time but denies the remainder of the allegations contained in paragraph 56 of the Amended Complaint.

57. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 57 of the Amended Complaint and therefore denies same.

58. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 58 of the Amended Complaint and therefore denies same.

59. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 59 of the Amended Complaint and therefore denies same.

60. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 60 of the Amended Complaint and therefore denies same.

61. Defendant admits that Par Funding raised money through the sale of promissory notes, but denies the remaining allegations contained in paragraph 61 of the Amended Complaint.

62. Defendant only admits that any subpoena issued by state regulators speaks for itself and denies the allegations in paragraph 62 of the Amended Complaint.

63. Defendant denies the allegations in paragraph 63 of the Amended Complaint.

64. Defendant only admits that Par Funding sold promissory notes to Agent Funds beginning in 2018 but denies the allegations in paragraph 64 of the Amended Complaint.

65. Defendant denies the allegations in paragraph 65 of the Amended Complaint.

66. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 66 of the Amended Complaint and therefore denies same.

67. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 67 of the Amended Complaint and therefore denies same.

68. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 68 of the Amended Complaint and therefore denies same.

69. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 69 of the Amended Complaint and therefore denies same.

70. Defendant denies the allegations in paragraph 70 of the Amended Complaint.

71. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 71 of the Amended Complaint and therefore denies same.

72. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 72 of the Amended Complaint and therefore denies same.

73. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 73 of the Amended Complaint and therefore denies same.

74. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 74 of the Amended Complaint and therefore denies same.

75. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 75 of the Amended Complaint and therefore denies same. Defendant only admits that the Agent Guide referenced in this paragraph speaks for itself.

76. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 76 of the Amended Complaint and therefore denies same. Defendant only admits that the Agent Guide referenced in this paragraph speaks for itself.

77. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 77 of the Amended Complaint and therefore denies same.

78. Defendant denies the allegations in paragraph 78 of the Amended Complaint.

79. Defendant denies the allegations in paragraph 79 of the Amended Complaint.

80. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 80 of the Amended Complaint and therefore denies same. Defendant denies the remaining allegations in paragraph 80 of the Amended Complaint.

81. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 81 of the Amended Complaint and therefore denies same.

82. Defendant denies the allegations in paragraph 82 of the Amended Complaint.

83. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 83 of the Amended Complaint and therefore denies same. Defendant denies the remaining allegations in paragraph 83 of the Amended Complaint.

84. Defendant denies the allegations in paragraph 84 of the Amended Complaint.

85. Defendant only admits that any agreement between Par and ABFP Management speaks for itself and denies the remaining allegations in paragraph 85 of the Amended Complaint.

86. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 86 of the Amended Complaint and therefore denies same.

87. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 87 of the Amended Complaint and therefore denies same.

88. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 88 of the Amended Complaint and therefore denies same. Defendant only admits that the PPM referenced in this paragraph speaks for itself.

89. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 89 of the Amended Complaint and therefore denies same. Defendant only admits that the PPM referenced in this paragraph speaks for itself.

90. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 90 of the Amended Complaint and therefore denies same. Defendant only admits that the PPM referenced in this paragraph speaks for itself.

91. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 91 of the Amended Complaint and therefore denies same.

92. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 92 of the Amended Complaint and therefore denies same.

93. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 93 of the Amended Complaint and therefore denies same.

94. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 94 of the Amended Complaint and therefore denies same.

95. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 95 of the Amended Complaint and therefore denies same.

96. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 96 of the Amended Complaint and therefore denies same. Defendant only admits that any document referenced in this paragraph speaks for itself.

97. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 97of the Amended Complaint and therefore denies same.

98. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 98 of the Amended Complaint and therefore denies same.

99. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 99 of the Amended Complaint and therefore denies same.

100. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 100 of the Amended Complaint and therefore denies same.

101. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 101 of the Amended Complaint.

102. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 102 of the Amended Complaint.

103. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 103 of the Amended Complaint.

104. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 104 of the Amended Complaint.

105. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 105 of the Amended Complaint and therefore denies same.

106. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 106 of the Amended Complaint and therefore denies same.

107. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 107 of the Amended Complaint and therefore denies same.

108. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 108 of the Amended Complaint and therefore denies same.

109. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 109 of the Amended Complaint and therefore denies same.

110. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 110 of the Amended Complaint and therefore denies same.

111. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 111 of the Amended Complaint and therefore denies same.

112. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 112 of the Amended Complaint and therefore denies same. Defendant denies the remaining allegations of this paragraph of the Amended Complaint.

113. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 113 of the Amended Complaint and therefore denies same.

114. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 114 of the Amended Complaint and therefore denies same. Defendant only admits that any filings made by Furman and Fidelis Planning speak for themselves.

115. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 115 of the Amended Complaint and therefore denies same.

116. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 116 of the Amended Complaint and therefore denies same.

117. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 117 of the Amended Complaint and therefore denies same.

118. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 118 of the Amended Complaint and therefore denies same.

119. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 119 of the Amended Complaint and therefore denies same.

120. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 120 of the Amended Complaint and therefore denies same.

121. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 121 of the Amended Complaint and therefore denies same.

122. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 122 of the Amended Complaint and therefore denies same.

123. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 123 of the Amended Complaint and therefore denies same.

124. Defendant only admits that the message referenced in paragraph 124 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 124 of the Amended Complaint and therefore denies same.

125. Defendant only admits that the message referenced in paragraph 125 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 125 of the Amended Complaint and therefore denies same.

126. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 126 of the Amended Complaint and therefore denies same.

127. Defendant denies the allegations contained in paragraph 127 of the Amended Complaint.

128. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 128 of the Amended Complaint and therefore denies same.

129. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 129 of the Amended Complaint and therefore denies same.

130. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 130 of the Amended Complaint and therefore denies same.

131. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 131 of the Amended Complaint and therefore denies same.

132. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 132 of the Amended Complaint and therefore denies same.

133. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 133 of the Amended Complaint and therefore denies same.

134. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 134 of the Amended Complaint and therefore denies same.

135. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 135 of the Amended Complaint and therefore denies same.

136. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 136 of the Amended Complaint and therefore denies same.

137. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 137 of the Amended Complaint and therefore denies same.

138. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 138 of the Amended Complaint and therefore denies same.

139. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 139 of the Amended Complaint and therefore denies same.

140. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 140 of the Amended Complaint and therefore denies same.

141. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 141 of the Amended Complaint and therefore denies same.

142. Defendant denies the allegations contained in paragraph 142 of the Amended Complaint.

143. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 143 of the Amended Complaint and therefore denies same.

144. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 144 of the Amended Complaint and therefore denies same.

145. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 145 of the Amended Complaint and therefore denies same.

146. Defendant denies the allegations contained in paragraph 146 of the Amended Complaint.

147. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 147 of the Amended Complaint and therefore denies same.

148. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 148 of the Amended Complaint and therefore denies same.

149. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 149 of the Amended Complaint and therefore denies same.

150. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 150 of the Amended Complaint and therefore denies same.

151. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 151 of the Amended Complaint and therefore denies same.

152. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 152 of the Amended Complaint and therefore denies same.

153. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 153 of the Amended Complaint and therefore denies same.

154. Defendant denies the allegations contained in paragraph 154 of the Amended Complaint.

155. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 155 of the Amended Complaint and therefore denies same.

156. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 156 of the Amended Complaint and therefore denies same.

157. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 157 of the Amended Complaint and therefore denies same.

158. Defendant only admits that the brochure referenced in paragraph 158 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 158 of the Amended Complaint and therefore denies same.

159. Defendant only admits that the brochure referenced in paragraph 159 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is

without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 159 of the Amended Complaint and therefore denies same.

160. Defendant only admits that the brochure referenced in paragraph 160 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 160 of the Amended Complaint and therefore denies same.

161. Defendant only admits that the brochure referenced in paragraph 161 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 161 of the Amended Complaint and therefore denies same.

162. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 162 of the Amended Complaint and therefore denies same.

163. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 163 of the Amended Complaint and therefore denies same.

164. Defendants are without knowledge regarding the allegations in paragraph 164, and therefore denied.

165. Defendant denies the allegations contained in paragraph 165 of the Amended Complaint.

166. Defendant denies the allegations contained in paragraph 166 of the Amended Complaint.

167. Defendant denies the allegations contained in paragraph 167 of the Amended

Complaint.

168. Defendant denies the allegations contained in paragraph 168 of the Amended Complaint.

169. Defendant denies the allegations contained in paragraph 169 of the Amended Complaint.

170. Defendant denies the allegations contained in paragraph 170 of the Amended Complaint.

171. Defendant denies the allegations contained in paragraph 171 of the Amended Complaint.

172. Defendant denies the allegations contained in paragraph 172 of the Amended Complaint.

173. Defendant denies the allegations contained in paragraph 173 of the Amended Complaint.

174. Defendant denies the allegations contained in paragraph 174 of the Amended Complaint.

175. Defendant denies the allegations contained in paragraph 175 of the Amended Complaint.

176. Defendant denies the allegations contained in paragraph 176 of the Amended Complaint.

177. Defendant denies the allegations contained in paragraph 177 of the Amended Complaint.

178. Defendant denies the allegations contained in paragraph 178 of the Amended Complaint.

179. Defendant denies the allegations contained in paragraph 179 of the Amended Complaint.

180. Defendant denies the allegations contained in paragraph 180 of the Amended Complaint.

181. Defendant denies the allegations contained in paragraph 181 of the Amended Complaint.

182. Defendant denies the allegations contained in paragraph 182 of the Amended Complaint.

183. Defendant denies the allegations contained in paragraph 183 of the Amended Complaint.

184. Defendant denies the allegations contained in paragraph 184 of the Amended Complaint.

185. Defendant denies the allegations contained in paragraph 185 of the Amended Complaint.

186. Defendant denies the allegations contained in paragraph 186 of the Amended Complaint.

187. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 187 of the Amended Complaint and therefore denies same.

188. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 188 of the Amended Complaint and therefore denies same.

189. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 189 of the Amended Complaint and therefore denies same.

190. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 190 of the Amended Complaint and therefore denies same.

191. Defendant only admits that the website referenced in paragraph 191 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 191of the Amended Complaint and therefore denies same.

192. Defendant denies the allegations contained in paragraph 192 of the Amended Complaint.

193. Defendant denies the allegations contained in paragraph 193 of the Amended Complaint.

194. Defendant denies the allegations contained in paragraph 194 of the Amended Complaint.

195. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 195 of the Amended Complaint and therefore denies same.

196. Defendant denies the allegations contained in paragraph 196 of the Amended Complaint.

197. Defendant denies the allegations contained in paragraph 197 of the Amended Complaint.

198. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 198 of the Amended Complaint and therefore denies same.

199. Defendant denies the allegations contained in paragraph 199 of the Amended Complaint.

200. Defendant denies the allegations contained in paragraph 200 of the Amended Complaint.

201. Defendant denies the allegations contained in paragraph 201 of the Amended Complaint.

202. Defendant denies the allegations contained in paragraph 202 of the Amended Complaint.

203. Defendant denies the allegations contained in paragraph 203 of the Amended Complaint.

204. Defendant denies the allegations contained in paragraph 204 of the Amended Complaint.

205. Defendant denies the allegations contained in paragraph 205 of the Amended Complaint.

206. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 206 of the Amended Complaint and therefore denies same.

207. Defendant denies the allegations contained in paragraph 207 of the Amended Complaint.

208. Defendant denies the allegations contained in paragraph 208 of the Amended

209. Defendant denies the allegations contained in paragraph 209 of the Amended Complaint.

210. Defendant denies the allegations contained in paragraph 210 of the Amended Complaint.

211. Defendant denies the allegations contained in paragraph 211 of the Amended Complaint.

212. Defendant denies the allegations contained in paragraph 212 of the Amended Complaint.

213. Defendant denies the allegations contained in paragraph 213 of the Amended Complaint.

214. Defendant denies the allegations contained in paragraph 214 of the Amended Complaint.

215. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 215 of the Amended Complaint and therefore denies same.

216. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 216 of the Amended Complaint and therefore denies same.

217. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 217 of the Amended Complaint and therefore denies same.

218. Defendant denies the allegations contained in paragraph 218 of the Amended Complaint.

219. Defendant denies the allegations contained in paragraph 219 of the Amended Complaint.

220. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 220 of the Amended Complaint.

221. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 221 of the Amended Complaint and therefore denies same.

222. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 222 of the Amended Complaint and therefore denies same.

223. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 223 of the Amended Complaint and therefore denies same.

224. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 224 of the Amended Complaint and therefore denies same.

225. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 225 of the Amended Complaint and therefore denies same.

226. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 226 of the Amended Complaint and therefore denies same.

227. Defendant denies the allegations contained in paragraph 227 of the Amended Complaint.

228. Defendant only admits that the Order referenced in paragraph 228 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 12 of the Amended Complaint and therefore denies same.

229. Defendant only admits that the Order referenced in paragraph 229 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 229 of the Amended Complaint and therefore denies same.

230. Defendant denies the allegations contained in paragraph 230 of the Amended Complaint.

231. Defendant only admits that the Order referenced in paragraph 231 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 231 of the Amended Complaint and therefore denies same.

232. Defendant denies the allegations contained in paragraph 232 of the Amended Complaint.

233. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 233 of the Amended Complaint and therefore denies same.

234. Defendant denies the allegations contained in paragraph 234 of the Amended Complaint.

235. Defendant denies the allegations contained in paragraph 235 of the Amended Complaint.

236. Defendant only admits that the Order referenced in paragraph 236 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 236 of the Amended Complaint and therefore denies same.

237. Defendant only admits that the Order referenced in paragraph 237 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 237 of the Amended Complaint and therefore denies same.

238. Defendant only admits that the Order referenced in paragraph 238 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 238 of the Amended Complaint and therefore denies same.

239. Defendant denies the allegations contained in paragraph 239 of the Amended Complaint.

240. Defendant denies the allegations contained in paragraph 240 of the Amended Complaint.

241. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 241 of the Amended Complaint and therefore denies same.

242. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 242 of the Amended Complaint and therefore denies same.

243. Defendant denies the allegations contained in paragraph 243 of the Amended Complaint.

244. Defendant denies the allegations contained in paragraph 244 of the Amended Complaint.

245. Defendant denies the allegations contained in paragraph 245 of the Amended Complaint.

246. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 246 of the Amended Complaint and therefore denies same.

247. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 247 of the Amended Complaint and therefore denies same.

248. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 248 of the Amended Complaint and therefore denies same.

249. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 249 of the Amended Complaint and therefore denies same.

250. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 250 of the Amended Complaint and therefore denies same.

251. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 251 of the Amended Complaint and therefore denies same.

252. Defendant only admits that the article referenced in paragraph 252 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 238 of the Amended Complaint and therefore denies same.

253. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 253 of the Amended Complaint and therefore denies same.

254. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 254 of the Amended Complaint and therefore denies same.

255. Defendant only admits that the article referenced in paragraph 255 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 238 of the Amended Complaint and therefore denies same.

256. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 256 of the Amended Complaint and therefore denies same.

257. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 257 of the Amended Complaint and therefore denies same.

258. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 258 of the Amended Complaint and therefore denies same.

259. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 259 of the Amended Complaint and therefore denies same.

260. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 260 of the Amended Complaint and therefore denies same.

261. Defendant only admits that the documents referenced in paragraph 261 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 261 of the Amended Complaint and therefore denies same.

262. Defendant only admits that the Order referenced in paragraph 262 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 262 of the Amended Complaint and therefore denies same.

263. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 263 of the Amended Complaint and therefore denies same.

264. Defendant only admits that the website referenced in paragraph 264 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 264 of the Amended Complaint and therefore denies same.

265. Defendant denies the allegations contained in paragraph 265 of the Amended Complaint.

266. Defendant denies the allegations contained in paragraph 266 of the Amended Complaint.

267. Defendant denies the allegations contained in paragraph 267 of the Amended Complaint.

COUNT I

268. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

269. Defendant denies the allegations contained in paragraph 269 of the Amended Complaint.

270. Defendant denies the allegations contained in paragraph 270 of the Amended Complaint.

COUNT II

271. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

272. Defendant denies the allegations contained in paragraph 272 of the Amended Complaint.

273. Defendant denies the allegations contained in paragraph 273 of the Amended

Complaint.

COUNT III

274. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

275. Defendant denies the allegations contained in paragraph 275 of the Amended Complaint.

276. Defendant denies the allegations contained in paragraph 276 of the Amended Complaint.

COUNT IV

277. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

278. Defendant denies the allegations contained in paragraph 278 of the Amended Complaint.

279. Defendant denies the allegations contained in paragraph 279 of the Amended Complaint.

COUNT V

280. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

281. Defendant denies the allegations contained in paragraph 281 of the Amended Complaint.

282. Defendant denies the allegations contained in paragraph 282 of the Amended Complaint.

COUNT VI

283. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

284. Defendant denies the allegations contained in paragraph 284 of the Amended Complaint.

285. Defendant denies the allegations contained in paragraph 285 of the Amended Complaint.

COUNT VII

286. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

287. Defendant denies the allegations contained in paragraph 287 of the Amended Complaint.

288. Defendant denies the allegations contained in paragraph 288 of the Amended Complaint.

289. Defendant denies the allegations contained in paragraph 289 of the Amended Complaint.

COUNT VIII

290. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

291. Defendant denies the allegations contained in paragraph 291 of the Amended Complaint.

292. Defendant denies the allegations contained in paragraph 292 of the Amended Complaint.

293. Defendant denies the allegations contained in paragraph 293 of the Amended Complaint.

294. Defendant denies the allegations contained in paragraph 294 of the Amended Complaint.

RELIEF REQUESTED

Defendant denies that he committed the violations alleged and that the Commission is entitled to any relief set forth in this section.

GENERAL DENIAL

Defendant generally denies all allegations of the Amended Complaint except for such allegations as are explicitly and specifically admitted above.

AFFIRMATIVE DEFENSES

Defendant asserts the following affirmative defense and reserves the right to amend his answer and affirmative defenses based upon information obtained in the course of litigation.

FIRST AFFIRMATIVE DEFENSE
(Advice of Counsel)

Defendant hereby provides notice that he intends to rely on a defense that he relied upon advice of counsel. Defendant did not act with the requisite mental state that Plaintiff must prove, and the Court should decline to issue the equitable relief sought by Plaintiff, because Defendant's reliance on the advice of his counsel is inconsistent with the Plaintiff's allegations of violations of the federal securities laws and the relief sought. Defendant made a full and complete good faith report of all materials facts to counsel that he considered competent, received the attorneys' advice as to the specific course of conduct that was followed, and reasonably relied on that advice in good faith.

SECOND AFFIRMATIVE DEFENSE
(Reliance on Other Professionals and Experts)

In executing or authorizing the execution and/or publication of any document containing the statements complained of in the Amended Complaint, Defendant was entitled to, and did, reasonably and in good faith, rely upon the work and conclusions of other professionals and experts, including Certified Public Accountants, Accountants, Auditors, & Tax Advisors.

THIRD AFFIRMATIVE DEFENSE
(Good Faith)

Plaintiff's claims are barred in whole or in part because Defendant acted at all times in good faith and/or did not know, and in the exercise of reasonable case could have known, or had any reasonable grounds to believe, that any misstatements or omissions of material fact existed in any statements, reports, and/or filings allegedly issued or uttered by Defendant. Defendant also relied upon competent personnel to assist him in making reasonable and informed decisions.

FOURTH AFFIRMATIVE DEFENSE
(Laches)

Plaintiff's claims are barred, in whole or in part, by the doctrine of laches.

FIFTH AFFIRMATIVE DEFENSE
(Estoppel)

Plaintiff's claims are barred by the doctrine of estoppel.

SIXTH AFFIRMATIVE DEFENSE
(Waiver)

Plaintiff's claims are barred by the doctrine of waiver.

SEVENTH AFFIRMATIVE DEFENSE
(Notes Are Not Securities)

Plaintiff's claims are barred because the notes at issue are not securities because they fall

squarely within the list of non-securities enumerated in *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990). The notes are also exempt as securities under the express language of the Exchange Act (15 U.S.C. § 78c(a)(10)) and from the registration requirement under the Securities Act (15 U.S.C. § 77b(a)(1).

JURY DEMAND

Defendant hereby requests a trial by jury on all claims and defenses in this action.

Dated: June 1, 2021

FRIDMAN FELS & SOTO, PLLC
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Daniel Fridman, Esq.
Co-Counsel for Joseph W. LaForte
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/s/Alejandro Soto
ALEJANDRO SOTO
Florida Bar No. 172847

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of June, 2021, a true and correct copy of the foregoing Answer and Affirmative Defenses was served via the Court's CM/ECF System upon all counsel of record.

/s/ Alejandro O. Soto
ALEJANDRO O. SOTO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 9:20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a/ PAR FUNDING, et al.,

Defendants.
_____/

DEFENDANT JOSEPH LUIS COLE BARLETA'S ANSWER AND AFFIRMATIVE DEFENSES TO THE AMENDED COMPLAINT

Defendant Joseph Luis Cole Barleta ("Defendant" or "Barleta"), files this Answer and Affirmative Defenses to the Amended Complaint filed by Plaintiff Securities and Exchange Commission ("Plaintiff" or "SEC"), and states as follows:

ANSWER

Defendant denies all allegations contained in the headings and all unnumbered paragraphs in the Amended Complaint and denies any allegations not specifically denied. Defendant answers the remaining allegations of the Amended Complaint as follows:

1. Defendant denies the allegations contained in paragraph 1 of the Amended Complaint.

2. Defendant denies the allegations contained in the first sentence of paragraph 2 of the Amended Complaint. Defendant only admits that Par Funding offered and issued promissory notes from 2012 through 2017.

3. Defendant denies the allegations contained in paragraph 3 of the Amended Complaint. Additionally, Defendant is without knowledge to form a belief as to the truth of the

allegations contained in the second sentence of paragraph 3 of the Amended Complaint and therefore denies same.

4. Defendant is without knowledge to form a belief regarding what the Pennsylvania Securities Regulators knew regarding the creation of the Agent Funds and is without sufficient knowledge with respect to the Agent Funds' obligations to its noteholders. Defendant denies the allegations contained in the remainder of paragraph 4 of the Amended Complaint.

5. Defendant denies the allegations contained in paragraph 5 of the Amended Complaint.

6. Defendant is without sufficient knowledge to form a belief as to the truth of the Allegations in paragraph 6 not concerning Defendant and therefore denies same.

7. Defendant is without sufficient knowledge to form a belief as to the truth of the Allegations in paragraph 7 not concerning Defendant and therefore denies same.

8. Defendant denies the allegations contained in paragraph 7 of the Amended Complaint.

9. Defendant denies the allegations contained in paragraph 9 of the Amended Complaint.

10. Defendant denies the allegations contained in paragraph 10 of the Amended Complaint.

11. Defendant admits that Par Funding had an office in Philadelphia, PA until 2017, when Par moved its office to Florida. Defendant admits that Complete Business Solutions Group has done business as Par Funding since 2013. Defendant admits that The LME 2017 Family Trust ("The LME Trust") was Par Funding's sole owner and that McElhone was Par Funding's

sole employee. Defendant denies the remaining allegations contained in paragraph 11 of the Amended Complaint.

12. Defendant only admits that the Order referenced in paragraph 12 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 12 of the Amended Complaint and therefore denies same.

13. Defendant only admits that the Order referenced in paragraph 13 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 12 of the Amended Complaint and therefore denies same.

14. Defendant only admits that the Order referenced in paragraph 14 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 14 of the Amended Complaint and therefore denies same.

15. Defendant admits that FSP's corporate filings speak for themselves and that McElhone was FSP's sole owner. Defendant denies the remainder of the allegations contained in paragraph 15 of the Amended Complaint.

16. Defendant only admits that the Order referenced in paragraph 16 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant admits that McElhone was the sole owner of Par Funding and denies the remainder of the allegations contained in paragraph 16 of the Amended Complaint.

17. Defendant admits that LaForte is a resident of Philadelphia and that he conceived of the idea for Par Funding with his wife, Lisa McElhone, but was never its owner. Defendant is

without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 17 of the Amended Complaint and therefore denies same.

18. Defendant only admits that the convictions referenced in paragraph 18 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 18 of the Amended Complaint.

19. Defendant only admits that he is a resident of Philadelphia and was employed by Par Funding as CFO until 2017, when Par Funding employees were converted to Full Spectrum Processing ("FSP") employees, and thereafter by FSP as its CFO. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 19 of the Amended Complaint and therefore denies same.

20. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 20 of the Amended Complaint and therefore denies same.

21. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 21 of the Amended Complaint and therefore denies same. Defendant only admits that the Order referenced in paragraph 21 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 21 of the Amended Complaint.

22. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 22 of the Amended Complaint and therefore denies same.

23. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 23 of the Amended Complaint and therefore denies same. Defendant only admits that the agreement referenced in paragraph 23 of the Amended Complaint speaks for

itself and denies any inconsistent and remaining allegations in paragraph 23 of the Amended Complaint.

24. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 24 of the Amended Complaint and therefore denies same.

25. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 25 of the Amended Complaint and therefore denies same.

26. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 26 of the Amended Complaint and therefore denies same. Defendant only admits that the Order referenced in paragraph 26 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 26 of the Amended Complaint.

27. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 27 of the Amended Complaint and therefore denies same.

28. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 28 of the Amended Complaint and therefore denies same.

29. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 29 of the Amended Complaint and therefore denies same.

30. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 30 of the Amended Complaint and therefore denies same.

31. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 31 of the Amended Complaint and therefore denies same.

32. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 32 of the Amended Complaint and therefore denies same.

33. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 33 of the Amended Complaint and therefore denies same.

34. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 34 of the Amended Complaint and therefore denies same.

35. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 35 of the Amended Complaint and therefore denies same.

36. Defendant admits that the LME Trust is Par Funding's owner. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 36 of the Amended Complaint and therefore denies same.

37. Defendant admits that Par Funding has an office in Florida and is registered to do business in Florida, and that McElhone is the owner of FSP. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 37 of the Amended Complaint and therefore denies same.

38. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 38 of the Amended Complaint and therefore denies same.

39. Defendant denies the allegations in paragraph 39 of the Amended Complaint.

40. Defendant denies the allegations in paragraph 40 of the Amended Complaint.

41. Defendant denies the allegations in paragraph 41 of the Amended Complaint.

42. Defendant denies the allegations in paragraph 42 of the Amended Complaint and only admits that Par Funding's corporate filings speak for themselves. Defendant is without sufficient knowledge as to the remaining allegations contained in paragraph 42 and therefore denies them.

43. Defendant denies the allegations in paragraph 43 of the Amended Complaint.

44. Defendant denies the allegations in paragraph 44 of the Amended Complaint.

45. Defendant denies the allegations in paragraph 45 of the Amended Complaint.

46. Defendant denies the allegations in paragraph 46 of the Amended Complaint.

47. Defendant denies the allegations in paragraph 47 of the Amended Complaint.

48. Defendant denies the allegations in paragraph 48 of the Amended Complaint.

49. Defendant denies the allegations in paragraph 49 of the Amended Complaint.

50. Defendant denies the allegations in paragraph 50 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

51. Defendant denies the allegations in paragraph 51 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

52. Defendant admits that he and McElhone signed promissory notes issued by Par Funding, and denies the remainder of the allegations contained in paragraph 52 of the Amended Complaint.

53. Defendant denies the allegations in paragraph 53 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

54. Defendant denies the allegations in paragraph 54 of the Amended Complaint and only admits that the agreement referenced in this paragraph speak for itself.

55. Defendant denies the allegations in paragraph 55 of the Amended Complaint and only admits that any agreement referenced in this paragraph speak for itself.

56. Defendant only admits that Defendant Vagnozzi had a Finders Agreement with Par Funding at one point in time but denies the remainder of the allegations contained in paragraph 56 of the Amended Complaint.

57. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 57 of the Amended Complaint and therefore denies same.

58. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 58 of the Amended Complaint and therefore denies same.

59. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 59 of the Amended Complaint and therefore denies same.

60. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 60 of the Amended Complaint and therefore denies same.

61. Defendant admits that Par Funding raised money through the sale of promissory notes, but denies the remaining allegations contained in paragraph 61 of the Amended Complaint.

62. Defendant only admits that any subpoena issued by state regulators speaks for itself and denies the allegations in paragraph 62 of the Amended Complaint.

63. Defendant denies the allegations in paragraph 63 of the Amended Complaint.

64. Defendant only admits that Par Funding sold promissory notes to Agent Funds beginning in 2018 but denies the allegations in paragraph 64 of the Amended Complaint.

65. Defendant denies the allegations in paragraph 65 of the Amended Complaint.

66. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 66 of the Amended Complaint and therefore denies same.

67. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 67 of the Amended Complaint and therefore denies same.

68. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 68 of the Amended Complaint and therefore denies same.

69. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 69 of the Amended Complaint and therefore denies same.

70. Defendant denies the allegations in paragraph 70 of the Amended Complaint.

71. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 71 of the Amended Complaint and therefore denies same.

72. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 72 of the Amended Complaint and therefore denies same.

73. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 73 of the Amended Complaint and therefore denies same.

74. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 74 of the Amended Complaint and therefore denies same.

75. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 75 of the Amended Complaint and therefore denies same. Defendant only admits that the Agent Guide referenced in this paragraph speaks for itself.

76. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 76 of the Amended Complaint and therefore denies same. Defendant only admits that the Agent Guide referenced in this paragraph speaks for itself.

77. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 77 of the Amended Complaint and therefore denies same.

78. Defendant denies the allegations in paragraph 78 of the Amended Complaint.

79. Defendant denies the allegations in paragraph 79 of the Amended Complaint.

80. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 80 of the Amended Complaint and therefore denies same. Defendant denies the remaining allegations in paragraph 80 of the Amended Complaint.

81. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 81 of the Amended Complaint and therefore denies same.

82. Defendant denies the allegations in paragraph 82 of the Amended Complaint.

83. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 83 of the Amended Complaint and therefore denies same. Defendant denies the remaining allegations in paragraph 83 of the Amended Complaint.

84. Defendant denies the allegations in paragraph 84 of the Amended Complaint.

85. Defendant denies the allegations in paragraph 85 of the Amended Complaint.

86. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 86 of the Amended Complaint and therefore denies same.

87. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 87 of the Amended Complaint and therefore denies same.

88. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 88 of the Amended Complaint and therefore denies same. Defendant only admits that the PPM referenced in this paragraph speaks for itself.

89. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 89 of the Amended Complaint and therefore denies same. Defendant only admits that the PPM referenced in this paragraph speaks for itself.

90. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 90 of the Amended Complaint and therefore denies same.

91. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 91 of the Amended Complaint and therefore denies same.

92. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 92 of the Amended Complaint and therefore denies same.

93. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 93 of the Amended Complaint and therefore denies same.

94. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 94 of the Amended Complaint and therefore denies same.

95. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 95 of the Amended Complaint and therefore denies same.

96. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 96 of the Amended Complaint and therefore denies same. Defendant only admits that any document referenced in this paragraph speaks for itself.

97. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 97of the Amended Complaint and therefore denies same.

98. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 98 of the Amended Complaint and therefore denies same.

99. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 99 of the Amended Complaint and therefore denies same.

100. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 100 of the Amended Complaint and therefore denies same.

101. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 101 of the Amended Complaint.

102. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 102 of the Amended Complaint.

103. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 103 of the Amended Complaint.

104. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 104 of the Amended Complaint.

105. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 105 of the Amended Complaint and therefore denies same.

106. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 106 of the Amended Complaint and therefore denies same.

107. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 107 of the Amended Complaint and therefore denies same.

108. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 108 of the Amended Complaint and therefore denies same.

109. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 109 of the Amended Complaint and therefore denies same.

110. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 110 of the Amended Complaint and therefore denies same.

111. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 111 of the Amended Complaint and therefore denies same.

112. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 112 of the Amended Complaint and therefore denies same.

113. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 113 of the Amended Complaint and therefore denies same.

114. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 114 of the Amended Complaint and therefore denies same. Defendant only admits that any filings made by Furman and Fidelis Planning speak for themselves.

115. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 115 of the Amended Complaint and therefore denies same.

116. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 116 of the Amended Complaint and therefore denies same.

117. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 117 of the Amended Complaint and therefore denies same.

118. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 118 of the Amended Complaint and therefore denies same.

119. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 119 of the Amended Complaint and therefore denies same.

120. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 120 of the Amended Complaint and therefore denies same.

121. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 121 of the Amended Complaint and therefore denies same.

122. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 122 of the Amended Complaint and therefore denies same.

123. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 123 of the Amended Complaint and therefore denies same.

124. Defendant only admits that the message referenced in paragraph 124 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 124 of the Amended Complaint and therefore denies same.

125. Defendant only admits that the message referenced in paragraph 125 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 125 of the Amended Complaint and therefore denies same.

126. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 126 of the Amended Complaint and therefore denies same.

127. Defendant denies the allegations contained in paragraph 127 of the Amended Complaint.

128. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 128 of the Amended Complaint and therefore denies same.

129. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 129 of the Amended Complaint and therefore denies same.

130. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 130 of the Amended Complaint and therefore denies same.

131. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 131 of the Amended Complaint and therefore denies same.

132. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 132 of the Amended Complaint and therefore denies same.

133. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 133 of the Amended Complaint and therefore denies same.

134. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 134 of the Amended Complaint and therefore denies same.

135. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 135 of the Amended Complaint and therefore denies same.

136. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 136 of the Amended Complaint and therefore denies same.

137. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 137 of the Amended Complaint and therefore denies same.

138. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 138 of the Amended Complaint and therefore denies same.

139. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 139 of the Amended Complaint and therefore denies same.

140. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 140 of the Amended Complaint and therefore denies same.

141. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 141 of the Amended Complaint and therefore denies same.

142. Defendant denies the allegations contained in paragraph 142 of the Amended Complaint.

143. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 143 of the Amended Complaint and therefore denies same.

144. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 144 of the Amended Complaint and therefore denies same.

145. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 145 of the Amended Complaint and therefore denies same.

146. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 145 of the Amended Complaint and therefore denies same.

147. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 147 of the Amended Complaint and therefore denies same.

148. Defendant only admits that the email referenced in paragraph 158 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 159 of the Amended Complaint and therefore denies same.

149. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 149 of the Amended Complaint and therefore denies same.

150. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 150 of the Amended Complaint and therefore denies same.

151. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 151 of the Amended Complaint and therefore denies same.

152. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 152 of the Amended Complaint and therefore denies same.

153. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 153 of the Amended Complaint and therefore denies same.

154. Defendant denies the allegations contained in paragraph 154 of the Amended Complaint.

155. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 155 of the Amended Complaint and therefore denies same.

156. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 156 of the Amended Complaint and therefore denies same.

157. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 157 of the Amended Complaint and therefore denies same.

158. Defendant only admits that the brochure referenced in paragraph 158 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 158 of the Amended Complaint and therefore denies same.

159. Defendant only admits that the brochure referenced in paragraph 158 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is

without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 159 of the Amended Complaint and therefore denies same.

160. Defendant only admits that the brochure referenced in paragraph 160 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 160 of the Amended Complaint and therefore denies same.

161. Defendant only admits that the brochure referenced in paragraph 161 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 161 of the Amended Complaint and therefore denies same.

162. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 162 of the Amended Complaint and therefore denies same.

163. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 163 of the Amended Complaint and therefore denies same.

164. Defendants are without knowledge regarding the allegations in paragraph 164, and therefore denied.

165. Defendant denies the allegations contained in paragraph 165 of the Amended Complaint.

166. Defendant denies the allegations contained in paragraph 166 of the Amended Complaint.

167. Defendant denies the allegations contained in paragraph 167 of the Amended

Complaint.

168. Defendant denies the allegations contained in paragraph 168 of the Amended Complaint.

169. Defendant denies the allegations contained in paragraph 169 of the Amended Complaint.

170. Defendant denies the allegations contained in paragraph 170 of the Amended Complaint.

171. Defendant denies the allegations contained in paragraph 171 of the Amended Complaint.

172. Defendant denies the allegations contained in paragraph 172 of the Amended Complaint.

173. Defendant denies the allegations contained in paragraph 173 of the Amended Complaint.

174. Defendant denies the allegations contained in paragraph 174 of the Amended Complaint.

175. Defendant denies the allegations contained in paragraph 175 of the Amended Complaint.

176. Defendant denies the allegations contained in paragraph 176 of the Amended Complaint.

177. Defendant denies the allegations contained in paragraph 177 of the Amended Complaint.

178. Defendant denies the allegations contained in paragraph 178 of the Amended Complaint.

179. Defendant denies the allegations contained in paragraph 179 of the Amended Complaint.

180. Defendant denies the allegations contained in paragraph 180 of the Amended Complaint.

181. Defendant denies the allegations contained in paragraph 181 of the Amended Complaint.

182. Defendant denies the allegations contained in paragraph 182 of the Amended Complaint.

183. Defendant denies the allegations contained in paragraph 183 of the Amended Complaint.

184. Defendant denies the allegations contained in paragraph 184 of the Amended Complaint.

185. Defendant denies the allegations contained in paragraph 179 of the Amended Complaint.

186. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 186 of the Amended Complaint and therefore denies same.

187. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 187 of the Amended Complaint and therefore denies same.

188. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 188 of the Amended Complaint and therefore denies same.

189. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 189 of the Amended Complaint and therefore denies same.

190. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 190 of the Amended Complaint and therefore denies same.

191. Defendant only admits that the website referenced in paragraph 191 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 191of the Amended Complaint and therefore denies same.

192. Defendant denies the allegations contained in paragraph 192 of the Amended Complaint.

193. Defendant denies the allegations contained in paragraph 193 of the Amended Complaint.

194. Defendant denies the allegations contained in paragraph 194 of the Amended Complaint.

195. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 195 of the Amended Complaint and therefore denies same.

196. Defendant denies the allegations contained in paragraph 196 of the Amended Complaint.

197. Defendant denies the allegations contained in paragraph 197 of the Amended Complaint.

198. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 198 of the Amended Complaint and therefore denies same.

199. Defendant denies the allegations contained in paragraph 199 of the Amended Complaint.

200. Defendant denies the allegations contained in paragraph 200 of the Amended Complaint.

201. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 201 of the Amended Complaint and therefore denies same.

202. Defendant denies the allegations contained in paragraph 202 of the Amended Complaint.

203. Defendant denies the allegations contained in paragraph 203 of the Amended Complaint.

204. Defendant denies the allegations contained in paragraph 204 of the Amended Complaint.

205. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 205 of the Amended Complaint and therefore denies same.

206. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 206 of the Amended Complaint and therefore denies same.

207. Defendant denies the allegations contained in paragraph 207 of the Amended Complaint.

208. Defendant denies the allegations contained in paragraph 208 of the Amended

209. Defendant denies the allegations contained in paragraph 209 of the Amended Complaint.

210. Defendant denies the allegations contained in paragraph 210 of the Amended Complaint.

211. Defendant denies the allegations contained in paragraph 211 of the Amended Complaint.

212. Defendant denies the allegations contained in paragraph 212 of the Amended Complaint.

213. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 213 of the Amended Complaint and therefore denies same.

214. Defendant denies the allegations contained in paragraph 214 of the Amended Complaint.

215. Defendant denies the allegations contained in paragraph 214 of the Amended Complaint.

216. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 216 of the Amended Complaint and therefore denies same.

217. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 217 of the Amended Complaint and therefore denies same.

218. Defendant denies the allegations contained in paragraph 218 of the Amended Complaint.

219. Defendant denies the allegations contained in paragraph 219 of the Amended Complaint.

220. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 102 of the Amended Complaint.

221. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 221 of the Amended Complaint and therefore denies same.

222. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 222 of the Amended Complaint and therefore denies same.

223. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 223 of the Amended Complaint and therefore denies same.

224. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 224 of the Amended Complaint and therefore denies same.

225. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 225 of the Amended Complaint and therefore denies same.

226. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations t in paragraph 226 of the Amended Complaint and therefore denies same.

227. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 227 of the Amended Complaint and therefore denies same.

228. Defendant only admits that the Order referenced in paragraph 228 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is

without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 12 of the Amended Complaint and therefore denies same.

229. Defendant only admits that the Order referenced in paragraph 229 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 229 of the Amended Complaint and therefore denies same.

230. Defendant denies the allegations contained in paragraph 230 of the Amended Complaint.

231. Defendant only admits that the Order referenced in paragraph 231 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 231 of the Amended Complaint and therefore denies same.

232. Defendant denies the allegations contained in paragraph 232 of the Amended Complaint.

233. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 233 of the Amended Complaint and therefore denies same.

234. Defendant denies the allegations contained in paragraph 234 of the Amended Complaint.

235. Defendant denies the allegations contained in paragraph 235 of the Amended Complaint.

236. Defendant only admits that the Form referenced in paragraph 236 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without

sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 236 of the Amended Complaint and therefore denies same.

237. Defendant only admits that the Order referenced in paragraph 237 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 237 of the Amended Complaint and therefore denies same.

238. Defendant only admits that the Order referenced in paragraph 238 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 238 of the Amended Complaint and therefore denies same.

239. Defendant denies the allegations contained in paragraph 239 of the Amended Complaint.

240. Defendant denies the allegations contained in paragraph 240 of the Amended Complaint.

241. Defendant denies the allegations contained in paragraph 240 of the Amended Complaint.

242. Defendant only admits that the document referenced in paragraph 242 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 242 of the Amended Complaint and therefore denies same.

243. Defendant denies the allegations contained in paragraph 243 of the Amended Complaint.

244. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 244 of the Amended Complaint and therefore denies same.

245. Defendant denies the allegations contained in paragraph 245 of the Amended Complaint.

246. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 246 of the Amended Complaint and therefore denies same.

247. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 247 of the Amended Complaint and therefore denies same.

248. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 248 of the Amended Complaint and therefore denies same.

249. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 249 of the Amended Complaint and therefore denies same.

250. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 250 of the Amended Complaint and therefore denies same.

251. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 251 of the Amended Complaint and therefore denies same.

252. Defendant only admits that the article referenced in paragraph 252 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 238 of the Amended Complaint and therefore denies same.

253. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 253 of the Amended Complaint and therefore denies same.

254. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 254 of the Amended Complaint and therefore denies same.

255. Defendant only admits that the article referenced in paragraph 255 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 238 of the Amended Complaint and therefore denies same.

256. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 256 of the Amended Complaint and therefore denies same.

257. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 257 of the Amended Complaint and therefore denies same.

258. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 258 of the Amended Complaint and therefore denies same.

259. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 259 of the Amended Complaint and therefore denies same.

260. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 260 of the Amended Complaint and therefore denies same.

261. Defendant only admits that the documents referenced in paragraph 261 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 261 of the Amended Complaint and therefore denies same.

262. Defendant only admits that the Order referenced in paragraph 262 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 262 of the Amended Complaint and therefore denies same.

263. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 263 of the Amended Complaint and therefore denies same.

264. Defendant only admits that the website referenced in paragraph 264 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 264 of the Amended Complaint and therefore denies same.

265. Defendant denies the allegations contained in paragraph 265 of the Amended Complaint.

266. Defendant denies the allegations contained in paragraph 266 of the Amended Complaint.

267. Defendant denies the allegations contained in paragraph 267 of the Amended Complaint.

COUNT I

268. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

269. Defendant denies the allegations contained in paragraph 269 of the Amended Complaint.

270. Defendant denies the allegations contained in paragraph 270 of the Amended Complaint.

COUNT II

271. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

272. Defendant denies the allegations contained in paragraph 272 of the Amended Complaint.

273. Defendant denies the allegations contained in paragraph 273 of the Amended Complaint.

COUNT III

274. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

275. Defendant denies the allegations contained in paragraph 275 of the Amended Complaint.

276. Defendant denies the allegations contained in paragraph 276 of the Amended Complaint.

COUNT IV

277. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

278. Defendant denies the allegations contained in paragraph 278 of the Amended Complaint.

279. Defendant denies the allegations contained in paragraph 279 of the Amended Complaint.

COUNT V

280. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

281. Defendant denies the allegations contained in paragraph 281 of the Amended Complaint.

282. Defendant denies the allegations contained in paragraph 282 of the Amended Complaint.

COUNT VI

283. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

284. Defendant denies the allegations contained in paragraph 284 of the Amended Complaint.

285. Defendant denies the allegations contained in paragraph 285 of the Amended

Complaint.

COUNT VII

286. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

287. Defendant denies the allegations contained in paragraph 287 of the Amended Complaint.

288. Defendant denies the allegations contained in paragraph 288 of the Amended Complaint.

289. Defendant denies the allegations contained in paragraph 289 of the Amended Complaint.

COUNT VIII

290. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

291. Defendant denies the allegations contained in paragraph 291 of the Amended Complaint.

292. Defendant denies the allegations contained in paragraph 292 of the Amended Complaint.

293. Defendant denies the allegations contained in paragraph 293 of the Amended Complaint.

294. Defendant denies the allegations contained in paragraph 294 of the Amended Complaint.

RELIEF REQUESTED

Defendant denies that he committed the violations alleged and that the Commission is entitled to any relief set forth in this section.

GENERAL DENIAL

Defendant generally denies all allegations of the Amended Complaint except for such allegations as are explicitly and specifically admitted above.

AFFIRMATIVE DEFENSES

Defendant asserts the following affirmative defense and reserves the right to amend his answer and affirmative defenses based upon information obtained in the course of litigation.

FIRST AFFIRMATIVE DEFENSE
(Advice of Counsel)

Defendant hereby provides notice that he intends to rely on a defense that he relied upon advice of counsel. Defendant did not act with the requisite mental state that Plaintiff must prove, and the Court should decline to issue the equitable relief sought by Plaintiff, because Defendant's reliance on the advice of his counsel is inconsistent with the Plaintiff's allegations of violations of the federal securities laws and the relief sought. Defendant made a full and complete good faith report of all materials facts to counsel that he considered competent, received the attorneys' advice as to the specific course of conduct that was followed, and reasonably relied on that advice in good faith.

SECOND AFFIRMATIVE DEFENSE
(Reliance on Other Professionals and Experts)

In executing or authorizing the execution and/or publication of any document containing the statements complained of in the Amended Complaint, Defendant was entitled to, and did, reasonably and in good faith, rely upon the work and conclusions of other professionals and

experts, including Certified Public Accountants, Accountants, Auditors, & Tax Advisors.

THIRD AFFIRMATIVE DEFENSE
(Good Faith)

Plaintiff's claims are barred in whole or in part because Defendant acted at all times in good faith and/or did not know, and in the exercise of reasonable case could have known, or had any reasonable grounds to believe, that any misstatements or omissions of material fact existed in any statements, reports, and/or filings allegedly issued or uttered by Defendant. Defendant also relied upon competent personnel to assist him in making reasonable and informed decisions.

FOURTH AFFIRMATIVE DEFENSE
(Laches)

Plaintiff's claims are barred, in whole or in part, by the doctrine of laches.

FIFTH AFFIRMATIVE DEFENSE
(Estoppel)

Plaintiff's claims are barred by the doctrine of estoppel.

SIXTH AFFIRMATIVE DEFENSE
(Waiver)

Plaintiff's claims are barred by the doctrine of waiver.

SEVENTH AFFIRMATIVE DEFENSE
(Notes Are Not Securities)

Plaintiff's claims are barred because the notes at issue are not securities because they fall squarely within the list of non-securities enumerated in *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990). The notes are also exempt as securities under the express language of the Exchange Act (15 U.S.C. § 78c(a)(10)) and from the registration requirement under the Securities Act (15 U.S.C. § 77b(a)(1).

JURY DEMAND

Defendant hereby requests a trial by jury on all claims and defenses in this action.

Dated: June 1, 2021

Bettina Schein, Esq.
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By: */s/ Bettina Schein*
BETTINA SCHEIN
Admitted Pro Hac Vice

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By: */s/ Andre G. Raikhelson*
ANDRE G. RAIKHELSON
Florida Bar No. 123657

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of June, 2021, a true and correct copy of the foregoing Answer and Affirmative Defenses was served via the Court's CM/ECF System upon all counsel of record.

/s/ *Bettina Schein*
Bettina Schein

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 9:20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a/ PAR FUNDING, et al.,

Defendants.
_____/

DEFENDANT LISA MCELHONE'S ANSWER AND AFFIRMATIVE DEFENSES TO AMENDED COMPLAINT

Defendant Lisa McElhone ("Defendant" or "McElhone"), files this Answer and Affirmative Defenses to the Amended Complaint filed by Plaintiff Securities and Exchange Commission ("Plaintiff" or "SEC"), and states as follows:

ANSWER

Defendant denies all allegations contained in the headings and all unnumbered paragraphs in the Amended Complaint and denies any allegations not specifically denied. Defendant answers the remaining allegations of the Amended Complaint as follows:

1. Defendant denies the allegations contained in paragraph 1 of the Amended Complaint.

2. Defendant denies the allegations contained in the first sentence of paragraph 2 of the Amended Complaint. Defendant only admits that Par Funding offered and issued various promissory notes.

3. Defendant denies the allegations contained in paragraph 3 of the Amended Complaint. Additionally, Defendant is without sufficient knowledge to form a belief as to the

truth of the allegations contained in the second sentence of paragraph 3 of the Amended Complaint and therefore denies same.

4. Defendant is without sufficient knowledge to form a belief regarding what the Pennsylvania Securities Regulators knew regarding the creation of the Agent Funds and is without sufficient knowledge with respect to the Agent Funds' obligations to its noteholders. Defendant denies the allegations contained in the remainder of paragraph 4 of the Amended Complaint.

5. Defendant denies the allegations contained in paragraph 5 of the Amended Complaint.

6. Defendant is without sufficient knowledge to form a belief as to the truth of the Allegations in paragraph 6 not concerning Defendant and therefore denies same.

7. Defendant is without sufficient knowledge to form a belief as to the truth of the Allegations in paragraph 7 not concerning Defendant and therefore denies same.

8. Defendant denies the allegations contained in paragraph 8 of the Amended Complaint.

9. Defendant denies the allegations contained in paragraph 9 of the Amended Complaint.

10. Defendant denies the allegations contained in paragraph 10 of the Amended Complaint.

11. Defendant admits that she and her husband, Joseph Laforte, started Par Funding in or about 2011 and that CBSG had an office in Philadelphia, PA until approximately 2017, when CBSG relocated its office to Florida. Defendant admits that Complete Business Solutions Group (CBSG) has done business as Par Funding since about 2013. Defendant admits that The LME

2017 Family Trust ("The LME Trust") was Par Funding's sole owner and that Defendant was Par Funding's sole employee. Defendant denies the remaining allegations contained in paragraph 11 of the Amended Complaint.

12. Defendant only admits that the Order referenced in paragraph 12 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 12 of the Amended Complaint and therefore denies same.

13. Defendant only admits that the Order referenced in paragraph 13 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 12 of the Amended Complaint and therefore denies same.

14. Defendant only admits that the Order referenced in paragraph 14 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 14 of the Amended Complaint and therefore denies same.

15. Defendant admits that FSP's corporate filings speak for themselves and that Defendant was FSP's sole owner. Defendant denies the remainder of the allegations contained in paragraph 15 of the Amended Complaint.

16. Defendant only admits that the Order referenced in paragraph 16 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant admits that Defendant was the sole owner of Par Funding and denies the remainder of the allegations contained in paragraph 16 of the Amended Complaint.

17. Defendant admits that LaForte is a resident of Philadelphia and that he worked on the idea for Par Funding with his wife, Lisa McElhone, but was never its owner. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 17 of the Amended Complaint and therefore denies same.

18. Defendant only admits that the convictions referenced in paragraph 18 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 18 of the Amended Complaint.

19. Defendant only admits that Cole is a resident of Philadelphia and was employed by Par Funding as CFO until about 2017, when Par Funding employees were converted to Full Spectrum Processing ("FSP") employees, and thereafter was employed by FSP as its CFO. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 19 of the Amended Complaint and therefore denies same.

20. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 20 of the Amended Complaint and therefore denies same.

21. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 21 of the Amended Complaint and therefore denies same. Defendant only admits that the Order referenced in paragraph 21 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 21 of the Amended Complaint.

22. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 22 of the Amended Complaint and therefore denies same.

23. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 23 of the Amended Complaint and therefore denies same. Defendant only admits that the agreement referenced in paragraph 23 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 23 of the Amended Complaint.

24. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 24 of the Amended Complaint and therefore denies same.

25. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 25 of the Amended Complaint and therefore denies same.

26. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 26 of the Amended Complaint and therefore denies same. Defendant only admits that the Order referenced in paragraph 26 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 26 of the Amended Complaint.

27. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 27 of the Amended Complaint and therefore denies same.

28. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 28 of the Amended Complaint and therefore denies same.

29. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 29 of the Amended Complaint and therefore denies same.

30. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 30 of the Amended Complaint and therefore denies same.

31. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 31 of the Amended Complaint and therefore denies same.

32. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 32 of the Amended Complaint and therefore denies same.

33. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 33 of the Amended Complaint and therefore denies same.

34. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 34 of the Amended Complaint and therefore denies same.

35. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 35 of the Amended Complaint and therefore denies same.

36. Defendant admits that the LME Trust is Par Funding's owner and that she is its Grantor. Defendant only admits that the Certification of Trust referenced in paragraph 36 of the

Amended Complaint speaks for itself and denies the remaining allegations contained in paragraph 36 of the Amended Complaint.

37. Defendant admits that Par Funding has an office in Florida and is registered to do business in Florida, and that she is the owner of FSP. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 37 of the Amended Complaint and therefore denies same.

38. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 38 of the Amended Complaint and therefore denies same.

39. Defendant denies the allegations in paragraph 39 of the Amended Complaint.

40. Defendant denies the allegations in paragraph 40 of the Amended Complaint.

41. Defendant denies the allegations in paragraph 41 of the Amended Complaint.

42. Defendant denies the allegations in paragraph 42 of the Amended Complaint and only admits that Par Funding's corporate filings speak for themselves. Defendant is without sufficient knowledge as to the remaining allegations contained in paragraph 42 and therefore denies them.

43. Defendant denies the allegations in paragraph 43 of the Amended Complaint.

44. Defendant denies the allegations in paragraph 44 of the Amended Complaint.

45. Defendant denies the allegations in paragraph 45 of the Amended Complaint.

46. Defendant denies the allegations in paragraph 46 of the Amended Complaint.

47. Defendant denies the allegations in paragraph 47 of the Amended Complaint.

48. Defendant denies the allegations in paragraph 48 of the Amended Complaint.

49. Defendant denies the allegations in paragraph 49 of the Amended Complaint.

50. Defendant denies the allegations in paragraph 50 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

51. Defendant denies the allegations in paragraph 51 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

52. Defendant admits that she and Cole signed promissory notes issued by Par Funding, and denies the remainder of the allegations contained in paragraph 52 of the Amended Complaint.

53. Defendant denies the allegations in paragraph 53 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

54. Defendant denies the allegations in paragraph 54 of the Amended Complaint and only admits that the agreement referenced in this paragraph speak for itself.

55. Defendant denies the allegations in paragraph 55 of the Amended Complaint and only admits that any agreement referenced in this paragraph speak for itself.

56. Defendant only admits that Defendant Vagnozzi had a Finders Agreement with Par Funding at one point in time but denies the remainder of the allegations contained in paragraph 56 of the Amended Complaint.

57. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 57 of the Amended Complaint and therefore denies same.

58. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 58 of the Amended Complaint and therefore denies same.

59. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 59 of the Amended Complaint and therefore denies same.

60. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 60 of the Amended Complaint and therefore denies same.

61. Defendant admits that Par Funding raised money through the sale of promissory notes, but denies the remaining allegations contained in paragraph 61 of the Amended Complaint.

62. Defendant only admits that any subpoena issued by state regulators speaks for itself and denies the allegations in paragraph 62 of the Amended Complaint.

63. Defendant denies the allegations in paragraph 63 of the Amended Complaint.

64. Defendant only admits that Par Funding sold promissory notes to Agent Funds beginning in 2018 but denies the allegations in paragraph 64 of the Amended Complaint.

65. Defendant denies the allegations in paragraph 65 of the Amended Complaint.

66. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 66 of the Amended Complaint and therefore denies same.

67. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 67 of the Amended Complaint and therefore denies same.

68. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 68 of the Amended Complaint and therefore denies same.

69. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 69 of the Amended Complaint and therefore denies same.

70. Defendant denies the allegations in paragraph 70 of the Amended Complaint.

71. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 71 of the Amended Complaint and therefore denies same.

72. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 72 of the Amended Complaint and therefore denies same.

73. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 73 of the Amended Complaint and therefore denies same.

74. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 74 of the Amended Complaint and therefore denies same.

75. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 75 of the Amended Complaint and therefore denies same. Defendant only admits that the Agent Guide referenced in this paragraph speaks for itself.

76. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 76 of the Amended Complaint and therefore denies same. Defendant only admits that the Agent Guide referenced in this paragraph speaks for itself.

77. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 77 of the Amended Complaint and therefore denies same.

78. Defendant denies the allegations in paragraph 78 of the Amended Complaint.

79. Defendant denies the allegations in paragraph 79 of the Amended Complaint.

80. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 80 of the Amended Complaint and therefore denies same. Defendant denies the remaining allegations in paragraph 80 of the Amended Complaint.

81. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 81 of the Amended Complaint and therefore denies same.

82. Defendant denies the allegations in paragraph 82 of the Amended Complaint.

83. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 83 of the Amended Complaint and therefore denies same. Defendant denies the remaining allegations in paragraph 83 of the Amended Complaint.

84. Defendant denies the allegations in paragraph 84 of the Amended Complaint.

85. Defendant only admits that any agreement between Par and ABFP Management speaks for itself and denies the remaining allegations in paragraph 85 of the Amended Complaint.

86. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 86 of the Amended Complaint and therefore denies same.

87. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 87 of the Amended Complaint and therefore denies same.

88. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 88 of the Amended Complaint and therefore denies same. Defendant only admits that the PPM referenced in this paragraph speaks for itself.

89. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 89 of the Amended Complaint and

therefore denies same. Defendant only admits that the PPM referenced in this paragraph speaks for itself.

90. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 90 of the Amended Complaint and therefore denies same. Defendant only admits that the PPM referenced in this paragraph speaks for itself.

91. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 91 of the Amended Complaint and therefore denies same.

92. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 92 of the Amended Complaint and therefore denies same.

93. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 93 of the Amended Complaint and therefore denies same.

94. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 94 of the Amended Complaint and therefore denies same.

95. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 95 of the Amended Complaint and therefore denies same.

96. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 96 of the Amended Complaint and

therefore denies same. Defendant only admits that any document referenced in this paragraph speaks for itself.

97. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 97of the Amended Complaint and therefore denies same.

98. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 98 of the Amended Complaint and therefore denies same.

99. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 99 of the Amended Complaint and therefore denies same.

100. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 100 of the Amended Complaint and therefore denies same.

101. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 101 of the Amended Complaint.

102. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 102 of the Amended Complaint.

103. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 103 of the Amended Complaint.

104. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 104 of the Amended Complaint.

105. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 105 of the Amended Complaint and therefore denies same.

106. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 106 of the Amended Complaint and therefore denies same.

107. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 107 of the Amended Complaint and therefore denies same.

108. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 108 of the Amended Complaint and therefore denies same.

109. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 109 of the Amended Complaint and therefore denies same.

110. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 110 of the Amended Complaint and therefore denies same.

111. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 111 of the Amended Complaint and therefore denies same.

112. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 112 of the Amended Complaint and therefore denies same.

113. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 113 of the Amended Complaint and therefore denies same.

114. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 114 of the Amended Complaint and therefore denies same. Defendant only admits that any filings made by Furman and Fidelis Planning speak for themselves.

115. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 115 of the Amended Complaint and therefore denies same.

116. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 116 of the Amended Complaint and therefore denies same.

117. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 117 of the Amended Complaint and therefore denies same.

118. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 118 of the Amended Complaint and therefore denies same.

119. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 119 of the Amended Complaint and therefore denies same.

120. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 120 of the Amended Complaint and therefore denies same.

121. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 121 of the Amended Complaint and therefore denies same.

122. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 122 of the Amended Complaint and therefore denies same.

123. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 123 of the Amended Complaint and therefore denies same.

124. Defendant only admits that the message referenced in paragraph 124 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 124 of the Amended Complaint and therefore denies same.

125. Defendant only admits that the message referenced in paragraph 125 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 125 of the Amended Complaint and therefore denies same.

126. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 126 of the Amended Complaint and therefore denies same.

127. Defendant denies the allegations contained in paragraph 127 of the Amended Complaint.

128. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 128 of the Amended Complaint and therefore denies same.

129. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 129 of the Amended Complaint and therefore denies same.

130. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 130 of the Amended Complaint and therefore denies same.

131. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 131 of the Amended Complaint and therefore denies same.

132. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 132 of the Amended Complaint and therefore denies same.

133. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 133 of the Amended Complaint and therefore denies same.

134. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 134 of the Amended Complaint and therefore denies same.

135. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 135 of the Amended Complaint and therefore denies same.

136. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 136 of the Amended Complaint and therefore denies same.

137. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 137 of the Amended Complaint and therefore denies same.

138. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 138 of the Amended Complaint and therefore denies same.

139. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 139 of the Amended Complaint and therefore denies same.

140. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 140 of the Amended Complaint and therefore denies same.

141. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 141 of the Amended Complaint and therefore denies same.

142. Defendant denies the allegations contained in paragraph 142 of the Amended Complaint.

143. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 143 of the Amended Complaint and therefore denies same.

144. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 144 of the Amended Complaint and therefore denies same.

145. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 145 of the Amended Complaint and therefore denies same.

146. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 146 of the Amended Complaint and therefore denies same.

147. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 147 of the Amended Complaint and therefore denies same.

148. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 148 of the Amended Complaint and therefore denies same.

149. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 149 of the Amended Complaint and therefore denies same.

150. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 150 of the Amended Complaint and therefore denies same.

151. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 151 of the Amended Complaint and therefore denies same.

152. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 152 of the Amended Complaint and therefore denies same.

153. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 153 of the Amended Complaint and therefore denies same.

154. Defendant denies the allegations contained in paragraph 154 of the Amended Complaint.

155. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 155 of the Amended Complaint and therefore denies same.

156. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 156 of the Amended Complaint and therefore denies same.

157. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 157 of the Amended Complaint and therefore denies same.

158. Defendant only admits that the brochure referenced in paragraph 158 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 158 of the Amended Complaint and therefore denies same.

159. Defendant only admits that the brochure referenced in paragraph 159 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 159 of the Amended Complaint and therefore denies same.

160. Defendant only admits that the brochure referenced in paragraph 160 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 160 of the Amended Complaint and therefore denies same.

161. Defendant only admits that the brochure referenced in paragraph 161 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is

without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 161 of the Amended Complaint and therefore denies same.

162. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 162 of the Amended Complaint and therefore denies same.

163. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 163 of the Amended Complaint and therefore denies same.

164. Defendants are without knowledge regarding the allegations in paragraph 164, and therefore denied.

165. Defendant denies the allegations contained in paragraph 165 of the Amended Complaint.

166. Defendant denies the allegations contained in paragraph 166 of the Amended Complaint.

167. Defendant denies the allegations contained in paragraph 167 of the Amended Complaint.

168. Defendant denies the allegations contained in paragraph 168 of the Amended Complaint.

169. Defendant denies the allegations contained in paragraph 169 of the Amended Complaint.

170. Defendant denies the allegations contained in paragraph 170 of the Amended Complaint.

171. Defendant denies the allegations contained in paragraph 171 of the Amended Complaint.

172. Defendant denies the allegations contained in paragraph 172 of the Amended Complaint.

173. Defendant denies the allegations contained in paragraph 173 of the Amended Complaint.

174. Defendant denies the allegations contained in paragraph 174 of the Amended Complaint.

175. Defendant denies the allegations contained in paragraph 175 of the Amended Complaint.

176. Defendant denies the allegations contained in paragraph 176 of the Amended Complaint.

177. Defendant denies the allegations contained in paragraph 177 of the Amended Complaint.

178. Defendant denies the allegations contained in paragraph 178 of the Amended Complaint.

179. Defendant denies the allegations contained in paragraph 179 of the Amended Complaint.

180. Defendant denies the allegations contained in paragraph 180 of the Amended Complaint.

181. Defendant denies the allegations contained in paragraph 181 of the Amended Complaint.

182. Defendant denies the allegations contained in paragraph 182 of the Amended Complaint.

183. Defendant denies the allegations contained in paragraph 183 of the Amended Complaint.

184. Defendant denies the allegations contained in paragraph 184 of the Amended Complaint.

185. Defendant denies the allegations contained in paragraph 185 of the Amended Complaint.

186. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 186 of the Amended Complaint and therefore denies same.

187. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 187 of the Amended Complaint and therefore denies same.

188. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 188 of the Amended Complaint and therefore denies same.

189. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 189 of the Amended Complaint and therefore denies same.

190. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 190 of the Amended Complaint and therefore denies same.

191. Defendant only admits that the website referenced in paragraph 191 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 191of the Amended Complaint and therefore denies same.

192. Defendant denies the allegations contained in paragraph 192 of the Amended Complaint.

193. Defendant denies the allegations contained in paragraph 193 of the Amended Complaint.

194. Defendant denies the allegations contained in paragraph 194 of the Amended Complaint.

195. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 195 of the Amended Complaint and therefore denies same.

196. Defendant denies the allegations contained in paragraph 196 of the Amended Complaint.

197. Defendant denies the allegations contained in paragraph 197 of the Amended Complaint.

198. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 198 of the Amended Complaint and therefore denies same.

199. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 199 of the Amended Complaint and therefore denies same.

200. Defendant denies the allegations contained in paragraph 200 of the Amended Complaint.

201. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 201 of the Amended Complaint and therefore denies same.

202. Defendant denies the allegations contained in paragraph 202 of the Amended Complaint.

203. Defendant denies the allegations contained in paragraph 203 of the Amended Complaint.

204. Defendant denies the allegations contained in paragraph 204 of the Amended Complaint.

205. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 205 of the Amended Complaint and therefore denies same.

206. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 206 of the Amended Complaint and therefore denies same.

207. Defendant denies the allegations contained in paragraph 207 of the Amended Complaint.

208. Defendant denies the allegations contained in paragraph 208 of the Amended

209. Defendant denies the allegations contained in paragraph 209 of the Amended Complaint.

210. Defendant denies the allegations contained in paragraph 210 of the Amended Complaint.

211. Defendant denies the allegations contained in paragraph 211 of the Amended Complaint.

212. Defendant denies the allegations contained in paragraph 212 of the Amended Complaint.

213. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 213 of the Amended Complaint and therefore denies same.

214. Defendant denies the allegations contained in paragraph 214 of the Amended Complaint.

215. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 215 of the Amended Complaint and therefore denies same.

216. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 216 of the Amended Complaint and therefore denies same.

217. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 217 of the Amended Complaint and therefore denies same.

218. Defendant denies the allegations contained in paragraph 218 of the Amended Complaint.

219. Defendant denies the allegations contained in paragraph 219 of the Amended Complaint.

220. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 220 of the Amended Complaint.

221. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 221 of the Amended Complaint and therefore denies same.

222. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 222 of the Amended Complaint and therefore denies same.

223. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 223 of the Amended Complaint and therefore denies same.

224. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 224 of the Amended Complaint and therefore denies same.

225. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 225 of the Amended Complaint and therefore denies same.

226. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 226 of the Amended Complaint and therefore denies same.

227. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 227 of the Amended Complaint and therefore denies same.

228. Defendant only admits that the Order referenced in paragraph 228 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 12 of the Amended Complaint and therefore denies same.

229. Defendant only admits that the Order referenced in paragraph 229 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 229 of the Amended Complaint and therefore denies same.

230. Defendant denies the allegations contained in paragraph 230 of the Amended Complaint.

231. Defendant only admits that the Order referenced in paragraph 231 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 231 of the Amended Complaint and therefore denies same.

232. Defendant denies the allegations contained in paragraph 232 of the Amended Complaint.

233. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 233 of the Amended Complaint and therefore denies same.

234. Defendant denies the allegations contained in paragraph 234 of the Amended Complaint.

235. Defendant denies the allegations contained in paragraph 235 of the Amended Complaint.

236. Defendant only admits that the Order referenced in paragraph 236 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 236 of the Amended Complaint and therefore denies same.

237. Defendant only admits that the Order referenced in paragraph 237 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 237 of the Amended Complaint and therefore denies same.

238. Defendant only admits that the Order referenced in paragraph 238 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 238 of the Amended Complaint and therefore denies same.

239. Defendant denies the allegations contained in paragraph 239 of the Amended Complaint.

240. Defendant denies the allegations contained in paragraph 240 of the Amended Complaint.

241. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 241 of the Amended Complaint and therefore denies same.

242. Defendant only admits that the document referenced in paragraph 242 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 242 of the Amended Complaint and therefore denies same.

243. Defendant denies the allegations contained in paragraph 243 of the Amended Complaint.

244. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 244 of the Amended Complaint and therefore denies same.

245. Defendant denies the allegations contained in paragraph 245 of the Amended Complaint.

246. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 246 of the Amended Complaint and therefore denies same.

247. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 247 of the Amended Complaint and therefore denies same.

248. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 248 of the Amended Complaint and therefore denies same.

249. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 249 of the Amended Complaint and therefore denies same.

250. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 250 of the Amended Complaint and therefore denies same.

251. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 251 of the Amended Complaint and therefore denies same.

252. Defendant only admits that the article referenced in paragraph 252 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 238 of the Amended Complaint and therefore denies same.

253. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 253 of the Amended Complaint and therefore denies same.

254. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 254 of the Amended Complaint and therefore denies same.

255. Defendant only admits that the article referenced in paragraph 255 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 238 of the Amended Complaint and therefore denies same.

256. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 256 of the Amended Complaint and therefore denies same.

257. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 257 of the Amended Complaint and therefore denies same.

258. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 258 of the Amended Complaint and therefore denies same.

259. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 259 of the Amended Complaint and therefore denies same.

260. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 260 of the Amended Complaint and therefore denies same.

261. Defendant only admits that the documents referenced in paragraph 261 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 261 of the Amended Complaint and therefore denies same.

262. Defendant only admits that the Order referenced in paragraph 262 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 262 of the Amended Complaint and therefore denies same.

263. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 263 of the Amended Complaint and therefore denies same.

264. Defendant only admits that the website referenced in paragraph 264 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 264 of the Amended Complaint and therefore denies same.

265. Defendant denies the allegations contained in paragraph 265 of the Amended Complaint.

266. Defendant denies the allegations contained in paragraph 266 of the Amended Complaint.

267. Defendant denies the allegations contained in paragraph 267 of the Amended Complaint.

COUNT I

268. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

269. Defendant denies the allegations contained in paragraph 269 of the Amended Complaint.

270. Defendant denies the allegations contained in paragraph 270 of the Amended Complaint.

COUNT II

271. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

272. Defendant denies the allegations contained in paragraph 272 of the Amended Complaint.

273. Defendant denies the allegations contained in paragraph 273 of the Amended

Complaint.

COUNT III

274. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

275. Defendant denies the allegations contained in paragraph 275 of the Amended Complaint.

276. Defendant denies the allegations contained in paragraph 276 of the Amended Complaint.

COUNT IV

277. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

278. Defendant denies the allegations contained in paragraph 278 of the Amended Complaint.

279. Defendant denies the allegations contained in paragraph 279 of the Amended Complaint.

COUNT V

280. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

281. Defendant denies the allegations contained in paragraph 281 of the Amended Complaint.

282. Defendant denies the allegations contained in paragraph 282 of the Amended Complaint.

COUNT VI

283. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

284. Defendant denies the allegations contained in paragraph 284 of the Amended Complaint.

285. Defendant denies the allegations contained in paragraph 285 of the Amended Complaint.

COUNT VII

286. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

287. Defendant denies the allegations contained in paragraph 287 of the Amended Complaint.

288. Defendant denies the allegations contained in paragraph 288 of the Amended Complaint.

289. Defendant denies the allegations contained in paragraph 289 of the Amended Complaint.

COUNT VIII

290. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

291. Defendant denies the allegations contained in paragraph 291 of the Amended Complaint.

292. Defendant denies the allegations contained in paragraph 292 of the Amended Complaint.

293. Defendant denies the allegations contained in paragraph 293 of the Amended Complaint.

294. Defendant denies the allegations contained in paragraph 294 of the Amended Complaint.

RELIEF REQUESTED

Defendant denies that she committed the violations alleged and that the Commission is entitled to any relief set forth in this section.

GENERAL DENIAL

Defendant generally denies all allegations of the Amended Complaint except for such allegations as are explicitly and specifically admitted above.

AFFIRMATIVE DEFENSES

Defendant asserts the following affirmative defense and reserves the right to amend her answer and affirmative defenses based upon information obtained in the course of litigation.

FIRST AFFIRMATIVE DEFENSE
(Advice of Counsel)

Defendant hereby provides notice that she intends to rely on a defense that she relied upon advice of counsel. Defendant did not act with the requisite mental state that Plaintiff must prove, and the Court should decline to issue the equitable relief sought by Plaintiff, because Defendant's reliance on the advice of her counsel is inconsistent with the Plaintiff's allegations of violations of the federal securities laws and the relief sought. Defendant made a full and complete good faith report of all materials facts to counsel that she considered competent, received the attorneys' advice as to the specific course of conduct that was followed, and reasonably relied on that advice in good faith.

SECOND AFFIRMATIVE DEFENSE
(Reliance on Other Professionals and Experts)

In executing or authorizing the execution and/or publication of any document containing the statements complained of in the Amended Complaint, Defendant was entitled to, and did, reasonably and in good faith, rely upon the work and conclusions of other professionals and experts, including Certified Public Accountants, Accountants, Auditors, & Tax Advisors.

THIRD AFFIRMATIVE DEFENSE
(Good Faith)

Plaintiff's claims are barred in whole or in part because Defendant acted at all times in good faith and/or did not know, and in the exercise of reasonable case could have known, or had any reasonable grounds to believe, that any misstatements or omissions of material fact existed in any statements, reports, and/or filings allegedly issued or uttered by Defendant. Defendant also relied upon competent personnel to assist her in making reasonable and informed decisions.

FOURTH AFFIRMATIVE DEFENSE
(Laches)

Plaintiff's claims are barred, in whole or in part, by the doctrine of laches.

FIFTH AFFIRMATIVE DEFENSE
(Estoppel)

Plaintiff's claims are barred by the doctrine of estoppel.

SIXTH AFFIRMATIVE DEFENSE
(Waiver)

Plaintiff's claims are barred by the doctrine of waiver.

SEVENTH AFFIRMATIVE DEFENSE
(Notes Are Not Securities)

Plaintiff's claims are barred because the notes at issue are not securities because they fall

squarely within the list of non-securities enumerated in *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990). The notes are also exempt as securities under the express language of the Exchange Act (15 U.S.C. § 78c(a)(10)) and from the registration requirement under the Securities Act (15 U.S.C. § 77b(a)(1).

JURY DEMAND

Defendant hereby requests a trial by jury on all claims and defenses in this action.

Dated: June 1, 2021

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By: */s/ Alan S. Futerfas*
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By: */s/ Joel Hirschhorn*
JOEL HIRSCHHORN
Florida Bar No. 104573

CERTIFICATE OF SERVICE

I hereby certify that on the 1st day of June, 2021, a true and correct copy of the foregoing Answer and Affirmative Defenses was served via the Court's CM/ECF System upon all counsel of record.

/s/ *Alan Futerfas*
Alan Futerfas

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 9:20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a/ PAR FUNDING, et al.,

Defendants.

---/

DEFENDANT MICHAEL FURMAN'S ANSWER AND AFFIRMATIVE DEFENSES TO SECURITIES AND EXCHANGE COMMISSION'S AMENDED COMPLAINT

Defendant Michael C. Furman ("Defendant" or "Furman"), files this Answer and Affirmative Defenses to the Amended Complaint filed by Plaintiff Securities and Exchange Commission ("Plaintiff" or "SEC"), and states as follows:

ANSWER

Defendant denies all allegations contained in the headings and all unnumbered paragraphs in the Amended Complaint. In response to the allegations in the specific numbered paragraphs in the Amended Complaint, Defendant answers the Amended Complaint as follows:

1. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 1 of the Amended Complaint and, therefore, denies same.

2. Defendant denies the allegations contained in the first sentence of paragraph 2 of the Amended Complaint. Additionally, Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in the second sentence of paragraph 2 of the Amended Complaint and, therefore, denies same.

3. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 3 of the Amended Complaint and, therefore, denies same.

4. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 4 of the Amended Complaint and, therefore, denies same.

5. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 5 of the Amended Complaint and, therefore, denies same.

6. Defendant denies the allegations contained in paragraph 6 of the Amended Complaint.

7. Defendant only admits that he participated in the formation of the United Fidelis Group Corp, which was a managing member of the Fidelis Financial Planning LLC, which issued promissory notes or limited partnership interemainders to the purchasers thereof. Defendant denies the remainder of the allegations contained in the first sentence of paragraph 7 of the Amended Complaint. Defendant denies any inconsistent allegations. Further, Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning Defendant in the first sentence of paragraph 7 of the Amended Complaint and, therefore, denies same. Additionally, Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in the remainder of paragraph 7 of the Amended Complaint and, therefore, denies same.

8. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 8 of the Amended Complaint and, therefore, denies same. Further, Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning Defendant in the first sentence of paragraph 8 of the Amended Complaint and, therefore, denies same.

9. Defendant denies the allegations contained in paragraph 9 of the Amended Complaint.

10. Defendant denies the allegations contained in paragraph 10 of the Amended Complaint.

11. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 11 of the Amended Complaint and, therefore, denies same.

12. Defendant only admits that the Order referenced in paragraph 12 of the Amended Complaint speaks for itself and denies any inconsistent allegations. However, Defendant is without sufficient knowledge to form a belief as to the truth of the remainder of the allegations contained in paragraph 12 of the Amended Complaint and, therefore, denies same.

13. Defendant only admits that the Order referenced in paragraph 13 of the Amended Complaint speaks for itself and denies any inconsistent allegations. However, Defendant is without sufficient knowledge to form a belief as to the truth of the remainder of the allegations contained in paragraph 13 of the Amended Complaint and, therefore, denies same.

14. Defendant only admits that the Order referenced in paragraph 14 of the Amended Complaint speaks for itself and denies any inconsistent allegations. However, Defendant is without sufficient knowledge to form a belief as to the truth of the remainder of the allegations contained in paragraph 14 of the Amended Complaint and, therefore, denies same.

15. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 15 of the Amended Complaint and, therefore, denies same.

16. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 16 of the Amended Complaint and, therefore, denies same.

17. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 17 of the Amended Complaint and, therefore, denies same.

18. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 18 of the Amended Complaint and, therefore, denies same.

19. Defendant is without sufficient knowledge to form a belief as to the truth of the

allegations contained in paragraph 19 of the Amended Complaint and, therefore, denies same.

20. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 20 of the Amended Complaint and, therefore, denies same.

21. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 21 of the Amended Complaint and therefore denies same. Defendant only admits that the Order referenced in paragraph 21 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 21 of the Amended Complaint.

22. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 22 of the Amended Complaint and, therefore, denies same.

23. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 23 of the Amended Complaint and therefore denies same. Defendant only admits that the agreement referenced in paragraph 23 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 23 of the Amended Complaint.

24. Defendant only admits that ABFP Management is a Delaware limited liability company that had offices in Pennsylvania. However, Defendant is without sufficient knowledge to form a belief as to the truth of the remainder of the allegations contained in paragraph 24 of the Amended Complaint and, therefore, denies same.

25. Defendant only admits that ABFP is a limited liability company that had offices in Pennsylvania. However, Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 25 of the Amended Complaint and therefore denies same.

26. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 26 of the Amended Complaint and

therefore denies same. Defendant only admits that the Order referenced in paragraph 26 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 26 of the Amended Complaint.

27. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 27 of the Amended Complaint and therefore denies same.

28. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 28 of the Amended Complaint and therefore denies same.

29. Defendant only admits that he is a resident of Florida and that he took part in the formation of United Fidelis Group and Fidelis Financial Planning LLC. Defendant denies any inconsistent allegations. However, Defendant denies the remainder of the allegations contained in paragraph 29 of the Amended Complaint. Further, Defendant is without sufficient knowledge to form a belief as to the truth of the allegation contained in paragraph 29 of the Amended Complaint and, therefore, denies same.

30. Defendant only admits that United Fidelis Group is a Florida corporation, that had offices in Florida. Defendant denies any inconsistent allegations. However, Defendant denies the remainder of the allegations contained in paragraph 30 of the Amended Complaint. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 30 of the Amended Complaint and, therefore, denies same.

31. Defendant only admits that Fidelis Financial Planning is a Delaware Limited Liability Company that had offices in Florida. However, Defendant denies any inconsistent allegations. Further, Defendant denies the remainder of the allegations contained in paragraph 31 of the Amended Complaint.

32. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 32 of the Amended Complaint and, therefore, denies same.

33. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 33 of the Amended Complaint and, therefore, denies same.

34. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 34 of the Amended Complaint and, therefore, denies same.

35. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 35 of the Amended Complaint and, therefore, denies same.

36. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 36 of the Amended Complaint and, therefore, denies same.

37. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 37 of the Amended Complaint and, therefore, denies same.

38. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 38 of the Amended Complaint and therefore denies same. Defendant only admits that he is a Florida resident and that United Fidelis and Fidelis Financial Planning had offices in Florida. Additionally, Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in the remainder of paragraph 38 of the Amended Complaint and, therefore, denies same.

39. Defendant denies the allegations contained in paragraph 39 of the Amended Complaint.

40. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 40 of the Amended Complaint and, therefore, denies same.

41. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 41 of the Amended Complaint and, therefore, denies same.

42. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 42 of the Amended Complaint and, therefore, denies same.

43. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 43 of the Amended Complaint and, therefore, denies same.

44. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 44 of the Amended Complaint and, therefore, denies same.

45. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 45 of the Amended Complaint and, therefore, denies same.

46. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 46 of the Amended Complaint and, therefore, denies same

47. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 47 of the Amended Complaint and, therefore, denies same.

48. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 48 of the Amended Complaint and, therefore, denies same.

49. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 49 of the Amended Complaint and, therefore, denies same.

50. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 50 of the Amended Complaint and, therefore, denies same.

51. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 51 of the Amended Complaint and, therefore, denies same.

52. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 52 of the Amended Complaint and, therefore, denies same.

53. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 53 of the Amended Complaint and, therefore, denies same.

54. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 54 of the Amended Complaint and, therefore, denies same.

55. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 55 of the Amended Complaint and, therefore, denies same.

56. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 56 of the Amended Complaint and, therefore, denies same.

57. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 57 of the Amended Complaint and, therefore, denies same.

58. Defendant denies the allegations in paragraph 58 of the Amended Complaint.

59. Defendant denies the allegations in paragraph 59 of the Amended Complaint.

60. Defendant denies the allegations in paragraph 60 of the Amended Complaint. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations not concerning the defendant contained in paragraph 60 of the Amended Complaint and, therefore, denies same.

61. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 61 of the Amended Complaint and, therefore, denies same.

62. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 62 of the Amended Complaint and, therefore, denies same.

63. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 63 of the Amended Complaint and, therefore, denies same.

64. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 64 of the Amended Complaint and, therefore, denies same.

65. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 65 of the Amended Complaint and, therefore, denies same.

66. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 66 of the Amended Complaint and, therefore, denies same.

67. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 67 of the Amended Complaint and, therefore, denies same.

68. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 68 of the Amended Complaint and, therefore, denies same.

69. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 69 of the Amended Complaint and, therefore, denies same.

70. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 70 of the Amended Complaint and, therefore, denies same.

71. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 71 of the Amended Complaint and, therefore, denies same

72. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 72 of the Amended Complaint and, therefore, denies same

73. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 73 of the Amended Complaint and, therefore, denies same

74. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 74 of the Amended Complaint and, therefore, denies same

75. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 75 of the Amended Complaint and, therefore, denies same

76. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 76 of the Amended Complaint and, therefore, denies same

77. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 77 of the Amended Complaint and, therefore, denies same

78. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 78 of the Amended Complaint and, therefore, denies same.

79. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 79 of the Amended Complaint and, therefore, denies same.

80. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 80 of the Amended Complaint and, therefore, denies same.

81. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 81 of the Amended Complaint and, therefore, denies same.

82. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 82 of the Amended Complaint and, therefore, denies same.

83. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 83 of the Amended Complaint and, therefore, denies same.

84. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 84 of the Amended Complaint and, therefore, denies same.

85. Defendant only admits that ABFP Management performed services as agreed to by a contract, when that contract was in place, and that the contracts speak for themselves. However, Defendant denies the remainder of the allegations contained in paragraph 85 of the Amended Complaint.

86. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 86 of the Amended Complaint and, therefore, denies same.

87. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 87 of the Amended Complaint and, therefore, denies same.

88. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 88 of the Amended Complaint and, therefore, denies same.

89. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 89 of the Amended Complaint and, therefore, denies same.

90. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 90 of the Amended Complaint and, therefore, denies same.

91. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 91 of the Amended Complaint and, therefore, denies same.

92. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 92 of the Amended Complaint and, therefore, denies same.

93. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 93 of the Amended Complaint and, therefore, denies same.

94. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 94 of the Amended Complaint and, therefore, denies same.

95. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 95 of the Amended Complaint and, therefore, denies same.

96. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 96 of the Amended Complaint and, therefore, denies same.

97. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 97 of the Amended Complaint and, therefore, denies same.

98. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 98 of the Amended Complaint and, therefore, denies same.

99. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 99 of the Amended Complaint and, therefore, denies same.

100. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 100 of the Amended Complaint and, therefore, denies same.

101. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 101 of the Amended Complaint and, therefore, denies same.

102. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 102 of the Amended Complaint and, therefore, denies same.

103. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 103 of the Amended Complaint and, therefore, denies same.

104. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 104 of the Amended Complaint and, therefore, denies same.

105. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 105 of the Amended Complaint and, therefore, denies same.

106. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 106 of the Amended Complaint and, therefore, denies same.

107. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 107 of the Amended Complaint and, therefore, denies same.

108. Defendant only admits that Fidelis Financial Planning, LLC offered and sold promissory notes, that the PPMs speak for themselves, and that promissory notes or limited partnership interests were purchased in the names of the purchaser or by an IRA that such purchasers formed. However, Defendant denies the remainder of the allegations contained in paragraph 108. Defendant denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 108 of the Amended Complaint and, therefore, denies same.

109. Defendant only admits that the PPMs speak for themselves and that promissory notes or limited partnership interests were purchased in the names of the purchaser or by an IRA that such purchasers formed. Defendant denies any inconsistent allegations. Further, Defendant denies the remainder of the allegations contained in paragraph 109 of the Amended Complaint.

110. Defendant only admits that the PPMs speak for themselves; Defendant denies any inconsistent allegations. However, Defendant denies the remainder of the allegations contained in paragraph 110 of the Amended Complaint.

111. Defendant denies the allegations contained in paragraph 111 of the Amended Complaint.

112. Defendant denies the allegations contained in paragraph 112 of the Amended Complaint.

113. Defendant denies the allegations contained in paragraph 113 of the Amended Complaint.

114. Defendant only admits that Fidelis Financial Planning LLCs filings speak for itself and denies any inconsistent allegations. Defendant denies the remainder of the allegations contained in paragraph 114 of the Amended Complaint.

115. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 115 of the Amended Complaint and, therefore, denies same.

116. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 116 of the Amended Complaint and, therefore, denies same.

117. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 117 of the Amended Complaint and, therefore, denies same.

118. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 118 of the Amended Complaint and, therefore, denies same.

119. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 119 of the Amended Complaint and, therefore, denies same.

120. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 120 of the Amended Complaint and, therefore, denies same.

121. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 121 of the Amended Complaint and, therefore, denies same.

122. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 122 of the Amended Complaint and, therefore, denies same.

123. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 123 of the Amended Complaint and, therefore, denies same.

124. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 124 of the Amended Complaint and, therefore, denies same.

125. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 125 of the Amended Complaint and, therefore, denies same.

126. Defendant only admits that the referenced message speaks for itself; Defendant denies any inconsistent allegations. However, Defendant denies the remainder of the allegations contained in paragraph 126 of the Amended Complaint.

127. Defendant denies the allegations contained in paragraph 127 of the Amended Complaint.

128. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 128 of the Amended Complaint and, therefore, denies same.

129. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 129 of the Amended Complaint and, therefore, denies same.

130. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 130 of the Amended Complaint and, therefore, denies same.

131. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 123 of the Amended Complaint and, therefore, denies same.

132. Defendant only admits that the referenced message speaks for itself; Defendant denies any inconsistent allegations. However, Defendant denies the remainder of the allegations contained in paragraph 132 of the Amended Complaint.

133. Defendant only admits that the referenced video speaks for itself; Defendant denies any inconsistent allegations. However, Defendant denies the remainder of the allegations contained in paragraph 133 of the Amended Complaint.

134. Defendant only admits that the referenced video speaks for itself; Defendant denies any inconsistent allegations. Additionally, Defendant is without sufficient knowledge to form a belief as to the truth of the remainder of the allegations contained in paragraph 134 of the Amended Complaint and, therefore, denies same.

135. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 135 of the Amended Complaint and, therefore, denies same.

136. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 136 of the Amended Complaint and, therefore, denies same.

137. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 137 of the Amended Complaint and, therefore, denies same.

138. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 138 of the Amended Complaint and, therefore, denies same.

139. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 139 of the Amended Complaint and, therefore, denies same.

140. Defendant denies the allegations contained in paragraph 140 of the Amended Complaint.

141. Defendant only admits that certain persons accepted Exchange Notes, and that the Exchange Notes speak for themselves. However, Defendant denies the remainder of the allegations contained in paragraph 141 of the Amended Complaint.

142. Defendant denies the allegations contained in paragraph 142 as it pertains to him. However, Defendant is without sufficient knowledge to form a belief as to the truth of the remainder of the allegations contained in paragraph 142 of the Amended Complaint and, therefore, denies same.

143. Defendant denies the allegations contained in paragraph 143 of the Amended Complaint.

144. Defendant denies the allegations contained in paragraph 144 of the Amended Complaint.

145. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 145 of the Amended Complaint and, therefore, denies same.

146. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 146 of the Amended Complaint and, therefore, denies same.

147. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 147 of the Amended Complaint and, therefore, denies same.

148. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 148 of the Amended Complaint and, therefore, denies same.

149. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 149 of the Amended Complaint and, therefore, denies same.

150. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 150 of the Amended Complaint and, therefore, denies same.

151. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 151 of the Amended Complaint and, therefore, denies same.

152. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 152 of the Amended Complaint and, therefore, denies same.

153. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 153 of the Amended Complaint and, therefore, denies same.

154. Defendant denies the allegations contained in paragraph 154 of the Amended Complaint.

155. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 155 of the Amended Complaint and, therefore, denies same.

156. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 156 of the Amended Complaint and, therefore, denies same.

157. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 157 of the Amended Complaint and, therefore, denies same.

158. Defendant only admits that the brochure referenced in paragraph 158 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 158 of the Amended Complaint and therefore denies same.

159. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 159 of the Amended Complaint and, therefore, denies same.

160. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 160 of the Amended Complaint and, therefore, denies same.

161. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 161 of the Amended Complaint and, therefore, denies same.

162. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 162 of the Amended Complaint and, therefore, denies same.

163. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 163 of the Amended Complaint and, therefore, denies same.

164. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 164 of the Amended Complaint and, therefore, denies same.

165. Defendant denies the allegations contained in paragraph 165 of the Amended Complaint.

166. Defendant denies the allegations contained in paragraph 166 of the Amended Complaint.

167. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 167 of the Amended Complaint and, therefore, denies same.

168. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 168 of the Amended Complaint and, therefore, denies same.

169. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 169 of the Amended Complaint and, therefore, denies same.

170. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 170 of the Amended Complaint and, therefore, denies same.

171. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 171 of the Amended Complaint and, therefore, denies same.

172. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 172 of the Amended Complaint and, therefore, denies same.

173. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 173 of the Amended Complaint and, therefore, denies same.

174. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 174 of the Amended Complaint and, therefore, denies same.

175. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 175 of the Amended Complaint and, therefore, denies same.

176. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 176 of the Amended Complaint and, therefore, denies same.

177. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 177 of the Amended Complaint and, therefore, denies same.

178. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 178 of the Amended Complaint and, therefore, denies same.

179. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 179 of the Amended Complaint and, therefore, denies same.

180. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 180 of the Amended Complaint and, therefore, denies same.

181. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 181 of the Amended Complaint and, therefore, denies same.

182. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 182 of the Amended Complaint and, therefore, denies same.

183. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 183 of the Amended Complaint and, therefore, denies same.

184. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 184 of the Amended Complaint and, therefore, denies same.

185. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 185 of the Amended Complaint and, therefore, denies same.

186. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 186 of the Amended Complaint and, therefore, denies same.

187. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 187 of the Amended Complaint and, therefore, denies same.

188. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 188 of the Amended Complaint and, therefore, denies same.

189. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 189 of the Amended Complaint and, therefore, denies same.

190. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 190 of the Amended Complaint and, therefore, denies same.

191. Defendant only admits that the website referenced in paragraph 191 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 191 of the Amended Complaint and therefore denies same.

192. Defendant denies the allegations contained in paragraph 192 of the Amended Complaint.

193. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 193 of the Amended Complaint and, therefore, denies same.

194. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 194 of the Amended Complaint and, therefore, denies same.

195. Defendant only admits that the brochure referenced in paragraph 195 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 195 of the Amended Complaint and, therefore, denies same.

196. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 196 of the Amended Complaint and, therefore, denies same.

197. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 197 of the Amended Complaint and, therefore, denies same.

198. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 198 of the Amended Complaint and, therefore, denies same.

199. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 199 of the Amended Complaint and, therefore, denies same.

200. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 200 of the Amended Complaint and, therefore, denies same.

201. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 201 of the Amended Complaint and, therefore, denies same.

202. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 202 of the Amended Complaint and, therefore, denies same.

203. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 203 of the Amended Complaint and, therefore, denies same.

204. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 204 of the Amended Complaint and, therefore, denies same.

205. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 205 of the Amended Complaint and, therefore, denies same.

206. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 206 of the Amended Complaint and, therefore, denies same.

207. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 207 of the Amended Complaint and, therefore, denies same.

208. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 208 of the Amended Complaint and, therefore, denies same.

209. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 209 of the Amended Complaint and, therefore, denies same.

210. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 210 of the Amended Complaint and, therefore, denies same.

211. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 211 of the Amended Complaint and, therefore, denies same.

212. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 212 of the Amended Complaint and, therefore, denies same.

213. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 213 of the Amended Complaint and, therefore, denies same.

214. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 214 of the Amended Complaint and, therefore, denies same.

215. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 215 of the Amended Complaint and, therefore, denies same.

216. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 216 of the Amended Complaint and, therefore, denies same.

217. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 217 of the Amended Complaint and, therefore, denies same.

218. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 218 of the Amended Complaint and, therefore, denies same.

219. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 219 of the Amended Complaint and, therefore, denies same.

220. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 220 of the Amended Complaint and, therefore, denies same.

221. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 221 of the Amended Complaint and, therefore, denies same.

222. Defendant only admits that the referenced video speaks for itself; Defendant denies any inconsistent allegations. However, Defendant denies the remainder of the allegations contained in paragraph 222 of the Amended Complaint.

223. Defendant only admits that the referenced video speaks for itself and denies any inconsistent allegations. However, Defendant denies the remainder of the allegations contained in paragraph 223 of the Amended Complaint.

224. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 224 of the Amended Complaint and therefore denies same.

225. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 225 of the Amended Complaint and therefore denies same.

226. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 226 of the Amended Complaint and, therefore, denies same.

227. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 227 of the Amended Complaint and therefore denies same.

228. Defendant only admits that the Order referenced in paragraph 228 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 228 of the Amended Complaint and therefore denies same.

229. Defendant only admits that the Order referenced in paragraph 229 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 229 of the Amended Complaint and therefore denies same.

230. Defendant denies the allegations contained in paragraph 230 of the Amended Complaint.

231. Defendant only admits that the Order referenced in paragraph 231 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 231 of the Amended Complaint and therefore denies same.

232. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 232 of the Amended Complaint and, therefore, denies same.

233. Defendant only admits that the transcript of the referenced statement reads as quoted in this paragraph, but denies it was made in that context. However, Defendant denies the remainder of the allegations contained in paragraph 233 of the Amended Complaint.

234. Defendant denies the allegations contained in paragraph 234 of the Amended Complaint.

235. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 235 of the Amended Complaint and, therefore, denies same.

236. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 236 of the Amended Complaint and, therefore, denies same.

237. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 237 of the Amended Complaint and, therefore, denies same.

238. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 238 of the Amended Complaint and, therefore, denies same.

239. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 239 of the Amended Complaint and, therefore, denies same.

240. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 240 of the Amended Complaint and, therefore, denies same.

241. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 241 of the Amended Complaint and, therefore, denies same.

242. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 242 of the Amended Complaint and, therefore, denies same.

243. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 243 of the Amended Complaint and, therefore, denies same.

244. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 244 of the Amended Complaint and, therefore, denies same.

245. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 245 of the Amended Complaint and therefore denies same.

246. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 246 of the Amended Complaint and therefore denies same.

247. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 247 of the Amended Complaint and therefore denies same.

248. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 248 of the Amended Complaint and therefore denies same.

249. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 249 of the Amended Complaint and therefore denies same.

250. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 250 of the Amended Complaint and therefore denies same.

251. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 251 of the Amended Complaint and therefore denies same.

252. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 252 of the Amended Complaint and therefore denies same.

253. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 253 of the Amended Complaint and therefore denies same.

254. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 254 of the Amended Complaint and therefore denies same.

255. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 255 of the Amended Complaint and therefore denies same.

256. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 256 of the Amended Complaint and therefore denies same.

257. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 257 of the Amended Complaint and therefore denies same.

258. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 258 of the Amended Complaint and therefore denies same.

259. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 259 of the Amended Complaint and therefore denies same.

260. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 260 of the Amended Complaint and therefore denies same.

261. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 261 of the Amended Complaint and therefore denies same.

262. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 262 of the Amended Complaint and, therefore, denies same.

263. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 263 of the Amended Complaint and therefore denies same.

264. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 264 of the Amended Complaint and therefore denies same.

265. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 265 of the Amended Complaint and therefore denies same.

266. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 266 of the Amended Complaint and therefore denies same.

267. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant contained in paragraph 267 of the Amended Complaint and, therefore, denies same.

COUNT I

268. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

269. Defendant denies the allegations contained in paragraph 269 of the Amended Complaint.

270. Defendant denies the allegations contained in paragraph 270 of the Amended Complaint.

COUNT II

271. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

272. Defendant denies the allegations contained in paragraph 272 of the Amended Complaint.

273. Defendant denies the allegations contained in paragraph 273 of the Amended Complaint.

COUNT III

274. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set

forth herein.

275. Defendant denies the allegations contained in paragraph 275 of the Amended Complaint.

276. Defendant denies the allegations contained in paragraph 276 of the Amended Complaint.

COUNT IV

277. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

278. Defendant denies the allegations contained in paragraph 278 of the Amended Complaint.

279. Defendant denies the allegations contained in paragraph 279 of the Amended Complaint.

COUNT V

280. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

281. Defendant denies the allegations contained in paragraph 281 of the Amended Complaint.

282. Defendant denies the allegations contained in paragraph 282 of the Amended Complaint.

COUNT VI

283. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

284. Defendant denies the allegations contained in paragraph 284 of the Amended

Complaint.

285. Defendant denies the allegations contained in paragraph 285 of the Amended Complaint.

COUNT VII

286. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

287. Defendant denies the allegations contained in paragraph 287 of the Amended Complaint.

288. Defendant denies the allegations contained in paragraph 288 of the Amended Complaint.

289. Defendant denies the allegations contained in paragraph 289 of the Amended Complaint.

COUNT VIII

290. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

291. This allegation is not directed at Defendant, and therefore, no response is required from Defendant; otherwise denied.

292. This allegation is not directed at Defendant, and therefore, no response is required from Defendant; otherwise denied.

293. This allegation is not directed at Defendant, and therefore, no response is required from Defendant; otherwise denied.

294. This allegation is not directed at Defendant, and therefore, no response is required from Defendant; otherwise denied.

* * * * * *

In response to the **RELIEF REQUESTED** section following paragraph 294 of the Amended Complaint, Defendant denies that he committed the violations alleged and that the Plaintiff is entitled to any of the relief it seeks therein and denies that Plaintiff is entitled to a judgment in its favor.

GENERAL DENIAL

Defendant generally denies all allegations of the Amended Complaint except for such allegations as are explicitly and specifically admitted above.

AFFIRMATIVE DEFENSES

In further response to the Amended Complaint, Defendant asserts the following defenses and reserves the right to amend his answer and affirmative defenses based upon information obtained in the course of litigation . The denomination of any matter below as a defense is not an admission that Defendant bears the burden of persuasion, burden of proof, or burden of producing evidence with respect to any such matter.

FIRST DEFENSE

(Failure to State a Claim)

The Amended Complaint, and each cause of action alleged therein against Defendant, fails to state a claim upon which relief can be granted.

SECOND DEFENSE

(Statute of Limitations)

The relief against Defendant is barred in whole or in part by the applicable statute(s) of limitation.

THIRD DEFENSE

(No Scienter)

Any allegedly untrue statements of material fact, leading statements, or other actions allegedly undertaken by Defendant was inadvertent and/or was made wholly without scienter.

FOURTH DEFENSE

(Good faith)

Plaintiff's claims are barred in whole or in part because Defendant acted at all times in good faith and/or did not know, and in the exercise of reasonable case could have known, or had any reasonable grounds to believe, that any misstatements or omissions of material fact existed in any statements, reports, and/or filings allegedly issued or uttered by Defendant. Defendant also exercised reasonable business judgment in the administration of his companies. Defendant also hired competent personnel to administer, manage, and provide advice on his business operations and to assist him in making reasonable and informed decisions. Such personnel prepared documents, marketing materials, and financial reports among other things which Defendant reasonable relied upon. Based on these and other actions, Defendant acted in good faith and with due regard to the best interemainders of his clients.

FIFTH DEFENSE

(Mistake)

Plaintiff's claims against Defendant cannot be maintained because the conduct alleged in the Amended Complaint was not intentional, was believed to be lawful, proper, and fair, and was the result of mistake of fact or mistake of law.

SIXTH DEFENSE

(Reliance on other Professionals and Experts)

In executing or authorizing the execution and/or publication of any document containing the statements complained of in the Amended Complaint, Defendant was entitled to, and did, reasonably and in good faith, rely upon the work and conclusions of other professionals and experts.

SEVENTH DEFENSE

(Justifiable Reliance)

Plaintiff's claims against Defendant cannot be maintained because Defendant relied, and in good faith was entitled to rely, on advice and information provided by professional advisors.

EIGHTH DEFENSE

(Acts of Others)

Plaintiff's claims against Defendant cannot be maintained because the alleged acts and/or omissions complained of, if any, were due to the fault of persons, factors, and circumstances presently unknown to Defendant, over which he exercised no control, and for whose actions it was not responsible.

NINTH DEFENSE

(Forfeiture)

Plaintiff's claims fail because the Amended Complaint seeks an impermissible forfeiture.

TENTH DEFENSE

(Unjust Enrichment)

Plaintiff cannot recover damages because any such recovery would be a windfall resulting in unjust enrichment to Plaintiff or to a party Plaintiff purports to seek to reimburse.

ELEVENTH DEFENSE

(Unconstitutionality)

Plaintiff's claims fail because the relief Plaintiff seeks violate the federal constitution.

TWELFTH DEFENSE

(Lack of Causation/Superseding or Intervening Events)

Plaintiff's claims against Defendant cannot be maintained because superseding or

intervening events, not caused by Defendant, caused some or all of the alleged damages.

THIRTEENTH DEFENSE

(No Material Misstatement)

Plaintiff's claims against Defendant are barred, in whole or in part, because any and all purported statements and/or actions attributed to Defendant were immaterial.

FOURTEENTH DEFENSE

(Estoppel)

Plaintiff's claims are barred by the doctrine of estoppel.

FIFTEENTH DEFENSE

(Waiver)

Plaintiff's claims are barred by the doctrine of waiver.

SIXTEENTH DEFENSE

(Laches)

Plaintiff's claims are barred, in whole or in part, by the doctrine of laches.

SEVENTEENTH DEFENSE

(Good-Faith Reliance on Counsel)

Plaintiff's claims are barred, in whole or in part, by virtue of Defendant's good-faith reliance on counsel. Defendant did not act with the requisite mental state that Plaintiff must prove, and the Court should decline to issue the equitable relief sought by Plaintiff, because his following of the advice of his counsel is inconsistent with the Plaintiff's allegations of violations of the federal securities laws and the relief sought. Defendant made a full and complete good faith report of all materials facts to counsel that he considered competent, received the attorneys' advice as to the specific course of conduct that was followed, and reasonably relied on that advice in good faith.

EIGHTEENTH DEFENSE

(Notes Are Not Securities)

Plaintiff's claims are barred because the notes at issue are not securities because they fall squarely within the list of non-securities enumerated in *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990). The notes are also exempt as securities under the express language of the Exchange Act (15 U.S.C. § 78c(a)(10)) and from the registration requirement under the Securities Act (15U.S.C. § 77b(a)(1).

NINETEENTH DEFENSE

(Right to Assert Additional Defenses)

Additional facts may be revealed by future discovery which support additional affirmative defenses presently available to, but unknown to, Defendant. Therefore, Defendant reserves the right to assert additional defenses in the event that investigation and discovery indicate that additional defenses are appropriate.

JURY DEMAND

Defendant hereby requests a trial by jury on all claims and defenses in this action.

Dated: June 8, 2021

Attorney's Fees and Costs

Defendant has previously retained attorneys and paid counsel reasonable fees for their services, and plans to retain new counsel in the future and pay reasonable fees. In the event he prevails, Defendant is entitled to an award of its reasonable attorney's fees and costs incurred in the defense of this matter, as are allowed by applicable law.

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Additional facts may be revealed in discovery or otherwise supporting additional defenses presently available, but unknown, to Defendant. Defendant therefore reserve the right to assert additional defenses in the event discovery or investigation reveals additional defenses.

WHEREFORE, Defendant Michael Furman prays for judgment as follows:

A. That Plaintiff takes nothing by its Amended Complaint;

B. That the Amended Complaint be dismissed, with prejudice, and judgment entered in favor of Defendant;

C. For costs of suit;

D. That Defendant recover costs and expenses incurred in defending this action, including reasonable attorneys' fees, as are allowed by applicable law; and

E. For such other and further relief as this Court deems just and proper.

Michael C. Furman, ProSe
736 Cresta Circle
West Palm Beach, FL 33413
Telephone- 561-623-0913
Email - MikeCFurman@gmail.com

CERTIFICATE OF SERVICE

I hereby certify that on the 8th day of June, 2021, a true and correct copy of the foregoing Answer and Affirmative Defenses was served via the Court's CM/ECF System upon all counsel of record.

/s/ Michael Furman
Michael C. Furman, ProSe

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____/

DEFENDANTS' JOINT MOTION FOR RECUSAL AND INCORPORATED MEMORANDUM OF LAW AND REQUEST FOR HEARING

Defendants Lisa McElhone, Joseph W. LaForte, and Joseph Cole Barleta ("Defendants"), by and through their attorneys, respectfully move for the recusal of the Honorable Rodolfo A. Ruiz ("Judge Ruiz") pursuant to 28 U.S.C. § 455(a).

I. INTRODUCTION

Defendants respectfully move for recusal given this Court's appearance of partiality in favor of the Receiver. This appearance of partiality has persisted in numerous court appearances conducted since July 2020 and culminated in the most recent status conference held on May 20, 2021, during which the Court: (1) allowed the Receiver to withhold evidence from Defendants for months; (2) allowed the Receiver to use and rely on this evidence to unilaterally allege untested and misleading claims against Defendants, including claims that mirror the SEC's allegations; (3) refused to permit Defense Counsel a fair and equal opportunity to respond during status conferences to the Receiver's claims; and (4) recently ignored its own ruling and allowed the Receiver to present facts and arguments without notice to Defendants. Consequently, as this Court has itself acknowledged, Defendants have been forced to litigate with "one hand tied behind their back." (December 15, 2020 Status Conference at, T. 93, 101.) ("Dec. 15 Status Conf.") This motion is not made lightly, but only after a careful examination of the record reflecting that the appearance of partiality is manifest and mandates recusal.

II. STATEMENT OF FACTS

1. September 8, 2020 Status Report and Conference

At this status conference, the Court invited the Receiver to exceed the text of its status report (DE 240) "for the edification of the investors, who are obviously waiting on bated breath to hear about how much of their principal is going to be returned." (September 8, 2020 Status Conference, T. at 40.) ("Sept. 8 Status Conf.") Counsel for the Receiver introduced a string of allegations erroneously suggesting troubling financial conditions for some of the merchants. (*Id.* at 41–44). What should have been a three-party exchange among the parties and the Court devolved into a two-party dialogue with the Court seemingly accepting every word uttered by the Receiver as not just accurate, but irrefutable, while ignoring Defendants' pleas for access to the documents and an equal opportunity to be heard. Essentially, the Court conducted an *ex parte* hearing with the Defendants' nominal presence.

Over Defendants' objections, the Court vouched for the Receiver and DSI, the Receiver's third-party vendor, as "the guys I've put in place." (*Id.* at 44.) The Court championed the Receiver's work and credited the Receiver's claims and conclusions about the financial condition of ten merchants DSI had concluded were simply never going to repay their debts to CBSG, dubbed the "Exception Portfolio." (*Id.* at 45–46.) Though only having heard from the Receiver, the Court pronounced that the Receiver had demonstrated that "the money that they were getting and the loans…. *may not have been on the up-and-up as much as had been advertised*." (*Id.* at 46) (emphasis supplied). The Court then accused Defendants of painting a "rosy picture" that the "numbers . . . don't support," and pointed to the DSI Report as its sole supporting evidence: "a perfect example of that." (*Id.*)

a. Defendants' Response (ECF 249)

In a filing on September 10, 2020, Defendants—still deprived by the Receiver of a single document notwithstanding multiple requests—responded to the Receiver's inaccurate claims, noting, among other things, that investors' regular interest payments had continued until the moment of the Receivership and would have continued absent the SEC's action. (DE 249) ("Defendants' Joint Response to Receiver's Status Report of September 8, 2020 (DE 240)").

2. The October Status Report and Conferences

As before, the Court again credited the Receiver's unrebutted (and, as Defendants still had received no documents, functionally unrebuttable) Report about CBSG. This included the

Receiver's claims that: (1) CBSG was financially unsound before the Receivership (October 7, 2020 Status Conference, T. at13) ("Oct. 7 Status Conf."); (2) the Receiver was impeded in collecting the accounts receivables because of purportedly poor underwriting, an SEC allegation, and poor record-keeping (*Id.* at 42–43); (3) "reloads" were improperly used to artificially prop-up merchant deals so that additional infusions of investor dollars would be needed to sustain the business (*Id.* at 38–39); (4) as a result of the reloads, the actual money received by CBSG daily was not 1.5 million but "a lot less" (*Id.* at 39); and (5) the high number of confessions of judgment was a tell-tale sign that the actual default rate was much higher than 1.2 percent, which, again, is an allegation in the SEC's complaint. (*Id.* at 13, 14, 39, 43.)

The Court relied on these claims by the Receiver and then chided Defendants—who still had not received the CBSG business records they requested and needed—for having promoted what the Court called "a misrepresentation of what was happening," a "fiction," and a "myth" of profitability. (*Id.* at 38–39.) Having fully adopted the Receiver's presentation, the Court accused Defendants of falsely claiming that "this place was printing money," and added, "the optics were of 1.5 or 1.2 million" but, in reality, because of the reloads, "this company was bringing in a lot less, 10 cents on the dollar almost. . ." (*Id.* at 38–39). The Court went further, accusing Defendants of pursuing "a figment of investor imagination, [in which] everyone here thinks that this all came to a halt when the SEC, the receiver, and the Court got involved" (*Id.* at 41), and contended that "[t]he underlying financials were not [] as advertised" (*Id.* at 14), and CBSG "was [not] going to last much longer," as "steady payments would have come crashing to a halt" even without the pandemic. (*Id.* at 41.) More concerning still, the Court accepted the Receiver's inaccurate claim that the number of confessions of judgments ("COJs") showed the actual default rate was much higher than the reported 1.2 percent, which is another SEC claim. (*Id.* at 13, 14, 39, 43.).

After summarizing the Receiver's position as though it were inarguable fact, the Court invited the Receiver—and *only* the Receiver—to comment on this "recitation of the situation." (*Id.* at 41.) Defense Counsel tried to speak and was muzzled until the hearing was nearly concluded. (*Id.* at 41, 113.) The Receiver and his counsel were then given additional time to expand upon their claims, including, among other things, that CBSG's "cash over cash default rate" was manipulated because CBSG was relying upon money it raised from investors to advance funds (*Id.* at 43); that the Top 10 Merchants were poorly underwritten debts of CBSG (*Id.* at 49); and that

Defendants' submission on the Big Ten Merchants was "continuing spin." (*Id.* at 49–52; *see* DE 249.)

The Court accepted these claims at face value, including the Receiver's claims regarding CBSG's underwriting and default rate—both allegations raised by the SEC—and even embellished the Receiver's excuses for failing to replicate CBSG's profitability: "This is something that I think is being lost on many investors . . . The Receiver is not going to show up at your storefront with a *baseball bat* asking for money . . . [he is] in place to do it legally." (*Id.* at 108) (emphasis added.)[1]

Recognizing the Court's apparent willingness to accept the Receiver's allegations before all the evidence was available to the Defense for review and rebuttal, Defense Counsel asked the Court to "keep an open mind, at least until all the evidence did come in." (*Id.* at 110–111) (emphasis added.) The Court, admittedly irritated by this request by counsel, dismissed his concern and informed him that he was fortunate the Court "let [him] speak," and then accused counsel of continuing the Defense "spin" by unfairly criticizing the Receiver's collections efforts to distract the Court from its task of getting investor money back:

> The reason why I take offense to that, is it goes back to the spin problem, because I've been trying to get to the truth on this case since day one. And I cannot have investors out there thinking that this entire case is a product of receivership delay."

(*Id.*, at 111–113.)

Bettina Schein, counsel for Joe Cole, then tried to correct the Receiver's inaccurate claim that CBSG did not maintain records of the merchants' outstanding balances. Ms. Schein advised that CBSG maintained a computer-generated website with a merchant portal for every merchant containing balances and other information, and that CBSG had more than 12 accountants and a set of QuickBooks that provided significant information about merchants' accounts, including what part of funds received were principal versus factoring fees. (*Id.* at 114–115.) Counsel reasserted that CBSG was collecting $1.5 million daily in July 2020, even after the pandemic began. (*Id.* at 116.) Counsel described CBSG's successful, profitable MCA relationship with some of the Top 10 Merchants critiqued by the Receiver as "fact" and not "spin." (*Id.* at 117.)

Before any other Defense attorney could speak, the Court rejected this argument out of

[1] The undersigned have seen no evidence in the record referencing the use of a baseball bat to collect merchant payments.

hand. After suggesting that Defense Counsel were engaging in more "narrative" by falsely suggesting that "the SEC and the receiver have gummed up an otherwise very successful company," the Court turned to the Receiver's counsel and invited him to disagree with Defense Counsel: "…what I just heard from Ms. Schein, Mr. Alfano, *I think you would agree is not what the receiver has uncovered in their diligence?*" (*Id.* at 118–119.) (Emphasis added.) Counsel for the Receiver was, of course, more than happy to agree that his own report was accurate. (*Id.* at 118–119) (emphasis added.)

When the Court next allowed Ms. Schein an opportunity to speak, at 5:00 p.m., it limited her to one minute and made clear that it wanted investors to "understand as much as they can about what's going on in the ground level"—but only from the Receiver: "So *I don't need another view, your view, of the financials*." (*Id.* at 122.) (Emphasis added.)

Alan Futerfas, counsel for Ms. McElhone, was permitted to speak briefly. Noting that it was 5:00 p.m., he appealed for a fair chance to rebut the Receiver's claims and reminded the Court that Defendants were powerless, having spent months trying to fend off the Receiver's claims, many of which overlapped with the SEC's claims, while the Receiver denied Defendant's access to CBSG's own business records:

> …My humble, humble suggestion is this. *We can't draw any conclusions*. There is discovery. There is–*and we need discovery. I don't have a piece of paper. They get up there and talk, I don't have a piece of paper*, because I served a discovery request and a regular response…
>
> …But I did want to get out there just this fundamental idea that here we are at the beginning of a litigation *that I don't have documents to, and I just started serving discovery demands on. And there is another side to this and should be another side.* And I think Your Honor appreciates that there are a lot of very sophisticated people who bet a lot of money on this company, who did a lot of due diligence and stand behind it.

(*Id*., at 129–131.) (Emphasis added.)

The Court persisted in asserting its disinterest in hearing any opposing viewpoints and assured the Receiver that he need not even concern himself with the arguments made by Defense Counsel: "there need be no reply to any Defense position or response to the Receiver's interim report from October 6th. It is simply to the Court's edification. . . I do not want the Receiver spending any time and money presenting any supplemental reports or clarifying the reports when faced with any sort of Defense response." (*Id.* at 131.) The Court even threatened to discontinue

the conferences—despite having deemed them useful to investors—if the Receiver's reports, teeming as they were with allegations of wrongdoing that mirrored the SEC's case, continued to be met with Defendants' "rebuttal positions," since this would not "assist anybody in getting to the real issues." (*Id.* at 133.)[2]

3. <u>The December DSI Report and Status Conference</u>

a. The Bradley Sharp DSI Declaration, December 13, 2020 (DE 426-1)

On December 13, 2020, the Receiver filed the Declaration of Bradley Sharp, CEO of DSI, (DE 426-1) ("The DSI Report") Sharp's Declaration characterized CBSG as financially unsound and, without actually using the phrase, averred that CBSG was a Ponzi scheme. (DE 426-1 at 3, ¶¶ 6–11) Notably, the Report also made other representations regarding CBSG and other Defendants that overlapped with the SEC's allegations, mentioning payments CBSG made to Defendants and other entities, all of whom the report inaccurately deemed "Insiders." (*Id.* at 2.) As before, the claims made in the DSI Report and Sharp Declaration were based on documents and evidence that the Receiver had withheld from Defendants, over their objections, for months. After the DSI Report appeared on the Court's electronic docket, Defendants immediately moved to postpone the conference scheduled just two days later on December 15th, reiterating their concerns regarding "fundamental fairness and due process," and requested sufficient time to respond to the DSI Report. (DE 430 at 1.)[3] The Court denied the request. (DE 431.)

b. <u>The December 15, 2020 Status Conference</u>

At the December 15, 2020 status conference, the Court immediately embraced the DSI Report as true, acknowledging that it caused a "sea-change" in the Court's perception and understanding of the "true nature" of CBSG. (Dec. 15 Status Conf., T. at 13–14.) The Receiver "staked [his] reputation" on its contents, saying that he and his accountant and consultants at DSI should be held "accountable" for its accuracy. (*Id.* at 14–15, 23, 31.) The Court acknowledged that Defendants had filed objections addressing the DSI Report's "flawed methodology" (*id.* at 14), but again precluded the Defense Counsel from speaking, stating at the outset that it would hear

[2] The Receiver filed status reports DE 240, 305, 358, 358-1, 426, 482, 482-1, 535, 577, 577-1. Defendants contested the Receiver's claims in multiple filings. *See, e.g.* DE 249, 355, 401, 430, 493, 602; *see also* DE 106, 148.

[3] Defendants pointed out that the DSI Report's financial claims were improbable and inconsistent with the many professional auditors and accountants who had reviewed the same raw data, including CPA James Klenk, who had submitted an affidavit in this case, and with CBSG's tax returns which showed operating revenues of $179 million on which Par had paid millions in taxes – revenues that the DSI Report concluded did not exist. (DE 430 at 2-3.)

only from the Receiver and would not "entertain argument" about either the DSI Report or the pending expansion motion. (*Id.* at 9–10.) "[W]e have to remember that this is a conversation between me and my receiver, an officer of the Court, and his due diligence and what it has generated in terms of reports for me to digest what is going on the ground in this business and in all the related Par Funding." (*Id.* at 14.) Throughout the hearing, the Court allowed "his" Receiver and his two attorneys to speak and argue the points made in the Receiver's status reports, including the DSI Report, completely uninterrupted.

Relying on the DSI Report by "my receiver, an officer of the Court," the Court then openly pronounced CBSG's business a "Ponzi" scheme even though the SEC had not even alleged as much in its filings: "[The DSI Report] . . . *makes it clear* that this was not a self-funding operation, meaning this operation could not, regardless of COVID-19, regardless of the SEC's involvement, that this was truly not a self-engineered or self-funding enterprise, it thrived off new money being put in from investors." [4] (*Id.* at 14, 15) (emphasis added.)

The Receiver, as before, was permitted ample time for a lengthy presentation in which he praised the "accuracy" of the DSI Report's analysis which inaccurately showed, using a cash-based analysis, that CBSG was unprofitable, since "more money has gone out to merchants than has come back" over the long term. (*Id.* at 16, 18–20.)

The Court explicitly sided with the Receiver, calling him "an extension of me," and again accused Defendants, albeit without pointing to any particular error in their facts or reasoning, of painting an inaccurate picture of CBSG's actual financial condition with "constant spin" and "alternate realities":

> THE COURT: . . . I share in the frustration that you have made clear in today's report that *we are dealing with alternative realities*. It's probably been the most frustrating part for the Court from the beginning . . . and now I have a declaration from Mr. Sharp, under oath. I have, at least at this point in the litigation, been able to get my hands around what I think are verifiable numbers and enough of a sample size in the nature of the loans and the profitability or lack thereof year-to-year to

[4] The unduly prejudicial reverberations from the Court's adoption of this claim cannot be overstated. When the SEC first addressed the issue of a Ponzi scheme, it advised the Court that it did not have evidence to support that claim. (*Id.* at 14-15.) Even after hearing the Receiver's report, the SEC advised the Court that it "had its own accountants and experts, and they will analyze the numbers." (*Id.* at 89.) In response, the Court reminded the SEC that "that the SEC got the receiver in here with me" and complained that "now the SEC couldn't run further away from the receiver." (*Id.* at 90-91.) The Court later added, "…I read Sharp's Report, and, I mean, as Mr. Stumphauzer put it eloquently, there are many definitions of a Ponzi scheme. Well this Court knows a couple and taking from Peter to pay Paul is one of them, and that is what it said in Sharp's entire Report. Now you [the SEC] don't want to call it that…" (*Id.* at 95.) In response to the Court's response to and adoption of the Receiver's Ponzi scheme claim, the SEC demurred and remarked, "we never said it was not a Ponzi scheme." (*Id.*)

> *get a true financial picture* as far as I can tell.
>
> *So I am similarly perturbed by what seems to be a constant spin* . . . And I think one of *the challenges we have had is to paint an accurate picture of this business* to all concerned parties, and I don't want any of the Defense lawyers to think that the Court is rushing to any conclusion. I think that I (T. 33) have attempted to allow this process to play out.
>
> By the same token, you have to understand that Defense lawyers are not litigating against my receiver. *My receiver is an extension of me. It's an extension of the Court. I take my obligations as overseer and supervisor of the receiver operation very seriously*. I know that it is, by nature of this business model and some of the difficulties of getting a true picture, it can sometimes be a costly endeavor, and I knew that going in, okay, but *a lot of what is being thrown against the wall here to me is not verifiable, it's not backed by numbers*. I have at least one clear picture emerging of this business and I think at some point the story that I hear that the receiver doesn't know what factoring is or that this is somehow a complicated business that makes it difficult to operate, *I think that argument is starting to fall apart quite a bit because I will confess that it doesn't take an economics major or CPA to look* at *Mr. Sharp's findings and figure out that* at *the very bottom, the model that we had here was not self-funding*, it just wasn't, and the loans were not over-performing. I don't even know if they can even say they were performing, period. *The amount loaned versus the amount recovered is pretty clear, it's pretty clear to the Court that this was not sustainable.*

(*Id.* at 32–33.) (Emphasis added.)

Without allowing the Defense to rebut the Receiver's claims, and despite knowing that the Receiver maintained sole possession of the CBSG business records that had been kept from Defendants for months, the Court nevertheless embraced the Receiver's claims and divulged its goal—to "shut down" any rebuttal of the Receiver's claims: "[W]e need to stop feeding the Court narratives that are not backed either by the credibility of lawyers and under oath, or verified statements or financials . . . let's actually contest it on merit, not on narrative, not on spin, because all that does is harm us in getting to the ultimate result in this case." (*Id.* at 34.) It added:

> *[H]ow can I shut this down* because I'm not going to sit here and allow a continued misinformation campaign from other parties confuse investors *when I have an officer of the Court appointed by me going through the numbers and now giving me an affidavit from DSI*, and they're telling me this is a gross, quote, gross mischaracterization of the financials.

(*Id.* at 34–36.) (Emphasis added.)

Finally, after giving the Receiver a months-long head-start within which to unilaterally

review and opine on CBSG's company financials and make inaccurate claims about Defendants, and then at times ignoring, muting, and denigrating Defendants for rebutting these claims, the Court challenged Defendants to provide a sworn CPA report,[5] with verified numbers, using the same financial data as used in the DSI Report to "see if any of the theories that have been repeatedly floated out by Defense Counsel every time I get a Receiver status report, are rooted in actual math." (*Id.* at 37.) The Court pledged to address any errors identified in the DSI Report by a Defense expert:

> *[L]et's get the same data in the same room with the Defense expert so that if there's a true problem with the methodology we can figure this out*. If there's something that Mr. Sharp is missing, if there's something that he wasn't aware of that is a collection prong for the benefit of investors, *let it be flagged by a Defense expert* or maybe some minutiae in the data that may have been missed because we all know it is a lot of numbers, a lot of data over several years, mistakes happen.

(*Id.* at 72.) (Emphasis added.)

4. The Glick Report and May 2020 Status Conference

a. <u>The Glick Report, April 15, 2021 (DE 535)</u>

Defendants met the Court's challenge to refute the Sharp Report with a sworn report by a credible, nationally recognized CPA. (*See* DE 535-1, Glick Report, DE 535;[6] DE 535-2, CV of Joel Glick). Using the same accounting records DSI reviewed, which finally had been made available to the Defense, Mr. Glick concluded that the Sharp Report applied a methodology that was fundamentally flawed and misleading, contrary to GAAP principles, and reached specific conclusions that were simply false. (DE 535) In other words, after the Court had repeatedly characterized Defendants' objections to the Receiver's characterizations of CBSG's financial condition as, among other things, "misleading" and "spin," Mr. Glick's analysis revealed that it was the Receiver's declarant who had misled and spun and engaged in a biased and flawed assessment of the company.

Finally challenged on the facts, the Receiver defensively acknowledged, for the first time, that the DSI Report was never "intended to serve as an expert report with respect to the underlying

[5] The Court's bias was further evident in the different bar he set for Defendants and Receiver: although Mr. Sharp was not a CPA, the Court challenged the Defendants to provide a rebuttal report with verified numbers prepared by a CPA.
[6] DE 535 is entitled: "Defendants' Joint Response to the Receiver's Quarterly Status Reports Dated December 13, 2020 and February 1, 2021."

action by the SEC" but, rather, was merely intended to provide "preliminary findings." (DE 577 at 14) (Receiver's Quarterly Report, May 3, 2021.)

b. The May 20, 2021 Conference

Notwithstanding its pledge to reassess the DSI Report for "problems with [its] methodology," or other mistakes brought to light by the Defense Report (Dec. 15 Status Conf., T. at 72), the Court engaged in no such reassessment or reevaluation and simply shrugged off the entire incident as "old ground." (May 20, 2021 Status Conference, T. at 36.) ("May 20 Status Conf.") Instead, the Court doubled down on its unilateral approach and reminded the Defense that these conferences were not intended for them to speak at all.

> I am [ ] not only [in] receipt of the [Sharp] report, but I also received and reviewed what I guess could be called the competing audit, for lack of a better word. I did review that independently. We're not really here today to argue anything on the merits of the case. I just want to just see how things are going in terms of the receiver, its collection efforts . . .

(*Id.* at 10.) Even after a credible sworn report analyzing the same financial data had been produced that refuted the Receiver's account and pointed out errors in its and DSI's accounting methodology, the Court dismissed the Glick Report as irrelevant to the Receiver's duties and declared that it would not alter the Court's view of CBSG's financial condition. Rather, the Court would consider the relevance of the Glick Report only much later, and only as to the SEC's allegations, and only if the report met the evidentiary standards of an expert report:

> We're not going to argue the merits, I just want to be very clear. The Court did look at what is really an expert issue. And that is the independent audit that's being conducted on the Defense side that I noted and I carefully studied and then I saw the somewhat brief response because the receiver, I think, appropriately did not want to get into a tit-for-tat on that issue because that's not really what the receiver reports are for, that's more of an expert issue down the line, and we'll get to that eventually. . .
>
> I think that there's some concerns there that are better left for a substantive hearing down the line, whether that's done in a *Daubert* context later perhaps or if it's just something that we do it *in limine*, but for now, that report is really not the issue of today's status. I just want to know how we're doing on trying to get our investors' money. I mean, I hate to be so blunt, but that's what matters to me and you guys on the investors that are listening, you have seen me expand the receivership. . .

(*Id.* at 14.)

The Court then allowed the Receiver to make an approximately three-hour long PowerPoint presentation, complete with exhibits, *not a slide of which the Defense had ever seen*, that went directly to the merits of the SEC case, including allegations about the Defendants' underwriting and use of investor proceeds. (*Id.* at 16–28, 44–96.)

The Defense objected to the Receiver's presentation and reminded the Court of its ruling on December 15, 2020 requiring the Receiver to file any papers it would rely on 14 days before any subsequent conference. (*Id.* at 28, 33, 81; Dec. 15 Status Conf., T. at 69–70.) Recognizing the importance of giving Defense Counsel notice to avoid another "gotcha" conference for which it was unable to prepare, the Court had issued a clear ruling in December:

> Now, to your earlier point about timing, I will pledge this to all of the Defense lawyers who are concerned about this that in the next setting that I have for a status conference, *my paperless order will have a deadline by which to submit any documents to be considered* at *the status conference, and I will do that with enough time so that if the receiver is submitting something for my review, that what we make sure happens is everyone sees that with enough time to file a response that I can digest before the status*. So going from here on out, I can tell you that I agree with you a hundred percent. *So that we don't have any sense of a gotcha or an inability to prepare, what we're going to do is we're just going to have a drop-dead deadline for anything you want to us discuss well before the actual status conference.* And I think if we do that, this won't happen again…

(*Id.* at 71.) (Emphasis added.)

Despite its December 15 ruling that "any documents to be considered at the status conference" would have to be filed 14 days beforehand to prevent another "gotcha" moment, the Court stated it was actually *not* interested in hearing Defense Counsel's view of the Receiver's presentation at the May hearing. (May 20 Status Conf., T. at 30.) The Court explained that due process was not at issue, even though the Court was listening to unrebutted claims suggesting that Defendants failed to use appropriate underwriting and misused investor proceeds, because the Court was making no rulings, the matter was not set for a "bench trial," and the case was not presently before a jury. (*Id.* at 37–38). Finally, it added that even if Defense Counsel had been given notice of the Receiver's presentation and responded, it would not have changed anything:

> If you wanted to put a rebuttal position out there, but there's not a situation where *had this PowerPoint, for example, had been advanced to you ten days ago that it would have changed anything today, because the only thing I'm going to hear today is I want to hear what they've found as an arm of the Court*, and if you want to file something after today that takes issue with these things or points out, as you believe, that the investors aren't getting a fulsome picture, you can point out what the issues

> are, I have no problem with that. I won't ask anybody to have to answer it, but if the SEC respond they may. I would not have the receiver spend time on that because I just don't want -- I want them to be focused on what they need to be doing, not in that litigation front.

(*Id.*) The Court, in fact, made clear that oppositions to the Receiver's filings—including Defendants' appeal of the expansion of the Receivership order—were nothing more than a "drain[]" on the Receiver's resources (*id.* at 31), and said, "I just don't know why in this status hearing I would be entertaining your version of events." (*Id.* at 38).

III. MEMORANDUM OF LAW

1. STANDARD OF REVIEW

A. The Code of Conduct for United States Judges

This Circuit maintains the position that "[t]he guarantee[s] to the defendant of a totally fair and impartial tribunal, and the protection of the integrity and dignity of the judicial process from any hint or appearance of bias is the palladium of our judicial system." *See United States v. State of Alabama*, 828 F.2d 1532, 1539 (11th Cir. 1987), *superseded by statute on other grounds by United States v. Florida*, 938 F.3d 1221, 1232 (11th Cir. 2019). Thus, to avoid any blemish on our judiciary, courts adhere to The Code of Conduct for United States Judges, Vol. 2A, Ch. 2, Canon 2 ("Judge Should Avoid Impropriety and the Appearance of Impropriety in all Activities"), which provides:

> **Respect for Law.** A judge should respect and comply with the law and should act at all times in a manner that promotes public confidence in the integrity and impartiality of the judiciary.

Given the significance of the appearance of impartiality to a fair tribunal, Congress passed a statute to adopt these principles. *See* 28 U.S.C. § 455(a).

B. Duty to Recuse Under 28 U.S.C. § 455(a)

The language in Section 455(a) is clear and unequivocal: "any justice, judge, or magistrate judge of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." *Id.* In this Circuit, the "test for determining whether a judge's impartiality might reasonably be questioned is an objective one and requires asking whether an objective, disinterested, lay observer fully informed of the facts underlying the grounds on which recusal was sought would entertain a significant doubt as to the judge's impartiality." *See United States. v. South Florida Water Mgmt. Dist.*, 290 F. Supp. 2d 1356, 1359 (S.D. Fla. 2003) (citing

Parker v. Connors Steel Co., 855 F.2d 1510, 1524 (11th Cir. 1988)) (collecting cases).

Indeed, the concern over impartiality and need to promote confidence in the judiciary is so great that "what matters is not [just] the reality of bias or prejudice but its *appearance*." *Liteky v. United States*, 510 U.S. 540, 548 (1994) (emphasis added). Thus, recusal may be required even where "no actual partiality, bias, or prejudice for or against a party exists." *See South Florida Water Mgmt. Dist.*, 290 F. Supp. 2d at 1359; *see, e.g.*, *United States v. Kelly*, 888 F.2d 732 (11th Cir. 1989) (finding defendant was not required to show actual bias, because it was enough that "the average layperson would have doubts about any judge's impartiality" when considering comments made by judge).

The reason for this is "to promote confidence in the judiciary by avoiding *even* the appearance of impropriety whenever possible." *See Parker*, 855 F.2d at 1523 (quoting *Liljeberg v. Health Services Acquisition Corp.*, 486 U.S. 847, 860 (1988)) (emphasis added).[7] As such, "section 455 does away with the old 'duty to sit' doctrine and requires judges to resolve any doubts they may have *in favor* of disqualification." *See Kelly*, 888 F.2d at 745 (emphasis added); *see also In re Boston's Children's First*, 244 F.3d 164, 167 (1st Cir. 2001) ("if the question of whether § 455(a) requires disqualification is a close one, the *balance tips in favor of recusal*") (citations omitted) (emphasis added). Thus, once the standard is met, "the judge should disqualify himself despite his subjective belief in his impartiality."[8] *German v. Fed. Home Loan Mortg. Corp.*, 943 F. Supp. 370, 373 (S.D.N.Y. 1996).

Moreover, the amount of time a Court has presided over a particular case is not dispositive. *See South Florida Water Mgmt. Dist.*, 290 F. Supp. 2d at 1361 (rejecting the opposition's argument that the Court should deny the motion for recusal because the Court had years of experience overseeing the case and holding that "the Court cannot find . . . precedent in which knowledge and understanding regarding a case is a factor in considering a § 455(a) motion.").

2. ARGUMENT

[7] *See also Dobson v. Camden*, 502 F. Supp. 679, 680 (S.D. Tex. 1980) (explaining that "this standard is broad enough to require recusal not only where partiality is in fact present, but also where only the appearance of partiality is present) (citations omitted).

[8] *See Liljeberg*, 486 U.S. at 858 (1988) (explaining how Congress amended Section 455 to replace the previous subjective standard with an objective test); *In re U.S.*, 441 F.3d 44, 65 ("The judge does not have to be subjectively biased or prejudiced, so long as he *appears* to be so") (citation omitted) (emphasis added); *United States v. Fifty-One Items of Real Prop.*, No. CIV-92-1155, 1998 WL 36030318, at *2 (D.N.M. Sept. 14, 1998) ([I]n applying § 455(a), the judge's actual state of mind, purity of heart, incorruptibility, or lack of partiality are not the issue.") (Citation omitted.)

Recusal is Required Under Section 455(a) Because the Court's Impartiality Can Reasonably be Questioned.

THE COURT: "I don't need another view, *your view*, of the financials."

(Oct. 7 Status Conf., T. at 122.) ("Emphasis supplied.)

The Court has repeatedly made clear during status conferences in which the Receiver has cavalierly accused Defendants of wrongdoing—including wrongdoing alleged by the SEC—that it has no interest in considering the Defendants' views in opposition to the Receiver. Time and again, the Court reminded Defense Counsel that its arguments constituted nothing more than "spin"—an "alternate reality" from what the Court evidently accepted as reality—the Receiver's version of the events. (Dec. 15 Status Conf., T. 32-–33.) The Court's rationale was consistent and clear: because the Receiver is an officer of the Court, his claims, even those that mirror the SEC's allegations, are unassailable and the Defense's countervailing view must be false:

> *[H]ow can I shut this down* because I'm not going to sit here and allow a continued misinformation campaign from other parties confuse investors *when I have an officer of the Court appointed by me going through the numbers and now giving me an affidavit from DSI*, and they're telling me this is a gross, quote, gross mischaracterization of the financials.

(*Id.* at 34-–36.)

However, while the Receiver may be an officer of the Court, (*Id.* at 14), the Court cannot tether itself so closely to the Receiver that it fails to consider the possibility that the Receiver's claims—particularly those that impugn the Defendants and their company—could be mistaken. The Defendants' fundamental right to a neutral and detached judge supplants the Court's sole reliance on the Receiver, or the appearance of it, particularly on matters at issue in the litigation. "A fair trial in a fair tribunal is a basic requirement of due process." *Caperton v. A.T. Massey Coal Co., Inc.*, 556 U.S. 868, 872 (2009) (citing *In re Murchison*, 349 U.S. 133, 75 S.Ct. 623, 99 L.Ed. 942 (1955)).

> "This most basic tenet of our judicial system helps to ensure both litigants' and the public's confidence that each case has been fairly adjudicated by a neutral and detached arbiter. An appearance of impropriety, regardless of whether such impropriety is actually present or proven, erodes that confidence and weakens our system of justice."

See Hurles v. Ryan, 650 F.3d 1301, *opinion withdrawn and superseded*, 706 F.3d 1021 (9th Cir. 2013), *opinion withdrawn and superseded on other grounds*, 752 F.3d 768 (9th Cir. 2014).

This principle applies with equal force when a receiver or other court-appointed individual is the subject of the apparent bias. *See, e.g.*, *Wachovia Bank v. Tien*, No. 04-20834, 2011 WL 2111787, *1 (S.D. Fla. May 26, 2011) (granting recusal of Judge where the Judge and Receiver were partners at the same law firm and explaining that "although a receiver or special master is not technically a *party*, the Federal Rules of Civil Procedure incorporates the recusal standard from 28 U.S.C. § 455 for special masters) (emphasis in the original). Thus, when the Court appears to favor one side over the other—whether the favored party is a receiver or a party—significant doubts arise as to its impartiality, and the Court must recuse itself. *See In re U.S.*, 441 F.3d 44, 68 (1st Cir. 2006) (granting a motion for recusal where the judge's conduct appeared to have been against the government and in favor of the defendants).

Here, a lay observer would entertain significant doubts as to this Court's impartiality given its stated preference for the Receiver's view of the facts over that of the Defendants. Indeed, as explained below, lay observers—investors observing these conferences—openly expressed such doubts. Examples of the Court's unreserved acceptance of the Receiver's untested representations alleging Defendant malfeasance (over their objections), many of which are at issue in the Complaint, abound. The SEC has alleged that Defendants engaged in a scheme to defraud based on representations regarding, among other things, CBSG's underwriting practices, the financial condition and success of the company, and Defendants' purported use of investor proceeds. (DE 119, Amended Complaint.) Nevertheless, the Court adopted the Receiver's view of CBSG's "poor" underwriting (Oct. 7, 2020, Status Conf., T. at 42-–43; May 20 Status Conf., T. at 16-–28, 44-–96); default rate (Oct. 7 Status Conf., T. at 13-–14, 39, 43); and use of investor proceeds (*Id.* at 39-–41), among other allegations raised in the Amended Complaint. Not surprisingly, after hours of these unrebutted presentations, the Court began to express open support not just for the Receiver, but the SEC's case: "… this was never the kind of business that was generating *what investors were led to believe, which is partly why registration concerns were red flags for the SEC*." (Oct. 7 Status Conf., T. at 40–41) (emphasis supplied).

More troubling still, the Court unreservedly embraced multiple presentations by the Receiver and a third-party vendor, DSI, accusing Defendants of operating a Ponzi scheme, something even the SEC has not alleged. This occurred repeatedly under circumstances where

Defendants were not given a meaningful opportunity to respond. At times, Defendants were even instructed not to respond at all because, from the Court's perspective, the Receiver's presentation was unassailable even if it disagreed with the SEC's view of the evidence:

> I was told by the SEC that *it was not a Ponzi scheme at the time*, that they were uncertain . . . [and] the DSI Report goes to great lengths not to use that term. But looking at the way the snapshot that DSI has prepared. . .under protest by Defense Counsels who feel that it is a flawed methodology, but we have to remember that *this is a conversation between me and my receiver, an officer of the Court, and his due diligence and what it has generated in terms of reports for me to digest what is going on the ground in this business* and in all the related Par Funding businesses. It seems to me, based upon the report that some of the payouts or the funds that investors were receiving were essentially generated or the product of new money coming into these investments *that we maybe have had a sea-change in the true nature of this business* and that it is less about factoring and due diligence on loans, and more about taking from new investors to pay old investors. . .
>
> [The DSI Report] . . . makes it clear that *this was not a self-funding operation*, meaning this operation could not, regardless of COVID-19, regardless of the SEC's involvement, that *this was truly not a self- engineered or self-funding enterprise, it thrived off new money being put in from investors*.

(Dec. 15 Status Conf., T. at 14-–15.) (Emphasis added.)

The Court's use of the status conferences (via Zoom) to hear from the Receiver, and only the Receiver, became so pervasive that even some investors openly questioned the Court's partiality in the accompanying Zoom chat room:

> THE COURT: . . . I want to be very clear. Investors that are commenting right now that this Court is compromised, or that this Court has a problem with being fair and impartial, you know, I am disappointed that investing public would feel that way…

(May 20 Status Conf., T. at 101.)

And, when the Defense *was* given an opportunity to speak, the Court made clear that it had no intention of considering their view of the facts, and on this point, did not mince words:

> [Your objection] presupposes that the Court is interested in entertaining argument from both sides, which I'm not.

(Dec. 15 Status Conf., T. at 30.)

To be clear, the issue is not whether the Receiver is right or accurate in his representations, but the appearance of partiality created when the Court embraces "its" Receiver's claims before Defendants are given a meaningful opportunity to respond—particularly when those claims overlap with the SEC's allegations. During the May 20 status conference, Defense Counsel

objected that the Receiver's presentation went far afield of merely informing the Court on collections and devolved into more allegations of wrongdoing that overlapped with the SEC's allegations, which violated the Court's December 15 *ore tenus* ruling that "any documents to be considered at the status conference" be filed 14 days before the conference. (May 20 Status Conf., T. at 28; December 15, 2020 Status Conf., T. at 69-70). Despite its acknowledgment on December 15 that notice was necessary to allow the Defense to prepare, to avoid another "gotcha" moment, the Court allowed the Receiver to continue with his presentation in clear violation of its own Order. (*Id.* at 71.)

And while the Court has indicated that it has not made findings and that the Receiver's Reports have not "cloud[ed] the Court's view" (May 20, 2021, Tr. Status Conf., T. at 38), it is required to maintain impartiality during every hearing and every conference, every step of the way, regardless of whether it is issuing a ruling. *See SEC v. Collector's Coffee, Inc.*, No. 19-CV-4355, 2020 WL 8614089, at *3 (S.D.N.Y. Dec. 9, 2020) (granting a motion for recusal to "avoid any appearance of impropriety" where, even though no conflict had yet occurred, there was the possibility that the Court *would have been required to rule* on whether an asset freeze order prohibited the defendant from pursuing a malpractice action against the Court's former law firm) (emphasis supplied). Moreover, despite this Court's assurances that its view of the case has not been "clouded," the Court has repeatedly expressed support for and admitted it has been influenced by the Receiver's functionally unrebutted presentations:

- "The money that they were getting and the loans… may not have been on the up-and-up as much as had been advertised." (Sept. 8 Status Conf., T. at 46.)

- "[Defendants] have painted a "rosy picture" of this Par Funding operation, that I think the numbers, as they start to trickle out, don't support. And this is a perfect example of that with the [DSI] report today." (*Id.* at 47.)

- "I think it's important that we understand that the underlying financials were not only *not as advertised*, but it looked like *a lot of these defaults were already on the books* in terms of these confessions well before the pandemic grinded some of these businesses to a halt. (Oct. 7 Status Conf., T. at 14.) (Emphasis added.)

- "…the way I see it is McElhone has a piece of one of these entities, who has defaulted and has cut the deal, whether it's Kingdom Logistics or otherwise. Now, what ends up happening is you're making a loan, you're repaying the loan, but *guess what? She's loaning money to an entity she already owns a piece of. She's essentially lending money to herself or to an entity she has an interest in.* And so when you add that level to it, plus the fact that they are loaning as you're taking

> repayment, *it is a fiction. It is an absolute fiction* [Par] was making or generating 1.2 or 1.5 million dollars a day in repayment of merchant cash advance loans. *We have to eliminate this figment of investor imagination*, because everyone here thinks that this all came to a halt when the SEC, the receiver, and the Court got involved. And what I'm hearing is that there's default judgments and consents pre-COVID. And the way in which the math worked on at least the top 10, which is half the portfolio, *this was never the kind of business that was generating what investors were led to believe, which is partly why registration concerns were red flags for the SEC*." (*Id.* at 40–41.) (Emphasis added.)

- But looking at the way the snapshot that DSI has prepared. . .under protest by Defense Counsels…*[i]t seems to me, based upon the report that some of the payouts or the funds that investors were receiving were essentially generated or the product of new money coming into these investments that we maybe have had a sea-change in the true nature of this business and that it is less about factoring and due diligence on loans, and more about taking from new investors to pay old investors*." (Dec. 15 Status Conf., T. at 14–15).) (Emphasis added.)

The record is replete with examples of statements made by the Court accepting the Receiver's view that Defendants engaged in poor underwriting, misrepresented the default rate and financial condition of the company, and even engaged in a Ponzi scheme, all before Defendants were even given access to CBSG's financial and business records. During one such hearing in December, the Court even appeared to scold the SEC for not openly agreeing with the Receiver's now debunked Ponzi scheme claim. (*Id.* at 94-95.)

Given the Court's clear adoption of prejudicial representations made by the Receiver that intersect with the SEC case (and other alleged wrongdoing), and the displeasure the Court seems to direct toward anyone who objects to the Receiver's claims, a lay person would reasonably entertain significant doubts regarding future rulings touching on these issues. *Sentis Group, Inc. v. Shell Oil Co,* 559 F.3d 888, 904 (8th Cir. 2009) (citing *Liteky v. United States*, 510 U.S. 540, 555 (1994)) ("reassignment[9] may be necessary based solely on events transpiring in current court proceedings or on a court's statements or rulings where 'they reveal such a high degree of favoritism or antagonism as to make fair judgement impossible'") (emphasis supplied).

Shell Oil is instructive. There, the court found numerous instances of an appearance of partiality warranting recusal where the district court failed to provide the plaintiffs with a "meaningful opportunity to respond" to the defendants' lengthy presentation at a hearing;

[9] The court applied Section 455(a) standard to determine whether the court should order reassignment pursuant to 28 U.S.C. Section 2106. *Id.* at 904.

permitted the defendants to put on an hour-long PowerPoint presentation and then silenced the plaintiffs; and accepted as true only the defendant's mischaracterization of the issues surrounding the discovery orders. Because of the unmistakable appearance of partiality, the court held that "the reasonable man, were he to know all the circumstances, would harbor doubts about the judge's impartiality." *Id.* at 897, 904-905.

The similarities are striking. In addition to the numerous examples in the record where the Court failed to provide Defendants a "meaningful opportunity to respond," the Court has made it abundantly clear that on any issue raised by the Receiver, Defendants need not even weigh in:

> By the same token, you have to understand that Defense lawyers are not litigating against my receiver. *My receiver is an extension of me. It's an extension of the Court. I take my obligations as overseer and supervisor of the receiver operation very seriously*. . . . but *a lot of what is being thrown against the wall here to me is not verifiable, it's not backed by numbers*.

(Dec. 15 Status Conf., T. at 32–33) (Emphasis added.)

But even when the Defense did present the Court with verified numbers in the form of a sworn declaration of a nationally recognized CPA—the Glick Report—the Court dismissed it and advised Defendants that he preferred to simply "move on." (May 20 Status Conf., T. at 35-–36). The Glick Report—which the Court challenged Defendants to present—flatly contradicted the Receiver's claim that CBSG was financially unsound and unsustainable and explained that the DSI Report relied on improper methodology to assess profitability—a fact with which the Receiver did not even disagree. (DE 577 at 15.) And while the Court explained after the Glick report was filed that it preferred to move on and remain focused on recovering investors' dollars, it is undeniable that when the Receiver presented the Court with *its* DSI Report, the Court was more than willing to opine that CBSG operated as a Ponzi scheme based only on its review of their report. As far as Defendants know, the Court harbors that same opinion today.[10]

Again, the issue is not whether the Receiver was right or accurate in his representations, but the appearance of partiality created when the Court embraced his claims before Defendants were given a meaningful opportunity to respond—particularly when those claims overlapped with

[10] As this Court has itself recognized, "the Receiver acts under supervision of the court . . . for the court must independently approve the Receiver's legal and factual findings." *SEC v. Elliott*, 953 F.2d 1560, 1577 (11th Cir. 1992). Given this Court's penchant for adopting the Receiver's representations and disclosures as true and refusing to even consider opposing views challenging the Receiver's findings, even if such opposition is verified by an expert, a lay observer might also entertain significant doubts regarding whether this Court is capable of discharging that duty.

the SEC's allegations. And Defendants have been prevented from meaningfully responding in several significant ways. First, the Court has consistently given the Receiver unlimited time to present its claims and arguments while largely limiting the Defense to the final few minutes of these conferences and muzzling them when they attempt to interject an objection. Second, the Court has permitted the Receiver to withhold access to documents the Defendants needed to defend themselves from the very accusations being lodged against them by the Receiver. Third, even when the Defense has been permitted to speak, the Court has repeatedly made clear, both through its characterizations of the Defense's responses as "spin" and its express desire to "shut them down," that it does not appear interested in considering their views on matters raised by the Receiver, even when those matters intersect with the SEC's case. Fourth, during the May 20 hearing, the Court advised Defendants it is not even interested in affording them notice of the claims the Receiver plans to make at these status conferences, despite a prior ruling acknowledging that such notice was necessary to allow the Defense to prepare. (May 20 Status Conf., T. at 28; Dec. 15 Status Conf., T. at 69 –70). The Court then allowed the Receiver to continue with his presentation in clear violation of the Court's Order. (*Id.* at 71.)

Having failed to provide Defendants a meaningful opportunity to respond to the Receiver's claims of fraud and other wrongdoing, including allegations inextricably intertwined with the SEC's allegations, and embracing those claims as true, there can be no doubt that a lay observer would have reason to question the Court's impartiality. Indeed, this case presents the rare occasion where the objective and subjective meet: not only *would* a lay observer reasonably question the Court's impartiality, numerous lay observers—investors—actually *did* question the Court's impartiality. (May 20 Status Conf., T. at 101.) As in *Shell Oil Company*, recusal is necessary here to preserve the appearance and reality of impartial justice. *See Liljeberg*, 486 U.S. at 864 ("to perform its high function in the best way 'justice must satisfy the appearance of justice'") (citation omitted). If Section 455(a) requires disqualification in even a close case, it is necessary here. *In re Boston's Children's First*, 244 F.3d at 167 (1st Cir. 2001) ("if the question of whether § 455(a) requires disqualification is a close one, the balance tips in favor of recusal").

IV. Conclusion

This motion affords the Court the opportunity to foreclose the possibility of actual bias by recusing itself to avoid even the *appearance* of bias. For the foregoing reasons, the Court should enter an order of recusal.

CERTIFICATE OF CONFERRAL

Pursuant to Local Rule 7.1(a)(3), the undersigned has conferred with all parties and non-parties who may be affected by the relief sought in this Motion. Counsel for the Commission and Receiver object to the Motion.

REQUEST FOR HEARING

Defendants respectfully request, pursuant to Local Rule 7.1(b)(1), that a hearing be scheduled as to the issues raised in this Motion. A hearing would allow the parties to more fully clarify and explain their arguments. Defendants estimate that the time required for the hearing would not exceed 60 minutes.

Date: June 23, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 23, 2021, a true and correct copy of the foregoing was served via CM/ECF on all counsel or parties of record.

By: /s/ Joel Hirschhorn
Joel Hirschhorn

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al,

Defendants.

DEFENDANTS' MOTION
TO DISCHARGE THE RECEIVER AND INCORPORATED MEMORANDUM OF LAW

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 13, 2021, a true and correct copy of the foregoing was served via CM/ECF on all counsel or parties of record.

By: /s/Joel Hirschhorn
Joel Hirschhorn

TABLE OF CONTENTS

INTRODUCTION

Defendants Joseph W. LaForte, Lisa McElhone and Joseph Cole Barleta, by and through their attorneys, respectfully submit this Joint Memorandum of Law seeking discharge of the Receiver for breach of his fiduciary duties to the estate and to CBSG's note holders. As shown herein, the Receiver promoted a fully discredited narrative about CBSG's financial condition to negatively influence this Court's view of CBSG and the Defendants, while it simultaneously destroyed a once profitable and self-sustaining business. Defendants request a hearing.

STATEMENT OF FACTS

I. THE HARD TRUTH FROM TWO GLICK REPORTS AND THE CLA AUDIT MATERIALS: CBSG'S PROFITABILITY AND FINANCIAL CONDITION WERE DEMONSTRABLY SOUND FOR YEARS BEFORE THE RECEIVER TOOK CONTROL OF CBSG IN LATE JULY 2020.

At the beginning of this case, this Court announced that the Receiver should not liquidate an ongoing business. (Aug. 4 status conf. at 72-73, 88; Aug. 17 status conf. at 45-46) The current record now shows unequivocally that CBSG (also referred to herein as Par Funding or Par), was a highly profitable, healthy ongoing concern – until the Receiver arrived. The Receiver has not preserved a profitable business; rather, he has taken a thriving, profitable business that employed over 70 people and utterly destroyed it. Further, the Receiver has argued that liquidation was unavoidable, claiming time and again that the financial condition of CBSG was a mirage, a failed business model that was systemically unprofitable at best, and a Ponzi scheme at worst.

As demonstrated by expert analysis, these claims were demonstrably untrue. And the Receiver knew or should have known it. The Receiver breached its obligations to CBSG and its noteholders by promoting inaccurate and false claims to mislead this Court and the public about the financial condition of CBSG. The Receiver used a false narrative to excuse its complete abandonment of the MCA business of CBSG – i.e., not funding a single new MCA deal since assuming control - and its liquidation of the merchant portfolio in violation of CBSG's lawful contractual rights.

For example, the Receiver also claimed that the merchant portfolio was difficult to collect by alleging misrepresentations and poor underwriting – claims that are untrue. It then requested that this Court seize Defendants' other assets, which he is now in the process of rapidly liquidating. In effect, the Receiver killed the profitable company which was readily capable of paying the

noteholders; falsely told the Court that the company was no good; and then urged the Court to let the Receiver take Defendants' personal assets to cover the extraordinary losses the Receiver alone caused. CBSG took in $393 million in merchant payments in 2019 and reported income on its CPA-prepared 2019 tax returns of $179 million; and took in $209 million in the first six months of 2020 (*see* CBSG Funding Analysis, 1/1/2013 – 6/30/2020, DE 106-1 at 6 (same as CBSG Receiver #000488270)). The company and the noteholders have since lost over $187,000,000 commencing with, and caused by, the Receiver's arrival in July 2020. (*See* Chart of Receiver Caused Losses, Exhibit A)

A. The CLA Audit Materials

On April 15, 2021, the highly reputable CPA firm of Berkowitz Pollack Brant ("BPB") prepared and issued the Glick Report, which analyzed 4.2 million transactions to determine, pursuant to GAAP, the financial condition and profitability of CBSG. The Glick Report, an unquestionably expert analysis undertaken by top experts in the field, concluded that CBSG was thriving and profitable. (DE 535)

On or about June 17, 2021, less than a month ago, the Defense received about 15,000 pages of materials relating to an audit commissioned by CBSG (the "CLA Audit Materials"). Specifically, in September 2019, CBSG engaged Clifton Larson Allen, LLP ("CLA"), one of the top eight accounting firms in the nation, to undertake a forensic audit of the company and its finances. (*See* Exhibit B, CLA Engagement Letter)[1] Approximately $200,000 had been paid for the audit which, in July 2020, was nearly complete. With a team of CPAs working steadily for months, CLA conducted a full-blown, top-notch deep-dive audit into CBSG's financial condition for the year ending December 31, 2018. (*See Id.*) By late July 2020, when the SEC filed this action, the audit was in its final stages and had advanced to CLA's Quality Control. It appears that the Receiver never requested that CLA complete its audit of CBSG for year ending 2018, even though it was nearly completed and paid for.

[1] As reflected in the engagement letter retaining CLA for the audit, CLA was retained to verify the models and profitability of CBSG. This included a thorough review of the company accounting systems, worksheets, merchant agreements, financial recognition methodology, tax guidance, bank/ACH processor verification, noteholder confirmation letters and cash flows from related parties. Confirmation letters would be sent to all related parties to verify the agreements in place and dollar amounts as represented in the company's accounting system.

The Receiver (and the SEC) clearly knew about CLA's audit for CBSG and that it was nearly complete.[2] Instead of using the almost fully paid-for and exhaustive audit conducted by CLA, the Receiver hired DSI to produce a non-CPA, non-GAAP-compliant, unqualified report at an estimated cost to CBSG and the noteholders of $500,000. (*See* DE 426-1, the "DSI Report") The CLA Audit Materials corroborate the Glick Report and contain further proof utterly refuting the Receiver's spurious narrative about the financial condition of CBSG.

Not only did CLA confirm that CBSG was profitable, CLA confirmed that the company's accounting systems and fraud controls were solid. CLA also verified the monthly Key Performance Indicator reports ("KPI Reports") that CBSG routinely and monthly provided to its noteholders for years. Thus, CLA confirmed CBSG's profitability and the accuracy of its accounting records. CLA also verified thousands of transactions reflected in CBSG's ledgers, and decisively ruled out inaccuracies or fraud in CBSG's financial records.

Although the Defense is still reviewing the 15,000 or so pages of the materials produced, the documents thus far reviewed show the following:

i. CLA found that 85% of CBSG's client merchants paid the contractual Right to Return (RTR) in a timely manner (*see* Exhibit E[3]);

ii. CLA nearly completed verifying all of the financial data contained in CBSG's monthly KPI Reports for the period January 1, 2013 - March 31, 2019 (Exhibit F[4]);

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[2] The Receiver's knowledge of the ongoing CLA audit is inescapable because James Klenk, CBSG's Controller and a CPA, began working directly with the Receiver and the SEC shortly after the filing of the Complaint. Klenk was the main point of contact with CLA with respect to the audit. CLA notified Klenk by email on July 31, 2020 that CLA was ceasing work on the audit due to the SEC action and was prepared to be rehired to finish it. (*See* Exhibit C, email entitled "Suspending work on the 2018 audit") The Defense advised in filings on August 4, 2020 that CLA and others had performed GAAP audits for CBSG in 2017, 2018 and 2019. (DE 84 at 8) In addition, billing records by the Receiver show that CLA files were reviewed on the same day as the December 15, 2020 court appearance at which the non-GAAP DSI Report was heralded as determinative. (*See* Exhibit D, containing extracts from billing records on the Receiver's website, parfundingreceivership.com)

[3] Exhibit E, #CLA0000012, is a CLA spreadsheet entitled "Aging" and indicates the amount of time by which account receivables were paid to CBSG in increments from 5 to 35-plus days. The final column shows that approximately 80% of AR were on time or overdue by less than 10 days. Nearly 85% were less than 35 days past due.

[4] Exhibit F, #CLA0000304.xlsx, is the first few pages of an 1,000-plus page Excel spreadsheet showing the completed verification work performed by CLA for CBSG's KPI Reports. It contains the spreadsheets provided to investors and hundreds of pages of worksheets deconstructing and

iii. CLA completed verifying CBSG's exposure rate of 1.3% reflected in the KPI Reports (*see* Exhibit F at 1); and

iv. CBSG successfully passed a thorough and rigorous examination of its fraud and financial controls in which no improprieties were detected. (Exhibit G[5]).

The findings of CLA should not surprise anyone, since they are consistent with numerous other CPAs who examined the financial condition of CBSG.[6] Among those CPAs, of course, is the firm of Berkowitz Pollack Brant firm ("BPB"), which prepared both the Glick Report (DE 535) and the Glick KPI Report, discussed *infra* and annexed hereto as Exhibit H. BPB's entirely independent and separate analysis of CBSG is corroborated by, and corroborates, the findings of CLA.

B. The Glick Report

While the Defense just recently obtained the CLA Audit Materials, we have long known that the Receiver was peddling a false financial narrative of CBSG which was ultimately embodied in the Declaration of Bradley Sharp dated December 13, 2020 (DE 426-1)(the "DSI Report"). The Defense, using the same data but meticulously analyzing 4.2 million transactions -

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analyzing that data to confirm the accuracy of every entry on CBSG's KPI Reports. This verification includes the column reflecting a total exposure rate of 1.3%.

[5] Exhibit G #CLA0000760, is a completed Question and Answer checklist completed by CLA assessing the quality of CBSG's business practices and internal controls, i.e., for accounting systems and funds wiring, to verify that appropriate systems are in place and that fraud risks are absent.

[6] Defendants' retention of CLA in September 2019 was only part of CBSG's undertaking pre-Receivership to provide substantial verification of its accounting. Years before retaining CLA, CBSG hired Rod Ermel and Associates in 2014, an accounting firm out of Colorado Springs which specialized in the MCA business. The Ermel firm not only prepared tax returns, it actively monitored the transactions through a live access portal to Par Funding's accounting server, letting their accountants work on the accounting files at the same time as staff in FSP's Philadelphia office. And CBSG engaged respected accounting firms to conduct independent financial audits. Additionally, sophisticated purchasers of Par notes also directed their own accounting personnel to examine the books and records and conduct due diligence. No firm or examiner, and certainly not James Klenk, CBSG's Controller, and a CPA, ever suggested financial impropriety or that Par's KPI's were inaccurate.

which the DSI Report failed to do - responded with the April 15, 2021 Glick Report (DE 535).[7] The Glick Report methodically refuted the fundamental claims of the DSI Report and the Receiver about the profitability and sustainability of CBSG. The Glick Report used correct GAAP accounting methodology required to calculate and file taxes; not the DSI Report's non-GAAP compliant cash basis, which is worthless. And the Glick Report analyzed the entire CBSG merchant portfolio, not the DSI Report's extrapolation from a nonrepresentative subset (the so-called "Exceptions Portfolio"), that excluded half of the merchant portfolio. Among the conclusions of the Glick Report:

i. CBSG was highly profitable for years, earning hundreds of millions of dollars in top-line revenue between 2012 and 2019. (DE 535-1 ¶¶ 88, see ¶¶ 50-59)

ii. CBSG's factoring, i.e., the profit made on every dollar used in funding of merchant cash advances ("MCA"), was highly profitable for years, resulting in a blended factor rate of 1.399, determined by reviewing all MCA deals that CBSG funded. (*Id.* ¶¶ 28, 82-87)

iii. CBSG's use of "reloads" – providing new funds to existing merchant clients which were used to pay down their debt – meant higher fees, resulting in higher revenue for CBSG. The DSI Report's claim (unsupported by data or an understanding of GAAP accounting), that CBSG's reloads were "excessive" or somehow an indication of a merchants' inability to repay, was baseless. (*Id.* ¶¶ 18, 64-66, 73-86) Moreover, only 14.4% of CBSG's merchants received reloads. (*Id.* ¶ 73 chart)

iv. Investor funds were not used to pay consulting fees to Defendants. (*Id.* ¶¶ 31-37)

v. CBSG's underwriting had a very conservative approval rate of 17 percent for underwriting applications, proving strong and stringent underwriting standards. (*Id.* ¶¶ 39-42)

(*See* DE 535-1; DE 535 at 3-4)

C. The Glick KPI Report

In addition to a detailed analysis of 4.2 million CBSG transactions for the April 15, 2021 Glick Report, the BPB CPA accounting firm has also completed an in-depth analysis of the KPI Reports issued by CBSG and sent monthly to noteholders. The results of that study powerfully corroborate the Glick Report and the CLA audit, as well as every CPA who has examined the

[7] The Glick Report is further corroborated by the testimony of Joe Cole dated June 2, 2021 and the testimony of Brett Berman, Esq., former counsel for CBSG, dated June 8, 2021. (*See* Berman Depo. T. 197, 201, 206-7, 213-215, 228-229)

records of CBSG. The BPB KPI study fully confirms that the KPI Reports issued by CBSG were accurate. In fact, BPB calculates a slightly lower exposure ratio than CBSG did, coming in at about 1.1%. *See* BPB KPI Report dated July 13, 2021 (Exhibit H). Just as critical, BPB's KPI Report confirms the data metrics for numerous CBSG financial parameters as accurate and verified. (*Id.*)

In no uncertain terms, this is hard, determinative and undeniable proof that CBSG's financial model was rock solid, profitable and thriving.[8] No one should be surprised as these reports simply corroborate CLA's work and the view of every CPA who has closely examined the business and analyzed it in accordance with Generally Accepted Accounting Principles (GAAP). What this means, of course, is that the financial narrative long peddled by the Receiver to the Court and public, was grossly inaccurate and fundamentally misleading.

D. The Discharge of the Receiver is Warranted and Overdue

The two Glick Reports and the CLA Audit materials now provide simply irrefutable proof that CBSG was -- just as the Defense has consistently maintained -- a highly profitable business that paid its investors like clockwork and, with extraordinary underwriting, earned nearly $1.4 for every dollar of merchant funding. CBSG held total assets of nearly $600 million, of which $420 million were accounts receivables - more than enough to repay its noteholders in July 2020. The Receiver took a great company, misled this Court and the public about its financial condition, and drove it into the ground while charging millions in fees. To justify its destruction of this business, the Receiver made ridiculous claims that made no sense (i.e., that CBSG earned only $6.6 million on a cash basis), which are directly refuted by the CLA Audit Materials and by the Glick Report and the Glick KPI Report. This isn't "spin" – these are the verified, professionally examined financial facts analyzed by CPAs in accordance with GAAP.

Further, the Receiver's inaccurate claims have invariably poisoned the Court against the Defendants and the company; have led the Court to make rulings, including the Receivership Expansion, on a mistaken and inaccurate factual record; and have kept the wholly unnecessary destruction of CBSG on course - all to the grave detriment of the noteholders, other stakeholders and Defendants. The Receiver should be discharged immediately.

[8] Obviously, the verified numbers of CBSG would not be possible without rigorous and sophisticated underwriting. Proof of that enormous underwriting effort, and its prowess, is contained in the 750 GB ConvergeHub database which, as far as the Defense can tell, was never examined by the SEC prior to the commencement of this action.

II. FROM THE START, THE RECEIVER PRESENTED INACCURATE AND MISLEADING INFORMATION TO THE COURT AND PUBLIC ABOUT CBSG'S FINANCIAL CONDITION, POISONING THE COURT AGAINST THE DEFENDANTS AND THE COMPANY, AND RESULTING IN RULINGS ADVANTAGING THE RECEIVER AND DESTROYING THE COMPANY

A. The SEC Brought an Omissions case; Not a Case Alleging Financial Malfeasance

In bringing the complaint, filed *ex parte* on July 24, 2020, the SEC did not allege financial malfeasance of any kind. (DE 1)(The "Complaint") Rather, the SEC accused Defendants of fraudulent "misrepresentations and omissions" connected to the "offer and sale of [Par Funding] promissory note," and claimed that the sales of the notes violated the registration requirement of Section 5 of the Securities Act of 1933. (Complaint at ¶¶ 48, 50, 286-89, DE 4 at 3-4; *see* DE 14 at 79.) Alleged misrepresentations and omissions "form the basis of this action." (Id. at ¶ 8)[9] The SEC did not claim that the alleged nondisclosures had placed investor assets at risk or that investors had lost money.[10]

Nor did the SEC allege that Defendants were engaged in a Ponzi scheme. Early on, this Court shared that view, repeatedly stating that this was, essentially, a case about disclosure and regulatory violations - not financial malfeasance. (Aug. 4 status conf. at 72, 73, 75) On August 17, 2020, the Court stated: "I'd like to try to see if we can try to recover and get this business back on the right side of the law going forward without any regulatory concerns and not run afoul of the SEC again . . . many of the investors were getting their monthly payouts and were getting their principal returns at the end of the 12-month returns. So there was some success . . ." (Aug.17. status conf. at 45-46; *see also* August 18, 2020 P.I. hearing at 154-156: "to some extent maybe even pre-coronavirus, pre-pandemic this was an extremely profitable enterprise.").

[9] The purported omissions and misrepresentations included the alleged: failure to disclose a criminal record of Joseph LaForte; understating Par's default rate for its MCA business; failure to conduct onsite inspections as part of the underwriting process; and the claim that investor funds were used to pay consulting fees.

[10] While the SEC has the power to seek emergency injunctive relief in rare circumstances (*see* DE 1 at ¶ 37, DE 14 at ¶¶ 49-50), it is profoundly striking and disturbing that the SEC chose this course of action in this case.

B. The Receivership Was Granted with Promises of No Liquidation and Over Defendants' Warnings that CBSG's Business Operations would Suffer – And So Would the Noteholders

Simultaneous with its *ex parte* filing of the Complaint, on July 24, 2020, the SEC moved for a TRO and the imposition of a Receivership, claiming that "the interests of investors would best be served" by appointing a Receiver to "determin[e] how to resolve or continue the businesses, locat[e] assets and investor funds, and [conduct] accounting and asset management." (DE 4 at 2-3)[11] Defendants expressed grave concern that the wholesale replacement of Par's staff with a Receivership would inevitably lead to the demise of a successful business engaged in lawful activity and the loss of noteholder's funds. (DE 19 at 3) The Court granted the SEC's motions on July 27, 2020. (*See* DE 36) Defense counsel, Fox Rothschild LLP, argued that "that the so-called 'temporary' relief that the SEC sought to impose" was "not temporary," would be "unnecessarily destructive of Defendant's legitimate businesses" and warned that such "will lead to the liquidation of Defendants' legitimate businesses" as well as the noteholder's interests. **(**DE 43 at 3; *see id* at 3-6**)**

C. The Receiver Immediately Began Dismantling CBSG's Business

The Receiver's destruction of CBSG's business and finances – and the noteholders' interest and security - began immediately. CBSG was, at the time, one of the largest MCA companies in the United States. Since its inception in 2012, the company had grown to 75 or more employees by 2019, and had advanced nearly $1.1 billion to merchants nationwide, and collecting over $1.1 billion while also paying noteholders principal and interest, operational costs and expenses, and amassing accounts receivable in excess of $420 million. (*See* DE 84 at 6, DE 426-1 at ¶¶ 1, 11-12)

On the afternoon of July 28, 2020, the Receiver caused the immediate dismissal of all the employees of Par with none permitted to enter the premises. The Receiver had no idea (and could have no idea) how to manage this extremely complex operation. Thousands of merchants around the country were left without any communication with Par, crippling the ongoing viability of Par's business operations. (*See* DE 84 at 6) The Receiver further advised that Fox Rothschild,

[11] The SEC represented, erroneously, that CBSG had less than three million dollars in its bank accounts when the Complaint was filed. (Aug. 4 status conf. at 78) The Receiver later acknowledged that CBSG's cash on hand before the Receivership was between $20-25 million dollars. (September 8, 2020 status conference ("Sept. 8 status conf.") at 64-65)

responsible for critical litigation and collections work, would be terminated from representing Defendants' businesses. (*See id.*)

As a result, merchant payments to Par stopped abruptly with the Receivership. (*See* DE 249 at 2) The damage posed by the Receiver's actions was immediately evident as CBSG lost approximately $6,592,991.59 in ACH payments during the Receiver's very first week, July 29, 2020 through August 4, 2020. (*See* DE 84 at 11) Fox Rothschild endeavored to resume the daily ACH draws - which in July 2020 averaged about $1.5 million per day - and to continue servicing the nearly $500,000,000 in existing MCA deals so that the investors could be repaid. (DE 84 at 7) But Fox Rothschild's efforts to protect the business and the investors was rebuffed. On Friday, July 31, 2020, the Court expanded the Receiver's authority. (*See* DE 56) CBSG's efforts to enforce its contracts and foreclose on collateral for the protection of its noteholders were ended.[12]

At the hearing on August 4, 2020, the Court dismissed Defendants' fears that the Receivership had already embarked on a path leading to liquidation and urged the Receiver to "get in there and do their job" because "the whole purpose of the receivership is to try to save what we can and not leave everybody on the street." (Aug. 4 status conf. at 59, 74-75) The Court emphasized that "no one here [is] seeking an end game of liquidation." (*Id.* at 88)(Emphasis added) On August 6, 2020, the Receiver moved to engage Development Specialists, Inc. ("DSI") as a financial analyst and operations consultant "to secure and analyze the assets . . . and ongoing operations of the Receivership Entities." (DE 101 at 3) The Receiver claimed that DSI's financial expertise was needed to "analyze the assets" of Par since the SEC's Complaint had alleged misrepresentations about Par's financial condition, including its default rate. (*Id.* at 3-4)

Defendants opposed the request, contrasting DSI's experience as mere liquidators, with the detailed, hands-on experience of Par's existing in-house staff, accountants and outside law firms and advisors. (DE 84 at 16-17) Defendants cross-moved for an Order directing the Receiver to immediately rehire Par's experienced employees, warning that the SEC and the Receiver "had no idea what it is doing" when it tossed out the 70 experienced employees of Par, only to be replaced

[12] The economic cost to Par and its noteholders by freezing all litigation cannot be overstated. For example, on the eve of the SEC's filing, Fox Rothschild had a $2 million settlement agreement from a merchant who had defaulted. That $2 million settlement was not executed.

by unfamiliar and untrained staff. (DE 106 at 1-2; DE 115 at 1) The request to hire DSI was granted on August 9, 2020. (DE 116)[13]

The Receiver was given expanded authority on August 13, 2020 (*see* DE 141), occasioning the withdrawal of Fox Rothschild as outside counsel. (*See* DE 138; *see* DE 100) The departure of Fox Rothschild left Par without any expertise litigating defaulted MCA payments – a significant source of revenue.[14] Defendants told the Court that "the Receiver [ ] candidly admits that he knows nothing about the merchant funding business. Investors are well aware of DSI's history…. the Receiver and DSI will take millions of dollars in investor money in fees while a once-thriving company deteriorates into oblivion…" (Opposition to the Preliminary Injunction, at 4; DE 148)

D. The Receiver Peddled a False Financial Narrative to Cast Blame on Defendants for its Destruction of CBSG and, in the Process, Poisoned the Court's View of the Case and of CBSG's Financial Condition.

Apparently to deflect blame for the financial ruin it alone was causing, the Receiver propagated a stream of gross inaccuracies about CBSG's financial condition to the Court and public. As the Receiver's filings and conference transcripts make clear, the Receiver claimed that the business of CBSG was not self-sustaining but just a mirage. The Receiver attributed the lack of profitability since the Receivership to Defendants' malfeasance and alleged deceptive accounting practices, rather than to the obvious liquidation that the Receiver and DSI alone were causing. Through its filings and during the course of hours-long conferences at which they alone could speak, the Receiver relentlessly filled the record with false assertions, smears and innuendo

[13] Defendants had provided a Proposed Action Plan with specific "Solutions to Stem the Damage and the Dissipation of Investor funds." (DE 115 at 7-9) Although the Court did not adopt the Proposed Action Plan, it directed the Receiver to examine the feasibility of implementing some or all of the recommendations. (DE 116 at 1-2)

[14] The removal of Par's litigation team resulted in immediate losses in every pending or imminent litigation, as there was no possibility of a court-authorized recovery for those defaults or settlements driven by litigation. All of those cases and pending settlement negotiations represent tens, if not hundreds, of millions of dollars in lost revenue. (*See* DE 249 at 2-3) Further, the cessation of litigation communicated to all of Par's merchants the simple truth that, for the first time in Par's history, they could fail to repay contractually obligated monies with little fear of repercussion.

about the financial wherewithal of CBSG, its profitability and self-sufficiency.[15] (*See generally* DE 630)

Ultimately, the Receiver placed reliance on the DSI Report which was objectively not competent to assess the financial condition of CBSG and used a grossly flawed and inept methodology.[16] Indeed, when confronted with the Glick Report filed on April 15, 2020, the Receiver shamefully demurred, claiming that DSI's analysis was never "intended to serve as an expert report" but merely issued to provide "preliminary findings." (DE 577 at 9; Receiver's Quarterly Report dated May 3, 2021)

The Receiver's inaccurate reports and claims about CBSG's true financial condition caused the destruction of millions of dollars in noteholder value and the expansion of the Receivership to all of the Defendants' assets on the untrue claim that CBSG did not have sufficient assets to fully compensate its noteholders. These baseless claims poisoned the view of this Court, from initially recognizing CBSG as an "extremely profitable enterprise" (August 18, 2020 P.I. hearing at 154) in which CBSG is "not taking from one to pay to the other" (Aug. 4 status conf. at 73), to the utter fantasy of a company supposedly verging on collapse and reliant on investor funds to survive.

i. The September 8, 2020 Status Report and Status Conference

DSI's September 8, 2020 Status Report stated that the Par MCA portfolio balance was $420 million, of which over $228,791,000 was the balance for the "top 10 merchant groups," and noted that this group was "approximately 54% of the gross MCA portfolio balance…." (DE 240-1 at 3)[17] Counsel for the Receiver then presented a string of allegations about these top 10

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[15] *See* the Receiver's status reports - DE 240, 305, 358, 358-1, 426, 482, 482-1, 535, 577, 577-1. In numerous filings, the Defense responded to the Receiver's false narratives and specific misrepresentations and falsehoods. *See, e.g.*, DE 106, 148, 249, 355, 401, 430, 493, 602, 632.

[16] In particular, DSI's nonsensical claim that CBSG had made a mere $6.6 million in profit since inception on a cash basis (DSI Report at ¶ 6), was irreconcilable with CBSG's tax returns, prepared by qualified CPAs for tax years 2012, 2013, 2014, 2015, 2016, 2017, 2018 and 2019, that reported millions of dollars in income ($179 million in 2019 alone, DE 430 at 2-3). Par's books and records have been pored over by perhaps a dozen CPA's, including in-house and external accountants, auditors and investors' representatives.

[17] The Receiver's first status report on August 20, 2020 did not include any financial data. (DE 180) The Receiver had already fired all of Par's staff, locked the office door and shut down the ACH bank accounts that processed the merchant receivables. The Receiver stated that DSI might restart collections "but only after the Receiver was assured of the legality of the merchant cash

merchants. (Sept. 8 status conf. at 42-44) The Defense heard these claims for the first time in open court and had no opportunity to respond. The Court was immediately persuaded of the dire implications of these claims. Suddenly, a company which, for eight years, had never missed an investor payment (save for two months in 2020 during early Covid), and paid investors hundreds of millions in interest and principal, and had not a single investor complaint, was now supposedly at risk. Based on the Receiver's claims, the Court advised Par's noteholders that the company's finances were in poor condition and that only the Receiver, not Defendants, was honestly disclosing the company's finances and, importantly, was capable of recovering for the investors. (*Id.* at 45-47) The Receiver's assertions were grossly inaccurate.

As the Glick Report and the Glick KPI Report make clear, DSI grossly misrepresented Par's purported overdependence on repayment from the Top 10 Merchants, as well as the likelihood of repayment from them. In fact, until the Receivership began, the company was profitable and sound.

ii. The October 6, 2020 Status Report and October 7, 2020 Status Conference

On October 6, 2020, the Receiver filed another status report prepared by DSI in which it asserted that CBSG's business model was financially unsound and that its revenue figures were "misleading." (DE 305) Revealing a total lack of accounting knowledge and expertise, the Receiver challenged the fact that CBSG had collected $1.5 million in daily MCA payments prior to the Receivership and suggested that "re-loaded" funds to merchants were used to repay existing balances due Par. (DE 305 at 5, 8-15) Under this baseless theory, the Receiver asserted that CBSG actually netted only $300,000 per day. The Receiver also suggested that the rise in confessions of judgments ("COJ") showed that Par was financially unsound (*see* DE 305 at 16-17), yet another clear indication that the Receiver had no idea what he was talking about.

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advance business…" (DE 240 at 3) The absurdity of this excuse is belied by the multiple opinion letters of Par counsel (*see* DE 180 at 5 n. 1), the work of Fox Rothschild, and the dozens of court rulings across the country holding that MCA contracts are valid and enforceable. (*See also* Berman Depo. T. 242-46; *see* Exhibit of Current MCA Validity, Exhibit I) The Receiver ignored all of this, claiming to need legal support for MCA validity not only in DE 240 at 4-6 but, indeed, well into April 2021.

At the status conference held the next day, the Receiver repeated at length, and the Court credited, the Receiver's false claims on all of these issues. (Oct. 7 status conf. at 13, 14, 38- 43) The Receiver's claims about reloads were baseless. The Receiver did not understand the MCA business and never bothered to do the complex GAAP-based accounting necessary to understand how "reloads" can drive profitability. (*See* Glick Report at ¶¶ 18, 64-66, 73-86) The same was true for confessions of judgment which can be, and often are, filed after an MCA has been profitable but where the merchant still has not paid the entire contractually obligated amount, the RTR.[18] Thus, the number of confessions of judgement is irrelevant to profitability. Only a GAAP examination of revenue, which only the BPB firm performed, could determine the profitability of the business. (*Id*.)

The Receiver's claims about record-keeping were similarly false. The BPB firm assembled and analyzed terabytes of data including ACH processing and bank records constituting 4.2 million transactions. And their work entailed detailed analysis of specific merchant funding, reloads and merchant repayments. In fact, CBSG calculated merchant receivables and debt every single day. The monthly KPI Reports, sent by Par to its investors every month, could only be created based upon extraordinarily detailed daily financial data. Those KPI Reports were evaluated, verified and found to be spot-on accurate. (*See* Glick KPI Report, Exhibit H)

The Court's criticism of the Defense for objecting to the Receiver's now-discredited claims attests to the effectiveness of the Receiver in poisoning the Court against the Defense and Defendants. (*See* DE 630 at 2-5) In particular, the Court was persuaded by the inaccurate claims that the Receivership would be unable to recover noteholder funds. It thus viewed the personal assets of Defendants as fair game. (Oct. 7 status conf. at 60-61)

iii. The October 30, 2020 Motion to Expand the Receivership

By October 30, 2020, the Receiver reported a significant decline in the portfolio balance to $392 million as of September 30, 2020, and that weekly (not daily) collections had plummeted to $1.8 million. (DE 358-1 at 7, 8) That decline was the direct and sole result of the Receiver's inability and refusal to continue the business of CBSG. Blaming CBSG's post-Receivership

[18] CBSG's in-house counsel and its external counsel, Fox Rothschild, collected millions of dollars of MCA funding debt through court process and was a significant profit center for the business. (*See* Berman Depo. T. 91-92, 96-98, 113, 213-14) Moreover, CLA documents show that 85% of all merchants paid the full right to return (RTR) on the MCA contracts. (Exhibit E) The Glick Report verified an overall return of 1.339 on funding contracts. (DE 535 at ¶¶ 17, 83-88)

financial decline on the Defendants, the Receiver moved to expand the Receivership to seize assets. (DE 357 at 5, 11-20) Defendants opposed the motion.[19]

vi. The Bradley Sharp DSI Declaration, December 13, 2020

On December 13, 2020, the Receiver filed the Declaration of Bradley Sharp, a limited, materially incomplete and grossly flawed non-GAAP analysis of the financial condition of CBSG by a person who was not a CPA, much less an experienced forensic accountant. (DE 426-1) ("The DSI Report") Masquerading as a report on the "financial status of the Receivership Entities," the DSI Report characterized Par as financially unsound and essentially called it a Ponzi scheme. The DSI Report dismissed Defendants' financial analysis (*see* DE 355), offered to explain the profitability of the business, as "misleading" and not a reflection of "actual operations at CBSG." (DE 426-1 at 3) Defendants moved to postpone the conference scheduled for December 15th citing concerns for "fundamental fairness and due process," and requested sufficient time to respond to the DSI Report. (DE 430) [20] The Court denied the Defense request. (DE 431)

v. The Court Adopts the DSI Report as Determinative

At the December 15, 2020 status conference, the Receiver made clear to the Court that the DSI Report was absolute Gospel. The Receiver trumpeted its non-GAAP conclusions and absurd methodology and proudly "staked [his] credibility on what [the DSI Report] said" and on "the credibility of DSI's consultants on what they put in their report." (Dec. 15 status conf. at 23, 31) The Receiver was provided with time for a lengthy presentation in which he praised the "accuracy" of the DSI Report's analysis. (*Id.* T. 16, 18-20) Relying upon DSI's flawed analysis, the Receiver rejected Defendants' most recent submissions as, ironically, not being candid about "the facts."

[19] Defendants opposed the expansion stating that in every example of commingling provided, the Par accounts in question held far more than enough money from sources other than noteholders funds to fund the payments to Defendants. (*See* Melissa Davis Declaration, dated August 26, 2020, at ¶¶ 7-24) (DE 290-8) Further, the proceeds from Par's MCA business "exceeded [ ] deposits" from Par's investor fundraising activities in the relevant accounts. (DE 401 at 13).

[20] Defendants asserted that the DSI Report's financial claims were improbable and inconsistent with the many professional auditors and accountants who had reviewed the same raw data, including CPA James Klenk, who had submitted an affidavit in this case, and with CBSG's tax returns, prepared by a recognized CPA firm, which showed operating revenues of $179 million on which Par had paid millions in taxes – revenues that the DSI Report concluded did not exist. (DE 430 at 2-3)

(*Id.* T. 23-24). The Receiver repeated DSI's grossly inaccurate claims, saying: "This notion that they're collecting in a multiple of 1.32 is, again, false." (*Id.* at T. 30)(Emphasis added)

The Court accepted the flawed DSI Report as determinative, calling it a "sea change" in how it viewed Par. (*Id.* at T. 13-14). Without a hint of the word *Daubert*, much less ordering a *Daubert* hearing, the Court concluded that, similar to a Ponzi scheme, Par "was not a self-sustaining operation . . .it thrived off new money being put in from investor." (*Id.* at T. 14, 15) The Receiver's DSI Report influenced the Court, leading it to denounce the defense for promoting "spin", "alternate realities," and a "continuous misinformation campaign. " (*Id.* at T. 32-36, 40 and 44) (*See also* DE 630 at 6-8)

vi. Relying on the Baseless DSI Report, the Court Orders Expansion

Without permitting a response from the Defense, or oral argument, the Court relied on the DSI Report and the Receiver's recitation to grant the expansion of the Receivership the very next day. (DE 436, *see* Dec. 15 Status Conf. at 86, 97-100) Upon entry of the order, the Receiver assumed the management of Ms. McElhone's properties and residences, promptly padlocked two, and demanded a "residual lease" agreement for the third (*see* DE 482 at 11). The Receiver has since moved aggressively to liquidate personal assets, such as vehicles and watches, when there is no need for liquidation. (*See* DE 640: Defense opposition to motion to sell Patek Philippe watches and vehicle; *see also* DE 632: Defense opposition to motion to sell vehicle and watercraft). While he spends tens of thousands of dollars pursuing these feeble, vindictive efforts, the Receiver has destroyed a well-run, highly profitable business that employed over 70 people and has unilaterally created losses of over $187,000,000 in stakeholder value. (*See* Chart of Receiver Caused Losses, Exhibit A)

vii. The False Narrative Continues even after the Filing of the Glick Report

The Glick Report met the Court's challenge at the December 15, 2020 status conference to refute the DSI Report with a qualified sworn declaration based on the same documents. (*See* Dec. 15 Status. Conf. at 37, 72) The Glick Report flatly disproved what the Court had been hearing from the Receiver for months. The Receiver responded by equivocating, claiming that the DSI Report was merely issued to provide "preliminary findings," and declining to respond with a substantive professional analysis (if one was even possible), citing concern about "controlling professional fees." (DE 577 at 15) In short, they caved.

On May 20, 2021, the Receiver was permitted to conduct a two-hour slide show during which he repeated arguments premised on the DSI Report - now entirely discredited by every CPA to look at the business. (May 20 status conf. at 30, 31, 38)[21] The Defense was largely precluded from responding. The Court did not address the CPA-authored, GAAP-compliant Glick Report, but, instead, accepted DSI's false claims that the "the business model was not . . .sustainable," and that CBSG's poor financial outlook – post July 2020 - was Defendants' fault. (*Id.* at 40-43) Having killed the business, the Receiver has turned to consolidating and liquidating assets owned by Defendants, purchased with consulting fees from CBSG. (May 20, 2021 Status Conf. at 24-26, 40-41)[22]

ARGUMENT

THE RECEIVER BREACHED HIS DUTIES TO THE DEFENDANTS, THE NOTEHOLDERS, AND THE RECEIVERSHIP ENTITIES AND MUST BE DISCHARGED. A HEARING IS WARRANTED

A. Applicable Standards

The "primary purpose of equity receiverships is to promote the orderly and efficient administration of the estate by the district court for the benefit of creditors . . .In so doing, federal equity receivers have multiple duties, including: (1) preserving receivership assets, (2) administering receivership property suitably, and (3) assisting in any equitable distribution of those assets if appropriate." *SEC v. Schooler*, 2015 2015 WL 1510949, *3-4 (S.D.CA 2015). "While a receiver must be impartial between parties, that impartiality does not extend to her relationship with the receivership estate as receivers owe a fiduciary duty to the owners of the property under her care and thus must protect and preserve the receivership's assets for the benefit of the persons

[21] The Receiver also disclosed that since the Receivership started (with $25 million cash on hand), the Receiver had collected a mere $37.6 million over the next ten months. (*Id*. T. 21-22) In 2019, Par collected $393 million from merchants. And, from January 1, 2020 to July 27, 2020, a period of 7 months, Par collected $ 209 million. (*See* DE 106-1 at 6)

[22] The assets retrieved from Defendants since the expansion of the Receivership include $127 million in "actual assets" of Defendants, such as $52.8 million worth of marquis commercial property in Philadelphia and elsewhere, plus $26.2 million in Kingdom Logistics (property that the Receivership was trying to control), and another $20 million of chattel property seized by the FBI. (*Id*. at 24-26) Since May 20, 2021, as noted, the Receiver has seized additional personal assets, i.e., watches, a car and a boat. (*See* DE 622 and 634)

ultimately entitled to it." *Fed. Trade Comm'n v. On Point Glob. LLC*, No. 19-25046-CIV, 2020 WL 5819809, at *2 (S.D. Fla. Sept. 30, 2020), *citing SEC v. Schooler*, *supra* at *3 (internal quotations omitted).

In an SEC enforcement action, "the persons ultimately entitled" to the receivership estate's assets are one of two distinct groups: (1) if the SEC does not prove its case, the defendants may retake their property, or (2) if the SEC does prove its case and investor restitution is deemed appropriate, the investors in the investment scheme may lay claim to the assets. *Sovereign Bank v. Schwab*, 414 F.3d 450, 454 (3d Cir. 2005). (Emphasis added) The receiver owes a fiduciary duty towards the receivership estate and is obligated to protect and preserve the estate's assets. *See Liberte Capitol Group, LLC v Capwill*, 462 F. 3d 543, 551 (6th Cir. 2006).

To that end, a receiver may not ignore the Defendants or the investors' rights to due process and is obligated to provide affected investors with necessary information, a meaningful opportunity to argue the facts and their claims and defenses, and an adjudication of their claims and defenses. *SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992). *See also SEC v. Torchia*, 922 F.3d 1307, 1319 (11th Cir. 2019) ("[A]t minimum summary proceedings must provide affected investors with necessary information, a meaningful opportunity to argue the facts and their claims and defenses, and an adjudication of their claims and defenses."); *SEC v. Terry*, 833 Fed. Appx. 229 (11th Cir. 2020) (reversing receiver's distribution plan based upon summary proceedings which were insufficient to provide due process to claimants).

"Receivers appointed by a federal court are directed to manage and operate the receivership estate according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." *SEC v. Stanford Int'l Bank, Ltd.*, 927 F.3d 830, 840 (5th Cir. 2019), *cert. denied sub nom. Becker v. Janvey*, 140 S.Ct. 2567 (2020),*quoting* 28 U.S.C. § 959(b) (internal quotations omitted)[23] "[S]tate law, and not federal bankruptcy law or federal common law,

[23] Under 28 U.S.C.A. § 959(b), "a trustee, receiver or manager appointed in any case pending in any court of the United States, including a debtor in possession, shall manage and operate the property in his possession as such trustee, receiver or manager according to the requirements of the valid laws of the State in which such property is situated, in the same manner that the owner or possessor thereof would be bound to do if in possession thereof." 28 U.S.C.A. § 959(b).

supplies the controlling standard of fiduciary care." *Alonso v. Weiss*, 932 F.3d 995, 1002 (7th Cir. 2019), *citing* 28 U.S.C. § 959(b).

"As neutral officers of the court, receivers must avoid the appearance of impropriety or partiality in their actions." *Fed. Trade Comm'n v. On Point Glob. LLC*, supra at *2 *citing SEC v. Schooler*, *supra*, at *3."In Florida, [a] fiduciary owes to its beneficiary the duty to refrain from self-dealing, the duty of loyalty, the overall duty to not take unfair advantage and to act in the best interest of the other party, and the duty to disclose material facts." *Sallah v. BGT Consulting, LLC*, No. 16-81483-CIV, 2017 WL 2833455, at *5 n. 5 (S.D. Fla. June 30, 2017), *citing Capital Bank v. MVB, Inc.*, 644 So.2d 515, 520 (Fla. 3d DCA 1994) (internal quotations omitted). "The fiduciary must act as a prudent person with reasonable care, skill, and caution." *Sallah v. BGT Consulting, LLC*, supra at *5 n. 5, *citing* Fla. Stat. § 736.0804. *See SEC v. Schooler*, *supra* (receiver directed to avoid actions which create the appearance of impropriety, or which violated ethical standards).

B. The Receiver Breached its Duty of Care and Duty of Loyalty in Misleading the Court and Liquidating a Profitable, Sound Company.

The Court's initial direction was clear. (*See* Aug. 4 status conf. at 88; "[t]he Court is on record making it very clear, as I have from the beginning, no one here [is] seeking an end game of liquidation.") And from the beginning, the Defense argued that neither the Receiver nor DSI had the expertise necessary to understand the MCA business, account for it properly or run CBSG as a going concern. Rather, the Receiver and DSI knew only how to liquidate assets. Accordingly, the Defense begged the Court to re-employ experienced staff who knew how to run the company.

Knowing that it could not run the company, and that it could not justify the liquidation of a thriving, profitable company (as such would breach its fiduciary duties to all stakeholders), the Receiver set about creating a narrative to justify only what it knew how to do -- liquidate. As far back as September 8, 2020, the Receiver began sprinkling the record with claims that CBSG was in poor financial condition and on the verge of collapse. The Receiver's inaccurate accusations of financial instability and the innuendo of malfeasance increased with each passing status report and court conference and peaked with the DSI Report on December 13th. The Receiver commissioned and used the DSI Report to ratify its prior financial claims, as well as justify the liquidation of CBSG's assets and the Court's expansion of the Receivership on December 16, 2020.

For utilizing grossly improper and unqualified analysis to justify its actions and conduct, and misleading this Court, the noteholders and the public for months with a false financial narrative, the Receiver has breached its fiduciary duty of care and acted with gross negligence.

Instead of running the business of CBSG as it had been to the benefit of its noteholders for years, the Receiver used this narrative to justify dismantling CBSG's MCA business, liquidating its assets and expanding the Receivership to grab all of Defendants' other assets. *Sallah v. BGT Consulting, LLC*, N*supra*, at *5 n. 5 ("The fiduciary must act as a prudent person with reasonable care, skill, and caution."), *citing* Fla. Stat. § 736.0804; ***West v. Chrisman***, 518 B.R. 655, 664 (M.D. Fla. 2014) citing *Capital Bank v. MVB, Inc.*, 644 So.2d 515, 520 (Fla. 3rd DCA 1994) ("[T]he very concept of a fiduciary . . . comes with attendant duties of loyalty, candor, and good faith[.]")

The evidence is flatly inconsistent with the Receiver's fiduciary duties. Upon taking over CBSG, the Receiver had access to and knowledge of CLA's nearly completed audit of CBSG for the year ending December 31, 2018. That audit was being performed by one of the top 10 CPA firms in the country and had reached the level of Quality Control (QC), i.e., the final stages of an audit. Permitting the conclusion of that audit would reveal a professional CPA's analysis of CBSG's accounting and control systems, its performance and profitability. It would dispel, upon analysis of GAAP-analyzed data, absurd, un-moored suggestions such as: that confessions of judgement are tied to profitability; that funding "reloads" are detrimental to the business instead of profit centers; that the company's merchant portfolio was not profitable; or that its underwriting was inadequate, since, obviously, excellent performance is reflective of excellent underwriting.

Avoiding these audit conclusions is in our view, precisely why this audit -- GAAP-compliant, nearly complete and nearly paid for -- was quietly abandoned by the Receiver and never completed. It is also why, in our view, the Receiver chose to pay DSI, his in-house financial advisor, perhaps $500,000 to produce a non-GAAP, non-CPA, non-IRS-compliant analysis that is absolutely meaningless – except to the extent it tells a story supporting the inaccurate claims the Receiver has been promoting to the Court and public for over 10 months.

The Court was misled. The misinformation not only caused the Court to echo the Receiver's erroneous claims, but it also led the Court to countenance the liquidation of CBSG's assets and accompanying release of collateral, and to grant the Receiver's requests to expand the Receivership. The misinformation poisoned the Court's view of the Defendants and the Defense. CBSG's stakeholders have been irreparably harmed and the damage continues while the Receiver remains.

CONCLUSION

Defendants demand an opportunity to be heard on the issues raised by this motion. At conference after conference, this Court has permitted the Receiver to speak for hours at a time about CBSG financial matters, without affording the Defense an opportunity to speak and be heard. The evidence is now overwhelming that so much of what was told to this Court and the noteholders about the financial performance of CBSG at these conferences was just plain wrong. And the results have been devastating – to the tune of over $187,000,000 in destroyed stakeholder value. The defense respectfully requests that a hearing be held and that the Court grant the instant motion to remove the Receiver.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.

DEFENDANTS' OPPOSITION TO PLAINTIFF'S MOTION TO CONSTRUE SOME AFFIRMATIVE DEFENSES AS DENIALS, AND TO STRIKE OTHERS

Defendants Joseph LaForte, Joseph Cole Barleta, Lisa McElhone, Perry Abbonizio, Dean Vagnozzi, and Michael Furman jointly file this opposition to the Securities and Exchange Commission's ("SEC" or Commission") Motion to Construe Some Affirmative Defenses as Denials, and to Strike Others (DE 627) ("Motion").

I. BACKGROUND

The Commission filed its Amended Complaint on August 10, 2020 (DE 119). The Defendants filed their respective Answers and Affirmative Defenses (DE 607-09, 615, 617, 658). The Commission has moved to strike various affirmative defenses (DE 627). As explained further below, the Commission's Motion fails to satisfy the stringent requirements of Rule 12(f) to justify the need for such a drastic measure.

II. STANDARD

A. Legal Standard for Reviewing Motions to Strike Under Rule 12(f)

Motions to strike are to be used sparingly. *See SEC v. 1 Glob. Capital LLC*, 331 F.R.D. 434, 437 (S.D. Fla. 2019) ("despite the Court's broad discretion, a motion to strike is considered a drastic remedy and is often disfavored"); *Sparta Ins. Co. v. Colareta*, No. 13-60579-CIV, 2013 WL 5588140, at *1 (S.D. Fla. Oct. 10, 2013) (striking defenses from a pleading 'is a drastic remedy to be resorted to only when required for the purposes of injustice'") (citation omitted); *FTC v. U.S. Work Alliance, Inc.*, No. 1:08-cv-2053, 2009 WL 10669724, at *1 (N.D. Ga. Feb. 24, 2009) ("partly because of the practical difficulty of deciding cases without a factual record, it is well established that the action of striking a pleading should be sparingly used by the courts") (citations omitted). Because of this, courts agree that a pleading should not be stricken unless the "stricken material has 'no possible relation to the controversy.'" *Sparta Ins. Co.*, 2013 WL 5588140, at *1; *Gonzalez v. Midlaw Credit Management, Inc.*, No. 6:13-cv-1576, 2013 WL 5970721, at *1 (M.D. Fla. Nov. 8, 2013) (explaining "because this is a difficult standard to satisfy, '[m]otions to strike are generally disfavored by the Court and are often considered time wasters.'") (citations omitted). Consequently, an affirmative defense may only be stricken "where they fail to give the plaintiff fair notice of the nature of the defense or where they are clearly insufficient as a matter of law." *See Sparta Ins. Co.*, 2013 WL 5588140, at *4 (explaining that "a defense is insufficient as a matter of law only if: (1) on the face of the pleadings, it is patently frivolous, or (2) it is clearly invalid as a matter of law.").

B. Pleading Standard

Pursuant to Rule 8 of the Federal Rules of Civil Procedure, a defendant must "state in *short and plain terms* its defenses to each claim asserted against it." *Id.* (emphasis added). While the Eleventh Circuit has not ruled otherwise, *see Bluegreen Vacations Unlimited, Inc., & Bluegreen Vacations Corp., v. Timeshare Termination Team, LLC, et al.*, No. 20-CV-25318, 2021 WL 2476488, at *2

(S.D. Fla. June 17, 2021) (explaining that the Eleventh Circuit has yet to resolve the split in opinion regarding whether affirmative defenses are subject to the heightened pleading standard delineated in *Twombly* and *Iqbal*), it *has* stressed the importance of applying a liberal interpretation to the notice requirement found in Rule 8(c):[1]

> we must avoid hypertechnicality in pleading requirements and focus, instead, on enforcing the actual purpose of the rule. The purpose of Rule 8(c) is simply to guarantee that the opposing party has notice of any additional issue that may be raised at trial so that he or she is prepared to properly litigate it.

Hassan v. U.S. Postal Serv., 842 F.2d 260, 263 (11th Cir. 1988) (permitting defendant to raise an affirmative defense at trial that he did not even plead because he provided the plaintiff with notice); *accord Hewitt v. Mobile Research Technology, Inc.*, 285 F. App'x. 694, 696 (11th Cir. 2008).

In accordance with this reasoning, courts in this Circuit have consistently found that defendants are not required to aver detailed facts in their affirmative defenses. *See 1 Glob. Capital LLC*, 331 F.R.D. at 437 ("the language of Rule 8(a) requires the party to "show" that they are entitled to relief, while Rule 8(b) does not"); *Sparta Ins. Co*, 2013 WL 5588140, at *3 (agreeing that "if the drafters of Rule 8 had intended for the "showing" requirement to apply to the pleading of defenses, they knew how to say it, as demonstrated by Rule 8(a), and would have written that requirement into Rules 8(b) and (c)) (internal citation omitted); *Adams v. JP Morgan Chase Bank, N.A.*, No. 3:11-CV-337-J-37MCR, 2011 WL 2938467, at *1 (M.D. Fla. July 21, 2011) ("if it is not even required that a defendant plead an affirmative defense (so long as the plaintiff has notice of the defense), it cannot be necessary for a defendant to include factual allegations supporting each affirmative defense); *Blanc v. Safetouch, Inc.*, No. 3:07-cv-1200, 2008 WL 4059786, at *1 (M.D. Fla. Aug. 27, 2008) ("under federal standards of notice pleading, it is not always necessary to allege the evidentiary

[1] Rule 8(c) of the Federal Rules of Civil Procedure asserts "in responding to a pleading, a party must affirmatively state any avoidance or affirmative defense."

facts constituting the defense. The pleading need only give fair notice of the asserted defense(s) 'so that opposing parties may respond, undertake discovery, and prepare for trial.'") (citations omitted); *Floyd v. SunTrust Banks, Inc.*, No. 1:10-CV-2620-RWS, 2011 WL 2441744, at *8 (N.D. Ga. June 13, 2011) ("when one considers that a defendant must answer the complaint within 21 days, imposing a different standard for defenses is not unfair."). Because Defendants' affirmative defenses are legally sufficient and provide the required notice to the Commission, the Court should deny the Commission's Motion.

III. ARGUMENT

A. The Defendants' Affirmative Defenses Are Valid.

1. Defendants' Equitable Defenses of Laches, Estoppel, and Waiver are Legally Sufficient and Consistent with the Fair Notice Standard.[2]

The Commission posits that the Court should strike the Defendants' affirmative defenses of laches, estoppel, and waiver because they are not available against the government in an enforcement action and because Defendants have advanced no basis to satisfy the elements of estoppel. *See* Motion at 12–14. First, an overgeneralized restatement of the law is an insufficient basis to justify a draconian remedy. Second, at this stage of the pleading, Defendants are not required to "aver detailed facts." *See Gonzalez*, 2013 WL 5970721, at *2.

This Circuit has made clear that a court may only strike an affirmative defense if it is insufficient as a matter of law. With respect to the affirmative defenses of laches, waiver, or estoppel, the Commission cannot meet this standard. *See United States Commodity Futures Trading Comm'n v. Mintco LLC*, No. 15-CV-61960, 2016 WL 3944101, at *7 (S.D. Fla. May 17, 2016) (declining to strike defendant's defense of laches because "it has been contemplated that laches can be asserted

[2] This section applies to Defendants' laches defenses (Vagnozzi #6, McElhone #4, LaForte #4, Barleta #4, Furman #16, and Abbonizio #16); estoppel defenses (Vagnozzi #4, McElhone #5, LaForte #5, Furman #14, and Abbonizio #14); and waiver defenses (Vagnozzi #5, McElhone #6, LaForte #6, Barleta #6, Furman #15, and Abbonizio #15).

against the government in certain, limited circumstances"); *SEC v. Calmes*, No. 09-80524-CIV, 2010 WL 11505260, at *6 (S.D. Fla. Nov. 19, 2010) (declining to strike defendant's defense of estoppel because the defense "may be relevant" when the defendant meets the "very high burden to establish the defense of estoppel against the government"); *SEC v. Spartan Sec. Group, LTD*, No. 8:19-CV-448-T-33, 2019 WL 3323477, at *2 (M.D. Fla. July 24, 2019) (declining to strike defendant's defense of waiver and estoppel because "it does not follow that Defendants' second affirmative defense is insufficient as a matter of law simply because such defense is only available in extreme circumstances"); *U.S. Work Alliance, Inc*., 2009 WL 10669724, at *1 (finding that the Supreme Court did not "craft a blanket bar" to asserting this defense against the government, and thus, "the court will not take the drastic step of striking an equitable defense that might have merit after discovery").[3]

The Commission's objection on the ground of sufficiency[4] also fails because Defendants' affirmative defenses as pled provide the Commission with notice of the defenses they plan to explore and develop in discovery, which is all that is required. *See Calmes*, 2010 WL 11505260, at *6 (finding defendant's pleading to be sufficient and explaining that "although the Commission believes that [defendant] does not have evidence to support the elements of the defense of estoppel, the Commission's position amounts to no more than its belief"); *McGlothan v. Walmart Stores, Inc.*, No. 6:06-CV-94-ORL-28JGG, 2006 WL 1679592, at *1 (M.D. Fla. June 14, 2006) (explaining defense averred as "this claim is barred by the statute of limitations" is sufficiently plead and provides fair

[3] *See SEC v. Cuban*, 798 F. Supp. 2d 783, 791 (N.D. Tex. 2011) (explaining that although the SEC pointed to a number of cases that seemed to support the conclusion that said equitable defense was unavailable against the government, "these decisions cite each other without explaining their reasoning . . . and others reach this result without explaining in more than conclusory terms the rationale for holding that the defense is unavailable as a matter of law"); *See generally United States v. Admin. Enter. Inc.*, 46 F.3d 670, 672–73 (7th Cir. 1995) ("[t]here is no dearth of statements that laches cannot be used against the government . . . [yet] the availability of laches in at least some government suits is supported by Supreme Court decisions . . . that refuse to shut the door *completely* to the invocation of laches or estoppel (similar doctrines) in government suits.") (emphasis added).

[4] *See, e.g.*, Motion at 15 ("the Defendants have not alleged any basis for an estoppel defense whatsoever, let alone a basis sufficient to conclude that the Commission engaged in egregious conduct sufficient to raise an estoppel defense against a government agency").

notice); *Jackson v. City of Centreville*, 269 F.R.D. 661, 662 (N.D. Ala. 2010) (finding that the affirmative defenses defendant raised such as waiver and estoppel were "at minimum, legal theories contained in FRCP 8(c)(1)" that put the plaintiff on notice as to what it will argue); *FTC v. Hang-Ups Art Enterprises, Inc.*, No. CV-95-0027, 1995 WL 914179, at *4 (C.D. Cal. Sept. 27, 1995) (declining to strike an affirmative defense where defendant simply asserted, "plaintiff's claims are barred by the doctrine of laches."). Accordingly, the Court should deny the Commission's Motion to Strike Defendants' affirmative defenses related to laches, waiver, and estoppel.

2. The Notes are Not Securities Affirmative Defense is Directly Related to the Controversy.[5]

The Commission contends that the Defendants' affirmative defense averring that the notes are not securities should be stricken because the Court addressed this subject once before in its Order Denying Defendants' Motion to Dismiss ("Order") (DE 583). *See* Motion at 8. The Commission's argument fails for two reasons.

First, the Commission fails to take into consideration that a pleading should not be stricken unless the "stricken material has '*no possible relation* to the controversy." *Sparta Ins. Co.*, 2013 WL 5588140, at *1 (emphasis added). Here, the question of whether the notes are securities goes to the heart of this case. *See Spartan Sec. Group, LTD*, 2019 WL 3323477, at *2 (rejecting the SEC's argument that it should strike defendant's affirmative defense because it "relates directly to the SEC's claims and that the SEC has failed to show it would experience undue prejudice if the Court did not strike the defense, the Court declines to strike Defendants' first affirmative defense").[6]

[5] This section applies to Defendants' notes are not securities defenses (McElhone #7, LaForte #7, Barleta #7, Furman #18, and Abbonizio #18).

[6] The Commission also notes that it would experience prejudice because it would have to litigate issues already litigated (to its satisfaction) once before. However, boilerplate restatements of prejudice are insufficient to invoke the use of such a drastic, "draconian remedy." *Fabing v. Lakeland Reg'l Med. Ctr., Inc.*, No. 8:12-CV-2624-T-33, 2013 WL 593842, at *2 n.2 (M.D. Fla. Feb. 15, 2013). This is especially true where the Commission has not demonstrated how this affirmative defense is "patently frivolous," "clearly invalid as a matter of law," or has "no possible relation to the controversy." *See Sparta Ins. Co*, 2013 WL 5588140, at *4.

Second, this Court only examined whether the notes are securities only within the four corners of the Complaint, that is, taking the allegations as true and construing them in the light most favorable to the Plaintiff. The Court should not prematurely strike this affirmative defense without giving the Defendants the benefit of discovery. *See Adams*, 2011 WL 2938467, at *1 (explaining that "whereas plaintiffs have the opportunity to conduct investigations prior to filing their complaints, defendants, who typically only have twenty-one days to respond to the complaint, do not have such a luxury"); *U.S. Work Alliance, Inc.*, 2009 WL 10669724, at *1 (declining to strike an affirmative defense that may have merit after discovery and finding that "a motion to strike is not appropriate unless the claims or defenses are completely meritless"); *Gutierrez v. Imt Integral Medizintechnik AG*, No. 3:14CV271, 2014 WL 11512206, at *2 (N.D. Fla. Dec. 29, 2014) (declining to strike an affirmative defense because "defendants should have an opportunity to develop their affirmative defenses through discovery."); *FTC v. BF Labs Inc.*, No. 4:14-CV-00815-BCW, 2015 WL 12806580, at *3 (W.D. Mo. Aug. 28, 2015) (declining to strike defendant's affirmative defense before the Defendants "have the benefit of some discovery").

Moreover, this Court has only specifically analyzed whether the promissory notes at issue fall within one of the judicially exempt categories enumerated in *Reves*.[7] After the Court found that they did not, the Court proceeded to analyze the promissory notes under the family resemblance factors elucidated in *Reves*. *See* Order at 12–19. This Court did *not* consider whether the notes at issue were exempt from the registration requirement under the Securities Act (15 U.S.C. 77b(a)(1)). *See 1 Glob. Capital LLC*, 331 F.R.D. at 438 (finding that though the Court ruled on whether the notes fall squarely within the enumerated exceptions found in *Reves*, the Court did not examine whether the notes were commercial in nature such that the notes were exempt as securities under 15 U.S.C. § 78c(a)(10) and

[7] *See Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990).

from the registration requirement under 15 U.S.C. § 77b(a)(1)). Accordingly, the Court should deny the Commission's motion to strike this affirmative defense.

B. Defendants Should not be Required to Re-Plead Their Affirmative Defenses.

The Commission also argues that certain affirmative defenses, to the extent they are not stricken, are insufficiently pled because they "provide no facts indicating who the counsel or professional are or which counts of the Complaint the reliance defense is relevant to." *See* Motion at 17.[8] However, the level of specificity demanded here by the Commission is neither required nor necessary to provide fair notice of Defendants' affirmative defenses. *See Spartan Sec. Group, LTD*, 2019 WL 3323477, at *1 (rejecting the SEC's "arguments based upon *Twombly and its progeny*") (citations omitted); *Jackson*, 269 F.R.D. at 663 (Rule 8(c) only requires responders to "state."); *see e.g.*, *Calmes*, 2010 WL 11505260, at *6 (declining to strike defendant's affirmative defense that asserted that defendant "relied upon opinions provided by counsel"); *1 Glob. Capital LLC*, 331 F.R.D. at 440 (declining to strike the defense of good faith where defendant simply asserted that he relied on "competent personnel" in his course of conduct).

The Commission's argument that Defendants' advice of counsel, advice of professional advisors, and reasonable care defenses are repetitive fares no better. The Defendants' advice of counsel and advice from professionals, respectively, differentiate between advice received from counsel as distinguished from that of other professionals such as certified public accountants, accountants, auditors, and tax advisors. Both categories of such advice are critical in this case. Defendants' reasonable care defense clearly relates to the exercise of reasonable care and good faith exercised by Defendants in following professional advice such that they did not have any reasonable

[8] It appears that the Commission's attacks with respect to these defenses are limited to Count VII, Section 5(a) and 5(c). *See* Ex. A (DE 627-1). Defendants are not raising these affirmative defenses as to this Count. However, it is nonetheless relevant as to the imposition of remedies (e.g., penalty or bar). *See Calmes*, 2010 WL 11505260, at *5.

grounds to believe that any misstatement or omissions of material fact existed in any statements, reports, and/or filings he allegedly issued or uttered were made with scienter. *See SEC v. BIH Corp.*, No. 2:10-CV-577-FTM-29, 2013 WL 1212769, at *7 (M.D. Fla. Mar. 25, 2013) (declining to strike three affirmative defenses that related to the defense of good faith and defendant's reliance legal counsel).

IV. CERTAIN DEFENSES RELATED TO ABBONIZIO AND FURMAN

A. Abbonizio and Furman Agree that Certain Defenses Can be Construed as Denials and Others Stricken.

The Commission argues that certain of Abbonizio's and Furman's affirmative defenses should not be treated as affirmative defenses but rather, as denials. Abbonizio and Furman agree and specifically noted in their respective Answers that "[t]he denomination of any matter below as a defense is not an admission that Defendant bears the burden of persuasion, burden of proof, or burden of producing evidence with respect to any such matter." (DE 615 at 36, 617 at 31). Accordingly, the Court can treat Abbonizio's and Furman's lack of scienter defense (third defense), mistake defense (fifth defense), acts of others defense (eighth defense), and misrepresentations as not material defense (thirteenth defense) as denials. *See EEOC v. Univ. of Miami*, 19-CV-23131, 2020 WL 2739711, at *7 (S.D. Fla. May 22, 2020) (proper remedy when defendant claims that plaintiff's complaint fails on facts alleged is to treat claim as a denial rather than to strike the defense).

Additionally, Abbonizio and Furman agree to remove four other defenses while reserving their rights to make appropriate arguments later in this proceeding—failure to state a claim (first defense), statute of limitations (second defense), justifiable reliance (seventh defense), and constitutionality defense (eleventh defense).

As to the statute of limitations defense, the Court previously held that "[i]f the SEC's claims included violations occurring outside the five-year limitations period, it would be appropriate for the

Court to partially dismiss the claims to the extent they seek time-barred relief." (DE 47). Based on the Court's motion to dismiss ruling and the Commission's representation, Abbonizio and Furman understand that the Commission is not currently seeking relief for violations that may have occurred outside the five-year limitations period. Abbonizio and Furman reserve their right to raise the statute of limitations argument should the Commission change its position.

Abbonizio and Furman agree to an order striking the justifiable reliance defense because this defense is adequately subsumed by their lack of scienter defense (third defense), reliance of advice of counsel defense (seventeenth defense), reliance on professionals defense (sixth defense), and good faith defense (fourth defense) which are all adequately pled as described above.

B. Abbonizio's and Furman's Lack of Causation Defense Should Not Be Stricken.

Abbonizio's and Furman's respective twelfth defenses state that "Plaintiff's claims against Defendant cannot be maintained because superseding or intervening events, not caused by Defendant, caused some or all of the alleged damages." The Commission argues that this defense should be stricken because loss causation is not an element that the Commission must prove under the Securities Act. *See* Motion at 11-12. Where, as here, the Government fails to allege prejudice and the defense is relevant to the extent it claims that someone other than Abbonizio and/or Furman are responsible for the alleged conduct, the Court should decline to strike the defense. *See SEC v. Esposito*, No. 1:16-cv-10960, 2017 WL 5615571, at *3 (D. Mass. Nov. 21, 2017) ("[T]he SEC is correct that it need not show causation or damages in order to prove … liability. Because the SEC again fails to adequately allege prejudice, however, the Court will also not strike this defense. Further, this defense may be relevant to the extent it claims that someone other than [defendant] … is responsible for the alleged conduct and harm, and [defendant] will be allowed to present evidence to such effect.").

C. Abbonizio's and Furman's Relief-Based Defenses Should Not Be Stricken.

Abbonizio and Furman assert two defenses related to the Commission's requests for relief—their respective ninth defense ("Plaintiff's claims fail because the Amended Complaint seeks an impermissible forfeiture") and respective tenth defense ("Plaintiff cannot recover damages because any such recovery would be a windfall resulting in unjust enrichment to Plaintiff or a party Plaintiff purports to seek to reimburse").

The Court should decline to strike these defenses for two reasons.

First, the Commission has failed to adequately allege prejudice if these defenses are allowed to stand. *See Spartan Sec. Group, LTD*, 2019 WL 3323477, at *2 (rejecting the SEC's argument that it should strike defendant's affirmative defense because it "relates directly to the SEC's claims and that the SEC has failed to show it would experience undue prejudice if the Court did not strike the defense, the Court declines to strike Defendants' first affirmative defense").

Second, the Court should allow these affirmative defenses to stand because both defenses adequately put the SEC on notice that Abbonizio and Furman intend to defend against any remedies the SEC seeks in violation of a recent Supreme Court decision, *Liu v. SEC*, 140 S.Ct. 1936, 1940 (2020). In *Liu*, the Court held that a disgorgement award is only permissible under the SEC's authority if it "does not exceed a wrongdoer's net profits and *is awarded for victims*." *Id.* (emphasis added). Most courts and commentators post-*Liu* agree that disgorgement cannot be used to collect money to be paid into the U.S. treasury; it can only be used to award victims. *SEC v. Penn*, No. 14-CV-581 (VEC), 2021 WL 1226978, at *13 (S.D.N.Y. Mar. 31, 2021) ("Pursuant to *Liu*, for disgorgement to constitute permissible equitable relief, the SEC is generally required 'to return a defendant's gains to wronged investors for their benefit' and that disgorgement awards 'must do more than simply benefit the public at large by virtue of depriving a wrongdoer of ill-gotten gains.') (citation omitted); *Fed. Trade Comm'n v. Elec. Payment Sols. of Am. Inc.*, 482 F. Supp. 3d 921, 928 (D. Ariz. 2020) ("Thus,

pursuant to *Liu*, a disgorgement order must be crafted so that its effect is 'restitutionary.' That is, to be an equitable form of relief, a disgorgement award must be awarded to victims."). Here, Abbonizio's and Furman's defenses should be allowed to stand to the extent the Commission seeks remedies inconsistent with *Liu*.

V. CONCLUSION

For all of the foregoing reasons, the Commission's Motion fails to demonstrate that striking Defendants' affirmative defenses is warranted, and thus, the Motion should be denied. Alternatively, in the event the Court determines that any of the affirmative defenses at issue are inadequate, Defendants respectfully request that the Court permit them to replead or amend the defenses to comply with the Court's findings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 20, 2021, a true and correct copy of the foregoing response was served via CM/ECF on all counsel or parties of record.

/s/ Joel Hirschhorn
JOEL HIRSCHHORN

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____/

MOTION TO DISMISS THE AMENDED COMPLAINT DUE TO MISCONDUCT BY THE SECURITIES AND EXCHANGE COMMISSION AND RELATED CONSTITUTIONAL VIOLATIONS

Rather than conduct its own investigation, the SEC delegated its investigative powers to a biased private attorney with a clear financial interest in the outcome of this case. After deputizing this attorney as a *de facto* SEC investigator, the Commission then took his false legal theories, false facts, defective "default rate" analysis, and hastily thrown together declarations obtained from his obviously biased merchant clients and submitted them to this Court without any critical scrutiny or corroboration. The SEC also added its own false allegations. The result – demonstrably inaccurate and false claims made to this Court and devastating fallout to Par and its noteholders and principals – could have been avoided had the SEC taken the time and effort to scrutinize the inaccurate information it was being provided and refrained from making its own false allegations. Because of the SEC's delegation of duties, extraordinary lack of diligence, and false allegations, and the immense harm caused thereby, Joseph LaForte, Lisa McElhone, and Joseph Cole Barletta request that this Court grant the proper remedy of dismissal.

Legal Standard

Rule 41(b) of the Federal Rules of Civil Procedure states, in pertinent part:

> …If the plaintiff fails…to comply with these rules or a court order, a defendant may move to dismiss the action or any claim against it….

(Emphasis added). "Rule 41(b) authorizes a district court to dismiss a complaint for failure to prosecute or failure to comply with a court order or the federal rules." *Gratton v. Great Am. Communs.*, 178 F.3d 1373, 1374 (11th Cir. 1999). The Court's power to involuntarily dismiss an action is an inherent aspect of its authority to enforce the rules of court and insure prompt disposition of lawsuits. *Goforth v. Owens*, 766 F.2d 1533, 1535 (11th Cir. 1985); *see also In Re: Am Track 'Sunset Ltd.' Train Crash*, 136 F.Supp.2d 1251 (S.D. Ala. 2001) (holding that a district court has discretionary authority to dismiss a plaintiff's case as a sanction, for the ***plaintiff's abuse of the judicial process***, under its inherent power to protect the orderly administration of justice and to preserve the dignity of the tribunal.).

The Supreme Court has specifically rejected the notion that an attorney's oversight and/or negligent failure to comply with the rules excuses the party's non-compliance. *Pioneer Inv. Servs. Co. v. Brunswick Assocs. Ltd. Partnership*, 507 U.S. 380 (1993). Attorneys must exercise diligence in monitoring the disposition of their cases, and "clients must be held accountable for the acts and omissions of their attorneys." *Pioneer Invest. Servs. Co.*, 507 U.S. at 396-97 ("we [find] no merit to the contention that dismissal of petitioner's claim because of his counsel's unexcused conduct imposes an unjust penalty on the client.") (citations omitted).

After Failing in His Private Crusade Against Par and Other MCAs, Shane Heskin and Kara DiPietro Shop This Case to Multiple Law Enforcement Agencies, All of Whom Reject It, But the S.E.C. Accepts It Without Doing Due Diligence

Shane Heskin, Esq. ("Heskin"), a partner at White & Williams in Philadelphia, has developed a practice of erroneously claiming that merchant cash advance ("MCA") contracts are illegal and/or in violation of state or federal law.[1] (Declaration of Norman Valz, dated August 11, 2020, ¶¶ 14-16, 1) ("Valz. Decl.") Attached as Exhibit 2. CBSG (also herein "Par") has been Heskin's primary target. Over the past four years, Heskin filed at least 25 merchant actions against Par.[2]

In such litigation, Heskin has alleged RICO claims and attempted class actions asserting that his clients should be allowed to avoid their contractual payment obligations to Par and other MCA businesses. (Valz. Decl. ¶¶ 16-19; Deposition of Brett Berman, Esq., June 8, 2021, Attached, as Exhibit 3 at T. 10:19-24, 12:18-25, and 239:7-16) None of these efforts were successful. (*Id.*) To Par's knowledge, Heskin has never prevailed on the merits in any MCA case and certainly never prevailed against Par. (*Id.*) And, Heskin's unsuccessful litigation has spawned abundant precedent in numerous jurisdictions that MCA contracts are valid and enforceable.[3]

In a particularly significant defeat, just four days before the SEC filed its Complaint on July 26, 2020, Heskin was effectively precluded from further efforts to attack MCA contracts in the U.S. District Court in the Eastern District of Pennsylvania when the court ruled that a confession of judgment filed in state court that has not been stricken or reopened remains a final state court judgment for the purposes of the *Rooker-Feldman* doctrine. *CBSG v. Sunrooms America, Inc., et al,* 474 F. Supp. 3d 693, 696 (ED Pa., July 22, 2020).

But more fundamentally, Heskin's ill-conceived and failed lawsuits ignored state laws clearly favorable to Par's business model, like Pennsylvania law, which is incorporated through choice of law

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[1] *See, e.g.,* written testimony of Shane R. Heskin, Partner, White and Williams LLP, before the United States House of Representatives Committee on Small Business "Crushed by Confessions of Judgment: The Small Business Story," June 26, 2019. https:\\docs.house.gov/meetings/SM/SM00/20190626/109720/HHRG-116-SM00-Wstate-HeskinsS-2019026.pdf.

[2] Dockets from Heskin's various unsuccessful cases are attached as Composite Exhibit 1

[3] *See, e.g., CBSG v. Boreal Water Collection Inc.,* No. 17062692, 2017 WL 5652572, at *2 (Pa.Com.Pl. Nov. 02, 2017) ("Here, it is clear that the transaction between the parties was not a loan."); and *CBSG vs. Pearce Timber et al.*, Phila. Common Pleas 180105060 ("The forum selection clause in the instant commercial contract it's not so unfair as to deprive defendants of an opportunity to be heard; nor is it fraudulent or against public policy.")

provisions in Par's MCA contracts.[4] Courts across the country have recognized MCA contracts as valid and have denied claims that such contracts were unlawful or constituted usurious loans.[5]

Kara DiPietro ("DiPietro") is a Heskin client. Her company, HMC, is a substantial kitchen remodeling business. With Par's assistance, in 2018 Ms. DiPietro started her own MCA funding business, Kinetic Capital, through which she provides cash advances to merchants. *See* Emails, attached as Exhibit 5.

In early 2018, DiPietro approached Par for funding.[6] Par conducted underwriting and provided $868,942 to her company on February 15, 2018. *See* Feb. 15, 2018, HMC Factoring Agreement, Exhibit 7. All told, Par funded DiPietro's company approximately $26 million. *See* Deposition of Josh Persing, dated March 12, 2020, attached as Exhibit 8 at T. 363-366. DiPietro used the cash Par advanced to expand her business and engage in a large number of interior design projects on which she made significant profits.

DiPietro was thrilled with the funding. In email correspondence with Par at the time, she repeatedly thanked the company. She even created and gave to Joseph LaForte a "Book of Gratitude" she made for him, expressing her appreciation for Par and its efforts on her behalf. In it, she stated:

> For your birthday HMC wanted to give you the gift of gratitude. The pages that follow are a collection of projects HMC completed in 2018. You and everyone at CBSG have played an integral role to HMC's successes. Please consider this book as a show of gratitude from me and everyone at HMC. We look forward to building more success in 2019.

DiPietro's Book of Gratitude, Exhibit 9. As late as April 2, 2019, DiPietro sent an email to LaForte saying, "HMC is stronger than we have ever been. I know that it is 90% because of you & PAR Funding." *See* Exhibit 10.

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[4] *See Gur v. Nadav*, 178 A.3d 851, 857 (Pa. Super. Ct. 2018) (recognizing that business loans are exempted from Pennsylvania's Usury Law). And, even if the factoring agreements constituted loans (they have not been so held by any court), they would qualify as "business loans" that do not violate Pennsylvania's Usury Law. *See* 41 Pa. Stat. Ann. § 201(b)(3). Other states' laws are similar. *See*, *e.g.*, Md. Code Ann., Com. Law § 12-103(e)(1) ("A lender may charge interest at any rate if the loan is . . . [a] loan made to a corporation"); *see*, *e.g.*, Tex. Fin. Code § 306.103(b) ("For the purposes of this chapter, the parties' characterization of an account purchase transaction as a purchase is conclusive that the account purchase transaction is not a transaction for the use, forbearance, or detention of money.")

[5] *See* various decisions on the legality of MCAs, attached as composite exhibit 4.

[6] DiPietro suggests in her declaration that she knew Joe LaForte as "Joe Mack" or "Joe Macki." (DiPietro Decl. at ¶ 3). However, documents produced in discovery prove that Kara DiPietro knew full well that the individual she was speaking to was named Joe LaForte. Exhibit 6.

However, in the spring of 2019, DiPietro failed to make payments on an approximately $11 million debt to Par, $3 million of which was principal. *See* Deposition of Joseph Cole Barletta, attached as Exhibit 11 at T. 46-47, 68; See also Exhibit 8 at T. 363-366; *see also* Exhibit 12. This failure to make payments triggered charges Par was entitled to collect from DiPietro's bank accounts. Exhibit 13. When negotiation proved fruitless, Par directed its outside law firm, Fox Rothschild, to enforce the contract by filing DiPietro's Confession of Judgment ("COJ"), which it did on May 14, 2019.

Rather than pay Par under the MCA contract, DiPietro tried various means to avoid her obligations. First, she made a false claim to the local police that Joseph LaForte threatened her during a negotiation meeting. At the same time, on or about May 20-21, 2019, DiPietro filed complaints about Par with the Federal Trade Commission *See* Exhibit 14, and the U.S. Postal Service *See* Exhibit 15. The local police, the FTC, and the U.S. Postal Service did not take Ms. DiPietro's bait.

On May 22, 2019, still on her campaign to pocket Par's money, DiPietro sent a lengthy email to the Philadelphia Police Department (the "PPD") making false allegations against Joseph LaForte and Par. In her email to the PPD, she claimed to have also notified numerous other agencies. *See* Exhibit 16. Later that same day, a PPD Detective notified DiPietro that, "it was determined that this is not a criminal case and should be handled in civil court." *See* Exhibit 17.

As early as May 31, 2019, if not earlier, DiPietro retained Heskin. On July 26, 2019, HMC filed a lawsuit against Par (*HMC, Inc. v. CBSG*, No. 19-cv-03285-JS (E.D. PA)).[7] Thereafter, (at least as early as September 2019),[8] DiPietro, turned to the SEC by corresponding with a SEC Senior Counsel, Linda Schmidt. Apparently, the SEC never questioned her credibility, bias, or financial motives and did nothing to corroborate her allegations. For over a year, with no notice to Par whatsoever, DiPietro, along with Heskin, engaged in extensive correspondence with the SEC in which DiPietro falsely positioned herself as a victim of Par. In her correspondence with the SEC, DiPietro fabricated numerous allegations in an effort to spur the SEC into taking action against Par - and thereby relieving DiPietro of her contractual obligations. Their correspondence includes hundreds of

[7] A year later, when the Receiver was appointed in late July 2020, this action was just concluding discovery.

[8] On August 27, 2020, Ms. DiPietro forwarded her law enforcement emails to the SEC investigator. We have reason to believe that Ms. DiPietro began corresponding with the SEC investigator at least as early as September 18, 2019.

emails and an untold number of phone calls.[9] Heskin is copied on and a participant in many of DiPietro's voluminous email communications with the SEC.

As just one outlandish example, DiPietro writes to the SEC that "CBSG is not in the MCA business. They are not in the factoring business. Their intentions are not to fund small businesses. They are just pretending to be a cash advance business. It's an act." (*See id.*) This coming from a merchant who received approximately $26,000,000.00 in advances from Par! DiPietro then calls Fox Rothchild "an accomplice." She tells the SEC one real fact, however: ConvergeHub – That should tell you all you need" *See* Exhibit 18. Having been a customer of Par and an MCA funder herself, DiPietro knew that Par engaged in very substantial underwriting and that Par's underwriting data was stored on ConvergeHub. After the Receiver was appointed, DiPietro sought the SEC's assistance in having the Receiver make her multi-million-dollar debt to Par go away. *See* Exhibit 19.

The SEC never once contacted Par or its counsel and apparently did no due diligence into DiPietro's claims about Par and did not consider Heskin's possible financial motive and his prior failures in the civil cases against Par. Nor is there any suggestion that the SEC realized that the Declarants were biased because they had massive financial motives to bring down Par; or was aware that DiPietro owed Par and thereby its noteholders more than $11,000,000 when it listened to her false claims.

Against a backdrop of legal losses, Heskin, along with his client and sidekick DiPietro, built this case for the Commission. Their obvious motivation and bias, which should have sounded multiple alarm bells at the SEC, apparently did not even cause the SEC to perform the slightest due diligence to verify their claims. Had the SEC done so, this case should never have been brought, or at the very least, emergency injunctive relief, a TRO and, thereafter, Preliminary Injunction should not have been sought be the SEC or entered by the Court.

The SEC Delegated Its Investigation to Heskin and Relies on His Clients' Biased and False Merchant Affidavits, "Expert" Report, and Private Investigator, Without Any Apparent Scrutiny and Without Performing Its Own Investigation

Foundational to the SEC's civil action and its purported justification for emergency relief for a Receivership, TRO, and Asset Freeze, was the allegation that Par falsely claimed that it conducted robust underwriting. The claimed misrepresentations about Par's underwriting span fully 31 paragraphs of the original 58-page Complaint and purportedly provided key evidence of Defendants'

[9] In addition to the emails attached as exhibits to this motion, there are hundreds more on the joint investigation between Heskin, DiPietro, the SEC, and FBI.

alleged securities law violations. (DE #1 ¶¶ 154-185, Section G(1), entitled: "False Claims about Par Funding's Rigorous Underwriting Process.") The SEC asserted that its claims about the quality of the underwriting were at the "core of the investment" allegations and a "key selling point." (DE#244 at 49). These claims were essential to the Complaint and to the Court granting emergency *ex parte* relief and appointing the Receiver. Heskin's merchant client declarations were the foundation of these claims. As the SEC made crystal clear, "you will see that in every investor (sic)[10] declaration we have provided, this misrepresentation occurs either with respect to the onsite inspections or with respect to the underwriting… it was lackluster... this is undisputed evidence that appears in declarations we obtained from merchants who stated this." (August 18, 2020, Preliminary Injunction Hearing Vol. I, DE# 244, 49-51). The Court later confirmed that the diligence of Par's underwriting was "really the thrust of the SEC's enforcement action." (August 17, 2020, Status Conference, DE# 193 30-31).

Of the 14 merchants whose sworn declarations were proffered by the SEC, all of them were represented by Heskin in prior or then active litigation.[11] Based on the uniform template of the merchant declarations and other information and documents finally obtained in discovery, including emails between Heskin and the SEC, it is clear that Heskin drafted the declarations for all of the merchants. Thus, Heskin and his merchant clients supplied every one of the 14 declarations for the SEC's complaint, *all of which were drafted over a one-week period between July 7 and July 14, 2020 – just days before the SEC filed its Complaint. See* Email chain between the SEC, Heskin, and Heskin clients attached as exhibit 23.

The declarations requested by the SEC and provided by Heskin from his financially motivated merchant clients are replete with demonstrable falsities. For example, the Heskin Merchant Declarations include the following falsities, among others: That Par did not perform an onsite inspection; that Par did not do a background check; and Par did not request accounts receivable information or account statements, as set forth in the chart and back-up exhibits attached hereto as Composite Exhibit "22." The SEC should have considered the obvious bias, scrutinized the Heskin Merchant Declarations, and/or done its own investigation, using its broad subpoena powers, instead of relying on Heskin and his faulty legal contentions (loans/interest rates/usury) and false facts. No

[10] Given that the SEC misspoke and accidentally called the declarations "investor declarations" rather than "merchant declarations," it is unclear whether the Court was further persuaded that there were misrepresentations made to investors. The truth is none of these declarations came from investors, but rather from biased and self-interested merchants.

[11] The dockets of Heskin's cases for the merchants he represented who signed declarations in this case are attached as composite exhibit 20.

doubt, many of the false representations to this Court led to the raid of Par's offices, LaForte and Lisa McElhone's home, and the *ex parte* installation of the Receiver. Furthermore, the SEC acknowledges that Par had received a number of subpoenas from different state regulatory bodies and Par always cooperated. Thus, there was no legitimate reason to believe the Defendants would not have cooperated with or would have absconded from the SEC.

Instead of examining the actual available financial data or using it broad subpoena powers, the SEC pursued its claims of insufficient underwriting by relying on the sworn declarations of fourteen (14) of the approximately *7,600* various merchants[12] who had received funding from Par. All fourteen declarants were preexisting Heskin clients, *see supra* at n. 10.[13] Moreover, the surrounding circumstances described herein and the declarations themselves suggest that Heskin hand-picked and represented all fourteen of these declarants. The fourteen declarations bear the hallmarks of a single draftsman, tracking nearly identical language, all signed days before the Complaint was filed, with occasional blank fields suggesting both uniformity and haste. Just days before this case was filed, Heskin sent a mass email to a number of merchants asking them to quickly respond to a number of yes or no questions regarding Par's underwriting on their funding requests. *See* Exhibit 23. These questions formed the basis for the template for the 14 Merchant Declarations. The haste with which Heskin and the SEC demanded these declarations be turned around quickly is borne out in their sloppiness. These cookie cutter declarations use identical statements and, in some instances, are incomplete and include blank lines,[14] but rather than reject these declarations, scrutinize them, or rely on its own efforts and work product, the SEC filed them with this Court.

In addition to containing falsities, the Heskin merchant declarations are neither a representative nor credible sampling of merchants. They constitute a mere .018% of Par's 7,600 merchant clients. Obviously, they are hardly random. Heskin and these merchants had a significant financial interest in the SEC's civil action and the appointment of a Receiver.[15] Thirteen of the 14

[12] Par funded approximately 7,600 merchants, via 17,000 different deals, and there were approximately 3,000 deals in the portfolio at the time the SEC caused the Court to order the Receivership.

[13] Of the fourteen merchants, three of them proffered declarations to support claims by the SEC other than the underwriting claims. These three clients are Kara DiPietro (HMC Decl.); Christine Rainwater (Quantico Decl.); and Michelle Rago (Woodside Decl.). (Also, prepared by Heskin)

[14] *See* Exhibit 21 at p. 6 Decl. of Julie Caricato at ¶3; and at p. 18 Decl. of Bruce McNider at ¶3.

[15] In addition to escaping their debts under the MCA contracts, Heskin and his declarants may have also sought a financial reward as whistleblowers under 15 U.S.C. § 78u-6 (a) (6). The Defense has served document demands to confirm this fact. Documents pursuant to those demands, if they exist,

merchants, all except Fleetwood Services that had an ill-conceived class action case pending, owed large outstanding balances to Par when they signed their sworn declarations.[16] They stood to gain massive financial benefit from the Receiver's liquidation of Par and his discretion to forgive some or all of their outstanding debts, at the expense of and huge detriment to Par and the investors. It appears their gambit may pay off because the Receiver's billing filed in this case show that he and his agent DSI have spent significant time negotiating a "Global Settlement" for Heskin's merchant clients. *See* Exhibit 25 Receiver billing entries related to global settlement. Since he was losing miserably in court over and over, the only hope Heskin had of getting his merchant clients out of their obligations to repay Par was to get a governmental agency to take the bait. After being rejected by local law enforcement, the FTC, the U.S. Postal Service, Heskin and DiPietro found a buyer in the SEC.

But the SEC did not just rely on merchant affidavits from Heskin clients, it actively relied upon Heskin and his clients to perform the SEC's investigation, contrary to the SEC's own guidelines. Pursuant to Section 3.1.4 of the SEC Enforcement Manual, government employees are apprised:

> When staff is aware that a private entity is investigating conduct that is the same or related to the conduct involved in the staff's investigation, staff should keep the following guidelines in mind:
>
> • In fact and appearance, the SEC and the private entity's investigations should be parallel and should not be conducted jointly. Staff should make investigative decisions independent of any parallel investigation that is being conducted by a private entity.
>
> • Do not take any investigative step principally for the benefit of the private entity's investigation or suggest investigative steps to the private entity.
>
> • In SEC investigations in which a witness has asserted or indicated an intention to assert the Fifth Amendment in testimony, do not suggest any line of questioning to the private entity conducting a parallel investigation, and do not provide to the private entity any document or other evidence for use in questioning a witness other than pursuant to an approved access request.

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have not yet been produced. And it appears that the SEC has withheld emails documenting its initial contacts with Heskin and Kara DiPietro.

[16] *See* Exhibit 24, a chart reflecting the outstanding balances owed by each of Heskin's seventeen clients who submitted declarations in support of the Complaint.

SEC Enforcement Manual[17] at 34. "Agencies must respect their own procedural rules and regulations." *Gonzalez v. Reno*, 212 F.3d 1338, 1349 (11th Cir. 2000) (*citing Morton v. Ruiz*, 415 U.S. 199, 234, 94 S. Ct. 1055, 1074 (1974) (*Hall v. Schweiker*, 660 F.2d 116, 119 (5th Cir.1981)).

Remarkably, Heskin and DiPietro were in regular contact with the SEC and FBI simultaneously both before and after this action was filed. They went beyond merely providing information within their personal knowledge and purported to investigate all different aspects of Par's business for the agencies and repeatedly sent their research to the SEC and FBI. *See* Exhibit 26. Perhaps most egregiously, on June 30, 2020, Heskin took the deposition of Defendant Joe Cole in a merchant civil action. In that deposition, Heskin asks numerous questions that were unrelated to any possible merchant concerns and beyond the proper scope of the deposition as ordered by the Court. Specifically, Heskin asked questions related to representations made to investors about topics outside the scope of the court order on permissible areas of inquiry for this deposition including topics such as: Par's default rate, other companies owned by defendants, LME Trust assets and ownership, investors, office addresses, LaForte's role in Par, the CLA Audit, CBS liabilities and assets, where McElhone lives and the address of her business Lacquer Lounge, COJ's, use of reloads, ABF owned by Vagnozzi, usury laws, investor disclosures, Laforte's statements about equity in the company, Joe Cole's partner Bill Broomly. These questions and topics were irrelevant to Heskin's lawsuit on behalf of his merchant client, but they were key to the SEC's case filed approximately three weeks after the deposition took place, which Heskin obviously knew about when he took the deposition. Three days after the deposition, Heskin forwarded the transcript to the SEC and the FBI in the same email. *See* Exhibit 11.

This conduct implicates the Defendants' constitutional rights because Heskin and DiPetro became arms of the government. "A nexus of state action exists between a private entity and the state when the state exercises coercive power, is entwined in the management or control of the private actor, or provides the private actor with *significant encouragement,* either overt or covert, or when the private actor operates as a *willful participant in joint activity* with the State or its agents, is controlled by an agency of the State, has been delegated a public function by the state, or is *entwined with governmental policies." United States v. Stein*, 541 F.3d 130, 147 (2d Cir. 2008) (emphasis in original). "The appropriate remedy for a constitutional violation is one that as much as possible restores the defendant to the circumstances that would have existed had there been no constitutional error." *United States v. Stein*,

[17] Available at https://www.sec.gov/divisions/enforce/enforcementmanual.pdf.

541 F.3d 130, 135 (2d Cir. 2008). In the event that the SEC has impinged upon the defendants' constitutional rights in filing the complaint and amending the complaint, the defendants would be restored to the circumstances that would have existed in the absence of a constitutional error via dismissal of the case. *See Stein*, 541 F.3d at 135.

The evidence shows that the SEC not only used and accepted the help of Heskin, DiPietro and his merchant clients - all with obvious bias and financial motive - to form and build its case, it deputized Heskin and DiPietro as *de facto* co-counsel and paralegal. As one example, the Defendants filed the declaration of Norm Valz, (DE 132-1), in which Mr. Valz soundly debunked Heskin's contention that Par's advances are "loans' that charge usurious rates of "interest," a false claim parroted by the SEC in its Complaint and TRO Motion. Incredibly, the SEC sent the Valz Declaration to Heskin soliciting his response. Heskin then drafted a page-long comfort email to the SEC attempting (unsuccessfully) to rebut the Valz Declaration. *See* Comfort Email, attached as exhibit 27. Heskin even offered to draft a counter-declaration. *Id.*

This vignette is disturbing because it shows that the SEC did no independent legal research or analysis of whether MCA contracts are lawful and enforceable throughout the United States, notwithstanding the dozens of published decisions making that absolutely clear, and the existence of an entire MCA industry. Rather, the SEC delegated its legal analysis to Heskin – an attorney who lost every MCA case he brought against Par. As a result, the SEC's Complaint included specious mischaracterizations of the MCA agreements as "loans" and criticized their terms. These are precisely the failed claims that Heskin made in his lawsuits. The SEC's delegation here is astounding and profoundly irregular.

The SEC, itself an investigative body and agency of the United States federal government that comes to the courts clothed in the authority of having conducted its own investigation prior to filing suit, alleged as fact knowingly or provably false allegations that benefited Heskin. First, Heskin hired his own private investigator to attend and video record an investor presentation put on by Dean Vagnozzi. *See* Letter from Ed Horder of Reehl Investigations, attached as exhibit 28. After the investigator attended the presentation, he sent a letter to Heskin stating: "The device used for recording the event was a 'Anysun AS820 Night Vision Camera' designed to look like the latest key fob. The device was given to "White & Williams" for sound and video and returned to the investigator." *Id.* The SEC relied upon Heskin's recording of this presentation 14 times in the TRO Motion for Temporary Restraining Order. (DE# 14).

Furthermore, as explained below, the SEC adopted Heskin's defective "default rate" analysis without its own scrutiny, even drafting declaration regarding this theory while Heskin was still explaining the theory to the SEC. Essentially, the SEC deputized Heskin as an investigator in violation of the state actor doctrine.

A private entity's conduct may be constrained where it is "fairly attributable" to the government, which has been held to mean that there is a "sufficiently close nexus between the State and the challenged action of the regulated entity." *D.L. Cromwell Invs., Inc. v. NASD Regulation, Inc.*, 279 F.3d 155, 161 (2d Cir. 2002).

> The test for such a nexus was established in *Blum v. Yaretsky*, 457 U.S. 991, 1004-05 (1982):
>
> That nexus exists either (1) where the state "has exercised coercive power [over a private decision] or has provided such significant encouragement, either overt or covert, that the choice must in law be deemed to be that of the State"; or (2) where "the private entity has exercised powers that are 'traditionally the exclusive prerogative of the State.'"

Under this standard- with the false affidavits and use of depositions to illicit improper discovery, the egregious actions certainly fall into prohibited conduct. *See generally Stein*, 541 F.3d at *passim*; *United States v. Connolly*, No, 16-CR-0370, 2019 WL 2120523, at *11 (S.D.N.Y. May 02, 2019); *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1279 (11th Cir. 2003).

Because the SEC built this case on improper discovery by deputizing Heskin and DiPietro as SEC investigators, this case should be dismissed for the constitutional violations. As bad as the SEC's delegation to Heskin is, the evidence shows that the claims placed before the Court to obtain emergency relief were false.

The SEC Obtained the TRO, Asset Freeze, and Receivership by Providing False Material Allegations to the Court That Were Not and Are Not Supported by Existing Fact or Law

The SEC misled the Court in its Complaint (DE 1)[18] and its Emergency *Ex Parte* Motion for Temporary Restraining Order (DE 14) (the "TRO Motion"). Specifically, as discussed in detail below, the SEC mislead the Court by: a) falsely alleging that Par's merchant cash advances are loans and usurious interest was charged on such loans, sometimes as high as 400% and half the time in excess 95% interest, which was and is not supported by existing fact or law and is contrary to existing law

[18] Although the SEC filed an Amended Complaint, Defendants refer to the original complaint here because those were the representations made to the Court at the time of the *ex-parte* proceedings and when the Receiver was installed. The misrepresentations in the original complaint were not corrected in the Amended Complaint.

because merchant cash advances are *not* loans and are not subject to an interest analysis; b) falsely alleging that Par funded the merchant cash advance to Fleetwood Services *before* conducting the on-site inspection of the business, which was and is not supported by existing fact and was entirely made up by the SEC; c) falsely alleging in the TRO Motion that a transcript of recorded dinner conversation establishes that Joe Cole referred to Par's MCAs as loans and said that the reason the Defendants were about to buy a bank was to avoid usury laws; d) the SEC mislead the Court about Joseph Laforte's identity being concealed from investors at a large event put on by Defendant Vagnozzi; (e) the SEC misled the Court regarding the default rate representations made to investors; and, last but not least, f) falsely alleging in the TRO Motion that the Defendants stole investor money by cleaning out Par's bank account and sending the money to another company in Georgia, which was and is not supported by existing fact because it never happened. Regardless of whether these false allegations came from Heskin or were made up by the SEC itself, the SEC is responsible for all of the false allegations of law and fact it made to this Court. As discussed below, there can be no doubt that the SEC misled the Court and in doing so has set into motion the near, if not already absolute, destruction of Par irrespective of the outcome of this case.

a) The SEC misled the Court with the false allegation that Par's merchant cash advances are "Loans" and that Merchants paid interest as high as 400% at times and 95% over half the time.

In its Complaint (DE 1) and its TRO Motion (DE 14) the SEC relies heavily on the false allegation that Par's merchant cash advances are "Loans." The very first paragraph of its Complaint and the TRO Motion states: "The McElhone-LaForte duo is in the business of making opportunistic loans – some of which charge more than 400% interest – to small businesses across America." *See* Complaint (DE 1) at ¶ 1; TRO Motion (DE 14) at p. 1. The SEC falsely referred to Pars' merchant cash advances as "Loans" 91 times in the Complaint and 101 times in the TRO Motion. The SEC obviously knew this loan contention was material because it harped on it incessantly throughout the Complaint and TRO Motion. The obvious reason the SEC falsely characterized Par's advances as "loans" right out of the gate and continued to do so repeatedly thereafter was to create a platform for the usurious interest rate false allegation, discussed below, to misled the Court into believing that the Defendants were running a mob-like, illegal, loan shark operation and thereby induce the Court to shut down Par. Obviously, if the Court believed that Par was making illegal loans it would have no choice but to enter a TRO and appoint a Receiver to protect the investors. The problem is the allegations are false.

The SEC could not, in good faith, claim that Par's cash advances were loans. Courts across the nation have held that merchant cash advances based upon the purchase of merchant accounts receivable are not loans. *See* Exhibits 2; 4. As shown above, Heskin had tried numerous times to convince courts that Par's cash advances were loans and failed. In fact, Heskin hired an expert CPA, Charles Lunden ("Lunden"), to provide a Report to present a damages model in an ill-conceived, attempted class action lawsuit[19] against Par. *See* Charles Lunden report, dated February 28, 2020 (the "Lunden Report"), attached hereto as Exhibit 29. The SEC received the Lunden Report from Heskin. Apparently, rather than doing any work to verify the accuracy of the Lunden Report's claim that Par's advances were usurious loans, the SEC blindly adopted it and attached it as Exhibit 76 to its TRO Motion and cited to it several times.

Had the SEC conducted its own legal research and due diligence, it would have learned that the loan contention was not supported by existing fact or law. And, had the SEC carefully examined the Lunden Report, it would have realized that Lunden was not endorsing the loan/interest proposition. Rather, he was making a damages assessment *assuming* that Heskin could convince the court that Par's MCA agreements were loans. The Lunden Report makes this clear with an apt disclaimer:

> While not rendering any opinion on the merits of the plaintiffs' claims, class or otherwise, *I necessarily assumed liability on the part of the defendants as alleged in the second amended complaint*, in order to determine whether any damages were suffered. That is, in order to compute damages, *I have assumed that counsel will prove at trial that the merchant cash advances are actually loans, subject to Texas laws about usury interest rates*…. I have assumed liability on the part of the defendants for purposes of my damages analysis. *See* [Exhibit 29]. (Emphasis added)

Lunden's disclaimer should have unequivocally made it clear to the SEC that it was *not* Lunden's opinion that Par's merchant cash advances were loans, it was Heskin's! Without any apparent scrutiny, investigation, or legal research of its own, the SEC ran with this false loan concept and misled this Court over and over again in the Complaint and TRO Motion. In fact, later when the SEC received the Valz Dec. that soundly debunks Heskin's and the SEC's false "loan" theory, the SEC turned to

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[19] *See* Fleetwood Services LLC, Robert L. Fleetwood and Pamela A. Fleetwood, individually, and on behalf of all others similarly situated v. Complete Business Solutions Group, Inc. d/b/a Par Funding; the John and Jane Does, Case No. 18-0268, E.D.P.A.

Heskin for reassurance that the Valz was wrong, and the advances are loans. *See* Exhibit 27. However, Heskin's reassurances were necessarily lackluster and entirely uncompelling because Heskin was flat wrong and Valz was correct. Subsequently, at the Preliminary Injunction hearing in August, the SEC changed its tune and said it did not care and it does not matter if the Defendants were selling loans or not (DE #193 at 29), but the damage was done and the SEC still referenced generally all the evidence it cited in the TRO Motion, referred to Par's advances as "loans", and referred to the Lunden Report. To this day the SEC has not conceded to the Court that it was wrong and there can be no doubt this false loan allegation was a factor in the Court granting the TRO and ordering a receivership. The SEC must be held to a higher standard than this and must be taught this type of conduct is not acceptable.

Heskin was the basis for the equally false, but damning contention in the Complaint and TRO motion that Par was charging merchants usurious interest rates as high as 400% and 95% over half the time. This false charge is made repeatedly throughout the Complaint and even more so in the TRO motion. *See* TRO Motion (DE 14) at p. 15; *see also* Complaint (DE 1) at ¶¶ 45 and 46. For example, the SEC states in its TRO Motion at page 15 that "[a]ccording to a recent expert witness analysis of the Loans issued to Texas small businesses, more than half the Loans charged in excess of 95% interest." The "recent expert witness analysis" the SEC is referring to for this information is Heskin's witness, Lunden, and his Report. *See id.* at p. 15, footnotes 119 and 120.

Nothing in the TRO Motion alerts the Court to the fact that the SEC relied on Heskin's paid expert, Lunden, who based his conclusions on Heskin's assumption that Par's cash advances were loans. The SEC failed to conduct its own independent investigation and legal analysis and, instead, relied upon and offered Heskin's false legal theories to urge this Court to take down Par. It is a blatant and frightening dereliction of responsibility by a government agency. So, when reading the TRO Motion the Court likely would have been led to believe the SEC retained an expert to back up this damning usury allegation, but the SEC did not. Instead, the SEC relied on Heskin's paid expert, Lunden, who got the base conclusion that Par's advances are loans and, as such, subject to an interest rate analysis from Heskin. Therefore, the SEC's "expert" for these sham loan/usury allegations is none other than Heskin. This conduct and disregard for the truth by the SEC is outrageous. The SEC should have conducted a legitimate, independent investigation, done its own legal research, and cultivated its own expert if it needed one, and should not have relied upon and offered Heskin's false legal theories to induce this Court to take down Par. Frankly, it is hard to think of a more blatant and more frightening dereliction of responsibility by a government agency than relying on the legal opinion

of a private litigant that his adversary is acting illegally and then filing a case and inducing the Court to installing a receiver without any independent legal analysis or factual inquiry.

There are thousands of MCA businesses across this United States and cash advances to merchants secured by the purchase of the right to collect on merchants' accounts receivable is a legal busines throughout the land, and interest rates and usury laws do not apply to merchant payments in the MCA context. One need look no further than to the fact that the Receiver is presently pulling Par merchant payments to conclusively demonstrate that Par's merchant cash advances are not loans and usury is inapplicable to merchant payments. If they were loans, the Receiver would be enforcing usurious loan contracts. Rather, recognizing their validity, the Receiver is collecting Merchant payments, albeit at a significantly lower rate than Par management did prior to the Receivership. Yet the SEC stands silent and allows its toxic false loan/usury allegations to fester and continues to refer to the MCA advances as loans, thereby continuing to cause irreparable injury to Par and extreme financial injury to the Defendants and the investors. It is shocking that the SEC made these false allegations in the first place and more shocking that it has not come forward to correct the record.

b) The SEC misled the Court with the false allegation that Par funded the advance to Fleetwood Services *before* doing the on-site inspection.

The SEC's misrepresentations to this Court continue with the false allegation that Par advanced cash to merchant Fleetwood Services *before* conducting an on-site inspection of the business. This allegation was obviously made to impugn Par's underwriting efforts. The problem for the SEC is that this allegation is demonstrably false and never should have been made. The funding to Fleetwood Services before the on-site inspection sham allegation was not even in a Merchant Declaration, but rather was concocted by the SEC. Specifically, the SEC states in its TRO Motion:

> The [Defendants'] representations about Par Funding's underwriting process are false…. For example, Par Funding executed a Loan agreement [and] 9{sic} funded a Loan to a Texas small business on January 4, 2017, and that same day ordered the inspection to occur on January 5, 2017. FN 264

See TRO Motion at p. 34. In footnote 264, the SEC cites to TRO Motion Exhibit 111, which is the Fleetwood Services on-site inspection report by Metro Inspections. That report clearly shows that the on-site inspection was, in fact, ordered on January 4, 2017, and a detailed and thorough inspection was conducted the next day, on January 5, 2017. *See id.* A true and correct copy of the Inspection Report of Fleetwood Services is attached hereto as Exhibit 22 at 149-53. However, the SEC's allegation that the Fleetwood Services advance was funded on January 4th *before* the on-site inspection on January 5th is untrue.

The SEC's own exhibits to its TRO Motion prove that the allegation that Par funded the Fleetwood Services advance *before* conducting an on-site inspection is untruthful and was made up by the SEC itself. First, the SEC filed as exhibits for the Motion for TRO the Declarations of Pamela Fleetwood (DE 29-2) (the "Pamela Fleetwood Declaration") and Robert Fleetwood (DE 29-3) (the "Robert Fleetwood Declaration"), both not surprisingly Heskin clients, in which they declare under penalty of perjury at paragraphs 7 that "CBSG [Par] did not perform an on-site inspection of the Company prior to approving the Loan." *See* Pamela Fleetwood Declaration (DE 29-2) at p. 1, ¶ 7 and Robert Fleetwood Declaration (DE 29-3) at p. 1, ¶ 7, true and correct copies of which are attached hereto as Exhibit 21 at 9-10. Importantly, Pamela and Robert Fleetwood make no mention whatsoever in their Declarations about when Par *funded* the Fleetwood Services advance. Next, another familiar SEC exhibit for the TRO Motion, the Lunden Report, makes clear the falsity of the SEC's allegation that the Fleetwood Services advance was funded before the on-site inspection. The Lunden Report, discussed above, shows on three different pages that Par funded the Fleetwood Services Advance on January 9, 2017, four days after the January 5th on-site inspection, not January 4th. *See* TRO Motion Exhibit 76 the Lunden Report, at Exhibit "A", pp. 1 (showing the "Payment Stream" and confirming the first advance to Fleetwood Services in the amount of $133,335.00 on 1/9/17) and 13 (confirming the "Start Date" and "Payment Stream" with the initial advance on 1/9/17); *see also* Par's Bank Statement showing the outbound advances to Fleetwood Services was made on January 9, 2017, a true and correct copy of which is attached hereto as Exhibit 29.

Thus, the SEC's allegation that the Fleetwood Services advance was funded on January 4th *before* the on-site inspection on January 5th is untrue and was concocted by the SEC. The SEC's untruths go on, as discussed below.

c) The SEC misled the Court with the false allegation that a transcript of a recorded dinner conversation establishes that Joe Cole referred to Par's MCAs as loans and stated that the reason acquiring a bank was being contemplated was to avoid usury laws.

The next false assertion made by the SEC in its TRO Motion is that a transcript of a recorded dinner establishes that Joe Cole ("Cole") referred to Par's MCAs as loans and stated that Par's advances are "loans" and that acquiring a bank was being considered to avoid usuary laws. While Cole was considering acquiring a bank,[20] the allegation that he said the acquisition was being considered to

[20] In reality, the contemplated bank acquisition involved Cole and other accredited individuals/entities other than Par to provide bank products and services other than MCA funding. However, even if Par's alleged involvement offered by the SEC is accepted as true for the purposes of this Motion only,

avoid usury laws is false, was made up by the SEC, and makes no sense. Specifically, in Section V(B) of the TRO Motion, titled "An *Ex Parte* Freeze of Assets Is Necessary," the SEC makes the following allegation:

> As Cole recently explained to two individuals posing as investors, they are buying a bank to "pump up our MCA business" and *there are no usury laws in effect if they run Loans through the bank*. FN 439

See TRO Motion at p. 73 (emphasis added). There is a transcript of a recording. The transcript does not establish that Cole said any such thing. In footnote 439 of the TRO Motion, the SEC cites to portions of a transcript of a recorded conversation at a dinner (the "Dinner Conversation Transcript"), attached to the TRO Motion as Exhibit 129, part 2, at 401:3-408:14, and 420:24-421:18. The transcript does not reflect that Cole ever made such a statement. In fact, the alleged statements attributed to Cole make no sense. As shown above, Par's cash advances are not loans and usury laws do not apply. On the other hand, usury laws do apply to regulated banks that make loans.

d) The SEC Misled the Court About Joseph LaForte Hiding His Identity from Investors

In the TRO motion, the SEC includes an entire section on how LaForte purportedly hid his identity from Investors to conceal his criminal identity. The SEC specifically references the November 2019 investor dinner as an example of this alleged malfeasance, stating:

> Additionally, Cole has solicited at least one investor by touting the experience of Par Funding's management team while failing to disclose LaForte's criminal history, despite knowing "from the first day" that LaForte has been convicted of crimes involving dishonesty. Abbonizio also touts the Par Funding management and conceals LaForte's identity and criminal history from investors. For example, at the November 2019 solicitation dinner, he introduced LaForte to the 300 potential investors and investors in attendance by telling them, "You're going to hear from the president of our company in a few moments, the gentleman that does the best job in multi-faceted businesses of exuding operational excellence."

(DE 14 at 43-44). The SEC leads this Court to believe that Mr. Abbonizio referred to LaForte as "the president" rather than by his name to conceal his identity from the investors at that dinner. However, the SEC completely ignores the fact that only 2 pages later in the transcript, Mr. Vagnozzi introduces LaForte by name, stating: "I want to introduce ***Joe LaForte***. Come on up, Joe." (DE 41-7 at 57, lines 17-18) (emphasis added). The SEC's representation that they were concealing LaForte's identity at this investor dinner when he was specifically introduced by name is a shocking misrepresentation. There

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the SEC's allegations are obviously false and nonsensical because Cole said no such thing and usuary laws do not apply to Par's merchant cash advances. The law could not be any clearer.

is no reasonable interpretation of the transcript that LaForte's true identity was concealed at the November 2019 investor dinner. Unfortunately, the SEC's misrepresentations do not end here.

e) The SEC mislead the Court regarding the default rate representations to investors

The SEC advances an inaccurate theory concocted by Heskin that Par misrepresents its default rates to investors, making it seem as if the rate of merchant defaults is significantly lower than it really is. However, the evidence shows that the SEC did not even fully understand this theory even after it filed the case but were rather relying on Heskin. The contention that filed judgments equal a default that would need to be disclosed to investors has already been debunked in the Glick KPI analysis. (DE# 694-8). On July 16, 2020, Heskin e-mails the SEC a 120-page long list of all the Judgments filed by Par's collection arm, New York Unity Factor. *See* Exhibit 30. The SEC adopts the documents and Heskin's concept and sends them to Crystal Ivory, Senior Accountant for the Miami Office of the SEC and Ray Anjlich who has the title of Senior Auditor. Six days later the two "seniors" create a declaration where they cut and paste the e-mail attachments Heskin sent to the SEC on July 16, 2020, just 8 days before the TRO Motion, adopting both Heskin's fallacious default rate calculation and his proposed strategy for the prosecution in this case. *See* declaration of Crystal Ivory and Ray Anjlich dated July 22, 2020, attached as Exhibit 31 and exhibits at pp. 155 to 275. It would appear from the Ivory and Anjlich declarations that they did months of investigation. Indeed, Anjlich stated in his declaration that he summarized the findings because to attach all the documents he reviewed would require printing over 5,000 pages. However, these declarations were in fact hastily thrown together, in the same fashion as the merchant declarations, without the SEC or its vendors performing its own critical analysis.

However, the speed with which Ivory and Anjlich allegedly reviewed thousands of case dockets is just the first problem. At the time the declarations were being prepared and executed, the SEC did not even know that New York Unity Factor was related to Par. On July 22, 2020, the day after the Anjlich declaration was executed and the same day the Ivory declaration was executed, the SEC e-mails Heskin asking, "how do we know the NY Unity Factor cases are CBSG/Par funding cases? I want to understand the link" *See* Exhibit 32. Heskin gives his explanation to the SEC, who accepts it. The fact that the SEC is taking instruction from Heskin on such a critical point two days before the case was filed and after one of the declarations were executed just goes to show that the Heskin tail was wagging the SEC dog, and the SEC did not understand the full nature of its case at the time it was filed. The next misrepresentation by the SEC is arguably the worst because it was likely one of the main reasons this Court decided to enter the TRO and appoint the Receiver.

f) The SEC misled the Court with the false allegation that the Defendants stole noteholder money by cleaning out Par's bank account and sending the money to another company in Georgia.

The most material and toxic misrepresentation the SEC made to trigger the Court to enter the TRO, Asset Freeze, and Receivership was the false allegation that some of the individual Defendants diverted investor funds by stealing all the money from Par's bank account and sending it to a company in Georgia. The Defendants did no such thing. However, the SEC falsely alleged in the TRO Motion that:

> Many of the individual Defendants are currently in the process of arranging financing and other details in their bid to acquire a bank in Dallas, Texas. Further, Par Funding recently transferred most of the proceeds in its bank account to the bank account held by another entity in Georgia.

See TRO Motion at p. 3. The SEC then elaborated on this false allegation, representing to the Court that:

> As set forth in the Declaration of Melissa Davis filed with this Motion, in June 2020, Par Funding transferred millions from the (sic) Par Funding, leaving only thousands in its bank account.

Specifically, Ms. Davis, stated: "As of June 30, 2020, the balance is the Par Funding JP Morgan Chase accounts total $82,319 after transfers labeled 'Par Fund Pref' totaling $20,865,953 were made out of the JP Morgan accounts during the month of June 2020." (Doc. 21-1 at 4).

So here the SEC was baiting the Court into believing an emergency asset freeze was needed because individual Defendants stole all of Par's money. Of course, this would alarm and grievously concern the Court. The problem is that caper never happened. The money transfer to "another entity in Georgia" was actually multiple transfers in the ordinary course of Par's business to Priority Processing, the company that Par routinely used to process cash advances to merchants, which was Par's core business function. Since January 2020, Par had sent many transfers totaling in excess of $360,000,000.00 to Priority Processing for the purpose of advancing cash to merchants. *See* Exhibit 33. The SEC could have easily figured this out. Indeed, the claim that certain Defendants stole or diverted money from Par's bank account "leaving only thousands" behind, is belied by the Receiver's Interim Status Reports that make clear there was approximately $22,000,000.00 in Par's bank account when he took over on July 28, 2020. (*See* DE#358-1). Most disturbingly, the SEC could have easily determined that the daily transfers to Par's ACH processer account were transactions made in the ordinary course of business.

The damage done by this false and misleading allegation is incalculable. The SEC made this claim in its filing seeking extraordinary emergency relief. And the false claim was incendiary – suggesting that Defendants were cleaning out millions of dollars from Par and leaving little. It was unquestionably material to the Court's decisions on the requested emergency relief. Yet, the SEC stands silent and leaves this Court, the public, and the investors to erroneously believe some individual Defendants cleaned out Par's bank account in June 2020, without correcting the record. This outrageous false allegation should never have been made. Contrary to the SEC's statement to this Court, there was not a single large transaction to some shell company in Georgia, but rather to a payment processer in an account owned by Par that Par used to fund merchant deals and save on transaction costs, passing those savings on to noteholders. Had the SEC bothered to do a proper investigation it would have discovered this and one of the foundational allegations upon which this Court granted the restraining order and installed the Receiver would not have been made.

There can be no doubt this false contention was a major factor in the Court's decision to enter the TRO, Asset Freeze, and Receivership. The SEC's conduct is indefensible and cannot be allowed.

Proposal to Rescue Par Funding

Despite all that has occurred, the Defendants are hopeful that Par can be saved. Defendants McElhone and Cole include in Exhibit 34, attached hereto, the planned structure and efforts to be made should the Court grant this motion in part or in whole. This should allay any concerns the Court has for Par and the noteholders and they would be open to modifying or adding to these terms if the Court deems necessary. Of course, given the injury already caused to Par by the SEC, it is impossible for the Defense to guarantee success, but the willingness and commitment to try hard to turn this situation around and right the ship endures.

Conclusion

The SEC improperly delegated its investigative authority to a private attorney who was a civil adversary of Par, who along with his merchant clients had a financial motive to induce the SEC to prosecute Par. In addition, the SEC induced this Court into entering the TRO, Asset Freeze, and Receivership Order with materially false allegations. The SEC's conduct is unacceptable and should not be condoned or rewarded. An agency of the United States federal government must not behave in such a way and must be held to a higher standard. The appropriate result is that this case should be dismissed, the Receivership should be terminated, and the Defendants should be allowed to get back to work and making money for the investors.

REQUEST FOR HEARING

Movants respectfully request a hearing on this motion. This motion presents a complex web of factual and legal issues and Movants believe oral argument would help the court wade through these issues and evidence. Movants estimate 2-3 hours for oral argument would be sufficient.

Dated: July 28, 2021

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 28, 2021, I electronically filed the forgoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record via transmissions of Notices of Electronic Filing generated by CM/ECF.

By: */s/ David L. Ferguson*
DAVID L. FERGUSON

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al,

Defendants.

DEFENDANTS' REPLY MEMORANDUM OF LAW TO THE SEC'S RESPONSE IN SUPPORT OF THEIR MOTION TO DISCHARGE THE RECEIVER

INTRODUCTION

Defendants respectfully submit this memorandum of law in Reply to the SEC's response to the Defendants' motion to Discharge the Receiver.

On July 13, 2021, the Defense moved to discharge the Receiver in light of overwhelming evidence of the positive financial condition of CBSG, contrary to prior reports issued by the Receiver, including the DSI Report. This motion drew upon, among other evidence, the two Glick reports and the CLA Audit Materials. (*See* DE 649) This evidence, now joined by the deposition testimony of CPA James Klenk, who still works for CBSG under the Receiver, demonstrates that the Receiver repeatedly misstated CBSG's financial position and wherewithal.

In opposing Defendants' motion for the discharge of the Receiver, the SEC never addresses the real issue. While Defendants were deprived of the evidence needed in July 2020 to oppose the granting of the receivership, they have that proof now. That proof is reliable, extensive and

overwhelming. The SEC's desire to avoid this issue is hardly surprising, because to address the truth now is to acknowledge the SEC's responsibility for seeking the Receivership in the first place and allowing it to continue, one year and counting, while the Receiver has cost hundreds of millions of dollars of revenue from Defendants' businesses and effectively ended them.

WHETHER THE RECEIVERSHIP SHOULD REMAIN IS RIPE AND NOT AN ISSUE FOR TRIAL

The issue before the Court is whether the Receivership should continue. That is not an issue for trial but an issue ripe for decision now. (*See* DE 662 at 3-4) The Court exercised its discretion to grant the Receivership expressly in order to preserve the status quo and protect the assets of CBSG for the benefit of the noteholders. This Court certainly did not grant the Receivership, and allow it to continue to this date, in a vacuum. Rather, at a time when the Defense had no records of CBSG to respond to inaccurate financial claims by the SEC and the Receiver, this Court was requested to, and did, make findings of fact about CBSG's financial condition, the soundness of its business model, and the propriety of appointing a Receiver to handle CBSG's merchant cash advance business and the preservation of its merchant portfolio.

Moreover, the Court has relied on the Receiver's representations about the financial wherewithal of CBSG to authorize the huge expansion of the Recievership on December 16, 2020, and order further expansions, including the seizure and sale of Defendant's personal property such as cars, watches and other personalty. Further, and importantly, the repetitive inaccurate claims about CBSG's financial condition acted to poison this Court against the company and the Defendants as exemplified by the contents of the December 15, 2020 status conference.

The SEC's position is that, while the Court can rely on factual assertions by the Receiver about CBSG's financial condition to enter Orders and make rulings against the Defendants, evidence that those assertions were inaccurate and/or misleading is not relevant to the Receiver's

duties or responsibilities, or to whether it misled the Court or the public, or to whether the rulings which relied upon those inaccurate facts should remain in force. This is a wholly unsupported proposition, and just stating it shows its invalidity.

The proof shows that the Receiver has failed to accurately and impartialy discharge his duties, or worse, misled the Court and public about the financial condition of CBSG, thus rendering a motion for his discharge ripe and actionable. This Court certainly has the authority to act, and to act now, to find that the current record fails to support continuing the Receivership any longer. It may well be the case that the proof now available to the Court to support discharging the Receiver is also relevant to issues at trial. (*See* DE 662 at 3-4) Indeed, the Defense evidence about the financial condition of CBSG will likely be valuable evidence to defend against the SEC's allegations in this case. But that certainly does not mean that this proof is limited to that use when it is clearly relevant right now to complete the record on which the Receivership currently exists.

The record has been, until recently, one-sided, for reasons repeatedly expressed. This Court made a decision to grant the Receivership based upon an entirely one-sided record of proof. That record was expanded further by the factual assertions of the Receiver concerning the financial condition of CBSG, culminating in the DSI Report. The factual record is overloaded with statements at status conferences expressing that the facts as asserted by the Receiver were compelling; that they justified the Receivership; and that the Receiver's inability to accumulate any additional money for the benefit of CBSG's noteholders was due to the financial instability of CBSG or worse, that CBSG was akin to a Ponzi scheme. And this Court has permitted the Receivership to continue to this day on the basis of that record.

The Court now has abundant proof that those factual assertions were inaccurate and misleading. The Court now has evidence that the Receiver ignored an ongoing top-notch audit that

was almost paid for and almost completed in July 2020 (the CLA audit) and, instead, paid huge amounts of money to utilize a non-CPA to generate a fatally flawed report (the DSI Report), in order, it appears, to confirm the inaccurate information the Receiver was telling this Court and the public. And the Receiver paraded that report around as if it were gospel and used it to seek, and obtain, the Receivership expansion of December 16, 2020, as well as numerous subsequent orders. Now the Court has the Reports of Joel Glick, including the powerful April 15, 2021 Report on the financial condition of the company, which have been previously addressed.

If that were not enough, the Defense recently took the deposition of James Klenk, the Financial Controller of CBSG since February 2018 and a CPA. He is still there today working under the auspises of the Receiver. To extent the Court needs even further proof of the financial condition of CBSG up until the Receivership in July 2020, Mr. Klenk puts the issue to bed. To start, he was hired to make CBSG GAAP compliant – and he did so. (Klenk Depo. at 9-10) CBSG is clearly not a Ponzi scheme. (*Id.* at 86) CBSG employed up to 17 employees doing accounting work including two CPA's – Mr. Klenk and a woman who was being certified as a CPA. (*Id*. at 13-14) CBSG was audited by two major accounting firms and its books and records were pored over numerous CPAs. Indeed, one email examining accounting minutia had seven (7) CPA's on the email who involved in the examination of CBSG's books and records. (*Id.* at 32-55) Then, there were sophisticated investors' accountants who not only examined the books and records of CBSG but received detailed financial statements from the company, including financial statements prepared in whole or in part by Mr. Klenk. (*Id.* at 57-65, 119-129, 173-175) And those financial statements are consistent with tax returns prepared by Rod Ermel and Associates, the company's outside CPA's, showing $75M in revenue in 2017; $123M in revenue and taxable income of $22M in 2018; and $179M in revenue and taxable income of $48M in 2019. (*See Id*. at 92-93, 120, 128,

134, 139, 154-57 and related Deposition Exhibits) And, by the way, Mr. Klenk verified that the Ermel firm indeed had a direct portal to the financial records of CBSG and used the company Quickbooks and data to prepare the tax returns. (*Id.* at 37, 93) Lastly, Mr. Klenk verified that CBSG had already paid CLA $200,000 for the 2018 audit and, by July 2020, the audit was almost complete and CLA was owed a balance of just $25,000. (T. 172)

In short, the evidence of CBSG's financial prowess is overwhelming. But more imnportantly for the instant motion, all of this evidence was available to the Receiver. It was available from Rod Ermel, the company's accountants; from CLA, which was almost finished with a comprehensive 2018 audit and was owed just $25,000 to complete; from Mr. Klenk, the Financial Controller; from the 17-odd accountants at CBSG; and from the tax returns and financial statements prepared by Mr. Klenk and others, including CPA's, and sent to potential investors. And it was available from a careful, qualified CPA examination of the books and records of the company.

It was the Receiver's job and duty and obligation to accurately and impartially advise this Court and the public of the true financial condition of CBSG. Having failed to do so, and worse, having provided inaccurate and misleading information to the Court and public for many months, the only appropriate resolution is discharge of the Receiver.

THIS COURT EXPRESSLY OFFERED TO CONSIDER SWORN PROOF REFUTING THE RECEIVER'S CLAIMS

The SEC's position also flies in the face of what the parties and the Court understood about Defendants' right to challenge the Receivership. At the December 15, 2020 status conference, the Court was so convinced of the claims made in the DSI Report that CBSG was a Ponzi scheme that the Court effectively dared the Defendants to disprove those claims and to prove that DSI's methodology was incorrect.

> "[W]e need to stop feeding the Court narratives that are not backed either by the credibility of lawyers and under oath, or verified statements or financials . . . let's actually contest it on merit, not on narrative, not on spin, because all that does is harm us in getting to the ultimate result in this case. . . .*[H]ow can I shut this down* because I'm not going to sit here and allow a continued misinformation campaign from other parties confuse investors *when I have an officer of the Court appointed by me going through the numbers and now giving me an affidavit from DSI*, and they're telling me this is a gross, quote, gross mischaracterization of the financials.

(*Id.* at 34–36.) (Emphasis added.)

The Court openly expressed the belief that Defendants could not counter the DSI Report's allegations and that it was time to "shut this down . . .the continued misinformation," from the Defense that contradicted the Receiver's Report. But the Court's offer was crystal clear: it pledged to address any errors identified in the DSI Report if Defendants provided a sworn CPA report,[1] with verified numbers, using the same financial data as used in the DSI Report.

> *[L]et's get the same data in the same room with the Defense expert so that if there's a true problem with the methodology we can figure this out.* If there's something that Mr. Sharp is missing, if there's something that he wasn't aware of that is a collection prong for the benefit of investors, *let it be flagged by a Defense expert* or maybe some minutiae in the data that may have been missed because we all know it is a lot of numbers, a lot of data over several years, mistakes happen.

[1] We note that the DSI Report was not evidence from a CPA.

(*Id.* at 72) (Emphasis added.)

And the Defense did so. The CPA's findings at Berkowitz Pollack Brant ("BPB") are contained in the Glick Report (DE 535). The Glick Report showed that there was, indeed, a devastating "problem" with the methodology used by Bradley Sharp. The methodology used is entirely – and fundamentally - wrong. (*See id.*) The DSI Report is not GAAP compliant. The Glick Report concludes that the DSI Report improperly used a cash basis analysis to claim, erroneously, that CBSG was not profitable. "A forensic analysis of CBSG data using an accrual basis method of accounting reveals that CBSG was profitable, earning hundreds of millions of dollars in top-line revenue that was ignored by DSI." (DE 535 at ¶ 16, *citing id.* at ¶¶ 52-54.) The DSI Report leads to ridiculous conclusions- i.e., that a company reporting operating revenues of $179 million, on which it paid millions of dollars in taxes, had income of only $6 million dollars on a cash basis. (*See* DE 649 at 14 n. 20 *citing* DE 430 at 2-3) The DSI Report was "incorrect" when it claimed that "CBSG could not have made principal and interest payments to the investors without additional funds from the investors." (DE 535 at ¶ 38)(emphasis added)

As previously described to this Court, the Glick Report methodically refuted the fundamental claims of the DSI Report and the Receiver about the profitability and sustainability of CBSG (DE 649 at 4-5). The Glick Report used correct GAAP accounting methodology to calculate revenue and profitability; not the DSI Report's non-GAAP compliant cash basis, which is worthless. And the Glick Report analyzed the entire CBSG merchant portfolio, not the DSI Report's extrapolation from a nonrepresentative subset (the so-called "Exceptions Portfolio"), that excluded half of the merchant portfolio. Among the conclusions of the Glick Report:

i. CBSG was highly profitable for years, earning hundreds of millions of dollars in top-line revenue between 2012 and 2019. (DE 535-1 ¶¶ 88, see ¶¶ 50-59)

ii. CBSG's factoring, i.e., the profit made on every dollar used in funding of merchant cash advances ("MCA"), was highly profitable for years, resulting in a blended factor rate of 1.399, determined by reviewing all MCA deals that CBSG funded. (*Id.* ¶¶ 28, 82-87)

iii. CBSG's use of "reloads" – providing new funds to existing merchant clients which were used to pay down their debt – meant higher fees, resulting in higher revenue for CBSG. The DSI Report's claim (unsupported by data or an understanding of GAAP accounting), that CBSG's reloads were "excessive" or somehow an indication of a merchants' inability to repay, was baseless. (*Id.* ¶¶ 18, 64-66, 73-86) Moreover, only 14.4% of CBSG's merchants received reloads. (*Id.* ¶ 73 chart)

iv. Investor funds were not used to pay consulting fees to Defendants. (*Id.* ¶¶ 31-37)

v. CBSG's underwriting had a very conservative approval rate of 17 percent for underwriting applications. (*Id.* ¶¶ 39-42)

(DE 649 at 4-5, citing DE 535-1; DE 535 at 3-4)

The Court made a promise to consider credible evidence rebutting the Receiver's claims. And the Court made this promise in the context of the December 15th status conference which was devoted to assessing the quality of the Receiver's reporting on the financial condition of CBSG and its work on behalf of the noteholders to preserve CBSG's assets. The Receiver, as well, recognized that his right to remain depended upon the accuracy of his reporting about CBSG. He

expressly staked his reputation in the accuracy of the DSI Report and insisted that he be "held accountable for what we say" in the DSI Report. (*Id.* at 21, 31)

On this crystal clear record, the SEC is simply wrong when it attempts to characterize the proof of the Receiver's conduct of the Receivership as somehow not relevant to whether he should be discharged. The Defense has satisfied – overwhelmingly - the Court's challenge. The Court promised to consider evidence that refuted the Receiver's numbers and methodology. Having made that commitment, the Court cannot help but find, upon a fair consideration of all the proof now assembled, that the Receiver's claims about CBSG's financial conditions were false, and, moreover, that the Receiver has performed abysmally as a steward over a once highly profitable company that employed over 70 people by liquidating its assets and shutting down its business.

The SEC does not even attempt to confront the record of the Receiver's poor stewardship, including Receiver-caused losses of over $180,000,000 and the evidence of propagating a wildly false narrative about CBSG's financial condition for months on end, upon which this Court made substantial rulings extremely detrimental to the Defendants and to the company. The Defense does not need to prove a vendetta to establish an overwhelming basis to discharge the Receiver. The Court has the discretion to grant a Receivership; and to end one. The Court's rulings based on the Receiver's information were not subject to the rules of evidence. Indeed the false DSI Report is not an expert report, was not subject to *Daubert*, and none of the Receiver's presentations or status reports, which went on for hours, were subject to the rules of evidence.

Finally, the Defense is not claiming that "the Receiver should be removed because the SEC did not assert that CBSG was Ponzi scheme." (SEC Response at 5) The Receiver should be removed because he has pursued a course of liquidation and destroying a thriving business while misrepresenting to the Court and public, again and again, that CBSG's business was actually a

mirage, its profits were a mirage, its multimillion dollar merchant portfolio was a mirage, and his pursuit of deep discount settlements and the liquidation of a thriving business were the only and best course possible for CBSG's noteholders. The proof now before the Court shows that this narrative was misleading at best and the Receiver had to know, or should have known, and certainly had the means to know, that the narrative provided to the Court and public was grossly inaccurate.

CONCLUSION

For the foregoing reasons, this Court should Discharge the Receiver.

WHEREFORE, Defendants Lisa McElhone, Joseph W. LaForte, and Joseph Cole Barleta respectfully request that this Court grant their Motion to Discharge the Receiver.

Respectfully submitted,

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/s/ Andre G. Raikhelson
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CERTIFICATE OF SERVICE

I hereby certify that on August 6, 2021, a true and correct copy of the foregoing was served via CM/ECF on all counsel or parties of record.

By: /s/ Joel Hirschhorn
Joel Hirschhorn

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH DIVISION
CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al,

Defendants.

AMENDED COPY[1]

DEFENDANTS' AMENDED REPLY MEMORANDUM OF LAW TO THE SEC'S RESPONSE IN SUPPORT OF THEIR MOTION TO DISCHARGE THE RECEIVER

INTRODUCTION

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[1] This filing adds a footnote, inadvertently omitted from the file copy of August 6, 2021, correcting one assertion made in the original motion (*see* n. 2, *infra*), as well as a renewed request for argument on the motion (*see* Conclusion), and corrects a single misspelling.

testimony of CPA James Klenk, who still works for CBSG under the Receiver, demonstrates that the Receiver repeatedly misstated CBSG's financial position and wherewithal.

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over numerous CPAs.[2] Indeed, one email examining accounting minutia had seven (7) CPA's on the email who involved in the examination of CBSG's books and records. (*Id.* at 32-55) Then, there were sophisticated investors' accountants who not only examined the books and records of CBSG but received detailed financial statements from the company, including financial statements prepared in whole or in part by Mr. Klenk. (*Id.* at 57-65, 119-129, 173-175) And those financial statements are consistent with tax returns prepared by Rod Ermel and Associates, the company's outside CPA's, showing $75M in revenue in 2017; $123M in revenue and taxable income of $22M in 2018; and $179M in revenue and taxable income of $48M in 2019. (*See Id.* at 92-93, 120, 128, 134, 139, 154-57 and related Deposition Exhibits) And, by the way, Mr. Klenk verified that the Ermel firm indeed had a direct portal to the financial records of CBSG and used the company Quickbooks and data to prepare the tax returns. (*Id.* at 37, 93) Lastly, Mr. Klenk verified that CBSG had already paid CLA $200,000 for the 2018 audit and, by July 2020, the audit was almost complete and CLA was owed a balance of just $25,000. (T. 172)

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[2] In the original motion papers (DE 649), we asserted that CLA had created a gigantic spreadsheet and verified the Funding Analysis, known as the KPIs. (*See* DE 649 at p. 3 and n. 4) Mr. Klenk corrected that assertion. He created the massive spreadsheet (800-1000 pages long), in April 2019 to examine, with CLA, the history of funding losses in order to better ballpark or estimate the allowance for doubtfull accounts for the close of 2018. In the course of that accounting project, he used the data from the Funding Analysis (KPI) form. (*Id.* at 163-170)

statements prepared by Mr. Klenk and others, including CPA's, and sent to potential investors. And it was available from a careful, qualified CPA examination of the books and records of the company.

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> "[W]e need to stop feeding the Court narratives that are not backed either by the credibility of lawyers and under oath, or verified statements or financials . . . let's actually contest it on merit, not on narrative, not on spin, because all that does is harm us in getting to the ultimate result in this case. . . .*[H]ow can I shut this down* because I'm not going to sit here and allow a continued misinformation campaign from other parties confuse investors *when I have an officer of the Court appointed by me going through the numbers and now giving me an affidavit from DSI*, and they're telling me this is a gross, quote, gross mischaracterization of the financials.

(*Id.* at 34–36.) (Emphasis added.)

The Court openly expressed the belief that Defendants could not counter the DSI Report's allegations and that it was time to "shut this down . . .the continued misinformation," from the Defense that contradicted the Receiver's Report. But the Court's offer was crystal clear: it pledged

to address any errors identified in the DSI Report if Defendants provided a sworn CPA report,[3] with verified numbers, using the same financial data as used in the DSI Report.

> *[L]et's get the same data in the same room with the Defense expert so that if there's a true problem with the methodology we can figure this out.* If there's something that Mr. Sharp is missing, if there's something that he wasn't aware of that is a collection prong for the benefit of investors, *let it be flagged by a Defense expert* or maybe some minutiae in the data that may have been missed because we all know it is a lot of numbers, a lot of data over several years, mistakes happen.

(*Id.* at 72) (Emphasis added.)

And the Defense did so. The CPA's findings at Berkowitz Pollack Brant ("BPB") are contained in the Glick Report (DE 535). The Glick Report showed that there was, indeed, a devastating "problem" with the methodology used by Bradley Sharp. The methodology used is entirely – and fundamentally - wrong. (*See id*.) The DSI Report is not GAAP compliant. The Glick Report concludes that the DSI Report improperly used a cash basis analysis to claim, erroneously, that CBSG was not profitable. "A forensic analysis of CBSG data using an accrual basis method of accounting reveals that CBSG was profitable, earning hundreds of millions of dollars in top-line revenue that was ignored by DSI." (DE 535 at ¶ 16, *citing id.* at ¶¶ 52-54.) The DSI Report leads to ridiculous conclusions- i.e., that a company reporting operating revenues of $179 million, on which it paid millions of dollars in taxes, had income of only $6 million dollars on a cash basis. (*See* DE 649 at 14 n. 20 *citing* DE 430 at 2-3) The DSI Report was "incorrect" when it claimed that "CBSG could not have made principal and interest payments to the investors without additional funds from the investors." (DE 535 at ¶ 38)(emphasis added)

[3] We note that the DSI Report was not evidence from a CPA.

As previously described to this Court, the Glick Report methodically refuted the fundamental claims of the DSI Report and the Receiver about the profitability and sustainability of CBSG (DE 649 at 4-5). The Glick Report used correct GAAP accounting methodology to calculate revenue and profitability; not the DSI Report's non-GAAP compliant cash basis, which is worthless. And the Glick Report analyzed the entire CBSG merchant portfolio, not the DSI Report's extrapolation from a nonrepresentative subset (the so-called "Exceptions Portfolio"), that excluded half of the merchant portfolio. Among the conclusions of the Glick Report:

i. CBSG was highly profitable for years, earning hundreds of millions of dollars in top-line revenue between 2012 and 2019. (DE 535-1 ¶¶ 88, see ¶¶ 50-59)

ii. CBSG's factoring, i.e., the profit made on every dollar used in funding of merchant cash advances ("MCA"), was highly profitable for years, resulting in a blended factor rate of 1.399, determined by reviewing all MCA deals that CBSG funded. (*Id.* ¶¶ 28, 82-87)

iii. CBSG's use of "reloads" – providing new funds to existing merchant clients which were used to pay down their debt – meant higher fees, resulting in higher revenue for CBSG. The DSI Report's claim (unsupported by data or an understanding of GAAP accounting), that CBSG's reloads were "excessive" or somehow an indication of a merchants' inability to repay, was baseless. (*Id.* ¶¶ 18, 64-66, 73-86) Moreover, only 14.4% of CBSG's merchants received reloads. (*Id.* ¶ 73 chart)

iv. Investor funds were not used to pay consulting fees to Defendants. (*Id.* ¶¶ 31-37)

v. CBSG's underwriting had a very conservative approval rate of 17 percent for underwriting applications. (*Id.* ¶¶ 39-42)

(DE 649 at 4-5, citing DE 535-1; DE 535 at 3-4)

The Court made a promise to consider credible evidence rebutting the Receiver's claims. And the Court made this promise in the context of the December 15th status conference which was devoted to assessing the quality of the Receiver's reporting on the financial condition of CBSG and its work on behalf of the noteholders to preserve CBSG's assets. The Receiver, as well, recognized that his right to remain depended upon the accuracy of his reporting about CBSG. He expressly staked his reputation in the accuracy of the DSI Report and insisted that he be "held accountable for what we say" in the DSI Report. (*Id.* at 21, 31)

On this crystal clear record, the SEC is simply wrong when it attempts to characterize the proof of the Receiver's conduct of the Receivership as somehow not relevant to whether he should be discharged. The Defense has satisfied – overwhelmingly - the Court's challenge. The Court promised to consider evidence that refuted the Receiver's numbers and methodology. Having made that commitment, the Court cannot help but find, upon a fair consideration of all the proof now assembled, that the Receiver's claims about CBSG's financial conditions were false, and, moreover, that the Receiver has performed abysmally as a steward over a once highly profitable company that employed over 70 people by liquidating its assets and shutting down its business.

The SEC does not even attempt to confront the record of the Receiver's poor stewardship, including Receiver-caused losses of over $180,000,000 and the evidence of propagating a wildly false narrative about CBSG's financial condition for months on end, upon which this Court made substantial rulings extremely detrimental to the Defendants and to the company. The Defense does not need to prove a vendetta to establish an overwhelming basis to discharge the Receiver. The

Court has the discretion to grant a Receivership; and to end one. The Court's rulings based on the Receiver's information were not subject to the rules of evidence. Indeed the false DSI Report is not an expert report, was not subject to *Daubert*, and none of the Receiver's presentations or status reports, which went on for hours, were subject to the rules of evidence.

Finally, the Defense is not claiming that "the Receiver should be removed because the SEC did not assert that CBSG was Ponzi scheme." (SEC Response at 5) The Receiver should be removed because he has pursued a course of liquidation and destroying a thriving business while misrepresenting to the Court and public, again and again, that CBSG's business was actually a mirage, its profits were a mirage, its multimillion dollar merchant portfolio was a mirage, and his pursuit of deep discount settlements and the liquidation of a thriving business were the only and best course possible for CBSG's noteholders. The proof now before the Court shows that this narrative was misleading at best and the Receiver had to know, or should have known, and certainly had the means to know, that the narrative provided to the Court and public was grossly inaccurate.

CONCLUSION

For the foregoing reasons, this Court should Discharge the Receiver. Oral argument and a hearing are requested.

WHEREFORE, Defendants Lisa McElhone, Joseph W. LaForte, and Joseph Cole Barleta respectfully request that this Court grant their Motion to Discharge the Receiver.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2021, a true and correct copy of the foregoing was served via CM/ECF on all counsel or parties of record.

By: /s/ Joel Hirschhorn
Joel Hirschhorn

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 9:20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a/ PAR FUNDING, et al.,

Defendants.
_____/

DEFENDANT JOSEPH W. LAFORTE'S AMENDED ANSWER AND AFFIRMATIVE DEFENSES TO AMENDED COMPLAINT

Defendant Joseph W. LaForte ("Defendant" or "LaForte"), files this Amended Answer and Affirmative Defenses to the Amended Complaint filed by Plaintiff Securities and Exchange Commission ("Plaintiff" or "SEC") pursuant to the Court's Order Granting in Part and Denying in Part Plaintiff's Motion to Construe Some Affirmative Defenses as Denials, and to Strike Others (DE 690), and states as follows:

ANSWER

Defendant denies all allegations contained in the headings and all unnumbered paragraphs in the Amended Complaint and denies any allegations not specifically denied.Defendant answers the remaining allegations of the Amended Complaint as follows:

1. Defendant denies the allegations contained in paragraph 1 of the Amended Complaint.

2. Defendant denies the allegations contained in the first sentence of paragraph 2 of the Amended Complaint. Defendant only admits that Par Funding offered and issued promissory notes from 2012 through 2017.

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3. Defendant denies the allegations contained in paragraph 3 of the Amended Complaint. Additionally, Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in the second sentence of paragraph 3 of the AmendedComplaint and therefore denies same.

4. Defendant is without sufficient knowledge to form a belief regarding what the Pennsylvania Securities Regulators knew regarding the creation of the Agent Funds and is without sufficient knowledge with respect to the Agent Funds' obligations to its noteholders.Defendant denies the allegations contained in the remainder of paragraph 4 of the Amended Complaint.

5. Defendant denies the allegations contained in paragraph 5 of the Amended Complaint.

6. Defendant is without sufficient knowledge to form a belief as to the truth of the Allegations in paragraph 6 not concerning Defendant and therefore denies same.

7. Defendant is without sufficient knowledge to form a belief as to the truth of the Allegations in paragraph 7 not concerning Defendant and therefore denies same.

8. Defendant denies the allegations contained in paragraph 8 of the Amended Complaint.

9. Defendant denies the allegations contained in paragraph 9 of the Amended Complaint.

10. Defendant denies the allegations contained in paragraph 10 of the Amended Complaint.

11. Defendant admits that he and his wife, Lisa McElhone conceived the idea for Par Funding and that Par Funding had an office in Philadelphia, PA until 2017, when Par moved its office to Florida. Defendant admits that Complete Business Solutions Group has done business as

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Par Funding since 2013. Defendant admits that The LME 2017 Family Trust ("The LME Trust") was Par Funding's sole owner and that McElhone was Par Funding's sole employee.Defendant denies the remaining allegations contained in paragraph 11 of the Amended Complaint.

12. Defendant only admits that the Order referenced in paragraph 12 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 12of the Amended Complaint and therefore denies same.

13. Defendant only admits that the Order referenced in paragraph 13 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 13of the Amended Complaint and therefore denies same.

14. Defendant only admits that the Order referenced in paragraph 14 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 14of the Amended Complaint and therefore denies same.

15. Defendant admits that FSP's corporate filings speak for themselves and that McElhone was FSP's sole owner. Defendant denies the remainder of the allegations containedin paragraph 15 of the Amended Complaint.

16. Defendant only admits that the Order referenced in paragraph 16 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant admits that McElhone was the sole owner of Par Funding and denies the remainder of the allegations contained in paragraph 16 of the Amended Complaint.

17. Defendant admits that he is a resident of Philadelphia and that he conceived the idea for Par Funding with his wife, Lisa McElhone, but was never its owner. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning theDefendant in paragraph 17 of the Amended Complaint and therefore denies same. Defendant only admits that he once held Series 7, 63, and 24 Licenses, and denies the remainder of the allegations contained in paragraph 17 of the Amended Complaint.

18. Defendant only admits that the convictions referenced in paragraph 18 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 18 of the Amended Complaint.

19. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 19 of the Amended Complaint and therefore denies same. Defendant only admits that Cole is a resident of Philadelphia and was employed by Par Funding as CFO until 2017, when Par Funding employees were converted toFull Spectrum Processing ("FSP") employees, and thereafter by FSP as its CFO.

20. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 20 of the Amended Complaint and therefore denies same.

21. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 21 of the Amended Complaint and therefore denies same. Defendant only admits that the Order referenced in paragraph 21 of theAmended Complaint speaks for itself and denies any inconsistent and remaining allegations inparagraph 21 of the Amended Complaint.

22. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 22 of the Amended Complaint and therefore denies same.

23. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 23 of the Amended Complaint and therefore denies same. Defendant only admits that the agreement referenced in paragraph 23 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 23 of the Amended Complaint.

24. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 24 of the Amended Complaint and therefore denies same.

25. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 25 of the Amended Complaint and therefore denies same.

26. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 26 of the Amended Complaint and therefore denies same. Defendant only admits that the Order referenced in paragraph 26 of theAmended Complaint speaks for itself and denies any inconsistent and remaining allegations inparagraph 26 of the Amended Complaint.

27. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 27 of the Amended Complaint and therefore denies same.

28. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 28 of the Amended Complaint and therefore denies same.

29. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 29 of the Amended Complaint and therefore denies same.

30. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 30 of the Amended Complaint and therefore denies same.

31. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 31 of the Amended Complaint and therefore denies same.

32. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 32 of the Amended Complaint and therefore denies same.

33. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 33 of the Amended Complaint and therefore denies same.

34. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 34 of the Amended Complaint and therefore denies same.

35. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 35 of the Amended Complaint and therefore

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denies same.

36. Defendant admits that the LME Trust is Par Funding's owner and that McElhone is its Grantor. Defendant only admits that the Certification of Trust referenced in paragraph 36 ofthe Amended Complaint speaks for itself and denies the remaining allegations contained in paragraph 36 of the Amended Complaint.

37. Paragraph 37 includes legal conclusions regarding jurisdiction and venue to which no response is required. Defendant only admits that Par Funding has an office in Florida and is registered to do business in Florida, and that McElhone is the owner of FSP. Defendant denies the remaining allegations contained in paragraph 37 of the Amended Complaint.

38. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 38 of the Amended Complaint and therefore denies same.

39. Defendant denies the allegations in paragraph 39 of the Amended Complaint.

40. Defendant denies the allegations in paragraph 40 of the Amended Complaint.

41. Defendant denies the allegations in paragraph 41 of the Amended Complaint.

42. Defendant denies the allegations in paragraph 42 of the Amended Complaint and only admits that Par Funding's corporate filings speak for themselves. Defendant is without sufficient knowledge as to the remaining allegations contained in paragraph 42 and therefore denies them.

43. Defendant denies the allegations in paragraph 43 of the Amended Complaint.

44. Defendant denies the allegations in paragraph 44 of the Amended Complaint.

45. Defendant denies the allegations in paragraph 45 of the Amended Complaint.

46. Defendant denies the allegations in paragraph 46 of the Amended Complaint.

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47. Defendant denies the allegations in paragraph 47 of the Amended Complaint.

48. Defendant denies the allegations in paragraph 48 of the Amended Complaint.

49. Defendant denies the allegations in paragraph 49 of the Amended Complaint.

50. Defendant denies the allegations in paragraph 50 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

51. Defendant denies the allegations in paragraph 51 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

52. Defendant admits that McElhone and Cole signed promissory notes issued by Par Funding, and denies the remainder of the allegations contained in paragraph 52 of the Amended Complaint.

53. Defendant denies the allegations in paragraph 53 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

54. Defendant denies the allegations in paragraph 54 of the Amended Complaint and only admits that the agreement referenced in this paragraph speak for itself.

55. Defendant denies the allegations in paragraph 55 of the Amended Complaint and only admits that any agreement referenced in this paragraph speak for itself.

56. Defendant only admits that Defendant Vagnozzi had a Finders Agreement withPar Funding at one point in time but denies the remainder of the allegations contained in paragraph 56 of the Amended Complaint.

57. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 57 of the Amended Complaint and therefore denies same.

58. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 58 of the Amended Complaint and therefore denies same.

59. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 59 of the Amended Complaint and therefore denies same.

60. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 60 of the Amended Complaint and therefore denies same.

61. Defendant admits that Par Funding raised money through the sale of promissory notes, but denies the remaining allegations contained in paragraph 61 of the Amended Complaint.

62. Defendant only admits that any subpoena issued by state regulators speaks foritself and denies the allegations in paragraph 62 of the Amended Complaint.

63. Defendant denies the allegations in paragraph 63 of the Amended Complaint.

64. Defendant only admits that Par Funding sold promissory notes to Agent Funds beginning in 2018 but denies the allegations in paragraph 64 of the Amended Complaint.

65. Defendant denies the allegations in paragraph 65 of the Amended Complaint.

66. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 66 of the Amended Complaint and therefore denies same.

67. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 67 of the Amended Complaint and therefore denies same.

68. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 68 of the Amended Complaint and therefore denies same.

69. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 69 of the Amended Complaint and therefore denies same.

70. Defendant denies the allegations in paragraph 70 of the Amended Complaint.

71. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 71 of the Amended Complaint and therefore denies same.

72. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 72 of the Amended Complaint and therefore denies same.

73. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 73 of the Amended Complaint and therefore denies same.

74. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 74 of the Amended Complaint and therefore denies same.

75. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 75 of the Amended Complaint and therefore denies same. Defendant only admits that the Agent Guide referenced in this paragraph speaks for itself.

76. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 76 of the Amended Complaint and therefore denies same. Defendant only admits that the Agent Guide referenced in this paragraph speaks for itself.

77. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 77 of the Amended Complaint and therefore denies same.

78. Defendant denies the allegations in paragraph 78 of the Amended Complaint.

79. Defendant denies the allegations in paragraph 79 of the Amended Complaint.

80. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 80 of the Amended Complaint and therefore denies same. Defendant denies the remaining allegations in paragraph 80 of the Amended Complaint.

81. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 81 of the Amended Complaint and therefore denies same.

82. Defendant denies the allegations in paragraph 82 of the Amended Complaint.

83. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 83 of the Amended Complaint and therefore denies same. Defendant denies the remaining allegations in paragraph 83 of the Amended Complaint.

84. Defendant denies the allegations in paragraph 84 of the Amended Complaint.

85. Defendant only admits that any agreement between Par and ABFP Management speaks for itself and denies the remaining allegations in paragraph 85 of the Amended Complaint.

86. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 86 of the Amended Complaint and therefore denies same.

87. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 87 of the Amended Complaint and therefore denies same.

88. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 88 of the Amended Complaint and therefore denies same. Defendant only admits that the PPM referenced in this paragraph speaksfor itself.

89. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 89 of the Amended Complaint and therefore denies same. Defendant only admits that the PPM referenced in this paragraph speaksfor itself.

90. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 90 of the Amended Complaint and therefore denies same. Defendant only admits that the PPM referenced in this paragraph speaksfor itself.

91. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 91 of the Amended Complaint and therefore denies same.

92. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 92 of the Amended Complaint and therefore denies same.

93. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 93 of the Amended Complaint and therefore denies same.

94. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 94 of the Amended Complaint and therefore denies same.

95. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 95 of the Amended Complaint and therefore denies same.

96. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 96 of the Amended Complaint and therefore

denies same. Defendant only admits that any document referenced in this paragraph speaks for itself.

97. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 97of the Amended Complaint and therefore denies same.

98. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 98 of the Amended Complaint and therefore denies same.

99. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 99 of the Amended Complaint and therefore denies same.

100. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 100 of the Amended Complaint and therefore denies same.

101. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 101 of the Amended Complaint.

102. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 102 of the Amended Complaint.

103. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 103 of the Amended Complaint.

104. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 104 of the Amended Complaint.

105. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 105 of the Amended Complaint and therefore denies same.

106. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 106 of the Amended Complaint and therefore denies same.

107. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 107 of the Amended Complaint and therefore denies same.

108. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 108 of the Amended Complaint and therefore denies same.

109. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 109 of the Amended Complaint and therefore denies same.

110. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 110 of the Amended Complaint and therefore denies same.

111. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 111 of the Amended Complaint and

therefore denies same.

112. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 112 of the Amended Complaint and therefore denies same. Defendant denies the remaining allegations of this paragraph of the Amended Complaint.

113. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 113 of the Amended Complaint and therefore denies same.

114. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 114 of the Amended Complaint and therefore denies same. Defendant only admits that any filings made by Furman and Fidelis Planning speak for themselves.

115. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 115 of the Amended Complaint and therefore denies same.

116. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 116 of the Amended Complaint and therefore denies same.

117. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 117 of the Amended Complaint and therefore denies same.

118. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 118 of the Amended Complaint and

therefore denies same.

119. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 119 of the Amended Complaint and therefore denies same.

120. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 120 of the Amended Complaint and therefore denies same.

121. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 121 of the Amended Complaint and therefore denies same.

122. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 122 of the Amended Complaint and therefore denies same.

123. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 123 of the Amended Complaint and therefore denies same.

124. Defendant only admits that the message referenced in paragraph 124 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant iswithout sufficient knowledge to form a belief as to the truth of the remaining allegations inparagraph 124 of the Amended Complaint and therefore denies same.

125. Defendant only admits that the message referenced in paragraph 125 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant iswithout sufficient knowledge to form a belief as to the truth of the remaining allegations inparagraph 125

of the Amended Complaint and therefore denies same.

126. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 126 of the Amended Complaint and therefore denies same.

127. Defendant denies the allegations contained in paragraph 127 of the Amended Complaint.

128. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 128 of the Amended Complaint and therefore denies same.

129. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 129 of the Amended Complaint and therefore denies same.

130. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 130 of the Amended Complaint and therefore denies same.

131. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 131 of the Amended Complaint and therefore denies same.

132. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 132 of the Amended Complaint and therefore denies same.

133. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 133 of the Amended Complaint and

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therefore denies same.

134. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 134 of the Amended Complaint and therefore denies same.

135. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 135 of the Amended Complaint and therefore denies same.

136. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 136 of the Amended Complaint and therefore denies same.

137. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 137 of the Amended Complaint and therefore denies same.

138. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 138 of the Amended Complaint and therefore denies same.

139. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 139 of the Amended Complaint and therefore denies same.

140. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 140 of the Amended Complaint and therefore denies same.

141. Defendant is without sufficient knowledge to form a belief as to the truth of the

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allegations not concerning the Defendant in paragraph 141 of the Amended Complaint and therefore denies same.

142. Defendant denies the allegations contained in paragraph 142 of the Amended Complaint.

143. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 143 of the Amended Complaint and therefore denies same.

144. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 144 of the Amended Complaint and therefore denies same.

145. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 145 of the Amended Complaint and therefore denies same.

146. Defendant denies the allegations contained in paragraph 146 of the Amended Complaint.

147. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 147 of the Amended Complaint and therefore denies same.

148. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 148 of the Amended Complaint and therefore denies same.

149. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 149 of the Amended Complaint and

therefore denies same.

150. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 150 of the Amended Complaint and therefore denies same.

151. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 151 of the Amended Complaint and therefore denies same.

152. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 152 of the Amended Complaint and therefore denies same.

153. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 153 of the Amended Complaint and therefore denies same.

154. Defendant denies the allegations contained in paragraph 154 of the Amended Complaint.

155. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 155 of the Amended Complaint and therefore denies same.

156. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 156 of the Amended Complaint and therefore denies same.

157. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 157 of the Amended Complaint and

therefore denies same.

158. Defendant only admits that the brochure referenced in paragraph 158 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant iswithout sufficient knowledge to form a belief as to the truth of the remaining allegations inparagraph 158 of the Amended Complaint and therefore denies same.

159. Defendant only admits that the brochure referenced in paragraph 159 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations inparagraph 159 of the Amended Complaint and therefore denies same.

160. Defendant only admits that the brochure referenced in paragraph 160 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant iswithout sufficient knowledge to form a belief as to the truth of the remaining allegations inparagraph 160 of the Amended Complaint and therefore denies same.

161. Defendant only admits that the brochure referenced in paragraph 161 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant iswithout sufficient knowledge to form a belief as to the truth of the remaining allegations inparagraph 161 of the Amended Complaint and therefore denies same.

162. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 162 of the Amended Complaint and therefore denies same.

163. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 163 of the Amended Complaint and therefore denies same.

164. Defendants are without knowledge regarding the allegations in paragraph 164,and therefore denied.

165. Defendant denies the allegations contained in paragraph 165 of the Amended Complaint.

166. Defendant denies the allegations contained in paragraph 166 of the Amended Complaint.

167. Defendant denies the allegations contained in paragraph 167 of the Amended Complaint.

168. Defendant denies the allegations contained in paragraph 168 of the Amended Complaint.

169. Defendant denies the allegations contained in paragraph 169 of the Amended Complaint.

170. Defendant denies the allegations contained in paragraph 170 of the Amended Complaint.

171. Defendant denies the allegations contained in paragraph 171 of the Amended Complaint.

172. Defendant denies the allegations contained in paragraph 172 of the Amended Complaint.

173. Defendant denies the allegations contained in paragraph 173 of the Amended Complaint.

174. Defendant denies the allegations contained in paragraph 174 of the Amended Complaint.

175. Defendant denies the allegations contained in paragraph 175 of the Amended Complaint.

176. Defendant denies the allegations contained in paragraph 176 of the Amended Complaint.

177. Defendant denies the allegations contained in paragraph 177 of the Amended Complaint.

178. Defendant denies the allegations contained in paragraph 178 of the Amended Complaint.

179. Defendant denies the allegations contained in paragraph 179 of the Amended Complaint.

180. Defendant denies the allegations contained in paragraph 180 of the Amended Complaint.

181. Defendant denies the allegations contained in paragraph 181 of the Amended Complaint.

182. Defendant denies the allegations contained in paragraph 182 of the Amended Complaint.

183. Defendant denies the allegations contained in paragraph 183 of the Amended Complaint.

184. Defendant denies the allegations contained in paragraph 184 of the Amended Complaint.

185. Defendant denies the allegations contained in paragraph 185 of the Amended Complaint.

186. Defendant denies the allegations contained in paragraph 186 of the Amended Complaint.

187. Defendant is without sufficient knowledge to form a belief as to the truth of the

allegations not concerning the Defendant in paragraph 187 of the Amended Complaint and therefore denies same.

188. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 188 of the Amended Complaint and therefore denies same.

189. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 189 of the Amended Complaint and therefore denies same.

190. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 190 of the Amended Complaint and therefore denies same.

191. Defendant only admits that the website referenced in paragraph 191 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant iswithout sufficient knowledge to form a belief as to the truth of the remaining allegations inparagraph 191of the Amended Complaint and therefore denies same.

192. Defendant denies the allegations contained in paragraph 192 of the Amended Complaint.

193. Defendant denies the allegations contained in paragraph 193 of the Amended Complaint.

194. Defendant denies the allegations contained in paragraph 194 of the Amended Complaint.

195. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 195 of the Amended Complaint and

therefore denies same.

196. Defendant denies the allegations contained in paragraph 196 of the Amended Complaint.

197. Defendant denies the allegations contained in paragraph 197 of the Amended Complaint.

198. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 198 of the Amended Complaint and therefore denies same.

199. Defendant denies the allegations contained in paragraph 199 of the Amended Complaint.

200. Defendant denies the allegations contained in paragraph 200 of the Amended Complaint.

201. Defendant denies the allegations contained in paragraph 201 of the Amended Complaint.

202. Defendant denies the allegations contained in paragraph 202 of the Amended Complaint.

203. Defendant denies the allegations contained in paragraph 203 of the Amended Complaint.

204. Defendant denies the allegations contained in paragraph 204 of the Amended Complaint.

205. Defendant denies the allegations contained in paragraph 205 of the Amended Complaint.

206. Defendant is without sufficient knowledge to form a belief as to the truth of the

allegations not concerning the Defendant in paragraph 206 of the Amended Complaint and therefore denies same.

207. Defendant denies the allegations contained in paragraph 207 of the Amended Complaint.

208. Defendant denies the allegations contained in paragraph 208 of the Amended Complaint.

209. Defendant denies the allegations contained in paragraph 209 of the Amended Complaint.

210. Defendant denies the allegations contained in paragraph 210 of the Amended Complaint.

211. Defendant denies the allegations contained in paragraph 211 of the Amended Complaint.

212. Defendant denies the allegations contained in paragraph 212 of the Amended Complaint.

213. Defendant denies the allegations contained in paragraph 213 of the Amended Complaint.

214. Defendant denies the allegations contained in paragraph 214 of the Amended Complaint.

215. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 215 of the Amended Complaint and therefore denies same.

216. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 216 of the Amended Complaint and

therefore denies same.

217. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 217 of the Amended Complaint and therefore denies same.

218. Defendant denies the allegations contained in paragraph 218 of the Amended Complaint.

219. Defendant denies the allegations contained in paragraph 219 of the Amended Complaint.

220. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 220 of the Amended Complaint.

221. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 221 of the Amended Complaint and therefore denies same.

222. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 222 of the Amended Complaint and therefore denies same.

223. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 223 of the Amended Complaint and therefore denies same.

224. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 224 of the Amended Complaint and therefore denies same.

225. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 225 of the Amended Complaint and therefore denies same.

226. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 226 of the Amended Complaint and therefore denies same.

227. Defendant denies the allegations contained in paragraph 227 of the Amended Complaint.

228. Defendant only admits that the Order referenced in paragraph 228 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant iswithout sufficient knowledge to form a belief as to the truth of the remaining allegations inparagraph 12 of the Amended Complaint and therefore denies same.

229. Defendant only admits that the Order referenced in paragraph 229 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant iswithout sufficient knowledge to form a belief as to the truth of the remaining allegations inparagraph 229 of the Amended Complaint and therefore denies same.

230. Defendant denies the allegations contained in paragraph 230 of the Amended Complaint.

231. Defendant only admits that the Order referenced in paragraph 231 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant iswithout sufficient knowledge to form a belief as to the truth of the remaining allegations inparagraph 231 of the Amended Complaint and therefore denies same.

232. Defendant denies the allegations contained in paragraph 232 of the Amended

Complaint.

233. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 233 of the Amended Complaint and therefore denies same.

234. Defendant denies the allegations contained in paragraph 234 of the Amended Complaint.

235. Defendant denies the allegations contained in paragraph 235 of the Amended Complaint.

236. Defendant only admits that the Order referenced in paragraph 236 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant iswithout sufficient knowledge to form a belief as to the truth of the remaining allegations inparagraph 236 of the Amended Complaint and therefore denies same.

237. Defendant only admits that the Order referenced in paragraph 237 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant iswithout sufficient knowledge to form a belief as to the truth of the remaining allegations inparagraph 237 of the Amended Complaint and therefore denies same.

238. Defendant only admits that the Order referenced in paragraph 238 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant iswithout sufficient knowledge to form a belief as to the truth of the remaining allegations inparagraph 238 of the Amended Complaint and therefore denies same.

239. Defendant denies the allegations contained in paragraph 239 of the Amended Complaint.

240. Defendant denies the allegations contained in paragraph 240 of the Amended

Complaint.

241. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 241 of the Amended Complaint and therefore denies same.

242. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 242 of the Amended Complaint and therefore denies same.

243. Defendant denies the allegations contained in paragraph 243 of the Amended Complaint.

244. Defendant denies the allegations contained in paragraph 244 of the Amended Complaint.

245. Defendant denies the allegations contained in paragraph 245 of the Amended Complaint.

246. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 246 of the Amended Complaint and therefore denies same.

247. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 247 of the Amended Complaint and therefore denies same.

248. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 248 of the Amended Complaint and therefore denies same.

249. Defendant is without sufficient knowledge to form a belief as to the truth of the

allegations not concerning the Defendant in paragraph 249 of the Amended Complaint and therefore denies same.

250. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 250 of the Amended Complaint and therefore denies same.

251. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 251 of the Amended Complaint and therefore denies same.

252. Defendant only admits that the article referenced in paragraph 252 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant iswithout sufficient knowledge to form a belief as to the truth of the remaining allegations inparagraph 238 of the Amended Complaint and therefore denies same.

253. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 253 of the Amended Complaint and therefore denies same.

254. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 254 of the Amended Complaint and therefore denies same.

255. Defendant only admits that the article referenced in paragraph 255 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant iswithout sufficient knowledge to form a belief as to the truth of the remaining allegations inparagraph 238 of the Amended Complaint and therefore denies same.

256. Defendant is without sufficient knowledge to form a belief as to the truth of the

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allegations not concerning the Defendant in paragraph 256 of the Amended Complaint and therefore denies same.

257. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 257 of the Amended Complaint and therefore denies same.

258. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 258 of the Amended Complaint and therefore denies same.

259. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 259 of the Amended Complaint and therefore denies same.

260. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 260 of the Amended Complaint and therefore denies same.

261. Defendant only admits that the documents referenced in paragraph 261 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 261 of the Amended Complaint and therefore denies same.

262. Defendant only admits that the Order referenced in paragraph 262 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant iswithout sufficient knowledge to form a belief as to the truth of the remaining allegations inparagraph 262 of the Amended Complaint and therefore denies same.

263. Defendant is without sufficient knowledge to form a belief as to the truth of the

allegations not concerning the Defendant in paragraph 263 of the Amended Complaint and therefore denies same.

264. Defendant only admits that the website referenced in paragraph 264 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant iswithout sufficient knowledge to form a belief as to the truth of the remaining allegations inparagraph 264 of the Amended Complaint and therefore denies same.

265. Defendant denies the allegations contained in paragraph 265 of the Amended Complaint.

266. Defendant denies the allegations contained in paragraph 266 of the Amended Complaint.

267. Defendant denies the allegations contained in paragraph 267 of the Amended Complaint.

COUNT I

268. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fullyset forth herein.

269. Defendant denies the allegations contained in paragraph 269 of the Amended Complaint.

270. Defendant denies the allegations contained in paragraph 270 of the Amended Complaint.

COUNT II

271. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fullyset forth herein.

272. Defendant denies the allegations contained in paragraph 272 of the Amended

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Complaint.

273. Defendant denies the allegations contained in paragraph 273 of the Amended Complaint.

COUNT III

274. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fullyset forth herein.

275. Defendant denies the allegations contained in paragraph 275 of the Amended Complaint.

276. Defendant denies the allegations contained in paragraph 276 of the Amended Complaint.

COUNT IV

277. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fullyset forth herein.

278. Defendant denies the allegations contained in paragraph 278 of the Amended Complaint.

279. Defendant denies the allegations contained in paragraph 279 of the Amended Complaint.

COUNT V

280. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fullyset forth herein.

281. Defendant denies the allegations contained in paragraph 281 of the Amended Complaint.

282. Defendant denies the allegations contained in paragraph 282 of the Amended Complaint.

COUNT VI

283. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fullyset forth herein.

284. Defendant denies the allegations contained in paragraph 284 of the Amended Complaint.

285. Defendant denies the allegations contained in paragraph 285 of the Amended Complaint.

COUNT VII

286. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fullyset forth herein.

287. Defendant denies the allegations contained in paragraph 287 of the Amended Complaint.

288. Defendant denies the allegations contained in paragraph 288 of the Amended Complaint.

289. Defendant denies the allegations contained in paragraph 289 of the Amended Complaint.

COUNT VIII

290. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fullyset forth herein.

291. Defendant denies the allegations contained in paragraph 291 of the Amended Complaint.

292. Defendant denies the allegations contained in paragraph 292 of the Amended Complaint.

293. Defendant denies the allegations contained in paragraph 293 of the Amended Complaint.

294. Defendant denies the allegations contained in paragraph 294 of the Amended Complaint.

RELIEF REQUESTED

Defendant denies that he committed the violations alleged and that the Commission is entitled to any relief set forth in this section.

GENERAL DENIAL

Defendant generally denies all allegations of the Amended Complaint except for such allegations as are explicitly and specifically admitted above.

AFFIRMATIVE DEFENSES

Defendant asserts the following affirmative defense and reserves the right to amend his answer and affirmative defenses based upon information obtained in the course of litigation.

FIRST AFFIRMATIVE DEFENSE
(Advice of Counsel)

Defendant hereby provides notice that he intends to rely on a defense that he relied upon advice of counsel. Defendant did not act with the requisite mental state that Plaintiff must prove, and the Court should decline to issue the equitable relief sought by Plaintiff, because Defendant's reliance on the advice of his counsel is inconsistent with the Plaintiff's allegations ofviolations of the federal securities laws and the relief sought. Defendant made a full and complete good faith

report of all materials facts to counsel that he considered competent, received the attorneys' advice as to the specific course of conduct that was followed, and reasonably relied on that advice in good faith.

SECOND AFFIRMATIVE DEFENSE
(Reliance on Other Professionals and Experts)

In executing or authorizing the execution and/or publication of any document containingthe statements complained of in the Amended Complaint, Defendant was entitled to, and did, reasonably and in good faith, rely upon the work and conclusions of other professionals and experts, including Certified Public Accountants, Accountants, Auditors, & Tax Advisors.

THIRD AFFIRMATIVE DEFENSE
(Good Faith)

Plaintiff's claims are barred in whole or in part because Defendant acted at all times in good faith and/or did not know, and in the exercise of reasonable case could have known, or had any reasonable grounds to believe, that any misstatements or omissions of material fact existed in any statements, reports, and/or filings allegedly issued or uttered by Defendant. Defendant also relied upon competent personnel to assist him in making reasonable and informed decisions.

FOURTH AFFIRMATIVE DEFENSE
(Notes Are Not Securities)

Plaintiff's claims are barred because the notes at issue are not securities because they fall squarely within the list of non-securities enumerated in *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990). The notes are also exempt as securities under the express language of the Exchange Act(15 U.S.C. § 78c(a)(10)) and from the registration requirement under the Securities Act (15 U.S.C. § 77b(a)(1).

JURY DEMAND

Defendant hereby requests a trial by jury on all claims and defenses in this action.

Dated: August 20, 2021

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/s/Alejandro Soto
ALEJANDRO SOTO
Florida Bar No. 172847

Co-Counsel for Joseph W. LaForte

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 20th day of August, 2021, a true and correct copy of the foregoing Amended Answer and Affirmative Defenses was served via the Court's CM/ECF System upon all counsel of record.

/s/ Alejandro O. Soto
ALEJANDRO O. SOTO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 9:20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a/ PAR FUNDING, et al.,

Defendants.
_____/

DEFENDANT LISA MCELHONE'S AMENDED ANSWER AND AFFIRMATIVE DEFENSES TO AMENDED COMPLAINT

Defendant Lisa McElhone ("Defendant" or "McElhone"), files this Amended Answer and Affirmative Defenses to the Amended Complaint filed by Plaintiff Securities and Exchange Commission ("Plaintiff" or "SEC"), and states as follows:

ANSWER

Defendant denies all allegations contained in the headings and all unnumbered paragraphs in the Amended Complaint and denies any allegations not specifically denied. Defendant answers the remaining allegations of the Amended Complaint as follows:

1. Defendant denies the allegations contained in paragraph 1 of the Amended Complaint.

2. Defendant denies the allegations contained in the first sentence of paragraph 2 of the Amended Complaint. Defendant only admits that Par Funding offered and issued various promissory notes.

3. Defendant denies the allegations contained in paragraph 3 of the Amended Complaint. Additionally, Defendant is without sufficient knowledge to form a belief as to the

truth of the allegations contained in the second sentence of paragraph 3 of the Amended Complaint and therefore denies same.

4. Defendant is without sufficient knowledge to form a belief regarding what the Pennsylvania Securities Regulators knew regarding the creation of the Agent Funds and is without sufficient knowledge with respect to the Agent Funds' obligations to its noteholders. Defendant denies the allegations contained in the remainder of paragraph 4 of the Amended Complaint.

5. Defendant denies the allegations contained in paragraph 5 of the Amended Complaint.

6. Defendant is without sufficient knowledge to form a belief as to the truth of the Allegations in paragraph 6 not concerning Defendant and therefore denies same.

7. Defendant is without sufficient knowledge to form a belief as to the truth of the Allegations in paragraph 7 not concerning Defendant and therefore denies same.

8. Defendant denies the allegations contained in paragraph 8 of the Amended Complaint.

9. Defendant denies the allegations contained in paragraph 9 of the Amended Complaint.

10. Defendant denies the allegations contained in paragraph 10 of the Amended Complaint.

11. Defendant admits that she and her husband, Joseph Laforte, started Par Funding in or about 2011 and that CBSG had an office in Philadelphia, PA until approximately 2017, when CBSG relocated its office to Florida. Defendant admits that Complete Business Solutions Group (CBSG) has done business as Par Funding since about 2013. Defendant admits that The LME

2017 Family Trust ("The LME Trust") was Par Funding's sole owner and that Defendant was Par Funding's sole employee. Defendant denies the remaining allegations contained in paragraph 11 of the Amended Complaint.

12. Defendant only admits that the Order referenced in paragraph 12 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 12 of the Amended Complaint and therefore denies same.

13. Defendant only admits that the Order referenced in paragraph 13 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 12 of the Amended Complaint and therefore denies same.

14. Defendant only admits that the Order referenced in paragraph 14 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 14 of the Amended Complaint and therefore denies same.

15. Defendant admits that FSP's corporate filings speak for themselves and that Defendant was FSP's sole owner. Defendant denies the remainder of the allegations contained in paragraph 15 of the Amended Complaint.

16. Defendant only admits that the Order referenced in paragraph 16 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant admits that Defendant was the sole owner of Par Funding and denies the remainder of the allegations contained in paragraph 16 of the Amended Complaint.

17. Defendant admits that LaForte is a resident of Philadelphia and that he worked on the idea for Par Funding with his wife, Lisa McElhone, but was never its owner. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 17 of the Amended Complaint and therefore denies same.

18. Defendant only admits that the convictions referenced in paragraph 18 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 18 of the Amended Complaint.

19. Defendant only admits that Cole is a resident of Philadelphia and was employed by Par Funding as CFO until about 2017, when Par Funding employees were converted to Full Spectrum Processing ("FSP") employees, and thereafter was employed by FSP as its CFO. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 19 of the Amended Complaint and therefore denies same.

20. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 20 of the Amended Complaint and therefore denies same.

21. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 21 of the Amended Complaint and therefore denies same. Defendant only admits that the Order referenced in paragraph 21 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 21 of the Amended Complaint.

22. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 22 of the Amended Complaint and therefore denies same.

23. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 23 of the Amended Complaint and therefore denies same. Defendant only admits that the agreement referenced in paragraph 23 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 23 of the Amended Complaint.

24. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 24 of the Amended Complaint and therefore denies same.

25. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 25 of the Amended Complaint and therefore denies same.

26. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 26 of the Amended Complaint and therefore denies same. Defendant only admits that the Order referenced in paragraph 26 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 26 of the Amended Complaint.

27. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 27 of the Amended Complaint and therefore denies same.

28. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 28 of the Amended Complaint and therefore denies same.

29. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 29 of the Amended Complaint and therefore denies same.

30. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 30 of the Amended Complaint and therefore denies same.

31. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 31 of the Amended Complaint and therefore denies same.

32. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 32 of the Amended Complaint and therefore denies same.

33. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 33 of the Amended Complaint and therefore denies same.

34. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 34 of the Amended Complaint and therefore denies same.

35. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 35 of the Amended Complaint and therefore denies same.

36. Defendant admits that the LME Trust is Par Funding's owner and that she is its Grantor. Defendant only admits that the Certification of Trust referenced in paragraph 36 of the

Amended Complaint speaks for itself and denies the remaining allegations contained in paragraph 36 of the Amended Complaint.

37. Defendant admits that Par Funding has an office in Florida and is registered to do business in Florida, and that she is the owner of FSP. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 37 of the Amended Complaint and therefore denies same.

38. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 38 of the Amended Complaint and therefore denies same.

39. Defendant denies the allegations in paragraph 39 of the Amended Complaint.

40. Defendant denies the allegations in paragraph 40 of the Amended Complaint.

41. Defendant denies the allegations in paragraph 41 of the Amended Complaint.

42. Defendant denies the allegations in paragraph 42 of the Amended Complaint and only admits that Par Funding's corporate filings speak for themselves. Defendant is without sufficient knowledge as to the remaining allegations contained in paragraph 42 and therefore denies them.

43. Defendant denies the allegations in paragraph 43 of the Amended Complaint.

44. Defendant denies the allegations in paragraph 44 of the Amended Complaint.

45. Defendant denies the allegations in paragraph 45 of the Amended Complaint.

46. Defendant denies the allegations in paragraph 46 of the Amended Complaint.

47. Defendant denies the allegations in paragraph 47 of the Amended Complaint.

48. Defendant denies the allegations in paragraph 48 of the Amended Complaint.

49. Defendant denies the allegations in paragraph 49 of the Amended Complaint.

50. Defendant denies the allegations in paragraph 50 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

51. Defendant denies the allegations in paragraph 51 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

52. Defendant admits that she and Cole signed promissory notes issued by Par Funding, and denies the remainder of the allegations contained in paragraph 52 of the Amended Complaint.

53. Defendant denies the allegations in paragraph 53 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

54. Defendant denies the allegations in paragraph 54 of the Amended Complaint and only admits that the agreement referenced in this paragraph speak for itself.

55. Defendant denies the allegations in paragraph 55 of the Amended Complaint and only admits that any agreement referenced in this paragraph speak for itself.

56. Defendant only admits that Defendant Vagnozzi had a Finders Agreement with Par Funding at one point in time but denies the remainder of the allegations contained in paragraph 56 of the Amended Complaint.

57. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 57 of the Amended Complaint and therefore denies same.

58. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 58 of the Amended Complaint and therefore denies same.

59. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 59 of the Amended Complaint and therefore denies same.

60. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 60 of the Amended Complaint and therefore denies same.

61. Defendant admits that Par Funding raised money through the sale of promissory notes, but denies the remaining allegations contained in paragraph 61 of the Amended Complaint.

62. Defendant only admits that any subpoena issued by state regulators speaks for itself and denies the allegations in paragraph 62 of the Amended Complaint.

63. Defendant denies the allegations in paragraph 63 of the Amended Complaint.

64. Defendant only admits that Par Funding sold promissory notes to Agent Funds beginning in 2018 but denies the allegations in paragraph 64 of the Amended Complaint.

65. Defendant denies the allegations in paragraph 65 of the Amended Complaint.

66. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 66 of the Amended Complaint and therefore denies same.

67. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 67 of the Amended Complaint and therefore denies same.

68. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 68 of the Amended Complaint and therefore denies same.

69. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 69 of the Amended Complaint and therefore denies same.

70. Defendant denies the allegations in paragraph 70 of the Amended Complaint.

71. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 71 of the Amended Complaint and therefore denies same.

72. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 72 of the Amended Complaint and therefore denies same.

73. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 73 of the Amended Complaint and therefore denies same.

74. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 74 of the Amended Complaint and therefore denies same.

75. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 75 of the Amended Complaint and therefore denies same. Defendant only admits that the Agent Guide referenced in this paragraph speaks for itself.

76. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 76 of the Amended Complaint and therefore denies same. Defendant only admits that the Agent Guide referenced in this paragraph speaks for itself.

77. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 77 of the Amended Complaint and therefore denies same.

78. Defendant denies the allegations in paragraph 78 of the Amended Complaint.

79. Defendant denies the allegations in paragraph 79 of the Amended Complaint.

80. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 80 of the Amended Complaint and therefore denies same. Defendant denies the remaining allegations in paragraph 80 of the Amended Complaint.

81. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 81 of the Amended Complaint and therefore denies same.

82. Defendant denies the allegations in paragraph 82 of the Amended Complaint.

83. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 83 of the Amended Complaint and therefore denies same. Defendant denies the remaining allegations in paragraph 83 of the Amended Complaint.

84. Defendant denies the allegations in paragraph 84 of the Amended Complaint.

85. Defendant only admits that any agreement between Par and ABFP Management speaks for itself and denies the remaining allegations in paragraph 85 of the Amended Complaint.

86. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 86 of the Amended Complaint and therefore denies same.

87. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 87 of the Amended Complaint and therefore denies same.

88. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 88 of the Amended Complaint and therefore denies same. Defendant only admits that the PPM referenced in this paragraph speaks for itself.

89. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 89 of the Amended Complaint and

therefore denies same. Defendant only admits that the PPM referenced in this paragraph speaks for itself.

90. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 90 of the Amended Complaint and therefore denies same. Defendant only admits that the PPM referenced in this paragraph speaks for itself.

91. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 91 of the Amended Complaint and therefore denies same.

92. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 92 of the Amended Complaint and therefore denies same.

93. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 93 of the Amended Complaint and therefore denies same.

94. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 94 of the Amended Complaint and therefore denies same.

95. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 95 of the Amended Complaint and therefore denies same.

96. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 96 of the Amended Complaint and

therefore denies same. Defendant only admits that any document referenced in this paragraph speaks for itself.

97. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 97of the Amended Complaint and therefore denies same.

98. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 98 of the Amended Complaint and therefore denies same.

99. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 99 of the Amended Complaint and therefore denies same.

100. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 100 of the Amended Complaint and therefore denies same.

101. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 101 of the Amended Complaint.

102. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 102 of the Amended Complaint.

103. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 103 of the Amended Complaint.

104. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 104 of the Amended Complaint.

105. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 105 of the Amended Complaint and therefore denies same.

106. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 106 of the Amended Complaint and therefore denies same.

107. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 107 of the Amended Complaint and therefore denies same.

108. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 108 of the Amended Complaint and therefore denies same.

109. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 109 of the Amended Complaint and therefore denies same.

110. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 110 of the Amended Complaint and therefore denies same.

111. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 111 of the Amended Complaint and therefore denies same.

112. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 112 of the Amended Complaint and therefore denies same.

113. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 113 of the Amended Complaint and therefore denies same.

114. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 114 of the Amended Complaint and therefore denies same. Defendant only admits that any filings made by Furman and Fidelis Planning speak for themselves.

115. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 115 of the Amended Complaint and therefore denies same.

116. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 116 of the Amended Complaint and therefore denies same.

117. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 117 of the Amended Complaint and therefore denies same.

118. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 118 of the Amended Complaint and therefore denies same.

119. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 119 of the Amended Complaint and therefore denies same.

120. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 120 of the Amended Complaint and therefore denies same.

121. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 121 of the Amended Complaint and therefore denies same.

122. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 122 of the Amended Complaint and therefore denies same.

123. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 123 of the Amended Complaint and therefore denies same.

124. Defendant only admits that the message referenced in paragraph 124 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 124 of the Amended Complaint and therefore denies same.

125. Defendant only admits that the message referenced in paragraph 125 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 125 of the Amended Complaint and therefore denies same.

126. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 126 of the Amended Complaint and therefore denies same.

127. Defendant denies the allegations contained in paragraph 127 of the Amended Complaint.

128. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 128 of the Amended Complaint and therefore denies same.

129. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 129 of the Amended Complaint and therefore denies same.

130. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 130 of the Amended Complaint and therefore denies same.

131. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 131 of the Amended Complaint and therefore denies same.

132. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 132 of the Amended Complaint and therefore denies same.

133. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 133 of the Amended Complaint and therefore denies same.

134. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 134 of the Amended Complaint and therefore denies same.

135. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 135 of the Amended Complaint and therefore denies same.

136. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 136 of the Amended Complaint and therefore denies same.

137. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 137 of the Amended Complaint and therefore denies same.

138. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 138 of the Amended Complaint and therefore denies same.

139. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 139 of the Amended Complaint and therefore denies same.

140. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 140 of the Amended Complaint and therefore denies same.

141. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 141 of the Amended Complaint and therefore denies same.

142. Defendant denies the allegations contained in paragraph 142 of the Amended Complaint.

143. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 143 of the Amended Complaint and therefore denies same.

144. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 144 of the Amended Complaint and therefore denies same.

145. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 145 of the Amended Complaint and therefore denies same.

146. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 146 of the Amended Complaint and therefore denies same.

147. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 147 of the Amended Complaint and therefore denies same.

148. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 148 of the Amended Complaint and therefore denies same.

149. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 149 of the Amended Complaint and therefore denies same.

150. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 150 of the Amended Complaint and therefore denies same.

151. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 151 of the Amended Complaint and therefore denies same.

152. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 152 of the Amended Complaint and therefore denies same.

153. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 153 of the Amended Complaint and therefore denies same.

154. Defendant denies the allegations contained in paragraph 154 of the Amended Complaint.

155. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 155 of the Amended Complaint and therefore denies same.

156. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 156 of the Amended Complaint and therefore denies same.

157. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 157 of the Amended Complaint and therefore denies same.

158. Defendant only admits that the brochure referenced in paragraph 158 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 158 of the Amended Complaint and therefore denies same.

159. Defendant only admits that the brochure referenced in paragraph 159 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 159 of the Amended Complaint and therefore denies same.

160. Defendant only admits that the brochure referenced in paragraph 160 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 160 of the Amended Complaint and therefore denies same.

161. Defendant only admits that the brochure referenced in paragraph 161 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is

without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 161 of the Amended Complaint and therefore denies same.

162. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 162 of the Amended Complaint and therefore denies same.

163. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 163 of the Amended Complaint and therefore denies same.

164. Defendants are without knowledge regarding the allegations in paragraph 164, and therefore denied.

165. Defendant denies the allegations contained in paragraph 165 of the Amended Complaint.

166. Defendant denies the allegations contained in paragraph 166 of the Amended Complaint.

167. Defendant denies the allegations contained in paragraph 167 of the Amended Complaint.

168. Defendant denies the allegations contained in paragraph 168 of the Amended Complaint.

169. Defendant denies the allegations contained in paragraph 169 of the Amended Complaint.

170. Defendant denies the allegations contained in paragraph 170 of the Amended Complaint.

171. Defendant denies the allegations contained in paragraph 171 of the Amended Complaint.

172. Defendant denies the allegations contained in paragraph 172 of the Amended Complaint.

173. Defendant denies the allegations contained in paragraph 173 of the Amended Complaint.

174. Defendant denies the allegations contained in paragraph 174 of the Amended Complaint.

175. Defendant denies the allegations contained in paragraph 175 of the Amended Complaint.

176. Defendant denies the allegations contained in paragraph 176 of the Amended Complaint.

177. Defendant denies the allegations contained in paragraph 177 of the Amended Complaint.

178. Defendant denies the allegations contained in paragraph 178 of the Amended Complaint.

179. Defendant denies the allegations contained in paragraph 179 of the Amended Complaint.

180. Defendant denies the allegations contained in paragraph 180 of the Amended Complaint.

181. Defendant denies the allegations contained in paragraph 181 of the Amended Complaint.

182. Defendant denies the allegations contained in paragraph 182 of the Amended Complaint.

183. Defendant denies the allegations contained in paragraph 183 of the Amended Complaint.

184. Defendant denies the allegations contained in paragraph 184 of the Amended Complaint.

185. Defendant denies the allegations contained in paragraph 185 of the Amended Complaint.

186. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 186 of the Amended Complaint and therefore denies same.

187. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 187 of the Amended Complaint and therefore denies same.

188. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 188 of the Amended Complaint and therefore denies same.

189. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 189 of the Amended Complaint and therefore denies same.

190. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 190 of the Amended Complaint and therefore denies same.

191. Defendant only admits that the website referenced in paragraph 191 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 191of the Amended Complaint and therefore denies same.

192. Defendant denies the allegations contained in paragraph 192 of the Amended Complaint.

193. Defendant denies the allegations contained in paragraph 193 of the Amended Complaint.

194. Defendant denies the allegations contained in paragraph 194 of the Amended Complaint.

195. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 195 of the Amended Complaint and therefore denies same.

196. Defendant denies the allegations contained in paragraph 196 of the Amended Complaint.

197. Defendant denies the allegations contained in paragraph 197 of the Amended Complaint.

198. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 198 of the Amended Complaint and therefore denies same.

199. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 199 of the Amended Complaint and therefore denies same.

200. Defendant denies the allegations contained in paragraph 200 of the Amended Complaint.

201. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 201 of the Amended Complaint and therefore denies same.

202. Defendant denies the allegations contained in paragraph 202 of the Amended Complaint.

203. Defendant denies the allegations contained in paragraph 203 of the Amended Complaint.

204. Defendant denies the allegations contained in paragraph 204 of the Amended Complaint.

205. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 205 of the Amended Complaint and therefore denies same.

206. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 206 of the Amended Complaint and therefore denies same.

207. Defendant denies the allegations contained in paragraph 207 of the Amended Complaint.

208. Defendant denies the allegations contained in paragraph 208 of the Amended

209. Defendant denies the allegations contained in paragraph 209 of the Amended Complaint.

210. Defendant denies the allegations contained in paragraph 210 of the Amended Complaint.

211. Defendant denies the allegations contained in paragraph 211 of the Amended Complaint.

212. Defendant denies the allegations contained in paragraph 212 of the Amended Complaint.

213. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 213 of the Amended Complaint and therefore denies same.

214. Defendant denies the allegations contained in paragraph 214 of the Amended Complaint.

215. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 215 of the Amended Complaint and therefore denies same.

216. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 216 of the Amended Complaint and therefore denies same.

217. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 217 of the Amended Complaint and therefore denies same.

218. Defendant denies the allegations contained in paragraph 218 of the Amended Complaint.

219. Defendant denies the allegations contained in paragraph 219 of the Amended Complaint.

220. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 220 of the Amended Complaint.

221. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 221 of the Amended Complaint and therefore denies same.

222. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 222 of the Amended Complaint and therefore denies same.

223. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 223 of the Amended Complaint and therefore denies same.

224. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 224 of the Amended Complaint and therefore denies same.

225. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 225 of the Amended Complaint and therefore denies same.

226. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 226 of the Amended Complaint and therefore denies same.

227. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 227 of the Amended Complaint and therefore denies same.

228. Defendant only admits that the Order referenced in paragraph 228 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 12 of the Amended Complaint and therefore denies same.

229. Defendant only admits that the Order referenced in paragraph 229 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 229 of the Amended Complaint and therefore denies same.

230. Defendant denies the allegations contained in paragraph 230 of the Amended Complaint.

231. Defendant only admits that the Order referenced in paragraph 231 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 231 of the Amended Complaint and therefore denies same.

232. Defendant denies the allegations contained in paragraph 232 of the Amended Complaint.

233. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 233 of the Amended Complaint and therefore denies same.

234. Defendant denies the allegations contained in paragraph 234 of the Amended Complaint.

235. Defendant denies the allegations contained in paragraph 235 of the Amended Complaint.

236. Defendant only admits that the Order referenced in paragraph 236 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 236 of the Amended Complaint and therefore denies same.

237. Defendant only admits that the Order referenced in paragraph 237 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 237 of the Amended Complaint and therefore denies same.

238. Defendant only admits that the Order referenced in paragraph 238 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 238 of the Amended Complaint and therefore denies same.

239. Defendant denies the allegations contained in paragraph 239 of the Amended Complaint.

240. Defendant denies the allegations contained in paragraph 240 of the Amended Complaint.

241. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 241 of the Amended Complaint and therefore denies same.

242. Defendant only admits that the document referenced in paragraph 242 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 242 of the Amended Complaint and therefore denies same.

243. Defendant denies the allegations contained in paragraph 243 of the Amended Complaint.

244. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 244 of the Amended Complaint and therefore denies same.

245. Defendant denies the allegations contained in paragraph 245 of the Amended Complaint.

246. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 246 of the Amended Complaint and therefore denies same.

247. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 247 of the Amended Complaint and therefore denies same.

248. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 248 of the Amended Complaint and therefore denies same.

249. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 249 of the Amended Complaint and therefore denies same.

250. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 250 of the Amended Complaint and therefore denies same.

251. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 251 of the Amended Complaint and therefore denies same.

252. Defendant only admits that the article referenced in paragraph 252 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 238 of the Amended Complaint and therefore denies same.

253. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 253 of the Amended Complaint and therefore denies same.

254. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 254 of the Amended Complaint and therefore denies same.

255. Defendant only admits that the article referenced in paragraph 255 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 238 of the Amended Complaint and therefore denies same.

256. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 256 of the Amended Complaint and therefore denies same.

257. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 257 of the Amended Complaint and therefore denies same.

258. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 258 of the Amended Complaint and therefore denies same.

259. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 259 of the Amended Complaint and therefore denies same.

260. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 260 of the Amended Complaint and therefore denies same.

261. Defendant only admits that the documents referenced in paragraph 261 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 261 of the Amended Complaint and therefore denies same.

262. Defendant only admits that the Order referenced in paragraph 262 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 262 of the Amended Complaint and therefore denies same.

263. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 263 of the Amended Complaint and therefore denies same.

264. Defendant only admits that the website referenced in paragraph 264 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 264 of the Amended Complaint and therefore denies same.

265. Defendant denies the allegations contained in paragraph 265 of the Amended Complaint.

266. Defendant denies the allegations contained in paragraph 266 of the Amended Complaint.

267. Defendant denies the allegations contained in paragraph 267 of the Amended Complaint.

COUNT I

268. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

269. Defendant denies the allegations contained in paragraph 269 of the Amended Complaint.

270. Defendant denies the allegations contained in paragraph 270 of the Amended Complaint.

COUNT II

271. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

272. Defendant denies the allegations contained in paragraph 272 of the Amended Complaint.

273. Defendant denies the allegations contained in paragraph 273 of the Amended

Complaint.

COUNT III

274. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

275. Defendant denies the allegations contained in paragraph 275 of the Amended Complaint.

276. Defendant denies the allegations contained in paragraph 276 of the Amended Complaint.

COUNT IV

277. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

278. Defendant denies the allegations contained in paragraph 278 of the Amended Complaint.

279. Defendant denies the allegations contained in paragraph 279 of the Amended Complaint.

COUNT V

280. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

281. Defendant denies the allegations contained in paragraph 281 of the Amended Complaint.

282. Defendant denies the allegations contained in paragraph 282 of the Amended Complaint.

COUNT VI

283. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

284. Defendant denies the allegations contained in paragraph 284 of the Amended Complaint.

285. Defendant denies the allegations contained in paragraph 285 of the Amended Complaint.

COUNT VII

286. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

287. Defendant denies the allegations contained in paragraph 287 of the Amended Complaint.

288. Defendant denies the allegations contained in paragraph 288 of the Amended Complaint.

289. Defendant denies the allegations contained in paragraph 289 of the Amended Complaint.

COUNT VIII

290. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

291. Defendant denies the allegations contained in paragraph 291 of the Amended Complaint.

292. Defendant denies the allegations contained in paragraph 292 of the Amended Complaint.

293. Defendant denies the allegations contained in paragraph 293 of the Amended Complaint.

294. Defendant denies the allegations contained in paragraph 294 of the Amended Complaint.

RELIEF REQUESTED

Defendant denies that she committed the violations alleged and that the Commission is entitled to any relief set forth in this section.

GENERAL DENIAL

Defendant generally denies all allegations of the Amended Complaint except for such allegations as are explicitly and specifically admitted above.

AFFIRMATIVE DEFENSES

Defendant asserts the following affirmative defense and reserves the right to amend her answer and affirmative defenses based upon information obtained in the course of litigation.

FIRST AFFIRMATIVE DEFENSE
(Advice of Counsel)

Defendant hereby provides notice that she intends to rely on a defense that she relied upon advice of counsel. Defendant did not act with the requisite mental state that Plaintiff must prove, and the Court should decline to issue the equitable relief sought by Plaintiff, because Defendant's reliance on the advice of her counsel is inconsistent with the Plaintiff's allegations of violations of the federal securities laws and the relief sought. Defendant made a full and complete good faith report of all materials facts to counsel that she considered competent, received the attorneys' advice as to the specific course of conduct that was followed, and reasonably relied on that advice in good faith.

SECOND AFFIRMATIVE DEFENSE
(Reliance on Other Professionals and Experts)

In executing or authorizing the execution and/or publication of any document containing the statements complained of in the Amended Complaint, Defendant was entitled to, and did, reasonably and in good faith, rely upon the work and conclusions of other professionals and experts, including Certified Public Accountants, Accountants, Auditors, & Tax Advisors.

THIRD AFFIRMATIVE DEFENSE
(Good Faith)

Plaintiff's claims are barred in whole or in part because Defendant acted at all times in good faith and/or did not know, and in the exercise of reasonable case could have known, or had any reasonable grounds to believe, that any misstatements or omissions of material fact existed in any statements, reports, and/or filings allegedly issued or uttered by Defendant. Defendant also relied upon competent personnel to assist her in making reasonable and informed decisions.

FOURTH AFFIRMATIVE DEFENSE
(Notes Are Not Securities)

Plaintiff's claims are barred because the notes at issue are not securities because they fall squarely within the list of non-securities enumerated in *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990). The notes are also exempt as securities under the express language of the Exchange Act (15 U.S.C. § 78c(a)(10)) and from the registration requirement under the Securities Act (15 U.S.C. § 77b(a)(1).

JURY DEMAND

Defendant hereby requests a trial by jury on all claims and defenses in this action.

Dated: August 21, 2021

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By: */s/ Joel Hirschhorn*
JOEL HIRSCHHORN
Florida Bar No. 104573

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August, 2021, a true and correct copy of the foregoing Answer and Affirmative Defenses was served via the Court's CM/ECF System upon all counsel of record.

/s/ *Alan Futerfas*
Alan Futerfas

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 9:20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a/ PAR FUNDING, et al.,

Defendants.
_____/

DEFENDANT JOSEPH LUIS COLE BARLETA'S AMENDED ANSWER AND AFFIRMATIVE DEFENSES TO THE AMENDED COMPLAINT

Defendant Joseph Luis Cole Barleta ("Defendant" or "Barleta"), files this Amended Answer and Affirmative Defenses to the Amended Complaint filed by Plaintiff Securities and Exchange Commission ("Plaintiff" or "SEC"), and states as follows:

ANSWER

Defendant denies all allegations contained in the headings and all unnumbered paragraphs in the Amended Complaint and denies any allegations not specifically denied. Defendant answers the remaining allegations of the Amended Complaint as follows:

1. Defendant denies the allegations contained in paragraph 1 of the Amended Complaint.

2. Defendant denies the allegations contained in the first sentence of paragraph 2 of the Amended Complaint. Defendant only admits that Par Funding offered and issued promissory notes from 2012 through 2017.

3. Defendant denies the allegations contained in paragraph 3 of the Amended Complaint. Additionally, Defendant is without knowledge to form a belief as to the truth of the

allegations contained in the second sentence of paragraph 3 of the Amended Complaint and therefore denies same.

4. Defendant is without knowledge to form a belief regarding what the Pennsylvania Securities Regulators knew regarding the creation of the Agent Funds and is without sufficient knowledge with respect to the Agent Funds' obligations to its noteholders. Defendant denies the allegations contained in the remainder of paragraph 4 of the Amended Complaint.

5. Defendant denies the allegations contained in paragraph 5 of the Amended Complaint.

6. Defendant is without sufficient knowledge to form a belief as to the truth of the Allegations in paragraph 6 not concerning Defendant and therefore denies same.

7. Defendant is without sufficient knowledge to form a belief as to the truth of the Allegations in paragraph 7 not concerning Defendant and therefore denies same.

8. Defendant denies the allegations contained in paragraph 7 of the Amended Complaint.

9. Defendant denies the allegations contained in paragraph 9 of the Amended Complaint.

10. Defendant denies the allegations contained in paragraph 10 of the Amended Complaint.

11. Defendant admits that Par Funding had an office in Philadelphia, PA until 2017, when Par moved its office to Florida. Defendant admits that Complete Business Solutions Group has done business as Par Funding since 2013. Defendant admits that The LME 2017 Family Trust ("The LME Trust") was Par Funding's sole owner and that McElhone was Par Funding's

sole employee. Defendant denies the remaining allegations contained in paragraph 11 of the Amended Complaint.

12. Defendant only admits that the Order referenced in paragraph 12 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 12 of the Amended Complaint and therefore denies same.

13. Defendant only admits that the Order referenced in paragraph 13 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 12 of the Amended Complaint and therefore denies same.

14. Defendant only admits that the Order referenced in paragraph 14 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 14 of the Amended Complaint and therefore denies same.

15. Defendant admits that FSP's corporate filings speak for themselves and that McElhone was FSP's sole owner. Defendant denies the remainder of the allegations contained in paragraph 15 of the Amended Complaint.

16. Defendant only admits that the Order referenced in paragraph 16 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant admits that McElhone was the sole owner of Par Funding and denies the remainder of the allegations contained in paragraph 16 of the Amended Complaint.

17. Defendant admits that LaForte is a resident of Philadelphia and that he conceived of the idea for Par Funding with his wife, Lisa McElhone, but was never its owner. Defendant is

without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 17 of the Amended Complaint and therefore denies same.

18. Defendant only admits that the convictions referenced in paragraph 18 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 18 of the Amended Complaint.

19. Defendant only admits that he is a resident of Philadelphia and was employed by Par Funding as CFO until 2017, when Par Funding employees were converted to Full Spectrum Processing ("FSP") employees, and thereafter by FSP as its CFO. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 19 of the Amended Complaint and therefore denies same.

20. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 20 of the Amended Complaint and therefore denies same.

21. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 21 of the Amended Complaint and therefore denies same. Defendant only admits that the Order referenced in paragraph 21 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 21 of the Amended Complaint.

22. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 22 of the Amended Complaint and therefore denies same.

23. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 23 of the Amended Complaint and therefore denies same. Defendant only admits that the agreement referenced in paragraph 23 of the Amended Complaint speaks for

itself and denies any inconsistent and remaining allegations in paragraph 23 of the Amended Complaint.

24. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 24 of the Amended Complaint and therefore denies same.

25. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 25 of the Amended Complaint and therefore denies same.

26. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 26 of the Amended Complaint and therefore denies same. Defendant only admits that the Order referenced in paragraph 26 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 26 of the Amended Complaint.

27. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 27 of the Amended Complaint and therefore denies same.

28. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 28 of the Amended Complaint and therefore denies same.

29. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 29 of the Amended Complaint and therefore denies same.

30. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 30 of the Amended Complaint and therefore denies same.

31. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 31 of the Amended Complaint and therefore denies same.

32. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 32 of the Amended Complaint and therefore denies same.

33. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 33 of the Amended Complaint and therefore denies same.

34. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 34 of the Amended Complaint and therefore denies same.

35. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 35 of the Amended Complaint and therefore denies same.

36. Defendant admits that the LME Trust is Par Funding's owner. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 36 of the Amended Complaint and therefore denies same.

37. Defendant admits that Par Funding has an office in Florida and is registered to do business in Florida, and that McElhone is the owner of FSP. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 37 of the Amended Complaint and therefore denies same.

38. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 38 of the Amended Complaint and therefore denies same.

39. Defendant denies the allegations in paragraph 39 of the Amended Complaint.

40. Defendant denies the allegations in paragraph 40 of the Amended Complaint.

41. Defendant denies the allegations in paragraph 41 of the Amended Complaint.

42. Defendant denies the allegations in paragraph 42 of the Amended Complaint and only admits that Par Funding's corporate filings speak for themselves. Defendant is without sufficient knowledge as to the remaining allegations contained in paragraph 42 and therefore denies them.

43. Defendant denies the allegations in paragraph 43 of the Amended Complaint.

44. Defendant denies the allegations in paragraph 44 of the Amended Complaint.

45. Defendant denies the allegations in paragraph 45 of the Amended Complaint.

46. Defendant denies the allegations in paragraph 46 of the Amended Complaint.

47. Defendant denies the allegations in paragraph 47 of the Amended Complaint.

48. Defendant denies the allegations in paragraph 48 of the Amended Complaint.

49. Defendant denies the allegations in paragraph 49 of the Amended Complaint.

50. Defendant denies the allegations in paragraph 50 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

51. Defendant denies the allegations in paragraph 51 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

52. Defendant admits that he and McElhone signed promissory notes issued by Par Funding, and denies the remainder of the allegations contained in paragraph 52 of the Amended Complaint.

53. Defendant denies the allegations in paragraph 53 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

54. Defendant denies the allegations in paragraph 54 of the Amended Complaint and only admits that the agreement referenced in this paragraph speak for itself.

55. Defendant denies the allegations in paragraph 55 of the Amended Complaint and only admits that any agreement referenced in this paragraph speak for itself.

56. Defendant only admits that Defendant Vagnozzi had a Finders Agreement with Par Funding at one point in time but denies the remainder of the allegations contained in paragraph 56 of the Amended Complaint.

57. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 57 of the Amended Complaint and therefore denies same.

58. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 58 of the Amended Complaint and therefore denies same.

59. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 59 of the Amended Complaint and therefore denies same.

60. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 60 of the Amended Complaint and therefore denies same.

61. Defendant admits that Par Funding raised money through the sale of promissory notes, but denies the remaining allegations contained in paragraph 61 of the Amended Complaint.

62. Defendant only admits that any subpoena issued by state regulators speaks for itself and denies the allegations in paragraph 62 of the Amended Complaint.

63. Defendant denies the allegations in paragraph 63 of the Amended Complaint.

64. Defendant only admits that Par Funding sold promissory notes to Agent Funds beginning in 2018 but denies the allegations in paragraph 64 of the Amended Complaint.

65. Defendant denies the allegations in paragraph 65 of the Amended Complaint.

66. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 66 of the Amended Complaint and therefore denies same.

67. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 67 of the Amended Complaint and therefore denies same.

68. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 68 of the Amended Complaint and therefore denies same.

69. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 69 of the Amended Complaint and therefore denies same.

70. Defendant denies the allegations in paragraph 70 of the Amended Complaint.

71. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 71 of the Amended Complaint and therefore denies same.

72. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 72 of the Amended Complaint and therefore denies same.

73. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 73 of the Amended Complaint and therefore denies same.

74. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 74 of the Amended Complaint and therefore denies same.

75. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 75 of the Amended Complaint and therefore denies same. Defendant only admits that the Agent Guide referenced in this paragraph speaks for itself.

76. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 76 of the Amended Complaint and therefore denies same. Defendant only admits that the Agent Guide referenced in this paragraph speaks for itself.

77. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 77 of the Amended Complaint and therefore denies same.

78. Defendant denies the allegations in paragraph 78 of the Amended Complaint.

79. Defendant denies the allegations in paragraph 79 of the Amended Complaint.

80. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 80 of the Amended Complaint and therefore denies same. Defendant denies the remaining allegations in paragraph 80 of the Amended Complaint.

81. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 81 of the Amended Complaint and therefore denies same.

82. Defendant denies the allegations in paragraph 82 of the Amended Complaint.

83. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 83 of the Amended Complaint and therefore denies same. Defendant denies the remaining allegations in paragraph 83 of the Amended Complaint.

84. Defendant denies the allegations in paragraph 84 of the Amended Complaint.

85. Defendant denies the allegations in paragraph 85 of the Amended Complaint.

86. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 86 of the Amended Complaint and therefore denies same.

87. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 87 of the Amended Complaint and therefore denies same.

88. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 88 of the Amended Complaint and therefore denies same. Defendant only admits that the PPM referenced in this paragraph speaks for itself.

89. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 89 of the Amended Complaint and therefore denies same. Defendant only admits that the PPM referenced in this paragraph speaks for itself.

90. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 90 of the Amended Complaint and therefore denies same.

91. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 91 of the Amended Complaint and therefore denies same.

92. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 92 of the Amended Complaint and therefore denies same.

93. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 93 of the Amended Complaint and therefore denies same.

94. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 94 of the Amended Complaint and therefore denies same.

95. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 95 of the Amended Complaint and therefore denies same.

96. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 96 of the Amended Complaint and therefore denies same. Defendant only admits that any document referenced in this paragraph speaks for itself.

97. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 97of the Amended Complaint and therefore denies same.

98. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 98 of the Amended Complaint and therefore denies same.

99. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 99 of the Amended Complaint and therefore denies same.

100. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 100 of the Amended Complaint and therefore denies same.

101. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 101 of the Amended Complaint.

102. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 102 of the Amended Complaint.

103. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 103 of the Amended Complaint.

104. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 104 of the Amended Complaint.

105. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 105 of the Amended Complaint and therefore denies same.

106. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 106 of the Amended Complaint and therefore denies same.

107. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 107 of the Amended Complaint and therefore denies same.

108. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 108 of the Amended Complaint and therefore denies same.

109. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 109 of the Amended Complaint and therefore denies same.

110. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 110 of the Amended Complaint and therefore denies same.

111. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 111 of the Amended Complaint and therefore denies same.

112. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 112 of the Amended Complaint and therefore denies same.

113. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 113 of the Amended Complaint and therefore denies same.

114. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 114 of the Amended Complaint and therefore denies same. Defendant only admits that any filings made by Furman and Fidelis Planning speak for themselves.

115. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 115 of the Amended Complaint and therefore denies same.

116. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 116 of the Amended Complaint and therefore denies same.

117. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 117 of the Amended Complaint and therefore denies same.

118. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 118 of the Amended Complaint and therefore denies same.

119. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 119 of the Amended Complaint and therefore denies same.

120. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 120 of the Amended Complaint and therefore denies same.

121. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 121 of the Amended Complaint and therefore denies same.

122. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 122 of the Amended Complaint and therefore denies same.

123. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 123 of the Amended Complaint and therefore denies same.

124. Defendant only admits that the message referenced in paragraph 124 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 124 of the Amended Complaint and therefore denies same.

125. Defendant only admits that the message referenced in paragraph 125 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 125 of the Amended Complaint and therefore denies same.

126. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 126 of the Amended Complaint and therefore denies same.

127. Defendant denies the allegations contained in paragraph 127 of the Amended Complaint.

128. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 128 of the Amended Complaint and therefore denies same.

129. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 129 of the Amended Complaint and therefore denies same.

130. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 130 of the Amended Complaint and therefore denies same.

131. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 131 of the Amended Complaint and therefore denies same.

132. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 132 of the Amended Complaint and therefore denies same.

133. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 133 of the Amended Complaint and therefore denies same.

134. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 134 of the Amended Complaint and therefore denies same.

135. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 135 of the Amended Complaint and therefore denies same.

136. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 136 of the Amended Complaint and therefore denies same.

137. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 137 of the Amended Complaint and therefore denies same.

138. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 138 of the Amended Complaint and therefore denies same.

139. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 139 of the Amended Complaint and therefore denies same.

140. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 140 of the Amended Complaint and therefore denies same.

141. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 141 of the Amended Complaint and therefore denies same.

142. Defendant denies the allegations contained in paragraph 142 of the Amended Complaint.

143. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 143 of the Amended Complaint and therefore denies same.

144. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 144 of the Amended Complaint and therefore denies same.

145. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 145 of the Amended Complaint and therefore denies same.

146. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 145 of the Amended Complaint and therefore denies same.

147. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 147 of the Amended Complaint and therefore denies same.

148. Defendant only admits that the email referenced in paragraph 158 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 159 of the Amended Complaint and therefore denies same.

149. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 149 of the Amended Complaint and therefore denies same.

150. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 150 of the Amended Complaint and therefore denies same.

151. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 151 of the Amended Complaint and therefore denies same.

152. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 152 of the Amended Complaint and therefore denies same.

153. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 153 of the Amended Complaint and therefore denies same.

154. Defendant denies the allegations contained in paragraph 154 of the Amended Complaint.

155. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 155 of the Amended Complaint and therefore denies same.

156. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 156 of the Amended Complaint and therefore denies same.

157. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 157 of the Amended Complaint and therefore denies same.

158. Defendant only admits that the brochure referenced in paragraph 158 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 158 of the Amended Complaint and therefore denies same.

159. Defendant only admits that the brochure referenced in paragraph 158 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is

without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 159 of the Amended Complaint and therefore denies same.

160. Defendant only admits that the brochure referenced in paragraph 160 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 160 of the Amended Complaint and therefore denies same.

161. Defendant only admits that the brochure referenced in paragraph 161 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 161 of the Amended Complaint and therefore denies same.

162. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 162 of the Amended Complaint and therefore denies same.

163. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 163 of the Amended Complaint and therefore denies same.

164. Defendants are without knowledge regarding the allegations in paragraph 164, and therefore denied.

165. Defendant denies the allegations contained in paragraph 165 of the Amended Complaint.

166. Defendant denies the allegations contained in paragraph 166 of the Amended Complaint.

167. Defendant denies the allegations contained in paragraph 167 of the Amended

Complaint.

168. Defendant denies the allegations contained in paragraph 168 of the Amended Complaint.

169. Defendant denies the allegations contained in paragraph 169 of the Amended Complaint.

170. Defendant denies the allegations contained in paragraph 170 of the Amended Complaint.

171. Defendant denies the allegations contained in paragraph 171 of the Amended Complaint.

172. Defendant denies the allegations contained in paragraph 172 of the Amended Complaint.

173. Defendant denies the allegations contained in paragraph 173 of the Amended Complaint.

174. Defendant denies the allegations contained in paragraph 174 of the Amended Complaint.

175. Defendant denies the allegations contained in paragraph 175 of the Amended Complaint.

176. Defendant denies the allegations contained in paragraph 176 of the Amended Complaint.

177. Defendant denies the allegations contained in paragraph 177 of the Amended Complaint.

178. Defendant denies the allegations contained in paragraph 178 of the Amended Complaint.

179. Defendant denies the allegations contained in paragraph 179 of the Amended Complaint.

180. Defendant denies the allegations contained in paragraph 180 of the Amended Complaint.

181. Defendant denies the allegations contained in paragraph 181 of the Amended Complaint.

182. Defendant denies the allegations contained in paragraph 182 of the Amended Complaint.

183. Defendant denies the allegations contained in paragraph 183 of the Amended Complaint.

184. Defendant denies the allegations contained in paragraph 184 of the Amended Complaint.

185. Defendant denies the allegations contained in paragraph 179 of the Amended Complaint.

186. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 186 of the Amended Complaint and therefore denies same.

187. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 187 of the Amended Complaint and therefore denies same.

188. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 188 of the Amended Complaint and therefore denies same.

189. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 189 of the Amended Complaint and therefore denies same.

190. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 190 of the Amended Complaint and therefore denies same.

191. Defendant only admits that the website referenced in paragraph 191 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 191of the Amended Complaint and therefore denies same.

192. Defendant denies the allegations contained in paragraph 192 of the Amended Complaint.

193. Defendant denies the allegations contained in paragraph 193 of the Amended Complaint.

194. Defendant denies the allegations contained in paragraph 194 of the Amended Complaint.

195. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 195 of the Amended Complaint and therefore denies same.

196. Defendant denies the allegations contained in paragraph 196 of the Amended Complaint.

197. Defendant denies the allegations contained in paragraph 197 of the Amended Complaint.

198. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 198 of the Amended Complaint and therefore denies same.

199. Defendant denies the allegations contained in paragraph 199 of the Amended Complaint.

200. Defendant denies the allegations contained in paragraph 200 of the Amended Complaint.

201. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 201 of the Amended Complaint and therefore denies same.

202. Defendant denies the allegations contained in paragraph 202 of the Amended Complaint.

203. Defendant denies the allegations contained in paragraph 203 of the Amended Complaint.

204. Defendant denies the allegations contained in paragraph 204 of the Amended Complaint.

205. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 205 of the Amended Complaint and therefore denies same.

206. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 206 of the Amended Complaint and therefore denies same.

207. Defendant denies the allegations contained in paragraph 207 of the Amended Complaint.

208. Defendant denies the allegations contained in paragraph 208 of the Amended

209. Defendant denies the allegations contained in paragraph 209 of the Amended Complaint.

210. Defendant denies the allegations contained in paragraph 210 of the Amended Complaint.

211. Defendant denies the allegations contained in paragraph 211 of the Amended Complaint.

212. Defendant denies the allegations contained in paragraph 212 of the Amended Complaint.

213. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 213 of the Amended Complaint and therefore denies same.

214. Defendant denies the allegations contained in paragraph 214 of the Amended Complaint.

215. Defendant denies the allegations contained in paragraph 214 of the Amended Complaint.

216. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 216 of the Amended Complaint and therefore denies same.

217. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 217 of the Amended Complaint and therefore denies same.

218. Defendant denies the allegations contained in paragraph 218 of the Amended Complaint.

219. Defendant denies the allegations contained in paragraph 219 of the Amended Complaint.

220. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 102 of the Amended Complaint.

221. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 221 of the Amended Complaint and therefore denies same.

222. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 222 of the Amended Complaint and therefore denies same.

223. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 223 of the Amended Complaint and therefore denies same.

224. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 224 of the Amended Complaint and therefore denies same.

225. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 225 of the Amended Complaint and therefore denies same.

226. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations t in paragraph 226 of the Amended Complaint and therefore denies same.

227. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 227 of the Amended Complaint and therefore denies same.

228. Defendant only admits that the Order referenced in paragraph 228 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is

without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 12 of the Amended Complaint and therefore denies same.

229. Defendant only admits that the Order referenced in paragraph 229 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 229 of the Amended Complaint and therefore denies same.

230. Defendant denies the allegations contained in paragraph 230 of the Amended Complaint.

231. Defendant only admits that the Order referenced in paragraph 231 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 231 of the Amended Complaint and therefore denies same.

232. Defendant denies the allegations contained in paragraph 232 of the Amended Complaint.

233. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 233 of the Amended Complaint and therefore denies same.

234. Defendant denies the allegations contained in paragraph 234 of the Amended Complaint.

235. Defendant denies the allegations contained in paragraph 235 of the Amended Complaint.

236. Defendant only admits that the Form referenced in paragraph 236 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without

sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 236 of the Amended Complaint and therefore denies same.

237. Defendant only admits that the Order referenced in paragraph 237 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 237 of the Amended Complaint and therefore denies same.

238. Defendant only admits that the Order referenced in paragraph 238 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 238 of the Amended Complaint and therefore denies same.

239. Defendant denies the allegations contained in paragraph 239 of the Amended Complaint.

240. Defendant denies the allegations contained in paragraph 240 of the Amended Complaint.

241. Defendant denies the allegations contained in paragraph 240 of the Amended Complaint.

242. Defendant only admits that the document referenced in paragraph 242 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 242 of the Amended Complaint and therefore denies same.

243. Defendant denies the allegations contained in paragraph 243 of the Amended Complaint.

244. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 244 of the Amended Complaint and therefore denies same.

245. Defendant denies the allegations contained in paragraph 245 of the Amended Complaint.

246. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 246 of the Amended Complaint and therefore denies same.

247. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 247 of the Amended Complaint and therefore denies same.

248. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 248 of the Amended Complaint and therefore denies same.

249. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 249 of the Amended Complaint and therefore denies same.

250. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 250 of the Amended Complaint and therefore denies same.

251. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 251 of the Amended Complaint and therefore denies same.

252. Defendant only admits that the article referenced in paragraph 252 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 238 of the Amended Complaint and therefore denies same.

253. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 253 of the Amended Complaint and therefore denies same.

254. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 254 of the Amended Complaint and therefore denies same.

255. Defendant only admits that the article referenced in paragraph 255 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 238 of the Amended Complaint and therefore denies same.

256. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 256 of the Amended Complaint and therefore denies same.

257. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 257 of the Amended Complaint and therefore denies same.

258. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 258 of the Amended Complaint and therefore denies same.

259. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 259 of the Amended Complaint and therefore denies same.

260. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 260 of the Amended Complaint and therefore denies same.

261. Defendant only admits that the documents referenced in paragraph 261 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 261 of the Amended Complaint and therefore denies same.

262. Defendant only admits that the Order referenced in paragraph 262 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 262 of the Amended Complaint and therefore denies same.

263. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 263 of the Amended Complaint and therefore denies same.

264. Defendant only admits that the website referenced in paragraph 264 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 264 of the Amended Complaint and therefore denies same.

265. Defendant denies the allegations contained in paragraph 265 of the Amended Complaint.

266. Defendant denies the allegations contained in paragraph 266 of the Amended Complaint.

267. Defendant denies the allegations contained in paragraph 267 of the Amended Complaint.

COUNT I

268. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

269. Defendant denies the allegations contained in paragraph 269 of the Amended Complaint.

270. Defendant denies the allegations contained in paragraph 270 of the Amended Complaint.

COUNT II

271. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

272. Defendant denies the allegations contained in paragraph 272 of the Amended Complaint.

273. Defendant denies the allegations contained in paragraph 273 of the Amended Complaint.

COUNT III

274. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

275. Defendant denies the allegations contained in paragraph 275 of the Amended Complaint.

276. Defendant denies the allegations contained in paragraph 276 of the Amended Complaint.

COUNT IV

277. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

278. Defendant denies the allegations contained in paragraph 278 of the Amended Complaint.

279. Defendant denies the allegations contained in paragraph 279 of the Amended Complaint.

COUNT V

280. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

281. Defendant denies the allegations contained in paragraph 281 of the Amended Complaint.

282. Defendant denies the allegations contained in paragraph 282 of the Amended Complaint.

COUNT VI

283. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

284. Defendant denies the allegations contained in paragraph 284 of the Amended Complaint.

285. Defendant denies the allegations contained in paragraph 285 of the Amended

Complaint.

COUNT VII

286. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

287. Defendant denies the allegations contained in paragraph 287 of the Amended Complaint.

288. Defendant denies the allegations contained in paragraph 288 of the Amended Complaint.

289. Defendant denies the allegations contained in paragraph 289 of the Amended Complaint.

COUNT VIII

290. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

291. Defendant denies the allegations contained in paragraph 291 of the Amended Complaint.

292. Defendant denies the allegations contained in paragraph 292 of the Amended Complaint.

293. Defendant denies the allegations contained in paragraph 293 of the Amended Complaint.

294. Defendant denies the allegations contained in paragraph 294 of the Amended Complaint.

RELIEF REQUESTED

Defendant denies that he committed the violations alleged and that the Commission is entitled to any relief set forth in this section.

GENERAL DENIAL

Defendant generally denies all allegations of the Amended Complaint except for such allegations as are explicitly and specifically admitted above.

AFFIRMATIVE DEFENSES

Defendant asserts the following affirmative defense and reserves the right to amend his answer and affirmative defenses based upon information obtained in the course of litigation.

FIRST AFFIRMATIVE DEFENSE
(Advice of Counsel)

Defendant hereby provides notice that he intends to rely on a defense that he relied upon advice of counsel. Defendant did not act with the requisite mental state that Plaintiff must prove, and the Court should decline to issue the equitable relief sought by Plaintiff, because Defendant's reliance on the advice of his counsel is inconsistent with the Plaintiff's allegations of violations of the federal securities laws and the relief sought. Defendant made a full and complete good faith report of all materials facts to counsel that he considered competent, received the attorneys' advice as to the specific course of conduct that was followed, and reasonably relied on that advice in good faith.

SECOND AFFIRMATIVE DEFENSE
(Reliance on Other Professionals and Experts)

In executing or authorizing the execution and/or publication of any document containing the statements complained of in the Amended Complaint, Defendant was entitled to, and did,

reasonably and in good faith, rely upon the work and conclusions of other professionals and experts, including Certified Public Accountants, Accountants, Auditors, & Tax Advisors.

THIRD AFFIRMATIVE DEFENSE
(Good Faith)

Plaintiff's claims are barred in whole or in part because Defendant acted at all times in good faith and/or did not know, and in the exercise of reasonable case could have known, or had any reasonable grounds to believe, that any misstatements or omissions of material fact existed in any statements, reports, and/or filings allegedly issued or uttered by Defendant. Defendant also relied upon competent personnel to assist him in making reasonable and informed decisions.

FOURTH AFFIRMATIVE DEFENSE
(Notes Are Not Securities)

Plaintiff's claims are barred because the notes at issue are not securities because they fall squarely within the list of non-securities enumerated in *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990). The notes are also exempt as securities under the express language of the Exchange Act (15 U.S.C. § 78c(a)(10)) and from the registration requirement under the Securities Act (15 U.S.C. § 77b(a)(1).

JURY DEMAND

Defendant hereby requests a trial by jury on all claims and defenses in this action.

Dated: August 21, 2021

Bettina Schein, Esq.
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By: */s/ Bettina Schein*
BETTINA SCHEIN
Admitted Pro Hac Vice

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By: */s/ Andre G. Raikhelson*
ANDRE G. RAIKHELSON
Florida Bar No. 123657

CERTIFICATE OF SERVICE

I hereby certify that on the 21st day of August, 2021, a true and correct copy of the foregoing Answer and Affirmative Defenses was served via the Court's CM/ECF System upon all counsel of record.

/s/ *Bettina Schein*
Bettina Schein

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 9:20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a/ PAR FUNDING, et al.,

Defendants.
_____/

DEFENDANT JOSEPH LUIS COLE BARLETA'S AMENDED ANSWER AND AFFIRMATIVE DEFENSES TO THE AMENDED COMPLAINT

Defendant Joseph Luis Cole Barleta ("Defendant" or "Barleta"), files this Amended Answer and Affirmative Defenses to the Amended Complaint filed by Plaintiff Securities and Exchange Commission ("Plaintiff" or "SEC"), and states as follows:

ANSWER

Defendant denies all allegations contained in the headings and all unnumbered paragraphs in the Amended Complaint and denies any allegations not specifically denied. Defendant answers the remaining allegations of the Amended Complaint as follows:

1. Defendant denies the allegations contained in paragraph 1 of the Amended Complaint.

2. Defendant denies the allegations contained in the first sentence of paragraph 2 of the Amended Complaint. Defendant only admits that Par Funding offered and issued promissory notes from 2012 through 2017.

3. Defendant denies the allegations contained in paragraph 3 of the Amended Complaint. Additionally, Defendant is without knowledge to form a belief as to the truth of the

allegations contained in the second sentence of paragraph 3 of the Amended Complaint and therefore denies same.

4. Defendant is without knowledge to form a belief regarding what the Pennsylvania Securities Regulators knew regarding the creation of the Agent Funds and is without sufficient knowledge with respect to the Agent Funds' obligations to its noteholders. Defendant denies the allegations contained in the remainder of paragraph 4 of the Amended Complaint.

5. Defendant denies the allegations contained in paragraph 5 of the Amended Complaint.

6. Defendant is without sufficient knowledge to form a belief as to the truth of the Allegations in paragraph 6 not concerning Defendant and therefore denies same.

7. Defendant is without sufficient knowledge to form a belief as to the truth of the Allegations in paragraph 7 not concerning Defendant and therefore denies same.

8. Defendant denies the allegations contained in paragraph 7 of the Amended Complaint.

9. Defendant denies the allegations contained in paragraph 9 of the Amended Complaint.

10. Defendant denies the allegations contained in paragraph 10 of the Amended Complaint.

11. Defendant admits that Par Funding had an office in Philadelphia, PA until 2017, when Par moved its office to Florida. Defendant admits that Complete Business Solutions Group has done business as Par Funding since 2013. Defendant admits that The LME 2017 Family Trust ("The LME Trust") was Par Funding's sole owner and that McElhone was Par Funding's

sole employee. Defendant denies the remaining allegations contained in paragraph 11 of the Amended Complaint.

12. Defendant only admits that the Order referenced in paragraph 12 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 12 of the Amended Complaint and therefore denies same.

13. Defendant only admits that the Order referenced in paragraph 13 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 12 of the Amended Complaint and therefore denies same.

14. Defendant only admits that the Order referenced in paragraph 14 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 14 of the Amended Complaint and therefore denies same.

15. Defendant admits that FSP's corporate filings speak for themselves and that McElhone was FSP's sole owner. Defendant denies the remainder of the allegations contained in paragraph 15 of the Amended Complaint.

16. Defendant only admits that the Order referenced in paragraph 16 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant admits that McElhone was the sole owner of Par Funding and denies the remainder of the allegations contained in paragraph 16 of the Amended Complaint.

17. Defendant admits that LaForte is a resident of Philadelphia and that he conceived of the idea for Par Funding with his wife, Lisa McElhone, but was never its owner. Defendant is

without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 17 of the Amended Complaint and therefore denies same.

18. Defendant only admits that the convictions referenced in paragraph 18 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 18 of the Amended Complaint.

19. Defendant only admits that he is a resident of Philadelphia and was employed by Par Funding as CFO until 2017, when Par Funding employees were converted to Full Spectrum Processing ("FSP") employees, and thereafter by FSP as its CFO. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 19 of the Amended Complaint and therefore denies same.

20. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 20 of the Amended Complaint and therefore denies same.

21. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 21 of the Amended Complaint and therefore denies same. Defendant only admits that the Order referenced in paragraph 21 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 21 of the Amended Complaint.

22. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 22 of the Amended Complaint and therefore denies same.

23. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 23 of the Amended Complaint and therefore denies same. Defendant only admits that the agreement referenced in paragraph 23 of the Amended Complaint speaks for

itself and denies any inconsistent and remaining allegations in paragraph 23 of the Amended Complaint.

24. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 24 of the Amended Complaint and therefore denies same.

25. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 25 of the Amended Complaint and therefore denies same.

26. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 26 of the Amended Complaint and therefore denies same. Defendant only admits that the Order referenced in paragraph 26 of the Amended Complaint speaks for itself and denies any inconsistent and remaining allegations in paragraph 26 of the Amended Complaint.

27. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 27 of the Amended Complaint and therefore denies same.

28. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 28 of the Amended Complaint and therefore denies same.

29. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 29 of the Amended Complaint and therefore denies same.

30. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 30 of the Amended Complaint and therefore denies same.

31. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 31 of the Amended Complaint and therefore denies same.

32. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 32 of the Amended Complaint and therefore denies same.

33. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 33 of the Amended Complaint and therefore denies same.

34. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 34 of the Amended Complaint and therefore denies same.

35. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 35 of the Amended Complaint and therefore denies same.

36. Defendant admits that the LME Trust is Par Funding's owner. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 36 of the Amended Complaint and therefore denies same.

37. Defendant admits that Par Funding has an office in Florida and is registered to do business in Florida, and that McElhone is the owner of FSP. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations contained in paragraph 37 of the Amended Complaint and therefore denies same.

38. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 38 of the Amended Complaint and therefore denies same.

39. Defendant denies the allegations in paragraph 39 of the Amended Complaint.

40. Defendant denies the allegations in paragraph 40 of the Amended Complaint.

41. Defendant denies the allegations in paragraph 41 of the Amended Complaint.

42. Defendant denies the allegations in paragraph 42 of the Amended Complaint and only admits that Par Funding's corporate filings speak for themselves. Defendant is without sufficient knowledge as to the remaining allegations contained in paragraph 42 and therefore denies them.

43. Defendant denies the allegations in paragraph 43 of the Amended Complaint.

44. Defendant denies the allegations in paragraph 44 of the Amended Complaint.

45. Defendant denies the allegations in paragraph 45 of the Amended Complaint.

46. Defendant denies the allegations in paragraph 46 of the Amended Complaint.

47. Defendant denies the allegations in paragraph 47 of the Amended Complaint.

48. Defendant denies the allegations in paragraph 48 of the Amended Complaint.

49. Defendant denies the allegations in paragraph 49 of the Amended Complaint.

50. Defendant denies the allegations in paragraph 50 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

51. Defendant denies the allegations in paragraph 51 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

52. Defendant admits that he and McElhone signed promissory notes issued by Par Funding, and denies the remainder of the allegations contained in paragraph 52 of the Amended Complaint.

53. Defendant denies the allegations in paragraph 53 of the Amended Complaint and only admits that the promissory notes referenced in this paragraph speak for themselves.

54. Defendant denies the allegations in paragraph 54 of the Amended Complaint and only admits that the agreement referenced in this paragraph speak for itself.

55. Defendant denies the allegations in paragraph 55 of the Amended Complaint and only admits that any agreement referenced in this paragraph speak for itself.

56. Defendant only admits that Defendant Vagnozzi had a Finders Agreement with Par Funding at one point in time but denies the remainder of the allegations contained in paragraph 56 of the Amended Complaint.

57. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 57 of the Amended Complaint and therefore denies same.

58. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 58 of the Amended Complaint and therefore denies same.

59. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 59 of the Amended Complaint and therefore denies same.

60. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 60 of the Amended Complaint and therefore denies same.

61. Defendant admits that Par Funding raised money through the sale of promissory notes, but denies the remaining allegations contained in paragraph 61 of the Amended Complaint.

62. Defendant only admits that any subpoena issued by state regulators speaks for itself and denies the allegations in paragraph 62 of the Amended Complaint.

63. Defendant denies the allegations in paragraph 63 of the Amended Complaint.

64. Defendant only admits that Par Funding sold promissory notes to Agent Funds beginning in 2018 but denies the allegations in paragraph 64 of the Amended Complaint.

65. Defendant denies the allegations in paragraph 65 of the Amended Complaint.

66. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 66 of the Amended Complaint and therefore denies same.

67. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 67 of the Amended Complaint and therefore denies same.

68. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 68 of the Amended Complaint and therefore denies same.

69. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 69 of the Amended Complaint and therefore denies same.

70. Defendant denies the allegations in paragraph 70 of the Amended Complaint.

71. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 71 of the Amended Complaint and therefore denies same.

72. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 72 of the Amended Complaint and therefore denies same.

73. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 73 of the Amended Complaint and therefore denies same.

74. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 74 of the Amended Complaint and therefore denies same.

75. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 75 of the Amended Complaint and therefore denies same. Defendant only admits that the Agent Guide referenced in this paragraph speaks for itself.

76. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 76 of the Amended Complaint and therefore denies same. Defendant only admits that the Agent Guide referenced in this paragraph speaks for itself.

77. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations contained in paragraph 77 of the Amended Complaint and therefore denies same.

78. Defendant denies the allegations in paragraph 78 of the Amended Complaint.

79. Defendant denies the allegations in paragraph 79 of the Amended Complaint.

80. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 80 of the Amended Complaint and therefore denies same. Defendant denies the remaining allegations in paragraph 80 of the Amended Complaint.

81. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 81 of the Amended Complaint and therefore denies same.

82. Defendant denies the allegations in paragraph 82 of the Amended Complaint.

83. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 83 of the Amended Complaint and therefore denies same. Defendant denies the remaining allegations in paragraph 83 of the Amended Complaint.

84. Defendant denies the allegations in paragraph 84 of the Amended Complaint.

85. Defendant denies the allegations in paragraph 85 of the Amended Complaint.

86. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 86 of the Amended Complaint and therefore denies same.

87. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 87 of the Amended Complaint and therefore denies same.

88. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 88 of the Amended Complaint and therefore denies same. Defendant only admits that the PPM referenced in this paragraph speaks for itself.

89. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 89 of the Amended Complaint and therefore denies same. Defendant only admits that the PPM referenced in this paragraph speaks for itself.

90. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 90 of the Amended Complaint and therefore denies same.

91. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 91 of the Amended Complaint and therefore denies same.

92. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 92 of the Amended Complaint and therefore denies same.

93. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 93 of the Amended Complaint and therefore denies same.

94. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 94 of the Amended Complaint and therefore denies same.

95. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 95 of the Amended Complaint and therefore denies same.

96. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 96 of the Amended Complaint and therefore denies same. Defendant only admits that any document referenced in this paragraph speaks for itself.

97. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 97of the Amended Complaint and therefore denies same.

98. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 98 of the Amended Complaint and therefore denies same.

99. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 99 of the Amended Complaint and therefore denies same.

100. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 100 of the Amended Complaint and therefore denies same.

101. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 101 of the Amended Complaint.

102. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 102 of the Amended Complaint.

103. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 103 of the Amended Complaint.

104. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 104 of the Amended Complaint.

105. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 105 of the Amended Complaint and therefore denies same.

106. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 106 of the Amended Complaint and therefore denies same.

107. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 107 of the Amended Complaint and therefore denies same.

108. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 108 of the Amended Complaint and therefore denies same.

109. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 109 of the Amended Complaint and therefore denies same.

110. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 110 of the Amended Complaint and therefore denies same.

111. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 111 of the Amended Complaint and therefore denies same.

112. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 112 of the Amended Complaint and therefore denies same.

113. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 113 of the Amended Complaint and therefore denies same.

114. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 114 of the Amended Complaint and therefore denies same. Defendant only admits that any filings made by Furman and Fidelis Planning speak for themselves.

115. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 115 of the Amended Complaint and therefore denies same.

116. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 116 of the Amended Complaint and therefore denies same.

117. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 117 of the Amended Complaint and therefore denies same.

118. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 118 of the Amended Complaint and therefore denies same.

119. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 119 of the Amended Complaint and therefore denies same.

120. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 120 of the Amended Complaint and therefore denies same.

121. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 121 of the Amended Complaint and therefore denies same.

122. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 122 of the Amended Complaint and therefore denies same.

123. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 123 of the Amended Complaint and therefore denies same.

124. Defendant only admits that the message referenced in paragraph 124 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 124 of the Amended Complaint and therefore denies same.

125. Defendant only admits that the message referenced in paragraph 125 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 125 of the Amended Complaint and therefore denies same.

126. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 126 of the Amended Complaint and therefore denies same.

127. Defendant denies the allegations contained in paragraph 127 of the Amended Complaint.

128. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 128 of the Amended Complaint and therefore denies same.

129. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 129 of the Amended Complaint and therefore denies same.

130. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 130 of the Amended Complaint and therefore denies same.

131. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 131 of the Amended Complaint and therefore denies same.

132. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 132 of the Amended Complaint and therefore denies same.

133. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 133 of the Amended Complaint and therefore denies same.

134. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 134 of the Amended Complaint and therefore denies same.

135. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 135 of the Amended Complaint and therefore denies same.

136. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 136 of the Amended Complaint and therefore denies same.

137. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 137 of the Amended Complaint and therefore denies same.

138. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 138 of the Amended Complaint and therefore denies same.

139. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 139 of the Amended Complaint and therefore denies same.

140. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 140 of the Amended Complaint and therefore denies same.

141. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 141 of the Amended Complaint and therefore denies same.

142. Defendant denies the allegations contained in paragraph 142 of the Amended Complaint.

143. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 143 of the Amended Complaint and therefore denies same.

144. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 144 of the Amended Complaint and therefore denies same.

145. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 145 of the Amended Complaint and therefore denies same.

146. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 145 of the Amended Complaint and therefore denies same.

147. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 147 of the Amended Complaint and therefore denies same.

148. Defendant only admits that the email referenced in paragraph 158 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 159 of the Amended Complaint and therefore denies same.

149. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 149 of the Amended Complaint and therefore denies same.

150. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 150 of the Amended Complaint and therefore denies same.

151. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 151 of the Amended Complaint and therefore denies same.

152. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 152 of the Amended Complaint and therefore denies same.

153. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 153 of the Amended Complaint and therefore denies same.

154. Defendant denies the allegations contained in paragraph 154 of the Amended Complaint.

155. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 155 of the Amended Complaint and therefore denies same.

156. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 156 of the Amended Complaint and therefore denies same.

157. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 157 of the Amended Complaint and therefore denies same.

158. Defendant only admits that the brochure referenced in paragraph 158 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 158 of the Amended Complaint and therefore denies same.

159. Defendant only admits that the brochure referenced in paragraph 158 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is

without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 159 of the Amended Complaint and therefore denies same.

160. Defendant only admits that the brochure referenced in paragraph 160 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 160 of the Amended Complaint and therefore denies same.

161. Defendant only admits that the brochure referenced in paragraph 161 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 161 of the Amended Complaint and therefore denies same.

162. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 162 of the Amended Complaint and therefore denies same.

163. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 163 of the Amended Complaint and therefore denies same.

164. Defendants are without knowledge regarding the allegations in paragraph 164, and therefore denied.

165. Defendant denies the allegations contained in paragraph 165 of the Amended Complaint.

166. Defendant denies the allegations contained in paragraph 166 of the Amended Complaint.

167. Defendant denies the allegations contained in paragraph 167 of the Amended

Complaint.

168. Defendant denies the allegations contained in paragraph 168 of the Amended Complaint.

169. Defendant denies the allegations contained in paragraph 169 of the Amended Complaint.

170. Defendant denies the allegations contained in paragraph 170 of the Amended Complaint.

171. Defendant denies the allegations contained in paragraph 171 of the Amended Complaint.

172. Defendant denies the allegations contained in paragraph 172 of the Amended Complaint.

173. Defendant denies the allegations contained in paragraph 173 of the Amended Complaint.

174. Defendant denies the allegations contained in paragraph 174 of the Amended Complaint.

175. Defendant denies the allegations contained in paragraph 175 of the Amended Complaint.

176. Defendant denies the allegations contained in paragraph 176 of the Amended Complaint.

177. Defendant denies the allegations contained in paragraph 177 of the Amended Complaint.

178. Defendant denies the allegations contained in paragraph 178 of the Amended Complaint.

179. Defendant denies the allegations contained in paragraph 179 of the Amended Complaint.

180. Defendant denies the allegations contained in paragraph 180 of the Amended Complaint.

181. Defendant denies the allegations contained in paragraph 181 of the Amended Complaint.

182. Defendant denies the allegations contained in paragraph 182 of the Amended Complaint.

183. Defendant denies the allegations contained in paragraph 183 of the Amended Complaint.

184. Defendant denies the allegations contained in paragraph 184 of the Amended Complaint.

185. Defendant denies the allegations contained in paragraph 179 of the Amended Complaint.

186. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 186 of the Amended Complaint and therefore denies same.

187. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 187 of the Amended Complaint and therefore denies same.

188. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 188 of the Amended Complaint and therefore denies same.

189. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 189 of the Amended Complaint and therefore denies same.

190. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 190 of the Amended Complaint and therefore denies same.

191. Defendant only admits that the website referenced in paragraph 191 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 191of the Amended Complaint and therefore denies same.

192. Defendant denies the allegations contained in paragraph 192 of the Amended Complaint.

193. Defendant denies the allegations contained in paragraph 193 of the Amended Complaint.

194. Defendant denies the allegations contained in paragraph 194 of the Amended Complaint.

195. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 195 of the Amended Complaint and therefore denies same.

196. Defendant denies the allegations contained in paragraph 196 of the Amended Complaint.

197. Defendant denies the allegations contained in paragraph 197 of the Amended Complaint.

198. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 198 of the Amended Complaint and therefore denies same.

199. Defendant denies the allegations contained in paragraph 199 of the Amended Complaint.

200. Defendant denies the allegations contained in paragraph 200 of the Amended Complaint.

201. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 201 of the Amended Complaint and therefore denies same.

202. Defendant denies the allegations contained in paragraph 202 of the Amended Complaint.

203. Defendant denies the allegations contained in paragraph 203 of the Amended Complaint.

204. Defendant denies the allegations contained in paragraph 204 of the Amended Complaint.

205. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 205 of the Amended Complaint and therefore denies same.

206. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 206 of the Amended Complaint and therefore denies same.

207. Defendant denies the allegations contained in paragraph 207 of the Amended Complaint.

208. Defendant denies the allegations contained in paragraph 208 of the Amended

209. Defendant denies the allegations contained in paragraph 209 of the Amended Complaint.

210. Defendant denies the allegations contained in paragraph 210 of the Amended Complaint.

211. Defendant denies the allegations contained in paragraph 211 of the Amended Complaint.

212. Defendant denies the allegations contained in paragraph 212 of the Amended Complaint.

213. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 213 of the Amended Complaint and therefore denies same.

214. Defendant denies the allegations contained in paragraph 214 of the Amended Complaint.

215. Defendant denies the allegations contained in paragraph 214 of the Amended Complaint.

216. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 216 of the Amended Complaint and therefore denies same.

217. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 217 of the Amended Complaint and therefore denies same.

218. Defendant denies the allegations contained in paragraph 218 of the Amended Complaint.

219. Defendant denies the allegations contained in paragraph 219 of the Amended Complaint.

220. Defendant only admits that the transcript of the referenced statement speaks for itself. Additionally, Defendant denies the remainder of the allegations contained in paragraph 102 of the Amended Complaint.

221. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 221 of the Amended Complaint and therefore denies same.

222. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 222 of the Amended Complaint and therefore denies same.

223. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 223 of the Amended Complaint and therefore denies same.

224. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations in paragraph 224 of the Amended Complaint and therefore denies same.

225. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 225 of the Amended Complaint and therefore denies same.

226. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations t in paragraph 226 of the Amended Complaint and therefore denies same.

227. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 227 of the Amended Complaint and therefore denies same.

228. Defendant only admits that the Order referenced in paragraph 228 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is

without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 12 of the Amended Complaint and therefore denies same.

229. Defendant only admits that the Order referenced in paragraph 229 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 229 of the Amended Complaint and therefore denies same.

230. Defendant denies the allegations contained in paragraph 230 of the Amended Complaint.

231. Defendant only admits that the Order referenced in paragraph 231 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 231 of the Amended Complaint and therefore denies same.

232. Defendant denies the allegations contained in paragraph 232 of the Amended Complaint.

233. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 233 of the Amended Complaint and therefore denies same.

234. Defendant denies the allegations contained in paragraph 234 of the Amended Complaint.

235. Defendant denies the allegations contained in paragraph 235 of the Amended Complaint.

236. Defendant only admits that the Form referenced in paragraph 236 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without

sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 236 of the Amended Complaint and therefore denies same.

237. Defendant only admits that the Order referenced in paragraph 237 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 237 of the Amended Complaint and therefore denies same.

238. Defendant only admits that the Order referenced in paragraph 238 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 238 of the Amended Complaint and therefore denies same.

239. Defendant denies the allegations contained in paragraph 239 of the Amended Complaint.

240. Defendant denies the allegations contained in paragraph 240 of the Amended Complaint.

241. Defendant denies the allegations contained in paragraph 240 of the Amended Complaint.

242. Defendant only admits that the document referenced in paragraph 242 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 242 of the Amended Complaint and therefore denies same.

243. Defendant denies the allegations contained in paragraph 243 of the Amended Complaint.

244. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 244 of the Amended Complaint and therefore denies same.

245. Defendant denies the allegations contained in paragraph 245 of the Amended Complaint.

246. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 246 of the Amended Complaint and therefore denies same.

247. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 247 of the Amended Complaint and therefore denies same.

248. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 248 of the Amended Complaint and therefore denies same.

249. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 249 of the Amended Complaint and therefore denies same.

250. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 250 of the Amended Complaint and therefore denies same.

251. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 251 of the Amended Complaint and therefore denies same.

252. Defendant only admits that the article referenced in paragraph 252 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 238 of the Amended Complaint and therefore denies same.

253. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 253 of the Amended Complaint and therefore denies same.

254. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 254 of the Amended Complaint and therefore denies same.

255. Defendant only admits that the article referenced in paragraph 255 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 238 of the Amended Complaint and therefore denies same.

256. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 256 of the Amended Complaint and therefore denies same.

257. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 257 of the Amended Complaint and therefore denies same.

258. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 258 of the Amended Complaint and therefore denies same.

259. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 259 of the Amended Complaint and therefore denies same.

260. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 260 of the Amended Complaint and therefore denies same.

261. Defendant only admits that the documents referenced in paragraph 261 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 261 of the Amended Complaint and therefore denies same.

262. Defendant only admits that the Order referenced in paragraph 262 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 262 of the Amended Complaint and therefore denies same.

263. Defendant is without sufficient knowledge to form a belief as to the truth of the allegations not concerning the Defendant in paragraph 263 of the Amended Complaint and therefore denies same.

264. Defendant only admits that the website referenced in paragraph 264 of the Amended Complaint speaks for itself and denies any inconsistent allegations. Defendant is without sufficient knowledge to form a belief as to the truth of the remaining allegations in paragraph 264 of the Amended Complaint and therefore denies same.

265. Defendant denies the allegations contained in paragraph 265 of the Amended Complaint.

266. Defendant denies the allegations contained in paragraph 266 of the Amended Complaint.

267. Defendant denies the allegations contained in paragraph 267 of the Amended Complaint.

COUNT I

268. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

269. Defendant denies the allegations contained in paragraph 269 of the Amended Complaint.

270. Defendant denies the allegations contained in paragraph 270 of the Amended Complaint.

COUNT II

271. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

272. Defendant denies the allegations contained in paragraph 272 of the Amended Complaint.

273. Defendant denies the allegations contained in paragraph 273 of the Amended Complaint.

COUNT III

274. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

275. Defendant denies the allegations contained in paragraph 275 of the Amended Complaint.

276. Defendant denies the allegations contained in paragraph 276 of the Amended Complaint.

COUNT IV

277. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

278. Defendant denies the allegations contained in paragraph 278 of the Amended Complaint.

279. Defendant denies the allegations contained in paragraph 279 of the Amended Complaint.

COUNT V

280. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

281. Defendant denies the allegations contained in paragraph 281 of the Amended Complaint.

282. Defendant denies the allegations contained in paragraph 282 of the Amended Complaint.

COUNT VI

283. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

284. Defendant denies the allegations contained in paragraph 284 of the Amended Complaint.

285. Defendant denies the allegations contained in paragraph 285 of the Amended

Complaint.

COUNT VII

286. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

287. Defendant denies the allegations contained in paragraph 287 of the Amended Complaint.

288. Defendant denies the allegations contained in paragraph 288 of the Amended Complaint.

289. Defendant denies the allegations contained in paragraph 289 of the Amended Complaint.

COUNT VIII

290. Defendant repeats and re-alleges paragraphs 1 through 267, inclusive, as if fully set forth herein.

291. Defendant denies the allegations contained in paragraph 291 of the Amended Complaint.

292. Defendant denies the allegations contained in paragraph 292 of the Amended Complaint.

293. Defendant denies the allegations contained in paragraph 293 of the Amended Complaint.

294. Defendant denies the allegations contained in paragraph 294 of the Amended Complaint.

RELIEF REQUESTED

Defendant denies that he committed the violations alleged and that the Commission is entitled to any relief set forth in this section.

GENERAL DENIAL

Defendant generally denies all allegations of the Amended Complaint except for such allegations as are explicitly and specifically admitted above.

AFFIRMATIVE DEFENSES

Defendant asserts the following affirmative defense and reserves the right to amend his answer and affirmative defenses based upon information obtained in the course of litigation.

FIRST AFFIRMATIVE DEFENSE
(Advice of Counsel)

Defendant hereby provides notice that he intends to rely on a defense that he relied upon advice of counsel. Defendant did not act with the requisite mental state that Plaintiff must prove, and the Court should decline to issue the equitable relief sought by Plaintiff, because Defendant's reliance on the advice of his counsel is inconsistent with the Plaintiff's allegations of violations of the federal securities laws and the relief sought. Defendant made a full and complete good faith report of all materials facts to counsel that he considered competent, received the attorneys' advice as to the specific course of conduct that was followed, and reasonably relied on that advice in good faith.

SECOND AFFIRMATIVE DEFENSE
(Reliance on Other Professionals and Experts)

In executing or authorizing the execution and/or publication of any document containing the statements complained of in the Amended Complaint, Defendant was entitled to, and did,

reasonably and in good faith, rely upon the work and conclusions of other professionals and experts, including Certified Public Accountants, Accountants, Auditors, & Tax Advisors.

THIRD AFFIRMATIVE DEFENSE
(Good Faith)

Plaintiff's claims are barred in whole or in part because Defendant acted at all times in good faith and/or did not know, and in the exercise of reasonable case could have known, or had any reasonable grounds to believe, that any misstatements or omissions of material fact existed in any statements, reports, and/or filings allegedly issued or uttered by Defendant. Defendant also relied upon competent personnel to assist him in making reasonable and informed decisions.

FOURTH AFFIRMATIVE DEFENSE
(Notes Are Not Securities)

Plaintiff's claims are barred because the notes at issue are not securities because they fall squarely within the list of non-securities enumerated in *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990). The notes are also exempt as securities under the express language of the Exchange Act (15 U.S.C. § 78c(a)(10)) and from the registration requirement under the Securities Act (15 U.S.C. § 77b(a)(1).

JURY DEMAND

Defendant hereby requests a trial by jury on all claims and defenses in this action.

Dated: August 21, 2021

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By: */s/ Bettina Schein*
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Admitted Pro Hac Vice

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By: */s/ Andre G. Raikhelson*
ANDRE G. RAIKHELSON
Florida Bar No. 123657

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 2021, a true and correct copy of the foregoing was served via CM/ECF on all counsel or parties of record.

By: */s/ Andre G. Raikhelson*
ANDRE G. RAIKHELSON

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____/

REPLY IN SUPPORT OF (DE 663) DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT DUE TO MISCONDUCT BY THE SECURITIES AND EXCHANGE COMMISSION AND RELATED CONSTITUTIONAL VIOLATIONS

> "[I]n June 2020, Par Funding transferred millions from the Par Funding, leaving only thousands in its bank account."
>
> -SEC Counsel Amie Riggle Berlin
> to this Court, regarding the need for an *ex parte* asset freeze.
> July 27, 2020 (DE 14 at 77)

This statement, and others similar statements by the SEC, had real and immediate consequences on this litigation. Conversely, the out of context quote about winning from Mr. LaForte to his lawyer in the context of litigating nonpaying merchants to recover money owed to Par, which is only seeing the light of day because the SEC was able to induce this Court to appoint a Receiver and shut down Par, does not show that Mr. Laforte or any of the Defendants have done anything wrong, but rather, that Mr. LaForte, like many others, has a will to win. This is not controversial. We do not demonize the late, great Vince Lombardi for his famous quote: "Winning isn't everything, it's the only thing," which Laforte was obviously paraphrasing. The SEC's Response opens with a continuation of the exact type of conduct that forms the basis for the Rule 41 Motion, demonizing the Defendants with ad hominem attacks, and even falsely accusing the Defense of presenting manufactured evidence. However, the SEC's conduct about which the Defense complains, was unfair, prejudicial, and has created a significantly unfair advantage in favor of the government that cannot be remedied by anything short of dismissal.

The SEC's Response fundamentally misunderstands the purpose of Defendants' Motion, which is not to prove that there is no genuine issue of material fact on any of the allegations of the Complaint, but that the SEC brought this case on an incomplete investigation full of undeveloped theories, many of which later proved false, but were not corrected by the SEC, and facts that were false when they were alleged. Unlike a statement in a complaint or preliminary motion that later is proven unfounded in ordinary litigation, these false statements had real, immediate, and devastating consequences due to the drastic *ex parte*, emergency, preliminary relief sought by the SEC. These false allegations fundamentally changed the character of this litigation by inducing the Court to order an asset freeze and install a Receiver and caused the Defendants to have to fight with one hand tied behind their backs, having to litigate for months just to get access to their own documents to defend themselves. It also caused devastating injury to Par because the Receiver ceased Par's daily business of making merchant cash advances and collecting money owed by merchants. This is not how an alleged securities registration and misrepresentation cases should be litigated but was done in this way by the SEC in an endeavor to prompt this Court to enter emergency *ex parte* relief so the SEC could

railroad the Defendants. Obviously, it is the SEC that is seeking to win at all costs regardless of the truth and the law. This type of government overreach and misbehavior should not be tolerated, and the case should be dismissed.

I. The SEC Has No Response for the Most Significant Frauds on This Court That Caused the TRO and Receivership

In its Response, the SEC attempts to divert attention away from the real issues by offering a series of strawman arguments, which it of course knocks down. But the facts are indisputable that the SEC's haphazard investigation resulted in false facts and faulty legal contentions being presented to this Court in support of the Motion for Temporary Injunction and Appointment of the Receiver. The SEC goes to great lengths in its Response to take responsibility for the investigation, but that is not the winning argument the SEC thinks it is because if true, it only shows that the SEC, more than the merchant declarants, is responsible for the misrepresentations to the Court.

In the Response, the SEC does not even acknowledge some of the arguments raised by Defendants regarding the false claims it presented to this Court and deflects as to others without providing a substantive response. The SEC completely ignores Defendants' arguments that the SEC misled the Court by falsely alleging that: (1) Joseph LaForte hid his identity from noteholders, which the SEC's own evidence proves is false; (2) Mr. Cole discussed purchasing a bank to avoid usury laws, which the SEC's own evidence proves is false; and (3) the Defendants stole millions of dollars of noteholders' money by cleaning out Par's bank account and sending the money to another company in Georgia leaving behind only $83,000.00, which did not happen. In fact, the SEC does everything it can to shift focus away from the fact that it told this Court that Par executives raided the company coffers right before this action was filed and implied they were about to abscond.

The significance of the theft of the Company's money misrepresentation cannot be stressed enough as the Defense submits that it had to have been a material inducement to this Court granting the extraordinary and devastating preliminary relief sought by the SEC. Case law is clear that even when there is sufficient prima facie evidence of securities laws violation such that a TRO can be entered, the appointment of a receiver is a different animal only appropriate in extraordinary circumstances. *SEC v. Brigadoon Scotch Distribs.*, 388 F. Supp. 1288, 1293 (S.D.N.Y. 1975) ("The application for the appointment of a Receiver is denied. No showing has been made that such a drastic remedy is necessary for the protection of the public. Indeed, it appears that the expense which a receivership would involve would not only impose an undue burden on the defendants but could jeopardize the interests of the public as well."); *SEC v. Bennett & Co.*, 207 F. Supp. 919, 924 (D.N.J. 1962) (granting preliminary injunction, but denying motion for appointment of receiver because

"[t]here is no evidence that any of the defendants have in the past diverted any funds belonging to others to their own use."); *see also SEC v. Hollnagel*, 503 F. Supp. 2d 1054, 1058 (N.D. Ill. 2007) (court denied motion for receiver because even though noteholders were owed $48 million, the defendant would be able to maintain the corporation and obtain the funds to pay the notes better than a receiver). Thus, the SEC needed to convince the Court that Par was in danger of dissipating its assets or that the Receiver could protect the noteholders better than Par. The SEC's allegations were false when made and the Defendants have now shown this to the Court.

The SEC does not even attempt to deny or justify this false allegation, because it cannot be justified. This case is a house of cards that started with the SEC's Big Lie that Par was diverting noteholder money out of its accounts resulting in the extraordinary relief from the Court which caused, among other things, the waiver by the Receiver standing in the shoes of Par of the attorney client privilege. Rather than even acknowledging this misrepresentation in its Response, the SEC uses an out of context quote from an email it would not even have had but for its misrepresentation to the Court to demonize the Defendants. The SEC's smug and callous indifference to what it did here is shameful.

It is now clear that the SEC's expert, Melissa Davis, whose inaccurate Declaration the SEC cited in its TRO Motion as verifying the theft of Par's money that never occurred, did not even bother to review all of the relevant accounts. As explained by the Defendants' expert:

> To date, Melissa Davis ("Davis"), the forensic accountant retained by the Securities and Exchange Commission (the "SEC"), has submitted three declarations. The first two, dated July 23, 2020, and August 4, 2020, address bank accounts for which the SEC asked her to analyze. The list of accounts she was provided to analyze as reflected in her July declaration did not include all bank accounts and did not include any ACH accounts. None of the nine automated clearing house (ACH) payment processors used by CBSG was included in this list. Additionally, five bank accounts used by CBSG were not included in the list she was asked to analyze.

Expert Report of Joel Glick, attached as Exhibit B at 5. Thus, the entire basis of Ms. Davis's theory that Par was moving money out of its bank accounts seems to be the fact that she did not consider that the ACH accounts belong to Par. As further explained by Mr. Glick, Par used these accounts primarily to make interest and principal payments to noteholders and make advances to merchants because the fees Priority charged were significantly less expensive than the cost of wiring the funds through a bank account. *Id.* at 6. This blunder should cause the Court great concern when considering Ms. Davis's expert opinions in this case. Whether the SEC withheld information regarding Par's ACH accounts from Ms. Davis, or she simply ignored them, the misrepresentation that Par was transferring

millions of dollars out of its accounts caused immediate and irreparable harm to the defense. The harm done by this false contention and other misrepresentations by the SEC cannot be remedied on post-judgment appeal or by anything short of dismissal.

The SEC likewise ignores the fact that in the Motion the Defendants dismantle the SEC's false allegation that Mr. LaForte hid his identity from noteholders. Mr. LaForte does not dispute that he did not always use his last name when dealing with merchants seeking cash advances, which is a common practice in the industry for safety and security reasons. The SEC twisted that practice into the false allegation Laforte concealed his last name from noteholders obviously to induce the Court to act. Again, however, the damage has been done. Mr. LaForte's past criminal conviction is littered throughout the SEC's case, despite the fact that there is no evidence that he has engaged in any criminal conduct related to Par. The SEC goes further and attempts to deflect attention away from its own bad behavior set forth in the Motion by saying in the Reply that there are ongoing investigations by other agencies. Response at 2 n. 2. Whether that is true or not is wholly irrelevant to the SEC's misconduct and the Motion at hand. Apparently, the SEC's defense to its misconduct is that if other agencies are or may be investigating defendants, then the Court should allow the SEC to lie about them. Moreover, the evidence that Mr. LaForte did not hide his identity from ***noteholders*** was in the possession of the SEC when it filed this case and made the allegation. The SEC describes in detail a 2019 noteholder dinner put on by Dean Vagnozzi, mentioning it 14 times in its TRO Motion. The SEC alleges that Mr. Laforte's name was concealed from noteholders at the dinner and attached a transcript of that dinner to its TRO Motion. However, the transcript of the dinner filed by the SEC as an exhibit to its TRO Motion shows that Mr. Vagnozzi introduced LaForte by name to the entire crowd over the PA system, stating: "I want to introduce ***Joe LaForte***. Come on up, Joe." (DE 41-7 at 57, lines 17-18) (emphasis added). Notably, this evidence was obtained though an undercover private investigator retained by Heskin. The SEC's response when called out for this falsity, again crickets. There is no excuse for such conduct, particularly by a federal agency.

The SEC produced multiple declarations from Heskin's merchant clients stating that Mr. LaForte concealed his identity from them. However, in light of the fact that the SEC was in possession of a recorded presentation where Mr. LaForte was introduced to approximately 300 noteholders by his real name, it is clear that these declarations were submitted for the improper purpose of baiting the Court into believing that Mr. LaForte always hid his identity from everyone, specifically noteholders. This was not the case.

II. Heskin Was a Significant Portion of the Complaint and TRO Motion and a Large Document Dump Does Not Change That

The SEC argues that it conducted its own investigation and points to the percentage of documents it produced from Heskin in relation to the number of documents it produced, as a whole as evidence of this. However, the SEC's argument fails because it ignores that it relied extensively on information and legal theories provided by Heskin in its Amended Complaint and the TRO Motion. Heskin procured the merchants and information in the merchant declarations for the SEC, much of which have been proven false. Heskin is the source of the allegations that Par's MCA's were "loans" and usurious, which the SEC argued to this Court, but now disavows knowing they are false and claiming they are "irrelevant" after the damage has been done. The SEC certainly thought those allegations were relevant when it littered them thought the Complaint, Amended Complaint, and TRO Motion. Heskin commissioned and paid for the Reehl investigations taping of a dinner on November 21, 2019, which the SEC used as evidence in support of the Complaint and TRO Motion, while conveniently ignoring the fact that Mr. LaForte was introduced to a room of approximately 300 noteholders by his real name. Heskin also invented the specious default rate analysis adopted by the SEC, that was the basis for the Andjich Declaration, whereby the number of confessions of judgment filed in courts equals the percentage of defaulted advances for noteholder purposes.

Additionally, the SEC's attempt to argue Heskin's investor and securities related deposition questions, which read like a blueprint of the Complaint later filed by the SEC, were relevant in his merchant lawsuits fails. Heskin deposed Mr. Cole a mere 24 days before the SEC filed its Complaint and TRO Motion. The SEC argues the investor and securities related questions were somehow not out of line because Defendants knew to expect them and for support points to email correspondence between Mr. Cole and Par's counsel, which the SEC should never have had and only now has because its false allegations induced the Court to appoint a Receiver who thereafter waived Par's attorney client privilege) However, these investor and securities related topics are *not* discussed in the correspondence (yet another example of the SEC making false allegations about conversations, similar to the false allegations about the transcript of the Cole dinner conversation about the bank and the Vagnozzi introduction of Joe Laforte at the noteholder dinner), nor are they on the area of inquiry set forth in the 30(b)(6) Corporate Representative deposition notice prepared by Heskin. Therefore, no matter what was litigated, those questions were outside the scope and wholly irrelevant to Heskin's merchant actions. However, most tellingly, the questions Heskin asked at that deposition read like a word for word rendition of the pleading and motion filed by the SEC just three weeks later. This cannot be a

mere coincidence. Notably, the documents produced by the SEC show that Heskin ordered Cole's deposition transcript on a *rush* basis and immediately forwarded it to the SEC. Furthermore, at the deposition, Heskin told Par's counsel "the time will come," foreshadowing the SEC's complaint that he was obviously gathering evidence for.[1] (DE#20-2). To believe the SEC's explanation it was Heskin with a crystal ball not the Defendants, as the SEC facetiously suggested in Exhibit 12 to its Response (DE #700-1 p. 18).

Finally, Heskin provided a report from his expert in a merchant action, the Lunden Report, and the SEC ran with it. Notably, Mr. Lunden in his report made it clear it was not his expert opinion that Par's MCA's were loans and usurious and he got that theory from Heskin, but the SEC misled the Court by not pointing out that caveat and thereby making it appear it was Mr. Lunden's opinion. Additionally, the Lunden Report makes it clear the Fleetwood advance was funded after the onsite inspection, but the SEC did not care and argued to the contrary when it filed its TRO Motion and still argues falsely that it was funded beforehand. Irrespective of the amount of documents and information the SEC collected from any other sources, it obviously considered what it got from Heskin to be highly relevant and relied heavily upon documents and evidence from Heskin to induce this Court to enter the most drastic pretrial relief there is. The SEC's Amended Complaint and TRO Motion make it clear Heskin was leading the investigation, not the SEC.

III. Response to SEC's Chart About Noteholder Misrepresentations

The SEC continues to attack Par's underwriting through its own chart of "truths." However, the SEC's chart is flawed because it attacks underwriting guidelines made up by the SEC that Par has never promised noteholders. First, the SEC claims that Par regularly approved funding before a site inspection. However, the way the SEC uses "approved" in its filings and merchant declarations is a made-up point in the funding process that does not exist. While merchants are preliminarily qualified based on their document submissions, Par has no obligation to actually fund until the money is actually sent. Par's documents are clear that if it learns anything new about the financial condition of the merchant after preliminary qualification, which would include a failed site inspection, troubling bank statements, or issues with a background check, it is not obligated to fund. Nevertheless, over a year into this case, the SEC continues to harp on the "approval" date, which is a concept manufactured by

[1] In the Response, the SEC claims that Heskin found out about the Complaint filed by the SEC after it was filed from the Philadelphia Inquirer. (DE# 691 at 6). However, the Heskin declaration the SEC points to as evidence of this says no such thing. (DE# 691-5). Yet another example of a made-up allegation by the SEC, not unlike the "approved" before the onsite turned into "funded" switcheroo the SEC pulled with the Fleetwood Declarations, discussed in the Motion and herein.

the SEC. The SEC is aware that the time period it refers to as "approval" was really a pre-qualification, but Par was not obligated to make the advance until funding.

The merchants, and by extension the SEC, were clearly aware that a deal is not finally approved until it is funded because the contracts say exactly that. Par's contracts state:

> You have been pre-qualified based on our preliminary review of the information you have provided. Your pre-qualification is not a guaranty of funding nor a commitment to fund. You must provide the requested additional information, sign and return the Agreement and related documents sent to you, and our underwriting department will make a final determination regarding the terms of your Agreement. Any misrepresentation relating to any information you have provided to us or may provide to us in the future or any adverse change in your financial condition or status may void this pre-qualification offer. Pre-qualification is subject to withdraw, change, and/or cancellation at any time if you no longer meet the requirements for the requested funding.

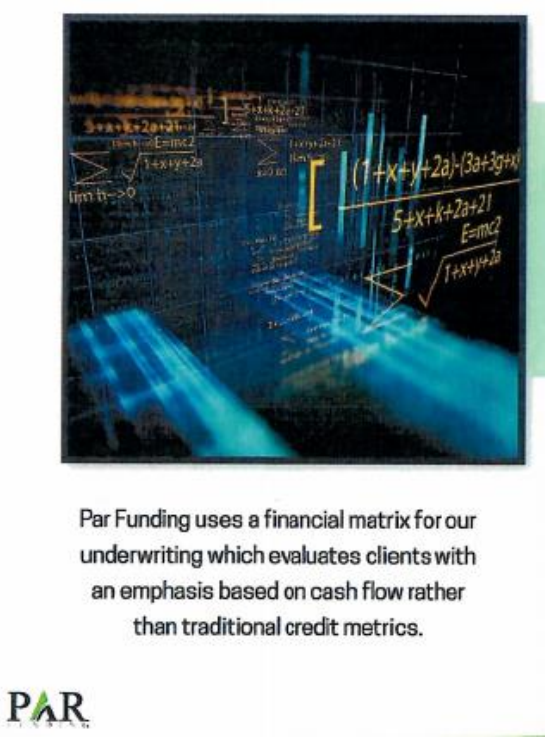
Again, all deals are pre-qualified before Par received the requested documentation needed to fulfill the underwriting guidelines and conducted the site inspection. Par would not waste the money or time to do an onsite if that were not the case. However, the merchants were not funded until the underwriting process was complete, which included all documents requested to complete underwriting and the onsite inspection where appropriate.[2] *See* Noteholder Brochure, attached as exhibits 1 and 2 to Exhibit A.

Additionally, the SEC is apparently making the nonsensical argument that Par must get a new application from a merchant and order new site inspections when it funded merchants who are existing clients that already provided an initial application and had an onsite inspection. While the federal government may revel in inefficiency and red tape, profitable businesses do not. The purpose of an onsite inspection is essentially to make sure the business exists. All documents gathered in the underwriting process were subsequently uploaded to and stored and maintained in ConvergeHub, Par's CRM. The purpose of a CRM is to store all the information that a company collects about its customers. Thereafter, employees have a centralized platform to allow them to access, analyze, and use previously obtained customer data on a continuing basis, rather than repeatedly requesting the same documents and information over and over. The purpose of a CRM is to allow businesses to store and use pre-existing data. Obviously, if a merchant requested a second round of funding after a first application, updated bank statements would be required to show current cash flow, but other

[2] Contrary to the SEC's assertion, Defendants did not forge or doctor documents or evidence. Documents were formatted or highlighted to show the Court information from QuickBooks and the application in the most streamlined way possible without needlessly overburdening the Court and filing all the bank statements. In light of the SEC's false allegations, a complete set of documents are being filed under seal. *See* Rebuttal Chart attached as Exhibit A 1-99.

documents do not need to be re-requested. Par's third-party vendor systems are capable of verifying preexisting information and any changes that may have resulted from prior data obtained in the original application process. By logging into Experian Business Background, Clear by Thompson Reuters, Data Tree, Data Merchant, and looking at social media and Google products, Par underwriters can ascertain the data that is needed for renewals.

The SEC also argues that Par does not collect debt schedules, profits and loss statements, and other underwriting documents, but fails to point to a single document that Par promised noteholders it would obtain and did not do so. Further, the SEC's discussion about profit and loss statements and debt schedules demonstrates a total lack of understanding of the MCA business, which is most concerned with cash flow and the merchants;' apparent ability to repay advances over a short period of time, usually 100 days. In fact, one of Par's brochures for noteholders explains that: "Par Funding uses a financial matrix for our underwriting which evaluates clients with an ***emphasis based on cash flow rather than traditional credit metrics.***" *See* Exhibits 1 and 2 to Exhibit A (emphasis added). Again, the SEC has manufactured underwriting guidelines that Par never promised its noteholders.



Given that Par funded deals that usually had 100-day terms or shorter, cash flow information was what it needed to determine a merchant's qualification for funding. There is no dispute that Par Funding obtained three-months of bank statements along with an application, a voided check, and a copy of the merchant's driver's license. Industry standard is a voided check, a driver's license, three-

months of bank statements, application, and proof of ownership. *See* competitors underwriting standards attached as exhibits 28-1 and 28-2 to Exhibit A. Par went above and beyond that and performed significantly more underwriting than many in the industry including site inspections, although it did accept pictures from the owner when the business was of a sensitive nature such as a law firm, children's playground, or a facility that stores hazardous materials. Par also took other information, when necessary, on a case-by-case basis when it deemed appropriate. Even though this was not a promise made to note holders.

Additionally, the SEC claims Par did not do background checks, but it did. This argument evidences complete ignorance of the fact that Experian has numerous products, not just personal credit report offerings, including individual and business background checks which are two platforms separate and apart through Experian: Experian Business Background for background checks and Experian for personal credit. Par conducted both on every merchant it ever funded, as disclosed to note holders. *See* Exhibit A-14, A-18 A-32, A-46, A-79-82, A-99.

The SEC in its chart continues to double down on many of the false assertions called out in Defendants' Motion despite overwhelming evidence to the contrary. The Defendants have attached a rebuttal chart dispensing with the contentions raised by the SEC it is chart, *See* Exhibit A, hereto, and its supporting exhibits, 1 through 99.

One of the most egregious misrepresentations made by the SEC in its TRO Motion involves the Fleetwood Declarations and the timing of the Fleetwood Services advance. Remarkably, when confronted with irrefutable evidence proving false its allegation that the Fleetwood Services advance was funded the day before the January 5, 2017, onsite inspection, the SEC belligerently doubles down. Defendants provided Par's Bank Statement that shows Fleetwood Services was funded on January 9, 2017, *not* January 4th. *See* Motion Exhibit 29. The SEC's own exhibits filed in support of its TRO Motion confirm that the merchant was funded on January 9, 2017. *See* TRO Motion Exhibit 76, the Lunden Report (provided to the SEC by Heskin), Exhibit "A," at pp. 1 and 13 (confirming Par made the first advance in the amount of $133,335.00 on January 9, 2017). In fact, the Fleetwoods say nothing about when the advance was first funded and instead allege the advance was "approved" before the site inspection. This approval concept is a false, irrelevant, and misleading concept explained in this Reply, but for the purposes of this argument, even the Fleetwoods knew better than to make the false claim that funding occurred before the onsite inspection. The SEC made the funded allegation up along with other false allegations discuss in the Motion to bait the Court into the most drastic pretrial relief possible. In its Reply, the SEC ignores Par's Bank Statement, its own TRO Motion Exhibit, the

Lunden Report, and does not address the discrepancy between the Fleetwoods' Declarations ("approved") and the SEC's allegation ("funded") in the TRO Motion. Instead, the SEC cites in its chart a "Fleetwood ConvergeHub record" that the SEC has to know is inaccurate and not reliable. *See* (DE 692) SEC Reply Chart at p. 15, footnote 32. Specifically, the "Fleetwood ConvergeHub record" cited by the SEC lists the date of funding as 01/04/2017; the date of Agreement is blank, the Deal Value is USD 0.00; and the Expected Close date is **08/17/2021**. This document is obviously inaccurate and not dispositive. The SEC may not understand or may but does not want to acknowledge that ConvergeHub is an internal database at Par that can be accessed and modified by employees/staff as documents and information are subsequently added to the file. Data entered into the CRM by Par staff does not trump original documents, like contracts, inspection reports, background checks from Experian, or bank statements, and is not intended to. If it read that document the SEC must know it is completely inaccurate. Notably SEC cut off information regarding the bottom of the application and used an application that was not Par's application. Ultimately, the Fast Advance Funding application dated December 29, 2016, was the one that this deal was based on. Ex. A-55.

The SEC does not even attempt to explain the discrepancy between this ConvergeHub record and Par's Bank Statement and the SEC's own (borrowed) Lunden Report because it cannot possibly do so in good faith. Notably, this Fleetwood ConvergeHub record is not something the SEC would have had access to prior to filing its TRO Motion since the TRO Motion was filed on July 27, 2020 (DE# 14) and the Receiver took over Par's operations on July 28, 2020.Therefore, the SEC cannot claim this erroneous internal record caused the SEC to mistakenly make a false allegation to this Court about Par's underwriting. Instead, the SEC uses this record that it obtained after the fact to cloud and confuse the issue and continue the harm caused by the false allegation. The SEC should admit the allegation is false but will not. The SEC's conduct should not be condoned. Without ramifications for this and the other false allegations raised in the Motion, like all the money was stolen from Par's bank account just before suit was filed, the SEC will be emboldened to engage in similar conduct in the future.

IV. The Investigation and Claims to the Court About the Investigation Were Constitutionally Insufficient and the SEC's Statements Regarding Its Sufficiency and the Defendants' Ability to Adequately Defend Themselves at the Prior Hearing Are Disingenuous

The SEC makes a number of statements regarding the sufficiency of its investigation as well as the Defendants' opportunity to defend themselves that are disingenuous and should be ignored by this Court. Contrary to the SEC's argument Defendants do not argue that the SEC has an improper

financial purpose (DE 691 at 10), but rather that given the financial motivation of the private attorney and his clients—to wit—getting paid legal fees and potentially avoiding repaying millions of dollars to Par, that a proper and diligent investigation would have consisted of obtaining declarations from multiple sources. Out of 7,600 Par merchant clients, the SEC starts this case with 14 merchants who were all represented by the same lawyer. While the SEC claims that it drafted all of the declarations, there is no dispute that the SEC used this single private attorney's clients rather than other sources, and that the contents of the declarations were procured by the private lawyer in a blast email and were not sufficiently vetted such that they were filed with material items left blank on a form declaration that does not vary much between declarants, if at all.[3] This is not the first time the SEC's counsel has relied on a single source with questionable motives and did not diligently confirm facts before submitting them to the Court. Another district judge once noted, calling out SEC's sole reliance on a single (clearly biased) witness's statements to prove a case against Defendant, despite the "unquestionable lack of reliability." *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1326 (M.D. Fla. 2011). The *Kramer* court also called out SEC for relying on this witness's own statement of location without independently investigating the facts ("The Commission appears not to have diligently attempted to locate Baker but rather to have attempted to ostentatiously fail to locate Baker.") *Id.* at 1324.

Furthermore, the SEC attempts to argue that the Defendants' position is that the SEC has an improper financial arrangement with the merchant declarants. Defendants said no such thing in their motion. Rather, the Defendants stated that the merchants have a financial motivation in helping the SEC take down Par and possibly make their debt go away or reducing it. This is indisputable.[4] Furthermore, while Heskin states in the declaration he filed in support of the Response that his cases are stayed, that is not dispositive of anything. Heskin obviously will seek to get paid for his legal work, whether now or in the future. He could have a contingency agreement with his clients whereby he gets a percentage of any debt that is discharged whether in a private case or this case, or he could simply realize that his private litigation was going nowhere and that this action is the best route for his clients to avoid their debt. Furthermore, the stay of litigation helped stop the bleeding from the losses in federal court. (Sunrooms) which helped Heskin's clients by taking Par down. The publicity from this case may have resulted in Heskin getting additional Par merchant clients. For example, BT Supply,

[3] During a meet and confer telephone call on a discovery issue, Ms. Berlin stated to Laforte's counsel, Joshua Levine, that she did not seek declarations from any other source because when she has one attorney cooperating, she does not need to seek out other sources.

[4] Defendants did say that merchants may have sought a whistleblower award as well but did not state that the SEC brought this case for the purpose of handing out a whistleblower award.

Par's largest merchant client that owed Par in excess of ***$91 million*** has now shown up in Receiver billing as a Heskin client.

Alternatively, through this action, Heskin can obtain discovery he could not otherwise have obtained in his private litigation to build his class action and RICO cases after the stay is lifted by virtue of the Receiver waiving the attorney-client privilege as well as obtaining other evidence that would not have been discoverable in the private litigation he had filed. While the SEC disputes that Heskin led the investigation of this case, it does not dispute that he willfully cooperated with the investigation. If this case truly hurt Heskin and his clients, he would not have so willingly assisted the SEC. This cannot be legitimately in dispute.

Furthermore, there is no dispute that the SEC presented declarations to this Court with inaccuracies, with blanks as to material relevant portions and containing sworn averments as to information that the merchants could not possibly have known, such as whether or not Par conducted a background check on them, even though they all signed documents consenting to background checks. The purpose of the hasty declarations is clear, to bias the Court against Defendants before they would even have a chance to present evidence in their favor. While SEC claims that the merchant correspondence was only a fraction of the production when it did its initial document dump, this statement is misleading because evidence provided by Heskin and his merchants was a significant portion of the "evidence" filed with the Complaint and in support of TRO and appointment of the Receiver. This evidence included merchant declarations, an expert report prepared for Heskin in his private litigation, and an undercover recording by a private investigator bought and paid for by Heskin, and a list of the confessions of judgement filed by New York Unity. The fact that this information does not represent a significant portion of the document dump the SEC made on the defense is irrelevant.

Furthermore, the SEC's so-called "corroborating" evidence either consists of statements taken out of context or is from further biased sources. As already explained above and in the Motion, the SEC presented a statement from the recorded 2019 noteholder dinner about Mr. LaForte being the president of Par but ignored the fact that he was introduced by his real name to these noteholders. The SEC's "corroboration" for Par's allegedly shoddy underwriting included a declaration of Lionese Jones. However, Ms. Jones is a disgruntled former employee who filed a wrongful termination complaint with the NLRB after she quit her job but could not qualify for unemployment due to voluntary resignation. Again, this case is a house of cards built on biased witnesses and outright misrepresentations to the Court.

The SEC also argues that it supported its assertions with declarations of its auditor that reviewed thousands of pages of documents and therefore, the Defendants are misrepresenting the evidence presented to this Court. Again, the SEC misconstrues Defendants' argument, and avoids responding to the true argument. The Defendants acknowledge that Mr. Andjich claimed to have reviewed thousands of documents consisting of court dockets. The argument in the motion to dismiss is that the SEC did not understand the relevance of the New York Unity dockets at the time the declaration was executed and had to obtain this information from Mr. Heskin, which it did after the declaration was executed. Whether he reviewed one document or thousands, not understanding their significance is the hallmark of an insufficient investigation.

Furthermore, the SEC argues that the Defendants should have raised all of these points in the initial response to the Motion for Temporary Injunction, arguing that it provided a document dump on Defendants, that Defendants had the opportunity to take discovery, and that the Defendants were able to pull some documents from their own system because the case was not properly sealed at the outset. While Defendants were able to get some documents, they did not have full access to ConvergeHub. There is no dispute as to that. In fact, there was protracted litigation and negotiation between Defendants' and the Receiver on access to ConvergeHub, which resulted in a stipulation to grant Defendants' access to a static copy of ConvergeHub on April 16, 2021. The SEC's documents were not what Defendants needed to defend themselves at the early hearings; their own documents were. Documents that were only in the possession of the Receiver because of the SEC's misrepresentations and omissions to this Court. Now the SEC disingenuously argues that the Defendants should have put on evidence that it deprived them of before the hearings and that they did not have until mid-2021.

Furthermore, the SEC's reliance on the volume of documents produced, shows why the Defendants were unfairly disadvantaged at the hearings. While the SEC produced a significant amount of documents during the expedited discovery period, the volume of documents made it like looking for a needle in a haystack and the documents relevant to this motion, were either buried in the SEC's production or not yet produced. The Defense has still been receiving production form the SEC through early July, including 1,051,389 documents from the SEC in the last 100 days, that is documents not pages.

Production Summary

Production Name	Folder	Date Received	Doc Count	Contents	Production
SEC-KAP_20210126	Par Funding	02/02/21	1,937	Melissa Davis documents - bank statements, wire confirmations, investor agreements	EPROD-SEC-DEF_2021
2021-01-11 - Production	Par Funding	02/08/21	29,379	Receiver initial production documents - statements, btransaction confirmations, accounting worksheets - already hosted on Dropbox	EPROD-SEC-DEF_2021
2021-01-13 - Supplemental	Par Funding	02/06/21	3,521	Receiver provided investor documents - already hosted on Dropbox	EPROD-SEC-DEF_2021
NVMS	Par Funding	02/23/21	255	NVMS merchant site inspections from 2015	EPROD-SEC-DEF_2021
EPROD-SEC-DEF_20200811	Par Funding	02/24/21	97,906	PPM solicitation materials, ABFP emails, Alexis emails, investor agreements, voice mail messages, actum emails, deposit slips, Camaplan documents, investor questionnaires and agreements, Dean financials and videos	EPROD-SEC-DEF_2021
SEC-EMAILS-E_20210223	Par Funding	02/24/21	163	Emails between Kara Dipietro and SEC	EPROD-SEC-DEF_2021
EPROD-SEC-DEF_20210211	Par Funding	02/24/21	67,678	ABFP Documents, CBSG Client Agreements, COJs, underwriting files, CBSG investor documents, FSP / VS HR documents, FAF agreements, Retirement Evolution PPM docs	CLA Production P1254
Premier Trust 2021-02-25	Par Funding	02/26/21	73	Premier Trust entity operating agreements, email correspondence with Lisa	EPROD-SEC-DEF_2021
EPROD-SEC-DEF_20210219	Par Funding	02/26/21	43,770	Fidelis PPM investor documents, Furman emails (a lot of spam), text messages	EPROD-SEC-DEF_2021
2021-02-25 - CBSG Receiver	Par Funding	03/05/21	67,680	Fidelis documents, CBSG accounting, investor, underwriting & ISO files, MPMG files, 1st Global underwriting files, ABFP emails, Camaplan documents.	EPROD-SEC-DEF_2021
EPROD-SEC-DEF_20210301	Par Funding	03/07/21	771	REA tax returns, financials and emails / Additional Kara Dipietro messages	
2021-03-04 - CBSG Receiver Production	Par Funding	03/08/21	244	Convergehub emails and client csv data, missing underwriting pdfs	
EPROD-SEC-DEF_20210225	Par Funding	03/10/21	41,139	Furman documents - text message logs, emails, phone photos,	
Truepic 2021-03-01	Par Funding	03/17/21	3,006	Amended 03/01 production, Truepic invoices, site inspection photos and emails	
EPROD-SEC-DEF_20210308	Par Funding	03/18/21	9,047	Additional Furman PPM documents, investor solicitation and communications.	
2021-03-22 Bybel Ruthledge	Par Funding	03/22/21	22	documents	
2021-03-22 DLA Piper	Par Funding	03/22/21	291	emails and documents from Lisa Jacobs pertaining to consulting agreement and updated notes	
2021-03-22 Fox Rothschild	Par Funding	03/22/21	915	email correspondence pertaining to securities and investor guidance with cbsg	
2021-03-23 Haynes and Boone	Par Funding	03/23/21	28	email correspondence with counsel pertaining to TSSB matter from early 2020	
2021-03-23 Offit Kurman	Par Funding	03/23/21	150	legal filings and documents related to cbsg and affiliate businesses near foudnation of company	
EPROD-SEC-DEF_20210319	Par Funding	03/25/21	6,228	additional Furman PPM documents, investor statements and account materials	
CBSG Database: 5 Custodians	CBSG	03/26/21	1,171,021	Email for parfunding for Joe, Jimmy, Joe Cole, Jamie and Lisa	
CBSG Database: 2 Custodians	CBSG	03/26/21	2,468,902	Email for parfunding for Wendy and Tori	
EPROD-SEC-DEF_20210325	Par Funding	04/02/21	40,713	Additional Furman PPM emails and documents, low value	
EPROD-SEC-DEF_20210402	Par Funding	04/12/21	8,304	About 4,500 merchant underwriting files, John Gissas and Retirement Evolution communications	
EPROD-SEC-DEF_20210408	Par Funding	04/17/21	241,482	FAF sales files, applications, merchant statements, leads, sales rep spreadsheets, collections, sales and accounting employee emails, CFS / FAF emails	
EPROD-SEC-DEF_20210416	Par Funding	04/23/21	122,725	Philadelphia computer files including underwriting, accounting, sales documents, employee emails with attachments, Tori's computer	
EPROD-SEC-DEF_20210427	Par Funding	04/30/21	48,391	Employee communications from the Philadelphia computers, these include attachments for collections, merchant contracts, ACH authorization and funding details. There were also payroll related emails for FSP and Vision Solar.	
ALI Media videos	Par Funding	05/04/21	44	ABFP marketing videos	

The SEC's argument that the Defense had a fair shake at the hearings and should have raised these issues sooner because it dumped documents on them should be rejected.

V. The SEC's Rebuttals to the Motion Is Replete with Strawman Attacks on Points the Defendants Did Not Make Combined with Personal Attacks

The SEC claims that the Defendants' theories about the investigation of this case are unfounded and then, without a hint of irony, accuses the Defense of attempting to intimidate witnesses.[5] As a preliminary matter, Ms. Berlin had a conversation with counsel for Lisa McElhone, Mr. Futerfas, in which she stated she did not intend to call Kara DiPietro and probably would not call any of the other Heskin merchants to testify at trial, thus, this alleged witness intimidation is illogical. To the extent the SEC changes its mind and desires to call these witnesses at trial, their bias, motives, and credibility will certainly be fair game. But there is absolutely no evidence that there has been any attempt by counsel to intimidate witnesses other than rank speculation by the SEC. This is a scandalous allegation that has no place in a federal court filing, especially in the context it is brought here. Furthermore, the concept that the Defendants are harassing or scaring witness by challenging the veracity, bias, and motives of its accusers is repugnant to due process and absurd.

Additionally, the SEC's arguments dismissing its other misrepresentations as irrelevant are not legitimate. For example, the SEC's argument about how this Court stated that it would not decide the issue of whether Par's transactions were loans or not or whether they were usurious at the Preliminary Injunction phase entirely misses the point. Falsities were used by the SEC to get the TRO, Asset

[5] Defendants concede that a few documents were filed that should have been redacted, without proper redactions. However, these exhibits were immediately sealed. Defense counsel submits that this was an oversight, not intentional as evidenced by the fact that other information was redacted.

Freeze, and Receiver appointed, and once obtained the SEC says the falsities are now irrelevant. Every misrepresentation made to the Court at the early stages of this case compounded to influence the Court's decision to enter the TRO, asset freeze, and appoint the Receiver. Combined with the SEC's uncorrected misrepresentation that Par executives were raiding the company coffers, the Court could not have reasonably reached any other conclusion than that the appointment of a Receiver was necessary, even though we know that this representation is and always has been false. The Defense has had to litigating against the Receiver extensively. This is not because the Defense wanted to but because it has been forced to. Most notably the nearly nine-month battle to obtain access to its own documents that needed to defend against the Receiver's and SEC allegations of wrongdoing. But for some of the material misrepresentations made to this Court at the outset, this case would have been litigated a completely different way and a profitable company would not have been destroyed by government overreach.

Conclusion

The SEC states: "This is a case about whether the securities offerings were registered and whether the Defendants made false representations to investors." (DE#691 at 26 n. 34). The Defense agrees, and again, this is not the prevailing argument the SEC thinks it is. Rather, it shows that the SEC had an improper motive in littering the record with scandalous, impertinent, and false allegations that induced the Court to enter a TRO, Asset Freeze, and appoint the Receiver. This has resulted in catastrophic injury to Par as well as extraordinary litigation disadvantages including the confiscation of Par's own documents, necessary for its defense, and the wavier of Par's attorney-client privilege and privileged documents being used against them. The primary issue the Court needs to resolve when considering this Motion is if the SEC did not make the false allegations at the inception and brought the case as it now casts it, about "whether the securities offerings were registered and whether the Defendants made false representations to investors," the Court would have ordered a Receivership and allowed Par to be shut down. Imagine if Par had been able to continue to operate and collect while this case was litigated how much different things would be now, how much better off the noteholders would be, how much more fair and just this litigation would be. There is simply no remedy for this conduct in this Court or on appeal, and the only adequate remedy is Dismissal.

Dated: August 23, 2021

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 23, 2021, I electronically filed the forgoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record via transmissions of Notices of Electronic Filing generated by CM/ECF.

By: */s/ David L. Ferguson*
DAVID L. FERGUSON

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____/

NOTICE OF CORRECTION TO CASE CITATION WITHIN DEFENDANTS' REPLY IN SUPPORT OF (DE 663) DEFENDANTS' MOTION TO DISMISS THE AMENDED COMPLAINT DUE TO MISCONDUCT BY THE SECURITIES AND EXCHANGE COMMISSION AND RELATED CONSTITUTIONAL VIOLATIONS

The Defendant, Joseph LaForte, hereby submits his Notice of Correction to the Reply filed on August 23, 2021 [D.E. 727]. The corrected reply is attached hereto as an exhibit, and its purpose is solely to clarify a citation made to the case *SEC v. Kramer*, 778 F. Supp. 2d 1320 (M.D. Fla. 2011), on page 11 of the Reply.

Dated: August 27, 2021

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on August 27, 2021, I electronically filed the forgoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record via transmissions of Notices of Electronic Filing generated by CM/ECF.

By: */s/ David L. Ferguson*
DAVID L. FERGUSON

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____/

LAFORTE'S SECOND MOTION FOR INVOLUNTARY DISMISSAL PURSUANT TO FED. R. CIV. P. 41 AND FOR SANCTIONS PURSUANT TO 28 USC § 1927

I. INTRODUCTION

While it should go without saying, the rules apply to the government. Notwithstanding, the SEC has a history of proceeding as though they do not. Due to the Commission's failure to properly conduct a reasonable inquiry of its factual and legal contentions, the defendants already had to file a Motion to Dismiss the Amended Complaint Due to Misconduct by the Securities and Exchange Commission and Related Constitutional Violations (the "First Motion for Dismissal") pursuant to Rule 41(b) of the Federal Rules of Civil Procedure on July 28, 2021. [D.E. 663]. The Court found that motion was well-pled, but it was denied because the Court determined the conduct of the SEC did not rise to the level of willful contempt. [D.E. 739; 744 at p 101].

This second motion neither replaces nor merely supplements that motion. Rather, this motion provides an independent rationale to dismiss the action, namely: the SEC has engaged in unacceptable violations of the discovery rules and blatant stonewalling that deprives Defendant and all defendants of their sacred due process rights to obtain information needed to defend themselves and prevents this case from being properly and fairly litigated or tried.

The Defendant, Joseph LaForte ("Defendant" or "LaForte"), brings this second motion for dismissal pursuant to Rule 41 due to the SEC's continued abuse of judicial process, refusal to follow the rules, and bad faith discovery conduct. Specifically, the SEC and the SEC's Counsel have willfully obstructed the discovery process by prohibiting the SEC's own designated corporate representatives from answering almost every substantive question, coaching at times, and producing representatives without the requisite knowledge of the identified issues of inquiry in the 30(b)(6) Notice. It bears repeating: the SEC produced two 30(b)(6) representatives for deposition with absolutely no intention of permitting either to meaningfully answer questions.

The SEC's conduct should offend this Court as it offends justice and due process. Defendant and all defendants should not have to file such a motion against an arm of a government that portends to maintain any semblance of a restrained executive body. Therefore, Defendant requests that this Court grant the proper remedy of dismissal. Alternatively, if this Court determines a lesser remedy than dismissal of the entire action is appropriate, the individual claims related to the topics about which the SEC's designated corporate representative refused to testify should be dismissed and the introduction of any related evidence should be excluded at any hearing or at trial regarding such topics. Additionally, Defendant requests that the Court enter sanctions pursuant to 28 USC Section 1927 by ordering the SEC's Counsel to personally satisfy the excess costs, expenses, and attorneys' fees incurred because she has unreasonably and vexatiously multiplied the proceedings.

II. THE SEC'S VIOLATIVE CONDUCT

While the relief sought herein is predicated on different facts and violations as asserted in the First Motion for Dismissal, examining the overall conduct by the SEC in this case as well as other unrelated litigation is warranted for determining the bad faith nature of both the SEC and the SEC's Counsel's actions.

Violations described in the First Motion for Dismissal

As already described in great detail in the First Motion for Dismissal, the SEC initiated the instant action with a disregard for the legal tenability or factual accuracy of its claims. Without fully restating all of the factual details asserted, the conduct described in the First Motion for Dismissal provides a backdrop for understanding the extent of its continued mocking refusal to abide by the rules.

The SEC could not in good faith claim that the subject merchant cash advances were loans subject to either the Securities Act or usury laws. Courts across the nation have held that merchant cash advances based upon the purchase of merchant accounts receivable are not loans. Moreover, the SEC failed to conduct a reasonable inquiry into the accuracy of its factual allegations. As a result, the SEC made the following misrepresentations:

(i) filing multiple declarations by financially motivated individuals replete with demonstrable falsities

(ii) falsely alleging that Par funded the merchant cash advance to Fleetwood Services *before* conducting the on-site inspection of the business despite the SEC's own exhibits to its TRO Motion establishing this was untrue;

(iii) falsely alleging in the TRO Motion that a transcript of recorded dinner conversation establishes that Joe Cole referred to Par's MCAs as loans and said that the reason the Defendants were about to buy a bank was to avoid usury laws (that do not apply);

(iv) falsely alleging Joseph Laforte's identity was concealed from investors at a large event put on by Defendant Vagnozzi;

(v) falsely representing the default rate made to investors by using an obviously flawed calculation method; and, last but not least,

(vi) falsely alleging in the TRO Motion that the Defendants stole investor money by cleaning out Par's bank account and sending the money to another company in Georgia, which was and is not supported by existing fact because it never happened.

Clearly, this is a party indifferent to the truth of its allegations before initiating a lawsuit and asking for the most drastic *ex parte* pretrial relief there is. Looking at the SEC through this lens paints the scene for its utter disregard for the rules of Court, the legitimacy of these proceedings, and Defendant's and all defendants' due process rights. The SEC's continuing improper conduct during the litigation only further emphasizes this indifference and establishes that the violative conduct is not mere negligence, but willful contempt.

The SEC's Flagrant Discovery Violations

At first, the SEC created the illusion that it intended to honor its Rule 30(b)(6) obligations by cooperating in the coordination of its representative's deposition. The SEC did not indicate an unwillingness to produce a witness and worked with defendants' counsel in advance to address topics it took issue with, giving the appearance that the SEC intended to meaningfully testify about the topics as narrowed. This seeming cooperation was a smokescreen, and the SEC later demonstrated that it never had any intention to allow a competent witness to provide any meaningful testimony regarding the facts or evidence in this case.

The SEC produced two separate corporate representatives to testify as to all of the defendants' designated 30(b)(6) topics: (1) Raymond Andjich,[1] a government contractor assigned to the SEC's Miami Regional office as a research and to assist with investigation interviews, who previously was an FBI Special Agent for 31 years[2] (the "First Corporate Representative"); and (2) Elisha Frank,[3] a 17 year SEC employee, previously Senior Counsel and now the Assistant Regional Director whose "primary responsibility is to supervise investigations"[4] (the "Second Corporate Representative," respectfully). The First Corporate Representative was unable to answer basic questions, repeatedly providing defendants with variations of "as I sit here today, I do not know" or "I do not recall" as responses to factual queries.[5]

At first, dismissive of the spirit and point of a 30(b)(6) deposition, the SEC's Counsel interjected that the SEC would later "supplement in writing" its position on any answer where the

[1] A copy of the Deposition Transcript of the Second Corporate Representative is attached hereto as **Exhibit A**.
[2] *See* Exhibit A at 5:18-6:12
[3] A copy of the Deposition Transcript of the Second Corporate Representative is attached hereto as **Exhibit B**.
[4] *See* Exhibit B at 10:17-11:21.
[5] *See* Exhibit A at 20:14-16; 27:11-14; 28:23-29:1; 31:24-25; 44:13-16; 45:23-46:3; 46:20-47:3; 47:11-17; 49:14-25; 50:11-18; 51:20-52:1; 53:20-54:1; and 58:16-22.

First Corporate Representative responded that he did not know an answer.[6] The SEC's Counsel further inaccurately characterized the questions being asked as requiring people to "memorize the evidence attached to the motion."[7]

Just as disturbing as not having information at all, the First Corporate Representative also testified several times in circular fashion that the facts supporting the allegations made in the complaint were based on the statements made in the complaint, itself.[8] This is a classic fallacy of begging the question where the argument's premise assumes the truth of the conclusion without proof.[9] Essentially, according to the First Corporate Representative's testimony, the SEC's position is that the accusations made against the defendants are true because the SEC said it was so. This tautological reasoning is not only self-serving and unfortunate but is also unsurprising when viewed against the SEC's prior and subsequent conduct in this action.

After several hours, and after the First Corporate Representative had given testimony which the SEC's Counsel unilaterally deemed "wrong," the SEC announced on the record that it would like to continue the deposition to another day with newly designated witnesses.[10] The SEC agreed the time spent deposing the First Corporate Representative would not be counted towards the time limits, and to pay the court reporter costs for the second deposition.[11] Furthermore, the SEC agreed to the defendants' request that Linda Schmidt, Senior Counsel at the Miami regional office of the SEC, who was involved in the SEC's investigation and had numerous communications with Heskin and DiPietro, would serve as one of the designees on specific topics, including "conversations that she had with investors, merchants, or counsel for either, and any email in which she was a participant, that is, someone who drafted received, or was copied on an email - in connection with this investigation…."[12] The parties' stipulation was put on the record and contemplated the situation in which Ms. Schmidt might serve as trial counsel. As part of the agreement, the SEC agreed that it "would not object to [defendants'] use of her deposition testimony, even if she is available, because she might serve as trial counsel." The stipulation expressly provided that if after being deposed Ms. Schmidt is to serve as trial counsel and her deposition testimony was used at trial, Ms. Schmidt would not be identified as

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[6] *See* Exhibit A at 57:9-11.
[7] *See* Exhibit A at 66:21-67:2
[8] *See* Exhibit A at 13:5-7; 30:11-25; 46:10-16; 47:20-48:11; 49:25-50:1; and 50:22-51:4.
[9] *See Hyman v. United States (In re Stanton)*, 503 B.R. 760, 764 & n. 23 (M.D. Fla. Bankr. Jan. 22, 2014).
[10] *See* Exhibit A at 59-6-14.
[11] *See* Exhibit A at 59:3-20.
[12] *See* Exhibit A at 72:9-15.

the deponent but rather, her "deposition testimony would be ascribed to an SEC representative or designee."[13] Again, this agreement was reached after was made after the First Corporate Representative could not answer substantive questions; it was only made when SEC's Counsel determined that she did not like the answers the First Corporate Representative was giving.

The reason provided by the SEC for continuing the deposition was, despite having spent "40 hours preparing," the First Corporate Representative felt that his memory was not good enough to allow him to "regurgitate" everything he had memorized or enable him to "be able to respond accurately."[14] The SEC refused to agree that the testimony already provided by the First Corporate Represented would be binding, with SEC's Counsel asserting that it would be "ridiculous" because the information sought during the deposition was available in the temporary restraining order with a footnote to the evidence and the First Corporate Representative "jumbled and got confused on and regurgitated incorrectly" so the parties all knew the testimony was inaccurate and needed to be corrected.[15]

Despite the continued deposition, and the stipulation on the record regarding Ms. Schmidt, the Second Corporate Representative Deposition did not go any better. First, the SEC reneged on its stipulation to provide Ms. Schmidt as a witness citing the Florida Bar Rules. Counsel for LaForte requested that the SEC provide the specific rule, but the SEC has not done so to date.[16] After breaching the stipulation on the record to produce Ms. Schmidt as the designee for certain topics, the SEC's Second Corporate Representative continued the misconduct by making it clear at her deposition that the SEC has baldly determined that the only information it will permit the defendants to discover is what the SEC has decided is pertinent and has already publicly filed in this case.[17] Pursuant to SEC's Counsel's instructions to the Second Corporate Representative not to answer, the SEC refused to respond to questions asking for identification of what evidence the SEC had at the time the complaint was filed supporting any of the SEC's allegations.[18] Pursuant to SEC's Counsel's instructions to the Second Corporate Representative not to answer, the SEC refused to respond to questions merely

[13] *See* Exhibit A at 72:17-25.
[14] *See* Exhibit A at 59:3-60:24.
[15] *See* Exhibit A at 61:12-
[16] Notably, counsel for LaForte, Joshua Levine, called the Florida Bar Ethics Hotline and was advised that the Bar rules would not prevent Ms. Schmidt from testifying at deposition.
[17] *See* Exhibit B at 12:11-13; 44:1-7; 46:10-13; 51:23-52:3; 57:1-7; 96:13-18; 108:5-8
[18] *See* Exhibit B at 23:2-9; 25:6-26:1; 55:5-20; 57:11-59:18; 90:13-23; 92:3-12; 121:10-125:3; 132:3-16; 193:24-194:9; 195:13-21; 229:3-18; and 230:24-231:20.

asking for identification of what evidence the SEC currently has supporting any of the SEC's allegations in its complaint.[19]

The Second Corporate Representative was repeatedly instructed not to answer questions requiring factual answers due to various privileges, including: (i) investigative privilege; (ii) deliberative process privilege; (iii) law enforcement privilege; (iv) attorney work product (v) and attorney-client privilege.[20] According to the explanation by SEC's Counsel, identification of what evidence the SEC has or had at the time of the complaint is all privileged:

> The deliberative process privilege would apply to the deliberations of the SEC in determining which evidence supports which potential allegations and the decision to allege them. The attorney-work product is not limited to the post-filing determinations, but includes the entire scope of the case. [The Second Corporate Representative], once again, she can testify about the evidence that we have already filed annotating the allegations of the complaint in the TRO motion, but she cannot testify about our attorney work-product with respect to other documents that we have produced to you and how they fit into this case, because that is attorney work product and deliberative process privilege concerning the investigative file.[21]

Furthermore, as for any evidence acquired during the litigation, the SEC resolutely declared that it had not yet finished reviewing documents and therefore, "the SEC will not be testifying about the post-filing evidence" and noting it is work product.[22] The SEC unilaterally decided that it was only required to testify about what was already provided publicly in connection with its preliminary injunction motion and exhibits.[23]

Notwithstanding this unilaterally declared position, the SEC did not even do that. When Defendant asked the Second Corporate Representative to direct him to the page or portion of an identified exhibit that supports an allegation in the complaint, she refused, essentially asserting that each exhibit "speaks for itself,"[24] and testified that merely explaining how or why an identified exhibit is supportive "would involve work product unless [the SEC] already identified it specifically with a

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[19] *See* Exhibit B at 23:2-9; 26:3-17; 40:9-41:8; 44:1-7; 45:18-46:4; 47:20-53:11; 55:15-20; 70:2-71:5; 88:8-19; 92:3-12; 93:3-11; 101:18-104:21; 109:3-22; 111:9-112:5; 113:9-20; 113:25-114:13; 115:14-25; 118:19-120:24; 170:15-23; 206:13-208:6; 216:18-25; 217:11-218:21; 226:8-227:19; 235:11-236:18; 251:1-10; and 258:11-259:16.

[20] *See* fn 15-16, supra. *See also* Exhibit B at 11:25-12:6; 12:17-18; 14:7-11; 28:14-20; 47:20-53:11; 91:13-92:2; 171:15; and 193:15-19.

[21] *See* Exhibit B at 56:9-25.

[22] *See* Exhibit B at 44:1-7 and 57:1-7.

[23] *See* Exhibit B at 46:10-13; 48:22-49:1; 96:13-18; and 108:5-8.

[24] *See* Exhibit B at 21:8-14; 22:8-24; 24:22-25:3; 45:9-47:19; 54:23-55:12; 63:4-9; 64:13-69:7; 71:3-74:6; 84:11-22; 91:1-7; 106:2-7; 111:2-24; 113:9-23; and 139:19-25.

pincite in the TRO."[25] No explanation was provided for how the mere existence of information could constitute work product, nor how it is suddenly rendered 'not work product' once it is identified within a filed motion. *See Johnson v. 27th Ave. Caraf, Inc.*, Nos. 19-14353, 19-14354, 2021 U.S. App. LEXIS 24521, at *19 (11th Cir. Aug. 17, 2021) ("Selective disclosure for tactical purposes waives the privilege."). The refusal to disclose how the SEC's blanket pronouncement that the exhibits supported its allegations did not waiver even where it was apparent that it did not support the claim.

The SEC's Counsel contributed to, facilitated, and emboldened the Second Corporate Representative's uncooperative responses, asserting work product privilege objections where Defendants asked: (i) whether specific allegations and statements in various declarations were false;[26] (ii) whether the SEC knew if the declarations contained false statements when they were filed;[27] and (iii) whether the SEC will be correcting the record with respect to declarations which contain false statements.[28]

Moreover- above and beyond the many asserted privilege objections- the SEC's Counsel also impermissibly instructed the Second Corporate Representative not to answer questions based on routine evidentiary objections, such as speculation, legal conclusion, argumentative, and asked and answered.[29] The SEC's Counsel amped up her impermissible directions to the Second Corporate Representative not to answer questions predicated on the SEC's unilateral determination that a line of questioning was "outside the scope" of the designated topics. In fact, in a roughly six-hour deposition with a transcript spanning 266 pages, almost 60 pages are comprised entirely of questions the Second Corporate Representative declined to answer because they were purportedly outside of the scope of the notice.[30]

If the SEC's abusive assertion of objections and refusal to answer fact-based questions were not enough, the SEC's Counsel further aggravated the integrity of the deposition process by repeatedly interjecting speaking objections and otherwise coaching the Second Corporate Representative how to

[25] *See* Exhibit B at 108:5-8.
[26] *See* Exhibit B at 247:21-8; 258:25-259:16; 262:12-263:21.
[27] *See* Exhibit B at 124:21-125:3.
[28] *See* Exhibit B at 192:15-25.
[29] *See* Exhibit B at 80:7-12; 82:16-19; and 131:17-20.
[30] *See* Exhibit B at 140:6-150:18; 151:4-158:18; 159:23-169:18; 171:1-174:5; 175:20-177:5; 178:4-192:1; 193:2-195:9; 199:6-201:15; 202:8-12; 206:10-208:6; 216:13-25; 217:11-218:21; 226:8-227:19; 232:20; 233:5; and 258:11-24.

testify, or more to the point, avoid testifying.[31] The Second Corporate Representative's regurgitation of the SEC's Counsel's improper speaking objection is perhaps best exemplified by the numerous times the Second Corporate Representative parroted as an answer that she "declined to testify in her personal capacity" based upon the SEC's ludicrous position that an answer to a question the SEC's Counsel unilaterally deemed "outside the scope" would not be on behalf of the SEC, but somehow in the witness's personal capacity.[32]

Finally, as a tandem legal strategy to asserting blanket privileges and refusing to answer questions seeking the mere identification of evidence, the Second Corporate Representative also testified that the SEC does not have "personal knowledge" regarding the substance or statements in this case.[33] The unremitting response that the SEC lacks personal knowledge included assertions that irreconcilably fly in the face of allegations raised in the SEC's complaint, such as not having knowledge about whether Defendants engaged in general solicitation despite needing this allegation to support the SEC's claim the Defendants filed an improper exemption.[34] According to the SEC, it does not know:

- whether its own accusations against defendants Cole and McElhone that they received gross proceeds means Cole and McElhone received investor proceeds or funds;[35]
- if there is any evidence that Par representatives engaged in any general solicitation through radio, television commercials, or internet[36]
- whether Par was involved in or prepared the PPMs for Agent Funds[37]
- whether any of the assertions made within the merchant declarations were false, or the dates of or documentation regarding any of the merchant loans.[38]

By bringing this lawsuit with outrageous accusations against the Defendants, pretending it does not need to even identify relevant facts or evidence outside what it has already filed with its TRO motion, and refusing to acknowledge the irrefutable evidence establishing the falsity of the allegations,

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[31] *See* Exhibit B at 16:3-4; 22:22-24; 24:18-25:3; 40:1-8; 45:20-46:4; 47:13-19; 53:1-10; 60:6-11; 60:18-24; 64:24-65:3; 68:12-17; 68:23-69:7; 114:17-19; and 140:6-150:25.
[32] *See* Exhibit B at 140:6-25-150:18.
[33] *See* Exhibit B at 21:8-14; 46:15-47:1; 63:21-64:17; 91:13-92:2; 113:9-23; 154:18-23; 214:4-14; 241:3-6; 250:21-251:10; and 257:11-14.
[34] A chart of the most obvious disagreements of the SEC's allegations juxtaposed to the deposition testimony is attached hereto as **Exhibit C**.
[35] *See* Exhibit B at 63:21-64:17; and Exhibit A at 51:15-58:22
[36] *See* Exhibit B at 113:9-23
[37] *See* Exhibit A at 21:19-27:14.
[38] *See* Exhibit B at 124:21-125:3; 192:15-25; 247:21-8; 258:25-259:16; 262:12-263:21.

the SEC has taken the Sergeant Schultz[39] posture. The timing of this deposition misconduct is especially damning given that when the Second Corporate Representative sat for deposition, the first Rule 41 Motion had been filed and was pending [DE# 663]. This motion, which was filed on July 28, 2021, alleged, *inter alia*, that the SEC's investigation was negligent to the point of being willfully incompetent because it relied on false declarations and other legal arguments from a biased private attorney and his financially motivated clients. The SEC's 30(b)(6) deposition, taken on August 3, 2021, was its opportunity to respond to questions about the evidence that supported the Complaint, TRO Motion, and Motion for Appointment of a Receiver. Instead, the SEC- apparently believing that it would not be held accountable to the same rules as every other federal litigant- chose a path of obstruction and willfully refused to comply with its discovery obligations under Rule 30(b)(6), unfairly depriving defendants of the ability to prepare for trial.

The result of the SEC's conduct, after two day-long depositions, defendants received no substantive answers to their questions about the evidence or the facts about the underlying claims against them. The SEC's Counsel's repeated interruptions, lengthy speaking objections, over-assertion of blanket privileges, witness coaching, and improper instructions not to answer deposition questions completely thwarted the discovery process and resulted in the SEC not providing substantive answers to the questions asked at the corporate representative depositions. Evidencing a total disrespect for the vital 30(b)(6) discovery opportunity/obligation, the SEC's Counsel dismissively asserted there was no need to take the depositions because "obviously, the amended complaint is annotated in our temporary restraining order, so we all know what the evidence is that the SEC relied on"[40] Defendant believes that the Court will be shocked by the SEC's and the SEC's Counsel's antics upon review of these two lengthy but utterly useless deposition transcripts.

The SEC's Violative Behavior in Other Cases

The SEC's win-at-all-costs approach to performing its governmental function is not novel, nor does the instant case present the first instance in which the SEC has been accused of truculently bad faith conduct. In fact, both the SEC and SEC's Counsel has a documented history of engaging in sharp discovery tactics and pursuing claims against defendants that were not supported in fact or law.

[39] So named after a character on an old television show, Sergeant Schultz on *Hogan's Heroes*, who was famous for always saying "I know nothing. NOTHING!"
[40] *See* Exhibit A at 62:19-22.

The SEC has repetitiously asserted the argument that it is not subject to Rule 30(b)(6) even when it brings a civil action in federal court. This argument has been repeatedly rejected. *See SEC v. McCabe*, No. 2:13-cv-00161-TS-PMW, 2015 U.S. Dist. LEXIS 67253, at *5 (D. Utah May 22, 2015). ("The SEC's motion appears to contend that the SEC enjoys blanket immunity from Rule 30(b)(6) depositions generally, and specifically that the SEC need not produce a 30(b)(6) deponent because the SEC's pretrial investigator, Mr. Casey, is an attorney, and the SEC chose to use Mr. Casey as one of several attorneys acting as trial counsel."); *SEC v. Navellier & Assocs.*, No. 17-11633-DJC, 2019 U.S. Dist. LEXIS 25703, at *4-5 (D. Mass. Feb. 19, 2019) ("Defendants are permitted to learn the facts underlying their selective enforcement defense and the SEC's counsel may protect against the disclosure of work product or privileged information in a 30(b)(6) deposition by interposing appropriate objections and giving instructions on a question-by-question basis") (internal quotations omitted); *SEC v. Gregory Lemelson & Lemelson Cap. Mgmt., LLC*, 334 F.R.D. 359, 362 (D. Mass. 2020) ("Taking these cases in the aggregate as standing for the proposition that a deposition of the SEC should not summarily be countenanced, but may nonetheless be appropriate in some instances, the court finds that the defendant here has asserted enough facts, even if just barely so, to warrant discovery on his claim of selective enforcement and bias. Conversely, the Commission has not demonstrated that Lemelson is acting for purposes of 'annoyance, embarrassment, oppression, or undue burden or expense....' The deposition therefore may go forward.")

This exact argument has been analyzed in detail in *SEC v. Kramer*, 778 F. Supp. 2d 1320 (M.D. Fla. 2011), in which SEC Counsel was the attorney of record. After stonewalling and refusing to allow the deposition of the SEC's corporate representative based on the SEC's assertion that the representative "'lacked independent knowledge' of the facts and because only [SEC] counsel worked on the case, a deposition of the [SEC] would necessarily intrude upon the work product and deliberative process privileges," the district court ruled that a defendant had a right to the discovery of facts underlying the claims against him, including the right to 30(b)(6) depositions. As SEC's Counsel is the same attorney who represented the SEC in *Kramer*, she is on direct notice that asserting such blanket privileges "creates a nonworkable circumstance in which a defendant loses a primary means of discovery without a meaningful review of his opponent's claim of privilege." *Id.* at 1328.

However, the ruling that the SEC should be required to produce a corporate representative over the SEC's baseless objections is not the full extent of the probative value of the *Kramer* case and the deliberate nature of the SEC and the SEC's Counsel's conduct.

Indeed, an examination of the allegations and procedural history in *Kramer* reveals a strikingly similar pattern of misbehavior: (1) the SEC brings claims premised upon legal theories characterizable as "an inaccurate statement of law" against defendants who cannot legally be held liable under the very Act the SEC derives its purpose;[41] (2) in attempting to establish its allegations, the SEC is willing to rely upon a single source with questionable motives while failing to procure evidence with more probative value despite being obtainable through reasonable efforts;[42] and (3) during the course of the litigation, the SEC thwarts defendants ability to defend themselves at trial by stonewalling discovery and otherwise engaging in dilatory tactics.[43]

Sanctions were not imposed against the SEC or the SEC's Counsel in *Kramer*. After conclusion of trial on the merits in the case, the district court denied Mr. Kramer's outstanding motions sanctions, noting that the discovery complaints became moot upon judgment in Kramer's favor, and finding there was nothing so "'out-of-bounds,' so aggravated, or so asymmetrical" as to warrant sanctions.[44] But the declination to impose sanctions could hardly be deemed a victory for the SEC, as the court went out of its way to note::

> Sanction is unwarranted for another reason. Each side has already paid the formidable price of suffering through many months of litigation and a trial, during which lead counsel for each side occasionally approached 'out of bounds' conduct. A reasonable and disinterested observer would (in fact, did) expect better from each. In the end, the indignities and inefficiencies and hostilities achieved an approximate equipoise.

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[41] In this case, the SEC attempts to incorrectly characterize merchant cash advances as "loans" subject to usury laws and the Act notwithstanding the overwhelming authority to the contrary; in *Kramer*, the SEC attempted to subject Mr. Kramer to the Act by incorrectly characterizing his actions as "broker activity" based upon an ex post facto, non-legally binding, non-persuasive no-action letter containing Commission opinions. The SEC's proposed single-factor transaction-based compensation test for determining whether an individual was engaged in the business of effecting transactions in securities for the accounts of others (and therefore subject to the Act) was legally incorrect. *SEC v. Kramer*, 778 F. Supp. 2d 1320, 1341 n.54 (M.D. Fla. 2011).

[42] In this case, the SEC relies upon the unvetted declarations of a single private attorney's financially motivated clients; in Kramer, the SEC attempted to submit statements of a witness that were "wholly uncorroborated and unreliable" and that "[e]ven if susceptible to admission under a hearsay exception, Baker's statements [alleging conduct by Kramer] unquestionably lack reliability. Thus, even if admitted into evidence, the statements would merit neither consideration nor credit." *Kramer*, 778 F. Supp. 2d at 1326.

[43] *Id.* at 1323-1324. In addition to improperly preventing the 30(b)(6) deposition, Mr. Kramer filed multiple motions for sanctions against the SEC and the SEC's Counsel based on discovery abuses and misrepresentations characterized by Judge Merryday as "an impressive ledger of perceived indignities suffered through the allegedly devious or neglectful doings of the Commission." *SEC v. Kramer*, No. 08-00455-CIV-MERRYDAY/MCCOUN, D.E. 224 at p. 1 (M.D. Fla. May 27, 2011).

[44] *Id.* at p. 2.

In essence, the Kramer court found having to litigate the case was sanction enough as both sides conduct effectively sanctioned each other. However, having yet to be held accountable for this like improper conduct, the SEC and the SEC's Counsel obviously did not learn a lesson and continue in the same- albeit modified- vein of disregard for the rules and due process rights of defendants.

After the order in *Kramer*, the SEC still did not veer from its position that it was exempt from basic rules of discovery, arguing that the court got it wrong.

> The SEC categorizes *Kramer* as an outlier case that is contrary to the weight of judicial authority. Nevertheless, one of the leading treatises on civil procedure cites *Kramer* with approval and cites other cases in which courts deemed the FBI and Navy Department government agencies within 30(b)(6) that could be compelled to provide designees for a 30(b)(6) deposition.

SEC v. Merkin, 283 F.R.D. 689, 694-95 (S.D. Fla. 2012) (citing to 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, Federal Practice & Procedure § 2103 and noting, "In their April 2012 supplement, the authors also added the comment that 'permitting a party to invoke work product as a blanket obstacle to a 30(b)(6) deposition seems to undermine the important utility of that device'"). Though *Merkin* did not involve the same attorney on behalf of the SEC, it bears mentioning that the court noted that the SEC attorney had already asserted the very same 30(b)(6) position and lost on the argument. *Merkin*, 283 F.R.D. at 694 n.3 ("Lead SEC counsel in this case should be familiar with *Collins & Aikman* because he also represented the SEC in that case"). *Id.*

The SEC is plainly aware that it cannot proceed on blanket privilege objections that frustrated the ability to meaningfully garner duly discoverable information. It has also been repeatedly explained to the SEC that defendants have a due process right to discover the facts and evidence underlying the claims against them. Nevertheless, the SEC still refuses to comply.

I. ARGUMENT AND MEMORANDUM OF LAW

a. The Rules Apply to the SEC

As the SEC has had to have been reminded, it does not get to escape the requirements to conduct discovery in accordance with the rules that apply to defendants. "As a general proposition, government agencies embroiled in litigation are subject to the same discovery rules as private litigants, regardless of the level of government to which the agency belongs." *SEC v. Merkin*, 283 F.R.D. 689, 696 (S.D. Fla. 2012). "Rule 30(b)(6) expressly applies to a government agency and provides neither an exemption from Rule 30(b)(6), nor special consideration concerning the scope of discovery, especially when the agency voluntarily initiates an action." *SEC v. McCabe*, No. 2:13-cv-

00161-TS-PMW, 2015 U.S. Dist. LEXIS 67253, at *6 (D. Utah May 22, 2015) (internal quotations omitted) (citing to *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414 (S.D.N.Y. 2009); *United States ex rel. Fry v. Health Alliance of Greater Cincinnati*, 2009 U.S. Dist. LEXIS 122533, 2009 WL 5227661, *2 (S.D. Ohio 2009) (citing *Yousuf v. Samantar*, 451 F.3d 248, 255, 371 U.S. App. D.C. 329 (D.C. Cir. 2006)).

> As succinctly noted by nationally recognized civil discovery expert United States District Judge Shira Scheindlin in *SEC v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414 (S.D.N.Y. 2009), '[l]ike any ordinary litigant, the Government must abide by the Federal Rules of Civil Procedure. It is not entitled to special consideration concerning the scope of discovery, **especially when it voluntarily initiates an action**. [n.2 *Contra* George Orwell, Animal Farm ch. X (1945) ("All animals are equal, but some animals are more equal than others")]. Judge Scheindlin also noted in *Collins & Aikman* that '[w]hen a government agency initiates litigation, it must be prepared to follow the same discovery rules that govern private parties (albeit with the benefit of additional privileges such as deliberative process and state secrets).'

SEC v. Merkin, 283 F.R.D. 689, 693-94 and n.2 (S.D. Fla. 2012) (emphasis in original) (footnote inserted as cited).

b. <u>It Is Proper to Consider Conduct from Other Cases</u>

Though the conduct exhibited by the SEC and SEC's Counsel in previous litigation may not affect the merits of this case, such conduct is still appropriate to consider for purposes of a Rule 41 analysis. *See Aguilar v. United Floor Crew, Inc.*, No. 14-CIV-61605, 2015 U.S. Dist. LEXIS 66478, at *17-19 (S.D. Fla. May 20, 2015) (entering a Rule 41(b) dismissal, noting the same attorneys "engaged in obstruction of and denied access to discoverable evidence" in other cases).

As noted by our Supreme Court, other cases involving either the same litigant or attorney can be relevant for determination of willful or blatant conduct. *Taylor v. Illinois*, 484 U.S. 400, 416 n.22, 108 S. Ct. 646, 657 (1988) ("If those violations involved the same attorney, or otherwise contributed to a concern about the trustworthiness of [a witness]'s testimony, they were relevant"). A judge is not "required to ignore [ ] bad conduct in other cases; indeed it would have been remiss not to consider it" *Johnson v. Comm'r of Internal Revenue*, 289 F.3d 452, 456 (7th Cir. 2002) (cited with approval in *Berkun v. Commissioner*, 890 F.3d 1260, 1264 (11th Cir. 2018)).

"To ignore a pattern of misbehavior would be blinking reality." *VOOM HD Holdings LLC v. EchoStar Satellite L.L.C.*, 2012 NY Slip Op 658, ¶ 9, 93 A.D.3d 33, 46, 939 N.Y.S.2d 321, 331 (App. Div.) (internal quotations omitted). *See also Thibeault v. Square D Co.*, 960 F.2d 239, 246 (1st Cir. 1992) ("Once the district court has recognized a pattern of misbehavior on an attorney's part, the court would be blinking reality in not taking counsel's proven propensities into account"). "We rule,

therefore, that a trial court may properly give some consideration to a lawyer's behavior in previous cases. . . ." *Id.*

Indeed, a proper consideration of whether sanctions are appropriate includes consideration of past litigation history. *Goodman v. Tatton Enters.*, No. 10-60624-CIV-ZLOCH/ROSENBAUM, 2012 U.S. Dist. LEXIS 189060, at *107-09 (S.D. Fla. June 1, 2012). "In making a sanctions determination, 'a court should consider whether the attorney's conduct was repetitious as opposed to isolated, willful as opposed to negligent, and whether the attorney has a history of similar conduct in other cases.'" *Atkins v. Fischer*, 232 F.R.D. 116, 129-30 (D.D.C. 2005)) (quoting *MAI Photo News Agency, Inc. v. Am. Broad. Co., Inc.*, 2001 U.S. Dist. LEXIS 1680, 2001 WL 180020, *7 (S.D.N.Y. Feb. 22, 2001)); *see also Issa v. Provident Funding Grp., Inc.*, 2010 U.S. Dist. LEXIS 83807, 2010 WL 3245408, *4 (E.D. Mich. Aug. 17, 2010) (considering the repeated filing of frivolous lawsuits by the same law firm). Similarly, it is proper to review a litigant's "history of litigation abuse and sanctions." *Janky v. Batistatos*, 259 F.R.D. 373, 381 (N.D. Ind. 2009); see also *Moody v. Miller*, 864 F.2d 1178, 1181 (5th Cir. 1989) (considering litigant's "past history with the federal courts" as a factor in determining sanctions). "Obviously, a pattern of wrongdoing may require a stiffer sanction than an isolated incident . . ." *Republic of the Philippines v. Westinghouse Elec. Corp.*, 43 F.3d 65, 73 (3d Cir. 1995).

c. <u>Dismissal is the Appropriate and Sufficient Sanction</u>

The SEC has demonstrated that it has no regard for the discovery rules, particularly as to a litigant's right to a 30(b)(6) deposition, the responsibility not to assert blanket privileges and to disclose a privilege log for legitimate privileges, and the prohibition against refusing to answer questions at a deposition. These particular violative antics are consistent with the SEC's attitude and actions that it is above the rules as the SEC has exhibited in other cases.

Previously, the SEC would seek intervention from the courts to prevent a 30(b)(6) deposition from happening. After losing on this argument and being admonished multiple times that defendants have a clear right to the discovery of the evidence and facts underlying the claims against them, the SEC and the SEC's Counsel adjusted their tactics with the same aim of thwarting basic discovery. Now, they pretend to cooperate by setting a deposition, but then trample on and stifle the record through prohibited antics so that crucial questions are not answered. The SEC has revised its improper strategy to achieve the same contemptuous result of the defendant not being afforded an opportunity to depose the SEC. Though the approach has been altered, the willfully contumacious attitude towards the rules of litigation has not changed. A read of the two deposition transcripts proves this.

"Rule 41(b) makes clear that a trial court has discretion to impose sanctions on a party who fails to adhere to court rules." *Zocaras v. Castro*, 465 F.3d 479, 483 (11th Cir. 2006). The Eleventh Circuit has "articulated a two-part analysis for determining when an action should be dismissed as a sanction: There must be both [1] a clear record of willful conduct and [2] a finding that lesser sanctions are inadequate." *Id.* (citing *Betty K Agencies, Ltd. v. M/V MONADA*, 432 F.3d 1333, 1339 (11th Cir. 2005) ("dismissal with prejudice is plainly improper unless and until the district court finds a clear record of delay or willful conduct and that lesser sanctions are inadequate to correct such conduct")); *see also Boazman v. Econ. Lab., Inc.*, 537 F.2d 210, 212 (5th Cir. 1976) ("[D]ismissal with prejudice is such a severe sanction that it is to be used only in extreme circumstances, where there is a clear record of delay or contumacious conduct, and where lesser sanctions would not serve the best interests of justice.") (internal quotations omitted). This contumacious conduct can be found through the refusal to abide by the discovery rules. *Lyle v. BASF Chemistry, Inc.*, 802 F. App'x 479, 482 (11th Cir. 2020) *Phipps v. Blakeney*, 8 F.3d 788, 790 (11th Cir. 1993) ("dismissal may be appropriate when a plaintiff's recalcitrance is due to willfulness, bad faith, or fault").

Here, the SEC behaves as if it is exempt from having to abide by the rules and does not need to provide any information to Defendant other than what it wants to disclose. Having deemed their own interpretation of what it would disclose as a fait accompli,[45] the SEC's Counsel repeatedly proclaimed, the SEC would only "testify about what we have already provided publicly in connection with our TRO and preliminary injunction exhibits,"[46] and refused to answer questions, either asserting a blanket privilege, self-determining the topic was outside the scope of the deposition, or professing a lack of personal knowledge. It was apparent that the SEC did not respect Defendant's right to depose a corporate representative. Throughout the depositions, the SEC and the SEC's Counsel unfairly minimized the information sought as just having a witness "memorize the evidence attached" to the TRO motion,[47] and stated "obviously, the amended complaint is annotated in our temporary restraining order, so we all know what the evidence is that the SEC relied on,"[48] in the face of having produced a representative who could not respond to questions, and dismissively suggesting any harm could be remedied later by the SEC's "supplement in writing" to its position on any answer where the

[45] *See* Exhibit B at 57:1-7 ("we read your topics to refer to the allegations in the Complaint").
[46] *See* Exhibit B at 96:13-18.
[47] *See* Exhibit A at 66:21-67:2.
[48] *See* Exhibit A at 62:19-22.

First Corporate Representative did not know an answer.[49] The brazen edict that the normal rules do not apply constitutes extreme contumacious conduct.

The Eleventh Circuit has established that this type of conduct is demonstrative of bad faith. "Preparing a designated corporate witness with only the self-serving half of the story that is the subject of his testimony is not an act of good faith." *Sciarretta v. Lincoln Nat'l Life Ins. Co.*, 778 F.3d 1205, 1213 (11th Cir. 2015). By providing representatives who were only prepared to merely translate footnote designations- directing LaForte to the cited exhibits but still refusing to give substantive testimony even as to these exhibits- the SEC deliberately engaged in selective disclosure and obfuscating tactics. Such a cavalier approach reveals a "blatant . . . failure to follow the rules." *Sciarretta v. Lincoln Nat'l Life Ins. Co.*, 778 F.3d 1205, 1211 (11th Cir. 2015). It is also demonstrative of a motive of "strategic, offensive purpose" aimed to create "an unfair advantage in this litigation." *Hayas v. Geico Gen. Ins. Co.*, No. 8:13-cv-1432-T-33AEP, 2014 U.S. Dist. LEXIS 149772, at *10 (M.D. Fla. Oct. 21, 2014).

"Modern instruments of discovery serve a useful purpose . . . [t]hey, together with pretrial procedures make a trial less a game of blindman's bluff and more a fair contest with the basic issues and facts disclosed to the fullest practicable extent." *United States V. Procter*, 356 U.S. 677, 682, 78 S. Ct. 983, 986-87 (1958). The SEC's discovery antics amount to a deliberate attempt to obstruct the investigation of the truth.

While this is a flagrant disregard of the spirit of litigation, it is especially troubling given the SEC's status as a government actor. "As the trustee of the people, the government is held to a higher standard . . . with a sharpened sense of good faith and fair dealing." *United States v. Ganz*, 806 F. Supp. 1567, 1575 (S.D. Fla. 1992) (noting that the "government's conduct and bad faith in its dealings with the defendant in this case shocks the conscience of the Court"). Confronted with unfavorable rulings or negative facts, the SEC "has an obligation to rectify its conduct, rather than compound it with what amounts to a claim of [its own] unfettered discretion. Such a level of discretion does not comport with our founding fathers' vision of government by consent of the governed." *Id.*

The SEC has unilaterally declared itself the final say-so-er and appears to intend to continue to do so in future cases. After repeatedly being shot down on its assertion that it is not subject to a 30(b)(6) deposition or that it cannot assert either blanket privileges or lack of personal knowledge as to facts or evidence underlying the claims brought against a defendant, the SEC still insists on

[49] *See* Exhibit A at 57:9-11.

presenting its failing positions. Any lesser sanction than dismissal would be inadequate to correct the continued misconduct of this government entity and would reward and invite same. Thus, dismissal under Rule 41(b) is appropriate based on the willful, repeated, and egregious nature of the SEC's conduct and the clear indication that, otherwise, the SEC will continue to misbehave in this case and future cases. *Zocaras v. Castro*, 465 F.3d 479, 483 (11th Cir. 2006).

d. Potential Lesser Sanctions if the Court Deems Dismissal Too Much

Defendant contends that lesser sanctions than dismissal of the entire action would not suffice, especially given the egregiousness of the violative conduct, the inescapable conclusion that the SEC intends to continue its pattern of misbehavior, and that the close of discovery in this case is September 10, 2021. *See Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 1540 (11th Cir. 1993) (affirming sanctions order against defendants' attorney where discovery objections were "part of their overall plan to obstruct the [p]laintiff's discovery attempts and that no sanction will change this aspect of the [d]efendants' conduct.") (internal quotations omitted).

However, should this Court be inclined to impose a less severe sanction, Defendant respectfully suggests that a potentially appropriate lesser sanction would be: dismissal of the claims related to the topics about which the SEC refused to testify, or to limit the introduction of evidence by the SEC at any hearing or trial by excluding evidence on topics the SEC refused to testify to.

e. The SEC's Counsel Should Be Individually Sanctioned Pursuant to 28 USC 1927

"It is beyond peradventure that all federal courts have the power, by statute, by rule, and by common law, to impose sanctions against recalcitrant lawyers and parties litigant." *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1446 (11th Cir. 1985). When an attorney is responsible for causing multiplicative proceedings, sanctions under 28 U.S.C. § 1927 are authorized. *Barash v. Kates*, 585 F. Supp. 2d 1347, 1359 (S.D. Fla. 2006).

The express purpose of 28 USC § 1927 is to allow district courts to "assess attorney's fees against litigants, counsel, and law firms who willfully abuse the judicial process by conduct tantamount to bad faith." *Avirgan v. Hull,* 932 F.2d 1572, 1582 (11th Cir.1991). As evinced from the SEC's Counsel's past litigation history and behavior in this case, the intransigent hampering of Defendant's depositions was obviously part of a deliberate scheme to sabotage the discovery process, showing disdain for the rules of court.

The SEC's Counsel's participation in the SEC's cavalier determination that it will not answer substantive questions at deposition multiplied the proceedings unreasonably and vexatiously, by

putting forth one 30(b)(6) deponent who could not answer questions accurately and then a second who refused to answer questions and allowed herself to be coached into not answering questions by the SEC's Counsel. Therefore, the SEC's Counsel should be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct. 28 U.S.C. § 1927. *See Malautea v. Suzuki Motor Co.*, 987 F.2d 1536, 154 (11th Cir. 1993) (affirming sanctions against an attorney on this basis as "entirely appropriate"). Specifically, the SEC's improper objections and thwarting of the 30(b)(6) depositions were made with the improper purpose of "causing the time for discovery to end before" LaForte was able to obtain the discovery materials "needed to litigate this case." Id. at 1541-42. These actions not only cause delay and increased costs for the parties, but also an increased burden on the Court. *Id.* The statute "was designed to curb exactly the kinds of abuses" committed by the SEC's Counsel in this case. *Avirgan,* 932 F.2d at 1582. If sanctions are not imposed, the SEC's Counsel's improper conduct will be rewarded and encouraged.

II. CONCLUSION

Based upon the foregoing, this matter should be dismissed pursuant to Federal Rule of Civil Procedure 41 because of the SEC's continual rule-defying behavior. Alternatively, the Court should dismiss any claim about which the SEC's 30(b)(6) designee refused to testify, and to preclude any evidence on these topics. Additionally, the Court should impose sanctions upon the SEC's Counsel pursuant to 28 U.S.C. § 1927.

III. REQUEST FOR HEARING

Defendant respectfully requests a hearing on this motion. This motion presents a complex web of factual and legal issues and LaForte believes oral argument would help the court wade through these issues and evidence. Defendant estimates 2-3 hours for oral argument would be sufficient.

Dated: September 3, 2021.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing on this 3 day of September 2021.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-CIV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____/

MOTION OF FOX ROTHSCHILD LLP TO STRIKE SEC'S MOTION [ECF No. 757] FOR ORDER TO SHOW CAUSE WHY DEFENDANT LISA MCELHONE AND HER FORMER COUNSEL SHOULD NOT BE HELD IN CONTEMPT OF COURT AND INCORPORATED MEMORANDUM OF LAW

Fox Rothschild LLP ("Fox"), a non-party in this action, by its undersigned counsel, moves to strike the Motion of the Securities and Exchange Commission ("SEC") requesting that the Court issue an order to show cause ("OSC") as to why Fox should not be held in contempt. The SEC's motion is deficient and fails as a matter of clear law for several glaring reasons:

(1) first, the orders the SEC claims were violated were entered *after* the conduct at issue;

(2) second, there was absolutely no need to seek extraordinary relief, in the form of a contempt order, and the fact that such relief was even requested suggests an improper motive—either to embarrass Fox or prejudice Fox in the eyes of the Court;

(3) third, the SEC lacks standing to seek this relief—the Receiver was vested by the Court with the exclusive right to seek the recovery of alleged estate assets;

(4) fourth, the SEC has improperly combined, in a single motion, a request for an OSC covering wholly unrelated conduct by Fox and its former client, Lisa McElhone, in an apparent effort to prejudice Fox; and

(5) fifth, the SEC, acting with unnecessary haste and carelessly, filed exhibits contain confidential information about Fox's bank account, information that should have been redacted.

Because this is a motion to strike, Fox will not address at any length the merits of the underlying substantive issues concerning ownership of the funds sought in the SEC's motion. Those issues should be addressed in response to an appropriate complaint by the Receiver, should the Receiver decide that such a filing would be well-founded.

INTRODUCTION

The SEC has sought extraordinary, unnecessary, and unsupported relief—a contempt order—against a well-respected national law firm that, at all times, has conducted itself honorably, openly and reasonably. The issue is a legal one: whether the Fox firm can keep a payment it received from CBSG before the Receiver was appointed, and before any asset freeze, for actual attorney time that was spent pre-receivership on legitimate and valuable legal services consisting mostly of efforts to collect on defaulted merchant advances.

Fox has been above-board from the beginning. It disclosed the payment to the Receiver early-on; it returned (in September 2020) approximately $910,000 voluntarily, an amount that was for future services; Fox explained its legal and factual position regarding the remainder (approximately $630,000) at length to the Receiver's counsel; Fox told the Receiver's counsel that, consistent with the Pennsylvania Rules of Professional Conduct, it would hold these funds in the law firm's IOLTA attorney trust account under the matter was resolved; Fox has maintained the

funds safely in that account; Fox was—at all times—completely candid and above-board in every respect.

There was absolutely no need to surprise Fox with a motion requesting contempt and sanctions. The parties have a dispute concerning issues affecting the disposition of funds that are safe and secure in an attorney trust account. The issues need to be resolved by a court though because the parties respectfully disagree with each other's positions. But, the issues should be resolved in a proper, orderly and transparent manner that will allow all parties to enjoy full due process, not through a legally unsupportable contempt motion.

Inexplicably, the SEC—which was not even a party to the prior discussions between Fox and the Receiver—fired off a contempt motion that is facially and fatally flawed because the actions that the SEC claims Fox should not have taken occurred before the Court entered any asset freeze and even before the Court's initial order appointing the Receiver. To be sure, Fox saw the SEC's complaint. But, contempt requires a conscious violation of an existing court order. The facts admitted by the SEC, and set forth in its motion, disprove that notion. For this reason, and other reasons set forth herein, the Court should strike the SEC's motion.

FACTUAL BACKGROUND

1. Fox represented Complete Business Solutions Group, Inc. (a/k/a Par Funding ("CBSG") prior to the appointment of the Receiver and for a short time thereafter.[1] Fox's primary role was litigation counsel for CBSG in its efforts to recover merchant advances following defaults by merchants. Fox was extremely successful in its litigation efforts on behalf of CBSG.

[1] In addition to serving as litigation counsel for CBSG, Fox, in limited matters, also served as corporate counsel, but not as securities counsel. After this legal action was filed, Fox briefly represented CBSG and certain related parties as defendants in this action, but Fox withdrew from that representation very early in this action.

2. Post-receivership, Fox was retained by the Court-appointed Receiver, Ryan Stumphauzer, to assist in the transition of the pending litigation matters to the Receiver. Fox performed valuable services for CBSG prior to the appointment of the Receiver, and it performed valuable services for the Receiver as well.

3. As alleged in the SEC's motion, the sequence of relevant procedural events in this action is as follows: (a) on July 24, 2020, the SEC file the original Complaint [ECF No. 1] herein alleging securities law violations and seeking preliminary injunctions and an asset freeze, among other relief, (b) on July 24, 2020, the SEC also filed an *ex parte* emergency motion for a temporary restraining order seeking, among other relief, an asset freeze against Defendants CBSG, Lisa McElhone and Joseph LaForte [ECF No. 14], (c) on July 27, 2020, the Court entered the initial Receivership Order [ECF No. 36], and Fox became aware of the Receivership Order, (d) on July 28, 2020, the Court granted the SEC's *ex parte* motion for a temporary restraining order [ECF No. 42] (referred to by the SEC as the "Asset Freeze Order") and (e) on August 13, 2020, the Court amended the Receivership Order [ECF No. 141] to expand the scope of the Receivership and to freeze "Receivership Assets" and "Recoverable Assets." SEC Motion, pp. 2-3 & 5.

4. The SEC alleges that Fox took the following actions for which it should be held in contempt—all of which, based on the SEC's own assertions, took place after the SEC filed its initial Complaint but, importantly, before any of the above-reference orders were entered and known to Fox. The SEC alleges, in its present motion:

> On Friday, July 24, 2020, the Defendants learn about the SEC's Complaint against them and LaForte makes arrangements for an immediate payment to Fox Rothschild.
>
> On July 24, Berman [a Fox partner] spoke with LaForte and requested fees for work Fox Rothschild had done and would do in the future. Berman discussed the SEC case with LaForte and advised him that the monies would be needed to pay for

> ongoing legal work, and LaForte and Berman agreed to the "immediate payment" of funds to Fox Rothschild.
>
> At 4:48pm that same day [July 24], Berman emailed a copy of the Complaint seeking an asset freeze in this case to Cole and LaForte, "Here is the filing. Let's talk." [Exhibit 1]. About two hours later, at 6:53pm, Aida Lau of Par Funding emailed Berman to confirm the ACH transfer of $1.5 million from Par Funding to Fox Rothschild.
>
> On Sunday, July 26 and Monday, July 27, 2020, Fox Rothschild tells Cole and LaForte to backup emails, financials, and computers and to take the download away from Par Funding.
>
> At 12:39pm on July 26, Berman emailed Cole and LaForte to ask if anyone could backup the financials, emails, and computers, and Cole responded the next day with a status update on that process.
>
> At 7:13am on July 27, Joseph DeMaria, also a law partner at Fox Rothschild, emailed Cole: "Bottom line if a receiver is appointed, which we are resisting, the receiver takes over your business. That means they get the original ode [sic] documents. You need to take your download away from the business so you have a personal copy in case this happens."

SEC Motion, pp. 4-5 (record citations omitted). Although the SEC alleges that the transfer of funds to Fox was "completed" on July 27, 2020—a date prior to the entry of the Asset Freeze Order[2]—the SEC admits that all of Fox's potentially relevant actions and conversations took place from July 24 to July 26, 2020. Incredibly, the SEC seeks to hold Fox in contempt for actions it took *before* this Court entered the relevant orders.

5. On Friday, July 24, 2020, Brett Berman spoke with Joseph LaForte and requested that CBSG pay Fox monies for fees Fox had already incurred—attorney time that was already in Fox's billing system--and for anticipated additional work moving forward. Mr. Berman advised

[2] The initial Receivership Order, entered on July 27, 2020 [ECF No. 36] did not include an asset freeze. But, regardless, the actions Fox took that the SEC complains about took place before even the entry of the initial Receivership Order.

Mr. LaForte that Fox had incurred substantial attorney time charges for work already performed for CBSG.

6. On July 24, 2020, Mr. Berman and Joseph LaForte agreed that CBSG would make immediate payment to Fox and that Fox could use the money to pay for work already performed and to establish a retainer for future work. On the same day, July 24, 2020, CBSG initiated an ACH payment to Fox in the amount of $1,500,000.

7. At the time of the payment, Fox had $633,270.95 in earned but unbilled attorney time entered in its time-keeping system. Fox earned these fees through its services, and its client agreed to pay these fees. However, knowing of the filing of the SEC's complaint, Fox chose not to immediately transfer the funds to its operating account, but, rather, to hold both the earned and unearned funds in its attorney trust account pending the resolution of any adverse claims to the funds. Fox deposited the entire $1.5 million in its attorney trust account.

8. After the Receiver was appointed by this Court, Fox disclosed the payment it had received from CBSG to the Receiver's counsel. The Receiver's counsel and Fox's counsel had cordial and professional telephone discussions about the $1.5 million in funds, and they exchanged correspondence about the subject. After discussing the matter with the Receiver's counsel, Fox decided to voluntarily refund the amount of $912,521.05 because that was the balance after deduction of the amount contractually due to Fox for recorded attorney hours and costs incurred prior to the entry of the Receivership Order.

9. On September 4, 2020, over a year ago, Fox hand-delivered a check to the Receiver's counsel in the amount of $912,521.05, and the Receiver's counsel accepted the check while also reserving the right to assert a claim to the remaining funds.

10. Thereafter, further discussions took place between Fox's counsel and the Receiver's counsel concerning the monies Fox retained for its pre-receivership work. Unfortunately, the parties could not reach an agreement. The Receiver requested that the remaining funds be turned over to the Receiver, and Fox asserted that Fox had earned and been paid the fees pre-receivership, and, therefore, the monies were not part of the receivership estate. Fox also asserted that it held a valid attorney retaining lien on the funds under Pennsylvania law. The Receiver asserted, among other things that funds held in an attorney trust account are client property, and, therefore, the funds should be returned to the Receiver as successor-in-interest to Fox's former client, CBSG.

11. Neither the SEC nor its counsel were party to the discussions that took place in the fourth quarter of 2020 between the Receiver's counsel and Fox's counsel. During that time period, Fox's counsel advised the Receiver's counsel in writing that Fox would continue to hold the remaining funds in its IOLTA attorney trust account pending the resolution of the dispute. For many months, Fox and its counsel heard nothing further about this matter. Fox continued to hold the retained funds in its trust account.

12. On Monday, September 13, 2021, Fox's counsel received an email from the SEC's counsel, Amie Berlin, asking about the status of the fees retained by Fox. The next morning, September 14, 2021, Ms. Berlin sent another email requesting a telephone conference concerning "a filing we are making today." A telephone conference ensued shortly thereafter, and Ms. Berlin asked whether Fox had changed its position about returning the funds. Counsel for Fox advised that, to his knowledge, Fox had not changed its position. Ms. Berlin did not mention that the SEC had prepared and was about to file a motion to hold the Fox law firm in contempt. Before any

further discussion could took place, the SEC, in the afternoon of September 14, filed the instant motion.

ARGUMENT

I. CONTEMPT IS NOT AVAILABLE FOR CONDUCT OCCURRING *BEFORE* THE ENTRY OF A COURT ORDER OR INJUNCTION.

The SEC, with almost no notice whatsoever, fired off an inflammatory and baseless contempt motion seeking to hold one of the nation's preeminent firms in contempt for conduct that is reasonable and certainly not in violation of any court order in effect at the time of the conduct. Fox voluntarily returned nearly $1 million in fees and did so over a year ago. Fox has retained only the amount it earned for legal services rendered prior to the appointment of the Receiver, and the payment was made to Fox by CBSG before this Court entered any asset freeze order.

On its face, the SEC's motion is obviously and fatally flawed. Federal courts throughout the country have ruled that a court cannot hold a party in contempt for actions taken before the entry of the order that arguably forbids the action. As the Eleventh Circuit has explained, "[i]f the court finds that the conduct as alleged would violate the prior order, it enters an order requiring the defendant to show cause why he should not be held in contempt and conducts a hearing on the matter." *Mercer v. Mitchell*, 908 F.2d 763, 768 (11th Cir. 1990) (underscoring added).

> "[C]ivil contempt proceeding[s are] brought to enforce a court order that requires [a party] to act in some defined manner." *Mercer*, 908 F.2d at 768. A petitioner "must [first] establish by clear and convincing evidence that the alleged contemnor violated [a] court's earlier order." *United States v. Roberts*, 858 F.2d 698, 700 (11th Cir.1988) (citation omitted). Once this prima facie showing of a violation is made, the burden then shifts to the alleged contemnor "to produce evidence explaining his noncompliance" at a "show cause" hearing. *Citronelle–Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297, 1301 (11th Cir.1991); *see Mercer*, 908 F.2d at 768; *Roberts*, 858 F.2d at 701.

Chairs v. Burgess, 143 F.3d 1432, 1436 (11th Cir. 1998).

Before a court will issue a show cause order in connection with a motion to hold a party in civil contempt, the entity seeking the contempt order must establish by clear and convincing evidence, among other things, that the alleged contemnor knew of the entry of a valid order, and, after entry of that order, knowingly engaged in acts violative of the order. *Ashcraft v. Conoco, Inc.*, 218 F.3d 288, 301 (4th Cir. 2000).

A party cannot violate an injunction or other order "which has not yet been issued." *Haendel v. Clark*, No. 7:17-CV-00135, 2019 WL 1373656, at *6 (W.D. Va. Jan. 22, 2019), report and recommendation adopted, No. 7:17-CV-00135, 2019 WL 1372166 (W.D. Va. Mar. 26, 2019). As one federal court aptly expressed the point,

> To find the respondents in civil contempt, the Court must find by clear and convincing evidence that each respondent violated the December 5 and 18 Orders. NOW v. Operation Rescue, 747 F. Supp. 772, 774 (D.D.C.1990). The Court may consider only the respondents' actions after the entry of the TRO and its freeze order; conduct prior to the Court's Orders could not have violated them and therefore could not constitute contempt. *United States v. Landsberger*, 692 F.2d 501, 503 (8th Cir.1982). The Court must conclude that respondents had notice of the terms of the Orders to reach a finding of contempt.

S.E.C. v. Current Financial Services, Inc., 798 F. Supp. 802, 806 (D.D.C. 1992). *See also United States v. Landsberger*, 692 F.2d 501, 504 (8th Cir. 1982) ("Obviously, if the act was committed before the injunction was entered, it could not have violated the injunction."); *In re Res. Tech. Corp.*, No. 08 C 4040, 2009 WL 1873529, at *2 (N.D. Ill. June 29, 2009) ("[A]s best as the Court can determine, there is no such thing as anticipatory contempt. . . . Contempt may be based only on conduct that occurs after the court order allegedly violated."); *Nykcool A.B. v. Pac. Fruit Inc.*, No. 10 CIV. 3867 LAK AJP, 2012 WL 1255019, at *9 (S.D.N.Y. Apr. 16, 2012) (same).[3]

[3] *See also In re General Motors Corp.*, 61 F.3d 256, 258 (4th Cir. 1995) ("Civil contempt is an appropriate sanction if we can point to an order of this Court [that] sets forth in specific detail an unequivocal command which a party has violated." (alterations and quotation marks omitted)); *N.W. Controls, Inc. v. Outboard Marine Corp.*, 349 F. Supp. 1254, 1256 (D. Del. 1972) ("Before

The SEC's motion, on its face, alleges that the relevant orders it says were violated were entered after Fox requested payment from CBSG, after CBSG's officer agreed to make the payment and after CBSG made the payment. Fox firmly believes, and will demonstrate, that the fees it earned and was paid for pre-receivership work are not an asset owned by the receivership estate. Rather, the funds are the property of Fox, and, even if that was not true, Fox has a valid attorney retaining lien under Pennsylvania law. Fox understands that reasonable attorneys can hold different views on an issue such as this. But this is not a matter that even arguably approaches a contempt of court issue.

Fox communicated frequently with the Receiver's counsel regarding this matter, voluntarily repaid the monies (nearly $1 million) that were not earned pre-receivership, and expressed its good faith and reasoned belief in its position that the remaining monies are not part of the receivership estate. Any dispute over this matter should be resolved in the normal, usual and orderly manner—through the filing by the appropriate party—the Receiver—of a complaint seeking a determination of the issue by the Court. Sadly, the SEC has attempted to short-circuit due process and bully Fox through an ill-advised and baseless contempt motion.

When the Receiver or Fox seeks appropriate relief, or in the unlikely event that this Court denies this motion to strike and issues an OSC, Fox will address the merits of its claim and present its legal authorities.[4] However, one contention of the SEC should be dismissed out-of-hand—the

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a court initiates a contempt proceeding or permits extensive discovery of suspected violations of its judgment, there should be at least a prima facie showing by the aggrieved party of disobedience of the order.").

[4] The SEC cites *SEC v. Credit Bancorp, Ltd.*, 109 F. Supp. 2d 142 (S.D.N.Y. 2000). However, *Credit Bancorp* is distinguishable because the court relied on a fee agreement which the court stated required the law firm to apply the funds in order to establish ownership of the funds. Here, the Fox firm was not required by any fee agreement with its client to maintain these funds in its trust account. The client agreed to pay the amount due and pay an advance for future services, and Fox voluntarily deposited all of the funds to its trust account pending the resolution of potential

notion that two Fox partners acted wrongfully in advising CBSG to make back-up copies of important documents or to retain copies of documents. Those recommendations were made before any order was entered by this Court, and, in any event, there is nothing wrong in making copies for defense purpose or to assist a future receiver. No one advised CBSG to destroy, remove or conceal any documents or data. It is not clear if the SEC is seeking to hold Fox in contempt for giving this advice, but, if so, that contention is beyond the realm of reasonableness and should not be reasserted in any future filing.

II. THE SEC'S MOTION WAS WHOLLY UNNECESSARY AND INAPPROPRIATE IN VIEW OF THE UNDISPUTED FACTS.

As discussed earlier, the SEC knows that the funds at issue are safe and secure in Fox's attorney trust account. Fox made that very clear to the Receiver in writing. The SEC also knows that Fox was paid the money prior to any asset freeze entered by this Court. The SEC also knows that Fox has asserted that the payment was for services it performed prior to the appointment of the Receiver. The SEC also knows that Fox and the Receiver have had substantial professional and respectful discussions concerning the legal and factual issues. The SEC also know that the

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adverse claims (not because of any agreement with its client to do so). Moreover, *Credit Bancorp* was not decided under Pennsylvania law and did not address any issue concerning an attorney retaining lien under Pennsylvania law. The SEC also cites *SEC v. Princeton Economic Int'l Ltd*., 84 F. Supp. 2d 443 (S.D.N.Y. 2000), but, in that case, there was no evidence that the fees were earned by services rendered before the relevant court orders, and one firm transferred monies after an asset freeze order was entered. *Princeton* also did not involve an assertion of a Pennsylvania attorney retaining lien. The SEC's remaining cases merely state a general proposition that funds in an attorney trust account are usually considered client property. As noted, Fox will address this authority, and other case authority, in more depth at the appropriate time. In particular, Fox will provide case law holding that law firms may have property rights and lien rights in funds held in attorney trust accounts. This is a fact-specific issue that should be fully and fairly litigated through an appropriate procedural mechanism. Fox is prepared to address these and other issues through a process that affords adequate due process to all parties.

Fox firm expected that this issue, if not settled, would be litigated fairly, calmly, and appropriately, in a professional manner.

Despite this knowledge, the SEC chose to file, without warning, an extremely inflammatory contempt motion that will likely damage Fox's national reputation. This was a completely over-the-top and inappropriate way to bring the issues before the Court.[5] It is not clear what motivated this effort, and, hopefully, it was not done to prejudice Fox in the eyes of the Court or embarrass Fox publicly or to intimidate Fox as a potential witness for the Defendants in this case.

The SEC did not even comply fully with the Local Rule "meet and confer" requirement before filing this motion.[6]

III. THE RECEIVER IS THE PROPER PARTY TO ASSERT THIS CLAIM, NOT THE SEC.

As this Court observed in its Receivership Order [ECF No. 36], the SEC sought "a Receiver with full and **exclusive** power, duty, and authority to: administer and manage the Receivership Entities' business affairs, funds, assets, causes of action, and any other property; marshal and

[5] In a similar vein, the SEC, knowing Fox did not violate any court order concerning CBSG's documents, suggests that Fox attorneys acted inappropriately by advising CBSG to make copies of important CBSG documents before the possible appointment of a receiver. It appears that the SEC's tack, in raising this unrelated and inconsequential matter, is to attempt to portray the Fox firm as a bad actor.

[6] Counsel for the SEC contacted counsel for Fox very shortly before filing this motion and did not advise counsel for Fox that a contempt motion would be filed, only that some "court filing" would be made. That omission deprived counsel for Fox of the opportunity to discuss with SEC counsel why contempt is not a form of relief that is appropriate here, in view of the timing of events and many other factors. Local Rule 7.1(a)(3) provides that parties or non-parties who may be affected by the relief sought must confer in a "good faith" effort "to resolve by agreement the issues to be raised in the motion." Counsel for the SEC did not seek a discussion of any of the "issues raised in the motion"; indeed, counsel for the SEC did not identify the type of motion that would be filed, let alone discuss the nature of the allegations that would be made. Counsel for the SEC did not even mention the word "contempt" or the word "sanctions." Instead, counsel for the SEC merely asked if the Fox firm had "changed its position" on the retention of the remaining funds.

safeguard all of the assets of the Receivership Entities; and take whatever actions are necessary for the protection of the investors." *Id*. at p. 2 (emphasis supplied).

As provided in paragraph 7(a) of the Amended Receivership Order [ECF No. 141], the Receiver was granted the power and duty to "use reasonable efforts to determine the nature, location and value of all property interests of the Receivership Entities, including, but not limited to, monies, funds, securities, credits, effects, goods, chattels, lands, premises, leases, claims, rights and other assets, together with all rents, profits, dividends, interest or other income attributable thereto, of whatever kind, which the Receivership Entities own, possess, have a beneficial interest in, or control directly or indirectly ("Receivership Property" or, collectively, "Receivership Estates").

As provided in paragraph 7(b) of the Amended Receivership Order, the Receiver was charged with the duty to "take custody, control and possession of all Receivership Property and records relevant thereto from the Receivership Entities; to sue for and collect, recover, receive and take into possession from third parties all Receivership Property and records relevant thereto."

This Court charged the Receiver, not the SEC, with the obligation to sue to recover any assets believed to be part of the Receivership Estate. Fox disputes that the cash it is holding is part of the Receivership Estate, but, without question, it is the Receiver whose responsibility it is to pursue any claim against Fox if the Receiver decides to do so. Consistent with this notion, all of the Fox firm's communications on this matter—until September 14, 2021—were with the Receiver. For reasons unknown, the SEC, which is merely a party litigant in this case and not an arm of the Court or a *de facto* receiver, has decided to pursue this matter and to do so in an inappropriate manner.

As provided in 28 U.S.C.A. § 754, "a receiver appointed in any civil action or proceeding involving property, real, personal or mixed, situated in different districts shall, upon giving bond as required by the court, be vested with complete jurisdiction and control of all such property with the right to take possession thereof. He shall have capacity to sue in any district without ancillary appointment, and may be sued with respect thereto as provided in section 959 of this title." These duties are codified by the terms of 28 U.S.C.A. § 959(b), which requires receivers to manage and operate the receivership property in the same manner that the owner or possessor of the property would be bound to do if in possession of it.

Notwithstanding this Court's orders, and two federal statutes, the SEC seeks to undermine the very purpose of a receiver and circumvent the exclusive powers granted to the Receiver by pursuing the recovery or putative receivership assets. Not only does this violate the Court's Receivership Orders and federal law, but it creates a conflict of interest. The Receiver is a neutral party, an arm of the Court. The SEC is a party litigant intent on prevailing in contentious securities litigation. *See Sterling v. Stewart*, 158 F.3d 1199, 1201 (11th Cir. 1998) ("[a] receiver is a neutral court officer appointed by the court, usually to "take control, custody, or management of property that is involved in or is likely to become involved in litigation for the purpose of ... undertaking any [ ] appropriate action.").

Fox is not aware of any provision in the federal securities laws or regulations that divests the Receiver of the exclusive authority to pursue the recovery of potential estate assets, and certainly nothing in this Court's orders vests the SEC with that authority.

Accordingly, although the relief sought by the SEC—the return of fees earned by Fox and paid pre-receivership, is not well-supported, the Receiver is the proper party to pursue such a claim, and the SEC's motion should be denied because it lacked standing or authority to bring it.

IV. THE SEC HAS IMPROPERLY COMBINED UNRELATED MATTERS INVOLVING DIFFERENT PARTIES IN ITS CONTEMPT MOTION IN AN EFFORT TO PREJUDICE FOX.

The SEC's motion addresses two entirely unrelated actions committed by parties who previously had a lawyer-client relationship but were not jointly involved in either action. The SEC alleges that Fox violated court orders that had not yet been entered by receiving payment for pre-receivership services. Fox's alleged actions occurred in the July 24-26, 2020 timeframe.

In the same motion, the SEC complains that Lisa McElhone, in October 2020, allegedly caused the transfer of land in Texas from one entity she controlled to another. The Texas property was owned by an entity that was not subject to the original Receivership Order. The SEC complains that Ms. McElhone caused the transfer while knowing that the Receiver was investigating this asset and pursuing an expansion of the Receivership Order to include the ownership entity. These allegations, whether true or false, and whether grounds for contempt or not, have nothing whatsoever to do with the allegations the Receiver is making against Fox. The two matters involve different events and different parties. There is no allegation that Fox was involved in the Texas land transfer.

Federal Rule of Civil Procedure 11(b)(1) provides: "By presenting to the court a pleading, written motion, or other paper—whether by signing, filing, submitting, or later advocating it—an attorney or unrepresented party certifies that to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances: (1) it is not being presented for any improper purpose, such as to harass, cause unnecessary delay, or needlessly increase the cost of litigation . . . ." The present motion appears designed to prejudice Fox by combining two unrelated and entirely different matters, one involving an alleged post-receivership transfer allegedly made to conceal an asset and the other involving a pre-receivership transfer made to

obtain payment of legitimate, hard-earned legal fees. By combining these matters and emphasizing that Fox is "*former counsel*" to Ms. McElhone, the SEC is attempting to create a form of "guilt by association" or to create the false appearance that Ms. McElhone and the Fox firm are colluding to avoid complying with the Court's orders. The Court should deny the motion on this basis alone.

V. IN ITS HASTE TO FILE THIS MOTION, THE SEC NEGLECTED TO REDACT CONFIDENTIAL INFORMATION AND HAS EXPOSED FOX TO NEEDLESS RISK.

Exhibit 4 [ECF No. 754-4] is an ACH confirmation showing the Fox firm's bank account number and the routing number of its bank. The SEC withdrew ECF 754 because of a "redaction problem" but then almost immediately thereafter refiled the motion with the same Exhibit 4 [ECF No. 757-4] showing the Fox firm's bank account number and the routing number of its bank—unredacted.

Local Rule 5.3(b)(2) provides: "Before the electronic filing and service of such exhibits, the filer must review each exhibit and redact any sensitive, confidential, or private information in accordance with Fed. R. Civ. P. 5.2, Fed. R. Crim. P. 49.1, and CM/ECF Administrative Procedures, Section 6, Redaction of Personal Information, Privacy Policy, and Inappropriate Materials, or seek an order from the Court either to seal . . . ." Fed. R. Civ. P. 5.2(a) specifically requires the redaction of bank account numbers. Section 6(a) of the CM/ECF Procedures expressly requires redaction of bank account numbers.

There is no excuse for the SEC, not once but twice, filing an exhibit with the Fox firm's bank account number and the routing number of its bank unredacted. For reasons unknown, and without any need for emergency action, the SEC rushed the filing of its motion and did not bother to review the few exhibits it filed in order to assure the redaction of confidential information.

The motion should be denied for this reason alone.

CONCLUSION

For all of the above reasons, the Court should strike the SEC's motion without prejudice to the Receiver, if he so chooses, pursuing a claim for the recovery of the retained funds through an appropriate complaint or motion rather than an inappropriate and procedurally defective motion for an OSC to hold the Fox firm in contempt.

Dated: September 15, 2021

Respectfully submitted,

/s/ Peter H. Levitt

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CERTIFICATE OF CONFERRAL

I HEREBY CERTIFY that, on September 14, 2021, pursuant to Local Rule 7.1(a)(3)(A), I conferred by email exchange with counsel for the SEC in a good faith effort to resolve the issues presented by this motion. On the morning of September 15, 2021, I conferred again, this time by telephone, with counsel for the SEC. I advised counsel for the SEC of the Fox firm's positions concerning the contempt motion and the reasons for this motion. Counsel for the SEC requested more time to consider a possible resolution. However, because the SEC filed a motion seeking an order to show cause, a matter that is normally acted upon very promptly by this Court, I am concerned that the Court will act before the Fox firm has the opportunity to advise the Court of the grounds set forth herein for striking the SEC's motion (and not issuing a show cause order). I advised the SEC's counsel that, because of this factor, I could not delay filing the instant motion. However, if counsel for the parties reach an agreement concerning the instant motion, I will immediately advise the Court. I intend to continue a dialog with SEC counsel in an effort to resolve this motion.

/s/ Peter H. Levitt
Peter H. Levitt

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that, on September 15, 2021, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record.

/s/ Peter H. Levitt
Peter H. Levitt

UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____/

LAFORTE'S MOTION FOR SANCTIONS FOR DISCOVERY VIOLATIONS PURSUANT TO RULE 37 OF THE FEDERAL RULES OF CIVIL PROCEDURE

I. INTRODUCTION

This motion for sanctions is brought pursuant to Fed. R. Civ. P. 37 due to the SEC's discovery violations. Specifically, the SEC has intentionally obstructed the discovery process by prohibiting its own designated corporate representative from answering a single substantive question or otherwise producing a representative with requisite knowledge of identified issues of inquiry in the 30(b)(6) Notice. With no intention of allowing a witness to testify, the SEC designated 30(b)(6) representatives and then not only proceeded to object to every question, but also impermissibly instructed their own corporate representative not to provide testimony. On the rare occasion that the SEC allowed its witness to answer, the answers were non-answers. Therefore, this Court should sanction the SEC for discovery violations, up to and including dismissal, striking of the allegations against the Defendants, precluding the SEC from taking a position contrary to the corporate representatives' deposition testimony, precluding the SEC from presenting evidence on topics it would not testify about, and awarding reasonable fees and costs

II. THE SEC'S DISCOVERY VIOLATIONS

1. On July 1, 2021, after mutual coordination, LaForte served a Notice of Deposition of SEC's Corporate Representative Designee Pursuant to Federal Rule of Civil Procedure 30(b)(6) (the "First Depo Notice"), to occur on July 9, 2021.[1]

2. Attached to the First Depo Notice was a list of deposition topics. Specifically, LaForte noticed as intended topics:

> The specific facts, information, documents, witness statements, investigative testimony, and other evidence relied upon by the Commission and Commission staff, that support:
>
> i. the Commission's allegations, causes of action and requests for relief in the Amended Complaint . . . .
>
> ii. the Commission's disgorgement calculation as to each Defendant. . . .
>
> iii. the Commission's claims that the Defendant's actions presented a risk to investor funds when it filed its Complaint. . . .
>
> The Commission and Commission staff's communications with attorney Shane Heskin prior to the filing of the Commission's enforcement action, including promises made to Heskin or his clients.

[1] A copy of the First Depo Notice is attached hereto as **Exhibit A**.

> The Commission's guidelines, policies, and procedures regarding joint action with, or direction or control by Commission staff of a private party involved in an investigation or private action.
>
> The Commission's guidelines, policies, and procedures regarding the appointment of a Receiver.

See Exhibit A.

3. The SEC did not provide the Defendants with a privilege log identifying any purportedly privileged work product after asserting the privilege and instructing the representative witness not to answer numerous times.

4. The SEC originally produced Raymond Andjich,[2] a government contractor assigned to the SEC's Miami Regional office as a researcher and to assist with investigation interviews, who previously was an FBI Special Agent for 31 years[3] , as its corporate representative for every deposition topic listed in the First Depo Notice (the "First Corporate Representative").

5. At the deposition, the First Corporate Representative described his preparation as involving, for the most part:

> [l]ooking at the motion for temporary restraining order, and then looking at the exhibits that were footnoted in that motion. And I know that there were at least 170 or more exhibits, and I'm happy to go through paragraph by paragraph and point out the exhibit that proves the allegation that the SEC is making . . . .

6. The First Corporate Representative was unable to answer basic questions, repeatedly providing Defendants with variations of "as I sit here today, I do not know" or "I do not recall" as responses to factual queries.[4] Admitting to not having the requisite knowledge to clarify the SEC's factual position regarding allegations in its complaint, he testified that other individuals would be better suited to answer the questions posed by the Defendants.[5]

7. At first wholly dismissive of the spirit and point of a 30(b)(6) deposition, the SEC's Lead-Counsel interjected that the SEC would later "supplement in writing" its position on any answer where the First Corporate Representative responded that he did not know an answer.[6] The SEC's

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[2] A copy of the Deposition Transcript of the First Corporate Representative is attached hereto as **Exhibit B**.
[3] *See* Exhibit B at 5:18-6:12
[4] *See* Exhibit B at 20:14-16; 27:11-14; 28:23-29:1; 31:24-25; 44:13-16; 45:23-46:3; 46:20-47:3; 47:11-17; 49:14-25; 50:11-18; 51:20-52:1; 53:20-54:1; and 58:16-22.
[5] *See* Exhibit B at 58:21-22.
[6] *See* Exhibit B at 57:9-11.

Lead-Counsel further unfairly characterized the questions being asked as requiring people to "memorize the evidence attached to the [TRO] motion."[7] (Of course, this attempt was a smokescreen, as the SEC would later demonstrate that it had no interest in allowing a potentially-competent witness to testify about the evidence, regardless of whether they had "memorized" it).

8. Just as disturbing as not having information at all, the First Corporate Representative also testified several times in circular fashion that the facts supporting the allegations made in the complaint were based on the statements made in the complaint, itself.[8] This is a classic fallacy of begging the question where the argument's premise assumes the truth of the conclusion without proof.[9] Essentially, according to the First Corporate Representative's testimony, the SEC's position is that the accusations made against the Defendants are true because the SEC said it was so.

9. After several hours, and after the First Corporate Representative had given testimony which the SEC's Lead-Counsel unilaterally deemed "wrong," the SEC announced on the record that it would like to continue the deposition to another day with newly designated witnesses. The SEC agreed the time spent deposing the First Corporate Representative would not be counted towards the time limits, and to pay the court reporter costs for the second deposition.[10] Furthermore, the SEC agreed to Defendant's request that Linda Schmidt, Senior Counsel at the Miami regional office of the SEC, who was involved in the SEC's investigation and had numerous communications with Heskin and DiPietro, would serve as one of the designees on specific topics, including "conversations that she had with investors, merchants, or counsel for either, and any email in which she was a participant, that is, someone who drafted received, or was copied on an email - in connection with this investigation…."[11] The parties' stipulation was put on the record and contemplated the situation in which Ms. Schmidt might serve as trial counsel. As part of the agreement, the SEC agreed that it "would not object to [Mr. LaForte's] use of her deposition testimony, even if she is available, because she might serve as trial counsel." The stipulation expressly provided that if after being deposed Ms. Schmidt is to serve as trial counsel and her deposition testimony was used at trial, Ms. Schmidt would not be identified as the deponent but rather, her "deposition testimony would be ascribed to an SEC representative or designee."[12]

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[7] See Exhibit B at 66:21-67:2
[8] *See* Exhibit B at 13:5-7; 30:11-25; 46:10-16; 47:20-48:11; 49:25-50:1; and 50:22-51:4.
[9] *See Hyman v. United States (In re Stanton)*, 503 B.R. 760, 764 & n. 23 (M.D. Fla. Bankr. Jan. 22, 2014).
[10] *See* Exhibit B at 59:3-20.
[11] *See* Exhibit B at 72:9-15.
[12] *See* Exhibit B at 72:17-25.

10. Again, this offer was not made when the First Corporate Representative could not answer substantive questions; it was only made when The SEC's Lead Counsel determined that she did not like the answers the First Corporate Representative was giving.

11. The reason provided by the SEC for continuing the deposition was, despite having spent "40 hours preparing," the First Corporate Representative felt that his memory was not good enough to allow him to "regurgitate" everything he had memorized or enable him to "be able to respond accurately."[13]

12. The Defendants stated on the record that any of the unobjected to statements provided should still be binding upon the SEC and any newly designated corporate representatives should not be able to contradict the First Corporate Representative's testimony. The SEC refused to agree, with the SEC's Lead-Counsel asserting that it would be "ridiculous" because the information sought during the deposition was available in the temporary restraining order with a footnote to the evidence and the First Corporate Representative "jumbled and got confused on and regurgitated incorrectly" so the parties all knew the testimony was inaccurate and needed to be corrected.[14]

13. Again, after mutual coordination, on July 27, 2021, the Defendants served a second Notice of Deposition of SEC's Corporate Representative Designee Pursuant to Federal Rule of Civil Procedure 30(b)(6) (the "Second Depo Notice") identifying the identical topics listed on the First Depo Notice, to occur on August 3, 2021.[15] Again, the never provided the Defendants with a privilege log identifying any purportedly privileged work product.

14. The SEC reneged on its stipulation to provide Ms. Schmidt as a witness citing the Florida Bar Rules. Counsel for the Defendant requested that the SEC provide the specific rule, but the SEC has not done so to date.[16] After breaching the stipulation on the record to produce Ms. Schmidt as the designee for certain topics, for the second deposition, the SEC produced Elisha Frank, a 17 year SEC employee, previously Senior Counsel and now the Assistant Regional Director whose "primary responsibility is to supervise investigations"[17] (the "Second Corporate Representative"), an assistant regional director for the SEC who is herself an attorney, as its newly designated corporate representative for every deposition topic listed in the Second Depo Notice.

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[13] *See* Exhibit B at 59:3-60:24.
[14] *See* Exhibit B at 61:12-63:5.
[15] A copy of the Second Depo Notice is attached hereto as **Exhibit C**.
[16] Notably, counsel for LaForte, Joshua Levine, called the Florida Bar Ethics Hotline and was advised that the Bar rules would not prevent Ms. Schmidt from testifying at deposition.
[17] *See* Exhibit C at 10:17-11:21.

15. Just as with the First Corporate Representative Deposition, the Second Corporate Representative made it clear at her deposition[18] that the SEC has baldly determined that the only information it will permit the Defendants to discover is what the SEC has decided is pertinent and has already publicly filed in this case.[19] Similarly, the Second Corporate Representative also limited her preparation for the deposition by reviewing the Amended Complaint, the TRO Motion and exhibits, the merchant declarations, the motion and certification to appoint a Receiver, and emails, as well as a review of the commission guidelines and manual.[20]

16. Throughout the deposition, the First and Second Corporate Representatives were repeatedly instructed not to answer questions requiring factual answers due to various privileges, including: (i) investigative privilege; (ii) deliberative process privilege; (iii) law enforcement privilege; (iv) attorney work product (v) and attorney-client privilege.[21]

17. Pursuant to the SEC's Lead-Counsel's instructions to the Second Corporate Representative not to answer, the SEC refused to respond to a single question asking for identification of what evidence the SEC had at the time the complaint was filed supporting any of the SEC's allegations.[22] Also Pursuant to the SEC's Lead-Counsel's instructions to the Second Corporate Representative not to answer, the SEC refused to respond to a single question asking for identification of what evidence the SEC currently has supporting any of the SEC's allegations in its complaint.[23]

18. According to the explanation by the SEC's Lead-Counsel, mere identification of what evidence the SEC has or had at the time of the complaint is all privileged:

> The deliberative process privilege would apply to the deliberations of the SEC in determining which evidence supports which potential allegations and the decision to allege them. The attorney-work product is not limited to the post-filing determinations, but includes the entire scope of the case. [The Second Corporate Representative], once again, she can testify about the evidence that we have already filed annotating the allegations of the complaint in the TRO motion, but she cannot

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[18] A copy of the Deposition Transcript of the Second Corporate Representative is attached hereto as **Exhibit D**.

[19] *See* Exhibit D at 12:11-13; 44:1-7; 46:10-13; 51:23-52:3; 57:1-7; 96:13-18; and 108:5-8.

[20] See Exhibit D at 30:11-33:24.

[21] *See* fn 15-16, supra. *See also e.g.*, Exhibit D at 11:25-12:6; 12:17-18; 14:7-11; 28:14-20; 47:20-53:11; 91:13-92:2; 171:15; and 193:15-19.

[22] *See* Exhibit D at 23:2-9; 25:6-26:1; 55:5-20; 57:11-59:18; 90:13-23; 92:3-12; 121:10-125:3; 132:3-16; 193:24-194:9; 195:13-21; 229:3-18; and 230:24-231:20.

[23] *See* Exhibit D at 23:2-9; 26:3-17; 40:9-41:8; 44:1-7; 45:18-46:4; 47:20-53:11; 55:15-20; 70:2-71:5; 88:8-19; 92:3-12; 93:3-11; 101:18-104:21; 109:3-22; 111:9-112:5; 113:9-20; 113:25-114:13; 115:14-25; 118:19-120:24; 170:15-23; 206:13-208:6; 216:18-25; 217:11-218:21; 226:8-227:19; 235:11-236:18; 251:1-10; and 258:11-259:16.

> testify about our attorney work-product with respect to other documents that we have produced to you and how they fit into this case, because that is attorney work product and deliberative process privilege concerning the investigative file.[24]

19. As for any evidence acquired during the litigation, the SEC resolutely declared that it had not yet finished reviewing documents and therefore, "the SEC will not be testifying about the post-filing evidence," noting it is also work product.[25]

20. Against the greater weight of authority, the SEC took the position that it was only required to testify about what was already provided publicly in connection with its preliminary injunction motion and exhibits.[26] But then refused to even do that. When the Defendants asked the Second Corporate Representative to direct them to the page or portion of an identified exhibit that supports an allegation in the complaint, she refused, essentially asserting that each exhibit "speaks for itself,"[27] and testified that merely explaining how or why an identified exhibit is supportive "would involve work product unless [the SEC] already identified it specifically with a pincite in the TRO."[28]

21. No explanation was provided for how the mere existence of information could constitute work product, nor how it is suddenly rendered 'not work product' once it is identified within a filed motion. *See Johnson v. 27th Ave. Caraf, Inc.*, Nos. 19-14353, 19-14354, 2021 U.S. App. LEXIS 24521, at *19 (11th Cir. Aug. 17, 2021) ("Selective disclosure for tactical purposes waives the privilege."). The refusal to disclose how the SEC's blanket pronouncement that the exhibits supported its allegations did not waiver even where it was apparent that it did not support the claim.

22. The SEC's Lead Counsel contributed to, facilitated, and emboldened the Second Corporate Representative's uncooperative responses, asserting work product privilege objections where Defendants asked: (i) whether specific allegations and statements in various declarations were false;[29] (ii) whether the SEC knew if the declarations contained false statements when they were filed;[30] and (iii) whether the SEC will be correcting the record with respect to declarations which contain false statements.[31]

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[24] *See* Exhibit D at 56:9-25.
[25] *See* Exhibit D at 44:1-7 and 57:1-7.
[26] *See* Exhibit D at 46:10-13; 48:22-49:1; 96:13-18; and 108:5-8.
[27] *See* Exhibit D 21:8-14; 22:8-24; 24:22-25:3; 45:9-47:19; 54:23-55:12; 63:4-9; 64:13-69:-7; 71:3-74:6; 84:11-22; 91:1-7; 106:2-7; 111:2-24; 113:9-23; and 139:19-25.
[28] *See* Exhibit D at 108:5-8.
[29] See Exhibit D at 247:21-8; 258:25-259:16; 262:12-263:21.
[30] See Exhibit D at 124:21-125:3.
[31] See Exhibit D at 192:15-25.

23. If the SEC's abusive assertion of objections and refusal to answer fact-based questions were not enough, the SEC's Lead-Counsel further aggravated the integrity of the deposition process by repeatedly interjecting speaking objections and otherwise "coaching" the Second Corporate Representative how to testify, or more to the point, avoid testifying. [32]

24. Moreover- above and beyond the many asserted privilege objections- the SEC's Lead-Counsel also impermissibly instructed the Second Corporate Representative not to answer questions based on routine evidentiary objections, such as speculation, legal conclusion, argumentative, and asked and answered.[33]

25. Unfortunately, the ineptitude of the First Corporate Representative, the SEC's choice to suspend the first deposition when it did not like the testimony it was hearing, and the SEC's actions in the beginning of the second deposition were merely a prelude to the SEC's misconduct that was still yet to occur during the latter half of the second deposition. The SEC's Lead-Counsel amped up her impermissible directions to the Second Corporate Representative not to answer questions predicated on the SEC's unilateral determination that a line of questioning was "outside the scope" of the designated topics. In fact, in a roughly six-hour deposition with a transcript spanning 266 pages, almost 60 pages are comprised entirely of questions the Second Corporate Representative declined to answer because they were purportedly outside of the scope of the notice.[34]

26. Finally, as a tandem legal strategy to asserting blanket privileges and refusing to answer questions seeking the mere identification of evidence, the Second Corporate Representative also testified that the SEC does not have "personal knowledge" regarding the substance or statements in this case.[35] The unremitting response that the SEC lacks personal knowledge included assertions that irreconcilably fly in the face of allegations raised in the SEC's complaint, such as not having knowledge about whether Defendants engaged in general solicitation despite needing this allegation to support the SEC's claim the Defendants filed an improper exemption. By bringing this lawsuit with outrageous accusations against the Defendants, pretending it does not need to even identify relevant

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[32] *See* Exhibit D at 16:3-4; 22:22-24; 24:18-25:3; 40:1-8; 45:20-46:4; 47:13-19; 53:1-10; 60:6-11; 60:18-24; 64:24-65:3; 68:12-17; 68:23-69:7; 114:17-19; and 140:6-150:25.
[33] *See* Exhibit D at 80:7-12; 82:16-19; and 131:17-20.
[34] *See* Exhibit D at 140:6-150:18; 151:4-158:18; 159:23-169:18; 171:1-174:5; 175:20-177:5; 178:4-192:1; 193:2-195:9; 199:6-201:15; 202:8-12; 206:10-208:6; 216:13-25; 217:11-218:21; 226:8-227:19; 232:20; 233:5; and 258:11-24.
[35] *See* Exhibit D at 21:8-14; 46:15-47:1; 63:21-64:17; 91:13-92:2; 113:9-23; 154:18-23; 214:4-14; 241:3-6; 250:21-251:10; and 257:11-14.

facts or evidence outside what it has already filed with its TRO motion, and refusing to acknowledge the irrefutable evidence establishing the falsity of the allegations, the SEC has taken the Sergeant Schultz[36] posture.

27. The SEC's Lead-Counsel's speaking objections, over-assertion of blanket privileges, and instructions not to answer deposition questions thwarted the discovery process and resulted in the Second Corporate Representative not providing a single substantive answer to any of the questions asked at corporate representative depositions. [37]

III. MEMORANDUM OF LAW

a. Legal Standard

The Defendants are entitled to discovery and the deposition of a corporate representative of the SEC. Federal Rule of Civil Procedure 30(b)(6) provides, in pertinent part:

> In its notice or subpoena, a party may name as the deponent a public or private corporation, a partnership, an association, a governmental agency, or other entity and must describe with reasonable particularity the matters for examination. The named organization must then designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on its behalf . . . . The persons designated must testify about information known or reasonably available to the organization.

Fed. R. Civ. P. 30(b)(6).

"As a general proposition, government agencies embroiled in litigation are subject to the same discovery rules as private litigants, regardless of the level of government to which the agency belongs." *SEC v. Merkin*, 283 F.R.D. 689, 696 (S.D. Fla. 2012). "Rule 30(b)(6) expressly applies to a government agency and provides neither an exemption from Rule 30(b)(6), nor special consideration concerning the scope of discovery, especially when the agency voluntarily initiates an action." *SEC v. McCabe*, No. 2:13-cv-00161-TS-PMW, 2015 U.S. Dist. LEXIS 67253, at *6 (D. Utah May 22, 2015) (internal quotations omitted) (citing to *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414 (S.D.N.Y. 2009).

"As an initial matter the rule does not limit what can be asked of a designated witness at a deposition." *FDIC v. Brudnicki*, No. 5:12-cv-00398-RS -GRJ, 2013 U.S. Dist. LEXIS 154908, at *4 (N.D. Fla. Oct. 29, 2013). Instead, the rule requires that the entity designating a witness must do so premised on the ability of the witness, who must testify "about information known or reasonably

[36] So named after a character on an old television show, Sergeant Schultz on *Hogan's Heroes*, who was famous for always saying "I know nothing. NOTHING!"

[37] A chart of the deposition questions, asserted objections, and testimony grouped by subject is attached hereto as **Exhibit E**.

available to the organization." *Sciarretta v. Lincoln Nat'l Life Ins. Co.*, 778 F.3d 1205, 1213 (11th Cir. 2015) (quoting Fed. R. Civ. P. 30(b)(6)). "The reason for adopting Rule 30(b)(6) was not to provide greater notice or protections to corporate deponents, but rather to have the right person present at deposition. The Rule is not one of limitation but rather of specification within the broad parameters of the discovery rules." *Salvia v. Lowe's Home Ctrs.*, No. 8:08-CV-1242-T-33MAP, 2011 U.S. Dist. LEXIS 161917, at *4 (M.D. Fla. Apr. 28, 2011) (internal quotations omitted). "If it becomes apparent during the deposition that the designee is unable to adequately respond to relevant questions on listed subjects, then the responding corporation has a duty to timely designate additional, supplemental witnesses as substitute deponents." *QBE Ins. Corp.*, 277 F.R.D. at 690.

Personal knowledge is not required and, in the absence of personal knowledge on behalf of the deponent, the entity bears the responsibility to "prepare the designee so that they may give knowledgeable and binding answers for the corporation." *Rocket Real Estate, LLC v. Maestres, No. 15-62488-CIV-COHN/SELTZER, 2016 U.S. Dist. LEXIS 37810*, at *3 (S.D. Fla. Mar. 23, 2016). *See also Colonial BancGroup Inc. v. PricewaterhouseCoopers LLP*, No. 2:11-cv-746-BJR, 2016 U.S. Dist. LEXIS 193186, at *18 (M.D. Ala. June 17, 2016) (explaining, "[L]ack of involvement or firsthand knowledge of plaintiff does not relieve obligation to designate 30(b)(6) witness").

Additionally, where the scope of such a deposition is known ahead of time, any objections as to that scope- or to privilege- should be made prior to the deposition. *See Kaplan v. Nautilus Ins. Co.*, No. 17-CV-24453-KING/LOUIS, 2018 U.S. Dist. LEXIS 222353, at *3 (S.D. Fla. Sep. 17, 2018) (reasoning, "When a party objects to the scope of a 30(b)(6) deposition notice, courts have found that the proper means for raising the dispute is by timely serving those objections upon the opposing party in advance of the deposition . . . ."). The corporate deponent should "object to the designation and give notice to the requesting party of those objections, so that the requesting party has the opportunity to reconsider its position, narrow the scope of the topic, or otherwise stand on its position and seek to compel additional answers, if necessary, following the deposition . . . The same holds true for privilege objections." *Id. See also Beach Mart, Inc.*, 302 F.R.D. at 406 (providing that the entity explicitly cannot "make its objections and then provide a witness that will testify only within the scope of its objections").

b. Argument

Rule 30(b)(6) "provides for a variety of sanctions for a party's failure to comply with its Rule 30(b)(6) obligations, ranging from imposition of costs to preclusion of testimony and even entry of default." *QBE Ins. Corp.*, 277 F.R.D. at 690. Requiring the responsive party to produce another

30(b)(6) deposition witness who is prepared and educated is a frequently-invoked sanction; however, where the discovery cutoff deadline has expired, such a sanction is no longer available. *See id.* at 690 n.6. Once a case's discovery cutoff deadline has expired, a more appropriate sanction is to preclude a corporation from admitting testimony at trial on the subjects which its designee was unable or unwilling to testify about at the 30(b)(6) deposition. *See id.* at 681.

i. Dismissal Is an Appropriate Sanction

This case should be dismissed as a sanction for the SEC's conduct regarding the deposition of its corporate representatives. The SEC has evinced a disrespectful refusal to provide discovery. The SEC's Lead Counsel's repeated direction that the witness not answer questions was violative of Rule 30(b)(6) and Rule 30(c)(2). The SEC's assertion of work product in the face of questions that were clearly aimed at the discovery factual information and were not aimed at mental impressions or opinions was inappropriate and improper. The unnuanced postulation that documents "speak for themselves" was not even a valid basis for objection, let alone for not providing answer in the event of an objection. And The SEC's Lead Counsel's speaking objections and other contextualization of the testimony was, itself, improper, to the limited extent that any testimony to have been contextualized was provided in the first place.

"If a corporate representative physically appears at a deposition but is completely unprepared to provide testimony on the noticed topics, courts have found a failure to appear under Rule 37(d)(1)(A)(i)." *Maronda Homes, Inc. v. Progressive Express Ins. Co.*, No. 6:14-cv-1287-Orl-31TBS, 2015 U.S. Dist. LEXIS 60603, at *7 (M.D. Fla. May 8, 2015) (*citing Cont'l Cas. Co. v. First Fin. Emple. Leasing, Inc.*, No. 8:08-cv-2372-T-27GW, 716 F. Supp. 2d 1176, 1193 (M.D. Fla. 2010)).

Federal Rule of Civil Procedure 37 governs the available relief when a party fails to make disclosures or cooperate in discovery. Specifically, Federal Rule of Civil Procedure 37(c) provides:

> (c) Failure to Disclose, to Supplement an Earlier Response, or to Admit.
> (1) Failure to Disclose or Supplement. If a party fails to provide information or identify a witness as required by Rule 26(a) or (e), the party is not allowed to use that information or witness to supply evidence on a motion, at a hearing, or at a trial, unless the failure was substantially justified or is harmless. In addition to or instead of this sanction, the court, on motion and after giving an opportunity to be heard:
> > (A) may order payment of the reasonable expenses, including attorney's fees, caused by the failure;
> > (B) may inform the jury of the party's failure; and
> > (C) may impose other appropriate sanctions, including any of the orders listed in Rule 37(b)(2)(A)(i)–(vi).

These other specifically available orders delineated by the rule under the present circumstances include:

(i) directing that the matters embraced in the order or other designated facts be taken as established for purposes of the action, as the prevailing party claims;
(ii) prohibiting the disobedient party from supporting or opposing designated claims or defenses, or from introducing designated matters in evidence;
(iii) striking pleadings in whole or in part;
(iv) staying further proceedings until the order is obeyed;
(v) dismissing the action or proceeding in whole or in part; or
(vi) rendering a default judgment against the disobedient party;

See Fed. R. Civ. P. 37(b)(2)(A).

Although dismissal with prejudice is the most severe Rule 37 sanction, "dismissal may be appropriate when a plaintiff's recalcitrance is due to willfulness, bad faith, or fault." *Phipps v. Blakeney*, 8 F.3d 788, 790 (11th Cir. 1993). "The Court in *National Hockey League* admonished the Courts of Appeals not to exhibit 'lenity' even in the face of 'outright dismissal as a sanction for failure to comply with a discovery order' because Rule 37 sanctions were designed 'not merely to penalize those whose conduct may be deemed to warrant such a sanction, but to deter those who might be tempted to such conduct in the absence of such a deterrent.'" *Carlucci v. Piper Aircraft Corp.*, 775 F.2d 1440, 1447 (11th Cir. 1985) (citing *National Hockey League v. Metropolitan Hockey Club, Inc.*, 427 U.S. 639, 642-43, 96 S. Ct. 2778, 2780-81, 49 L. Ed. 2d 747 (1976)).

Where a party's conduct evinces a disrespectful refusal to provide discovery, the entry of judgment is appropriate. *Maus v. Ennis*, 513 F. App'x 872, 878 (11th Cir. 2013). The severity of the sanction is, itself, sanctioned even where the party asserts privileges, and especially where that party fails to timely object based on a recognized privilege. *Id.* Here, the SEC has conducted itself in a manner demonstrative of a lack of respect for the discovery process in multiple regards, including: (i) self-declaring of what the Defendants can ask for despite the gravity of what is at stake for Defendant being exceptionally high; (ii) asserting improper, blanket privilege objections to shield against discovery; (iii) The SEC's Lead-Counsel impermissibly instructing the witness not to answer questions posed at a deposition; and (iv) The SEC's Lead-Counsel repeated assertion of speaking objections which tainted the testimony.

<u>The Self-Declared Arbiter of Producible Discovery</u>

The SEC's outright refusal to answer any question outside of what it determined- in its own estimation- to be subject to disclosure is unacceptable conduct. The SEC has baldly determined that the only information discoverable by the Defendants is what the SEC is willing to provide and has

already publicly filed in this case. While this is a flagrant disregard of the spirit of the discovery process taken alone, it is especially troubling given the high stakes for the Defendants in this case and the SEC's status as a state actor.

Litigants may not unilaterally choose what discovery is appropriate to produce. To do so is a breach of discovery obligations and stymies not only a party's "access to discoverable documents, but also the efficient functioning of the adversarial process in this litigation." *Inmuno Vital, Inc. v. Telemundo Grp., Inc.*, 203 F.R.D. 561, 571 (S.D. Fla. 2001). *See also Ramirez v. World Oil Corp.*, 2021 Cal. Super. LEXIS 1345, *9 (Sup. Ct. Cal. 2021) ("Plaintiff cannot unilaterally determine what documents she deems relevant to Defendants' defenses"); *Enargy Power (Shenzhen) Co. v. Wang*, Civil Action No. 13-11348-DJC, 2014 U.S. Dist. LEXIS 130997, at *7 (D. Mass. Sep. 17, 2014); *Judicial Watch, Inc. v. United States DOC*, 34 F. Supp. 2d 47, 51 (D.D.C. 1998) ("it is not appropriate for a litigant to unilaterally determine what documents to produce"). This is of particular concern where privilege objections are asserted without a privilege log. *Williams v. Taser Int'l, Inc.*, No. 1:06-CV-0051-RWS, 2007 U.S. Dist. LEXIS 40280, at *1 (N.D. Ga. June 4, 2007) ("non-specific objections operate to render the producing party the final arbiter of whether it has complied with its discovery . . . because the requesting party lacks sufficient information to understand either the scope of the objection, or to frame any argument as to why that objection is unfounded").

Here, the SEC declared it was categorically exempt from testifying about information other than what it wanted to disclose. Having deemed their own interpretation of the depo notices a fait accompli,[38] both the First Corporate Representative and Second Corporate Representative limited their review of the evidence in preparation for the deposition to just the exhibits filed with the TRO Motion. The SEC's Lead-Counsel repeatedly proclaimed, the SEC would only "testify about what we have already provided publicly in connection with our TRO and preliminary injunction exhibits,"[39] that the SEC would not discuss anything about the post-filing evidence, and directed the designee not to answer questions about the existence of claim supporting evidence did "unless she's referencing a filing or something public."[40] And despite the clear prohibition against the practice in Federal Rule of Civil Procedure 30(c), the SEC's Lead Counsel instructed the deponent not to answer questions for reasons not falling into the three exceptions (privilege, enforcing a court-ordered limitation, or to suspend the deposition in order to bring a motion to terminate or limit it).

[38] See Exhibit D at 57:1-7 ("we read your topics to refer to the allegations in the Complaint").
[39] See Exhibit D at 96:13-18.
[40] See Exhibit D at 46:10-13.

The Eleventh Circuit has established that this type of conduct is demonstrative of bad faith. "Preparing a designated corporate witness with only the self-serving half of the story that is the subject of his testimony is not an act of good faith." *Sciarretta v. Lincoln Nat'l Life Ins. Co.*, 778 F.3d 1205, 1213 (11th Cir. 2015). By providing representatives who were only prepared to merely translate footnote designations- directing Defendants to the cited exhibits but still refusing to give substantive testimony even as to these exhibits- the SEC deliberately engaged in selective disclosure and obfuscating tactics.

It was apparent that the SEC did not respect the Defendants' right to depose a corporate representative. Throughout the depositions, the SEC and the SEC's Lead Counsel unfairly reduced the information sought as just having a witness "memorize the evidence attached" to the TRO motion,[41] stated "obviously, the amended complaint is annotated in our temporary restraining order, so we all know what the evidence is that the SEC relied on"[42] in the face of having produced a representative who could not respond to questions, and dismissively suggesting any harm could be remedied later by the SEC's "supplement in writing" to its position on any answer where the First Corporate Representative did not know an answer.[43]

Such a cavalier approach reveals a "blatant . . . failure to follow the rules." *Sciarretta v. Lincoln Nat'l Life Ins. Co.*, 778 F.3d 1205, 1211 (11th Cir. 2015). It is also demonstrative of a motive of "strategic, offensive purpose" aimed to create "an unfair advantage in this litigation." *Hayas v. Geico Gen. Ins. Co.*, No. 8:13-cv-1432-T-33AEP, 2014 U.S. Dist. LEXIS 149772, at *10 (M.D. Fla. Oct. 21, 2014). Given the SEC's role as a government entity and severity of the relief sought by the SEC, the abuse is all the more egregious.

This calculus is not new to state actors pursuing non-damages based remedies. "The claims in this case are substantial and raise serious claims of wrongdoing by former bank directors and officers. The Defendants should be allowed to explore fully the claims against them in this case and defend themselves. As discussed above, the scope of the Rule 30(b)(6) deposition will go beyond simply the calculation of damages." *FDIC v. Brudnicki*, No. 5:12-cv-00398-RS -GRJ, 2013 U.S. Dist. LEXIS 154908, at *15-16 (N.D. Fla. Oct. 29, 2013).

Within this proceeding, the SEC has requested injunctive relief, disgorgement, and a monetary penalty for alleged securities fraud and insider trading, and the gravity of what is at stake for Defendant is exceptionally high. *United States v. Sanchez*, 520 F. Supp. 1038, 1040 (S.D. Fla. 1981); *SEC v. Snyder*,

[41] See Exhibit B at 66:21-67:2
[42] See Exhibit B at 62:19-22.
[43] *See* Exhibit B at 57:9-11.

No. H-03-04658, 2006 U.S. Dist. LEXIS 81830, 2006 WL 6508273, at *1 (S.D. Tex. Aug. 22, 2006). "This practical reality is equally present in this case and necessitates careful consideration of the SEC's attempts to avoid a Rule 30(b)(6) deposition in a case that it, not the Defendant, chose to file." *See also SEC v. Kramer*, 778 F. Supp. 2d 1320, 1323 n.3 (M.D. Fla. 2011). *But see United States v. Melvin*, 918 F.3d 1296, 1300 (11th Cir. 2017).

The brazen attitude of not being subjectable to the rules combined with the SEC's governmental role and the exceptionally high stakes involved in the litigation frame the severity of the sanctions this Court should impose and highlight that sanctions should be levied.

Blanket Privilege Objections

The SEC was aware that it could not proceed on blanket privilege objections that frustrated the ability to meaningfully garner duly discoverable information. "According to Federal Rule of Evidence 501, 'the privilege of a witness … shall be governed by the principles of the common law as they may be interpreted by the courts of the United States in the light of reason and experience.'" *Cox v. Adm'r United States Steel & Carnegie*, 17 F.3d 1386, 1414 (11th Cir. 1994). Despite its value in encouraging clients to confide in their counsel, the law recognizes that, as "'an obstacle to the investigation of the truth,'" the attorney-client privilege is not without exceptions. *Garner v. Wolfinbarger*, 430 F.2d 1093, 1101 (5th Cir.1970) (quoting 8 Wigmore, Evidence, § 2291, at 554), cert. denied, 401 U.S. 974, 91 S. Ct. 1191, 28 L. Ed. 2d 323 (1971). Moreover, it has been specifically held that work product cannot be asserted as a means to avoid testifying "regarding facts learned while reviewing documents selected by . . . counsel." *United States v. Pepper's Steel & Alloys, Inc.*, 132 F.R.D. 695, 698 (S.D. Fla. 1990) (internal quotations omitted). In the event that the SEC were allowed to conduct itself as it has attempted to, "every witness that counsel prepares for deposition pursuant to Rule 30(b)(6) could assert the work product doctrine on the basis that he learned the facts while reviewing documents selected by [counsel]." *See id.* (internal quotations omitted).

"The attorney-client and work product privileges may not be generally raised against testifying." *Woznicki v. Raydon Corp.*, No. 6:18-cv-2090-Orl-78GJK, 2019 U.S. Dist. LEXIS 193514, at *13-14 (M.D. Fla. Oct. 25, 2019). *See Johnson v. Gross*, 611 F. App'x 544, 547 (11th Cir. 2015) (blanket privilege assertions are generally unacceptable). "If such an objection is made without a *proper* privilege log attached, it shall be deemed a nullity." *Guzman v. Irmadan, Inc.*, 249 F.R.D. 399, 401 (S.D. Fla. 2008). This is because "without a privilege log, the agency's assertions of privilege would be effectively unreviewable." *State v. United States Immigration & Customs Enf't*, 438 F. Supp. 3d 216, 219 (S.D.N.Y. 2020) (citing *Balintulo v. Daimler AG*, 727 F.3d 174, 186 (2d Cir. 2013)). See also *Ctr. for Biological*

Diversity v. Bernhardt, No. 2:19-CV-14243, 2020 U.S. Dist. LEXIS 92370, at *20 (S.D. Fla. May 26, 2020) (holding in an administrative context, "Accordingly, the Court concludes that deliberative documents may be withheld from the record only upon invocation of the deliberative process privilege, as documented in a privilege log").

"Permitting a litigant to use a 30(b)(6) deposition to learn facts would not cause disclosure of work product information merely because a lawyer prepared the witness. As the *Pepper's Steel* court explained, '[t]he revelation of facts relevant to the litigation does not necessarily reveal the origin of those facts or how those facts were selected or ordered.'" *SEC v. Merkin*, 283 F.R.D. 689, 697 (S.D. Fla. 2012).

Thus, the Defendants' questions involving the existence of evidence supporting the SEC's claims were entirely appropriate and the objections were baseless. *See id. See also Protective Nat'l Ins. Co. v. Commonwealth Ins. Co.*, 137 F.R.D. 267, 280 (D. Neb. 1989) (reasoning, "There is simply nothing wrong with asking for facts from a deponent even though those facts may have been communicated to the deponent by the deponent's counsel. But, depending upon how questions are phrased to the witness, deposition questions may tend to elicit the impressions of counsel about the relative significance of the facts; opposing counsel is not entitled to his adversaries' thought processes"). In this case, the SEC's objections were not based on how the questions were phrased to the witness. The SEC simply did not want to provide testimony of any facts or information that may have ever been *thought about* by the SEC or the SEC's attorneys.

Further, "The courts have consistently held that the work product concept furnishes no shield against discovery, by interrogatories or by deposition, of the facts that the adverse party's lawyer has learned, or the person from whom he has learned such facts, or the existence or nonexistence of documents, even though the documents themselves may not be subject to discovery." 8 C. Wright & A. Miller, *Federal Practice & Procedure* § 2023, at 194 (1970) (footnote omitted).

The work product doctrine "does not protect the facts a Rule 30(b)(6) deponent is aware of that support a particular allegation in the corporation's answer." *Palma v. Metro PCS Wireless, Inc.*, No. 8:13-cv-698-T-33MAP, 2014 U.S. Dist. LEXIS 68034, at *4 (M.D. Fla. Apr. 30, 2014). *See Hickman v. Taylor*, 329 U.S. 495, 511, 67 S. Ct. 385, 91 L. Ed. 451 (1947) (finding that work product protection does not extend to facts the attorney has in his possession). Moreover, "Plaintiffs are permitted to ask Defendant's corporate representative about the facts Defendant relied upon to support its affirmative defenses, without inquiring about legal theory." *Palma v. Metro PCS Wireless, Inc.*, No. 8:13-cv-698-T-33MAP, 2014 U.S. Dist. LEXIS 68034, at *5 (M.D. Fla. Apr. 30, 2014).

"It seems fundamental that a defendant should be able to inquire into the facts upon which a plaintiff relies in support of its complaint." *A.R. v. Dudek*, No. 12-60460-CIV-ZLOCH/HUNT, 2015 U.S. Dist. LEXIS 6426, at *10 (S.D. Fla. Jan. 15, 2015). "[T]he argument that a lawyer would be involved in the preparation process is simply a truism which, if sufficient to preclude 30(b)(6) depositions, would eliminate that discovery tool." *Id.*

The fact that attorneys happen to assist with SEC investigations and that the SEC designated an attorney as its designee does not change the analysis. As specifically discussed by the Middle District regarding the very same privilege objections with an attorney deponent: "Plaintiff's counsel improperly instructed [the witness] not to answer on the basis of work product in response to questions that were facially aimed at eliciting factual information rather than [his] mental impressions or opinions." *FTC v. Vylah Tec LLC*, No. 2:17-cv-228-FtM-99MRM, 2018 U.S. Dist. LEXIS 223374, at *13 (M.D. Fla. Nov. 26, 2018).

The SEC knew or should have known that it was violating multiple rules of discovery by employing these disruptive tactics. The violations were willful.

Instructions Not to Answer

In the context of a Rule 30(b)(6) deposition, the court in *FTC v. Vylah Tec LLC*, No. 2:17-cv-228-FtM-99MRM, 2018 U.S. Dist. LEXIS 223374, at *11 (M.D. Fla. Nov. 26, 2018), explained that an "objection made at a deposition 'must be noted on the record, but the examination still proceeds' and that '[a] person may instruct a deponent not to answer only when necessary to preserve a privilege, to enforce a limitation ordered by the court, or to present a motion under Rule 30(d)(3).'" *FTC v. Vylah Tec LLC*, No. 2:17-cv-228-FtM-99MRM, 2018 U.S. Dist. LEXIS 223374, at *11 (M.D. Fla. Nov. 26, 2018).

"[I]t is well established in the Eleventh Circuit that the scope of a Rule 30(b)(6) deposition is not strictly confined to the topics set forth in the notice. Instead, courts have found that, while Rule 30(b)(6) was intended to give notice of the subject matter that the corporate representative must be prepared to discuss, any relevant question may still be asked of the deponent, who must answer if he or she knows the answer." *Christie v. Royal Caribbean Cruises, LTD*, No. 20-22439, 2021 U.S. Dist. LEXIS 129957, at *15 (S.D. Fla. July 13, 2021).

"If a 30(b)(6) deponent is asked a question thought to be outside the scope of a notice, Defendants should have briefly asserted their objection and allowed the deposition to proceed." *Christie v. Royal Caribbean Cruises, LTD*, No. 20-22439, 2021 U.S. Dist. LEXIS 129957, at *13 (S.D. Fla.

July 13, 2021) (citing *Siegmund v. Bian*, 2018 U.S. Dist. LEXIS 153313, 2018 WL 4293148, at *1 (S.D. Fla. Sept. 6, 2018).

> Defendants did so at various points but went much further by crossing the line into instructing the witness not to answer on relevance and form grounds. By doing so, they violated Rule 30 because there are only three circumstances where an attorney can instruct a witness not to answer a question and none of them apply to many of the questions at issue: (1) if the information contained in the answer is protected by a privilege, (2) to enforce a court order, or (3) to suspend a deposition for the purposes of filing a Rule 30(d)(3) motion related to improper harassing conduct.

Id.

"Counsel did the witness no favors by repeatedly instructing him not to answer those questions . . . ." *Buckley Towers Condo., Inc. v. QBE Ins. Corp.*, No. 07-22988-CIV-MORE, 2008 U.S. Dist. LEXIS 49305, at *31-32 (S.D. Fla. June 26, 2008). The proffered objections by The SEC's Lead-Counsel and the Second Corporate Representative's refusal to answer that the "document speaks for itself" was improper. "This is neither a valid objection nor a basis upon which counsel may instruct a witness not to answer." *See Collins v. Int'l Dairy Queen, Inc.*, No. CIV.A. 94-95-4MACWDO, 1998 U.S. Dist. LEXIS 8254, 1998 WL 293314, at *2 (M.D. Ga. June 4, 1998) ("With respect to relevant documents, it is not a valid objection in the deposition of a witness who has or may have some relevant knowledge concerning the document or its subject matter, that the document 'speaks for itself.' The questioning attorney ordinarily is entitled to inquire of a witness concerning his or her relevant knowledge concerning the contents and subject matter of a document").

Furthermore, the SEC did not immediately file a motion for protection following the deposition. "On this basis alone, any otherwise meritorious arguments to the questions posed during the deposition were thus waived." *Buckley Towers Condo., Inc. v. QBE Ins. Corp.*, No. 07-22988-CIV-MORE, 2008 U.S. Dist. LEXIS 49305, at *25-26 (S.D. Fla. June 26, 2008). "The record also shows that there was nothing about the questioning that could be deemed oppressive, harassing, or in bad faith. Rule 30(d)(4) could thus not have been used by counsel as a cover for improperly instructing the witness not to answer." *Id. See also Branca v. Sec. Ben. Life Ins. Co.*, 773 F.2d 1158, 1165 (11th Cir. 1985) (reversing with instructions to make factual findings regarding discovery violations where one party's counsel instructed a deponent not to answer questions).

The questions asked of both the First Corporate Representative and the Second Corporate Representative were germane to the facts of the case and what evidence could or would be used against the Defendants at trial. Therefore, the SEC's refusal to answer these relevant inquiries should not be countenanced.

Improper Speaking Objections

Additionally, the SEC's Lead Counsel's pervasive speaking objections and other attempts to frame or editorialize the testimony have tainted the testimony. "The rule further clarifies that testimony taken during a deposition is to be completely that of the deponent, not a version of the testimony which has been edited or glossed by the deponent's lawyer." *Christie v. Royal Caribbean Cruises, LTD*, No. 20-22439, 2021 U.S. Dist. LEXIS 129957, at *10 (S.D. Fla. July 13, 2021). "That is, a witness must be allowed to provide an answer to the best of his or her ability, free from any influence by the attorney. If a witness is confused about a question, or if a question seems awkward or vague to the witness, the witness may ask the deposing counsel to clarify the question." *Id.*

Ultimately, the Federal Rules of Civil Procedure "do not permit attorneys representing deponents to (1) coach the client by raising rhetoric-filled objections designed to feed the deponent information or advice; (2) answer the substantive questions themselves, before the deponent has provided an under-oath substantive response; and (3) instruct the deponent to not answer questions in the absence of a legitimate privilege objection or a Court-ordered limitation on the subject matter." *United States v. Tardon*, 493 F. Supp. 3d 1188, 1247 (S.D. Fla. 2020) (*citing United States v. Amodeo*, 916 F.3d 967, 972 (11th Cir. 2019)). *See also Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993).

Here, the SEC's Lead Counsel continually attempted to recalibrate the testimony of the deponent and used speaking objections and other asides to cause the deponent to give second versions of answers that were more in line with the SEC's Lead Counsel's theory than they were with the deponent's legitimate testimony. The SEC's conduct demonstrates a recalcitrance and disrespectful refusal to provide discovery. Therefore, dismissal of this case is an appropriate remedy. *Maus v. Ennis*, 513 F. App'x 872, 878 (11th Cir. 2013).

ii. Alternatively, Either Prohibiting the SEC From Supporting Its Claims or Striking the SEC's Pleadings Is Also an Appropriate Sanction

District courts "have broad discretion in imposing consequences for abusive discovery practices or for a failure to preserve the integrity of the discovery process." *Chappel v. Boss Rain Forest Pet Resort, INC.*, No. 16-62779-CIV-DIMITROULEAS/S, 2018 U.S. Dist. LEXIS 238512, at *2-3 (S.D. Fla. Jan. 29, 2018) (citing *Aztec Steel Co. v. Florida Steel Corp.*, 691 F.2d. 480, 482 (11th Cir., Nov. 4, 1982)).

As an initial matter, the SEC should not be permitted to brandish privileges as both a sword and a shield. *See McGahee v. Massey*, 667 F.2d 1357, 1362 (11th Cir. 1982) (finding that a "privilege cannot be invoked to oppose discovery and then tossed aside to support a party's

assertions"). When an abuse has occurred under this doctrine, it is appropriate to preclude the introduction of evidence previously withheld on privilege grounds. *See SEC v. Zimmerman*, 854 F. Supp. 896, 898-99 (N.D. Ga. 1993) (finding in favor of the SEC where it ironically expressed concern about withheld information by a defendant pursuant to an asserted privilege); *see also Sciarretta*, 778 F.3d at 1213 (noting that similar gotcha tactics can be likened to "the long-disallowed use of the Fifth Amendment as both a sword and a shield"). Therefore, the SEC should now be barred from presenting evidence in support of any matter where it asserted a privilege improperly.

Additionally, where the SEC was either unable or refused to answer a question, it should similarly be prohibited from changing their position and later supporting the claim. In *QBE Ins. Corp.*, the court found that the plaintiff should be sanctioned and precluded from offering any testimony at trial on the subjects which its designee was unable or unwilling to testify about at the 30(b)(6) deposition since the discovery deadline had expired, the plaintiff did not fulfill its obligation to properly prepare its own designee, the plaintiff waited until the corporate representative deposition began to give notice of its designee's inadequacy, and because its designee could have (but did not) review substantially more material in order to be a more-responsive witness. *Id.* at 681.

Furthermore, "[w]hen a corporation's designee legitimately lacks the ability to answer relevant questions on listed topics and the corporation cannot better prepare that witness or obtain an adequate substitute, then the "we-don't-know" response can be binding on the corporation and prohibit it from offering evidence at trial on those points." *Id.* at 690. "[T]he lack of knowledge answer is itself an answer which will bind the corporation at trial." *Id.* (citations omitted). This conclusion is "a variation on the rule and philosophy against trial by ambush." *Id.* "It would be patently unfair to permit [the responding party] to avoid providing a corporate deposition designee on certain topics…yet allow it to take a position at trial on those very same issues by producing testimony which [the requesting party] was unable to learn about during a pre-trial 30(b)(6) deposition." *Id.* at 681. "[S]trict adherence to discovery rules is necessary to prohibit not only trial by ambush, but discovery gaming wherein a party holds back evidence" *Kearney Partners Fund, LLC v. United States*, 946 F. Supp. 2d 1302, 1317-1318 (M.D. Fla. 2013) (excluding non-disclosed evidence based on prejudice); s*ee also Goodman-Gable-Gould Co. v. Tiara Condo. Assoc., Inc.*, 595 F.3d 1203 (11th Cir. 2010) (affirming exclusion of evidence of an unpled misrepresentation theory because it had not been disclosed).Based on the SEC improperly invoking a variety of privileges to avoid producing discovery and failure to answer any substantive questions about the claims against the Defendants, if the case is not involuntarily dismissed, the SEC should be prohibited from supporting its claims or its pleadings should be stricken.

IV. CONCLUSION

Based upon the foregoing, this matter should be outright dismissed. Alternatively, based on its improper objections, assertions of privilege, testified lack of knowledge, or refusal to disclose or identify evidence, the SEC should be prohibited from supporting or opposing a factual position and should be barred from presenting evidence on topics that it improperly refused to testify about.

REQUEST FOR HEARING

Movants respectfully request a hearing on this motion. This motion presents a complex web of factual and legal issues and Movants believe oral argument would help the court wade through these issues and evidence. Movants estimate 2-3 hours for oral argument would be sufficient.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been served upon all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing on this 17th day of September, 2021.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____/

DEFENDANTS' MOTION *IN LIMINE* TO EXCLUDE EXPERT TESTIMONY AND REPORT OF MELISSA DAVIS

Defendants, Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta respectfully move this Court to exclude the proffered expert testimony of Melissa Davis, pursuant to Fed. R. Evid. 402, 403, and 702, and, in support thereof, state as follows:

INTRODUCTION

Davis offered two opinions in her Expert Report, only the first of which is at issue in this Motion. This Court should exclude her opinion that the cash flow from Par Funding's Merchant Advances was not sufficient to pay promised investor returns and operational expenses. While she has the professional qualifications to serve as an expert in this case, her opinion is unreliable and would only mislead rather than assist the jury.

First, Davis's opinion is unreliable because—and there is no dispute on this point—she did not conduct her analysis under Generally Accepted Accounting Principles ("GAAP"). Davis "analyzed the cash activity of the Merchant Advances on an individual basis to determine their profitability." (*See* Exhibit A., Expert Report of Melissa Davis, ¶70.) However, GAAP makes clear that a cash flow analysis alone is not appropriate to determine a company's profitability, and that an accrual-based analysis is the only method of accurately assessing profitability. (*See* Exhibit B, Expert Rebuttal Report of Joel Glick, pp. 8, 20-21) (citing "U.S. GAAP" (Generally Accepted Accounting Principles)).

Davis attempts to remedy this dilemma by suggesting that her cash flow analysis "essentially marries the concepts of accrual based accounting and actual cash flow…" (Expert Report of Melissa Davis, ¶70.) But even this attempt to resuscitate her flawed opinion falls flat. In explaining why she undertook a cash analysis rather than an accrual-based analysis to assess profitability, Davis explained, "*if* the estimate of uncollectible Merchant Advances were understated, the accrual-based income as recorded in the financial statements is overstated...

because it would not account for the fact that Par Funding *had not yet collected* more than $419 million of its accounts receivable." (Id. ¶ 69.)

But there is no GAAP provision that supports Davis's historical cash flow methodology as a proxy for the collectability of Par Funding's as yet uncollected receivables. GAAP quite literally contradicts her rationale for using a cash-flow analysis:

> Accrual accounting depicts the effects of transactions, and other events and circumstances on a reporting entity's economic resources and claims in the periods in which those effects occur, **even if the resulting cash receipts and payments occur in a different period**. This is important because information about a reporting entity's economic resources and claims and changes in its economic resources and claims during a period **provides a better basis for assessing the entity's past and future performance than information solely about cash receipts and payments during that period.**[1][2]

In other words, GAAP contemplates the risks inherent in accrual-based accounting which Davis cites a justification for refusing to follow GAAP-based methodology, and still prefers it as the only accurate way of assessing a company's profitability. Davis conducted *no analysis* on an accrual basis to assess whether Par Funding estimate of uncollectible receivables is understated. Consequently, she offers no opinion explaining to what extent the estimate is understated, if it understated at all. She also offers no response to the fact that Par Funding's estimate for fiscal year 2017, which she also opines is understated, is in line with the recommendation of an auditor whose estimate she admits she did not analyze for accuracy. Moreover, Davis manages to undermine her own opinion by conceding that her "married" cash flow analysis is inapplicable to the receivables from 2019 and 2020 advances, which account for the vast majority of the

[1] Financial Accounting Standards Board **Conceptual Framework for Financial Reporting**, Chapter 1, The Objective of General Purpose Financial Reporting, and Chapter 3, Qualitative Characteristics of Useful Financial Information As Amended, August 2018 a replacement of FASB Concepts Statements No. 1 and No. 2.

[2] Davis testified at deposition that the Statement of Financial Accounting Concepts is guidance for GAAP accounting issued by FASB. (Davis Dep., pp. 135-136.)

receivables held by the company. Finally, in comparing the cash flow she expects the company to generate to promised investor returns and operational expenses, she "made no attempt to reconcile her view with real world events,"[3] including the revenue Par Funding would collect on new business and, just as importantly, the fact that maturity dates for the notes at issue in her opinion have largely been extended to April 2027. For these and other reasons set forth below, Davis's opinion should be excluded by the Court as speculative and unreliable.

MEMORANDUM OF LAW

I. APPLICABLE STANDARD

Federal Rule of Civil Procedure 702 allows "a witness qualified as an expert by knowledge, skill, experience, training, or education" to testify "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Civ. Pro. 702. The Supreme Court's decision in *Daubert v. Merrell Dow Phram., Inc.* "requires the trial court to act as a gatekeeper to ensure that speculative and unreliable opinions do not reach the jury." 509 U.S. 579 (1993).

> Expert testimony is admissible under Fed. R. Evid. 702 only if:
> (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> (b) the testimony is based on sufficient facts or data;
> (c) the testimony is the product of reliable principles and methods; and
> (d) the witness has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. *Daubert v. Merrell Dow Pharms.*, 509 U.S. 579 (1993), requires district courts to act as "gatekeepers" to ensure expert opinions are reliable and relevant. *Rink v. Cheminova, Inc.*, 400 F.3d 1286, 1291 (11th Cir. 2005); *see also Hendrix, ex rel. G.P. v. Evenflo Co.*, 609 F.3d 1138, 1194 (11th Cir. 2010) (describing a "rigorous three-part inquiry"). "The burden of laying the

[3] *Comm. of Unsecured Creditors v. Motorola, Inc. (In re Iridium Operating LLC)*, 373 B.R. 283, 350 (Bankr. S.D.N.Y. 2007).

proper foundation for the admission of the expert testimony is on the party offering the expert, and admissibility must be shown by a preponderance of the evidence." *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1306 (11th Cir. 1999) (citing *Daubert*, 509 U.S. at 592 n. 10).

"Even if a witness is qualified as an expert regarding a particular issue, the process used by the witness in forming his expert opinion must be sufficiently reliable under *Daubert* and its progeny." *In re BankAtlantic Bancorp, Inc. Sec. Litig.*, No. 07-61542-CIV, 2010 U.S. Dist. LEXIS 143162, at *8 (S.D. Fla. Aug. 31, 2010) (citing *Quiet Tech. DC-8, Inc. v. Hurel-Dubois UK Ltd.*, 326 F.3d 1333, 1342 (11th Cir. 2003) (stating that "one may be considered an expert but still offer unreliable testimony"). While the Defendants do not dispute that Davis has the proper educational and professional pedigree, the processes and methods she used in forming her opinions are clearly unreliable under *Daubert* and its progeny.

II. DAVIS'S EXPERT OPINION SHOULD BE EXCLUDED BECAUSE IT DOES NOT COMPLY WITH GAAP.

"The ASC [Accounting Standards Codification] is the "source of authoritative" Generally Accepted Accounting Principles ("GAAP") published by the Financial Accounting Standards Board ("FASB"). *In re Perrigo Co. PLC Sec. Litig.*, No. 19cv70 (DLC), 2021 U.S. Dist. LEXIS 131766, at *1 n.1 (S.D.N.Y. July 11, 2021) (citing Financial Accounting Standards Board, Accounting Standards Codification: About the Codification 4 (Dec. 2014), https://asc.fasb.org/imageRoot/71/58741171.pdf.). *Frymire-Brinati v. KPMG Peat Marwick*, 2 F.3d 183, 186-187 (7th Cir. 1993) (trial court should not have admitted expert valuation that relied on discounted cash flow analysis which was not GAAP compliant); *MSC Software Corp v. Altair Engineering, Inc.*, 2014 WL 6485492, *9 (E.D. Mich. Nov. 13, 2014) (excluding expert report and opinion as unreliable under F.R.E. 702 as it cites no authority, no GAAP, other standards or articles"); *ABS Glob., Inc. v. Inguran, LLC*, 2015 WL 1486647, at *4 (W.D. Wis. 2015) (expert

analysis "appears to be indefensible under any meaningful cost of goods sold calculation, much less GAAP.")

During a December 15, 2020 status hearing, this Court wrestled with the notion that Defendants so vehemently disagreed with the DSI Report authored by Bradley Sharp, which suggested, as Davis has, that the cash flow from Par Funding's Merchant Advances was not sufficient to pay the promised investor returns and operational expenses: "One of the issues I am having is I -- if this is a methodology problem, if this is -- you know, this isn't a dispute over GAAP principles, this is -- I mean, to me as far as I can tell from Mr. Sharp, this is all well-rooted in verifiable numbers…" (*See* Exhibit C, Dec. 15. 2020 Status Hrg., p. 37.) The Court's view of the issue at the core of this disagreement was prescient. This is a methodology problem, and there is no dispute that GAAP principles should be applied in any reliable assessment of Par Funding's profitability.

Only the Defendants have offered this Court what it requested: a GAAP compliant assessment well-rooted in what the parties agree are verifiable numbers. Davis has chosen to conduct a cash flow analysis to assess Par Funding's profitability. (*See* Exhibit D, Deposition of Melissa Davis, at pp. 77-78, 150-151). Davis's chosen methodology is one that the *Receiver agreed was improper* after reviewing Joel Glick's first declaration, which used an accrual-based methodology:

> **A. GAAP Profitability Analysis.** The Glick Declaration accurately stated that an analysis of the profitability of Par Funding should be performed in accordance with U.S. Generally Accepted Accounting Principles ("GAAP").

(D.E. 577, p.15). Davis' use of a cash-flow based assessment of Par Funding's profitability is particularly galling given that Par kept its books on a GAAP basis and, according to Davis herself, intended to recognize revenue on a GAAP compliant basis. (*Id.*, p. 73).

Not surprisingly, when asked during her deposition to point the undersigned to a GAAP provision that supported her use of a cash flow analysis to assess a company's profitability, despite multiple opportunities, Davis was unable to do so. (Davis Dep., pp. 152-154.)[4] It seems clear that in suggesting that her cash-based analysis "marries" to the GAAP approved accrual-based analysis, Davis was attempting to lend credibility to a methodology lacking in the same. But even this attempt falls short because Davis acknowledged that her cash-flow methodology only "marries" to an accrual-based methodology so long as the collection cycle applicable to the receivables she analyzed were complete. (*Id.*, pp. 143-144.) And this is where her theory completely falls apart.

First, Davis admits that the collection cycle would not even be complete for receivables stemming from merchant advances made in late 2019 and 2020. (*Id.*, p. 144.) In other words, Davis admits that her historical cash-flow assessment does not "marry" to the more reliable accrual-based assessment for those receivables. Second, while Davis relies on a collection cycle of 120 days, she admits that she did nothing to actually calculate the collection cycles for the actual transactions at issue in her opinion:

> Ms. Berlin: Ms. Davis, earlier in your testimony, you referenced the collections cycle. I wonder if -- is -- did you calculate the collections cycle for the -- each of the transactions -- for the transactions?
> Ms. Davis: *So the collections cycle is not something that I calculated, so no, I did not calculate that*.

(*Id.*, p. 288-289). Instead, Davis simply estimated the collection cycle at 120 days, even though "some of them could have been longer." (*Id.*) And Davis's own exhibits demonstrate a much longer collection cycle:

> Mr. Soto: Okay. And there are various other examples in your chart that suggest that Par Funding *continued to collect on advances made over a course of years*, correct?

[4] And there is no GAAP provision that that references a "marriage" of cash and accrual methodologies, or one that supports a backwards looking cash flow analysis as equally reliable for purposes of assessing the collectability of uncollected receivables.

Ms. Davis: Agreed.

(*Id.*, p. 146). In other words, Davis did nothing to calculate the collection cycles applicable to the receivables at issue here. She did not examine the appropriate collection cycle for receivables in the industry. She did not rely on any guidance. She simply decided on a period of 120 days, which happens to be at odds with the actual, years-long collection cycles in her own report.

Not surprisingly, Davis's dartboard approach yields results that find no support in reality. Par Funding's former controller, James Klenk, himself a CPA, testified that the collection cycle for Par Funding's merchant cash advance receivables can sometimes exceed two years:

> Mr. Futerfas: And *did there come a point in 2018 when you knew the actual default losses for 2017*?
> Mr. Klenk: I'm sorry. You're saying the *actual losses* for '17?
> Mr. Futerfas: Yes.
> Mr. Klenk: Friedman [Par Funding's auditor] provided their estimate what the losses -- the adjustment for the losses.
> Mr. Futerfas: Okay, and… you testified that before that that's an estimate. Correct?
> Mr. Klenk: It was still an estimate [in 2018] because we had outstanding AR [Accounts Receivable] from 2017 that was not collected."
>
> ***
>
> Mr. Futerfas: Well, let me ask you this, *by 2019, did you have actual loss in numbers for 2017*?
> Mr. Klenk: "*No, because a number of those deals were still outstanding*."

(*See* Exhibit E, Deposition of James Klenk, pp. 69-70) (emphasis added). Klenk's testimony makes clear that actual loss numbers based on cash collected could not be computed in 2019 for merchant cash advances made in 2017 because they were still collecting cash on those deals. In other words, the collection cycle on those deals was still not complete even after two years. Because Davis's cash-flow methodology only works if the collection cycle applicable to the receivables she analyzed is "complete," (*id.*, pp. 143-144), and that cycle can continue for years, her methodology at a minimum is not applicable to receivables for such advances made in *all of*

2019 and 2020, because, as Mr. Klenk testified, those deals are still outstanding.[5] In Davis's chart, the deals in 2019 and 2020 alone account for $180,300,390 and $166,389,580, respectively, for a total of $346,689.970 of "active AR." (*See* Exhibit A, Davis Expert Report, at Exhibit J). In other words, her methodology is unreliable with respect to the vast majority of the "active AR," because those deals are still outstanding.

ABS illustrates why Davis' methodology is unreliable. There, Defendants sought to exclude the lost profits opinion of plaintiffs' damages expert because his analysis violated GAAP accounting methods. *See ABS*, 2015 WL 1486647, at *7-8. Defendants argued that the expert's decision to exclude certain fixed costs from his analysis, which did not "follow GAAP." *Id.* The court held that the expert's justification for excluding fixed costs "*appears to be indefensible under any meaningful cost of goods sold calculation, much less GAAP*." *Id.* The court reserved ruling before deciding to exclude the expert's "flawed approach," but only to consider whether it might be possible to have him recalculate his numbers to comport with GAAP. *Id.* That, of course isn't possible here, because first, collections ceased for 2019 and 2020 receivables after the Receiver took over the business and, second, the collection cycles for those receivables still would not be complete anyway.

The problems with Davis's methodology, however, do not end there. Davis's objection to the use of an accrual-based assessment of Par Funding's receivables stems from her concern that the "accrual-based income has not been collected yet," and, based on her historical cash flow

[5] It may be that Davis' inexperience dealing with merchant cash advance businesses has contributed to her flawed approach here: Q: "You've never assessed the accuracy of credit loss provisions for an MCA business, correct? A: "… I -- *I think that is correct*. There have been some engagements that I've worked on, you know, involving MCA, you know, companies, *but in terms of specifically evaluating the terminology that you used, evaluating their credit loss provision, you know, from a GAAP perspective, I don't think that's something I've done in those projects*." (Id. p. 114).

methodology, may not be collected. (*Id.* p. 137; 140-141, 144.) However, this is true of every business, such as Par Funding, which keeps its books an accrual basis in compliance with GAAP, which means that the cash-flow methodology rejected by GAAP would be the only method available for companies that keep their books on an accrual-basis—an absurd result.

Second, among the credit loss estimates Davis believes is understated is fiscal year 2017. (*Id.*, p. 137.) The problem with her opinion is that Par recorded a credit loss for 2017 that agrees with the estimate of its auditor, Friedman & Associates. In 2018, the Friedman firm prepared a version of Par's Funding's 2017 financial statement that was presented in accordance with GAAP, including a factoring loss of $20,293,950 million. (*Id.*, p. 80.) Davis agreed that the factoring loss figure Par Funding recorded for 2017, $20,580,713, was in line with (and actually exceeded) the number recommended by Friedman. (*Id.*, pp. 121-122.) Moreover, Davis conceded that she had no basis to disagree with the Friedman estimate because she never conducted an independent estimate of her own. (*Id.*, p. 81).[6] *See In re Iridium*, 373 B.R. at 348 (Bankr. S.D.N.Y. 2007) ("thorough analysis by an independent accounting firm of the projections that affirm their validity is an indicator of reasonableness.") Friedman's independent analysis of Par Funding's estimate of credit losses is the very indicator of reasonableness contemplated by the *Iridium* court and clearly undermines the reliability of Davis's opinion. This is yet another reason for this Court to reject Davis's opinion that Par Funding's credit losses were understated.

Finally, Davis's opinion should be excluded because it fails to account for "real world events." *In re Iridium*, 373 B.R. at 350 (Bankr. S.D.N.Y. 2007). In assessing whether the cash flow from Par Funding's Merchant Advances was sufficient to pay promised investor returns and operational expenses, Davis simply compared the amount of account receivables available as of

[6] Davis, in fact, admitted that she never conducted an accrual-based assessment of the appropriate credit loss estimates for any of the years she now takes issue with. (*Id.*, pp. 77-78).

July 27, 2020 to the amount owed to investors and joint funders as of the same date. (Davis Dep., p. 287). Davis admitted that she "did not consider future business operations," or "the dates that the payments were due to the investors or joint funders." (*Id.*) There is no reference to the fact that 88% of the noteholders agreed to renegotiate the terms of their notes, dropping the interest rate to 5% and extending maturity to April 2027 on a back-weighted basis. (*See* Expert Rebuttal Report of Joel Glick, p. 23.) Davis simply ignores these real-world events, admitting that she was not even aware when the debt she claims Par Funding could not pay was due. (*Id.*, p. 279.) *See In re Iridium*, 373 B.R. at 350 (Bankr. S.D.N.Y. 2007) (expert opinion is unreliable when the expert fails to acknowledge and account for real world events); *Zenith Elecs. Corp. v. WH-TV Broadcasting Corp.*, 395 F.3d 416, 418 (7th Cir. 2005) ("failure to look at facts even for a reality check means that an expert lacks sufficient facts and renders his opinion unreliable.") For these reasons as well, Davis's opinion should be excluded as unreliable.

CONCLUSION

WHEREFORE, the Defendant, Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta respectfully request that this Court grant the Motion and exclude the proffered expert testimony of Melissa Davis, and for such other and further relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed on the Court's CM/ECF system which will serve a copy on all counsel of record via notices of electronic filing.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.

JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Pursuant to Federal Rule of Civil Procedure 56, Defendants Joseph W. LaForte, Lisa McElhone, and Joseph Cole Barleta (collectively referred to as "Defendants") move for partial summary judgment on the following undisputed issues of fact.

INTRODUCTION

Despite this case being pending for over a year, there is no more evidence about Par's alleged misrepresentations today than when this case was filed. Contrary to the SEC's dubious allegations, there is no genuine issue of material fact that Par was a profitable business that adequately disclosed material information to investors such as the disclosures, merchant default rate, Par's underwriting, the purchase of insurance, and the legality of the merchant cash advances. Having completed discovery, and the evidence crystalized on those points, Pursuant to Federal Rule of Civil Procedure 56 Defendants Joseph W. LaForte, Lisa McElhone, and Joseph Cole Barleta (collectively referred to as "Defendants") move for partial summary judgment on the following undisputed issues.

MEMORANDUM OF LAW

I. Summary Judgment Standard

Summary judgment is proper if the record shows that "there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." *See* Fed. R. Civ. P. 56(a). This Circuit holds that "a court should grant summary judgment when, 'after an adequate time for discovery, a party fails to make a showing sufficient to establish the existence of an essential element of that party's case.'" *Mann v. Taser Int'l, Inc.*, 588 F.3d 1291, 1303 (11th Cir. 2009) (citing to *Nolen v. Boca Raton Community Hosp., Inc.*, 373 F.3d 1151, 1154 (11th Cir. 2004).

II. ARGUMENT

A. Defendants are Entitled to Partial Summary Judgment on Section 10(b) of the Exchange Act, SEC Rule 10b-5, and Section 17(a) of the Securities Act.

To establish a violation of Section 10(b) and 10b-5 thereunder, the SEC bears the burden of proving that Defendants made "(1) material misrepresentations or materially misleading omissions, (2) in connection with the purchase or sale of securities," and that they "(3) made [them] with scienter." *SEC v. Merch. Capital LLC*, 483 F.3d 747, 766 (11th Cir. 2007) (citing *Aaron v. SEC*, 446 U.S. 680, 695 (1980)).

Similarly, to establish a violation under Section 17(a)(1), "the SEC must prove (1) material misrepresentations or materially misleading omissions, (2) in the offer or sale of securities, (3) made with scienter." *Id.* This Circuit also permits the SEC to establish scienter under Section 17(a)(1) with either a

showing of an "intent to deceive, manipulate or defraud," or "severe recklessness."[1] *See Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1238 (11th Cir. 2008). Under Section 17(a)(2) and (3), the SEC may establish these violations through a showing of negligence. *Id.*

After a year of investigation and discovery, the SEC lacks factual support for many of their core allegations. Accordingly, as discussed below, partial summary judgment in favor of Defendants is warranted.

1. The SEC Cannot Establish That Defendants Made a Materially Misleading Omission Regarding the Cease-and-Desist Orders Issued by Pennsylvania and New Jersey.

The SEC contends that Defendants violated Section 10(b) and Rule 10b-5 thereunder of the Exchange Act as well as Section 17(a) of the Securities Act because Par intentionally "concealed three Cease-and-Desist Orders state securities regulators have entered against Par Funding for violating state securities laws." (DE 119) (Am. Compl., ¶¶ 8, 220-232.) First, the SEC must prove—and they cannot—that the omission is tied to and renders materially misleading a representation made in connection with the offer or sale of a security. An omission is material for purposes of a securities fraud claim if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988). Here, the SEC's theory is that Defendants' statements touting Par Funding's success as a profitable cash advance company are made materially misleading by omission because they failed to disclose that Par Funding "has twice been sanctioned for violating the securities laws." (DE 119) (Am. Compl., ¶ 227.) Simply put, the SEC has failed to present any evidence that Par Funding's regulatory history has any connection to or impact on its financial performance. *See e.g.*, *Fries v. Oil & Gas, Inc.*, 285 F. Supp. 3d 706, 719 (S.D.N.Y. 2018).

Second, the SEC cannot prove Defendants acted with scienter. There is no evidence that Defendants knew or had reason to know that they had to disclose the Pennsylvania or New Jersey Orders to investors. Par Funding hired Phillip Rutledge, a lawyer with over 25 years of experience in the areas of securities enforcement and litigation, to counsel them on several matters, the first of which was to respond to the Pennsylvania Securities Regulator's investigation into the company's use of finders to sell promissory notes. *See* Exhibit 1, Rutledge Dep., Tr. at Vol. I, 12-14. Rutledge was aware when he counseled Par Funding regarding the Pennsylvania investigation that Par Funding was continuing to sell

[1] The Eleventh Circuit, however, limits severe recklessness as follows: "scienter may be established by a showing of knowing misconduct or severe recklessness. Proof of recklessness requires a showing that the defendant's conduct was an *extreme departure of the standards of ordinary care*, which presents a danger of misleading buyers or sellers that is either known to the defendant or is so obvious that the actor must have been aware of it." *Id.* at 1238 (emphasis added).

notes. *See* Exhibit 2, Rutledge Dep., Tr. *a*t Vol. II, 192:16-193; 250:16-251:9, Dep. Ex. 126, 127. Rutledge, in fact, provided advice to Par Funding regarding their new plan to sell notes to Agent Funds and drafted a new note purchase agreement for them to sell notes to the Agent Funds. *Id.* at 215-218, Dep. Ex. 128. Given Rutledge's role as Par Funding's securities lawyer, his involvement in the resolution of the Pennsylvania investigation, and his knowledge of (and involvement in) Par's intention to sell notes to the Agent Funds *after* the Pennsylvania action was resolved, Defendants had no reason to believe that they needed to disclose the Pennsylvania Order to the Agent Funds. *See Howard v. SEC,* 376 F.3d 1136, 1147 (D.C. Cir. 2004) ("[R]eliance on the advice of counsel need not be a formal defense; it is simply evidence of good faith, a relevant consideration in evaluating a defendant's scienter"); *In the Matter of Donald F. Lathen, et al.*, Release No. 1161, 117 S.E.C. Docket 1733, 2017 WL 3530992 (August 17, 2017), *decision made final at* Release No. 4804, S.E.C. Docket 4103, 2017 WL 11367918 (November 2, 2017) (respondent accused by the SEC of failing to make disclosures acted without scienter because "[his lawyer] never told him to provide additional disclosures to the issuers, and [ ] "he understood [his lawyer] would have told him to do so if necessary.").

In fact, Rutledge's advice to Defendants was that the Pennsylvania Order was public. *See* Exhibit 2, Rutledge Dep., Tr. at Vol. II, 170:20-171:12, Dep. Ex. 132. It would have been illogical for Defendants to attempt to conceal an order that is public. Moreover, as discussed below, Rutledge repeatedly advised Cole that Defendants had no duty to make disclosures to their accredited investors. Given this, and the fact that Defendants relied on Rutledge to tell them what they needed to do in connection with their continued sale of the notes after he helped them resolve the Pennsylvania investigation, there is no issue of fact that Defendants could not have acted with scienter with respect to the need to disclose the Pennsylvania and NJ Orders. Finally, it is undisputed that Defendants, when directed to do so, by Rutledge, disclosed the fact of the Pennsylvania, New Jersey and Texas investigations and Orders to the Exchange Note investors. This again is inconsistent with the SEC's theory that they intended to conceal these facts from investors. (DE 119) (Am. Compl., ¶¶ 8, 220-232.)

2. The SEC Cannot Establish That Defendants Engaged in a Scheme to Defraud Pennsylvania Securities Regulators.

The SEC contends that Defendants engaged in a scheme to deceive Pennsylvania Securities Regulators that Par Funding was no longer paying commissions to find investors. (DE 119) (Am. Compl., ¶¶ 62-69.) Here, the SEC's theory is that Defendants sought to deceive Pennsylvania Securities Regulators after learning that Par Funding was under investigation for violating securities laws through its use of unregistered agents. *Id.* at ¶ 62. For starters, the SEC's own exhibits prove that Defendant Vagnozzi, and not Defendants, "proposed this structure in 2016 and 2017," well before Defendants first

learned about the Pennsylvania investigation in January 2018. *See* DE 14, SEC's Motion for Preliminary Injunction, at 18 n.146. This is inconsistent with the SEC's theory that Defendants conceived this idea to deceive Pennsylvania Regulators. Moreover, Defendants understood that Vagnozzi sought advice of counsel with respect to the use of Agent Funds. Defendants believed that Vagnozzi's lawyer, John Pauciulo, reviewed and approved of Vagnozzi's creation of the Agent Fund structure. They could not have intended to violate the law using a structure approved by Vagnozzi's lawyer.

Second, Defendants sought legal advice from their own securities attorney, Phillip Rutledge, with respect to their decision to sell notes to the Agent Funds. Par Funding hired Rutledge in January 2018 to respond to a subpoena issued by Pennsylvania Securities Regulators involving Par Funding's payment of commissions to finders to sell their promissory notes. It is undisputed that Rutledge was aware *before he resolved the Pennsylvania investigation* that Par Funding had pivoted to the sale of its notes to Agent Funds. *See* Exhibit 2, Rutledge Depo., Tr. at Vol. II, 238-239, Dep. Ex. 136. Rutledge, in fact, drafted the new note purchase agreement for Par Funding knowing that they planned to use it to sell notes to the agent Funds. *Id.* at 215-218, Dep. Ex. 128. During Rutledge's negotiations with the Pennsylvania Securities Regulators, Par Funding's then general counsel asked Rutledge to disclose as much as possible to the regulators about their new structure—the sale of notes to Agent Funds—in order to assure themselves that they were in compliance *Id.* at 269-276, 279. Rutledge advised them that asking regulators for this assurance was not practical, and instead opted to include language of his own choosing in the final settlement letter to regulators. *Id.* at 270:11-271:2, Ex. 136. These undisputed facts are wholly inconsistent with a finding that Defendants intended to mislead Pennsylvania regulators.

3. The SEC Cannot Establish That Defendants Made False or Misleading Representations Regarding Par Funding's Default Rate.

The SEC alleges that Defendants' representations about the default rate were "false and misleading" and that "Par Funding has filed more than 2,000 collection lawsuits against small borrowers for defaulting on the Loans Par Funding made to them." (DE 119) (Am. Comp. at ¶¶ 192–93.) The SEC alleges as a result of these lawsuits that Par Funding's default rate was actually higher than what Defendants represented to investors. (DE 119) (Am. Compl., at ¶ 194.)

i. Par Funding's Default Rate Is Accurate and Not Misleading.

It is undisputed that Par Funding's default rate was accurately represented to investors as between 1-2%. The SEC cannot demonstrate that Par Funding's method of calculating the default rate was inaccurate. Instead, the record demonstrates that the default rate, as defined in oral and written disclosures, was correct.

It is undisputed that Par Funding prepared a Funding Analysis Report that contained detailed

information regarding Par Funding's merchant deals, including how Par Funding calculated the default rate. *See* Exhibit 3, CBSG Funding Analysis, at n.4 and 5. Defendants provided noteholders with the Funding Analysis Report before they invested and continued to distribute the report every month to investors. *See* Exhibit 4, Cole Dep. Tr. at 111:3-7, 127; Exhibit 5, (emails of Cole sending out KPI Report); Exhibit 6, Declaration of Dan Cistone, at ¶¶ 5, 8; Exhibit 7, Declaration of Dilip Lamaye, at ¶ 5; Exhibit 8, Declaration of Jose Alves, at ¶¶ 5, 9; Exhibit 9, Declaration of Steve Wittmer, at ¶ 5.

Consistent with the written disclosures found in the Funding Analysis Report, this methodology was often explained at length to investors. *See* Exhibit 4, Cole Dep. Tr. at 151:22-25, 152:11-14, 154:15-16 ("the operative word there is always 'cash over cash losses'"); Exhibit 9, Declaration of Steve Wittmer, at ¶ 6. Defendants made sure to inform investors that the default rate was based on a cash-over-cash analysis:

> The exposure percentage is a dynamic number that's calculated each month. It reflects the cash-over-cash exposure for deals that were written off for that respective period of time in proportion to the amount of funding for that respective period of time.

See Exhibit 4, Cole Dep. Tr. at 152-54; Exhibit 10, Perry Abbonizio Depo. Tr. at 177:2-180:5; *see also id.* at 181:5-10 ("I typically would put it that we have a 1.2 percent cash on cash default rate.").

Not only was the method of calculation disclosed to investors, but the percentage derived from the calculation was accurate. Defendants' expert performed the same calculation as conducted by Par Funding and verified the numbers. *See* Exhibit 11, Second Declaration of Joel Glick, ¶ 19, Table 1; Exhibit 12, Glick Dep. Tr. at 222:6-13 (explaining that the default rate is based on a "cash over cash determination").

The only evidence the SEC points to support its position that the default rate was misleading is its contention that Par Funding should have based its default rate on the amount of money actually wired out and not just the total amount that was approved to be funded. Exhibit 13, Davis, Expert Report at ¶ 65(a)(i). As a result, the SEC contends that the Wire Total, the denominator in the calculation, was "overstated." *See* Exhibit 14, Klenk Dep. Tr. Vol II at 260:20-24; Exhibit 13, Davis, Expert Report at ¶ 65(a)(i). Notably, however, neither James Klenk nor the SEC's expert performed *any* analysis to determine whether the exposure percentage would be materially different if Par Funding used only the amounts that were wired out. Only the Defendants' expert performed that analysis.

Glick, Defendants' forensic accountant, concluded that even if Par Funding had performed the calculation based on the actual amounts wired out rather than the amount represented by the contractual

agreement, the exposure percentage would have only changed from 1.16% to 1.19%.[2] *See* Exhibit 11, Second Declaration of Joel Glick, ¶¶ 19-24 ("KPI Analysis"). In other words, the exposure percentage rounded to the nearest hundredth, as was originally represented in the KPI, *would not have changed at all. Id.*

The SEC cannot point to any contrary evidence. The SEC's own expert did not come up with her own calculation. The only thing the expert did was make a conclusory statement that the default rate was wrong, without proving it. *See SEC v. Shanahan*, 646 F.3d 536, 543 (8th Cir. 2011) (finding that the SEC's evidence with respect to materiality was deficient because its sole witness only presented a circular reasoning as to the importance of the disclosure); *Haft v. Eastland Fin. Corp.*, 755 F. Supp 1123, 1131 (D.R.I. 1991) (rejecting plaintiff's allegation that "because the loan loss reserves were 'inadequate' the defendant's earnings were overstated").

Instead, the SEC attempts to deflect the Court's attention to its preferred methodology to determine the default rate, but this is wholly improper. The SEC must examine what has been explicitly conveyed to investors in the manner that it has been conveyed. *See SEC v. Revolutions Med. Corp.*, No. 1:12-CV-3298, 2015 WL 11199068, at *15 (N.D. Ga. Apr. 3, 2015) (granting summary judgment for defendants because the statement within the press release was factually true and did not include the additional language the SEC sought); *Hoffman v. UBS-AG*, 591 F. Supp. 2d 522, 535 (S.D.N.Y. 2008) (explaining "this conclusion runs contrary to the basic requirement of Rule 10b–5, which holds parties liable for misleading statements, not merely incomplete statements . . . Defendants cannot be held liable given that their statements did not affirmatively create an impression that was materially different from the truth) (internal citations omitted).

The record shows that Defendants disseminated to investors the Funding Analysis Report that defines that default rate and explained to investors how the default rate was calculated. *See* Exhibit 4, Cole Dep. Tr. at 111:3-7, 127:14-25, 152-154; Ex. 5, June 10, 2019 email from Cole to undisclosed recipients (investors); Exhibit 10, Abbonizio Dep. Tr. at 177-78; Exhibit 6, Declaration of Dan Cistone, at ¶ 5. Defendants' expert demonstrated that the default rate was accurate, and the SEC has not pointed to any evidence to the contrary. *See* Exhibit 11, Second Declaration of Joel Glick, ¶ 19, Table 1. This means that each time the Defendants represented that the default rate ranged from 1% to 2%, it was true.

ii. **The SEC Cannot Meet Its Burden to Show That the Alleged Misrepresentations About the Default Rate Were Material.**

For a statement to be material, the SEC needs to establish that there was a "substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having

[2] A close review of the Funding Analysis Report also shows that some months, the exposure percentage was less than 1%.

significantly altered the 'total mix' of information made available." *See Basic v. Levinson*, 485 U.S. 224, 231–32 (1988).

It is undisputed that the "total mix" of information investors had at their disposal during the relevant period included the Funding Analysis Report. *See* Exhibit 6, Declaration of Dan Cistone, at ¶ 5. It is undisputed that investors received the Funding Analysis Report prior to investing and every month thereafter without fail. *See* Exhibit 4, Cole Dep. Tr. at 111:3-7, 127; Ex. 15, June 10, 2019 email from Cole to undisclosed recipients (investors); Exhibit 6, Declaration of Dan Cistone, at ¶¶ 5, 8; Exhibit 7, Declaration of Dilip Lamaye, at ¶ 5; Exhibit 8, Declaration of Jose Alves, at ¶¶ 5, 9; Exhibit 9, Declaration of Steve Wittmer, at ¶ 5. There cannot be any genuine issue of material fact as to this point when the Funding Analysis Report defined exactly how the default rate would be calculated. *See Drucker v. Just for Feet Inc.*, CV 97-B-1578-S, 2000 WL 36733071, at *4 (N.D. Ala. Sept. 29, 2000) (finding no securities law violation where defendant accurately disclosed the company's challenged method of accounting and its financial results based on the accurately disclosed accounting methodology) (collecting cases).

The SEC's own evidence demonstrates that Par Funding fully disclosed the methodology used to calculate the default rate to their investors. For example, the Funding Analysis Report used by Defendant Perry Abbonizio explained that the default rate "reflects the proportion of cash losses under Bad Debt Exposure in proportion to new capital being funded." *See* Exhibit 15, at 28, n.4. Mr. Abbonizio disseminated this report to investors, including Dean Vagnozzi. *Id.* There cannot be a claim as to any contrary understanding when the Funding Analysis Report explains the exact manner the default rate is being calculated. *See Acme Propane, Inc. v. Tenexco, Inc.,* 844 F.2d 1317, 1322 (7th Cir.1988) ("A seller who fully discloses all material information in writing should be secure in the knowledge that it has done what the law requires.").

Additionally, there is no record evidence of any representation from the Defendants stating that the default was anything but what is described in the Funding Analysis Report. *See* Exhibit 4, Cole Dep. Tr. at 151:22-25, 152:11-14, 154:15-16 ("the operative word there is always 'cash over cash losses'"); Exhibit 10, Abbonizio Dep. Tr. at 177:2-180:5; *see also id.* at Procedure Letter1:5-10 ("I typically would put it that we have a 1.2 percent cash on cash default rate.").

The SEC contends the Defendants statements were misleading as to a material fact because the default rate should have been computed based on the actual amounts wired out instead of the amount contracted to be advanced. Exhibit 13, Davis Expert Report at ¶ 65(a)(i). Defendants' expert calculated the difference between these two approaches and found that the default rate would have changed from 1.19% to 1.16%, respectively, an immaterial difference. *See SEC v. Shanahan*, 646 F.3d 536, 543 (8th Cir. 2011); *In re Friedman's Inc. Sec. Litigation*., 385 F. Supp. 2d 1345, 1359 (N.D. Ga. 2005) (citation omitted)

("Conversely, a fact is immaterial where a reasonable investor could not have been swayed by the misrepresentation.").

A difference of .03% would not have swayed a reasonable investor. *See Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 546–47 (8th Cir. 1997) (misstatement of 6.8 million, which only amounted to two percent of company assets, was immaterial as a matter of law because, "alleged misrepresentations may also present or conceal such insignificant data that, in the total mix of information, it simply would not matter to a reasonable investor."); *Shanahan*, 646 F.3d at 543 (finding that the SEC's evidence as to materiality was deficient and "non-existent").[3]

The undisputed evidence belies any argument that there was a substantial likelihood that the difference between the calculation as performed with the contractual amount and the calculation as performed with the actual amount funded was material and altered the "total mix of information." *Hoffman v. UBS-AG*, 591 F. Supp. 2d 522, 533–36 (S.D.N.Y. 2008) (additional one percent fee paid to securities brokers was so small as to be not material as a matter of law).

iii. The SEC Has Failed to Show That Defendants Acted with the Requisite Level of Scienter to Establish a Violation Under Section 10(b) and 17(a) Claim.

The SEC's Section 10(b) and Section 17(a) claims as to Par Funding's default rate also fail for lack of scienter. The SEC must show that Defendants made materially misleading statements with scienter. *SEC v. Merch. Capital*, 483 F.3d 747, 766 (11th Cir. 2007). In *Aaron v. SEC,* the Supreme Court held that Section 17(a) "plainly evinces an intent on the part of Congress to proscribe *only knowing or intentional misconduct.*" 446 U.S. 680, 696 (1980) (emphasis added). Scienter may also be established with a showing severe recklessness, which the Eleventh Circuit defines as an "extreme departure from the standards of ordinary care." *Merch. Capital*, 483 F.3d at 766.

The SEC cannot point to any evidence establishing that Defendants acted with the intent to deceive. *See Rebel Enterprises, Inc. v. Prudential-Bache Sec., Inc.*, 959 F.2d 245 (10th Cir. 1992) (finding that the district court correctly granted defendants' motion for summary judgment as to scienter because the plaintiff failed to present affirmative evidence to show that defendants acted with scienter). There is no evidence that the Defendants intentionally manipulated the exposure percentage to defraud investors.

Instead, the evidence shows that Defendants worked alongside professional accountants to implement the policies and procedures that are at issue in this litigation. *See* Exhibit 4, Cole Dep. Tr. at

[3] In *SEC v. Shanahan*, the Court found that the "SEC's weak proof of materiality" was "fatal to its case" because the SEC failed to demonstrate how defendant "failed to see an obvious danger that investors would be materially misled." 646 F.3d at 545.

150, 169-170:4[4]; Exhibit 16, Par Funding's Write Off Policy at 3; Exhibit 17, Agreed-Upon-Procedure Letter. *See, e.g.*, *SEC v. Shanahan*, 646 F.3d 536, 544 (8th Cir. 2011) (explaining that defendant's reliance on professionals including outside and general counsel as well as the company's independent auditors to ensure that his actions were proper demonstrated a lack of intentional fraud or severely reckless conduct).

The Defendants certainly would not have provided professional accountants with access to Par Funding's books and records for complete scrutiny if there was an intent to defraud investors. Defendants provided Rod Ermel Associates with complete access to their QuickBooks data through a live electronic portal to review its records. *See* Exhibit 18, Klenk Dep. Tr. Vol I at 36:23-37:8. Par Funding also permitted an investor's CPA to audit its records. *See* Exhibit 19, October 7, 2016 email from Kaufman to Cole. Remarkably, after conducting his personal audit of Par Funding's records, the CPA sought to invest in Par Funding. *See* Exhibit 20, March 1, 2017 email from Chehebar to Cole. The noteholder expressed approval: "comforting to know that the CPA we went to audit CBSG now wants to invest in CBSG." *Id.* Even more, Defendants requested another accounting firm, Clifton Larson Allen, to review its financial records. In preparation of this audit, Mr. Klenk testified that he utilized the company's records and the funding exposure ratio found in the Funding Analysis to create a 900-page spreadsheet for CLA's review. *See* Exhibit Klenk Dep. Tr. Vol I at 165-67, 169-70. Defendants certainly would not have permitted CLA to review its QuickBooks and the Deposit Log, which the Funding Analysis Report is derived from, if they had an intent to defraud, deceive, or mislead investors. *Id.* at 144:1-12.

Upon validation, Par Funding disseminated the Funding Analysis Report and made factual representations about the default rate. *See* Exhibit 4, Cole Dep. Tr. at 149:24-150:3. The record demonstrates that Defendants acted in good faith based upon the policies and procedures put in place and validated by professionals.[5]

4. Summary Judgment Should Be Granted as to the Allegation That Par Did Not perform Vigorous Underwriting.

Summary judgment is proper for the Defendants on the issue of Par Funding's underwriting. Contrary to the SEC's allegations, the facts that have been developed in this litigation show that there is no genuine issue of material fact that Par Funding did conduct vigorous underwriting, up there with the

[4] With respect to determining what deals to write off, Mr. Cole testified that, "the policy was put into place with cooperation from the auditing firm, Friedman, LLP, Rod Ermel Associates who would take that information to use for the tax returns, and legal, in-house legal which drafted some of the language as part of that policy." See Exhibit 4, Cole Dep. Tr. at 169:9-15.

[5] To the extent that the Commission contends that the Court may find that the Defendants were negligent in their actions to satisfy Section 17(a)(2)-(3), this equally fails.

best in the MCA business. Contrary to the SEC's attempt to paint Par Funding as lacking strict underwriting processes, the evidence show that Par Funding had a vigorous underwriting process and only approved 17% of the merchants that applied for cash advances. (DE 535-1 at 13.) The evidence shows that Par Funding did, in fact, collect financials necessary for its underwriting and conduct site inspections. The SEC's reliance on an insignificantly small sample of merchants, all of whom are represented by the same financially motivated attorney, does not create a genuine issue of material fact when juxtaposed against the 7,600 merchants that received advances from Par Funding and whose accounts were properly underwritten. Furthermore, many of the underwriting standards have been made up by the SEC and were not even represented as steps taken by Par Funding.

Contrary to the SEC's unsupported allegations, Par had an entire underwriting department that preapproved deals and then conducted further underwriting after a merchant accepted an offer. *See* Exhibit 21, Villarose Dep., Tr. at 19-23. This process included collecting the necessary documents and a site inspection as the final prerequisite to funding. As a result of this vigorous underwriting process, it funded only 17% of the merchants that applied. (DE 535-1 at 13.) This is far below industry standards. *Id.* at 13–14. Two studies from the Federal Reserve show average approval rates of 79% in 2017 and 84% in 2021. *Id.*

Furthermore, the evidence in this case shows why Par's rigorous underwriting was approximately 20% of the industry average. When a merchant sought to obtain a cash advance, as part of Par's rigorous underwriting process, Par examined the financial stability of the merchant's company by, among other things, running credit profiles, reviewing bank statements, and conducting background searches (including criminal history). *See* Exhibit 21, Villarose Dep., Tr. at 20-21. Included in the underwriting process were on-site inspections originally completed by Metro Site Inspections. *See* Exhibit 21, Villarose Dep., Tr. at 78. The on-site inspections involved a third-party hired to inspect and photograph the premises and, where possible, to photograph the merchant's credit terminals. Thus, it is clear that contrary to the allegations in the Amended Complaint, Par had rigorous underwriting standards and there was not misrepresenting its underwriting standards to investors.

The SEC's cherry-picked merchants from the Amended Complaint do not create a genuine issue of material fact on this point. First, the allegations made regarding these merchants are demonstrably false. For example, the SEC states that "Par Funding approved a $370,000 Loan to a Sports Field Grading and Maintenance company in Dallas, Texas and funded the Loan on January 4, 2017. The on-site inspection occurred on January 5, 2017, after the Loan had been approved and funded in its entirety." (DE 119 at 33.) However, this Company, which we now know is Fleetwood Services, had a site inspection prior to the date the loan was funded. In fact, an expert report that the SEC relied on, clearly shows that

the on-site inspection was, in fact, ordered on January 4, 2017, and a detailed and thorough inspection was conducted the next day, on January 5, 2017. *See* DE 28-1, Exhibit 76 (hereinafter "Lunden Report"). The Lunden Report, discussed above, shows on three different pages that Par Funding funded the Fleetwood Services Advance on January 9, 2017, four days after the January 5th on-site inspection, not January 4th. *See* Lunden Report, at Exhibit "A", pp. 1 (showing the "Payment Stream" and confirming the first advance to Fleetwood Services in the amount of $133,335.00 on 1/9/17) and 13 (confirming the "Start Date" and "Payment Stream" with the initial advance on 1/9/17); *see also* Exhibit 22, QuickBooks Report.

While there were certainly some cases where an on-site was not performed, it was done so based on principled underwriting guidelines, such as a transaction amount being very low, and Par Funding could verify the business's existence other ways such as an internet search. *See* Ex. 21, Villarose Dep., Tr. at 70. Alternatively, sensitive businesses such as law firms or a childcare facility could be verified through other means. *See* Ex. 21, Villarose Dep., Tr. at 75–76. Furthermore, if a merchant had an existing relationship with Par Funding, there was no need to do another site inspection since they already had the information it needed, to wit, that it was a real business. *See* Ex. 21, Villarose Dep., Tr. at 69.

Additionally, some of the underwriting standards that the SEC alleges Par Funding of failing to meet are simply made up by the SEC. For example, the SEC argues that the on-sites were not performed before Par "approved" the cash advance. However, this concept of approved is made up by the SEC. Par would pre-approve a deal to make an offer to a merchant, but the there was no obligation on Par Funding's behalf until the deal was funded. *See* Ex. 21, Villarose Dep., Tr. at 87; Exhibit 23, Par Funding's Applications. The initial document review stage was done prior to preapproval and the site inspection was done after preapproval. It would not make sense to incur the cost of a site inspection if Par and the Merchant could not agree on deal terms based on the merchant's financials.

Additionally, the SEC appears to use this preapproval date as the date it chooses to argue that underwriting was completed in less than 48-hours. This is clearly incorrect since there is no obligation to fund until the money is wired into a merchant's account. Furthermore, even if underwriting were completed in less than 48-hours on a regular basis, it is not a material misrepresentation, and in fact, it is not a misrepresentation at all. The SEC cannot point to a shred of evidence that fact that Par Funding told investors that underwriting is usually completed within 48-72 hours was a promise that it would take at lest 48-hours. Nor would a reasonable investor care about the time. In fact, the faster the underwriting process could be completed, the better, since Par could be more profitable that way. The only material element to the underwriting is that all the proper documents are collected and analyzed, and an informed underwriting decision is made. If a merchant was able to get all of its documents in and the site inspection

completed in less than 48-hours, there is no reason why this should be considered a material misrepresentation, given the rigor of Par's underwriting process.

Furthermore, the SEC alleges that Par "did not request information about debt schedules, profit margins, or expenses." (DE 119 at 31-32.) However, the SEC fails to point to a single document that Par promised noteholders it would obtain these documents. Further, the SEC's discussion about profit and loss statements and debt schedules demonstrates a total lack of understanding of the MCA business, which is most concerned with cash flow and the merchants;' apparent ability to repay advances over a short period of time, usually 100 days. In fact, one of Par's brochures for noteholders explains that: "Par Funding uses a financial matrix for our underwriting which evaluates clients with an ***emphasis based on cash flow rather than traditional credit metrics.***" *See* Exhibit 24, Brochures (emphasis added).

The clear takeaway from the undisputed evidence is that Par conducted vigorous underwriting resulting in an extremely low approval rate. Even if the SEC can point to a few files where the underwriting file is missing a document or a site inspection was not performed, it does not prove that material misrepresentations were made to investors about the type of underwriting Par performed as a matter of course, and certainly does not prove scienter in any alleged misrepresentation. Thus, this Court should grant summary judgment on the underwriting misrepresentations.

5. **The Defendants' Did Not Make Any Materially False or Misleading Statements Regarding Par Funding's Insurance in Connection with the Purchase or Sale of a Security**

The SEC contended that Defendants made false or misleading statements about whether Par Funding had insurance to cover a merchant default. (DE 119) (Am. Comp. ¶ 204.) The SEC alleged that these claims are false because "Par Funding did not offer small businesses insurance on Loans, and thus investor funds were not protected by insurance." (DE 119) Am. Comp. ¶¶ 205–212. But the SEC fails to produce any evidence to support the most basic requirement of a securities fraud claim: that the Defendants made materially false or misleading statements and omissions "in connection with" the purchase or sale of a security. *See, e.g., SEC v. Goble*, 682 F.3d 934, 942 (11th Cir. 2012) (reversing the district court's judgment on the SEC's Section 10(b) because the defendant's alleged misrepresentation was not made in connection with the purchase or sale of securities).

The record shows that from the very beginning, Par Funding believed it had insurance to cover merchant defaults. Mr. Bernato testified:

> I have read the Securities and Exchange Commission's claim in its lawsuit that Par Funding and/or its agents falsely told investors that it had insurance to back up investor funds in the event of a default by a merchant.
>
> In fact, I know Par Funding's assertions about its insurance coverage to be true since I

> was the insurance broker for Par Funding who secured insurance for the company in the event of a merchant default.

See Exhibit 25, Declaration of Anthony Bernato, at ¶¶ 5-6; Exhibit 26, Insurance Policy.

The SEC's claim fails even under its own version of the events. The SEC's own evidence suggests that the Defendants did not definitively gain knowledge that its insurance did not cover its merchants' receivable until August 2019. *See* Exhibit 27, Declaration of Ariel Benjamin Mannes, at ¶ 7. The record demonstrates that the moment Par Funding even had a slight inclination that there may have been a problem with the insurance, Defendants took prompt action, including seeking legal counsel, to cure any issues that may arise. *See* Exhibit 28 July 22, 2019, email from Cole to Rutledge; Exhibit 29, Letter to Dean Vagnozzi. Certainly, if there was an intent to defraud investors, Defendants would have turned a blind eye to this matter.

There is no evidence that Defendants represented that Par Funding had insurance in connection with the purchase or sale of security after this point. Instead, it is undisputed that Defendants at all relevant times believed in good faith that Par Funding had insurance to cover merchant defaults. *See* Exhibit 25, Declaration of Anthony Bernato, at ¶¶ 5-6.

Additionally, the SEC equates Defendants' alleged misrepresentations regarding insurance to mean that Defendants' statements were false because "Par Funding did not offer small businesses insurance on Loans, and thus investor funds were not protected by insurance." (DE 119) (Am. Comp. ¶¶ 205–212.) The SEC's position lacks something in substance. The alleged statements at issue never once referenced that Par Funding offered small businesses insurance. Indeed, advising merchants that Par would be covered by insurance if they defaulted would simply be counterproductive. *See* Exhibit 25, Declaration of Anthony Bernato, at ¶ 10. Any evidence on this point does not, and cannot, create an issue of fact.

The SEC has also failed to produce any evidence that demonstrates that the Defendants' acted with an intent to deceive, manipulate, or defraud investors or that Defendants acted with reckless disregard. The evidence shows quite the contrary. When Defendants learned that misrepresentations were being made about Par Funding's insurance, the Defendants immediately stepped in and told its Agent Fund Manager to stop making any and all representations pertaining to the insurance. *See* Exhibit 29, Letter to Dean Vagnozzi.

The record demonstrates that at no point did any of the Defendants engage in knowing misconduct when it allegedly made any representation about the insurance coverage. As discussed above, it was Par Funding's understanding since inception that the insurance policy provided coverage. Indeed, Par Funding paid millions in insurance premiums for this insurance coverage. The record reflects good faith,

genuine efforts by Par Funding to ensure that there was coverage. A review of the evidence submitted by the SEC demonstrates the same. *See* Exhibit 27, Declaration of Ariel Benjamin Mannes, Ex. A.

6. There is no Evidence to Support the SEC's allegations that Par Funding engaged in unlawful loan practices.

In the Amended Complaint (DE 119), the SEC relies heavily on these false claims, alleging:

- The McElhone-LaForte duo is in the business of making opportunistic *loans* – some of which charge more than *400% interest* – to small businesses across America. They offer the *loans* through a company they control, Complete Business Solutions Group, Inc. d/b/a Par Funding ("Par Funding"). (DE 119 at ¶ 1).

- To fuel the Par Funding *loans* and enrich themselves, the Defendants operate a scheme wherein they raise investor money through unregistered securities offerings. (DE 119 at ¶ 2) (emphasis added).

- The fraudulent scheme operates behind multiple veils of secrecy built of the Defendants' lies to conceal: (1) the true nature of *Par Funding's-loan practices*; (2) Par Funding's true track record of issuing *loans* and the default rates of the *loans*; (3) the safety of investing in Par Funding's *loans*[.] (ECF 119 at ¶ 8) (emphasis added).

- Par Funding has purportedly funded more than $600 million in *Loans*. (DE 119 at ¶ 44) (emphasis added).

- Some of Par Funding's *Loans* carry *interest rates* of more than *400%*. (DE 119 at ¶ 45) (emphasis added).

- According to a recent expert witness analysis of a sample of the *Loans*, more than half of the *Loans* charge in excess *of 95% interest*. (DE 119 at ¶ 46) (emphasis added).

Presumably because the SEC has abandoned these false claims, counsel for the SEC has given little–if any–attention to the issue at depositions. However, the issue has on occasion been broached. For example, during Mr. Cole's deposition, when counsel for the SEC referred to the agreements as "loans," Mr. Cole corrected her:

> Q. Mr. Cole, when you testified about Mr. LaForte and you mentioned sales, were those sales of merchant cash advance loans?
>
> A. The merchant cash advance -- the merchant cash advance that CBSG provides are not loans. They are factoring agreements.

See Exhibit 4, Cole Dep. Tr. at 54:8-13.

In one rare instance, the SEC raised the issue with Bret Berman, Esq., prior counsel for Par Funding:

> Q. Were you ever asked for any legal opinion about whether or not the merchant cash advances were usurious?
>
> A. We weren't asked for a legal opinion in the sense that you're asking, like a client asking can you give us a formal legal opinion. We didn't do that. I wasn't asked to. But we filed

a lot of briefs in court addressing the legality of the merchant cash advance business and the fact that they were not usurious or loans or anything of the sort.

Q. Understood. I'm not asking about what was filed in court. I'm just asking you about legal advice that was provided to Complete Business Solutions Group about the way they were operating and whether you were asked for that legal advice.

A. I was not.

Q. Okay. At any point did you advise anyone at Complete Business Solutions about whether or not it was legal for them to charge merchants the amount that was being charged under the merchant cash advances?

A. Did you say was I asked? I'm sorry.

Q. No. Did you provide legal advice about that?

A. No. The answer is no, other than defending against the lawsuits that were -- or the lawsuits or counterclaims or whatever they may be challenging that fact, because when we got involved in this part of it in February of 2020, obviously this company had been around for six years and the merchant cash advance business had been around for a very long time. So we were not asked, nor did I provide that.

See Exhibit 30, Berman Dep. Tr. at 105:13-106:21. Mr. Berman was later asked to clarify his answer on cross examination:

Q. . . . do you recall saying that you don't recall providing CBSG specifically advice regarding whether the advances were usurious. Did I hear you correctly?

A. I did not provide them with that advice, but they were given -- like Mr. Cole was given copies of our briefing along with the general counsel where we made substantial and significant arguments with respect to the legality of the entire portfolio of what they were doing as we understood it.

Q. Okay. And that's exactly what I wanted to clarify. You testified earlier that you had filed briefings with respect to whether the advances were usurious. Those are the briefings that you are now testifying you provided to Mr. Cole?

A. Of course, yeah.

Q. And I imagine in those briefings you argued that the advances were not usurious; correct?

A. 1,000 percent.

Q. So would it be fair to say that you provided an opinion at minimum through those briefings to Mr. Cole that the advances were not usurious?

A. You know, what I would say, Mr. Soto, and I said this to Mr. Kolaya and Mr. Alfano when they were asking these questions at the beginning of this case about opinions, I've been practicing for almost 15 years. I've never given a legal opinion on things. There's a very technical meaning to legal opinions that at Fox Rothschild involve audit committees and approvals. So I've never done what you're asking.

Did we file legal briefs in court? Yes. **Did we take the position these are not usurious or illegal loans? Yes. Do I believe that sitting here today? Yes. And the reason I believe that are the court opinions around the country that have upheld the legality of this type of business.** But I'm not in the business, unless there's a specific request, which I never had in 15 years, to give legal opinions in the way you just framed it.

Q. Okay. And I didn't mean to ascribe any particular meaning to the phrase legal opinion.

. . . .

Q. Is it your understanding that he had an opinion with respect to whether these advances were usurious based on the pleadings that you provided to him?

A. I think that Mr. Cole had an understanding that this was not illegal.

MS. BERLIN: Mr. Berman, I'm objecting on grounds that this calls for speculation about what you think Mr. Cole was thinking based on pleadings you filed.

THE WITNESS: What I was going to say was **not only did I think Mr. Cole believed 100 percent that these were not illegal. I think he had been working with lawyers for many, many years before me. They were very well aware of cases all around the country involving MCA, the MCA business.**

This was a hotly litigated topic in New York for a number of years and in Pennsylvania and in Texas and in California.

The answer was they were not -- to my knowledge other than, you know -- that this was legal. I mean, yeah, that was their -- of course, that was their opinion.

. . . .

A. I don't think Mr. Cole's opinion changed after reading my briefing that supported the legality of the business.

Q. Did you have a conversation with Mr. Cole regarding the pleadings that were filed and the legality of the advances?

A. Again, I didn't give a legal opinion to him. But, I mean, remember, the prime thrust of my role in 2019 into '20 was defending the cases brought by who you said before, Mr. Heskin on behalf of his clients, where he was bringing criminal RICO allegations involving the alleged impropriety of this entire business.

And so, yeah, that was a topic of discussion because they were defending and spending a lot of money on legal fees defending that type of allegation, none of which were getting any traction from any courts, by the way.

See Exhibit 30, Berman Depo. Tr. at 235:15-239:21 (emphasis added).

The SEC has not pursued evidence to support its "loan" assertions in discovery. While the SEC has not conceded to the Court that it was wrong to characterize the MCA agreements as loans, or that it was equally wrong to allege that Par was charging merchants usurious interest rates as high as 400% and 95% over half the time, at the Preliminary Injunction hearing in August 2020, the SEC did alter course. There, the SEC conceded that it did not care, and it did not matter if the Defendants were selling loans or not

(DE 193 at 29). This change occurred because the SEC could not, in good faith, sustain these claims. Courts across the nation have held that merchant cash advances based upon the purchase of merchant accounts receivable are not loans. *See* Exhibits 2; 4 to DE 663.[6]

Because there is no evidence in the record to support the SEC's allegations that Par Funding engaged in unlawful loan practices, the Court should grant summary judgment in Defendants' favor.

7. Defendants Relied on Counsel with Respect to Whether Mr. LaForte's Criminal History Required Disclosure.

The SEC alleges that Defendants made a materially misleading omission in failing to disclose Mr. Laforte's "criminal record, identity, and control of Par Funding." (Am. Compl., ¶ 8.) However, even assuming Mr. LaForte was a *de facto* manager or principal of Par Funding, the SEC cannot prove that Defendants acted with scienter in failing to disclose him to investors, as Par Funding's securities lawyer, Phillip Rutledge, advised Defendants that this disclosure was not necessary.

Rutledge was first hired to serve as Par Funding's counsel in connection with the PADOB subpoena. *See* Exhibit 1, Rutledge Dep., Tr. at Vol. I, 13:12-23. It is undisputed that during the course of this representation, Rutledge represented to PADOB that Par Funding's sale of promissory notes to its individual ("Phase 1") investors was exempt under Rule 506(b) of Regulation D because Par Funding had a reasonable basis to believe that they were accredited. *See* Exhibit 1, Rutledge Dep., Tr. Vol. I at 30:10-15. In Rutledge's final letter to PADOB, he represented that it was continuing to sell promissory notes under a new structure, using a new note purchase agreement, which was also exempt under Rule 506(b) for the same reason. Rutledge also wrote to PADOB that under Rule 502(b), Par Funding did not have to make certain disclosures to its accredited investors. *See* Exhibit 2, Rutledge Dep., Tr. at Vol. II, 207:22-208:6.

During an email exchange in March 2020 with Cole and other Par Funding counsel who were representing Par Funding in connection with an enforcement action brough by Texas Securities

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[6] As Defendants noted in the Motion to Dismiss the Amended Complaint Due to Misconduct by the Securities and Exchange Commission and Related Constitutional Violations:

> There are thousands of MCA businesses across this United States and cash advances to merchants secured by the purchase of the right to collect on merchants' accounts receivable is a legal busines throughout the land, and interest rates and usury laws do not apply to merchant payments in the MCA context. One need look no further than to the fact that the Receiver is presently pulling Par merchant payments to conclusively demonstrate that Par's merchant cash advances are not loans and usury is inapplicable to merchant payments. If they were loans, the Receiver would be enforcing usurious loan contracts. Rather, recognizing their validity, the Receiver is collecting Merchant payments, albeit at a significantly lower rate than Par management did prior to the Receivership.

(DE 663 at 15).

Regulators, Rutledge clarified the kinds of disclosures that Par Funding did not need to make to its accredited investors. Paragraph 61 of the Texas Securities Regulators' Order alleged that Par Funding, A Better Financial Plan, and Abbonizio failed to disclose the identity, the business repute and qualifications, and experience of the principals and managers of Par Funding. In Rutledge's email to Cole and counsel for Par Funding, Rutledge advised:

> "interestingly… the TX Order [] does not state to whom CBSG failed to make these disclosures, which I think is important because, *with respect to paragraph 61, CBSG is not required under Rule 502(b) to provide this type of business disclosure to accredited investors."*

See Exhibit 2, Rutledge Dep., Tr. at Vol. II, 298-299.

Accordingly, even if Mr. Laforte were a principal or manager of Par Funding, Defendants could not have had the scienter necessary to withhold LaForte's "identity, the business repute and qualifications" given Rutledge's advice that such disclosure was not necessary under Rule 502(b).

8. **The SEC Cannot Establish That Defendants Misled Investors When They Represented That Par Funding Was at Risk of Defaulting on Then Existing Notes or Entering Bankruptcy Shortly Before the Exchange Note Offering**.

Here, the SEC's theory apparently is that "Par Funding and Vagnozzi's attorney" misled investors when they represented "that Par Funding would otherwise default on payments altogether or enter bankruptcy," and that investors had no choice but to accept the Exchange Offering based on this representation. (Am. Compl., at ¶¶ 139-140.) First, the SEC's allegation appears to be that the representation that Par Funding would either default on loans or enter bankruptcy, and the SEC has adduced no evidence that Par Funding did not default on payments during the first quarter of 2020. Second, while it is unclear whether the SEC is attributing these comments to Defendant Cole, to the extent they are, Par Funding's counsel, Phil Rutledge, testified during his deposition that he recommended to Cole that a provision regarding the risk of bankruptcy be included in the Exchange Notes. *See* Exhibit 2, Rutledge Dep., Tr. at Vol. II, Dep. Ex. 134. Cole's reliance on Rutledge negates scienter.

9. **The SEC Cannot Establish That Defendants Failed to Disclose That the Texas Securities Regulators Had Entered an Emergency Cease-and-Desist Order with Findings Regarding ABFP, Par Funding, and Abbonizio. ¶ 139.**

There is no issue of fact that the investigations and orders brought by the Pennsylvania, New Jersey, and Texas Securities Regulators were disclosed in the very Exchange Notes referenced in the allegations made by the SEC in paragraph 138. *See* Exhibit 2, Rutledge Dep., Tr., at Vol II, 319-320.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that their Motion for Partial Summary Judgment be granted.

Dated: October 4, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all counsel of record via the Court's CM/ECF Filing Portal on this 4th day of October, 2021.

/s/ Alejandro O. Soto
ALEJANDRO O, SOTO, ESQ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE MMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.

DEFENDANTS JOSEPH W. LAFORTE, LISA MCELHONE, AND JOSEPH COLE BARLETA'S JOINT STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

A. Relevant Background

1. Complete Business Solutions Group Inc., d/b/a Par Funding (hereinafter "Par Funding") is a merchant cash advance business founded in Philadelphia, PA. Par Funding provided funding to small businesses throughout the country. The company employed about 70 employees, including highly skilled accountants, bookkeepers, underwriters, and ACH account processors.

2. Pursuant to tax advice given, Par Funding restructured its business operations in 2017, and thereafter an entity referred to as Full Spectrum Processing ("FSP") began to handle the day-to-day operations of Par Funding. *See* Exhibit 4, Cole Deposition Tr. at 19:16-20. Defendant Lisa McElhone is the sole owner of FSP. (DE 119) (Am. Compl. at 6.)

3. Par Funding initially employed Defendant Joseph Cole Barleta as its Chief Financial Officer until 2017 when Par Funding employees were converted to FSP employees. Thereafter, FSP hired Cole as its Chief Financial Officer ("CFO"). *See* Exhibit 4, Cole Deposition Tr. at 8:9-21. FSP also hired other integral employees, including James Klenk as its Controller and Ariel Benjamin Mannes as its Chief Compliance Officer. *See* Exhibit 18, Klenk Deposition Tr. at 8:19-22; Exhibit 27, Declaration of Ariel Benjamin Mannes at ¶ 2.

A. Par Funding's Daily Business Activities

4. Par Funding maintained its accounting records in QuickBooks. *See* Exhibit 12, Second Declaration of Joel Glick, ¶ 14(b). Par Funding internally prepared various spreadsheets including but not limited to a Funding Analysis report. *See* Exhibit 3, CBSG Funding Analysis Report. The information found in the Funding Analysis is also referred to as the Key Performance Indicators ("KPI"). *See* Exhibit 4, Cole Deposition Tr. at 146:17-25.

5. CBSG's accounting personnel prepared the Funding Analysis and provided Mr. Cole with the document for his final review. *Id.* at 147:1-12.

6. The Funding Analysis report summarized, on a monthly basis, certain financial metrics including but not limited to the number of merchant cash advance ("MCA") deals funded, average amount funded per MCA deal, average term of each MCA deal, funds wired to merchants ("Wire Total"), accounts receivables, and the exposure on merchants deals that were written off. *See id.* at 13-14; Exhibit 18, Klenk Deposition Tr. at 100:1-7; Exhibit 12, Second Declaration Joel Glick, ¶¶ 17-18.

7. CBSG also internally prepared other spreadsheets including but not limited to the Daily Deposit Logs and a Bank Activity Log. *See* Exhibit 12, Second Declaration of Joel Glick, ¶ 14(c). CBSG created and maintained the Daily Deposit Logs to track merchant funding activity, merchant defaults, and daily merchant repayments. *Id.* at 16(a).

8. CBSG pulled from various sources to generate the Funding Analysis report including the Daily Deposit Log. Exhibit 18, Klenk Deposition, p. 100:8-12. In specific, CBSG utilized the Daily Deposit Log to populate the "Wire Total" and the "Funding Exposure" columns of the Funding Analysis report. *Id.* at 100:18-101:5.

9. The Wire Total represents the cash funded to the merchant per the terms of the contractual agreement. Exhibit 12, Second Declaration of Joel Glick, ¶ 17(f). The Funding Exposure represents the cash portion of deals that are written off. *Id.* at ¶ 17(g). This data mirrors the "Default Tab" found in the Daily Deposit Log. *Id.*

10. To calculate the Exposure percentage, the Funding Analysis report divides the Funding Exposure column by the Wire Total column. *See* Exhibit 12, Second Declaration of Joel Glick, ¶ 19. The term Exposure % is commonly referred to as a default rate.

11. The Funding Analysis report informs any reader of the document as to what exactly is included in the Exposure percentage. *See* Exhibit 3, n.4. In specific, the Funding Analysis report provides that the Exposure percentage reflects "factoring losses realized in respective month equal to total AR balance for transactions written off against Factoring Loss reserve." *Id.* There has never been any oral or written representation stating otherwise.

12. The Funding Analysis Report also informs any reader of the document as to how exactly the Funding Exposure is calculated. *See* Ex. 3, n.5. The report details that the Funding Exposure is the "cumulative exposure, as determined by funding amount minus collected payments, at the time that transactions were written off in the respective month to Factoring Losses." *Id.* There has never been any oral or written representation stating otherwise.

13. Investors were routinely provided with a copy of the Funding Analysis Report prior to investing. *See* Exhibit 3, Cole Deposition Tr. at 111:3-7, 127; Exhibit 5, June 10, 2019 email from Cole to undisclosed recipients (investors); Exhibit 6, Declaration of Dan Cistone, at ¶¶ 5, 8; Exhibit 7, Declaration of Dilip Lamaye, at ¶ 5; Exhibit 8, Declaration of Jose Alves, at ¶¶ 5, 9; Exhibit 9, Declaration of Steve Wittmer, at ¶ 5. Investors reviewed the report, including the Exposure percentage. *Id.*

14. Every month thereafter, CBSG routinely provided investors with a copy of the Funding Analysis report. *See* Exhibit 4, Cole Deposition Tr. at 111:3-7, 127; Exhibit 5, June 10, 2019 email from Cole to undisclosed recipients (investors); Exhibit 6, Declaration of Dan Cistone, at ¶¶ 5, 8; Exhibit 7, Declaration of Dilip Lamaye, at ¶ 5; Exhibit 8, Declaration of Jose Alves, at ¶¶ 5, 9; Exhibit 9, Declaration of Steve Wittmer, at ¶ 5.

15. Investors also inquired about the Funding Analysis Report:

> Can you explain the metrics on the report? Can you explain your historic trends and projected trends going forward? What are the methodologies used to determine the various columns, the calculations, and explaining the footnotes on how these numbers were derived.

See Exhibit 4, Cole Deposition Tr. at 152-1-21. This is uncontradicted in the record. When asked about the exposure percentage, Mr. Cole explained to investors:

> The exposure percentage is a dynamic number that's calculated each month. It reflects the cash-over-cash exposure for deals that were written off for that respective period of time in proportion to the amount of funding for that respective period of time.

Id. at 152:11-21; *see also id.* at 154:12-16 ("the operative word there is always cash-over-cash losses"). The record is uncontradicted that CBSG made any representation stating otherwise.

16. The SEC alleges that Perry Abbonizio "claims to be an owner and managing partner of Par Funding and he is responsible for bringing investment capital into Par Funding." (DE 119) (Am. Compl. ¶ 20.) Mr. Abbonizio routinely provided investors with the Funding Analysis report and utilized it to explain the default rate. *See* Exhibit 10, Perry Abbonizio Deposition Tr. at 177:2-180:5; *see also id.* at 181:5-10 ("I typically would put it that we have a 1.2 percent cash on cash default rate.").

17. For good measure, the version of the Funding Analysis Report Mr. Abbonizio disseminated to investors further defined the default rate[1] as "reflects the proportion of cash losses under Bad Debt Exposure in proportion to new capital being funded." *See* Exhibit 15, at 28 n.4.

18. Defendants' expert witness, Joel Glick, analyzed the internal spreadsheets prepared by CBSG, including the Funding Analysis Report. *See* Exhibit 11, Second Declaration of Joel Glick ¶¶ 15-16. In conducting his analysis, Defendants' expert witness recreated portions of the Funding Analysis report to mirror the data stored and maintained in QuickBooks ("KPI Analysis"). In particular, the KPI Analysis revealed that when the Exposure percentage is calculated based on the actual amounts wired out to merchants (e.g., the Wire Total), the revised percentage went from 1.16% to 1.19%. *Id.* at 9.

19. The SEC's expert did not perform a similar analysis to determine what impact the Exposure percentage would have if the Wire Total column was adjusted to account for only the actual amounts wired out to merchants. The SEC did not provide any expert rebuttal report. Likewise, the SEC has not provided any witness that countered this point.

B. Par Funding Employed Credible Attorneys and Accountants for Assistance in Various Matters

Rod Ermel Associates, Inc.

[1] The exposure percentage is also referred to as the bad debt ratio.

20. Rod Ermel Associates, Inc. ("Rod Ermel") is a public accounting firm based in Colorado Springs, Colorado. *See* Exhibit 4, Cole Deposition Tr. at 144:12-17. Rod Ermel was responsible for preparing Par Funding's tax returns. *Id.* at 144:12-17, 146:1-9. Rod Ermel had full and complete access to Par Funding's books and records through a live electronic portal. *See* Exhibit 18, Klenk Deposition Tr. at 36:23-37:17.

21. In 2016, CBSG also enlisted Rod Ermel to review its Funding Analysis Report. *See* Exhibit 4, Cole Deposition Tr. at 150:4-18. Mr. Cole explained:

> Lisa hired them in 2016 to perform an audit on that specific report. They issued an agreed upon letter procedure where they verified for a week. Two of their CPAs flew out to the office. They verified the deals we had reported on the report were accurate and that they were indeed funded per the terms of the agreement.

Id. at 150:4-14. This review was performed once. Though Mr. Ermel would continue to receive the Funding Analysis Report in his individual capacity as an investor, Mr. Cole did not ask Mr. Ermel to verify the Funding Analysis Report every month thereafter. *Id.* at 150:19-151:7.

22. Rod Ermel confirmed the accuracy of the procedures utilized in the Funding Analysis. *See* Exhibit 17, Agreed Upon Procedures Letter.

Insurance Broker

23. In 2018, Par Funding received assurances from its licensed insurance broker, Anthony Bernato, that it could help them obtain insurance to cover merchant defaults. *See* Exhibit 25, Declaration of Anthony Bernato at ¶¶ 5-6. Mr. Bernato has over 30 years of experience. Mr. Bernato affirmed:

> I have read the Securities and Exchange Commission's claim in its lawsuit that Par Funding and/or its agents falsely told investors that it had insurance to back up investor funds in the event of a default by a merchant.
>
> In fact, I know Par Funding's assertions about its insurance coverage to be true since I was the insurance broker for Par Funding who secured insurance for the company in the event of a merchant default.

Id.

24. To obtain the insurance, Par Funding submitted a list of merchant transactions that Par Funding wanted insured. *See* Exhibit 25, Declaration of Anthony Bernato at ¶ 9. Mr. Bernato explained that he entered the list of merchant transactions into the insurance carrier's portal and provided the list to the carrier to conduct its own internal due diligence review. *Id.*

25. Mr. Bernato secured the insurance coverage for Par Funding through Euler Hermes (hereinafter "Euler"), a $800 billion global credit default insurance company. *See* Exhibit 25, Declaration of Anthony Bernato at ¶ 7. Euler did not extend coverage until it satisfied their own underwriting process was satisfied. *Id.* Euler eventually increased their policy coverage to $150MM. *See* Exhibit 24, Declaration of Anthony Bernato at ¶ 11. In the end, Par Funding paid XX in insurance premiums.

Legal Counsel

26. In or about January of 2018, the Pennsylvania Department of Banking and Securities ("PADOB") issued a subpoena to Par Funding to investigate Par's payment of commissions to finders in connection with the sale of notes ("PADOB Subpoena"). *See* Exhibit 2, Rutledge Deposition Tr., at Vol II, at 169-171; Exhibit 132.

27. Shortly thereafter, Par Funding hired G. Philip Rutledge, partner at Bybel Rutledge LLP, to respond to the PADOB subpoena. Norman Valz, Par Funding's then general counsel, contacted Mr. Rutledge regarding the PADOB subpoena. *See* Exhibit 1, Rutledge Deposition Tr., at Vol I, 13-14.

28. Mr. Rutledge's points of contact at Par Funding were Mr. Cole, Mr. Valz, and after Mr. Valz's departure, Cynthia Clarke, Par Funding's subsequent in-house general counsel. *See id.* at 15.

29. Mr. Rutledge graduated from law school in 1978. For 25 years thereafter, he worked for the Pennsylvania Legislative and Budget Committee, and then for the Pennsylvania Securities Commission. By the time he left the Commission, he held positions there as the Director of the Division of Corporate Finance and Chief Counsel to the Commission. In 2012, the Pennsylvania Securities Commission combined with the Pennsylvania Department of Banking to create the Pennsylvania Department of Banking and Securities. *See id.* at 12-13.

30. After entering private practice, Mr. Rutledge specialized in the areas of "securities and the corporate, and the area of securities dealing with broker dealers and investment advisors." *See* Exhibit 2, Rutledge Deposition Tr., at Vol. II, 165.

31. Mr. Rutledge taught securities law and regulation as a professor at various universities in the United States and England including the well-renowned Wharton School of the University of Pennsylvania, Widener University Commonwealth, Penn State Dickinson School of Law, BPP University Law School and the University of London. *Id.* at 165-166.

32. In connection with the PADOB Subpoena, Mr. Rutledge advised Par Funding to stop selling notes immediately. *Id.* at 169-171, Dep. Ex. 132. *Id.* Defendants followed his advice. He also told them that any final order would be public and searchable on the internet. *Id.*

33. In a letter to PADOB on February 5, 2018, Mr. Rutledge wrote that "[a]lthough CBSG believed at the time that its promissory notes were purchased by accredited investors … CBSG went back to each noteholder to confirm such status." Mr. Rutledge repeatedly argued to PADOB (including the February 5 letter) that the notes were not securities. *Id.* at 232-233.

34. He also successfully argued to PADOB that the notes were exempt from registration under Rule 506(b) of Regulation D because Par Funding held a reasonable belief that all of Par Funding's investors

were accredited. *Id.* Mr. Rutledge believed that the Phase 1 notes were exempt under Rule 506(b). Mr. Rutledge also told Mr. Cole the same. *Id.* at 184-186.

35. In a series of emails in March 2018, Mr. Rutledge and Mr. Cole discussed the accreditation confirmations for Par Funding's Phase 1 [individual] noteholders. *See id.* at 242-244. Mr. Rutledge explained that he filed a supplemental production with PADOB that included the additional accreditation confirmations. Mr. Rutledge asked Mr. Cole whether he had any additional accreditation confirmation letters and whether Par Funding has sold any other notes "sans [without] finders fees." *Id.* at 244-245.

36. Mr. Cole responded that they have no other accreditation confirmations, and that they have sold notes to PPM Funds. Mr. Cole explained that Par Funding is no longer taking any new notes from individuals and are directing individuals whose notes mature to the PPMs. Mr. Cole stated, "I'll assume no news is good news," and asked Mr. Rutledge to review Par Funding's "note/security agreement language for the PPMs." *Id.* at 257. Mr. Rutledge testified that as of March 30, 2018, he understood that Par was pivoting away from selling to individuals and instead selling to PPM Funds, which he understood to be pooled investment vehicles. *Id.* at 250-251.

37. Mr. Rutledge was therefore aware as early as March 2018 that Par Funding was changing its structure from the use of finders to selling their notes exclusively to Agent Funds. *Id.* at 192-193. This was before Mr. Rutledge settled the PADOB matter in November 2018. *Id.* at 238-239; Dep. Exhibit 136.

38. Before Mr. Rutledge settled the matter with PADOB in 2018, Mr. Cole told Mr. Rutledge in an email dated September 21, 2018, that he was gathering documents from the PPM Funds, which Rutledge understood to be pooled investment vehicles, to certify that they were also accredited investors. *Id.* at 196-198, 259-262; Dep. Exhibit 127, at p. 5.

39. In a subsequent email dated September 25, 2018, Mr. Cole told Mr. Rutledge that Par Funding wanted to increase its retainer reserve for Mr. Rutledge to handle the upcoming response to the PADOB and to "draft agreements" "for the funds we work with." *Id.* at 217.

40. In an email dated September 28, 2018, Mr. Rutledge attached a draft of a note purchase agreement ("NPA") template he prepared for Par Funding's use to sell notes to Agent Funds. *Id.* at 220; Exhibit 128, at p. 3-4. Mr. Rutledge understood that the NPA template he was preparing would be for Par to use to sell notes to Agent Funds, *id.* at 215-218, and this was several months after he learned that Par Funding was pivoting away from selling notes to individuals and was instead selling notes to Agent Funds. *Id.* at 258.

41. The NPA included a provision at Section 2.05 where the Purchaser [the Agent Fund] and Seller [Par Funding] agree that a bargained for provision of this Agreement is that Seller shall offer to sell notes

to Purchaser only if Purchaser is an Accredited Investor as that term is defined in Rule 501 of Regulation D…" *Id.* at 220; Exhibit 128, at p. 2. The NPA included another provision at Section 4.05 under "Representations and Warranties of the Purchaser" for the Purchaser [Agent Fund] to certify its status as an accredited investor.

42. Mr. Rutledge testified that he asked Par Funding to instruct the Agent Funds to include in the Section 4.05 certification the specific provision they believed applied under Rule 501 to confirm their status as accredited, as some had merely marked an "X" instead of the applicable numerical subparagraph of Rule 501. Mr. Rutledge agreed that Mr. Cole followed his advice in carrying out this instruction. *See id.* at 301-302. Mr. Rutledge, however, testified that it was not necessary for Agent Funds to certify in the NPA that they were accredited for the exemption to apply, but it is "good practice." *Id.* at 226-227.

43. On November 8, 2018, after receiving this email that Mr. Cole was gathering documents certifying that its new noteholders, the Agent Funds, were accredited, Mr. Rutledge wrote an email to PADOB that Par Funding: (1) sold notes exclusively to accredited investors in good faith reliance on Rule 506(b); (2) had no duty to make disclosures to accredited investors under Rule 502(b); and had provided documentary evidence to PADOB that Par Funding had a reasonable basis to believe that all of its note purchasers were accredited. *See id.* at Dep. Exhibit 135, p. 2. At the time of this letter, it is undisputed that Rutledge knew that Par was selling notes to Agent Funds, who were in turn selling notes to investors.

44. In an email dated November 12, 2018, Mr. Rutledge attached a draft letter to Mr. Cole and Ms. Clark, attaching a draft of his final settlement offer to PADOB. *See id.* at 267; Dep. Ex. 149.

45. In a series of emails that follow, both Mr. Cole and Ms. Clark wanted Mr. Rutledge to disclose more about the new plan Par Funding pivoted to:

> Does that language encompass or *can it be broadened to encompass the manner in which CBSG currently offers and sells notes* (i.e., a statement or acknowledgement that the current manner in which CBSG offers or sells notes is not in violation of Pennsylvania law)? Our concern is that CBSG has modified the manner in which notes now being offered/sold (beyond the notes that are specifically the subject of the current investigation) and that the Department could initiate a new investigation after the date of the consent order with respect to those sales being made under the new procedures after the date of the order. Please advise. Thanks, Cindy.

Id.

46. Rutledge understood this email to mean that Ms. Clarke was asking whether Par Funding could provide more information describing what Par Funding was doing in November 2018, namely selling its notes to Agent Funds, to make sure they were compliant. *See* at 269-276. Mr. Rutledge responded that

what Ms. Clark was requesting was a "no action letter," which is a request that PADOB approve of the new structure that Par Funding is using. Mr. Rutledge advised Ms. Clark that PADOB's "Corp. Fin." [Division of Corporate Finance] Section would not be likely to grant that request. *See id.* at 267; Dep. Ex. 149, at p. 3. Instead, Mr. Rutledge suggested in an email dated November 13, 2018, that they add language referencing the new NPA. *Id.* Rutledge testified that he understood Ms. Clark's email to mean that she wanted language in the consent order "to cover as much about the current manner which they are selling notes as is possible?" *Id.* at 279.

47. In his final letter to PADOB on November 14, 2018, Mr. Rutledge told PADOB that Par Funding had revised its practices regarding the sale of notes, was only selling notes to accredited investors under Rule 506(b), was no longer using brokers, and was using a new note purchase agreement ("NPA") where no commission was paid to brokers. *See id.*; Dep. Exhibit 136, at p.4. Mr. Rutledge understood the new structure involving PPM Funds by then and was drafting the NPA for this new structure. *Id.* at 266-267. Despite Defendants' request that he include specific language about the sale of notes to Agent Funds, Mr. Rutledge did not do so.

48. In an email dated March 3, 2020, Mr. Rutledge raised a concern for the first time that a regulator might deem the sale of notes by Par Funding to Agent Funds to be a commission if the interest on the note received by the Agent Fund was more than the amount the Agent Fund was charging to its noteholders. See *id.* at 310, SEC Exhibit 66.

49. Nevertheless, Mr. Rutledge never asked anyone at Par Funding the amount of interest the Agent Funds were paying, what the Agent Funds were paying on the notes they sold, and never instructed Par Funding to stop selling notes to Agent Funds. *See id.* at 313-316; 320-322. There is no evidence in the record that Par played any role in or had any control over what the Agent Funds paid their noteholders.

50. On March 11, 2020, Rutledge wrote an email to Mr. Cole, and counsel for Fox Rothschild and Haynes Boone. In the email, he prepared a draft of regulatory disclosures he suggested should be made to convince the Texas Securities Regulators to resolve their case against Par Funding. *See id.* at Exhibit 122, p. 2.

51. Mr. Rutledge explained that the disclosure would show that the PADOB Order "stated that Par Funding could continue sales in Pennsylvania in compliance with the order, recognized that it had stopped paying sales commissions, and stated that the order should not be a basis for any disqualification under federal or state laws." Mr. Rutledge also explained in the email that, "interestingly… the TX Order [] does not state to whom CBSG failed to make these disclosures, which I think is important because, with respect to paragraph 61, CBSG is not required under Rule 502(b) to provide this type of business

disclosure to accredited investors. Mr. Rutledge also testified that no disclosures need to be made to accredited investors to comply with Regulation D. *See id.* at 298-299

52. Paragraph 61 of the Texas Order alleges that Par Funding, A Better Financial Plan, and Defendant Perry Abbonizio failed to disclose the identity, the business repute and qualifications, and experience of the principals and managers of Par Funding.

53. Mr. Rutledge's advice was that Defendants did not need to make these disclosures under Rule 502(b) to its accredited investors. Mr. Rutledge testified that Par Funding had a reasonable basis to believe that its investors were accredited. Mr. Rutledge also explained in the March 11, 2020, email that any disclosures regarding Par Funding's civil litigation [involving merchant suits] "equally would be within the realm of Rule 502(b)."

54. Par Funding also hired attorney Martin Hewitt to handle Par Funding's response to the New Jersey Securities Regulator's investigation. There is no evidence in the record that Mr. Hewitt ever advised anyone at Par Funding that it had to disclose the NJ investigation to investors.

C. Par Funding's Underwriting Process

55. Par had an entire underwriting department that preapproved deals and then conducted further underwriting after a merchant accepted an offer. This process included collecting the necessary documents and a site inspection as the final prerequisite to funding.

56. As a result of this vigorous underwriting process, it funded only 17% of the merchants that applied. *See* Glick Report, 535-1 at 13. This is far below industry standards. Two studies from the Federal Reserve show average approval rates of 79% in 2017 and 84% in 2021. *Id.*

57. As part of Par's rigorous underwriting process, Par examined the financial stability of the merchant's company by, among other things, running credit profiles, reviewing bank statements, and conducting background searches (including criminal history). Included in the underwriting process were on-site inspections originally completed by Metro Site Inspections. The on-site inspections involved a third-party hired to inspect and photograph the premises and, where possible, to photograph the merchant's credit terminals. *See* Exhibit 21, Villarose Dep. Tr. at 78.

58. While there were certainly some cases where an on-site was not performed, it was done so based on principled underwriting guidelines, such as a transaction amount being very low, and Par could verify the business's existence other ways such as an internet search. *See id.* at 70. Alternatively, sensitive businesses such as law firms or a childcare facility could be verified through other means. *Id.* at 75-76. Furthermore, if a merchant had an existing relationship with Par, there was no need to do another site inspection since they already had the information it needed, to wit, that it was a real business. *Id.* at 69.

59. Additionally, some of the underwriting standards that the SEC access Par of failing to meet are

simply made up by the SEC. For example, the SEC argues that the on-sites were not performed before Par "approved" the cash advance. However, this concept of approved is made up by the SEC. Par would pre-approve a deal to make an offer to a merchant, but there was no obligation on Par's behalf until the deal was funded. *Id.* at 87; *see* Exhibit 23.

60. Par did not promise noteholders that it requested information about debt schedules, profit margins, or expenses. In fact, one of Par's brochures for noteholders explains that: "Par Funding uses a financial matrix for our underwriting which evaluates clients with an ***emphasis based on cash flow rather than traditional credit metrics.***" *See* Exhibit 24.

Dated: October 4, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all counsel of record via the Court's CM/ECF Filing Portal on this 4th day of October, 2021.

/s/ Alejandro O. Soto
ALEJANDRO O. SOTO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____/

DEFENDANTS' RESPONSE TO THE RECEIVER'S EXPEDITED MOTION TO SEAL (1) MOTION IN LIMINE TO EXCLUDE EXPERT TESTIMONY AND REPORT OF MELISSA DAVIS, (2) JOINT MOTION FOR PARTIAL SUMMARY JUDGMENT, AND (3) JOINT STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants, Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta files this Response to Receiver Ryan Stumphauzer's Expedited Motion to Seal. (DE 807.) The undersigned counsel agrees that the expert report of Melissa Davis, which itself includes numerous exhibits and is over 500 pages long, includes information that should be sealed for the reasons explained in the Receiver's Motion. While the undersigned believes the issues raised in the Receiver's Motion are largely tied to this expert report, in an abundance of caution, Defendants agree that the other exhibits attached to Defendants' Motions in Limine and for Partial Summary Judgment and their Joint Statement of Undisputed Facts should be sealed pending a closer review by the undersigned. However, the undersigned has reviewed the Motions in Limine and for Partial Summary Judgment and the Joint Statement of Undisputed Facts and they do not contain information that requires redacting or that is subject to the Protective Order referenced in the Receiver's Expedited Motion. Therefore, it is not necessary to seal those documents.

CONCLUSION

WHEREFORE, the Defendant, Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta respectfully request that this Court seal the exhibits attached to their Motion in Limine (DE 803), Motion for Partial Summary Judgment (DE 804), and Statement of Undisputed Facts (DE 805).

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____/

DEFENDANTS' RESPONSE TO PLAINTIFF'S MOTION TO FILE MOTION FOR SUMMARY JUDGMENT AND EXHIBITS UNDER SEAL AND INCORPORATED MOTION TO STRIKE SEC'S UNTIMELY MOTION FOR SUMMARY JUDGMENT WHEN IT IS FILED

Despite proposing to file a dispositive motion in a case of massive public interest under seal, Plaintiff, the Securities and Exchange Commission's ("SEC") has not met the high burden to overcome public access to Court records. Furthermore, the SEC used its tenuous Motion to Seal as an excuse for not filing its motion for summary judgment by the deadline. Therefore, Defendants, Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta file this Response in Opposition to the SEC's Motion to File Summary Judgment and Exhibits Under Seal ("Motion to Seal"), and also request that this Court strike the SEC's motion for summary judgment when it is filed, and in in support thereof, state as follows:

After the extended summary judgment motions deadline had passed, the SEC first raised the issue with Defense counsel and the Court that the motion for summary judgment should be filed under seal. However, the Motion does not even come close to overcoming the strong presumption of public access to Court records. In fact, the motion requests to seal a dispositive motion in this case that has a massive public interest solely on the grounds that "[t]he Motion includes portions that describe Confidential documents and some of the exhibits are Confidential documents." (DE# 806). While Defendants do not oppose the filing of exhibits under seal that contain confidential information too voluminous to redact, there is no basis to seal an entire dispositive motion on the grounds that a portion of the motion refers to "[t]he Motion includes portions that describe Confidential documents and some of the exhibits are Confidential documents." Rather, it appears, the SEC is using this tenuous motion to file under seal to circumvent the deadline and get a free look at the Defendants' motion before filing its own. Therefore, the Motion to Seal should be denied on the merits and as moot, because the SEC's Motion for Summary Judgment should be stricken as untimely when it is ultimately filed.

MEMORANDUM OF LAW

I. APPLICABLE STANDARD

"'The operations of the courts and the judicial conduct of judges are matters of utmost public concern,' and '[t]he common-law right of access to judicial proceedings, an essential component of our system of justice, is instrumental in securing the integrity of the process.'" *Romero v. Drummond Co.*, 480 F.3d 1234, 1245 (11th Cir. 2007) (quoting *Landmark Commc'ns, Inc. v. Virginia*, 435 U.S. 829, 839, 98 S. Ct. 1535, 1541, 56 L. Ed. 2d 1 (1978); *Chi. Tribune Co. v. Bridgestone/Firestone, Inc.*, 263 F.3d 1304, 1311 (11th Cir. 2001)). "Material filed in connection with any substantive pretrial motion, unrelated to discovery, is subject to the common law right of access." *Romero v. Drummond Co.*, 480 F.3d 1234,

1245 (11th Cir. 2007) (citing *Chi. Tribune*, 263 F.3d at 1312). "The common law right of access may be overcome by a showing of good cause, which requires 'balanc[ing] the asserted right of access against the other party's interest in keeping the information confidential." *Romero v. Drummond Co.*, 480 F.3d 1234, 1246 (11th Cir. 2007) (quoting *Chi. Tribune*, 263 F.3d at 1309).

A party seeking to seal a judicial record bears the burden of overcoming the strong presumption of public access. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). "In balancing the public interest in accessing court documents against a party's interest in keeping the information confidential, courts consider, among other factors, whether allowing access would impair court functions or harm legitimate privacy interests, the degree of and likelihood of injury if made public, the reliability of the information, whether there will be an opportunity to respond to the information, whether the information concerns public officials or public concerns, and the availability of a less onerous alternative to sealing the documents." *Romero*, 480 F.3d at 1246 (citations omitted). "Good cause is established by showing that disclosure will cause 'a clearly defined and serious injury." *Sutton v. Clayton Hosp'y Grp, Inc.*, No. 6:14-cv-571-Orl-40TBS, 2015 U.S. Dist. LEXIS 61389, at *3-4 (M.D. Fla. May 11, 2015) (quoting *Pansy v. Borough of Stroudsburg*, 23 F.3d 772, 786 (3d Cir. 1994)).

II. THE MOTION FOR SUMMARY JUDGMENT SHOULD NOT BE FILED UNDER SEAL BEAUSE IT IS A DISPOSITVE MOTION IN A CASE WITH A MASSIVE PUBLIC INTEREST.

As stated above, a party seeking to seal a judicial record bears the burden of overcoming the strong presumption of public access by meeting the "compelling reasons" standard. *Kamakana v. City and County of Honolulu*, 447 F.3d 1172, 1178 (9th Cir. 2006). The compelling reasons standard applies to all motions except those that are only "tangentially related to the merits of a case." *Center for Auto Safety v. Chrysler Grp. LLC*, 809 F.3d 1092, 1101 (9th Cir. 2016). Since the SEC is attempting to file its summary judgment motion under seal, the proposed sealed motion is clearly not only tangentially related to the merits of the case. Rather, it is a dispositive motion. Moreover, this case is not just a normal civil litigation between two private parties, but a case with a massive public interest. It is a case brought by an agency of the federal government and Par has approximately 80 direct noteholders along with the investors of ABFP PPM Funds, all of whom have an interest in the outcome of this case, many of whom appear on Zoom at every hearing or status conference held by the Court.

The SEC has not even come close to approaching its burden as to why an entire motion, let alone a dispositive one, should be filed under seal in any case, let alone this case. With respect to the

exhibits, the SEC does not even claim that all of the exhibits are confidential and would potentially warrant being filed under seal, but rather states "***some of the exhibits*** are Confidential documents." Certainly, those exhibits that are not "Confidential documents" under the protective order should be filed on the public docket.[1]

Furthermore, the fact that portions of the motion merely "described Confidential documents" is insufficient to warrant filing the entire motion under seal and may not warrant any redactions whatsoever. At most, portions of the motion that describe Confidential documents, ***specifically referring*** to the ***Confidential information*** therein, should be redacted, and the remainder of the motion should be filed on the public docket, with a full unredacted copy filed under seal. However, merely describing Confidential documents alone is insufficient to warrant redactions, let alone filing under seal.

For example, if the SEC is describing a merchant's application for funding and the application is confidential because it contains the merchant's EIN, banking information, and personal contact information, but the motion for summary judgment only describes the application to the extent it was submitted on a certain date and the name of the company that submitted it, that would not warrant even redacting the motion, let alone filing the motion under seal. On the other hand, if the motion described the average daily balance of the merchant's bank accounts that is shown on the exhibits, that would likely need to be redacted. However, this is not what the SEC is asking this Court to do. The SEC is asking this Court to seal an entire motion for summary judgment, which necessarily requires putting forth facts and arguments that support the allegations of the publicly filed Amended Complaint. There is simply no justification for filing the motion under seal especially given the strong presumption of public access to judicial records. The SEC has clearly not overcome this strong presumption. Thus, the Motion to Seal should be denied.

III. THE MOTION TO FILE UNDER SEAL SHOULD BE DENIED AS MOOT SINCE THE MOTION FOR SUMMARY JUDGMENT IS UNTIMELY AND SHOULD BE STRICKEN IF IT IS ULTIMATELY FILED.

The Motion to Seal should also be denied as moot since the Motion for Summary Judgment should be stricken as untimely when it is filed. After the extended summary judgment motions deadline had passed, the SEC first raised the issue with Defense counsel and the Court that the motion for summary judgment should be filed under seal. Notably, the motions deadline was extended for

[1] Defendants take no position on whether proposed exhibits that are designated Confidential should be filed under seal, and if this motion were to be granted, Defendants would seek to unseal any documents that they believe not be designated as Confidential, if there are any.

ten days because two members of the defense counsel team suffered deaths in their families in the weeks leading up to the deadline. Defendants agreed as a matter of fairness that the deadlines for all parties should be extended so that they would not be getting an extra ten days to prepare their motion while the SEC had to file its motion by the original deadline and give the Defendants ten days to review it and craft their motion having the advantage of a sneak peek of the SEC's motion. This provided an unexpected ten-day extension to the SEC for a motion that should have been near completion when the extension was granted that was not encumbered with the burdens of out-of-state travel and family obligations like it was for two members of the defense team.

Nevertheless, the SEC did not file its motion for summary judgment by the extended deadline. In fact, it did not even raise the issue about the need to file under seal with counsel for the Defendants, and simply filed its Motion to Seal after the dispositive motion deadline.[2] A motion to file under seal does not toll a deadline. In fact, the Southern District of Florida Local Rules specifically contemplate what a party should do when, as the SEC claims here, it was ready to file its motion, but the Court had not granted a motion to seal. The local rules state: "If, prior to the issuance of a ruling on the motion to file under seal, the moving party elects or is required to publicly file a pleading, motion, memorandum, or other document that attaches or reveals the content of the proposed sealed material, then the moving party must redact from the public filing all content that is the subject of the motion to file under seal." S.D. Fla. L.R. 5.4(b)(1). Thus, the SEC should have filed its motion for summary judgment, redacting all content that actually reveals the content of the Confidential information.[3] Thus, there is no excuse for the SEC not filing the motion for summary judgment by the deadline on the basis that the Motion to Seal, also filed after the deadline, was pending.

Putting aside that the SEC did not file a redacted motion for summary judgment as required by S.D. Fla. L.R. 5.4(b)(1), the SEC did not even provide a service copy of the motion to the parties by the deadline. There is no dispute that all parties and their counsel are entitled to receive full unredacted copies of all Confidential information. Had the SEC truly been finished with the motion in advance of the deadline and realized it could not file it at the 11th hour, it should have at least served a copy of the completed motion on all parties to preserve the fairness and attempt to meet the deadline. It did not do so. In fact, the SEC reached out to confer with the Defendants about the Motion to Seal

[2] The SEC's failure to confer before filing its Motion to Seal alone provides grounds to deny the motion and impose sanctions. S.D.F.L. L.R. 7.1(a)(3).

[3] Of course, the Defense would not have opposed the later filing of exhibits that were entirely confidential and could not have been sufficiently redacted.

at noon on October 5, 2021. Counsel for Mr. LaForte immediately responded stating: "We're having a bit of trouble understanding why the entire motion needs to be filed under seal. Could you please send us a service copy of the motion so we can review it and make an informed decision?" Over an hour later, the SEC responded stating that it had spoken with the Receiver and was going to file a modified version of the motion for summary judgment. Thus, the SEC is using its tenuous Motion to Seal as an unauthorized extra extension of time to continue to edit its motion for summary judgment. The SEC's explanation is simply not credible, and it should be held to filing the motion by the deadline. The SEC should not be rewarded by its last-minute request especially since it failed to comply with S.D. Fla. L.R. 5.4(b)(1), has not provided a service copy of the completed motion to all Parties, and the Defendants have already filed their motion for summary judgment.

CONCLUSION

WHEREFORE, the Defendant, Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta respectfully request that this Court Deny the Motion to Seal, strike any motion for summary judgment filed by the SEC, and for such other and further relief as this Court deems just and proper.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed on the Court's CM/ECF system which will serve a copy on all counsel of record via notices of electronic filing.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE MMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____ /

DEFENDANTS JOSEPH W. LAFORTE, LISA MCELHONE, AND JOSEPH COLE BARLETA'S AMENDED JOINT STATEMENT OF UNDISPUTED FACTS IN SUPPORT OF THEIR MOTION FOR PARTIAL SUMMARY JUDGMENT

A. Relevant Background

1. Complete Business Solutions Group Inc., d/b/a Par Funding (hereinafter "Par Funding" or "CBSG") is a merchant cash advance business founded in Philadelphia, PA. Par Funding provided funding to small businesses throughout the country. The company employed about 70 employees, including highly skilled accountants, bookkeepers, underwriters, and ACH account processors.

2. Pursuant to tax advice given, Par Funding restructured its business operations in 2017, and thereafter an entity referred to as Full Spectrum Processing ("FSP") began to handle the day-to-day operations of Par Funding. *See* Exhibit 4, Cole Deposition Tr. at 8, 19:16-20. Defendant Lisa McElhone is the sole owner of FSP. (DE 119) (Am. Compl. at 6.)

3. Par Funding initially employed Defendant Joseph Cole Barleta as its Chief Financial Officer until 2017 when Par Funding employees were converted to FSP employees. Thereafter, FSP hired Cole as its Chief Financial Officer ("CFO"). *See* Exhibit 4, Cole Deposition Tr. at 8:9-21. FSP also hired other integral employees, including James Klenk as its Controller and Ariel Benjamin Mannes as its Chief Compliance Officer. *See* Exhibit 18, Klenk Deposition Tr. at 8:19-22; Exhibit 27, Declaration of Ariel Benjamin Mannes at ¶ 2.

A. Par Funding's Daily Business Activities

4. Par Funding maintained its accounting records in QuickBooks. *See* Exhibit 11, Second Declaration of Joel Glick, ¶ 14(b). Par Funding internally prepared various spreadsheets including but not limited to a Funding Analysis report. *See* Exhibit 3, CBSG Funding Analysis Report. The information found in the Funding Analysis is also referred to as the Key Performance Indicators ("KPI"). *See* Exhibit 4, Cole Deposition Tr. at 146:17-25.

5. Par Funding's accounting personnel prepared the Funding Analysis and provided Mr. Cole with the document for his final review. *Id.* at 147:1-12.

6. The Funding Analysis report summarized, on a monthly basis, certain financial metrics including but not limited to the number of merchant cash advance ("MCA") deals funded, average amount funded per MCA deal, average term of each MCA deal, funds wired to merchants ("Wire Total"), accounts receivables, and the exposure on merchants deals that were written off. *See* Exhibit 11, Second Declaration Joel Glick, ¶ 17.

7. Par Funding also internally prepared other spreadsheets including but not limited to the Daily Deposit Logs and a Bank Activity Log. *See* Exhibit 11, Second Declaration of Joel Glick, ¶ 14(c). Par Funding created and maintained the Daily Deposit Logs to track merchant funding activity, merchant defaults, and daily merchant repayments. *Id.* at 16(a).

8. Par Funding pulled from various sources to generate the Funding Analysis report including the Daily Deposit Log. Exhibit 18, Klenk Deposition, p. 100:8-12. In specific, Par Funding utilized the Daily

Deposit Log to populate the "Wire Total" and the "Funding Exposure" columns of the Funding Analysis report. *Id.* at 100:18-101:5.

9. The Wire Total represents the cash funded to the merchant per the terms of the contractual agreement. Exhibit 11, Second Declaration of Joel Glick, ¶ 17(f). The Funding Exposure represents the cash portion of deals that are written off. *Id.* at ¶ 17(j). This data mirrors the "Default Tab" found in the Daily Deposit Log. *Id.*

10. To calculate the Exposure percentage, the Funding Analysis report divides the Funding Exposure column by the Wire Total column. *See* Exhibit 11, Second Declaration of Joel Glick, ¶ 19. The term Exposure % is commonly referred to as a default rate.

11. The Funding Analysis report informs any reader of the document as to what exactly is included in the Exposure percentage. *See* Exhibit 3, n.4. In specific, the Funding Analysis report provides that the Exposure percentage reflects "factoring losses realized in respective month equal to total AR balance for transactions written off against Factoring Loss reserve." *Id.* There has never been any oral or written representation stating otherwise.

12. The Funding Analysis Report also informs any reader of the document as to how exactly the Funding Exposure is calculated. *See* Ex. 3, n.5. The report details that the Funding Exposure is the "cumulative exposure, as determined by funding amount minus collected payments, at the time that transactions were written off in the respective month to Factoring Losses." *Id.* There has never been any oral or written representation stating otherwise.

13. Investors were routinely provided with a copy of the Funding Analysis Report prior to investing. *See* Exhibit 4, Cole Deposition Tr. at 111:3-7, 127; Exhibit 5, June 10, 2019 email from Cole to undisclosed recipients (investors); Exhibit 6, Declaration of Dan Cistone, at ¶¶ 5, 8; Exhibit 7, Declaration of Dilip Lamaye, at ¶ 5; Exhibit 8, Declaration of Jose Alves, at ¶¶ 5, 9; Exhibit 9, Declaration of Steve Wittmer, at ¶ 5. Investors reviewed the report, including the Exposure percentage. *Id.*

14. Every month thereafter, Par Funding routinely provided investors with a copy of the Funding Analysis report. *See* Exhibit 4, Cole Deposition Tr. at 111:3-7, 127; Exhibit 5, June 10, 2019 email from Cole to undisclosed recipients (investors); Exhibit 6, Declaration of Dan Cistone, at ¶¶ 5, 8; Exhibit 7, Declaration of Dilip Lamaye, at ¶ 5; Exhibit 8, Declaration of Jose Alves, at ¶¶ 5, 9; Exhibit 9, Declaration of Steve Wittmer, at ¶ 5.

15. Investors also inquired about the Funding Analysis Report:

> Can you explain the metrics on the report? Can you explain your historic trends and projected trends going forward? What are the methodologies used to determine the various columns, the calculations, and explaining the footnotes on how these numbers were derived.

See Exhibit 4, Cole Deposition Tr. at 152-1-21. This is uncontradicted in the record. When asked about

the exposure percentage, Mr. Cole explained to investors:

> The exposure percentage is a dynamic number that's calculated each month. It reflects the cash-over-cash exposure for deals that were written off for that respective period of time in proportion to the amount of funding for that respective period of time.

Id. at 152:11-21; *see also id.* at 154:12-16 ("the operative word there is always cash-over-cash losses"). The record is uncontradicted that Par Funding made any representation stating otherwise.

16. The SEC alleges that Perry Abbonizio "claims to be an owner and managing partner of Par Funding and he is responsible for bringing investment capital into Par Funding." (DE 119) (Am. Compl. ¶ 20.) Mr. Abbonizio routinely provided investors with the Funding Analysis report and utilized it to explain the default rate. *See* Exhibit 10, Perry Abbonizio Deposition Tr. at 177:2-180:5; *see also id.* at 181:5-10 ("I typically would put it that we have a 1.2 percent cash on cash default rate.").

17. For good measure, the version of the Funding Analysis Report Mr. Abbonizio disseminated to investors further defined the default rate[1] as "reflects the proportion of cash losses under Bad Debt Exposure in proportion to new capital being funded." *See* Exhibit 15, at 28 n.4.

18. Defendants' expert witness, Joel Glick, analyzed the internal spreadsheets prepared by Par Funding, including the Funding Analysis Report. *See* Exhibit 11, Second Declaration of Joel Glick ¶¶ 19-21. In conducting his analysis, Defendants' expert witness recreated portions of the Funding Analysis report to mirror the data stored and maintained in QuickBooks ("KPI Analysis"). *Id.* at 9. In particular, the KPI Analysis revealed that when the Exposure percentage is calculated based on the actual amounts wired out to merchants (e.g., the Wire Total), the revised percentage went from 1.16% to 1.19%. *Id.*

19. The SEC's expert did not perform a similar analysis to determine what impact the Exposure percentage would have if the Wire Total column was adjusted to account for only the actual amounts wired out to merchants. The SEC did not provide any expert rebuttal report. Likewise, the SEC has not provided any witness that countered this point.

B. Par Funding Employed Credible Attorneys and Accountants for Assistance in Various Matters

Rod Ermel Associates, Inc.

20. Rod Ermel Associates, Inc. ("Rod Ermel") is a public accounting firm based in Colorado Springs, Colorado. *See* Exhibit 4, Cole Deposition Tr. at 144:12-17. Rod Ermel was responsible for preparing Par Funding's tax returns. *Id.* at 144:12-17, 146:1-9. Rod Ermel had full and complete access to Par Funding's books and records through a live electronic portal. *See* Exhibit 18, Klenk Deposition Tr. at 36:23-37:17.

21. In 2016, Par Funding also enlisted Rod Ermel to review its Funding Analysis Report. *See* Exhibit 4, Cole Deposition Tr. at 150:4-18. Mr. Cole explained:

[1] The exposure percentage is also referred to as the bad debt ratio.

> Lisa hired them in 2016 to perform an audit on that specific report. They issued an agreed upon letter procedure where they verified for a week. Two of their CPAs flew out to the office. They verified the deals we had reported on the report were accurate and that they were indeed funded per the terms of the agreement.

Id. at 150:4-14. This review was performed once. Though Mr. Ermel would continue to receive the Funding Analysis Report in his individual capacity as an investor, Mr. Cole did not ask Mr. Ermel to verify the Funding Analysis Report every month thereafter. *Id.* at 150:19-151:7.

22. Rod Ermel confirmed the accuracy of the procedures utilized in the Funding Analysis. *See* Exhibit 17, Agreed Upon Procedures Letter.

Insurance Broker

23. In 2018, Par Funding received assurances from its licensed insurance broker, Anthony Bernato, that it could help them obtain insurance to cover merchant defaults. *See* Exhibit 25, Declaration of Anthony Bernato at ¶¶ 5-6. Mr. Bernato has over 30 years of experience. Mr. Bernato affirmed:

> I have read the Securities and Exchange Commission's claim in its lawsuit that Par Funding and/or its agents falsely told investors that it had insurance to back up investor funds in the event of a default by a merchant.
>
> In fact, I know Par Funding's assertions about its insurance coverage to be true since I was the insurance broker for Par Funding who secured insurance for the company in the event of a merchant default.

Id.

24. To obtain the insurance, Par Funding submitted a list of merchant transactions that Par Funding wanted insured. *See* Exhibit 25, Declaration of Anthony Bernato at ¶ 9. Mr. Bernato explained that he entered the list of merchant transactions into the insurance carrier's portal and provided the list to the carrier to conduct its own internal due diligence review. *Id.*

25. Mr. Bernato secured the insurance coverage for Par Funding through Euler Hermes (hereinafter "Euler"), a $800 billion global credit default insurance company. *See* Exhibit 25, Declaration of Anthony Bernato at ¶ 7. Euler did not extend coverage until its own underwriting process was satisfied. *Id.* Euler eventually increased their policy coverage to $150MM. *See* Exhibit 25, Declaration of Anthony Bernato at ¶ 11. In the end, Par Funding paid millions in insurance premiums. *Id.* at ¶ 12.

Legal Counsel

26. In or about January of 2018, the Pennsylvania Department of Banking and Securities ("PADOB") issued a subpoena to Par Funding to investigate Par's payment of commissions to finders in connection with the sale of notes ("PADOB Subpoena"). *See* Exhibit 1, Rutledge Deposition Tr., at Vol I, at 13-14.

27. Shortly thereafter, Par Funding hired G. Philip Rutledge, partner at Bybel Rutledge LLP, to respond to the PADOB subpoena. *Id.* Norman Valz, Par Funding's then general counsel, contacted Mr. Rutledge regarding the PADOB subpoena. *Id.*

28. Mr. Rutledge's points of contact at Par Funding were Mr. Cole, Mr. Valz, and after Mr. Valz's departure, Cynthia Clarke, Par Funding's subsequent in-house general counsel. *See id.* at 15.

29. Mr. Rutledge graduated from law school in 1978. *Id.* at 12. For 25 years thereafter, he worked for the Pennsylvania Legislative and Budget Committee, and then for the Pennsylvania Securities Commission. *Id.* By the time he left the Commission, he held positions there as the Director of the Division of Corporate Finance and Chief Counsel to the Commission. *Id.* at 13. In 2012, the Pennsylvania Securities Commission combined with the Pennsylvania Department of Banking to create the Pennsylvania Department of Banking and Securities. *See id.* at 13.

30. After entering private practice, Mr. Rutledge specialized in the areas of "securities and the corporate, and the area of securities dealing with broker dealers and investment advisors." *See* Exhibit 2, Rutledge Deposition Tr., at Vol. II, 165.

31. Mr. Rutledge taught securities law and regulation as a professor at various universities in the United States and England including the well-renowned Wharton School of the University of Pennsylvania, Widener University Commonwealth, Penn State Dickinson School of Law, BPP University Law School and the University of London. *Id.* at 165-166.

32. In connection with the PADOB Subpoena, Mr. Rutledge advised Par Funding to stop selling notes immediately. *Id.* at 169-171, Dep. Ex. 132. Defendants followed his advice. He also told them that any final order would be public and searchable on the internet. *Id.* at 170-171.

33. In a letter to PADOB on February 5, 2018, Mr. Rutledge wrote that "[a]lthough CBSG believed at the time that its promissory notes were purchased by accredited investors … CBSG went back to each noteholder to confirm such status." *Id.* at Dep. Ex. 124, p. 2. Mr. Rutledge repeatedly argued to PADOB (including the February 5 letter) that the notes were not securities. *Id.* at 232-233.

34. He also successfully argued to PADOB that the notes were exempt from registration under Rule 506(b) of Regulation D because Par Funding held a reasonable belief that all of Par Funding's investors were accredited. *Id.* Mr. Rutledge believed that the Phase 1 notes were exempt under Rule 506(b). *Id.* at 183-186. Mr. Rutledge also told Mr. Cole the same. *Id.* at 184-186.

35. In a series of emails in March 2018, Mr. Rutledge and Mr. Cole discussed the accreditation confirmations for Par Funding's Phase 1 [individual] noteholders. *See id.* at Dep. Ex. 126. Mr. Rutledge explained that he filed a supplemental production with PADOB that included the additional accreditation confirmations. *Id.* at Dep. Ex. 126, p. 2. Mr. Rutledge asked Mr. Cole whether he had any additional

accreditation confirmation letters and whether Par Funding has sold any other notes "sans [without] finders fees." *Id.*

36. Mr. Cole responded that they have no other accreditation confirmations, and that they have sold notes to PPM Funds. *Id.* Mr. Cole explained that Par Funding is no longer taking any new notes from individuals and are directing individuals whose notes mature to the PPMs. Mr. Cole stated, "I'll assume no news is good news," and asked Mr. Rutledge to review Par Funding's "note/security agreement language for the PPMs." *Id.* Mr. Rutledge testified that as of March 30, 2018, he understood that Par was pivoting away from selling to individuals and instead selling to PPM Funds, which he understood to be pooled investment vehicles. *Id.* at 250-251.

37. Mr. Rutledge was therefore aware as early as March 2018 that Par Funding was changing its structure from the use of finders to selling their notes exclusively to Agent Funds. *Id.* at 192-193. This was before Mr. Rutledge settled the PADOB matter in November 2018. *Id.* at 238-239; Dep. Exhibit 136.

38. Before Mr. Rutledge settled the matter with PADOB in 2018, Mr. Cole told Mr. Rutledge in an email dated September 21, 2018, that he was gathering documents from the PPM Funds, which Rutledge understood to be pooled investment vehicles, to certify that they were also accredited investors. *Id.* at 196-198, 259-262; Dep. Exhibit 127, at p. 7-8..

39. In a subsequent email dated September 25, 2018, Mr. Cole told Mr. Rutledge that Par Funding wanted to increase its retainer reserve for Mr. Rutledge to handle the upcoming response to the PADOB and to "draft agreements" "for the funds we work with." *Id.* at Dep. Ex. 127, at 1.

40. In an email dated September 28, 2018, Mr. Rutledge attached a draft of a note purchase agreement ("NPA") template he prepared for Par Funding's use to sell notes to Agent Funds. *Id.* at 220; Exhibit 128, at p. 7.. Mr. Rutledge understood that the NPA template he was preparing would be for Par to use to sell notes to Agent Funds, *id.* at 215-218, and this was several months after he learned that Par Funding was pivoting away from selling notes to individuals and was instead selling notes to Agent Funds. *Id.* at 258.

41. The NPA included a provision at Section 2.05 where the Purchaser [the Agent Fund] and Seller [Par Funding] agree that a bargained for provision of this Agreement is that Seller shall offer to sell notes to Purchaser only if Purchaser is an Accredited Investor as that term is defined in Rule 501 of Regulation D…" *Id.* at 220; Exhibit 128, at p. 2 of NPA. The NPA included another provision at Section 4.05 under "Representations and Warranties of the Purchaser" for the Purchaser [Agent Fund] to certify its status as an accredited investor. *Id.* at p. 4 of NPA.

42. Mr. Rutledge testified that he asked Par Funding to instruct the Agent Funds to include in the Section 4.05 certification the specific provision they believed applied under Rule 501 to confirm their

status as accredited, as some had merely marked an "X" instead of the applicable numerical subparagraph of Rule 501. *Id.* at 278. Mr. Rutledge agreed that Mr. Cole followed his advice in carrying out this instruction. *See id.* at 301-302. Mr. Rutledge, however, testified that it was not necessary for Agent Funds to certify in the NPA that they were accredited for the exemption to apply, but it is "good practice." *Id.* at 226-227.

43. On November 8, 2018, after receiving this email that Mr. Cole was gathering documents certifying that its new noteholders, the Agent Funds, were accredited, Mr. Rutledge wrote a letter to PADOB that Par Funding: (1) sold notes exclusively to accredited investors in good faith reliance on Rule 506(b); (2) had no duty to make disclosures to accredited investors under Rule 502(b); and had provided documentary evidence to PADOB that Par Funding had a reasonable basis to believe that all of its note purchasers were accredited. *See id.* at Dep. Exhibit 135, p. 2. At the time of this letter, it is undisputed that Rutledge knew that Par was selling notes to Agent Funds, who were in turn selling notes to investors.

44. In an email dated November 12, 2018, Mr. Rutledge attached a draft letter to Mr. Cole and Ms. Clark, attaching a draft of his final settlement offer to PADOB. *See id.* at 267; Dep. Ex. 149.

45. In a series of emails that follow, both Mr. Cole and Ms. Clark wanted Mr. Rutledge to disclose more about the new plan Par Funding pivoted to:

> Does that language encompass or *can it be broadened to encompass the manner in which CBSG currently offers and sells notes* (i.e., a statement or acknowledgement that the current manner in which CBSG offers or sells notes is not in violation of Pennsylvania law)? Our concern is that CBSG has modified the manner in which notes now being offered/sold (beyond the notes that are specifically the subject of the current investigation) and that the Department could initiate a new investigation after the date of the consent order with respect to those sales being made under the new procedures after the date of the order. Please advise. Thanks, Cindy.

Id.

46. Rutledge understood this email to mean that Ms. Clarke was asking whether Par Funding could provide more information describing what Par Funding was doing in November 2018, namely selling its notes to Agent Funds, to make sure they were compliant. *See* at 269-276. Mr. Rutledge responded that what Ms. Clark was requesting was a "no action letter," which is a request that PADOB approve of the new structure that Par Funding is using. Mr. Rutledge advised Ms. Clark that PADOB's "Corp. Fin." [Division of Corporate Finance] Section would not be likely to grant that request. *See id.* at 273-276; Dep. Ex. 149, at p. 3. Instead, Mr. Rutledge suggested in an email dated November 13, 2018, that they add language referencing the new NPA. *Id.* Rutledge testified that he understood Ms. Clark's email to mean

that she wanted language in the consent order "to cover as much about the current manner which they are selling notes as is possible?" *Id.* at 276-277.

47. In his final letter to PADOB on November 14, 2018, Mr. Rutledge told PADOB that Par Funding had revised its practices regarding the sale of notes, was only selling notes to accredited investors under Rule 506(b), was no longer using brokers, and was using a new note purchase agreement ("NPA") where no commission was paid to brokers. *See id.*; Dep. Exhibit 136, at p.4. Mr. Rutledge understood the new structure involving PPM Funds by then and was drafting the NPA for this new structure. *Id.* at 266-267. Despite Defendants' request that he include specific language about the sale of notes to Agent Funds, Mr. Rutledge did not do so.

48. In an email dated March 3, 2020, Mr. Rutledge raised a concern for the first time that a regulator might deem the sale of notes by Par Funding to Agent Funds to be a commission if the interest on the note received by the Agent Fund was more than the amount the Agent Fund was charging to its noteholders. See *id.* at 310, SEC Exhibit 66.

49. Even though Mr. Rutledge knew that Par Funding was selling notes to Agent Funds, and those Agent Funds were selling notes to investors whose funds were going to CBSG, he never asked anyone at Par Funding the amount of interest the Agent Funds were paying, what the Agent Funds were paying on the notes they sold, and never instructed Par Funding to stop selling notes to Agent Funds. *See id.* at 314-316; 320-322. There is no evidence in the record that Par played any role in or had any control over what the Agent Funds paid their noteholders.

50. On March 11, 2020, Rutledge wrote an email to Mr. Cole, and counsel for Fox Rothschild and Haynes Boone. In the email, he prepared a draft of regulatory disclosures he suggested should be made to convince the Texas Securities Regulators to resolve their case against Par Funding. *See id.* at Exhibit 122, p. 2.

51. Mr. Rutledge explained that the disclosure would show that the PADOB Order "stated that Par Funding could continue sales in Pennsylvania in compliance with the order, recognized that it had stopped paying sales commissions, and stated that the order should not be a basis for any disqualification under federal or state laws." *Id.* at Dep. Ex. 122. Mr. Rutledge also explained in the email that, "interestingly… the TX Order [] does not state to whom CBSG failed to make these disclosures, which I think is important because, with respect to paragraph 61, CBSG is not required under Rule 502(b) to provide this type of business disclosure to accredited investors. *Id.* Mr. Rutledge also testified that no disclosures need to be made to accredited investors to comply with Regulation D and advised Cole of the same. *See id.* at 208-209.

52. Paragraph 61 of the Texas Order alleges that Par Funding, A Better Financial Plan, and Defendant Perry Abbonizio failed to disclose the identity, the business repute and qualifications, and experience of the principals and managers of Par Funding. (*Id.* at Dep. Exhibit 131, p. 10.)

53. Mr. Rutledge's advice was that Defendants did not need to make these disclosures under Rule 502(b) to its accredited investors. *Id.* at Dep. Ex. 122, p. 2. Mr. Rutledge testified that Par Funding had a reasonable basis to believe that its investors were accredited. *Id.* at 183-186. Mr. Rutledge also explained in the March 11, 2020, email that any disclosures regarding Par Funding's civil litigation [involving merchant suits] "equally would be within the realm of Rule 502(b)." *Id.* at Dep. Ex. 122.

54. Par Funding also hired attorney Martin Hewitt to handle Par Funding's response to the New Jersey Securities Regulator's investigation. Hewitt advised Cole that he had resolved the matter with New Jersey and that CBSG's notes were exempt from registration. (See Exhibit 31, March 1, 2019 email from Hewitt to Cole.) There is no evidence in the record that Mr. Hewitt ever advised anyone at Par Funding that it had to disclose the NJ investigation to investors.

Loan Practices

55. The SEC alleged that Par Funding, through Lisa McElhone and Joseph Laforte, made usurious loans. (ECF No. 119 at ¶¶ 1, 2, 8, 45, 46).

56. What the SEC alleged were loans, however, were in fact "advances" made on "factoring agreements." (*See* Exhibit 4, Cole Dep., Tr. At 54:8-13.) Fox Rothschild, who represented Par Funding in lawsuits filed in connection with those advances, filed legal briefings in various court proceedings representing that the advances were not usurious, but were in fact legal and enforceable. (*See* Exhibit 30**,** Berman Dep. Tr. at 105:13-106:21; 237:6-9.) Courts across the country have upheld the enforceability of the advances and legality of the merchant cash advance business. (*Id.* at 237:9-11.)

57. Cole and Par Funding's general counsel received copies of Fox Rothschild's briefings. (*Id.* at 236:2-8.) Counsel for Fox Rothschild, Brett Berman, spoke with Cole about this issue. Cole was "very well aware" of the court opinions holding that the MCA business was legal and that the loans were not usurious based on his conversations with Berman and other lawyers Par Funding had hired before Berman. (*Id.* at 237:18-238:21; 239:7-21.)

58. The SEC has not pursued evidence to support its "loan" assertions in discovery. At the Preliminary Injunction hearing in August 2020, the SEC conceded that it did not care, and it did not matter if the Defendants were selling loans or not (*See* ECF No. 193 at 29-30).

59. Courts across the nation have held that merchant cash advances based upon the purchase of merchant accounts receivable are not loans. (*See* ECF No. 663, Exhibit 2, Declaration of Norman Valz, ¶¶20-24, 26; and Exhibit 4 at pp. 2-4 (Relevant Background), 9-13 (Allegation of Usury), 15-21 (Granting Summary Judgment as to Count 1 because the Agreement is not a loan). The SEC has not adduced any

evidence supporting its assertion in the Amended Complaint that the advances made by Par Funding can be characterized as usurious loans.

C. Par Funding's Underwriting Process

60. Par had an entire underwriting department that preapproved deals and then conducted further underwriting after a merchant accepted an offer. This process included collecting the necessary documents and a site inspection as the final prerequisite to funding.

61. As a result of this vigorous underwriting process, it funded only 17% of the merchants that applied. *See* Glick Report, DE 535-1 at 13. This is far below industry standards. Two studies from the Federal Reserve show average approval rates of 79% in 2017 and 84% in 2021. *Id.*

62. As part of Par's rigorous underwriting process, Par examined the financial stability of the merchant's company by, among other things, running credit profiles, reviewing bank statements, and conducting background searches (including criminal history). *See* Exhibit 21, Villarose Dep. Tr. at 20-21. Included in the underwriting process were on-site inspections originally completed by Metro Site Inspections. *Id.* at 78. The on-site inspections involved a third-party hired to inspect and photograph the premises and, where possible, to photograph the merchant's credit terminals. *See* Exhibit 21, Villarose Dep. Tr. at 78.

63. While there were certainly some cases where an on-site was not performed, it was done so based on principled underwriting guidelines, such as a transaction amount being very low, and Par could verify the business's existence other ways such as an internet search. *See id.* at 70. Alternatively, sensitive businesses such as law firms or a childcare facility could be verified through other means. *Id.* at 75-76. Furthermore, if a merchant had an existing relationship with Par, there was no need to do another site inspection since they already had the information it needed, to wit, that it was a real business. *Id.* at 69.

64. Additionally, some of the underwriting standards that the SEC access Par of failing to meet are simply made up by the SEC. For example, the SEC argues that the on-sites were not performed before Par "approved" the cash advance. However, this concept of approved is made up by the SEC. Par would pre-approve a deal to make an offer to a merchant, but there was no obligation on Par's behalf until the deal was funded. *Id.* at 87; *see* Exhibit 23.

65. Par did not promise noteholders that it requested information about debt schedules, profit margins, or expenses. In fact, one of Par's brochures for noteholders explains that: "Par Funding uses a financial matrix for our underwriting which evaluates clients with an ***emphasis based on cash flow rather than traditional credit metrics.***" *See* Exhibit 24.

Dated: October 6, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all counsel of record via the Court's CM/ECF Filing Portal on this 6th day of October, 2021.

/s/ Alejandro O. Soto
ALEJANDRO O, SOTO

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE MMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al*.,

Defendants.

DEFENDANTS' NOTICE OF FILING AMENDED JOINT STATEMENT OF UNDISPUTED FACTS AND REDACTED EXHIBITS IN SUPPORT OF (1) DEFENDANTS' MOTION FOR PARTIAL SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW AND (2) DEFENDANTS' AMENDED JOINT STATEMENT OF UNDISPUTED FACTS.

Defendants, Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta hereby file this Notice of Filing an Amended Joint Statement of Undisputed Facts (DE 822) and Redacted Exhibits in support of their (1) Motion for Partial Summary Judgment and Incorporated Memorandum of Law (DE 804) and (2) Amended Joint Statement of Undisputed Facts. Defendants inadvertently filed copies of exhibits that required redactions in accordance with Southern District of Florida Local Rule 5.3(b)(2) and Federal Rules of Civil Procedure Rule 5.2(a).

Dated: October 6, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all counsel of record via the Court's CM/ECF Filing Portal on this 6th day of October, 2021.

/s/ Alejandro O. Soto
ALEJANDRO O, SOTO, ESQ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO.: 9:20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, et al,

Defendants.

DEFENDANTS' MOTION TO ADJOURN THE TRIAL AND FOR A STATUS CONFERENCE TO ADDRESS TRIAL LOGISTICS

INTRODUCTION

Defendants Lisa McElhone, Joseph Cole Barleta, Joseph W. LaForte, Perry Abbonizio, Dean Vagnozzi, and Michael Furman (collectively "Defendants"), request that the Court adjourn the jury trial of this case, currently scheduled for December 6, 2021 for thirty days or as the Court's schedule permits. Defendants also respectfully request a status conference to discuss logistics for the jury trial.

REQUESTED RELIEF

A. Adjournment of trial

1. Defendants respectfully request an adjournment of the trial until January 2022.

2. On September 23, 2020, the Court set the trial for August 30, 2021 (DE 279.) On March 26, 2021, the Defendants filed a Joint Motion for Extension of Time to Conduct Discovery, Motion Deadlines and Trial Date (DE 519). On March 29, 2021, the Court set the current trial schedule of December 6, 2021 (DE 521).

3. At the time Court set the current trial schedule, the defense was just beginning to receive discovery. Since then, the defense has received 1.64 terabytes of data from the SEC – the equivalent of tens of millions of pages of discovery. Indeed, the defense continues to receive discovery well past the discovery deadline, including the receipt of discovery on October 15, 2021.

4. This case is thus factors of complexity greater than was known when the trial date was set on March 29, 2021. And it will necessitate the introduction of a significant number of exhibits and amount of data for the jury to understand what happened in this case; what Par Funding is about; and to establish the defenses to and rebut the allegations in the Amended Complaint and the elements of those allegations.

5. The defense has conferred and all of the defense attorneys – collectively about 150 years of trial experience amongst them – estimate the trial to last at least three weeks and most likely four. There are six defendants and thus six lawyers who will be cross-examining witnesses and presenting evidence. Further, each defendant will be putting on a defense case. The defense anticipates easily calling 15-20 witnesses. The defense will call as witnesses noteholders, Par employees, former Par attorneys and other professionals, an expert, defendants, and others. The defense case alone is expected to last last 10-14 days.

6. It is notable that the depositions conducted by the SEC in this case routinely lasted an entire day -- seven hours – with little time for cross-examination by counsel. At trial, defense counsel will engage in cross-examination to rebut the SEC's inferences, and develop the defense claims to the extent supported by each of the SEC's witnesses. The defense expects the SEC will conduct similarly comprehensive cross-examinations of its witnesses.

7. The SEC has stated that it anticipates that the presentation of its case-in-chief should be concluded within one week. Defendants believe this estimate is overly optimistic by half, given the breadth and complexity of the allegations in the Amended Complaint and the number of defendants. The estimate minimizes the time the lawyers for each defendant will conduct appropriate cross-examination. Defense counsel believe that the SEC will actually need at least two weeks to present its case – including defense cross-examination. And then there is the defense case – which will be extensive.

8. There is also the issue of the compressed schedule between now and the time of trial for dispositive motion practice and pre-trial matters. The parties have jointly moved to extend some of these dates to have adequate time to finish briefing these issues and meet the other deadlines preparatory to trial in this complex case, but the intersection of these deadlines shortly before trial has complicated matters further. A brief continuance would alleviate this compressed schedule.

9. Moreover, if the trial were to begin on December 6, 2021, the parties would only have two weeks of trial time until Christmas week (and the winter break for most school-aged children) begins. Under no analysis will the evidence be presented in that short time. And then there will be summations, the jury charge and deliberations. Accordingly, there is no question that the trial will run smack into the Christmas holidays – likely at or near the start of the defense case. That presents, in the defense view, a significant problem.

10. First, jury selection. The venire will have to be advised that they will very likely be sitting on the jury through the week before Christmas perhaps up to December 23 or 24, 2021. This will be a significant disincentive for any prospective juror with child care issues during the

winter break or those who fears holiday plans will be disrupted. School vacations, family trips, holiday shopping, social events and similar events are often committed to long before December 25th and encompass events well before that date.

11. Because of the high, almost definite, likelihood that the jury's service will not conclude by Christmas, jurors would then be faced with the disagreeable prospect of either continuing the case during the week between Christmas and New Year's or, more likely, continuing the case in January 2022. Such a week-long hiatus would compound the uncertainty and inconvenience to jurors during a traditionally busy time of year. Given the complexity of this case, jurors' memories may fade and their interest in this case may diminish. Alternatively, one or more jurors may fail to return altogether, resulting in a costly and unnecessary mistrial.

12. One thing that should not be done is a promise to the venire to end the trial on or before December 23, 2021. Such a promise will essentially be a precursor to a mistrial.

13. First, such a promise invites the Court to truncate the presentation of evidence and constrain cross-examination and the calling of witnesses – all in an effort to meet an artificial time constraint.

14. Secondly, there is the significant risk of prejudice, and a mistrial, if jurors are asked to serve through the holidays when they were assured beforehand that the trial will end by mid-December.

15. Third, should the trial and the presentation of evidence and cross-examination be truncated to meet a December 22 or 23 summation deadline, for instance, then the jury will be backed up against the Christmas holiday to render a verdict lest they be forced to return on

December 26th or after the New Year to deliberate. Putting the jury in such a bind in a complicated case is unfair to the parties.

16. Jurors in this situation may rush to verdict, or seek to avoid their jury service altogether, if their holiday plans are so threatened, especially if they have been assured that this will not occur.

17. To avoid the impractical and wholly unnecessary goal of concluding this complex and important trial before December 23, 2021, it is respectfully submitted that the trial be rescheduled for thirty days, or to a date in early 2022 convenient to the Court and parties.

B. Status Conference

18. In addition, counsel respectfully request an early status conference to discuss trial logistics, particularly in light of Covid precautions. Among the topics counsel wish to address is the question of the physical courtroom space that will be adequate for the number of attorneys and support personnel who will need seats and a tabletop throughout the trial. We understand that there are four (4) SEC attorneys scheduled to be involved in the trial, as well as paralegals and technical staff who will join SEC counsel in the courtroom. There are six (6) Defendants. Each defendant has at least one attorney and a paralegal who will be present every day. Collectively, the defense will also have one or more technical personnel to assist with evidence. At a bare minimum, there will be about 17 defendants, attorneys and support in the courtroom; more likely 20. The courtroom will need to accommodate this number, as well as provide room for the Court's staff and jurors. We should consider Covid precautions in such a space.

19. We welcome an opportunity to address this and other logistical questions at a status conference.

Dated: October 18, 2021

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(a)(3)

I HEREBY CERTIFY that counsel for the movant has conferred with all parties or non-parties who may be affected by the relief sought in this motion in a good faith effort to resolve the issues and their respective positions are addressed in this motion.

CERTIFICATE OF SERVICE

WE HEREBY CERTIFY that on the 18th day of October 2021, we electronically filed the foregoing document with the Clerk of the Court using CM/ECF. We also certify that the foregoing document is being served this day on all counsel of record via transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Alan S. Futerfas
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Admitted *Pro Hac Vice*

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____/

DEFENDANTS' REPLY IN SUPPORT OF MOTION *IN LIMINE* TO EXCLUDE EXPERT TESTIMONY AND REPORT OF MELISSA DAVIS

Defendants, Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta respectfully file this Reply in Support of their Motion in Limine to Exclude the Expert Testimony and Report of Melissa Davis (ECF No. 803), pursuant to Fed. R. Evid. 402, 403, and 702, and, in support thereof, state as follows:

1. **Davis Must Be Precluded from Offering Any Testimony on the Issue of Par Funding's Profitability.**

The Commission has taken the position that Melissa Davis "never analyzed whether Par Funding as an entity was profitable and has offered no opinion on that issue." (SEC Response at 1.) This may come as somewhat of a surprise to Davis, who stated in her report that she "analyzed the cash profitability of the merchant advances" and that her "conclusions [were] based on [her] analysis of Par Funding's historical cash activity and the profitability of the Merchant Advances." (Davis Report, ECF No. 836-1, at ¶20.) Given that Par Funding's merchant advances were the core of its revenue generating business, the Commission's claim that her analysis of those advances did

not happen is telling. That said, the Court should certainly preclude Davis from testifying about an analysis the SEC says she did not do and an opinion it says she did not offer.

Moreover, if Davis "did not offer an opinion on the issue" of Par Funding's profitability, she should not be permitted to offer testimony undermining Joel Glick's opinion on the issue. In her report, Davis states that she disagreed with Par Funding's credit loss provisions, which are a component of profits on an accrual basis. The SEC should not be permitted to "back door" an opinion on the company's profitability by suggesting Glick's opinion on Par Funding's profitability relies on inaccurate credit loss provisions. She either has "an opinion on the issue" or she does not. Given the SEC's clear position that she does not, Davis should be precluded from testifying or opining regarding Par Funding's credit loss provisions or their impact on Par Funding's profitability. But this would not be enough.

2. The SEC Has Erected a Strawman to Deflect Attention from Davis's Flawed Methodology.

Unless the Court excludes Davis's first opinion in its entirety as requested in Defendants' motion, the SEC will have Davis offer an opinion on Par Funding's profitability (using a cash analysis they know violates GAAP) by cloaking it in different terms. The definition of profit in Black's Law Dictionary (11th ed. 2019) is "[the] [e]xcess of revenues over expenses for a transaction." Davis's opinion is that "the cash flow from Par Funding's Merchant Advances was not sufficient to pay the promised investor returns and operational expenses." (Davis Report, ECF No. 803-1, ¶13, p. 7.) Consequently, her opinion simply replaces the GAAP-approved accrual-based assessment of revenue generated by the Merchant Advances with her cash-based assessment of those same Merchant Advances. GAAP makes clear, however, that an accrual-based analysis is the only way to accurately assess profit, that is, a company's ability to generate the revenue necessary to cover its expenses.

Notably, the SEC's Response *never once* (and could not in good faith) argue that GAAP permits Davis's cash-based methodology to assess profitability. Instead, they engage in this sleight of hand and argue that Davis isn't opining on Par Funding's ability to pay its expenses using its revenues, i.e., its profitability, even though she is clearly opining on its ability to pay its expenses using cash generated from merchant advances. So why is the SEC taking this position?

The reason is simple. The SEC cannot dispute that Par Funding generated sufficient revenue from merchant advances on a GAAP-approved accrual basis to pay investor returns and operational expenses. And because the SEC cannot argue that a cash-based assessment is an appropriate method to assess a company's ability to cover its expenses, *i.e.*, generate a profit, they have no choice but to change the argument. The SEC should not be permitted to trot out this flawed opinion to mislead the jury into believing Par Funding couldn't cover its expenses when the only appropriate methodology for this purpose says otherwise.

On the issue of GAAP, because the SEC cannot dispute that an accrual-based method is the only proper method of assessing whether Par Funding can cover its operational expenses, *i.e.*, whether it is profitable, it once again erects a strawman to recast the argument to better suit its position. This time, the SEC argues that none of the Defendants' cases "hold that only GAAP is appropriate for all financial or accounting analyses." (SEC Response at 15.)[1] Of course, Defendants did not cite those cases for this proposition. Defendants' argument—clearly stated on page one of their Motion and quoting directly from Davis's report—is that her analysis "*of the cash profitability of the Merchant Advances* on an individual basis to determine their profitability" is unreliable because "GAAP makes clear that a cash flow analysis alone is not appropriate to determine a company's profitability." So, while Defendants agree there may be "many situations

[1] Notably, the SEC does not cite to Defendant's Motion on this point.

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where an analysis under GAAP is not appropriate," (Response at 15), this, according to GAAP and even the Receiver, is not one of them.

Consequently, this is not "a disagreement over expert witnesses' methodologies." (SEC Response at 2.) The issue raised in Defendants' motion to exclude Davis' testimony and opinion is not whether one expert's methodology is an equally acceptable but better method of assessing whether a company is able to cover its expenses. As GAAP Guidance and the Receiver, himself a former CPA, state, there is only one proper way to accurately assess a company's ability to cover its expenses, and that is with accrual-based revenues from operations as opposed to "mere" cash.[2] And just as Davis failed to do when asked at deposition, the SEC fails to point this Court to a single provision in GAAP that says otherwise, opting instead to change the conversation. Rather than respond to the errors in Davis's methodology, the SEC opts to make clever sounding arguments like "accounts receivable don't pay bills" (SEC Response at 9). However, the truth is that when revenues are recorded on an accrual-basis, which is what GAAP prefers and is how Par Funding kept its books, from an accounting perspective, *receivables are revenue and do pay the bills*. It is ironic indeed that the SEC, which requires public companies to keep their books on a GAAP-approved accrual basis which recognizes that receivables can and must be booked as revenue, is taking this position. GAAP matters. This Court has asked the SEC on more than one occasion whether Davis's opinions are GAAP-approved and there is now no dispute that they are not.

[2] Statement of Financial Accounting Concepts No. 1 states: "…Modern business activities are largely conducted on credit and often involve long and complex financial arrangements or production or marketing processes. … Similarly, receivables and the related effects on earnings must often be accrued before the related cash is received, or obligations must be recognized when cash is received and the effects on earnings must be identified with the periods in which goods or services are provided. The goal of accrual and deferral of benefits and sacrifices is to relate the accomplishments and the effects so that reported earnings measures an enterprise's performance during a period **instead of merely listing its cash receipts and outlays.** (Emphasis supplied.)

3. The SEC Ignores Other Errors in Davis's Report.

Finally, the Court should grant Defendants' Motion because the SEC could not address other glaring errors in Davis's methodology which were raised in Defendant's Motion. First, in an effort to lend credibility to her flawed cash-flow analysis, Davis suggested that her analysis "marries" to the more accurate GAAP-approved assessment, but only if the collection cycle applicable to the receivables she analyzed were "complete." The SEC says absolutely nothing in its Response about the fact that the 120-day collection cycle Davis relies on for this purpose is not applicable—by her own admission no less—to the receivables in 2020 and the latter part of 2019. And they say nothing about the fact that Davis's own exhibits demonstrate that the collection cycle for Par Funding's merchant receivables well exceeded 120 days and extended over years, which is consistent with the testimony of Par Funding's Controller, James Klenk. The fact that Davis's collection cycle did not comport with reality should not be surprising given that she admitted during her deposition testimony that she did not even attempt to individually calculate the collection cycles for each of the merchant advances. As explained in Defendants' Motion to Exclude Davis's Opinion and Report, this glaring error renders her methodology unreliable with respect to the vast majority of the active accounts receivable because those deals were still outstanding at the time the Receiver took over in July 2020. The SEC simply ignores this error.

But the SEC's head-in-the-sand approach does not end there. In addition to Davis's flawed approach to recognizing Par Funding's revenue, Davis also puts her finger on the scale in assessing the other side of the equation—Par Funding's obligations to pay investor returns and operational expenses. Even though it is undisputed that Par Funding extended its payment obligations for *seven years* through its exchange note offering, Davis freely admitted that, incredibly, she simply did not

consider those facts in assessing whether Par Funding would be able to meet those obligations. For these reasons as well, Davis's opinions should be excluded as unreliable.

CONCLUSION

WHEREFORE, the Defendants Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta respectfully request that this Court grant their Motion and exclude the opinions and expert testimony of Melissa Davis referenced herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed on the Court's CM/ECF system which will serve a copy on all counsel of record via notices of electronic filing on this 28th day of October 2021.

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC.
d/b/a PAR FUNDING, *et al.*

Defendants, and

THE LME 2017 FAMILY TRUST, a/k/a
LME 2017 FAMILY TRUST,

Relief Defendant.
_____/

DEFENDANT, MICHAEL C. FURMAN'S, RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendant, Michael C. Furman, by and through the undersigned counsel, hereby files this Response in Opposition to the Plaintiff, Securities and Exchange Commission's ("***SEC***"), Motion for Partial Summary Judgment [DE 817] (the "***Motion***") and in support thereof states:

ARGUMENT

The SEC relies on the facts set forth in paragraph 24-26, 38-40, 72-79, and 83 of the Statement of Material and Undisputed Facts [DE 816-1], and Exhibits 13, 25, 41, 61, 62, 64, 68, 103, 113, 127, 129 and 132 of its Motion for a Preliminary Injunction to claim that it has established the following undisputed facts, and is entitled to judgment as a matter of law:

6. Michael Furman

Defendant Michael Furman participated in the offer or sale of securities by:

- Creating Fidelis and managing it through his company United Fidelis, for the purpose of soliciting numerous investors to invest in Fidelis' securities for the ultimate purpose of funneling that investor money to Par Funding in exchange for Par Funding promissory notes, and then doing just that[60]

Notwithstanding the SEC's contention, the evidence submitted by the SEC in support of its Motion do not support entry of summary judgment, because the SEC failed to provide any evidence showing that the exemption of Rule 506(c) does not apply. While the burden is on the Defendants to demonstrate that an exemption applies at trial, on a motion for summary judgment, the SEC must still demonstrate that there are no genuine issues of material fact that an exemption does not apply. *See SEC v. Tuchinsky*, No. 89-6488, 1992 WL 226302, at *5 (S.D. Fla. June 29, 1992) (finding "the Commission has not demonstrated the presence of facts in the record which would indisputably establish the unavailability of an exemption"); *SEC v. N. Am. Acceptance Corp.*, No. C75-230A, 1978 WL 1130, at *6 (N.D. Ga. Nov. 7, 1978) (finding that the SEC failed to demonstrate that there were no triable issues of material fact as to whether the defendants' affirmative defenses applied to Section 5(a) and 5(c)).

The SEC's blanket statement that "there is no evidence in the record to demonstrate that any exemption applies," *see* SEC Motion at 10, is woefully insufficient to prevail on a motion for summary judgment when such facts exist in the record that would demonstrate otherwise. *See SEC v. Webb*, No. 11-C-7152, 2019 WL 1454532, at *6 (N.D. Ill. Apr. 2, 2019) (denying SEC's motion for summary judgment as to Section 5 because genuine issues of material fact existed as to "whether regulation D's exemption from registration applied to the issuer's offer and sale of securities"). The SEC's failure to conduct an analysis on this point is fatal, and, in fact the evidence that it submitted as to Furman, establishes that there are material issues of disputed fact preventing

entry of summary judgment. *See Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991) ("[e]ven after *Celotex* it is never enough simply to state that the non-moving party cannot meet its burden at trial.").

Under Rule 506(c) of Regulation D, securities are exempt from the registration requirement where the issuer takes reasonable care to ensure that investors are accredited investors and that they are not underwriters, and the issuer files Form D with the SEC. 17 C.F.R. §§ 230.502, 230.506. And the SEC has attached evidence to the Motion, showing substantial compliance with Rule 506(c). The SEC has attached the Private Placement Memorandum of Fidelis (Exhibit 61), which provides, in relevant part that the "Units are being offered to a limited number of **accredited investors** who meet the suitability requirements set forth below" and mandates that any investor "complete an Accredited Investor Questionnaire and Verification Letter" as a condition precedent to purchase securities. Similarly, the SEC has attached the Form D that Fidelis filed to confirm the offering was exempt pursuant to 506(c). *See* Exhibit 64. Similarly, Exhibit 133, reveals that Furman stated that the investments in Fidelis were for "accredited [investors] only." The Declaration of Marc Reikes (Exhibit 103) also reveals that the luncheons, which the SEC claims was the general solicitation of investment was only available to accredited investors, as set forth below:

This evidence, which was put forth by the SEC itself in support of its own motion, establishes that Furman had in fact complied with Section 506(c) preventing entry of summary judgment.

In addition to the evidence that the SEC submitted, which in and of itself justifies denial of the motion, Furman has submitted significant evidence showing that he has complied with the requirements of Section 506(c). As set forth in Furman's Declaration, attached to the Statement of Disputed Facts as Exhibit 1, Section 506(c) has been complied with in its entirety, as all the investors in Fidelis, were accredited investors, Furman took reasonable steps to ensure that they were accredited, and filed Form D with the SEC. As a result, Furman was not engaged in any violation of Section 5(b), and summary judgment cannot be entered in the SEC's favor. *See Faye L. Roth Revocable Trust v. UBS Painewebber, Inc.*, 323 F. Supp. 2d 1279, 1301 (S.D. Fla. March 30, 2004); *Supernova Sys., Inc. v. Great Am. Broadband, Inc.,* 2012 WL 425552, at *5 (N.D. Ind. Feb. 9, 2012); *Premier Capital Mgmt., LLC v. Cohen*, 2008 WL 4378300, at *5 (N.D. Ill. Mar. 24, 2008); *Goodwin Properties, LLC v. Acadia Grp., Inc.*, 2001 WL 800064 at *1 (D. Me. July 17, 2001) (determining issue at Fed. R. Civ. P. 12(b)(6) stage and dismissing Section 5 claim based on plaintiff's representation of accreditor status in a private offering memorandum); *Noz v. Value Investing Partners, Inc.*, 1999 WL 387400, at *1 (S.D.N.Y. June 14, 1999) (same); *Goodwin Properties, LLC v. Acadia Grp., Inc.*, 2001 WL 800064 at *1 (D. Me. July 17, 2001) (determining issue at Fed. R. Civ. P. 12(b)(6) stage and dismissing Section 5 claim based on plaintiff's representation of accreditor status in a private offering memorandum); *Noz v. Value Investing Partners, Inc.*, 1999 WL 387400, at *1 (S.D.N.Y. June 14, 1999) (same).

Because there is no material issue of disputed fact as to Furman's compliance with Rule 506(c), Furman also requests that the Court, pursuant to Fed. R. Civ. P. 56(f) that the Court enter summary judgment in his favor with respect to any claims premised on his alleged solicitation of

unregistered securities. *See Faye L. Roth Revocable Trust v. UBS Painewebber, Inc.*, 323 F. Supp. 2d 1279, 1301 (S.D. Fla. March 30, 2004) (noting that section 5 claims can be disposed of at the motion to dismiss claim where investors sign form confirming that they are accredited).

It also appears as though the SEC is attempting to claim that Furman's efforts to raise funds through Fidelis should be considered as one integrated offering with Par Funding. However, the SEC simply referred to investments in Fidelis as investments in Par funding, without actually presenting any evidence to support the position. *See APA Excelsior III, L.P. v. Premiere Techs., Inc.*, 03-15552, 2004 WL 6064402, at *4 (11th Cir. Sept. 23, 2004) (noting that courts may consider an offering as integrated based on an assessment of "whether (1) the different offerings are part of a single plan of financing, (2) the offerings involve issuance of the same class of security, (3) the offerings are made at or about the same time, (4) the same type of consideration is to be received, (5) the offerings are made for the same general purpose.") (citing Non–Public Offering Exemption, SEC Release No. 33–4552, 27 Fed.Reg. 11316, 11317 (Nov. 6, 1962)). The only evidence that the SEC has presented to support that theory is its unsubstantiated allegation that because Fidelis invested in Par Funding, that it was involved in Par Funding's offerings. This constitutes an impermissible stacking of inferences, to the extent it could properly be considered at this juncture. *Berbridge v. Sam's East, Inc.*, 728 F. App'x 929, 932 (11th Cir. 2018) (noting that on summary judgment the Court is only required to consider *reasonable* inferences, which must be based on evidence); *Rli Ins. Co. v. Alfonso*, 19-60432-CIV, 2021 WL 430720, at *21 (S.D. Fla. Feb. 8, 2021).

In any case, the SEC is not entitled to Summary Judgment and the Motion must be denied.

WHEREFORE, Defendant, Michael C. Furman, respectfully requests that the Court enter an Order: (i) Denying the Motion; (ii) Requiring the SEC, pursuant to Fed. R. Civ. P. 56(f) to show

why summary judgment should not be entered in his favor; (iii) Entering Summary Judgment, pursuant to Fed. R. Civ. P. 56(f) in Furman's favor; and (iv) Granting such further relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this **28th** day of October, 2021, the foregoing was filed using the Court's CM/ECF Filing system which will transmit Notices of Electronic Filing generated by CM/ECF to all counsel of record.

By: *s/ Zachary P. Hyman*
Zachary P. Hyman

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.

DEFENDANTS JOSEPH LAFORTE, LISA MCELHONE, AND JOSEPH COLE BARLETA'S JOINT RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT AND INCORPORATED MEMORANDUM OF LAW

Defendants Joseph W. LaForte, Lisa McElhone, and Joseph Cole Barleta (collectively referred to as "Defendants"), by and through their undersigned counsel, file this Joint Response to Plaintiff Securities and Exchange Commission's Motion for Summary Judgment.

MEMORANDUM OF LAW

I. Summary Judgment Standard

A motion for summary judgment can only be granted when "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" *See Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986) (citation omitted). The court "must view all the evidence and all factual inferences reasonably drawn from the evidence in the light most favorable to the nonmoving party." *See Stewart v. Happy Herman's Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997). It must also "resolve all reasonable doubts about the facts in favor of the nonmovant." *See United of Omaha Life Ins. v. Sun Life Ins. Co.*, 894 F.2d 1555, 1558 (11th Cir. 1990). The Court should not grant summary judgment unless a trial is clearly unnecessary, and any doubts in this regard should be resolved against the moving party. *See Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 157 (1970).

Where, as here, "the non-movant presents direct evidence that, if believed by the jury, would be sufficient to win at trial, summary judgment is not appropriate even where the movant presents conflicting evidence. It is not the court's role to weigh conflicting evidence or to make credibility determinations; the non-movant's evidence is to be accepted for purposes of summary judgment." *See Mize v. Jefferson City Bd. of Educ.*, 93 F.3d 739, 742 (11th Cir. 1996).

ARGUMENT

A. The Motion Should Be Denied as to Count VII Because the SEC Fails to Show that There is No Genuine Dispute of Material Fact as to Defendants' Fourth Affirmative Defense.

In Count VII of the Amended Complaint, the SEC alleges that Defendants violated Sections 5(a) and (c) of the Securities Act of 1933, because Par Funding issued promissory notes without filing a registration statement. *See* Am. Compl. ¶ 2. The SEC incorrectly argues, however, that no material dispute of fact exists as to Defendants' Fourth Affirmative Defense that the notes are exempt from registration. *See* Plaintiff's Motion for Partial Summary Judgment ("SEC Motion" or "Motion") (DE 817) at 10. Moreover, the Court must deny the SEC's motion as to Count VII given the SEC's abject failure to meet its burden to demonstrate that there is no genuine issue of material fact as to whether the defense applies.

1. The SEC Has Failed to Meet its Burden as to Defendants' Fourth Affirmative Defense That the Phase 1 and 2 Notes are Exempt from Registration.

The SEC advances no evidence that an exemption does not apply. While the burden is on the Defendants to demonstrate that an exemption applies at trial, on a motion for summary judgment, the SEC must still demonstrate that there are no genuine issues of material fact that an exemption does not apply. *See SEC v. Tuchinsky*, No. 89-6488, 1992 WL 226302, at *5 (S.D. Fla. June 29, 1992) (finding "the Commission has not demonstrated the presence of facts in the record which would indisputably establish the unavailability of an exemption"); *SEC v. N. Am. Acceptance Corp.*, No. C75-230A, 1978 WL 1130, at *6 (N.D. Ga. Nov. 7, 1978) (finding that the SEC failed to demonstrate that there were no triable issues of material fact as to whether the defendants' affirmative defenses applied to Section 5(a) and 5(c)).

The SEC must "foreclose" the availability of an exemption, *see Tuchinsky*, 1992 WL 226302 at *5, and this the SEC has not done. The SEC's blanket statement that "there is no evidence in the record to demonstrate that any exemption applies," *see* SEC Motion at 10, is woefully insufficient to prevail on a motion for summary judgment when facts exist in the record that would demonstrate otherwise. *See SEC v. Webb*, No. 11-C-7152, 2019 WL 1454532, at *6 (N.D. Ill. Apr. 2, 2019) (denying SEC's motion for summary judgment as to Section 5 because genuine issues of material fact existed as to "whether regulation D's exemption from registration applied to the issuer's offer and sale of securities"). The SEC's failure to conduct an analysis on this point is fatal. *See Clark v. Coats & Clark, Inc.*, 929 F.2d 604, 608 (11th Cir. 1991) ("[e]ven after *Celotex* it is never enough simply to state that the non-moving party cannot meet its burden at trial."). "Instead, the moving party *must point to specific portions of the record* in order to demonstrate that the nonmoving party cannot meet its burden of proof at trial." *See United States v. Four Parcels of Real Prop. in Greene & Tuscaloosa Ctys. in State of Ala.*, 941 F.2d 1428, 1438 (11th Cir. 1991). Having failed to do so, the SEC's Motion as to Count VII must be denied.[1]

[1] The SEC should not be permitted to cure this error by attempting to meet its burden in a reply brief. *See Herring v. Sec'y, Dep't of Corr.*, 397 F.3d 1338, 1342 (11th Cir. 2005) ("arguments raised for the first time in a reply brief are not properly before a reviewing court"); *Prescott-Crawford v. Fulton County, Georgia*, No. 1:09-CV-3373, 2011 WL 13323672, at *4 (N.D. Ga. Mar. 14, 2011) (adopting magistrate judge's decision to reject defendants' argument in their reply brief in support of summary judgment motion because "[t]he reply brief is not a proper filing in which to introduce a novel argument or to commence the analysis of the second and third steps of the burden-shifting framework.") Allowing the SEC to do so here would leave Defendants "no recourse to respond to the arguments made for the first time in the reply brief without leave of court." *Id.; see also Gist v. TVA Bd. of Dirs.*, No. 2:08-cv-227, 2010 WL 2465484 *4 n. 4 (E.D. Tenn. June 14, 2010) (denying motion for partial summary judgment in employment discrimination case based on movant's failure to assert their legitimate, non-discriminatory reason for the hiring until the reply brief, stating it would be "improper to assess a Motion for Partial Summary Judgment with the benefit of [movant's] asserted legitimate nondiscriminatory reason, but without any evidence of pretext

2. The Notes Are Exempt Under Rule 506 of Regulation D.

While the SEC's failure to carry its burden as to Defendants' affirmative defense to Count VII should end the inquiry and place the issue of the exemption squarely in the hands of the jury, the record evidence makes clear that, at a minimum, a material issue of fact exists as to the defense. Section 4(2) exempts from the Securities Act registration requirements "transactions by an issuer not involving any public offering." *See* § 77(d)(2). Pursuant to its authority under Section 4(2), the SEC promulgated 17 § C.F.R. 230.506 ("Rule 506") as a safe harbor provision for limited private placements. *See SEC v. Life Partners, Inc.*, 912 F. Supp. 4, 10 (D.D.C. 1996).

Rule 506 provides that offers and sales of securities that satisfy the conditions of the rule must be deemed "transactions not involving any public offering within the meaning of [S]ection 4(2)." *See* 17 C.F.R. 230.506(a). The general condition that must be satisfied is that the offers and sales must satisfy Rule 501 and 502 of Regulation D. *See* § 230.506(b)(1). Rule 506(b) requires that: (a) excluding "accredited investors," the issuer reasonably believes there are no more than 35 purchasers of the securities in any 90-day calendar period; and (b):

> Each purchaser who is not an accredited investor either alone or with his purchaser representative(s) has such knowledge and experience in financial and business matters that he is capable of evaluating the merits and risks of the prospective investment, or the issuer reasonably believes immediately prior to making any sale that such purchaser comes within this description.

See § 230.506(b)(2); *see also Faye L. Roth Revocable Trust v. UBS PaineWebber, Inc.*, 323 F. Supp. 2d 1279, 1300 (S.D. Fla. 2004); *see also SEC v. Ishopnomarkup.com, Inc.*, No. 04-Civ-4057, 2007 WL 2782748, at *5 (E.D.N.Y. Sept. 24, 2007).

a. The Rule 506(b)(2) Conditions Were Satisfied Here.

The Par Funding Phase 1 and 2 Offerings meet the conditions of Rule 506 regarding the number and nature of the purchasers. The SEC admits that after Par Funding received a subpoena from Pennsylvania Regulators regarding its use of unregistered finders in January 2018, it "restructured its offering" and began selling notes to Agent Funds, who in turn would sell notes to investors promising a lower interest rate than the Agent Funds received from Par Funding. *See* Am. Compl. ¶¶ 3-4, 62.[2] There is no dispute that Par Funding hired Phillip Rutledge, a lawyer with over 25 years of experience in the areas of securities enforcement and litigation, to counsel them on several matters, the first of which was

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from [non-movant]," and concluding that it "cannot address the rest of the burden-shifting framework on the Motion before it.").

[2] There is no evidence in the record that Defendants or Par Funding played any role in or had any control over what the Agent Funds paid their noteholders.

to respond to the Pennsylvania Regulator's investigation into the company's use of finders to sell promissory notes.[3] Rutledge was the former Director of the Division of Finance and Chief Counsel to the Pennsylvania Regulator conducting the investigation.[4] Immediately after being retained, Rutledge directed Par Funding to stop using and paying finders, and Par Funding complied.[5]

Cole held a reasonable belief that each Phase 1 noteholder was accredited at the time of their note purchase based on his understanding of their investment experience, assets, income, and the amount of money they each invested,[6] but had not obtained written confirmation of the same.[7] Rutledge directed Cole to confirm the accreditation status of each Phase 1 noteholder using a questionnaire Rutledge prepared.[8] Rutledge advised Cole that the completed questionnaires would provide a basis for Rutledge to advise Pennsylvania Regulators that the Phase 1 Offering was exempt from registration.[9] Cole did so and received from each Phase 1 noteholder a signed questionnaire confirming their status as accredited investors.[10]

Rutledge successfully argued to Pennsylvania Regulators that the Phase 1 Notes were exempt from registration under Rule 506(b) of Regulation D because Par Funding held a reasonable belief that all of Par Funding's investors were accredited.[11] Rutledge believed that the Phase 1 notes were exempt under Rule 506(b) and told Cole the same.[12]

Rutledge settled the Pennsylvania investigation on Par Funding's behalf in November 2018.[13] Prior to doing so, Rutledge—at the urging of Cole and Par Funding's then in-house counsel, Cindy Clarke—disclosed to the Pennsylvania Regulators that Par Funding had restructured its method for selling notes using a new Note Purchase Agreement (which Rutledge drafted).[14] Rutledge advised the Pennsylvania Regulators that Par Funding had revised its practices regarding the sale of notes, was only

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[3] *See* Defendants' Statement of Additional Facts (hereinafter "SOF") at ¶¶ 103–105.
[4] *Id.* at ¶ 105.
[5] *Id.* at ¶ 106.
[6] A sizeable minimum investment is an indication of accredited status. 17 C.F.R. § 230.506; 78 Fed. Reg. 44,771
[7] *See* Ex. D, Declaration of Joseph Cole Barleta at ¶ 6. *See also* 17 C.F.R. § 230.506; 78 Fed. Reg. 44,771 (stating that third-party verification is not an exclusive means of satisfying the "reasonable steps" requirement and articulating other factors that are relevant to the determination).
[8] *Id.*
[9] *Id.* at 10.
[10] *Id.* at ¶ 8.
[11] *See* SOF at ¶ 112.
[12] *Id* at ¶ 113; *see* Ex. D, Declaration of Joseph Cole Barleta at ¶ 10.
[13] SOF at ¶ 120.
[14] *Id.* at ¶ 118. Clarke, in fact, further urged Rutledge to describe as broadly as possible Par Funding's new structure to ensure compliance with the law in connection with its Phase 2 Offering, but Rutledge counseled them against that approach. *Id.*

selling notes to accredited investors under Rule 506(b), was no longer using brokers, and was using a new Note Purchase Agreement where no commission was paid to brokers.[15] There is no dispute, in other words, that the Pennsylvania Regulators understood that Par Funding would continue selling notes, guided by Rutledge, under this new structure. Rutledge advised Cole and other attorneys for Par Funding that the order issued by Pennsylvania Regulators stated that Par Funding could continue sales in Pennsylvania in compliance with the order and should not be a basis for any disqualification under federal or state laws.[16]

The notes sold to the Agent Funds, deemed the Phase 2 Offering by the SEC, were sold to only 42 Agent Fund.[17] In effect, according to the SEC's version of the events, these 42 Agent Funds became Par Funding's Phase 2 investors.[18] The Note Purchase Agreement prepared by Rutledge included provisions asking each Agent Fund Manager to certify its status as an accredited investor.[19] Rutledge then counseled Defendants to file a Form D with the SEC to claim that the Phase 2 Offering was exempt under Rule 506(b) of Regulation D.[20]

Consequently, there is no dispute that Defendants had a reasonable basis to believe that Par Funding's Phase 1 and 2 noteholders were accredited. Moreover, given Rutledge's advice to Par Funding that: (1) its Phase 1 and Phase 2 Note Offering was exempt from registration and his representations to Pennsylvania Regulators of the same; and (2) it file an updated Form D claiming the exemption for its Phase 2 noteholders, Defendants were further justified in believing that they were complying with the requirements of Regulation D under the guidance of counsel. *See Wright v. Nat'l Warranty Co.*, 953 F.2d 256, 260 (6th Cir. 1992) (rejecting argument that Regulation D exemption was unavailable based in part on affidavit of issuer's attorney that Form D was duly filed in accordance with the pertinent Regulation D provision.)

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[15] *Id.* at ¶ 119.
[16] *Id.* at ¶ 121.
[17] *Id.* at ¶ 122.
[18] Rutledge made clear in his testimony that Par Funding's investor was the Agent Fund, and its duty of disclosure would have been to the Agent Fund and not the Agent Fund's noteholders. *See id.* at ¶ 123.
[19] *Id.* at ¶ 126; Declaration of Joseph Cole Barleta at ¶ 10.
[20] *See id.* at ¶ 127. Rutledge testified regarding an email in which he directed Defendants to file with the SEC an updated Form D. *See* Declaration of Joseph Cole at ¶ 10, at attached Ex. B, at pdf page 3. The Form D referenced in Rutledge's email claimed an exemption under Rule 506(b). *See* Ex. F, Form D filing. In his email, Rutledge recommended that Par Funding delete finder fee information which appeared on a previous Form D filed by the company. *Id.* At the time Rutledge advised Defendants to file the Form D in this fashion (April 2020), he was already aware that Par Funding was selling its notes to Agent Funds, who were in turn selling notes to their own noteholders.

b. Rules 501 and 502 Were Satisfied.

Rule 506 also requires compliance with certain general conditions set out in Rules 501 and 502. *See* § 230.506(b)(1). Rule 501 does not set out conditions or requirements. See 17 C.F.R. § 230.501. Rather, it provides definitions that are pertinent to Rule 506, including the definition of an accredited investor, the manner by which the number of purchasers should be calculated, and the definition of a "purchaser representative." *See id.* Rule 502 provides general conditions to be met in a Rule 506 offering. 17 C.F.R. § 230.502.[21] In pertinent part, under Rule 502, an issuer must provide certain information about the issuer, including financial statements, to unaccredited purchasers before the sale of the exempt security. *See id.*

The rule also prohibits an issuer from selling the exempt security through advertisements, articles, or notices in the media or in seminars whose attendees were invited by general solicitation or advertising. *See id.* at (c).[22] Despite its burden, the SEC does not point to any evidence that the Phase 1 or 2 Offerings violated either rule. While the SEC argues that LaForte and Cole attended seminars hosted by Vagnozzi, it marshals no evidence suggesting that there were prospective investors there, or that LaForte or Cole played any role in soliciting the attendees, much less arranging the event.[23] Consequently, the SEC can point to no evidence that LaForte or Cole or any other Par Funding representative actually sold or even

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[21] As explained above, the SEC fails to meet its burden to demonstrate that there is no genuine issue of material fact on the issue of the exemption and does not address integration, which is governed by 17 C.F.R. § 230.502(a). Rule 502(a) identifies five factors that courts review to determine when multiple, separate offerings are "integrated," and thus, treated as one, continuous offering. The record makes clear that there are genuine issues of material fact on this issue because there are facts demonstrating that Par Funding is a separate and discrete entity from the Agent Funds it sold promissory notes to, as each hired their own respective counsel to represent them in discrete legal matters, and more importantly, worked independently from one another as the Agent Funds at no point were under the control of, or were operated by, any agents or persons associated with Par Funding. *See* Ex. D, Declaration of Joseph Cole at ¶¶ 13–14; Declaration of Mike Furman at ¶¶ 15, 18; Declaration of Dean Vagnozzi at ¶¶ 18, 19, 21, 22. As such, this Court should deny summary judgment on this additional ground. *Wingsco Energy One v. Vanguard Groups Res. 1984, Inc.*, 699 F. Supp. 1232, 1240 (S.D. Tex. 1988) (denying summary judgment based on the plaintiffs' theory on integration because it found that, despite the partnerships' offerings involved the issuance of the same class of securities, made at or about the same time, and for the same type of consideration, genuine issues of material fact existed regarding whether the sales made were part of a single plan of financing, and whether the sales were made for the same general purpose).

[22] Unlike Rule 506(b), Rule 506(c) does not include a prohibition against general solicitation to investors if all purchasers are "accredited investors" and the issuer takes reasonable measures to verify that purchasers are accredited investors. 17 C.F.R. § 230.506(c)(2). Because the record includes facts that support a reasonable inference that Par Funding's Phase 1 and 2 noteholders were accredited (and that Defendants held a reasonable belief that they were accredited), the Phase 1 and 2 Offerings were also exempt under Rule 506(c). Consequently, under Rule 506(c), both offerings are exempt from registration regardless of whether Par Funding engaged in general solicitation to Phase 1 or Phase 2 noteholders.

[23] *See* SOF at ¶¶ 137–139, 141–144.

offered to sell a note to any attendee at any such event. Instead, the evidence demonstrates that LaForte and Cole attended at the invitation of Vagnozzi, their *actual* (Phase 2) investor, to answer questions about the company, which is a requirement of Rule 502(b).[24] Moreover, the record evidence makes clear that Rutledge, Par Funding's securities counsel, counseled Defendants that making themselves available to the Agent Fund Managers—their Phase 2 investors—to answer questions, for example, about how their business is performing is not akin to selling.[25]

c. Par Funding Showed Good Faith Compliance Under Rule 508

While Par Funding was fully compliant with Rule 506, even if there were some deviations in compliance with the rule, the company and Defendants are still entitled to the exemption under Rule 508 because they made a good faith effort to comply with all the pertinent conditions. *See* 17 C.F.R. § 230.508. Rule 508 provides a safeguard for insignificant deviations from the terms of Regulation D if the error was made in good faith. *See id.*; *see also Faye*, 323 F. Supp. 2d at 1300 ("Section 230.508 provides that an issuer will not lose exempt status when there is a 'good faith and reasonable attempt' to comply with . . . Regulation D."); *SEC v. Levin*, 849 F.3d 995, 1001 (11th Cir. 2017) (safe harbor provision of Rule 508(a) is available in SEC enforcement action). In pertinent part, Rule 508 states that a Regulation D exemption will not be lost if the purported failure to comply did not pertain to a condition directly intended to protect the purchaser, the failure was insignificant with respect to the offering as a whole, and a good faith effort was made to comply with all conditions of Rule 506.

First, the SEC has failed to meet its burden that no genuine issue of material fact exists that Defendants failed to make a good faith effort to comply with Rule 506(b) or 506(c). Defendants held a reasonable belief that both Phase 1 and Phase 2 noteholders were accredited and confirmed the same in writing at the direction of counsel.[26] Moreover, Defendants did not engage in general solicitation during either offering, and the SEC offers no evidence of the same in its Motion. Indeed, the SEC admits that many of the Agent Fund Managers who became Par Funding's Phase 2 noteholders had a previous relationship with the company as finders during the Phase 1 Offering.[27] And while the SEC may argue that Defendants LaForte and Cole's presence at dinners hosted by Vagnozzi constitute general solicitation, there is at minimum a genuine issue of fact regarding the role they played at those dinners. Rutledge counseled them that answering questions posed by their investors—in this case the Agent

[24] *Id.* at ¶ 139.
[25] *See* Ex. E, Rutledge Depo. Tr. at 355, citing Dep. Exhibit 133; *see* Ex. D, Declaration of Joseph Cole at ¶ 15.
[26] *See* SOF at ¶¶ 99–100.
[27] *See* SEC Statement of Undisputed Facts at ¶ 43. Defendants, however, dispute that Par Funding "converted" its finders to agent fund managers. *See* SOF at ¶ 43.

Funds, did not constitute selling, but in fact was something they had to do in order to comply with Rule 502 and, correspondingly, Rule 506(b).

Even if there were some evidence of minor instances of non-compliance with Regulation D, courts typically find that the pertinent registration exemption still applies due to good faith compliance under Rule 508, or that good faith compliance under Rule 508 cannot be resolved at the summary judgment stage. *See, e.g., Levin*, 849 F.3d at 999–1000*; Faye*, 323 F. Supp. 2d at 1301 (finding that Rule 506 exemption applied in part because the "record also shows that UBS followed a number of procedures to ensure that the investors were accredited"); *Ishopnomarkup.com*, 2007 WL 2782748, at *9–10 (denying motion for summary judgment because of genuine issues of material fact relating to Rule 506 and 508 compliance where "[issuers] produced evidence that they exerted a good faith attempt to comply with all of the strictures of Rule 506").

In *Levin*, the SEC sued the defendant for violations of Securities Act sections 5 and 17(a), as well as for violation of Exchange Act section 10(b) and Rule 10b-5. *See* 849 F.3d at 999–1000. On cross motions for summary judgment as to the section 5 claim, the district court initially concluded that the motion should be denied because the defendant relied on Rule 508 to support an exemption and there were genuine issues of fact under that rule as to whether the defendant had made a good faith and reasonable effort to comply with Rule 506 and whether the failure to comply with any provision was significant to the offering as a whole. *Id.* at 1000. Specifically, the court held that the defendant attempted to comply with Rule 506(b)(2) by requiring investors, before purchasing the notes to submit certifications of their accreditation status. *Id.* at 1002. After the SEC moved for reconsideration, however, the lower court held that Rule 508 did not apply in actions by the Commission at all, and therefore granted summary judgment to the SEC for violation of the registration requirement. *Id.* On appeal, the Eleventh Circuit reversed the summary judgment on the registration count, holding that an issuer can employ Rule 508 as a defense in a section 5 enforcement action by the Commission. *Id.* at 1004–1005. Consequently, it reversed the district court's judgment on the registration claim because there were disputed facts regarding whether the notes fell within the good faith safe harbor provisions of Rule 508. *Id.*

In its Motion, the SEC neither argues nor presents evidence demonstrating that Par Funding is foreclosed from good faith compliance under Rule 508, and for good reason. There is no dispute that Defendants not only obtained signed questionnaires from Phase 1 noteholders certifying their accreditation status and included a certification of accreditation status in their Note Purchase Agreement with Phase 2 investors, but that they did so under the guidance of counsel. Like the defendant in *Levin*, *supra*, Defendants "made a 'good faith and reasonable effort' to comply with Rule 506 as required under Rule 508(a)(3)." *Id.* at 1002. Accordingly, the SEC's argument as to Count VII should be denied because

Defendants complied with Rule 506 in good faith under Rule 508, or, at a minimum, there is a genuine issue of fact as to their good faith compliance under Rule 508.

3. The Notes Are Exempt Under the Section 4(2) Exemption

Even though the Rule 506 exemption applies, the Par Funding Note Offering also qualifies under the generic exemption set forth in Section 4(2). *See Faye*, 323 F. Supp. 2d at 1297–98 ("if a court cannot use the clarifying and unifying Regulation D . . . in determining whether an offering is exempt, an alternate route [is] obtaining Section 4(2) exempt status"); *SEC v. Life Partners, Inc.*, 912 F. Supp. at 10 ("when an issuer tries to comply with Rule 506 but fails, the issuer may still rely on the statutory exemption of section 4(2)"). In deciding whether this exemption applies, courts consider the number of offerees, the relationship of the offerees to each other and the issuer, the manner of the offering (*e.g.*, solicitation), information disclosure or access, and the sophistication of the offerees. *See Life Partners*, 912 F. Supp. at 10; *see also Faye*, 323 F. Supp. 2d at 1296. The ultimate issue is "whether the particular class of persons affected need the protection of the [Securities] Act." *See Faye*, 323 F. Supp. 2d at 1296.

Based on this record, consideration of these factors compels a finding that the Section 4(2) exemption applies to the Phase 1 and 2 Note Offerings, or that, at a minimum, a genuine dispute of fact exists as to application of this exemption. The Phase 1 Offering was a limited offering that occurred between 2012 and 2018, and many of the investors were known to Defendants.[28] The Phase 2 Note Offering was more limited still, restricted to Agent Fund Managers with whom Par Funding had a pre-existing relationship, all of whom claimed in the related Note Purchase Agreement to be accredited. The Phase 2 Offering by Defendants was directed to just 42 Agent Fund Managers in total, and Defendants did not engage in any general solicitation in either Offering to these accredited investors. The record also shows that Par Funding provided prospective and existing purchasers of the Phase 1 and 2 Notes with materials regarding the company, including Par Funding's Key Performance Indicators, on a monthly basis.[29]

B. The Motion Should Be Denied as to Counts II-IV Because There Is a Genuine Issue of Fact as To Whether Defendants Violated Section 17(a) and Section 10(b).

In Counts I-III, the SEC alleges that Defendants committed securities fraud in violation of Section 10(b) of the Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5(a)-(c), 17 C.F.R. § 240.10b-5(a)-(c). In Counts IV-VI, the SEC alleges that Defendants committed securities fraud in violation of Section 17(a)(1)-(3) of the Act, 15 U.S.C. § 77q(a)(1)-(3). The SEC seeks summary judgment as to Defendants LaForte and McElhone on these causes of action, asserting that it has proven a number of purported misrepresentations and omissions made by LaForte and McElhone with respect to securities sold by Par

[28] *See* Ex. D, Declaration of Joseph Cole Barleta at ¶ 7.
[29] *See* SOF at ¶ 130.

Funding. *See* SEC Motion at 19–27.

Contrary to the SEC's argument, McElhone and LaForte did not make material misrepresentations in violation of Rule 10b-5(b) and Section 17(a)(2). Not only is the SEC's supposed undisputed evidence, disputed, there is actually undisputed evidence that warrants summary judgment in favor of McElhone and LaForte on these issues. As a preliminary issue, both materiality and scienter, which the SEC is attempting to prove here, is a question properly left for the jury. "Determining materiality in securities fraud cases 'should ordinarily be left to the trier of fact.'" *SEC v. Phan*, 500 F.3d 895, 908 (9th Cir. 2007) (quoting *In re Apple Computer Sec. Litig.*, 886 F.2d 1109, 1113 (9th Cir. 1989). "Materiality typically cannot be determined as a matter of summary judgment because it depends on determining a hypothetical investor's reaction to the alleged misstatement." *Phan*, 500 F.3d at 908. Moreover, the burden to show materiality on summary judgment is extremely high. *SEC v. Cole*, No. CV 12-08024, 2016 U.S. Dist. LEXIS 203793, at *14 (C.D. Cal. Dec. 6, 2016) ("Summary judgment on matters of materiality in a securities fraud case is appropriate when the omissions and misrepresentations in question are so obviously important to the investor, that reasonable minds cannot differ on the question of materiality.") (emphasis added) (citing *SEC v. Credit Bancorp, Ltd.*, 195 F. Supp. 2d 475, 492 (S.D.N.Y. 2002); *SEC v. Research Automation Corp.*, 585 F.2d 31, 35 (2d Cir. 1978)).

The SEC has a similar barrier with obtaining summary judgment on scienter because "[i]n the ordinary securities fraud case, scienter is a genuine issue of material fact." *SEC v. Pace*, 173 F. Supp. 2d 30, 33 (D.D.C. 2001). As is explained below, this Court should deny summary judgment because (1) the alleged misrepresentations were not misrepresentations at all and (2) the SEC has not proven the materiality of the alleged misrepresentations or the defendants' scienter to the exclusion of all genuine issues of material fact. Thus, summary judgment is inappropriate here.

1. LaForte Invested His Own Money

The SEC argues that LaForte misrepresented that he had invested his own money into Par. Putting aside the issue of whether this would be a material misrepresentation, it is not a misrepresentation because it is true. In fact, both LaForte, and his wife McElhone invested substantial amounts of their own money in the form of seed money for the company, being a noteholder through their family trust, and by LaForte taking a fraction of the money he was entitled to take as an ISO through his company, RMR. Therefore, not only should the Court deny the SEC's motion for summary judgment on this issue, but it could even grant it in favor of the Defendants. [30]

[30] Fed. R. Civ. P. 56(f) states:

After giving notice and a reasonable time to respond, the court may:

The SEC relies on the hyper-technical argument that LaForte was not one of Par's noteholders. While this is technically true, it does not tell even half the story. First, LaForte and McElhone invested seed capital in Par from the sale of their own assets. SOF ¶ 98. Second, there was a note to Heritage Business Consulting, an entity owned by LaForte, that featured the same terms as every other investor, including 12-month terms with monthly interest and principal payments. *Id.* This note started with $180K in 2015 and went up to $1.3M in 2018 before being paid back per audit guidance in 2019. *Id*; Cole Decl. at 19.

Next, there are retained earnings and equity. This category reflects earnings made by the business that have not been taken out of the business by ownership. This is the largest category of growth and what LaForte meant when he said that he had $80M in the business during one of the presentation transcripts. SOF ¶98; Cole Decl. at 20.. After income is made by the company, it is rolled over as retained earnings in the following fiscal period. Any money taken from the business is deducted from this and this amount grew by over 400% from 2012 through 2015. *Id.* Therefore, it is clear, owner capital was left in the business to allow it to grow faster than being invested by the family trust.

Finally, LaForte also left millions of dollars in the company by taking smaller commissions than is industry standard through his ISO company, RMR. Unlike other ISOs that charged around 10% commission, RMR only charged 2.5% on old deals and 5% on new deals, often not charging points for "house" deals that LaForte originated for the benefit of CBSG. SOF ¶ 98; Cole Decl. at 21. RMR left large balances owed to it unpaid for the benefit of Par despite having the full right to receive these funds under their sales agreement with CBSG. *Id.*

As these undisputed facts make clear, LaForte invested a substantial amount of his own money and left money that he was entitled to be paid in the company to allow it to grow. Thus, it was not a misrepresentation, let alone a material misrepresentation, when he stated that he had invested substantial sums of money into Par. To the extent the SEC argues that it was a misrepresentation because LaForte did not take a promissory note in his own name, that creates a fact issue for the jury on both the truth of the representation and the materiality of it.

2. LaForte's Criminal Record Is Not a Material Omission

The SEC argues that LaForte made a material omission by failing to disclose his criminal record. This Court should deny the SEC's motion because there are genuine issues of material fact in that LaForte did not conceal his identity from noteholders and it is a genuine issue of fact whether such an omission,

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(1) grant summary judgment for a nonmovant;
(2) grant the motion on grounds not raised by a party; or
(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

if actually made, would be material.

First, LaForte did not conceal his criminal history. While he did occasionally use the nickname, Joe Mack or Joe Macki, he did so when dealing with merchants. SOF ¶ 87. This is a common practice in the industry for safety, especially since a merchant cash advance company operator was gunned down execution style in his office in NY, along with is assistant. *Id.*; SOF ¶¶ 148-50. When dealing with investors, LaForte used his real name. For example, the SEC submitted a transcript of an investor dinner in which LaForte was introduced to nearly 300 investors and potential investors by his real name. SOF ¶ 87. Furthermore, LaForte used his real name in a recorded statement with undercover FBI agents as well as other numerous recorded meetings. *Id.* Par also had a lounge room that included a framed article about LaForte including his picture, for everyone, including visiting Phase 1 investors and Agent Fund Managers (Par's Phase 2 investors), to see. Cole Decl. at 15. The fact that another individual introduced him to a potential agent fund manager by his nickname and LaForte did not correct him is dispositive of nothing. LaForte may have not wanted to be rude. At best, there is a genuine issue of material fact since one does not scheme to conceal their identity by disclosing it to almost everyone.

As to the criminal convictions, Par received and relied upon advice of counsel that it was not necessary to advertise the publicly searchable criminal record, and there is no evidence it was withheld for an improper purpose. A number of individuals learned about LaForte's criminal record through Google searches. (cite). He also disclosed his criminal history to his counsel. (cite). Clearly it was not concealed.

Counsel knew of his criminal record and advised him it was not necessary to formally disclose. LaForte was entitled to rely on the advice of counsel in good faith. *SEC v. Huff*, 758 F. Supp. 2d 1288, 1348 (S.D. Fla. 2010). This certainly makes the issue of scienter a jury question at best even if this Court finds he was required to formally disclose his criminal record. The SEC argues that because Par advertised LaForte's business success, it was required to disclose the criminal conviction, but this argument crumbles under the fact that the business success was true. Further, by linking to LaForte's LinkedIn and Forbes Council profiles, Par was necessarily disclosing his real name, not concealing his identity behind his nickname.

Furthermore, the fact that Par made true statements about LaForte's business acumen and referenced articles he actually wrote for Forbes, had no bearing on his ability to successfully run Par's sales department and thus did not trigger a duty to disclose his criminal conviction. *See In re Banco Bradesco S.A. Sec. Litig.*, 277 F. Supp. 3d 600, 653 (S.D.N.Y. 2017) (citing *In re Morgan Stanley Info. Fund Sec. Litig.*, 592 F.3d 347, 365–66 (2d Cir. 2010) ("rejecting argument that company's disclosures about their funds and investment strategy "triggered a clear duty to disclose all material information on the same or related

subjects," and explaining that the 'disclosures did not trigger a generalized duty requiring defendants to disclose the entire corpus of their knowledge regarding' the company"). Thus, there was not even a clear duty to disclose LaForte's criminal convictions and, had there been, there is no scienter because of the reliance on advice of counsel.

As to materiality, the SEC does not cite a single case where a court granted summary judgment in its favor based on a company or individual concealing past criminal convictions. Rather, it cites two preliminary injunction cases and one case that involved a motion for judgment of acquittal after a jury trial. Furthermore, the SEC quotes this Court nearly word for word when citing its cases regarding failure to disclose a criminal conviction, but omits the preceding sentence in which this Court stated, "reasonable minds *could* conclude that LaForte's criminal history was material to investors." *SEC v. Complete Bus. Sols. Grp.*, No. 20-CIV-81205-RAR, 2021 U.S. Dist. LEXIS 89518, at *40 (S.D. Fla. May 11, 2021)(emphasis added). The obvious implication of the use of the permissive "could," is that reasonable minds could also conclude that LaForte's criminal history was not material to investors, and thus, it is an issue of fact to be decided by the jury.

As to the SEC's cases, both *Prater* and *Cap. Cove Bancorp* involved preliminary injunction hearings, not summary judgment. Furthermore, in *Prater*, Mr. Prater did not participate as counsel or a witness at the hearing on the preliminary injunction, though he remained present for the hearing. *SEC v. Prater*, 289 F. Supp. 2d 39, 44 (D. Conn. 2003). In *Cap. Cove Bancorp*, the individual with a criminal record was the sole owner and managing member. There was also testimony that investors would not have invested had they know about the individual's history. *SEC v. Cap. Cove Bancorp LLC*, No. SACV 15-980-JLS (JCx), 2015 U.S. Dist. LEXIS 174962, at *6 (C.D. Cal. Sep. 1, 2015). In addition to the fact that LaForte is distinguishable because he used his nickname with merchants, rather than the *Cap. Cove Bancorp* individual who used it with investors, there was also nothing in the opinion to suggest that this individual obtained advice of counsel. It is also notable that these cases involved a preliminary injunction hearing with a lower standard of proof than the exclusion of all genuine issues of material fact, and that one of the defendants was unrepresented.

United States v. Hatfield, 724 F. Supp. 2d 321, 328 (E.D.N.Y. 2010), involved a motion for judgment of acquittal after a jury trial and also the court found that even if the defense's view of the evidence was fully credited, it would still have supported a conviction ("Additionally, it should be noted that—at this stage—even Mr. Brooks' 'looting' defense would support an insider trading conviction."). Thus, the jury, not the court on summary judgment, had found that the government had proven its case beyond a reasonable doubt. Quite simply put, the SEC's cases show why materiality is a jury question, they do not support the granting of summary judgment on this fact issue.

3. Summary Judgment Is Inappropriate on the Issue of the Form D Filings

The SEC argues that "[i]n its 2019 and 2020 Form D Filings with the Commission, Par Funding failed to identify LaForte in the Item 3 of the form requiring the disclosure of 'Related Persons.'" (DE# 817 at 14-15). However, the SEC does not point to a single fact that shows it was required and the SEC's argument in favor of scienter is entirely conclusory. In reality, there is clearly a genuine issue of material fact as to whether LaForte would fit under the category of a "related persons" on the form D filing that would require disclosure because he had no corporate interest in the ownership or management of CBSG.

As to scienter, the SEC's wholly conclusory argument should be rejected because it ignores the evidence that Par sought advice of counsel as to what it needed to disclose on its Form D filing, including whether LaForte needed to be disclosed as a "Related Person." *See Huff*, 758 F. Supp. 2d at 1348.

Here, there is evidence that Par sought advice of experienced and respected securities law counsel, who was fully aware of Mr. LaForte's role in the company. Par also had in-house attorneys who clearly knew of LaForte's role in the company. These attorneys assisted with the Form D filings and did not advise Par to include LaForte as a "Related Person." Thus, there is significant evidence of good-faith reliance on advice of counsel and to the extent LaForte is found to be a "Related Person" who should have been disclosed on the Form D, there is a genuine issue of material a fact that precludes a finding of scienter.

4. Par Funding did not Make Any Misrepresentations or Omissions about Par Funding's Regulatory History

The SEC contends that, as a matter of law, Defendants Lisa McElhone and Joseph LaForte violated Section 10(b) and Rule 10b-5 thereunder of the Exchange Act, as well as Section 17(a) of the Securities Act, because "LaForte touts to prospective investors Par Funding's success[,]" and that a marketing brochure distributed by Par Funding "does not disclose the regulatory history of Par Funding." SEC's Motion for Partial Summary Judgement (ECF 817) at 15. Not only is the SEC mistaken, but the Court should grant Summary Judgement in favor of Defendants on the issue of the disclosure of the state regulatory actions. *See* Defendants Motion for Partial Summary Judgement (ECF 803) at 3-4.

First, the evidence shows that Par Funding sought and followed the advice of their attorneys as to what to disclose.[31]

[31] *See* June 8, 2021 Bret Berman Depo. at T-66:9-15 ("Q. And so in connection with the exchange note offering in April of 2020, what was the advice that Phil Rutledge gave concerning the disclosures that needed to be made for that offering? A. Everything that was disclosed was what Phil Rutledge recommended. That was the scope of disclosures recommended."); Bret Berman Depo. at T-211:2-16 ("Q. . . . And when it came to the disclosure issues that we just talked about and that you recall conversations about, again, did these individuals, who are not attorneys, rely on and utilize the expertise

Second, the SEC must prove—and they cannot—that the omission is tied to and renders materially misleading a representation made in connection with the offer or sale of a security. An omission is material for purposes of a securities fraud claim if there is "a substantial likelihood that the disclosure of the omitted fact would have been viewed by the reasonable investor as having significantly altered the 'total mix' of information made available." *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32 (1988). Here, the SEC's theory is that "These omissions are material as any reasonable investor would want to know that the company it was investing in was the subject of numerous regulatory actions for violating the securities laws." *See* SEC's Motion for Partial Summary Judgement (ECF 817) at 15. But what a reasonable investor would want to know is a question for the jury. "The materiality of information is a mixed question of law and fact" and should generally be presented to a jury. *In re Physician Corp. of Am. Sec. Litig.*, No. 97-3678-CIV, 2002 WL 34477593, at *7 (S.D. Fla. July 24, 2002). The SEC's perfunctory and conclusory argument that the omissions are material is not enough to remove the issue from the Jurors.

Indeed, because of additional facts the SEC fails to address, the issue should be determined as a matter of law in favor of the Defendants. *See* Defendants Joint Motion for Partial Summary Judgment and Incorporated Memorandum of Law (ECF 804) at 1-4, and 18. When Par became aware of a potential problem in the way they sold the notes (paying commissions to finders), they hired Phillip Rutledge, a lawyer with over 25 years of experience in the areas of securities enforcement and litigation, to counsel them on how to become compliant.[32] After 2018, the PADOBS and New Jersey regulatory actions were not reflective of Par's note offering structure and a reasonable investor would not have been concerned by the actions – which concerned the previous operations, corrected by Par as a result of its advice from Rutledge. All of the actions were disclosed on the Exchange Notes shortly after Par became aware of the Texas Regulatory action. [33]

Third, the SEC cannot prove Defendants acted with scienter.[34] There is no evidence that Defendants knew or had reason to know that they were required to disclose the Pennsylvania or New

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of attorneys with respect to what needed to be disclosed, if anything? A: The answer was they were very proud of the fact that they had someone like Phil Rutledge on their team because he is, to my knowledge, a renowned securities expert. And they relied on -- I can't say what they did, but they asked him questions, and they followed his advice."); and Defendants' Joint Statement of Facts in Support of their Response to the SEC's Motion for Partial Summary Judgment at ¶¶ 6-8, 103-32, and 141-42.

[32] *See* Defense Exhibit 1, Rutledge Dep., Tr. at Vol. I, 12-14; and SOF ¶¶ 104-05.
[33] *See* SEC Exhibit 90, Exchange Note, at A-8; Exhibit C to ABFP Income Fund Exchange Note, Defense Exhibit 2, Rutledge Dep., Tr., at Vol II, 319-320; and SOF at ¶¶ 8.
[34] Defendants hereby incorporate the arguments in their Joint Motion for Partial Summary Judgment and Incorporated Memorandum of Law (ECF 804) at 8-9.

Jersey Orders to investors. In or about 2016, DLA Piper – a major US law firm - drafted the Promissory Notes to include language advising the purchasers that the Notes were not registered as securities:

> THIS NOTE HAS NOT BEEN REGISTERED UNDER THE SECURITIES ACT OF 1933, AS AMENDED, OR APPICABLE STATE SECURITIES LAWS. THIS NOTE MAY NOT BE OFFERED, SOLD, ASSIGNED, TRANSFERRED, PLEDGED, HYPOTHECATED OR OTHERWISE DISPOSED OF IN THE ABSENCE OF AN EFFECTIVE REGISTRATION STATEMENT PERTAINING TO THIS NOTE UNDER SUCH LAWS, OR UPON SATISFACTION OF THE ISSUER HEREOF THAT SUCH REGISTRATION IS NOT REQUIRED TO EFFECT SUCH SALE OR OFFER.[35]

Once it received the PADOBS subpoena, Par Funding hired Phillip Rutledge to counsel them on several matters, the first of which was to respond to the Pennsylvania Securities Regulator's investigation into the company's use of finders to sell promissory notes. *See* Defense Exhibit 1, Rutledge Dep., Tr. at Vol. I, 12-14; and Defendants' Joint Statement of Facts in Support of their Response to the SEC's Motion for Partial Summary Judgment at ¶¶ 106-08. Rutledge was aware when he counseled Par Funding regarding the Pennsylvania investigation that Par Funding was continuing to sell the notes. *See* Defense Exhibit 2, Rutledge Dep., Tr. *a*t Vol. II, 192:16-193; 250:16-251:9, Dep. Ex. 126, 127; and Defendants' Joint Statement of Facts in Support of their Response to the SEC's Motion for Partial Summary Judgment at ¶¶ 6, 121, 157. Rutledge, in fact, provided the new operational structure wherein Par Funding would sell the notes to Agent Funds and Rutledge drafted a new note purchase agreement for that use. *Id.* at 215-218, Dep. Ex. 128; and Defendants' Joint Statement of Facts in Support of their Response to the SEC's Motion for Partial Summary Judgment at ¶¶ 6, 43, 122-132, 141-42. Given Rutledge's role as Par Funding's securities lawyer, his involvement in the resolution of the Pennsylvania investigation, and his knowledge of (and involvement in) Par's decision to sell notes to the Agent Funds *after* the Pennsylvania action was resolved, Defendants had no reason to believe that they needed to disclose the Pennsylvania Order to the Agent Funds. *See Howard v. SEC,* 376 F.3d 1136, 1147 (D.C. Cir. 2004) ("[R]eliance on the advice of counsel need not be a formal defense; it is simply evidence of good faith, a relevant consideration in evaluating a defendant's scienter"); *In the Matter of Donald F. Lathen, et al.*, Release No. 1161, 117 S.E.C. Docket 1733, 2017 WL 3530992 (August 17, 2017), *decision made final at* Release No. 4804, S.E.C. Docket 4103, 2017 WL 11367918 (November 2, 2017) (respondent accused by the SEC of failing to make disclosures acted without scienter because "[his lawyer] never told him to provide additional disclosures to the issuers, and [ ] "he understood [his lawyer] would have told him to do so if necessary.").

[35] *See* Exhibit ____, DLA Note.

Moreover, Rutledge's advice to Defendants was that the Pennsylvania Order was public.[36] It would have been illogical for Defendants to attempt to conceal an order that is public. Further, Rutledge repeatedly advised Cole that Defendants had no duty to make disclosures to their accredited investors. Given this, and the fact that Defendants relied on Rutledge to tell them what they needed to do in connection with their continued sale of the notes after he helped them resolve the Pennsylvania investigation, there is no issue of fact that Defendants could not have acted with scienter with respect to the need to disclose the Pennsylvania and NJ Orders. Finally, it is undisputed that Defendants, when directed to do so by Rutledge, disclosed the fact of the Pennsylvania, New Jersey and Texas investigations and Orders to the Exchange Note investors.[37] This again is inconsistent with the SEC's theory that they intended to conceal these facts from investors. (DE 119) (Am. Compl., ¶¶ 8, 220-232.)

Fourth, the SEC cites to LaForte's touting the profitability of Par. This is irrelevant because the SEC has failed to present any evidence that Par Funding's regulatory history has any connection to or impact on its financial performance. *See e.g.*, *Fries v. Oil & Gas, Inc.*, 285 F. Supp. 3d 706, 719 (S.D.N.Y. 2018). Put another way, the SEC appears to be suggesting that Par Funding's regulatory history renders a representation regarding its profitability misleading by omission. That is a total non-sequitur. Par was profitable regardless of whether it had regulatory proceedings – that it resolved. Indeed, absent some evidence that a material reason for its success was the use of the improper business practices which led to those sanctions, the omission is not material. *See Fries*, 285 F. Supp. 3d at 719. However, there has been no evidence submitted by the SEC showing that Par's profitability was in any way effected by the conduct underlying the regulatory actions. In fact, the evidence is to the contrary – Par made more money after Par's business structure was changed on the advice of counsel.

C. There are Genuine Issues of Material Fact Concerning Whether McElhone can be Liable Under Janus or as a Control Person.

There are genuine issues of material fact concerning whether Lisa McElhone can be held liable under *Janus* or as a Control Person for Par employees' alleged misrepresentations or omission of material fact, in violation of Section 10(b) and Rule 10b-5 of the Exchange Act and Section 17(a) of the Securities Act.

First, before examining whether McElhone can be held liable under *Janus* or as a control person, the SEC must prove misrepresentations made by Par. As discussed *supra*, the SEC cannot. Moreover, the SEC's laundry list of statements made by Messrs. Abbonizio, Vagnozzi, Furman and Gissas are not attributable to Par Funding. Under *Janus Capital Group, Inc.*, 564 U.S. at 142–43, no defendant can be liable

[36] *See* Defense Exhibit 2, Rutledge Dep., Tr. at Vol. II, 170:20-171:12, Dep. Ex. 132; and SOF at ¶ 159.
[37] SOF ¶ 163.

for any alleged misstatements that are not attributable to him, or over which he has no ultimate authority. Even before the Supreme Court's decision in *Janus*, courts found that corporations generally were not held liable for statements made by third parties on their behalf. *See Raab v. General Physics Corp.*, 4 F.3d 286, 289 (4th Cir. 1993).

Even assuming *arguendo*, that the Court does hold that the undisputed facts support a finding that Par or its employees made misrepresentations or omissions of material fact, the Court must still find that McElhone is liable for those misrepresentations. The SEC argues two theories as to why it should. Both are flawed and unsupported by the facts.

Under the first theory, the SEC argues that "the undisputed facts demonstrate McElhone is primarily liable under Rule 10b-5(b) for Par Funding's misrepresentations because she was the 'maker[]'" under *Janus*.[38] *See* SEC Motion at 15. Under *Janus*: "[T]he maker of a statement is the entity with authority over the content of the statement and whether and how to communicate it. Without such authority, it is not "necessary or inevitable" that any falsehood will be contained in the statement." *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135, 144 (2011). The Supreme Court explained:

> For purposes of Rule 10b–5, the maker of a statement is the person or entity with ultimate authority over the statement, including its content and whether and how to communicate it. Without control, a person or entity can merely suggest what to say, not "make" a statement in its own right. One who prepares or publishes a statement on behalf of another is not its maker. And in the ordinary case, attribution within a statement or implicit from surrounding circumstances *143 is strong evidence that a statement was made by—and only by—the party to whom it is attributed. This rule might best be exemplified by the relationship between a speechwriter and a speaker. Even when a speechwriter drafts a speech, the content is entirely within the control of the person who delivers it. And it is the speaker who takes credit—or blame—for what is ultimately said.

Janus Cap. Grp., Inc. v. First Derivative Traders, 564 U.S. 135, 142–43 (2011).

The SEC concedes, "[a] corporate officer's position alone is insufficient to render the officer a 'maker' of the statement." *See* SEC Motion at 16 citing *Mandalevy v. Bofi Holding, Inc.,* No. 17-00667, 2021 WL 794275, at *6 (S.D. Cal. Mar. 2, 2021) (motion to dismiss) ("Several district courts applying *Janus* have found that a corporate officer's position alone, without additional allegations as to the officer's ability to control the contents of the statement at issue, does not suffice to render the officer a 'maker' of the statement."). Here, there is no evidence that McElhone drafted, edited, or approved any offering memoranda, or that she had knowledge about any alleged false statements contained therein.

[38] *Janus Cap. Grp., Inc. v. First Derivative Traders*, 564 U.S. 135 (2011).

Further, it is clear that the SEC seeks to rely heavily on adverse inferences from McElhone's testimony [39] because it has no other evidence to support the propositions that McElhone authorized, approved, or directed (1) the marketing materials; (2) the marketing brochure, and (3) the offerings.[40] But this the SEC cannot do. The SEC cannot move for summary judgment on an adverse inference without independent evidence to corroborate it. This is reason enough to deny summary judgment. *See SEC v. Monterosso*, 746 F. Supp. 2d 1253, 1261–62 (S.D. Fla. 2010) ("a motion for summary judgment cannot be granted on an adverse inference alone; rather, the inference must be weighed with other evidence in the matter in determining whether genuine issues of fact exist."); *SEC v. Simmons*, No. 8:04-CV-2477, 2008 WL 7935266, at *17 (M.D. Fla. Apr. 25, 2008) (explaining that an "[A]dverse inference is insufficient by itself to allow summary judgment to be entered against a party. A party seeking summary judgment must establish independently the elements of the claim within the confines of Federal Rule of Civil Procedure 56."); *Hamilton Group Funding, Inc. v. Basel*, 311 F. Supp. 3d 1307, 1316 (S.D. Fla. 2018) (noting that "[t]he Court is not permitted and will not rest any findings against Defendant on the fact of his assertion of his privilege alone" at summary judgment).

Moreover, there are factual disputes about McElhone's level of involvement at Par Funding, and the amount of control she actually exercised. The evidence shows that McElhone's daily responsibilities diminished as the company grew, and she delegated those responsibilities to other management.[41] McElhone divided her time among numerous businesses.[42] McElhone was more involved in the business in the early years and exercised less control as time went on.[43] Full Spectrum Processing employed a lateral management structure; individual department managers semi-autonomously ran their departments, including making decisions as to the hiring, termination and administration of employees.[44] In short, McElhone delegated running Par to the management team and would intervene only when circumstances demanded her attention. Thus, summary judgment is not appropriate.[45]

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[39] It should be noted that McElhone is the subject of a DOJ investigation. If McElhone were to answer even basic questions, she would risk waving her Fifth Amendment privilege. *See Mitchell v. United States*, 526 U.S. 314, 321–22 (1999).

[40] *See* SEC Facts 10, 95.

[41] SOF ¶¶ 10, 165-66.

[42] SOF ¶ 10.

[43] SOF ¶¶ 10, 167; Jun. 2, 2021 Cole Depo. at 11, 15.

[44] SOF ¶¶ 10, 168; and June 7, 2021 Berman Depo. at T-43:4-5 ("You know, the company was pretty tiered out. And that's what I said before. You had the collection arm, which was Anthony Fazio and Tim. You had the accounting arm, which was Joe Cole, Aida and others. You had the underwriting team, which included -- or underwriting such documentation, which was Wendy Furman and that group.") and T-53:7-9 (The company, as I knew it, was broken up into various subparts, collections, finance, underwriting.").

[45] SOF ¶ 10, 95, 165, 169.

Under the second theory, the SEC also argues that "McElhone is liable as a 'controlling person' under Section 20(a) of the Exchange Act." McElhone may avoid liability if the evidence establishes that she did not act in bad faith or recklessly:

> Section 20(a) is a derivative liability statute because it in effect requires, through the affirmative defense, a defendant to disprove certain wrongful conduct on its part. *See Musick, Peeler & Garrett v. Employers Ins. of Wausau,* 508 U.S. 286, 296, 113 S.Ct. 2085, 2091, 124 L.Ed.2d 194 (1993) ("§ 20 of the 1934 Act ... impose[s] derivative liability."). Specifically, a defendant must prove that it did not act in bad faith or with a recklessness that equates to inducing the acts constituting a securities law violation. *See G.A. Thompson & Co., Inc. v. Partridge,* 636 F.2d 945, 963 (5th Cir.1981). Notwithstanding Section 20(a) liability involves culpable conduct both by the person who is derivatively liable and the person whose wrongful conduct was the direct cause of the securities law violation and injury to the plaintiff, a controlling person's liability under section 20(a) is derived from the acts of its controlled person.

Laperriere v. Vesta Ins. Grp., Inc., 526 F.3d 715, 722 (11th Cir. 2008).

To meet these burdens, the SEC relies exclusively on the adverse inference, namely, its Exhibit C, which are propositions the SEC would have the Court accept as proven fact based solely on the adverse inference. The SEC also cites to the Jamie McElhone Deposition (SEC Exhibit B) and, similarly, an adverse inference against Ms. McElhone because she invoked. For the extensive reasons given above, basing summary judgment on adverse inferences is not only contrary to law, but also wholly inappropriate in this singular case. But beyond that, there is evidence in the record which disputes these factual claims. For example, Joseph Cole testified that "[McElhone] wasn't always working in the office. She would often work either from home or on the road depending on what she was doing."[46] He also testified that Ms. McElhone was more involved in the business in the early years and exercised less control as time went on.[47] Further, the record is clear that the Par engaged attorneys to help bring it into compliance.[48] Ms. McElhone had a good faith belief that Par was operating in compliance with Par's internal and external counsel's advice. There is simply no evidence to the contrary. The jury should be permitted to resolve the factual issues and they should not be decided on summary judgment.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the SEC's motion for summary judgment be denied.

[46] *See* Jun. 2, 2021 Cole Depo. at 15:12-15; see SOF ¶ 10.
[47] *See* Jun. 2, 2021 Cole Depo. at 11, 15; SOF ¶¶ 10, 167.
[48] *See* DE# 823 at 26-54; and SOF¶¶ 6-8, 103-32, and 141-42.

Dated: October 28, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all counsel of record via the Court's CM/ECF Filing Portal on this 28th day of October, 2021.

/s/ Alejandro O. Soto
ALEJANDRO O, SOTO, ESQ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____ /

DEFENDANTS' JOINT STATEMENT OF FACTS IN SUPPORT OF THEIR RESPONSE TO THE SEC'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants Joseph W. LaForte, Lisa McElhone, and Joseph Cole Barleta respectfully submit the below responses to the SEC's Statement of Undisputed Facts (DE 816-1) and supplement the record with their own Statement of Additional Facts.

RESPONSE TO THE SEC'S STATEMENT OF UNDISPUTED FACTS

1. Partially disputed. The testimony cited does not indicate that LaForte started Par Funding with McElhone. The testimony cited states that LaForte and McElhone are married.

2. Undisputed.

3. Disputed. Par Funding did not make short-term loans to small businesses. *See* Defendants Amended Joint Statement of Undisputed Facts (hereinafter "Def. Am. Facts")[1] (DE 822) at ¶¶ 56–59. Par Funding provided small businesses with merchant cash advances. *Id.* at ¶ 56. The website cited does not state that Par Funding provided loans, at all. The citation, Exhibit E, is illegible.

4. Undisputed.

5. Undisputed.

6. Disputed. It should be noted that the Bureau did not order Par Funding to stop selling promissory notes. The Bureau understood that Par Funding would continue to sell promissory notes through a new Note Purchase Agreement drafted by securities compliance counsel G. Philip Rutledge.

[1] Rather than re-file the same exhibits, Defendants will refer to their previously filed Amended Joint Statement of Facts. If the citation for support requires additional evidence that did not appear in the Amended Joint Statement of Facts, Defendants will refer to those exhibits by letter.

See Def. Am. Facts at ¶¶ 34–47. The Bureau also understood that the promissory notes were exempt under Rule 506(b). *See id.*; SEC Fact Ex. 8 at ¶ 6.

7. Disputed. It should be noted that counsel Martin Hewitt advised Par Funding that the filing of a Form D to claim an exemption under Rule 506(b) would resolve any issues outlined by the New Jersey Bureau of Securities ("NJ Bureau"). *See infra* at ¶ 160. Once Par Funding filed the Form D, Hewitt informed Cole that the NJ Bureau did not have any further issues. *Id.*

8. Disputed. It should be noted that Par Funding hired the law firm Haynes Boone to resolve the matter. *See infra* at ¶ 163. At the time of the receivership, there were ongoing negotiations between Haynes Boone and the Texas State Securities Board to reach an amicable resolution. *Id.*

9. Undisputed.

10. Disputed. Defendants dispute the extent of McElhone's involvement in the company. The evidence shows that McElhone's daily responsibilities diminished as the company grew, and she delegated those responsibilities to others in management. *See* Ex. A, Cole Depo. Tr. at 19. McElhone divided her time among numerous businesses. *See infra* at ¶ 166. Defendants dispute that the Marketing Brochure was approved by McElhone or that McElhone approved the marketing materials used in the offerings for distribution to investors. There is no credible evidence to support that assertion. Rather, the evidence suggests that McElhone delegated drafting and approving marketing material, such as Par's website, to management. *See* Ex. A, Cole Depo. Tr. at 72–80. Defendants dispute that McElhone authorized and directed the offerings. Defendants dispute that McElhone was at the Par Funding office every day. *See* Ex. A, Cole Depo. Tr. at 10:7–8; 11:8–20; 13–18.

11. Partially disputed. Defendants do not dispute the first sentence, except that the citation to the deposition testimony of Jamie McElhone is incorrect. Defendants dispute the SEC's characterization regarding LaForte's use of pseudonyms. *See infra* at ¶¶ 151–153. The transcript cited (Exhibit 136) relates to statements made by Abbonizio and does not indicate that LaForte used the pseudonym "Joe McElhone." LaForte managed ISOs and did not run the day-to-day operations of Par Funding. *See infra* at ¶¶ 148–150; Def. Am. Facts at ¶ 2. The SEC's citation (Exhibit 20 and Exhibit 98) does not support its representation that LaForte acted as the *de facto* CEO. LaForte did not act as the *de facto* CEO of Par Funding and Full Spectrum. *See infra* at ¶¶ 148–150; Def. Am. Facts at ¶ 2. Defendants dispute that Exhibit "H" supports the assertion that LaForte "participated in the drafting of marketing materials and the funding analysis and brochure." LaForte's comments were limited to the appearance of the materials. LaForte did not comment on the content of the materials. Moreover, Cole and the accounting department drafted the funding analysis. *See* Def. Am. Facts at ¶ 5.

12. Undisputed.

13. Undisputed.

14. Disputed. Cole did not receive investor funds. ALB Management Inc. and Beta Abigail received payment from Par Funding pursuant to the terms of his consulting agreement with Par Funding. *See* Ex. A, Cole Depo. Tr. at 25:3–17, 81:1–16. Cole owns both ALB Management Inc. and Beta Abigail. *Id.* Cole does not have an ownership or any beneficial interest in New Field Ventures, LLC. *Id.* at 81:20–25. New Field Ventures, LLC is owned by Perry Abbonizio. *Id.* at 81:17–19. Defendants dispute the amounts reflected in this paragraph. Cole received, pursuant to his consultant agreement and payroll, approximately $6 million from 2012–2020. The citation to Exhibit 132 does not contain the referenced pages.

15. Partially disputed. Abbonizio worked for Par Funding beginning in 2016 under the terms of his consultant agreement. While the consultant agreement permitted the use of the title "Principal," the consultant agreement did not authorize Abbonizio to represent that he is an owner or managing partner of Par Funding. The sole owner of Par Funding is the LME 2017 Family Trust. *See* SEC Facts at ¶ 4. Par Funding employed Abbonizio to serve as a liaison between Par Funding and investors.

16. Disputed. Defendants dispute that the agent funds were "Par Funding's Agent Fund managers" as described here. *See infra* at ¶¶ 133–135. Defendants dispute that Abbonizio "solicited" investors. *See infra* ¶¶ 139–142. Defendants dispute that Abbonizio provided marketing materials for use in solicitation to a third-party. *Id.* The testimony cited shows that Abbonizio's interactions with investors were solely to provide information and educate them. *See, e.g.*, SEC Exhibit F at 150:1–11.

17. Undisputed.

18. Disputed. Defendants dispute the use of the term "solicit." Vagnozzi entered into a finder's fee agreement with Par Funding and received a fee for introducing prospective note purchasers to Par Funding.

19. Disputed. Vagnozzi did not recruit individuals to start agent funds for the purpose of raising money for Par Funding. *See infra* at ¶¶ 133–136. The Agent Funds were established for the purpose of investing in merchant cash advance opportunities but were not exclusive to Par Funding. *See infra* at ¶ 94.

20. Partially disputed. Defendants dispute the last sentence. The Agent Funds are not "Par Funding Agent Funds" as described here. *See infra* at ¶¶ 133–135. There is no evidence cited by the SEC supporting what it characterizes as an arrangement for ABFP to provide services to Par Funding

"in exchange for a portion of the investment returns." Par Funding paid interest to its noteholders pursuant to the terms of the promissory note.

21. Partially disputed. Defendants dispute the fifth sentence. *See supra* at ¶ 18. The finder's fee agreement concluded in 2017.

22. Disputed. Defendants dispute that ABFP Income Fund raised at least $22 million for Par Funding. Vagnozzi testified that ABFP Income Fund offered and sold promissory notes for other entities. *See* Ex. B, Vagnozzi Depo. Tr. at 13:7–13; *see also infra* at ¶¶ 133–136. The Form D filing reflects the general amount raised.

23. Disputed. Defendants dispute that Vagnozzi formed ABFP Income Fund 2 for the purpose of raising investor money to pool and invest specifically in Par Funding. *See infra* at ¶¶ 133–136. Defendants dispute that Vagnozzi raised at least $6 million for Par Funding. ABFP Income Fund 2 used investor proceeds to purchase promissory notes in different merchant cash advance companies and common stock in a NYSE-traded company. *See* SEC Fact at ¶ 63.

24. Undisputed.

25. Undisputed.

26. Disputed. Defendants dispute that Fidelis was created for the purpose of raising investor funds for Par Funding. The management services agreement between ABFP Management Company LLC and Fidelis Financial Planning LLC states that Fidelis was organized for the "purpose of raising funds and using the proceeds to invest in various Alternative Asset Classes." *See* SEC Ex. 41.

27. Disputed. At all relevant times, any notes offered and sold by Par Funding were pursuant to an exemption. *See infra* at ¶¶ 99–132. The citations referenced do not support this paragraph.

28. Undisputed.

29. Undisputed.

30. Disputed. The citation in this paragraph does not indicate that Lisa McElhone signed the Par Funding Notes.

31. Disputed. The testimony cited does not make any reference to the terms of the Par Funding Notes.

32. Undisputed.

33. Disputed. Defendants did not "solicit" investors. *See infra* at ¶¶ 140–141, 143. Pursuant to its obligations under Regulation D per the advice of securities compliance counsel Rutledge,

Defendants made themselves available to investors to answer questions and provide information about Par Funding. *See id.*

34. Undisputed.

35. Undisputed.

36. Undisputed.

37. Partially disputed. Defendants dispute the SEC's characterization that "A Better Financial Plan raised about $20 million for Par Funding." *See infra* at ¶ 135. Defendants dispute the use of the term "commission" and "solicit." Pursuant to the finder's fee agreement, Vagnozzi received 2–3.5% of the principal received from the promissory notes as reflected in the accounting records.

38. Disputed. Defendants did not authorize or have control over Furman's actions. The citations in this paragraph do not support that Par Funding authorized Furman's conduct.

39. Disputed. Defendants did not authorize Furman to distribute any marketing materials, make any statements on behalf of Par Funding, or represent that the default rates on the loans were 1% or less. The citations in this paragraph do not support that Par Funding authorized Furman's conduct.

40. *See supra* at ¶¶ 38–39.

41. Disputed. Par Funding did not raise $482 million from investors by December 2017. The citations in this paragraph reflect the overall capital raised through 2020. Additionally, the accounting is overstated. The SEC's expert, Melissa Davis, erroneously calculates the initial amount invested as well as the renewed amount as two separate transactions. They are not. If an investor initially invested $1 million and then decided to renew his investment with Par Funding, this would be considered one transaction because it is the same $1 million.

42. Undisputed.

43. Disputed. Par Funding did not convert its finders to agent fund managers. *See infra* at ¶¶ 133–136. Par Funding has no control over any of the agent funds. With advice of counsel, Defendant Vagnozzi proposed and implemented the use of investment funds for his own purposes. *See infra* at 136. The citations in this paragraph reference what type of investors Par Funding would work with, not that Par Funding converted finders to agent fund managers to continue raising money through agent funds. Par Funding issued promissory notes to agent funds pursuant to the Note Purchase Agreement drafted by securities counsel Philip Rutledge. *See infra* at ¶¶ 116–117.

44. Disputed. Par Funding did not use Agent Funds to offer and sell promissory notes to investors. *See infra* at ¶¶ 133–138. Also, Agent Funds do not "funnel" investor money to Par Funding.

The testimony cited explained that investors do not have a promissory note directly with Par Funding, but rather with the investment fund. As explained, the investment fund would use the gross proceeds received from the investor to purchase the promissory note issued by Par Funding.

45. Disputed. Par Funding does not offer loans. *See supra* at ¶ 3. The promissory notes are repaid through the independent growth of Par Funding's portfolio. Also, the citations do not support that "investors are told that profits will be generated by Par Funding's Loan business in which the Agent Funds invest." The citation also fails to provide a pinpoint citation for the transcript as required by Local Rule 56.1(b).

46. Disputed. Defendants do not dispute that Vagnozzi proposed the creation of his investment funds. Defendants dispute any suggestion of collaboration between LaForte, Par Funding, and Vagnozzi to create his investment funds including the SEC's description that Vagnozzi "spearheaded the effort" and "report[ed] to LaForte on his efforts." Defendants dispute any suggestion of involvement from LaForte. Exhibits 60, 164, and 181 do not support the SEC's assertion that Vagnozzi reported to LaForte his efforts to recruit people to create agent funds. Exhibit 180 demonstrates a cordial conversation, in which LaForte provided no input and did not request any updates about Vagnozzi's investment funds. Defendants dispute that Par Funding "raised funds through" Agents Funds. *See supra* at ¶¶ 43–44.

47. No response required because the SEC does not cite these facts in seeking summary judgment against Defendants.

48. No response required because the SEC does not cite these facts in seeking summary judgment against Defendants.

49. No response required because the SEC does not cite these facts in seeking summary judgment against Defendants.

50. No response required because the SEC does not cite these facts in seeking summary judgment against Defendants.

51. No response required because the SEC does not cite these facts in seeking summary judgment against Defendants.

52. Disputed. Par Funding did not train agents at their office. The citations in this paragraph demonstrate that Abbonizio provided background information about Par Funding. There is no citation that shows that any training took place at Par Funding's office. Par Funding did not provide the Agents with marketing materials to solicit investors. The Agent Funds were Par Funding's

Phase 2 investors. Par Funding provided the Agent Funds, its Phase 2 Investors, with information about the company as directed by its securities compliance counsel, Philip Rutledge.

53. No response required because the SEC does not cite these facts in seeking summary judgment against Defendants.

54. Disputed. Defendants dispute that the Agent Funds raised money for Par Funding. *Infra* at ¶¶ 133–136.

55. Disputed. *See* Ex. B, Vagnozzi Depo. Tr. at 227:19–230 (explaining that no coordination occurred between Par Funding and any of his funds).

56. Disputed. *See infra* at ¶¶ 139–146. There is no evidence that Defendants solicited investors, assisted with hosting the dinner, contributed monetarily to arranging the dinner, or distributed materials to solicit an investment. Defendants were invited to the November dinner and solely there to provide information about Par Funding. Notwithstanding, there were only existing clients in attendance and the event was not open to the public. *See infra* at ¶ 144. Further, as the liaison between Par Funding and investors, Abbonizio answered questions about Par Funding. Par Funding did not authorize or direct Abbonizio to make any statements inconsistent with his consultant agreement. *See supra* at ¶ 15.

57. Disputed. Defendants did not communicate with investors for the purpose of selling, negotiating, or soliciting the terms of an investment agreement with the agent. The purpose of any meeting was solely to provide information about the company. *See infra* at ¶¶ 140–141. The cited transcripts also do not demonstrate any solicitation efforts by Defendants.

58. Disputed. Defendants do not dispute that Par Funding issued promissory notes to the agent funds. The citations in this paragraph do not reference that "Par Funding issued a Par Funding Note to the Agent Fund with a higher promised rate of rate than the Agent Fund promised to its investors in its own notes." There is no evidence in the record that Par Funding exercised any control over the amount of interest the Agent Funds charged their investors.

59. Disputed. Defendants do not dispute that Par Funding paid monthly returns. Par Funding executed payments pursuant to the terms of the promissory note. There is no evidence in the record cited that Par Funding exercised any control over the "spread."

60. Undisputed.

61. Undisputed.

62. Undisputed.

63. Undisputed.

64. No response required because the SEC does not cite these facts in seeking summary judgment against Defendants.

65. Disputed. The dinner events were not held for the purpose of investing in Par Funding-related promissory notes. *See infra* at ¶¶ 144–146. Some events, as referenced in Exhibit 20, were client appreciation events and were held for Vagnozzi's existing clients. *See infra* at ¶ 144. Exhibit "D" pertains to a consulting agreement and does not reference the assertion that "dinner seminars were for the purpose of getting potential investors to invest in the Par-Funding-related promissory notes."

66. Disputed. The email cited does not reference Par Funding as the merchant cash advance company or that Vagnozzi would "pitch the Par Funding investment." Quite the contrary, the email indicates that Vagnozzi intended to inform the audience about all the investments he offered for his purposes.

67. Disputed. *See infra* at ¶¶ 139–146; *supra* at ¶¶ 56, 65. Par Funding did not authorize any materials to be disseminated at this event. There is no pinpoint citation to a flyer in subsection (a)-(b) as required by Local Rule 56.1(b). Defendants dispute the SEC's mischaracterization of Vagnozzi's statements, which are incomplete and out of context. Vagnozzi did not specifically refer to Par Funding when he stated that "we have stock market alternative investments that are secure." Further, Vagnozzi explained that he is not making a guarantee as it relates to any investment because "there's risk . . . pros and cons when you come in." *See* SEC Ex. 20 at 18:6-14.

68. Disputed. *See supra* at ¶¶ 33, 56, 65, 67. Defendants dispute that they "touted" anything.

69. Disputed. Defendants dispute describing the video as "Vagnozzi Par Funding Marketing Video." Par Funding never approved or authorized any such video to be used on its behalf. The video provides general information about the merchant cash advance industry as a whole and never once references Par Funding by name.

70. Disputed. The testimony cited in footnote 147 does not contain or reference any statement that Vagnozzi "told potential investors that he has taken more than 500 investors into an investment with Par Funding." Notwithstanding, Defendants did not authorize Vagnozzi to make any statements on its behalf.

71. Undisputed.

72. *See supra* at ¶ 26.

73. Undisputed.

74. Undisputed.

75. Disputed. Defendants dispute any marketing video being distributed on Par Funding's behalf and that the videos are "Par Funding Marketing Video." *See supra* at ¶ 69.

76. Disputed. Defendants did not solicit any investors to invest in Par Funding. *See supra* at ¶¶ 33, 56, 65, 67. Further, it is unclear what portion of the transcripts the SEC is relying on as the SEC fails to provide specific, pinpoint citations as required by Local Rule 56.1(b).

77. Undisputed.

78. Disputed. Par Funding did not authorize or approve Furman to distribute any marketing brochure to potential investors. Par Funding did not authorize either Furman or Abbonizio to make any representations relating to Par Funding. Par Funding's engagement with Furman and his entities was limited exclusively to the terms of the promissory note. The purchase agreement between the parties contained an indemnification provision that protected Par Funding.

79. Disputed. *See supra* at ¶ 26.

80. Disputed. LaForte joined the call to answer questions and provide additional information about Par Funding, something its securities compliance counsel, Rutledge advised them they could do. *See infra* at ¶ 141. LaForte did not introduce himself as "Joe Mack." Notwithstanding this, there were no prospective investors on the call and the call was not open to the public. Nowhere in the transcript cited does it indicate that LaForte made any statements in connection with the purchase, offer, or sale of securities.

81. *See supra* at ¶ 80.

82. *Id.*

83. Disputed. Defendants dispute that they solicited investors. *See infra* at ¶¶ 140–141, 143.

84. Disputed. LaForte did not conceal his criminal history. *See infra* at ¶¶ 147–152.

85. Undisputed.

86. Undisputed but immaterial.

87. Disputed. LaForte does not conceal his criminal history by using a nickname. *See infra* at ¶¶ 147–152. He openly uses his real name with investors. As is common in the industry, LaForte uses a nickname with merchants for security purposes especially since a merchant cash advance company operator was gunned down execution style in his office in NY along with is assistant. *See infra* at ¶¶ 147–152; Ex. C, Article; *See also,* (DE 41-7 at 57, lines 17-18) (Transcript of dinner where he was introduced as Joe LaForte. LaForte identified himself by his real name to undercover FBI agents posing as investors and even invited them to a meeting at his gated community where they would have to use his real name to gain access (SEC Ex. 129 4::15-20. Additionally, LaForte's name and criminal

convictions were widely known and publicly available. For example, Victoria Villarose leared of LaForte's background by googling it when she started working at company. Villarose Depo at 58::11-22. Brett Berman, Par's counsel testified that everyone knew about his criminal conviction. Berman Depo at 79::21-87::2. Additionally, meetings with potential investors were held in a lounge room at Par's office. In this room was a framed article about Joe LaForte from a magazine including a picture of Mr. LaForte. The article identified Mr. LaForte by name.Declaration of Joe Cole at 15.

88. The email address is undisputed. The remainder of this statement is disputed. *See supra* at ¶ 87.

89. Disputed. The exhibit cited in support of this allegation is an entire deposition transcript of Abbonizio. It contains no pincite in violation of Southern District of Florida Local Rule 56.1(b), which states: "When a material fact requires specific evidentiary support, a general citation to an exhibit without a page number or pin cite (e.g., "Smith Affidavit" or "Jones Deposition" or "Exhibit A") is non-compliant."

90. Disputed. LaForte was not required to be listed as a "Related Person." Therefore, Par did not "fail" to identify him as such.

91. Undisputed.

92. Undisputed.

93. Disputed. LaForte was not required to be disclosed to the Commission. Therefore, Par did not "fail" to disclose him as such.

94. Undisputed.

95. Defendants dispute that the Marketing Brochure was authorized by McElhone or that that McElhone approved the marketing materials used in the offerings for distribution to investors, and there is no credible evidence to support that assertion. Rather, the evidence suggests that McElhone delegated drafting and approving marketing material, such as Par's website, to management. *See* Ex. A, Cole Depo. at T at 72–80.

96. Disputed. LaForte truthfully told investors he had money in Par. *See infra* ¶ 98.

97. Disputed. LaForte truthfully told investors he had money in Par. *See infra* ¶ 98.

98. Disputed. LaForte invested in Par in four different ways. He provided seed capital through his businesses. He was a noteholder through his family trust. LaForte left retained earnings in the company to allow it to grow. Finally, LaForte also a fraction of the money he was entitled to take as an ISO through his company RMR. *See* declaration of Joe Cole Barleta at 19-21.

DEFENDANTS' STATEMENT OF ADDITIONAL FACTS

A. The Offer and Sale of Securities

Phase 1 Offerings

99. From 2012 through 2018, Par Funding issued promissory notes to accredited investors ("Phase 1 Offering").

100. Cole held a reasonable belief that each Phase 1 noteholder was accredited at the time of their note purchase based on his understanding of their investment experience, assets, income, and the amount of money they each invested. *See* Ex. D, Declaration of Joseph Cole Barleta at ¶ 6. Cole did not receive written confirmation of the same. *See id.*

101. The Phase 1 Offering was a limited offering that occurred between 2012 and 2018, and many of the investors were known to Defendants. *See* Ex. A, Declaration of Joseph Cole Barleta at ¶ 7.

102. Par Funding provided prospective and existing purchasers of the Phase 1 Offering with materials regarding the company, including Par Funding's Key Performance Indicators, on a monthly basis. *See* Def. Am. Facts at ¶¶ 13–14.

103. In 2018, the Pennsylvania Department of Banking and Securities ("PADOB") issued a subpoena to Par Funding to investigate the company's use of finders to sell promissory notes ("PADOB Subpoena"). *Id.* at ¶ 26.

104. Par Funding hired attorney Phillip Rutledge to respond to the Subpoena. *See Id.* at ¶¶ 26–27.

105. Rutledge has over 25 years of experience in the areas of securities enforcement and litigation, including as the former Director of the Division of Finance and Chief Counsel at the PADOB. *Id.* at ¶ 29.

106. As securities compliance counsel, Rutledge first advised Par Funding to stop using and paying finders. *Id.* at ¶ 32. Par Funding complied. *Id.*

107. Rutledge then directed Cole to confirm the accreditation status of each Phase 1 noteholder using a questionnaire Rutledge prepared. *See* Ex. D, Declaration of Joseph Cole Barleta at ¶ 6. Rutledge advised Cole that he would use the completed questionnaires to inform the Pennsylvania Regulators that the Phase 1 Offering was exempt from registration under Rule 506(b) of Regulation D. *Id.* at ¶ 10.

108. In connection with the Subpoena, Rutledge drafted a letter to the PADOB and explained that "[a]lthough CBSG believed at the time that its promissory notes were purchased by

accredited investors . . . CBSG went back to *each* noteholder to confirm such status." *See* Def. Am. Facts at ¶¶ 33–34 (emphasis added).

109. Par Funding did in fact confirm that its purchasers were accredited investors. *See* Ex. D, Declaration of Joseph Cole Barleta at ¶ 7, Ex. A. Cole received from each Phase 1 noteholder a signed questionnaire confirming their status as accredited investors. *Id.*

110. The Accredited Investor Questionnaires ("Questionnaire") explained, "the purpose of this Questionnaire is to verify that you meet the standards for participation in a non-public offering under Section 4(2) of the Securities Act of 1933, as amended ("Act"), and under the laws of the various States." *Id.*

111. The Questionnaire instructed the purchaser to certify that it has met one of the accredited investors conditions as outlined in Rule 501 of the Securities Act. *Id.*

112. Rutledge successfully argued to Pennsylvania Regulators that the Phase 1 Notes were exempt from registration under Rule 506(b) of Regulation D because Par Funding held a reasonable belief that all of Par Funding's investors were accredited. *See* Def. Am. Facts at ¶ 34.

113. Rutledge believed that the Phase 1 notes were exempt under Rule 506(b) and told Cole the same. *See* Ex. E, Rutledge Depo. Tr. at 184–186; Declaration of Joseph Cole Barleta at ¶ 10.

114. In an email dated March 30, 2018, Cole explained to Rutledge that Par Funding was no longer accepting new notes from individuals and were directing individuals whose notes matured to the PPMs. *See* Def. Am. Facts at ¶ 36. In the same email, Cole asked Rutledge to review Par Funding's "note/security agreement language for the PPMs." *Id.*

115. Rutledge testified that he understood this to mean that Par Funding was pivoting away from selling to individuals and instead selling to PPM Funds. Rutledge understood PPM Funds to be "pooled investment vehicles." *Id.* at ¶¶ 36–38.

116. In an email dated September 25, 2018, Cole enlisted Rutledge's assistance to "draft agreement" "for the funds we work with." *Id.* at ¶ 39.

117. Three days later, Rutledge attached a draft of a note purchase agreement ("NPA") template for Par Funding to use to sell its notes to the pool investment vehicles. *See id.* at 40.

118. Cole and Par Funding's former in-house counsel Cindy Clarke urged Rutledge to describe as broadly as possible Par Funding's new structure to ensure compliance with the law in connection with its Phase 2 Offering, but Rutledge counseled them against that approach. *Id.* at ¶ 45–46.

119. Rutledge disclosed to PADOB that Par Funding had restructured its method for selling notes using the new NPA. *Id.* at ¶ 47. Additionally, Rutledge advised the PADOB that Par Funding would only sell notes to accredited investors under Rule 506(b), ceased the practice of using brokers, and started to use the NPA where no commission was paid to brokers. *Id.* at ¶ 47.

120. Rutledge settled the PADOB matter on Par Funding's behalf in November 2018. *Id.* at ¶ 37.

121. Rutledge advised Cole and other attorneys for Par Funding that the order issued by PADOB stated that Par Funding could continue to sell promissory notes in Pennsylvania in compliance with the order and should not be a basis for disqualification under federal or state laws. *Id.* at ¶ 51.

Phase 2 Offering

122. Par Funding sold to 42 Agent Fund Managers ("Phase 2 Offering"). *See* Ex. D, Declaration of Joseph Cole at ¶ 12.

123. These 42 Agent Fund Managers are Par Funding's Phase 2 investors. *See* Rutledge Depo. Tr. at 351–352 (explaining that Par Funding's investor was the Agent Fund, and its duty of disclosure would have been to the Agent Fund and not the Agent Fund's noteholders.).

124. The Agent Fund Managers had prior relationships with Par Funding as former finders during the Phase 1 Offering. *See* SEC Fact at ¶ 43[2]

125. Par Funding provided the noteholders of the Phase 2 Offering with materials regarding the company, including Par Funding's Key Performance Indicators, on a monthly basis. *See* Def. Am. Facts at ¶¶ 13–14.

126. The NPA drafted by Rutledge included provisions asking each Agent Fund to certify its status as an accredited investor. *See id.* at ¶ 41.

127. Rutledge advised Defendants to file a Form D with the SEC to claim an exemption under Rule 506(b) of Regulation D for the Phase 2 Offering. *See* Ex. D, Declaration of Joseph Cole Barleta at ¶ 10, at attached Ex. B, at pdf page 3; Ex. E, Rutledge Depo., Vol. II, Tr. at 326-327. The Form D referenced in the above email claimed an exemption under Rule 506(b). *See* Ex. F, Form D Filing.

[2] Defendants, however, dispute that Par Funding "converted" its finders to agent fund managers. *See* Defendants' Response to SEC Fact at ¶ 43.

128. Rutledge recommended that Par Funding delete the finder fee information which appeared on a previous Form D filed by the company. *See* Ex. D, Declaration of Joseph Cole Barleta at ¶ 10, at attached Ex. B, at pdf page 3.

129. At the time Rutledge advised Defendants to file the Form D in this fashion (April 2020), he was already aware that Par Funding was selling its notes to Agent Funds, who were in turn selling notes to their own noteholders.

130. Par Funding provided the prospective and existing purchasers of the Phase 2 Notes with materials regarding the company, including Par Funding's Key Performance Indicators, on a monthly basis. *See* Def. Am. Facts at ¶¶ 13–14.

Par Funding did not "Convert" its Finders to Agent Fund Managers

131. Par Funding did not "convert" its finders to agent fund managers. Par Funding did not direct or have any control over the activities of the agent funds.[3]

132. Vagnozzi testified that he created the idea for the use of investment funds by himself. *See* Ex. B, Vagnozzi Depo. Tr. at 12:11–14 ("in 2018 I started a fund by myself and only for myself and not . . . anybody else but myself to . . . take out investor dollars to invest with merchant cash companies"). This was Vagnozzi's idea alone. *See id.* at 95:22–24 ("I agree that Dean Vagnozzi started a fund for me not called an agent fund[].").

133. Vagnozzi further testified that he did not create the investment funds for the purpose of raising money for Par Funding:

> **Q**: And the purposes of the investment funds you created was for Complete Business Solutions Group and to raise money for them; right?
>
> **A**: No.
>
> . . .
>
> **Q**: Let's talk about your funds because you have ABFP Income Fund – ABFP Income Fund 1, 2, 3, 4, and 6. You created those income funds for purposes of raising money for CBSG. Is that right?

[3] *See* Ex. B, Vagnozzi Depo. Tr. at 15:3-15:

> I was not tasked by any company to raise money for them. I raised money for the -- for my fund for -- you know, that I was in control of, that I controlled. So I -- I had no -- I had no mission from any other company to raise money for them. You keep alluding to that, and that's not what I did.

A: No.

Id. at 114:4–7. Likewise, other investment funds were not created for the purpose of offering promissory notes in Par Funding:

> Amie, I've been trying to work with agents for ten years in various forms, helping them get into life insurance because that's -- that's my background, helping them get into multiple -- multiple offerings, not just the CBSG performance. Okay? So -- so I've been -- I've been -- worked -- trying to work with advisers to help them be successful and make a few bucks for myself along the way long before I met CBSG, long before I met anybody at CBSG.

Id. at 96:4–19.

134. Vagnozzi hired counsel to draft certain documents including a private placement memorandum to be used for any merchant cash company of his choice. *See id.* at 12:11–14. The PPMs were not specific to Par Funding.

135. Vagnozzi also relied on his own securities compliance counsel to educate prospective investors about the legalities of the private placement memorandum infrastructure. *See id.* at 68:8–70:22.

136. With respect to individuals who wanted to create a similar fund as Vagnozzi, he provided guidance on how to form a fund. *See id.* at 99:7-12. Par Funding played no role in this.

137. Pursuant to Rule 506(b), Par Funding issued promissory notes to these investment funds.

138. Pursuant to Rule 502, as an issuer, Par Funding was required to make itself available to answer questions from its purchasers concerning the terms and conditions of the offering. *See* Ex. E, Rutledge Dep. Tr. at 354:20-355:25 (explaining that Par Funding had an obligation to make itself available).

139. Rutledge testified that by making themselves available to the Agent Fund Managers—their Phase 2 investors—to answer questions, for example, about how their business is performing is not tantamount to selling. *Id.*

140. Perry Abbonizio served as the liaison between Par Funding and pooled funds investors. At times, a prospective investor would visit Par Funding's office and meet with Abbonizio to learn more about Par Funding. *See* Ex. F, Abbonizio Deposition Tr. at 57:19–61:19, 64:19–66:18, 140:15–143:2; Ex. B, Vagnozzi Deposition Tr. at 147:7–16, 149:1–8.

141. Prospective investors would also get the chance to speak with Defendants if they had additional questions. The conversations were limited to providing an overview of the merchant cash advance industry, Par Funding's business model and its overall health. *See, e.g.*, Def. Am. Facts at ¶ 15.

142. At times, Defendants were invited to attend events to provide additional information about Par Funding. For example, Vagnozzi hosted an event in November 2019. This event was intended to be a "client appreciation event . . . to provide a life settlement check to individuals." *See* Ex. F, Abbonizio Depo. Tr. at 116:2 –13. This event was not intended to raise money from potential investors for Par Funding. *Id.*

143. Defendants did not play any role in soliciting the attendees at any event, including the November 2019 dinner.

144. Defendants did not plan, orchestrate or arrange any event, including the November 2019 dinner.

B. Joseph LaForte

145. Joseph LaForte worked for Recruiting and Marketing Resources ("RMR") as a sales manager and in the Credit Committee department at Full Spectrum Processing. *See* Ex. A, Cole Depo. Tr. at 17:12 –18

146. LaForte was primarily responsible for generating deals for Par Funding. *Id.*. at 47:18–49:2

> He primarily worked out of Recruiting and Marketing Resources to generate deals for CBSG to fund. . . . His responsibility specifically really focused on the sales and communication with the underwriting departments and credit committee to help determine the worthiness of these MCA deals that CBSG would end up funding through the efforts of the folks at Full Spectrum Processing.

147. LaForte also negotiated deals on behalf of Par Funding through his function as an independent sales operator. *Id.* at 53:1–6. An independent sales operator is responsible for "providing merchants interested in working with [Par Funding] to do these merchant cash advance factoring agreements for receiving operating capital to the respective businesses." *See id.* at 54:15–19.

148. LaForte worked closely with merchants. *Id.* As such, LaForte would use a pseudonym whenever he communicated with merchants. *See id.* at 63:1–10:

> From the capacity of sales and sometimes collections from deals that were forwarded over from his sales entity to CBSG, I believe that the use of an alias or an incomplete name was due to the anonymity and safety of employees working in those capacities.

149. It is common practice in the merchant cash advance industry to use a pseudonym for safety and security purposes.

150. LaForte did not use a pseudonym when speaking to investors. *See id.* at 61:22–62:5.

151. LaForte received materials related to Par Funding in connection with his limited capacity as sales manager and a member of the credit committee. *See id.* at 49:13–24:

> by report if you mean did I have to get his approval on anything or make decisions based on approvals, absolutely not. I would report some of the numbers and issues going on with the business . . . . and copy Joe so the sales group and underwriting team knew what sort of dollars we were working with in the bank, for example.

152. LaForte also did not have any authority to direct the operations of any department including the accounting department. *See id.* at 49:13–24 ("if you're speaking about report in terms of authority or functional authority over my departments or my person. That was only Lisa"); *id.* at 50:5–8, 57:11–19.

153. No one understood LaForte to be president of Par Funding and he was not.

C. Par Funding's Regulatory History

154. Based on the settlement and their attorney's advice, Par understood that selling the promissory notes to the Agent Funds brought Par into compliance with security laws, and Par believed in good faith that it could properly continue selling notes in accordance with the changes implemented by its lawyers, Phil Rutledge and Martin Hewitt. *See supra* at Subsection A; SEC Exhibit 8, PABOBS Consent Order at ¶ 6 (CBSG offered and sold, and continues to offer and sell, Notes only to persons that CBSG had a reasonable basis to believe were accredited investors as that term is defined in Rule 501 (a) of Regulation D adopted by the [SEC] . . . in good faith reliance on the exemptions from security registration . . . . As of February 8, 2018, CBSG does not pay any compensation to any person in connection [with] the sale of Notes.").

155. Rutledge's advice to Defendants was that the Pennsylvania Order was public. *See* Defense Exhibit 2, Rutledge Dep., Tr. at Vol. II, 170:20-171:12, Dep. Ex. 132.

156. In December 2018, Par learned that the New Jersey Bureau of Securities was investigating the same matters issues PADOBS had investigated. *Compare* SEC Exhibit 8, PABOBS Consent Order; with SEC Exhibit 9, NJ Summary Cease and Desist Order. *See also* Def. Am. Facts at ¶ 54; *supra* at ¶ 7.

157. Par Funding hired attorney Martin Hewitt to handle Par Funding's response to the New Jersey Securities Regulator's investigation. Def. Am. Facts at ¶ 54. There is no evidence in the record that Mr. Hewitt ever advised anyone at Par Funding that it had to disclose the NJ investigation to investors. *Id.*

158. Moreover, the issues raised by New Jersey were the substantially the same as those alleged by PADOBS namely, the payment of commissions to finders, *compare* SEC Exhibit 8, PABOBS Consent Order; *with* SEC Exhibit 9, NJ Summary Cease and Desist Order, and Par believed in good faith that it was now operating properly and in compliance with its lawyer's advice and revised operational structure. SEC Exhibit 8, PABOBS Consent Order at ¶ 6.

159. In late February 2020, Par learned of an investigation by the Texas State Securities Board ("TSSB"), premised on the same allegations of commissions to finders. SEC's Statement of Undisputed Facts at ¶ 8; *supra* at ¶ 8.

160. Par hired Haynes Boone to represent it in the matter and cooperated with the TSSB to resolve the matter. The investigations and orders brought by the Pennsylvania, New Jersey, and Texas Securities Regulators were disclosed in the April 2020 Exchange Notes—the very notes referenced in the allegations made by the SEC in paragraph 138. *See* SEC Exhibit 90, Exchange Note, at A-8; and Defense Exhibit 2, Rutledge Dep., Tr., at Vol II, 319-320.

161. Par Funding sought and followed the advice of their attorneys as to what to disclose:

> **Q**: And so in connection with the exchange note offering in April of 2020, what was the advice that Phil Rutledge gave concerning the disclosures that needed to be made for that offering?
>
> **A**: Everything that was disclosed was what Phil Rutledge recommended. That was the scope of disclosures recommended.
> *See* June 8, 2021 Bret Berman Depo. at T-66:9-15
>
> **Q:** And when it came to the disclosure issues that we just talked about and that you recall conversations about, again, did these individuals, who are not attorneys, rely on and utilize the expertise of attorneys with respect to what needed to be disclosed, if anything?
>
> **A:** The answer was they were very proud of the fact that they had someone like Phil Rutledge on their team because he is, to my knowledge, a renowned securities expert. And they relied on -- I can't say what they did, but they asked him questions, and they followed his advice.").

Bret Berman Depo. at T-211:2-16.

D. Lisa McElhone

162. McElhone's daily responsibilities diminished as the company grew, and she delegated those responsibilities to management. *See* Cole Depo. Tr. at 19.

163. McElhone divided her time among numerous businesses. *Supra* at ¶ 10.

164. McElhone was more involved in the business in the early years and exercised less control as time went on. *Supra* at ¶ 10; Ex. A, Cole Depo. at 11, 15.

165. Full Spectrum Processing employed a lateral management structure; individual department managers semi-autonomously ran their departments, including making decisions as to the hiring, termination and administration of employees. *Supra* at ¶ 10 and June 7, 2021 Berman Depo. at T-43:4-5 ("You know, the company was pretty tiered out. And that's what I said before. You had the collection arm, which was Anthony Fazio and Tim. You had the accounting arm, which was Joe Cole, Aida and others. You had the underwriting team, which included -- or underwriting such documentation, which was Wendy Furman and that group.") and T-53:7-9 (The company, as I knew it, was broken up into various subparts, collections, finance, underwriting.").

166. McElhone delegated running Par to the management team and would intervene only when circumstances demanded her attention. *Supra* at ¶ 10.

167. Joseph Cole testified that "[McElhone] wasn't always working in the office. She would often work either from home or on the road depending on what she was doing." *See* Jun. 2, 2021 Cole Depo. at 15:12-15.

168. He also testified that Ms. McElhone was more involved in the business in the early years and exercised less control as time went on. *See* Jun. 2, 2021 Cole Depo. at 11, 15.

Dated: October 28, 2021

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all

counsel of record via the Court's CM/ECF Filing Portal on this 28th day of October, 2021.

/s/ Alejandro O. Soto
ALEJANDRO O, SOTO, ESQ

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC., d/b/a PAR FUNDING, *et al*,

Defendants
_____/

DEFENDANT LISA MCELHONE'S MOTION TO AMEND ADMISSIONS

Defendant Lisa McElhone moves, pursuant to Federal Rule of Civil Procedure 36(b), to amend her admissions to Plaintiff Securities and Exchange Commission's Request for Admissions to Defendant Lisa McElhone ("RFA"). That Defense Counsel did not respond was an oversight; allowing the Defendant to amend her responses would promote the presentation of the merits of the action, and the SEC will not be prejudiced because it knew what the Defendant's responses would be.

BACKGROUND

On June 17, 2021, the SEC served upon the Defense the RFA, annexed hereto as **Exhibit A**. At the time, Ms. McElhone was represented by both undersigned counsel and another lawyer. The attorneys divided the very large workload with undersigned counsel attending to significant motion practice and other matters. Undersigned counsel believed that other counsel for Ms.

McElhone had responded to the RFA. Several months later, other counsel filed a motion to withdraw as counsel (ECF 688) and the motion was granted.

Undersigned Defense Counsel did not realize the oversight until it received the SEC's Proposed Jury Instructions just days ago which included language about unanswered requests for admission. Ms. McElhone's Responses to the Plaintiff Securities and Exchange Commission's Request for Admissions to Defendant Lisa McElhone is annexed hereto as **Exhibit B**. Therein, Ms. McElhone invokes her Fifth Amendment Privilege Against Self-Incrimination. These responses are identical to the responses that Ms. McElhone would have served upon the SEC had the responses been timely served.

Throughout the litigation, Ms. McElhone has responded to discovery requests from both the SEC and the Receiver by providing notice of her intention to invoke her Fifth Amendment Privilege Against Self-Incrimination or by invoking her Fifth Amendment Privilege against self-incrimination. And, as noted, these responses are identical to the responses that Ms. McElhone would have served upon the SEC had the responses been timely served. The SEC has not been prejudiced by the oversight.

For example, on Thursday, May 27, 2021, the SEC deposed Ms. McElhone and she invoked her Fifth Amendment Privilege against self-incrimination in response to most questions. As another example, on or about March 8, 2021, Ms. McElhone served her Objections and Responses to Receiver, Ryan K. Stumphauzer's First Set of Interrogatories to Defendant Lisa McElhone. Therein, Ms. McElhone states, "Defendant McElhone provides notice of her intention to invoke her Fifth Amendment Privilege Against Self-Incrimination." On September 1, 2021, Ms. McElhone served her Objections and Responses to the Securities and Exchange Commission's

First Set of Interrogatories to Defendant Lisa McElhone. Therein, she invoked her Fifth Amendment Privilege against self-incrimination in response to all interrogatories.

In addition, Ms. McElhone filed her Answer and Affirmative Defenses to Amended Complaint with Jury Demand on June 1, 2021, ECF 609, and on August 21, 2021, she filed her Amended Answer and Affirmative Defenses to Complaint with Jury Demand. ECF 716. Therein, she denied the charges in the Amended Complaint.

SEC has had a course of dealing with undersigned counsel in which both sides have always followed up on their respective discovery requests. Particularly in this very complex litigation involving separate discovery requests and separate litigations with both the SEC and the Receiver; in this singular circumstance, the SEC never asked undersigned counsel for the RFAs and never suggested that the Defendant was delinquent in its discovery obligations.

The SEC used the RFA as an Exhibit to its Summary Judgement Motion. *See* ECF 816-4. However, in its papers, the SEC makes no mention that it sought the Court to hold the propositions contained in the RFA as admitted because the defense failed to respond to the RFA. Rather, it appeared to defense attorneys working on the Summary Judgement Motion that the SEC was seeking the Court to apply the adverse inference against Ms. McElhone for her invocation of the Fifth Amendment Privilege.

Having answered the Amended Complaint with denials on June 1, 2021 and having litigated vigorously on behalf of Ms. McElhone throughout this litigation, the SEC had to have understood that the lack of a response to the RFAs were a mere oversight, and that, like she had repeatedly before, Ms. McElhone would invoke her Fifth Amendment Privilege.

ARGUMENT

Requests for Admission are governed by Rule 36. Under Rule 36, "a matter is admitted unless, within 30 days after being served, the party to whom the request is directed serves on the requesting party a written answer or objection addressed to the matter and signed by the party or its attorney." Fed. R. Civ. P. 36(a)(3). Under Rule 36(b), "the court may permit withdrawal or amendment if it would promote the presentation of the merits of the action and if the court is not persuaded that it would prejudice the requesting party in maintaining or defending the action on the merits." Fed. R. Civ. P. 36(b). Here, allowing Ms. McElhone to amend her admissions would promote the presentation of the merits and would not prejudice the SEC.

Allowing Defendant to amend her admissions would "not subserve the presentation of the merits" of the action. *Great Am. Ins. Co. v. Mueller*, No. 8:19-CV-3170-TPB-JSS, 2021 WL 2037805, at *2 (M.D. Fla. Mar. 19, 2021) citing *Perez v. Miami-Dade Cty.*, 297 F.3d 1255, 1264 (11th Cir. 2002) (internal quotations omitted). The issues raised in the RFA bear on Defendant's Defenses. *Great Am. Ins. Co. v. Mueller*, No. 8:19-CV-3170-TPB-JSS, 2021 WL 2037805, at *2 (M.D. Fla. Mar. 19, 2021). ("The issue of notice may bear on Defendant's defenses in the case.") Deeming the propositions in the RFA admitted could confuse the jury as to testimony it may hear, particularly about the roles various employees played at Par. *Id.* ("According to Defendant, if Request for Admission No. 7 is deemed admitted, the trier of fact could be misled or confused concerning when the relevant persons became aware of the leaking fuel.") Moreover, allowing Defendant "to amend her admissions with her late responses will ultimately allow the court to have a better understanding of the parties' positions in the case and will promote consideration of the merits of the case." *Tolbert v. Discovery, Inc.*, No. 4:18-CV-00680-KOB, 2020 WL 3269149, at *3 (N.D. Ala. June 17, 2020). Therefore, allowing Defendant to Amend her responses to the RFA

will "promote the presentation of the merits of the action." *Great Am. Ins. Co. v. Mueller*, No. 8:19-CV-3170-TPB-JSS, 2021 WL 2037805, at *2 (M.D. Fla. Mar. 19, 2021)

The SEC will not be prejudiced if the Court allows the Defendant to amend her responses to the RFA. First, the Defendant has invoked her fifth amendment privilege in every discovery production or request, including the SEC's deposition of Ms. McElhone, which took place before the SEC served her with the RFA. The SEC had to know that the Defendant would invoke her Fifth Amendment Privilege in response to the RFA as well. Second, the SEC at trial will be permitted to argue to the jury that it should apply an adverse inference against Defendant. Indeed, those instructions have already been sought by the SEC. Third, in this one instance, the regular course of dealing amongst counsel was not followed. *See Tolbert v. Discovery, Inc.*, No. 4:18-CV-00680-KOB, 2020 WL 3269149, at *3 (N.D. Ala. June 17, 2020) ("Moreover, Discovery has not argued that the withdrawal or amendment of the deemed admissions and subsequent consideration of Ms. Tolbert's amended responses to the admissions will create any significant prejudice."); and *Great Am. Ins. Co. v. Mueller*, No. 8:19-CV-3170-TPB-JSS, 2021 WL 2037805, at *2 (M.D. Fla. Mar. 19, 2021)("As to the second prong of the test, the Court finds there is no risk of prejudice to either party if the request is withdrawn."). For all these reasons, the Court should permit Ms. McElhone to amend her response to the RFA. We have conferred with the SEC and they oppose this motion.

CONCLUSION

For the reasons stated herein, the Court should grant Defendant's Motion to Amend her Admissions.

November 8, 2021

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1(a)(3)

I HEREBY CERTIFY that counsel for the movant has conferred with all parties or non-parties who may be affected by the relief sought in this motion in a good faith effort to resolve the issues and their respective positions are addressed in this motion.

/s/ Alan S. Futerfas
ALAN S. FUTERFAS
Admitted Pro Hac Vice

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was served on all counsel of record via electronic mail this 8th day of November, 2021.

/s/ Joel Hirschhorn
JOEL HIRSCHHORN

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.

DEFENDANTS, JOSEPH W. LAFORTE, LISA MCELHONE, AND JOSEPH COLE BARLETA'S
OMNIBUS MOTION IN LIMINE AND INCORPORATED MEMORANDUM OF LAW

INTRODUCTION

The SEC plans on introducing a number of facts into evidence that are either flatly inadmissible, irrelevant, and that the prejudicial value substantially outweighs any probative value. For the reasons explained below, they should be excluded from evidence at trial. Therefore, Defendants Joseph W. LaForte, Lisa McElhone, and Joseph Cole Barleta (collectively referred to as "Defendants") move in liminie to have the following issues excluded from evidence at trial.

MEMORANDUM OF LAW

I. Applicable Legal Standard

"The real purpose of a motion in limine is to give the trial judge notice of the movant's position so as to avoid the introduction of damaging evidence, which may irretrievably affect the fairness of the trial." *Ortiz v. Home Depot USA, Inc.*, 2013 U.S. Dist. LEXIS 156231, at *1 (S.D. Fla. Oct. 25, 2013); *See Stewart v. Hooters of America, Inc.*, 2007 U.S. Dist. LEXIS 44056, at *1 (M.D. Fla. June 18, 2007).

It is axiomatic that only relevant, probative evidence is properly admissible at trial. Fed R. Evid. 401 defines the test for relevant evidence. "Evidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action." Specifically, "relevancy" describes evidence that has a legitimate tendency to prove or disprove a given proposition that is material as shown by the pleadings. Fed R. Evid. 401. If the evidence is shown to have a special relevance to a disputed issue, the court must balance the probative value against the possibility of unfair prejudice. *See* Fed. R. Evid. 403.

"Rule 403 states that a court 'may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence.'" *Ermini v. Scott*, 937 F.3d 1329, 1343 (11th Cir. 2019) (alteration in original) (quoting Fed. R. Evid. 403). The term "unfair prejudice … speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged." *Old Chief v. United States*, 519 U.S. 172, 180 (1997). Evidence should be excluded when it unduly inflames the jury or otherwise inappropriately leads them to find a defendant liable based on conduct not at issue in the trial. *Stewart v. Daimler Chrysler Fin. Services America, LLC*, Civil Action No. 07-60510, 2008 WL 11333226, at *3 (S.D. Fla. 2008). Stated another way, "[f]or purposes of Rule 403, 'unfair prejudice' occurs where there is 'an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one.'" *United States v. Symonevich*, 688 F.3d 12, 23 (1st Cir. 2012) (quoting Fed. R. Evid. 403 advisory committee's note).

II. ARGUMENT

A. *The SEC Should Be Precluded from Referring to the Defendants as a Ponzi Scheme or as Operating a Ponzi Scheme.*

The SEC should be precluded, pursuant to Fed. R. Evid. 401 and 403. from using the term "Ponzi Scheme" to describe Par Funding or any of the Defendants as operating a "Ponzi Scheme," or implying as such. The SEC has not alleged that that Defendants were engaged in a Ponzi Scheme. As the Court will recall, Defendants have maintained, and presented evidence showing, that the business of Par was not a Ponzi Scheme. The term is not probative of the allegations in this case, yet it is a highly charged, derogatory term. "With respect to [] inflammatory language, courts often prohibit the use of certain 'pejorative terms when such categorizations were inflammatory and unnecessary to prove a claim' and such statements 'do not bear on the issues being tried.'" *MF Glob. Holdings Ltd. v. PricewaterhouseCoopers LLP*, 232 F. Supp. 3d 558, 570 (S.D.N.Y. 2017) (quoting *Aristocrat Leisure Ltd. v. Deutsche Bank Tr. Co. Ams.*, No. 04-cv-10014, 2009 U.S. Dist. LEXIS 89183, 2009 WL 3111766, at *7 (S.D.N.Y. Sept. 28, 2009)). Courts have specifically found that the term "Ponzi scheme" or allegations of comingling funds are unduly prejudicial if they are not a matter framed by the pleadings. *Roda Drilling Co. v. Siegal*, No. 07-CV-400-GFK-FHM, 2009 U.S. Dist. LEXIS 55578, at *6 (N.D. Okla. June 29, 2009) ("However, the court finds that the use of colloquial, slang and inflammatory characterizations such as the terms and phrases 'ponzi scheme,' 'playing with house money,' and having 'skin in the game' are potentially prejudicial to Defendant as such terms may imply wrongdoing separate from the alleged breach of the parties' agreement."); *accord Blue Cross & Blue Shield of Minn. v. Wells Fargo Bank*, N.A., No. 11-2529 (DWF/JJG), 2013 U.S. Dist. LEXIS 83741, at *9 (D. Minn. June 14, 2013).

If the SEC wishes to present evidence supporting its claims that Par Funding was in poor financial condition, not profitable and/or performed poor underwriting of merchants, it may do so, and Defendants will respond with evidence suggesting the opposite. However, "Ponzi Scheme" or any similar pejorative terms should not be used by the SEC since there is no probative value relating to the issues to be tried, any limited probative value will be substantially outweighed by the unfair prejudice.

B. *Cash Seized from Mr. LaForte and McElhone's Home or References to Their Wealth*

The SEC should be precluded, pursuant to Fed. R. Evid. 401 and 403, from making any reference to the seizure of $2 million in cash from Mr.LaForte's home by agents executing a search warrant in this case or other gratuitous references to their wealth. The cash is not pertinent to any issue in the case. There is no evidence in the record as to the source of the funds. Specifically, the SEC has not alleged any embezzlement or theft of funds by Defendants. Given that the trial is solely about liability, not disgorgement, evidence about what assets people have or may have received from Par is

irrelevant and can only serve to bias the jury. "In general, gratuitous references to, or emphasis on, the wealth and lifestyle of the parties are not relevant and therefore are to be excluded. Roda Drilling Co., 2009 U.S. Dist. LEXIS 55578, at *7 (precluding references to the number of homes owned, cost of homes, number of household staff employed, any listing on the 'Forbes 400,' or making similar gratuitous references to wealth). Therefore, the existence of the cash and the Defendants' wealth is irrelevant. Moreover, if the SEC is not precluded from mentioning the cash, Defendants may be compelled to engage in a mini-trial to dispel any suggestion that the cash is proceeds of unlawful conduct. Thus, any reference to the cash by the SEC would be highly prejudicial and pose a waste of valuable time.

C. Guns Seized from Mr. LaForte's Home and His Arrest for the Guns and the Parallel Criminal Investigation Against Par in the Eastern District of Pennsylvania

The SEC should be precluded, pursuant to Fed. R. Evid. 401 and 403, from making any reference to Mr. LaForte's arrest for possession of firearms by a felon and the seizure of these firearms as well as the parallel criminal investigation against Par and its principals in the Eastern District of Pennsylvania. The SEC has indicated that it is planning to introduce LaForte's arrest for possession of firearms by a convicted felon. The SEC's position is that the guns "show a complete disregard of the law and rules. Everyone knows a felon cannot have guns. This shows that Joe LaForte routinely violated the law." Furthermore, the SEC has included FBI agents on its witness list and the Defense is concerned that the SEC may attempt to make reference to the parallel criminal investigation that it has been alluding to through the life of this case. However, these are both classic examples of propensity or character evidence inadmissible under Rule 404, which states "[e]vidence of any other crime, wrong, or act is not admissible to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." Fed. Rules. Evid. 404(b)(1). *See Knight v. Gen. Telecom, Inc.*, 271 F. Supp. 3d 1264, 1283 n.30 (N.D. Ala. 2017) (striking from summary judgment motion the fact that a plaintiff in an employment discrimination action "lost his subsequent employment at Camping World for similar such behavior . . . since it, and the evidence cited in support thereof, is inadmissible character and/or 'other acts' evidence.").

"Rule 404(b) forbids the admission of evidence of 'a crime, wrong, or other act . . . to prove a person's character in order to show that on a particular occasion the person acted in accordance with the character." *United States v. Hunter*, 758 F. App'x 817, 822 (11th Cir. 2018). While Rule 404(b) evidence is typically referred to as "prior bad acts" evidence, "the standard for evaluating the admissibility of a subsequent bad act under Rule 404(b) is identical to that for determining whether a prior bad act should be admitted under this Rule." *United States v. Michel*, 832 F. App'x 631, 635 (11th

Cir. 2020) (quoting *United States v. Jernigan*, 341 F.3d 1273, 1283 (11th Cir. 2003)).

"To be admissible under Rule 404(b), the evidence must (1) be relevant to an issue other than the defendant's character; (2) be sufficiently proven to allow a jury to find that the defendant committed the extrinsic act; and (3) possess probative value that is not substantially outweighed by its risk of undue prejudice under Federal Rule of Evidence 403. *Hunter*, 758 F. App'x 817, 822 (11th Cir. 2018) (citing *United States v. Matthews*, 431 F.3d 1296, 1310-11 (11th Cir. 2005)). While Rule 404(b) evidence is typically referred to as "prior bad acts" evidence, "the standard for evaluating the admissibility of a subsequent bad act under Rule 404(b) is identical to that for determining whether a prior bad act should be admitted under this Rule." *United States v. Michel*, 832 F. App'x 631, 635 (11th Cir. 2020) (quoting *United States v. Jernigan*, 341 F.3d 1273, 1283 (11th Cir. 2003)). "The Supreme Court has set identified four factors for courts to consider him in exercising their discretion under Rule 404, stating that '[p]rior bad-acts evidence must be (1) offered for a proper purpose, (2) relevant, and (3) substantially more probative than prejudicial. In addition, (4) at defendant's request, the district court should give the jury an appropriate limiting instruction." *Dougherty v. Cty. of Suffolk*, No. CV 13-6493 (AKT), 2018 U.S. Dist. LEXIS 67465, at *19-20 (E.D.N.Y. Apr. 20, 2018) (quoting *United States v. Downing*, 297 F.3d 52, 58 (2d Cir.2002) (citing *Huddleston v. United States*, 485 U.S. 681, 691-92, 108 S. Ct. 1496, 99 L. Ed. 2d 771, (1988))).

LaForte's pending charge for possession of a firearm by a felon cannot meet any of these standards and must be excluded from evidence. First, it is not offered for a proper purpose. As stated by the SEC, they intend to use this evidence to show that LaForte routinely violated the law. This is classic inadmissible 404(b) excluded propensity evidence. As admitted by the SEC, it is not relevant to an issue other than LaForte's character. Next, it is simply not relevant to any of the allegations in this case. This is a case involving alleged securities laws violations. Whether or not LaForte was illegally in possession of a firearm is not probative or remotely relevant to whether or not securities laws were violated. Character evidence that is not relevant to the matters at issue is especially inadmissible. *In re 3M Combat Arms Earplug Prods. Liab. Litig.*, No. 3:19md2885, 2021 U.S. Dist. LEXIS 53167, at *40-41 (N.D. Fla. Mar. 22, 2021) ("The Court finds that evidence and argument regarding Keefer's Article 15 proceeding is irrelevant to his claims in this litigation. Additionally, evidence regarding the circumstances of Keefer's Article 15 proceeding and demotion constitute improper evidence of prior bad acts under Fed. R. of Evid. 404.").

Next, the case has not been significantly proven to allow the jury to find that LaForte committed this extrinsic act. As explained in the pending criminal case, LaForte's wife, who is licensed to carry a firearm in Pennsylvania, purchased these firearms legally, after she was robbed at knifepoint

at her place of business. *See USA v. LaForte*, 2:20-cr-00231-PBT DE# 9 at p. 1. Given that these are pending charges that have not been proven before a jury, they certainly cannot be considered significantly proven here.

Finally, these unproven allegations do not possess probative value that is not substantially outweighed by its risk of undue prejudice under Federal Rule of Evidence 403. As explained above, the pending firearm case is not relevant at all to the triable issues in this case. Evidence of the firearm case would only prejudice the jury against LaForte without adding any probative value. Furthermore, by prejudicing the jury against LaForte, the evidence will prejudice the jurors against the other defendants given their association. This prejudice substantially outweighs any probative value—because there is none—and any reference to the pending firearm case should be excluded from trial.

As to the parallel criminal case, it is even more prejudicial and even less probative. First, no case has been filed, and the fact that a criminal investigation is pending against Par and its principals would certainly prejudice the jury about whether Par has done what the SEC alleges in this case. Since no case has been filed, and one may never be filed, making reference to this investigation is extremely prejudicial and an amorphous criminal investigation lacks any probative value. Defendants would further be prejudiced because with only an investigation, Defendants have not had the opportunity to test or even know what the allegations against them are. Therefore, any reference the parallel investigation should be excluded from trial.

D. Usury

The SEC should be precluded, pursuant to Fed. R. Evid. 401 and 403, from using the word "usury," "usurious," "loan sharking," "predatory lending" or any variation of these words or any words that suggest that Par's merchant cash advances were illegal, at trial. Despite using such language in its complaint and amended complaint, the SEC backed off these allegations, stating that the legality of the Par's business model is not relevant to this case. Defendants have maintained, and have presented significant evidence showing, that the merchant cash advance (MCA) agreements at the heart of its business activities were legal contracts to purchase accounts receivables -- not loans. (See, e.g. DE 649-1(courts recognize lawfulness of MCA transactions); DE 132-1 (Declaration of Norman Valz)) "Usury" is a legal term meaning "the practice of lending money at interest, [especially] at an exorbitant or illegal rate of interest." *See Webster's Dictionary of the English Language*, Lexicon Publications, Inc., p. 1083 (1990).

The term "usury" is inapposite to the MCA business and the allegations in this case. Yet, like the term "Ponzi scheme," "usury" has a derogatory connotation in common discourse. The SEC can reference the relative high cost to merchants of entering into cash advance agreements with Par Funding without resorting to a term that is factually and legally inaccurate and prejudicial. Moreover,

to the extent the SEC claims that the word "usury" is unavoidable since Mr. Cole purportedly said it during a conversation about a plan to purchase a Texas bank, discussed *infra*, Defendants dispute the SEC's characterization of that recording, and the attribution to Mr. Cole, and seek to preclude the entire Texas bank narrative as collateral to any issue in this case.

E. Mr. Cole's Purported Plan to Purchase a Bank

The SEC should be precluded, pursuant to Fed. R. Evid. 401 and 403, from introducing any evidence in support of its allegation that Mr. Cole was planning to purchase a bank. (See SEC's TRO Mem., ECF 14, p. 77 and Ex. 129 part 2 thereto). The allegation, as posited by the SEC, is complicated. The SEC has indicated that it believes Mr. Cole, Mr. LaForte, Mr. Vagnozzi and Mr. Abbonizio, were actually planning to move away from the MCA business and into the bank business. Further, these Defendants were supposedly soliciting investors to invest in the purported bank deal at the same time that they were advising Par Funding's investors that expected repayments would be reduced due to COVID. The SEC draws support for its narrative from a consensually recorded conversation in which participants talked over one another while allegedly discussing the plan. (ECF 14-129 part 2)

Counsel for the defense have vigorously challenged the SEC's claims that Defendants were planning to purchase a bank, the accuracy of the transcript of the consensual recording, and the SEC's interpretation of that recording. (Motion to Dismiss the Complaint, ECF 663, pp. 16-17; August 25, 2021 Hearing, T. 25-26) Notably, the SEC's transcript does not even identify Mr. Cole as one of the speakers, and the defense disputes the context in which an unidentified male speaker purportedly commented about usury laws. (See ECF 663 p. 17 citing ECF 14 p. 73; ECF 14-129 part 2)

The SEC's narrative includes the claims that (a) the MCA business was not profitable, because Defendants were planning to leave it for something better; (b) that Defendants purportedly misrepresented to Par Funding's noteholders that Par could not make the expected repayments due to Covid when they were actually secretly planning to divert those funds to a new business opportunity; and (c) a recorded conversation reveals Defendants discussing such a plan. Defendants will vigorously dispute each of these component parts at trial.

The notion that Defendants were considering the purchase of a bank is simply irrelevant to the SEC's claims that Defendants are liable for omissions and misrepresentations in the note offering. While the allegation is not probative of any issue in this case, it is a complicated story that risks prejudice to Defendants and will require a fulsome response at trial. Since probative value is minimal, the risk of prejudice is high, and the claim will necessitate a mini-trial to refute a wholly collateral issue, the Court should preclude the SEC's evidence under Fed. R. Evid. 401 and 403.

F. Prior Convictions of Mr. LaForte

The SEC should be precluded, pursuant to Fed.R.Evid. 401, 403, 404(a) and 404(b), from introducing evidence of Mr. LaForte's criminal history, except to the limited extent relevant to the SECs nondisclosure claims. The SEC has placed at issue only whether Defendants failed to disclose Mr. LaForte's criminal history to investors. (ECF 119 ¶¶ 213-219) As to that issue, Mr. LaForte is prepared to stipulate to the basic facts:

On October 4, 2006, Mr. LaForte was convicted of state charges in New York for grand larceny and money laundering. In 2009, Mr. LaForte pled guilty to federal criminal charges in the District of New Jersey for conspiracy to operate an illegal gambling business. *See* ECF 119 ¶ 118.

Yet, the SEC seeks to introduce much more evidence of Mr. LaForte's criminal history for the jury's perusal - the publicly available records -- the indictments, plea agreements, plea allocutions and judgments in the two prior cases. These documents provide extensive details of the criminal allegations against Mr. LaForte, having no plausible relevance to the claims at issue in this case. SEC disclosure rules do not require publicly posting these documents. (See Item 401 of Regulation S-K regarding disclosure requirements) They are pure "bad character" proof squarely prohibited by Fed. R. Evid. 404(a) (evidence of a person's character or character trait is not admissible to prove that on a particular occasion the person acted in accordance with the character or trait). And the SEC cannot satisfy any of the limited exceptions for introducing prior criminal acts under Fed. R. Evid. 404(b).

No doubt the SEC would like the jury to conclude from these documents that Mr. LaForte is a criminal and that his involvement in Par Funding is a continuation of a life of crime. Yet, the Federal Rules of Evidence guard against just such improper propensity proof by clearly delineating when allegations of criminal behavior may, and may not, be paraded in front of the jury, and requiring the balancing of any probative value against the risk of undue prejudice. Fed. R. Evid. 403. As the Court is aware, the defense has vigorously challenged whether disclosure of the prior convictions was even required under the law and is prepared to show at trial that Mr. LaForte's criminal history was, in fact, known to investors. Given the very limited purpose for which Mr. LaForte's criminal history is at issue in this case, the significant risk of undue prejudice in admitting details of that criminal history, and the prohibition against propensity proof (Fed. R. Evid. 404(a)), the Court should preclude the SEC from introducing or referencing Mr. LaForte's criminal history beyond the content of a bare-bones stipulation.

G. Prior Regulatory Action against Ms. McElhone

The SEC should be precluded, pursuant to Fed. R. Evid. 401, 403, 404(a) and 404(b), from introducing any evidence, including the Final Consent Order, of a 2012-2013 Oregon State Regulatory

Action against Lisa McElhone. The existence of the Oregon State Regulatory Action does not support or pertain to any of the SEC's causes of action. In the Amended Complaint, the SEC mentions the the matter in passing only once in the paragraph describing Ms. McElhone as a Defendant. (ECF 119 ¶ 16) The Oregon State Regulatory Action concerns events before the facts at issue in this trial and have no probative value whatsoever. The SEC no doubt seeks to introduce this evidence for the same improper purpose it seeks to introduce the evidence of Mr. LaForte's gun possession charge or details about his prior criminal convictions: as improper proclivity and "bad character" proof. The Court should not permit the SEC to do so. *See supra* Sections C. & F. Rather, given the complete lack of probative value, and the substantial likelihood of prejudice, the Court should preclude the SEC from introducing evidence of the Oregon State Regulatory Action.

H. Bradley Sharp Should Be Precluded from Testifying

Throughout the litigation, this Court has ruled that the Receiver and his agents are an arm of the Court vested with judicial immunity. *See e.g.*, DE# 156-57. The SEC has included Bradley Sharp, the Receiver's vendor with DSI, on its witness list. Mr. Sharp should be precluded from testifying because as the Receiver's agent he was not subject to deposition, because he lacks personal knowledge of anything that occurred pre-receivership, and he is not an expert witness qualified to provide an opinion on any matters.

As argued by the Receiver, and agreed by this Court, the Receiver and his retain a status of officers and agents of the Court who enjoy quasi-judicial immunity. *Ftc ex rel. Yost*, No. EP-19-CV-196-KC, 2020 U.S. Dist. LEXIS 134523, at *7 (W.D. Tex. May 26, 2020) ("'this conclusion follow[s] from the case law' as well as the court's order that the Receiver and his staff 'shall have the status of officers and agents of this Court'") (quoting *Coleman v. Schwarzenegger*, No. CIV S-90-0520 LKK JFM P, 2007 U.S. Dist. LEXIS 99340, at *19 (E.D. Cal. Nov. 29, 2007)). In fact, this Court's Amended Receivership Order confirmed that both the Receiver and his agents like Mr. Sharp enjoy such immunity.

> The Receiver and his agents, acting within scope of such agency ("Retained Personnel") are entitled to rely on all outstanding rules of law and Orders of this Court ***and shall not be liable to anyone*** for their own good faith compliance with any order, rule, law, judgment, or decree. ***In no event shall the Receiver or Retained Personnel be liable to anyone for their good faith compliance with their duties and responsibilities as Receiver or Retained Personnel***, nor shall the Receiver or Retained Personnel be liable to anyone for any actions taken or omitted by them except upon a finding by this Court that they acted or failed to act as a result of malfeasance, bad faith, gross negligence, or in reckless disregard of their duties.

(ECF# 141 at 16) (emphasis added). Furthermore, quasi-judicial immunity was grounds under which the Receiver moved to quash a subpoena against him, which was granted by this Court. (DE# 156-57).

It was similarly, the grounds upon which the Receiver asserted that Mr. Sharp could not be deposed when the Defendants sought to depose him. It would be a significant deprivation of due process to allow the Receiver and his Retained Personnel to hide behind this Court's order and case law to avoid being subject to deposition, but at the same time allow the SEC to call him as a witness.

In addition to the lack of discovery, Mr. Sharp lacks firsthand knowledge of any issues in the case. First, he cannot authenticate any documents from before the Receivership. While he or the Receiver may be in possession of these documents now, they were not around when the documents were created and lacks firsthand knowledge of whether they were created and maintained in the ordinary course of business and whether it was the practice of the business to maintain such documents, such that they would satisfy the business-record exemption to the rule against hearsay. *See* Fed. R. Evid. 803(6). On the other hand, the Receiver did retain some of Par's former employees who have such knowledge. They are on the SEC's witness list, and they should be the ones to authenticate and admit any relevant business records of Par.

Since the documents cannot be introduced into evidence through Mr. Sharp, he cannot testify as a fact witness as to their content. He is also not an expert witness because he is neither qualified as one as a non-CPA, and because he was not disclosed as an expert by the SEC. In fact, the Receiver himself acknowledged that Mr. Sharp's declaration was not intended to serve as an expert report. (DE# 577 at 17). The SEC has retained an expert witness, Mellissa Davis, who has produced a report opining on the financial state of Par. While the Defense has moved to exclude her because her report is not GAAP complaint, allowing a second witness to testify as a matter that is the province of a purported expert witness is cumulative and unduly prejudicial because it will cause the jury to add additional credibility to Ms. Davis's opinion even though Mr. Sharp would, at best, be a fact witness who lacks personal knowledge and would only confuse the Jury. Thus, Mr. Sharp should be precluded from testifying.

I. The SEC Should Be Precluded from Introducing Evidence That Some Noteholders Were Repaid During the Covid-19 Pandemic and Others Signed Exchange Notes

The SEC should be precluded, pursuant to Fed. R. Evid. 401, 403 and 404(a) from introducing evidence concerning Defendants' alleged repayment of some noteholders during the financial turmoil brought on by the Covid-19 pandemic. As Covid bore down on commercial activity in March 2020, Defendants prudently anticipated that Par Funding's revenues would be dramatically affected by forces beyond their control and promptly offered exchange notes to all investors. These exchange notes provided a lower interest rate over a longer term than the existing notes. The majority of noteholders accepted this exchange offer. Some noteholders did not. As to those who declined, Defendants

allowed–on a case-by-case basis–for some of these noteholders to receive a return of their principal and interest to date. These repayment decisions were made with consideration for the financial predicament of individual noteholders. This is also misleading to the jury because all of those noteholders who signed the exchange notes, agreed to accept the exchange notes, which offered a better long-term return even if the short-term return was less.

There is no possible relevance of these events to the issues in this case. The SEC may seek to introduce the repayments to some—but not other–noteholders who declined the exchange offer to suggest that Defendants acted recklessly, in their self-interest, or without regard for all noteholders. Whatever inference the SEC seeks to draw, it is classic propensity proof precluded under Fed. R. Evid. 404(a) that is also unduly prejudicial, Fed. R. Evid. 403. Defendants will be compelled to refute the SEC's inference of malfeasance and/or self-interest by introducing extensive proof showing the strength of the business model and the reasonableness and prudence of their handling of the noteholders' interests amid the unprecedented circumstances present by the Covid-19 pandemic. This will include evidence that Par stopped raising capital yet was still able to fund approximately 130 million dollars in cash advances and pay approximately $19 million to noteholders experiencing hardship as determined on a case-by-case basis. Necessitating such a side-show of proof to refute a wholly irrelevant claim also warrants preclusion of the repayments to some noteholders during Covid under Fed. R. Evid. 403.

III. CONCLUSION

For the foregoing reasons, Defendants respectfully request that the foregoing issues, evidence, and testimony be excluded from trial.

S.D. Fla L. R. 7.1(a)(3) Certification of Counsel

I certify that counsel for the Defendants conferred with counsel for the SEC, and was informed Plaintiff opposes the relief requested in this Motion.

Dated: November 10, 2010,

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all counsel of record via the Court's CM/ECF Filing Portal on this 10th day of November 2021.

/s/ Joshua R. Levine
JOSHUA R. LEVINE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____/

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR PARTIAL SUMMARY JUDGMENT

Defendants, Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta ("Defendants") file this Reply in support of and respectfully move the Court to grant Defendants' Motion for Partial Summary Judgment (ECF No. 804) for the reasons set forth in said motion and below.[1]

1. The SEC Cannot Establish That Defendants Made a Materially Misleading Omission Regarding the Cease-and-Desist Orders Issued by Pennsylvania and New Jersey.

The SEC's Response reveals that its claim of a material omission involving the Pennsylvania and New Jersey cease-and-desist orders ("C&D Orders") must be dismissed on summary judgment. The SEC erroneously argues that "Defendants cite no evidence in support of their argument" (Response at 2). In fact, Defendants met their burden "by showing that there is an 'absence of evidence to support the non-moving party's case." *Jeffery v. Sarasota White Sox, Inc.*, 64 F.3d 590, 593 (11th Cir.1995). Where, as here, "the non-moving party bears the burden of proof at trial, the moving party may obtain summary judgment simply by establishing the nonexistence of a genuine issue of material fact as to any essential element of a non-moving party's claim or affirmative defense"—and does not have to "support its motion with affidavits or other similar material negating the opponent's claim." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-324 (1986). Accordingly, Defendants discharged their burden in this situation by showing the Court that "there is an absence of evidence to support the [SEC's] case." *Id.* at 325. Having done so, the SEC bore the burden of proof in its Response to cite "to particular parts of materials in the record" or show "that the materials cited do not establish the absence or presence of a genuine dispute." Fed.R. Civ. P. 56(c)(1).

And the SEC did not meet its burden. The SEC was required to show that the alleged omission regarding the C&D orders *rendered another statement made by Defendants materially misleading*. This is because while the existence of a state cease and desist order may be relevant to a reasonable investor, *SEC v. Merchant Capital, LLC*, 483 F.3d 747, 771 (11th Cir. 2007), "Section 10(b) of the Exchange Act and Rule 10b-5 do not create an affirmative duty to disclose any and all material information." *In re Galectin Therapeutics, Inc. Secs. Litig.*, 843 F.3d 1257, 1274 (11th Cir. 2016). "Silence, absent a duty to disclose, is not misleading under Rule 10b-5." *Id.* Rather, Rule 10b-5 prohibits "omissions of material fact *'necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading.*" *Id.* (Emphasis supplied).

[1] Notwithstanding the allegations in the Amended Complaint, Defendants accept the SEC's representation that Defendants' (1) "loan practices," including the amount of "interest" charged; and (2) alleged representations regarding Par Funding's possible insolvency before the exchange note offering are not part of its case. (Response at 13, 18.)

Here, the SEC has not alleged that Defendants had a duty to disclose the cease-and-desist orders and has produced no evidence that Defendants told investors that Par Funding had never been the subject of a cease-and-desist orders, because they did not. *Id.* Instead, the SEC alleged that Defendants' omission regarding the C&D orders rendered another statement—Par Funding's success as a profitable cash advance company—materially misleading. (Am. Compl., ¶ 227.) *Fries v. Oil & Gas, Inc.*, 285 F. Supp. 3d 706, 719 (S.D.N.Y. 2018) addresses the issue at hand here—the requisite connection necessary between an omission and a statement made by a defendant triggering a duty to disclose. *See Fried v. Stiefel Labs., Inc.*, 814 F.3d 1288, 1294 (11th Cir. 2016) ("[T]his Court has never held that a failure to disclose material information is an omission under subsection (b) absent a statement made misleading by that failure."). "Therefore, 'you can't have one without the other' – absent any omission, the statements would not be misleading, and absent any statements that were rendered misleading by the omission, the omission by itself would not be actionable." *MAZ Partners LP v. First Choice Healthcare Sols., Inc.*, No. 6:19-CV-619, 2019 WL 5394011, at *9-10 (M.D. Fla. Oct. 16, 2019).

In *Fries*, a company's CEO was investigated by the SEC for securities laws violations and, like Defendants here, was the subject of a cease-and-desist order. *Id.* at 712. The plaintiff in *Fries* alleged that the defendants' failure to disclose this conduct rendered the company's statements touting the CEO materially misleading. *Id.* at 719. The court explained that "the requisite connection triggering a duty to disclose" arises in the following three circumstances:

> (1) when a corporation puts the reasons for its success at issue, but fails to disclose that a material source of its success is the use of improper or illegal business practices; (2) when a defendant makes a statement that can be understood, by a reasonable investor, to deny that the illegal conduct is occurring; and (3) when a defendant states an opinion that, absent disclosure, misleads investors about material facts underlying that belief.

Id., citing In re Virtus Inv. Partners, Inc. Sec. Litig., 195 F.Supp.3d 528, 536 (S.D.N.Y. 2016). Because the omission of the CEO's conduct—including the SEC cease-and-desist order—did not render the defendants' statements touting the CEO misleading (and the statements made did not deny that the illegal conduct was occurring), the court held that there was no actionable misstatement or omission. *Id.* at 719-720.

Similarly, the SEC in this case has failed to point to any evidence demonstrating that the C&D orders they allege Defendants omitted had any connection to—much less *were a material source* of—Par Funding's success. And because the SEC cannot point to a single statement made by Defendants

denying the existence of the C&D Orders, its claim of a material omission must be dismissed.[2] *MAZ Partners LP*, 2019 WL 5394011, at *9-10 (M.D. Fla. Oct. 16, 2019) (statement that CEO was key to company's success not rendered materially misleading by omission of corporate misconduct, the CEO's involvement in a market manipulation scheme, *even though the court agreed that the market manipulation scheme would have been relevant to a reasonable investor*.)[3]

The SEC's Response also makes clear that Defendants did not act with scienter in connection with this alleged omission. The SEC has failed to point to any evidence demonstrating that the Defendants knew or understood that they had an obligation to disclose the C&D Orders to investors. There is no evidence of an effort to conceal this information from investors and, as explained above, there is no evidence that Defendants ever told investors that Par Funding had never been the subject of any such Orders. While the SEC prefers to argue based on an adverse inference that Lisa McElhone "admitted" Par Funding never sought legal advice regarding whether to disclose its regulatory history,

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[2] Instead, recognizing that they have no such evidence to offer, the SEC points to evidence that "LaForte not only falsely claimed there were no such restrictions, but tied it directly to Par Funding's success and then omitted the fact that two separate state regulatory organizations had already sanctioned Par Funding for violating securities laws in connection with raising investor capital." (Response at 3.) This loose reference to a statement regarding "restrictions" being "tied to Par Funding's success," of course, is not evidence that the C&D Orders were tied to Par Funding's success and is not evidence that Defendants stated that they were not the subject of C&D Orders or regulatory investigations. Beyond the fact that this reference to a statement about "restrictions" was not the subject of Defendants argument on summary judgment, it is not even alleged in the Amended Complaint. This court should not permit the SEC to move the goalposts yet again, as they have done repeatedly in this case. *See Richards v. Headley*, No. 2:19-CV-845-KFP, 2021 WL 2784278, at *5 (M.D. Ala. July 2, 2021) ("Plaintiff's summary judgment response is not an elaboration of evidentiary details; it is an impermissible attempt to 'move the goalposts' by substituting an entirely new factual predicate for his claims at the summary judgment stage"); *Wilcox v. Green Tree Servicing, LLC*, No. 8:14-CV-1681-T-24, 2015 WL 2092671, at *1 (M.D. Fla. May 5, 2015) (finding that "the court could only consider the claims and theories of liability that plaintiff actually pled in her complaint," and thus, the court could not consider additional facts raised by the plaintiff for the first time in response to a summary judgment motion) (collecting authorities).

[3] Beyond the fact that *Merchant Capital* is inapposite because it only reaches the question of materiality and not the duty to disclose at issue here, it is also distinguishable on the issue of materiality. There, the court held that "the existence of a state cease and desist order" was relevant to a reasonable investor because the defendants continued selling "*identical instruments*" after having received the order. 483 F.3d at 771, n. 22 (emphasis added.) It is undisputed here that Par Funding hired counsel, Phillip Rutledge, to change the way it sold notes using a new instrument—a note purchase agreement drafted by Rutledge for that purpose. Evidence of the new instrument used by Par Funding was not considered by the Court on Defendants' Motion to Dismiss, which was decided solely on the allegations of the Amended Complaint. *See Barberi v. Luisi Dollar Discount Mini Market, Inc.*, No. 17-20522-CIV, 2017 WL 2651710, at *3 (S.D. Fla. 2017) (permitting re-argument of issue at summary judgment stage after denial on motion to dismiss "with the benefit of a more complete record.)

the actual undisputed evidence in the record proves otherwise. *See Rivera v. Guevara*, 319 F.Supp.3d 1004, 1040 (N.D. Ill. 2018) ("defendants' summary judgment cannot be denied solely because one defendant has exercised his Fifth Amendment right any more than the question of liability for damages could be sent to the jury on that basis alone.") Defendants hired counsel to deal with the Pennsylvania investigation and sought his assistance in how to legally continue selling notes to investors, which would include necessary disclosures.

The SEC offers nothing to dispute these facts; instead, it argues that Defendants are asking the Court to weigh the evidence. But the SEC, who has the burden of proving scienter, has offered no contrary facts on this point for the Court to consider. It has offered no evidence that Defendants knew they had to disclose the C&D Orders.[4] The SEC even goes so far as to invite this Court to speculate as a basis to deny summary judgment: "Had Par Funding hired Mr. Rutledge to draft its disclosure documents in 2018 or 2019 (after a regulatory Order was entered), then *he would have advised Par Funding to disclose the regulatory history*." (Response at 5.) *Parker v. Wal-Mart Stores E., LP*, No. 1:16-CV-1479-ODE, 2018 WL 9437354, at *4 (N.D. Ga. Aug. 23, 2018), *aff'd*, 769 Fed. Appx. 875 (11th Cir. 2019) ("[m]ere speculation is not enough to rebut contrary evidence, and for an inference to create a genuine issue of material fact that is enough to defeat a motion for summary judgment, the inference must be based upon evidence 'which is [not] too uncertain or speculative or which raises merely a conjecture or possibility.'") It offers no actual evidence that Defendants did not seek this opinion from counsel or that Rutledge advised Par to disclose the regulatory history. Its only attempt in this regard is a reference to an adverse inference,[5] which cannot alone rebut Defendants' evidence that they sought counsel from Rutledge. Indeed, the SEC's evidence makes clear that Defendants disclosed the C&D Orders and another investigation brought by Texas as soon as they were advised to do so by counsel. These unrebutted facts alone undermine any *reasonable argument* that Defendants concealed the C&D Orders with scienter. *Daniels v. Twin Oaks Nursing Home*, 692 F.2d 1321, 1326 (11th Cir. 1982) (inference must be "reasonable" to defeat a motion for summary judgment).

[4] The SEC erroneously represents that paragraphs 37, 47, and 61-75 of its Opposition to Defendants' Statement of Facts (ECF No. 887-1) support the proposition that Rutledge told Defendants "that if Pennsylvania entered an Order against Par Funding, then it could give rise to a disclosure requirement."

[5] The SEC points this Court to a request for Admission that Ms. McElhone, through inadvertence, did not initially answer, but has answered through an invocation of her 5th Amendment Rights. (*See* ECF No. 914.)

2. Defendants Did Not Engage in a Scheme to Defraud Pennsylvania Regulators.

The SEC's repeated efforts to play fast and loose with the evidence should be cause for the Court's concern. Not only is there no evidence that "LaForte decided to implement the Agent Fund," the record (including the SEC's own Amended Complaint), makes clear that Vagnozzi conceived the idea and implemented it with assistance from *his* attorney, John Paucioulo. (*See* ECF No. 895, ¶¶ 132-136). The SEC's desire to involve LaForte in a decision the undisputed evidence demonstrates was conceived and implemented by Vagnozzi and his attorney is not evidence. Even assuming LaForte "knew about the Agent Fund model for years" – his knowledge does not take the place of evidence that he or anyone at Par Funding *implemented this model to deceive Pennsylvania regulators*. There is simply no evidence of this, and the SEC cites none in its Response. Instead, it argues, forgetting it is the Plaintiff, that Defendants "cite no evidence other than the fact that Vagnozzi previously proposed the Agent Fund…" The SEC is wrong for several reasons.

First, Defendants met their burden on summary judgment by showing that there is an absence of evidence to support the SEC's case on the issue of scienter. *See Sarasota White Sox, Inc.*, 64 F.3d at 593. The SEC bore the burden of proof in its Response to cite "to particular parts of materials in the record" that LaForte or some other Defendant implemented this plan with the intent to deceive regulators, *see* Fed.R. Civ. P. 56(c)(1), and failed to do so. Second, the SEC is simply wrong in arguing that the Defendants failed to support their argument that Vagnozzi conceived and implement the idea with the assistance of his lawyer. (See ECF No. 895, ¶¶ 132-136). Third, the SEC is conflating the advice of counsel defense with Defendants' argument that they had a good faith belief that Vagnozzi's lawyer, Pauciulo, had set up the Agent Funds in a manner compliant with the law. As the court noted in *Howard v. SEC*, 376 F. 3d 1136, 1147-48 (D.C. Cir. 2004), the SEC knows better than to confuse those distinct ideas. Defendants bear no burden to prove their good faith, as it is the SEC's burden to disprove that they acted in good faith, and evidence relevant to a defendant's good faith always is admissible. *Id.* The SEC's assertion that a defendant must satisfy the elements of the wholly separate advice-of-counsel defense before he can refer to the role played by lawyers or consultants is a fiction that courts have rejected repeatedly. *Id.*; *see also S.E.C. v. Snyder*, 292 Fed.Appx. 391, 406 (5th Cir. 2008); *S.E.C. v. Prince*, 942 F. Supp. 2d 108, 138 (D.D.C. 2013). The evidence demonstrates that Defendants were not experienced or knowledgeable about and did not even come up with the idea for the Agent Fund model. To overcome this glaring problem, the SEC is asking this Court to draw an unreasonable inference from the evidence—that LaForte's mere knowledge that Vagnozzi and his lawyer planned to create the Agent Funds is somehow proof that he not only implemented the model but did so to

deceive Pennsylvania regulators. *See Daniels,* 692 F.2d at 1326 (11th Cir. 1982) (inference must be "reasonable" to defeat a motion for summary judgment).

3. The SEC Cannot Prove That Defendants Misled Investors Regarding the Default Rate.

In an effort to make the argument that Defendants made a materially misleading statement about the default rate, the SEC once again ignores "the total mix of information" made available to investors in favor of its own version of what investors were told. Defendants provided investors with a monthly CBSG Funding Analysis Reports including a default rate calculation. The SEC's argument that "the Financial Analysis Report does not reflect the default rate on the MCA loans at all" (Response at 8), ignores the reports themselves. The calculation in the reports included a footnote defining the default rate as "Factoring Losses realized in respective month equal to total AR balance for transactions *written off* against *Factoring Loss reserve*." (ECF No. 805, Exhibit 3, n. 4) (emphasis supplied.) Amounts written off against receivables *are* amounts in default.[6] *See Matter of Federated Dept. Stores, Inc. and Allied Stores Corp.*, WL 10858840, *5 (S.D. Ohio 1990) (citing to an agreement defining "Defaulted Receivable" as a Receivable that is written off the Purchaser's or the applicable Seller's books as uncollectable.") The SEC's own interpretation of default cannot trump or take the place of Defendants' actual, written representations to investors. This would be true even if someone who receives the report believes it to mean something else. In *Carr v. CIGNA Securities, Inc.*, Judge Posner explained that:

> If a literate, competent adult is given a document that in readable and comprehensible prose says X (X might be, "this is a risky investment"), and the person who hands it to him tells him, orally, not-X ("this is a safe investment"), our literate, competent adult cannot maintain an action for fraud against the issuer of the document. This principle is necessary to provide sellers of goods and services, including investments, with a safe harbor against groundless, or at least indeterminate, claims of fraud by their customers. Without such a principle, sellers would have no protection against plausible liars and gullible jurors ... If the documents he was given, warning him in capitals and bold face that it was a RISKY investment, do not preclude the suit, it will simply be his word against the seller's concerning the content of an unrecorded conversation.

[6] See Paragraph 35 of Expert Report of Melissa Davis, in which she writes, "Par Funding made periodic adjustments to the Merchant Advance Receivables to reduce it for Merchant Advances *that it deemed were in default* and likely not collectible. *These transactions were recorded as factoring losses expense*, ('Factoring Loss') on Par Funding's profit and loss statement and resulted in a reduction to the Merchant Advance Receivables."

95 F.3d 544, 547 (7th Cir.1996). Because the SEC does not challenge the accuracy of the default rate reported to investors, its claim that Defendants misled investors with scienter regarding the default rate reported in the Funding Analysis Report it provided investors on a monthly basis cannot stand.

4. Defendants Conducted the Underwriting Represented to Investors.

The SEC forgets that statements must be materially misleading and made with scienter to be actionable. It concedes that Par Funding's approved just 17% of merchant application, yet somehow argues that "this says nothing about what underwriting was actually done." (Response at 10.) The SEC offers no evidence to rebut the fact that Par Funding's underwriting efforts and guidelines resulted in the rejection of roughly 83% of merchant applications, far more than the industry standard, or that it had an entire department dedicated to this task, which included background checks, on-site inspections, and credit and financial verifications. Based on this record, the SEC cannot meet its burden to prove that Par Funding's representations regarding its underwriting were *materially* misleading, as any discrepancies raised by the SEC pale in comparison to the mountain of undisputed evidence that the Company maintained rigorous underwriting standards.

With respect to the claim of on-sites, the SEC erects a strawman to suggest that Defendants "pivot and argue without support that on-site inspections are not necessary." (Response at 11.) The SEC knows better. Certainly, had Defendants represented to investors that on-site inspections were done when they were never, or rarely done, that would be misleading and material to the reasonable investor. But a reasonable investor would not alter their investment decision simply because on-sites were not repeated for merchants with which Par Funding had a pre-existing relationship, or that other measures were taken to verify the existence of businesses like law firms and child-care centers, where on-sites were not possible. The only material element to the underwriting is that all the proper documents are collected and analyzed, and an informed underwriting decision is made, particularly given the SEC's concession that Par Funding operated an underwriting department that rejected more merchant applications than the industry standard.[7]

5. Par Funding Believed in Good Faith That It Had the Insurance Coverage It Represented to Investors.

The record is clear that Defendants believed that Par Funding had insurance to cover merchant defaults. In yet another desperate effort to undermine clear evidence, the SEC attempts to

[7] The SEC misstates the testimony of Victoria Villarose in its Opposition to Defendants' Statement of Undisputed Facts. The SEC's exhibits do not support its contention that on-sites were not done at all.

argue that while Anthony Bernato, Par Funding's insurance broker understood that Par Funding's insurance carrier misrepresented the insurance they sold to Par Funding, he may not have told Defendants, his clients, about it. (Response at 12: "Bernato's declaration says nothing of what he told Defendants…") This is non-sensical. Bernato was Par Funding's broker and testified in his declaration that he believed Par Funding's assertions regarding the insurance they purchased from Euler Hermes to be true. *See* Exhibit 25, Declaration of Anthony Bernato, at ¶¶ 5-6. Moreover, when Defendants learned for the first time that the insurance they purchased might not cover what the carrier represented to them, they immediately advised the Agent Fund Manager who was selling notes to investors on the promise of insurance about the lack of coverage, *and asked him to stop*. There is simply no evidence that Defendants represented that Par Funding had insurance in connection with the purchase or sale of security after this point, and the SEC does not cite to any contrary evidence. Thus, the record clearly reflects that Defendants acted in good faith with respect to representations they made to investors, which is all that matters in an SEC enforcement action.

6. LaForte's Criminal History

The SEC somehow concedes that Defendants received legal advice that disclosing LaForte's criminal history to investors wasn't necessary under SEC Rule 502(b), but that the omission was still material to investors and made with scienter. The SEC maintains Defendants acted with the intent to defraud investors despite this advice because of the timing of the disclosure. But the SEC ignores the undisputed evidence that Defendants held a reasonable belief based on advice they received from counsel they hired before Rutledge, Lisa Jacobs, that the Phase 1 notes were not securities. ECF No. 896-13, pp. 177-178. Rutledge himself argued to Pennsylvania regulators that the Phase 1 notes were not securities, *see id.*, and therefore not subject to the disclosure requirements of the securities laws. It is therefore clear that Defendants believed based on advice they received from Jacobs, before consulting Rutledge, that they had no duty of disclosure to Phase 1 investors. When they sought Rutledge's advice regarding this disclosure as to Phase 2 investors, he advised them—as the SEC concedes—that it was not required.

The context of Rutledge's advice on this point bears repeating. Defendants hired Rutledge to advise them regarding *the continued sale of notes* following the conclusion of the Pennsylvania investigation, which obviously includes disclosures necessary to make those sales compliant with the securities laws. In connection with this representation, Rutledge advised Defendants – and represented to Pennsylvania regulators – that Par Funding's Phase 1 and Phase 2 investors were accredited and, accordingly, that disclosures regarding management did not need to be made to accredited investors.

Because Rutledge took the position with Pennsylvania Regulators (and advised Defendants of the same), that Par Funding's Phase 1 investors were accredited, his advice would apply to them as well.

Undaunted, the SEC next asks the Court to ignore Rutledge's legal advice because they claim Defendants did not disclose LaForte's position to Rutledge. But the record is clear that Rutledge knew LaForte had "oversight" over Par Funding's affairs when Rutledge provided this advice to Defendants. ECF No. 896-12, pp. 36-38. Rutledge therefore understood, because Mr. Cole disclosed it to him, that while LaForte was operating a separate company which provided sales leads to Par Funding, he had oversight authority over certain aspects of Par Funding's business. *Id.* Notably, Rutledge counseled Par Funding to amend Form D—which includes disclosures regarding the company's management—*after* he was aware that LaForte had this oversight and did not advise Defendants to disclose LaForte in the Form D filing.[8] Consequently, Rutledge legal advice to Defendants negates any reasonable inference that they omitted this information from investors with scienter.

[8] Defendants' exhibits filed in support of their Partial Motion for Summary Judgment support a finding that Defendants disclosed the Texas cease-and-desist letter. At a minimum, Defendants discussed this matter with Rutledge and believed he had included the disclosure in the Exchange Notes.

CONCLUSION

WHEREFORE, the Defendant, Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta respectfully request that this Court grant the Partial Motion for Summary Judgment, ECF No. 804.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing has been filed on the Court's CM/ECF system which will serve a copy on all counsel of record via notices of electronic filing.

Respectfully submitted,

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UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO.: 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.

DEFENDANT, JOSEPH W. LAFORTE'S, RESPONSE IN OPPOSITION TO THE SECURITIES AND EXCHANGE COMMISSION'S EXPEDITED MOTION TO PRECLUDE TRIAL TESTIMONY OF DEFENDANT LAFORTE AND MEMORANDUM OF LAW IN SUPPORT [DE # 937]

INTRODUCTION

By initiating this case with false allegations of a theft of all the money out of the corporate bank account and illegal usurious loans to get the green light for a military style raid of the Defendants' homes and offices more appropriate in a drug kingpin case than an SEC registration and disclosures case, and then repeatedly waiving the specter of a criminal case in front of this Court and over the Defendants' head through out this litigation, the SEC compelled Defendants, LaForte and McElhone to assert their 5th Amendment rights against self-incrimination. This tactic played out just as the SEC hoped it would, as LaForte and McElhone's 5th Amendment invocations prevented them from fully defending themselves and permitted the SEC to parade their invocations before this Court. However, the SEC has included LaForte on its witness list and served him with a trial subpoena, indicating that it wants to call him to testify, presumably for the purpose of forcing him to take the fifth in front of the jury for the prejudicial effect rather than simply relying on the adverse inference the SEC could request without LaForte being called to the stand. Additionally, having had the opportunity to review the massive amount of documents produced by the SEC and Receiver, LaForte feels comfortable that he can testify truthfully without incriminating himself and wishes let the jury hear the full story.

Consequently, on November 10, 2021, LaForte accepted the SEC's invitation to drop the 5th Amendment and have his deposition taken immediately. *See* correspondence from SEC attached as exhibit A. However, after LaForte accepted the SEC's offer and made himself immediately available for deposition on the date requested by the SEC, the SEC changed its mind and took the position that permitting him to testify at trial in his own defense would be too prejudicial. Given the extraordinary temporary relief the SEC has already obtained against LaForte as well as the permanent relief it is seeking, this Court should not permit the SEC's fear tactic to play out in their favor and allow LaForte to testify in his own defense.[1] Therefore, Defendant Joseph W. LaForte respectfully requests that this Court deny the SEC's motion and allow him to testify at his trial.

MEMORANDUM OF LAW

I. Applicable Legal Standard

Generally, trial courts have the discretion to determine whether to allow a party to withdraw his Fifth Amendment privilege. *Davis-Lynch, Inc. v. Moreno*, 667 F.3d 539, 547 (5th Cir. 2012), as revised (Jan. 12, 2012). However, there is no bright line rule determining when parties may withdraw their fifth amendment privilege; rather, the courts weigh the facts of each individual case. *See Evans v. City of Chicago*, 513 F.3d 735, 743 (7th Cir.2008); *United States v. Certain Real Prop. and Premises Known as: 4003–4005 5th*

[1] LaForte remains available to be deposed before trial.

Ave., *Brooklyn, N.Y.*, 55 F.3d 78, 85 (2d Cir.1995); *Edmond v. Consumer Prot. Div.*, 934 F.2d 1304, 1309–10 (4th Cir.1991); *United States v. Parcels of Land*, 903 F.2d 36 (1st Cir.1990); *SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 191 (1st Cir.1989); *Davis-Lynch, Inc.*, 667 F.3d at 547.

II. ARGUMENT

LaForte Should Be Permitted to Testify as the SEC Will Not Be Prejudiced by Taking His Deposition at This Stage of the Litigation

Contrary to the SEC's assertion, there is no bright line rule that prohibits LaForte from testifying. Instead, courts employ a balancing test that weighs a party's right to testify against any perceived prejudice to the other party. "Generally, '[t]he court should be especially inclined to permit withdrawal of the privilege if there are no grounds for believing that opposing parties suffered undue prejudice from the litigant's later-regretted decision to invoke the Fifth Amendment.'" *Davis-Lynch, Inc. v. Moreno*, 667 F.3d 539, 547 (5th Cir. 2012) (quoting *United States v. 4003-4005 5th Ave.*, 55 F.3d 78, 84 (2d Cir. 1995)). Courts look at the totality of the circumstances surrounding the waiver of the privilege. "Therefore, a party may withdraw its invocation of the Fifth Amendment privilege, even at a late stage in the process, when circumstances indicate that there is no intent to abuse the process or gain an unfair advantage, and there is no unnecessary prejudice to the other side." *Davis-Lynch, Inc.*, 667 F.3d at 548 (quoting *Evans v. City of Chi.*, 513 F.3d 735, 746 (7th Cir. 2008)). For example, the Evans court found that there was no gamesmanship when the party withdrew its invocation of the 5th Amendment privilege "around the time the special prosecutor was wrapping up his [criminal] probe." *Evans*, 513 F.3d at 746.

The SEC's conduct in this case was a large part of the reason LaForte asserted his Fifth Amendment rights in this case. As acknowledged by this Court throughout the litigation, there is a parallel criminal investigation into Par and its principals that seriously affects the Defendants' rights and decision whether or not to testify in this civil case.

At the October 7, 2020, Status Conference Hearing the Court stated:

> So that is something that I'm very aware of, so I don't want to necessarily belabor it today. But I think it would be good to get a sense of the defendant's sworn accounting generally, perhaps also the status of the LaForte consent. I know that there's some limitations because I believe -- I don't think he's -- I don't think he's out. I think he's still inside. I know that he's got the pending criminal case. So I know that's slow-moving and that's fine, it can take some time.

[DE# 329 at 93]. At the May 20, 2021, status conference the Court again brought up the parallel criminal investigation, stating:

> If you recall, Ms. Berlin, early in the case there was resolutions with a couple of defendants that came out organically. I don't know if there's any other discussions in that regard. I know it's, from what I heard today, there's parallel, arguably parallel criminal investigations ongoing. I don't know where that is, but it just would be good

> for the Court to know that litigation is proceeding in the normal course while the receiver does his job on recovery.

[DE# 595 at 103]. Finally, again in August 2021, this Court expressed its frustration with the lack of any apparent movement or update of the parallel criminal case, stating:

> And, again, I may not be able to be privy to it, and I don't know how much we know about it. There has been that swirling criminal investigation since this case started last July, and I keep waiting and waiting and waiting to find out -- I don't know if it's going to impact my case or not, but do we have any sense of what's happening on that side of the coin?
>
> And I don't know how much any party can divulge on that, but when I saw this case come on my docket originally, I did not think that it would be almost over a year before that side of what's going on here manifested itself one way or the other. I'm just curious because that seems to kind of hang over my head a little bit, and I never really know if that's heading in the direction with regard to Par. And I don't mean unrelated criminal charges that I know one of the defendants has. That's -- I'm not talking about felon and possession counts. I'm talking about a true criminal investigation. Is that something that the parties are monitoring? Can I get at least, to the extent there is an update, some sense of what's going on with that or we don't really know?

[DE# 744 at 172].

It is no secret that the SEC has been working in concert with the FBI to obtain evidence for this case, including using undercover FBI agents to record conversations with LaForte that the SEC has used in this case. The FBI then executed search warrants on LaForte's homes and Par's offices in which they seized electronic devices, documents, currency, and firearms, the last of which has resulted in LaForte being on pre-trial home confinement during the pendency of this action.

It is also no secret that, for the first several months of this case, the Defendants were unable to review company documents to prepare their own defense, while the SEC was able to obtain any documents it wanted from the Receiver. When the Defendants eventually obtained their documents and sought to postpone their depositions so they could review the hundreds of thousands of documents and adequately prepare for their depositions, the SEC objected and obtained an order compelling the Defendants to immediately sit for deposition on the SEC's schedule. [DE## 529; 533]. As a result, LaForte and McElhone asserted their Fifth Amendment rights due to the fact that they lacked time to adequately prepare along with the specter of the criminal investigation. However, with trial approaching, the SEC has now indicated that it wants to parade LaForte and McElhone in front of the jury for the added prejudicial effect of the jury observing them asserting their 5th Amendment rights rather than simply reviewing the deposition transcripts where they did so. *See* SEC Witness List and Trial Subpoena to Joseph LaForte, attached as exhibits B & C. The SEC has even said it wants to tell the jury about LaForte's firearms charges to establish that he purportedly has no respect for the law.

On November 2, 2021, Mr. Futerfas had a one-hour telephonic conference with Amie Berlin and Alise Johnson of the SEC. The purpose of the conversation was to meet and confer on the parties' proposed motions in limine. During the call, one of the topics discussed involved the Fifth Amendment assertions of Mr. Laforte and Ms. McElhone, specifically, whether the SEC intended to have them assert their fifth amendment before the jury, or whether the SEC would agree to put deposition transcripts into evidence, which contain the fifth amendment assertions, and obtain an adverse inference instruction from the Court. Ms. Berlin advised counsel that the SEC intended to have those defendants assert their fifth amendment rights in front of the jury but added that if either wished to change their mind and testify, the SEC would request a prompt deposition before the trial. The sum and substance of that call was memorialized in a memorandum circulated to all defense counsel. *See* Declaration of Alan Futerfas, attached as exhibit D.

Apparently, the SEC's idea of a fair trial is compelling LaForte to testify, but not permitting him to answer any questions. This Court should not countenance such gamesmanship. Had the SEC called LaForte to the stand and he decided to answer questions, they would have had no basis to object to this as they would have opened the door by compelling him to take the stand. However, rather than engaging in such gamesmanship, counsel decided it was best to advise the SEC and take them up on their invitation to immediately depose LaForte. The SEC proposed November 17, 2021, but when counsel for LaForte agreed to the date, the SEC changed its position and filed the instant motion. *See* exhibit A.

The SEC's argument that it will be prejudiced by LaForte being permitted to testify is pretextual at best. The SEC admitted that it was investigating Par for over a year prior to filing this case, amassing over 100,000 documents that it produced in a document dump of its investigative file at the outset of this case. [DE# 691 19-20]. The SEC then moved *ex-parte* for a Receiver and the FBI raided LaForte's homes and Par's office, seizing all computers and documents eventually turning them over to the Receiver. Having done so, it is not exactly clear what, if any, documents LaForte would have been able to produce to the SEC. If anything, all he would have been able to do is have his counsel tell the SEC what documents, already in the SEC's possession, supported which legal theory of the defense, invading the work-product privilege. This is the exact ground upon which the SEC has refused to respond to many of the Defense's discovery requests and deposition questions. *See e.g.*, Exhibit E at 1; DE# 800 at 11-12. The SEC cannot honestly claim prejudice in this situation given that this was the SEC's *modus operandi* in response to discovery in this case.

Other courts have looked at similar claims of prejudice by the SEC with skepticism when it attempted to prevent a defendant from withdrawing its 5th Amendment privilege despite adequate evidence from other sources throughout the litigation.

> ***Moreover, any allegation that the SEC was surprised by suddenly being confronted with new and unexpected evidence must be received with some caution***. As noted earlier, Ackerly and Adams were but two of seven defendants who had been sued by the SEC. Before Adams and Ackerly appeared at the hearing, two co-defendants, Shawn M. Crane and Robert L. Rock, had entered into consent judgments for the disgorgement of $ 60,663.15 and $ 279,074.00, respectively, 2 and had agreed to testify at any evidentiary proceeding requested by the SEC. ***In addition, the SEC had already taken the depositions of several individuals whose testimony was cited by the district court in support of summary judgment.***
>
> ***The SEC possessed substantial evidence in addition to the material that Adams asserted he had made available. It is apparent that the government had devoted substantial resources to expose the fraudulent security arrangements and to proceed against those responsible. Therefore, this appears to be a far cry from a case where invocation of the privilege prevented the opposing party from obtaining the evidence it needed to prevail in the litigation.***

SEC v. Graystone Nash, Inc., 25 F.3d 187, 193 (3d Cir. 1994) (emphasis added); *accord FTC v. Sharp*, 782 F. Supp. 1445, 1452 (D. Nev. 1991) (declining to bar the defendant's later testimony because the FTC was not unfairly prejudiced by the defendant's prior fifth amendment assertion considering that the "FTC has been able to thoroughly prepare . . . because [the defendant] is not the only, or even the primary source of pertinent information"); *FTC v. Kitco of Nevada, Inc.*, 612 F. Supp. 1282, 1292 (D. Minn. 1985) (finding that the defendant should be permitted to testify, notwithstanding his prior invocation of his fifth amendment privilege, because the FTC has not been unfairly prejudiced and the FTC was able to thoroughly prepare its case and "anticipate through other witnesses what [the defendant's] testimony would be").

Here, the SEC has deposed ten fact witnesses,[2] and Defendants' expert witness, and while the Defendants cannot be sure how many potential witnesses the SEC has interviewed without a deposition, it has included 68 potential witnesses on its witness list, indicating that it has clearly not been hindered in its ability to investigate this case. Additionally, given that the Receiver has been in possession of all of Par's books and records and waived attorney-client privilege, the Receiver, not the Defendants have been the primary source of pertinent documents, the Receiver has allowed the SEC to speak to Par employees who were kept on the payroll, and SEC has been able to depose Par's attorneys, George Philip Rutledge, Esq. John W. Pauciulo, Esq., and Brett Berman, Esq., something it would clearly not have been able to do had it not initiated this case in the heavy-handed way it did. "Courts must bear in mind that when the government is a party in a civil case and also controls the decision as to whether criminal proceedings will be initiated, special consideration must be given to the plight of the party asserting the Fifth

[2] Of these fact witnesses, Defendants Joseph Cole Barleta, Dean Vagnozzi, Perry Abbonizio, and Michael Furman testified and did not invoke their 5th Amendment rights.

Amendment." *Graystone Nash, Inc.*, 25 F.3d at 193-94. Despite the SEC's claim that it will not be able to conduct follow-up discovery after deposing LaForte, the SEC has conducted a substantial amount of discovery, exhausting all of its depositions, and has had all of Defendants' documents from the outset of this case—and this is in addition to the information and evidence it gathered during its yearlong, pre-Complaint investigation. Given these facts, the SEC's claim of prejudice strains credulity.

Contrary to the SEC's assertions, LaForte's withdrawal of the Fifth Amendment privilege does not fit the pattern of gamesmanship described in other cases. For example, LaForte is not attempting to file an affidavit in support of his motion or in opposition to the SEC's motion for summary judgment insuring that his unquestioned, unverified affidavit would be the only version. *See Davis-Lynch, Inc.*, 667 F.3d at 548 n.20 (citing *4003-4005 5th Ave.*, 55 F.3d at 86; *Edmond*, 934 F.2d at 1308; *United States v. Parcels of Land*, 903 F.2d 36, 45 (1st Cir. 1990)). Rather, his withdrawal of his Fifth Amendment privilege is in direct response to the totality of the circumstances that LaForte and his counsel have had sufficient time to review the documents received from the SEC and Receiver, and LaForte feels comfortable that he can truthfully testify without incriminating himself, and furthermore does not believe that the risk of criminal prosecution outweighs the risks of continuing to assert his right against self-incrimination in this case, combined with the SEC's attempt to compel him to testify. While the discovery period is complete, LaForte will willingly sit for deposition, which will cure any alleged prejudice.

III. CONCLUSION

For the foregoing reasons, Defendant, Joseph W. LaForte, respectfully requests that this Court deny the SEC's motion and permit him to testify at trial.

Dated: November 16, 2010,

Respectfully submitted by,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was served on all counsel of record via the Court's CM/ECF Filing Portal on this 16th day of November 2021.

/s/ Joshua R. Levine
JOSHUA R. LEVINE

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____/

DEFENDANTS LAFORTE, MCELHONE, AND COLE'S MOTION TO STRIKE PONZI ALLEGATIONS FROM PLAINTIFF'S OMNIBUS MOTION FOR FINAL JUDGMENTS, OR IN THE ALTERNATIVE, MOTION TO WITHDRAW/BE RELIEVED FROM THEIR CONSENTS [D.E. 1002-2; 1004-1; 1016-1], VACATE THE JUDGMENTS OF PERMANENT INJUNCTION AND OTHER RELIEF [D.E. 1007-10; 1016-1], AND TO RETURN THE CASE TO THE ACTIVE DOCKET

Defendants, Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta (the "Defendants") move to strike from Plaintiff's Omnibus Motion for Final Judgments [D.E. 1214] all references to a purported Ponzi scheme because the Amended Complaint contains no such allegations and the Defendants did not and would never have stipulated to bifurcation and signed the Consents if it did. Throughout this litigation, the SEC has repeatedly advanced its case with heavy-handed techniques that have unfairly prejudiced the Defense, starting with depriving Defendants of the documents they needed to defend themselves for months. The SEC also made outright misrepresentations that induced the Court to enter the Receivership Order, including the false allegation that Defendants stole money from Par Funding's bank account, when in reality Par was sending money to its ACH processor in the ordinary course of business. *See* Rule 41 motion and hearing transcript (D.E. 663; 744 at p.16-17.). While it was perhaps too late to undo the harm done by the SEC by the time the defense was able to bring the truth to light, the SEC's latest (and perhaps most insidious) unfair

tactics can and should be shut down immediately. The SEC has engaged in a bait-and-switch on the Parties' bifurcated settlement that should not be countenanced by a Court of equity or any Court for that matter.

After settling this case with a no-admit no-deny consent judgment, in which Defendants agreed not to contest the allegations of the Amended Complaint for the purposes of the final judgment motion only, the SEC has violated the letter, intent, and spirit of the agreement and has made salacious and scandalous allegations that the Defendants were operating a Ponzi scheme – a significant allegation that is not found *anywhere* in the original Complaint or the Amended Complaint.[1] These allegations, which were only made after the Defendants waived their right to a jury trial on liability, are interposed for the improper purpose of unduly influencing the Court, the investor community at large, and the court of public opinion. Had the SEC truly believed Par Funding was a Ponzi scheme, it should have pled such allegations and given the Defendants their due process rights to challenge such allegations at a trial.

Furthermore, the insertion of the Ponzi scheme allegations (which Defendants categorically deny) at this stage of the proceedings would un-do all the benefits of the bifurcated settlement and impose significant burdens upon the Defendants, the SEC, and the Court. The purpose of the settlement was to dispense with liability issues and proceed on the issues of disgorgement and the penalties sought by the SEC. The Defendants agreed to accept the allegations of the Amended Complaint (and only those allegations) for the purposes of the disgorgement and penalty proceedings. They *did not* agree, and never would have agreed, to accept the unpled and *unproven* allegations of a Ponzi scheme – which the SEC relies on as the basis for seeking disgorgement of all proceeds from

[1] A cursory review of the Complaint and Amended Complaint reveals that the SEC did not allege or intimate a Ponzi scheme. By contrast, the term Ponzi scheme is used *thirteen times* in the SEC's Omnibus Motion for Final Judgments!

PAR Funding's operations (without any offset for legitimate business expenses) and tier-three penalties totaling more than $100 Million! Because these allegations were not included or contemplated in the Amended Complaint or the Defendants' Consents, they are not deemed admitted for the purposes of the disgorgement/penalty proceedings. Accordingly, if the Court intends to consider these allegations at all, the SEC would need to attempt to prove them at an evidentiary hearing, and the Defendants would have a due process right to present evidence and testimony to disprove them. Such liability proceedings could take days, if not weeks, to adjudicate. Further, the Defendants have the right and should be given the opportunity to submit such factual dispute to a jury if they are going to be required to defend themselves against Ponzi allegations. It would be fundamentally unfair and a violation of due process to allow the SEC to insert these new liability issues into this case after the Defendants entered their Consents and waived their right to a jury trial, and to force them to litigate these complicated liability issues on an expedited schedule with limited opportunity to conduct discovery.

To be clear, Defendants would never have agreed to this bifurcated settlement had they been required to accept allegations of operating a Ponzi scheme and instead would have elected to go to trial to prove to a jury that these horrible allegations are patently false. *See* Declarations of LaForte, McElhone, and Cole, attached as exhibits hereto. Par Funding was **not** a Ponzi scheme, and the SEC's Complaint, even after its amendment, never alleged it was. This Court should not permit the SEC to ambush the Defendants by inserting unpled and unproven liability allegations into the case after the Defendants agreed to bifurcated settlements and entered their Consents. Therefore, Defendants respectfully request that this Court strike all allegations of or references to Par Funding being a Ponzi Scheme from the Securities and Exchange Commission's Motion for Final Judgments [D.E. 1214] and preclude the SEC from presenting these allegations in any subsequent proceedings. In the alternative, if the Court is not inclined to strike these allegations, the Defendants respectfully request

that, pursuant to Federal Rule of Civil Procedure 60(b), the Court relieve the Defendants from the Judgment of Permanent Injunction and Other Relief entered against each of them [D.E. 1007 to 1010 and 1017 to 1018] and their respective Consents, and restore this case to the active trial docket. In support thereof, Defendants state as follows:

Background and Facts

1. On July 27, 2020, the SEC filed this action alleging a violation of Federal Securities laws. [D.E. 1]. The SEC did not make any allegations of a Ponzi scheme in the original Complaint.

2. On August 10, 2020, the SEC filed an Amended Complaint [D.E. 119]. While the Complaint and Amended Complaint made allegations about misrepresentations, there was never a single allegation pled in the Amended Complaint that Par Funding is or was a Ponzi Scheme.

3. On September 23, 2020, this Court issued a trial order, setting this case for trial on the two-week trial calendar starting August 23, 2021. [D.E. 279].

4. On March 23, 2021, this Court issued and Amended Trial Order rescheduling trial for December 6, 2021. [D.E. 521].

5. On November 23, 2021, Defendants LaForte and McElhone executed Consents in which they stipulated to liability without admitting or denying the allegations of the Amended Complaint. [D.E. 1002-2; 1004-1]. This was done as part of a bifurcated settlement which allowed the SEC to obtain a permanent injunction against LaForte and McElhone by consent and then proceed to seek disgorgement and civil penalties from this Court. [D.E. 1002-2; 1004-1].

6. On November 24, 2021, this Court granted the SEC's motions for permanent injunction (based on the Consents) and entered a Judgment of Permanent Injunction and Other Relief against Defendants LaForte and McElhone, with an order permitting the SEC to seek disgorgement and penalties from this Court [D.E. 1007 to 1010].

7. On November 28, 2021, Defendant Cole agreed to a bifurcated settlement in which he consented to a judgment of liability and to a permanent injunction that neither admitted nor denied the allegations of the Amended Complaint. [D.E. 1016-1].

8. On November 28, 2021, this Court granted the SEC's motions for permanent injunction and entered a Judgment of Permanent Injunction and Other Relief against Defendant Cole with an order permitting the SEC to seek disgorgement and penalties from this Court [D.E. 1017 to 1018].

9. The SEC's motions for permanent injunctions were based on the agreement between the Parties in which the Defendants neither admit nor deny the allegations in the Amended Complaint but are precluded from challenging them for the purpose of the final judgment hearing.

10. On April 15, 2022, Plaintiff Securities and Exchange Commission filed an Omnibus Motion for Final Judgments, which seeks a Final Judgment ordering the Defendants to pay disgorgement, prejudgment interest, and penalties [D.E. 1214]. In this Motion, the SEC alleges for the **first time** that the Defendants are Ponzi schemers and uses these unproven allegations – which the Defendants never consented to – as a basis to seek an outrageous disgorgement award and tier-three penalties in excess of $100 Million!

11. This Court should not countenance, and the Defendants should not have to be prejudiced by or respond to, the SEC's uncharged Ponzi claim. If such allegations are allowed to stand, the Defendants would prefer and should be allowed to go to trial to prove to a jury there was no Ponzi scheme. Enough is enough, the SEC has to be roped in and made to play fair.

Argument

Despite having the opportunity to amend the Complaint and add Ponzi allegations if it believed it could prove them, the SEC waited until after the Defendants entered into a bifurcated settlement to make these scandalous and unsupported allegations. The Defendants were not on notice that the SEC

would seek disgorgement and civil penalties based on allegations of a Ponzi scheme because those allegations were not found in the pleadings and were never raised or pursued by the SEC. More egregious still, these unpled allegations of a Ponzi scheme form the platform for the SEC's request for third tier civil penalties and, with respect to disgorgement, the SEC's efforts to deprive the Defendants of offsets/deductions for legitimate business expenses which they are entitled to under the Supreme Court's directive in *Liu v. SEC*, 140 S. Ct. 1936, 1949 (2020). Because these Ponzi scheme allegations are unpled, unproven, and constitute a significant basis for the relief requested by the SEC, they should be stricken by the Court or, alternatively, Defendants should be released from their Consents and Judgments of Permanent Injunction and afforded the right to go to trial to defend against and disprove the SEC's Ponzi scheme allegations.

1. The Court Should Strike the SEC's Unpled Ponzi Scheme Allegations

In civil litigation, the pleadings frame the issues to be tried. The SEC's attempt to insert a Ponzi scheme theory into the instant motion following the entry of consent judgments on liability is completely improper. At best, the SEC's actions amount to an untimely amendment of the Complaint which would deprive the Defendants of their opportunity to take meaningful discovery and make an informed decision on whether to proceed to a trial on the merits. At worst, the SEC's actions amount to a deliberate ambush calculated to deprive the Defendants of their due process rights.

It is fundamental that '"a judgment may not be based on issues not presented in the pleadings and not tried with the express or implied consent of the parties.'" *Kipu Sys., LLC v. ZenCharts, LLC*, No. 17-CV-24733, 2020 WL 9460639, at *9 (S.D. Fla. Nov. 24, 2020) (quoting *Cioffe v. Morris*, 676 F.2d 539, 541 (11th Cir. 1982)); (also citing *Doe #6 v. Miami-Dade Cty.*, 974 F.3d 1333, 1335 (11th Cir. 2020)). This is because "one must comply with the notice demands of procedural due process before an unpled issue can be added." *Doe #6*, 974 F.3d at 1335.

> "[I]mplied consent under Rule 15(b) will not be found if the defendant will be prejudiced; that is: (1) ***if the defendant had no notice of the new issue,*** (2***) if the defendant could have offered additional evidence in defense, or*** (3) ***if the defendant in some other way was denied a fair opportunity to defend.***" Cioffe, 676 F. at 542 (alternations made). "A party cannot be said to have implicitly consented to the trial of an issue not presented by the pleadings unless that party should have recognized that the issue had entered the case at trial." *Wesco Mfg., Inc. v. Tropical Attractions of Palm Beach, Inc.*, 833 F.2d 1484, 1487 (11th Cir. 1987). "***Even where a party implicitly consents to the [ ] issue being tried, the prejudicial effect of a party may further prevent any amendment to the pleadings.***" *Schmidt v. Versacomp, Inc.*, 2011 WL 13172508, at *2 (S.D. Fla. Feb. 9, 2011).

Kipu Sys., LLC, 2020 WL 9460639, at *9 (emphasis added).

Even when a court is considering leave to amend when an issue is tried by consent, the court

> "must ascertain that the evidence would not prejudice the objecting party's action or defense on the merits. Fed.R.Civ.P. 15(b)(1). 'There can be no question that ***a defendant should be protected from surprise resulting from a change of theory.***" *Robbins v. Jordan*, 181 F.2d 793, 795 (D.C.Cir.1950). "Prejudice under the rule means undue difficulty in prosecuting a lawsuit as a result of a change of tactics or theories on the part of the other party." *Deakyne v. Comm'rs. of Lewes*, 416 F.2d 290, 300 (3d Cir.1969).

Ramjeawan v. Bank of Am. Corp., No. 09-20963-CIV, 2010 WL 1882262, at *3 (S.D. Fla. May 11, 2010) (emphasis added).

Alternatively, the SEC's injection of a new theory into this motion should be looked at as an attempt to constructively amend the Complaint, an act which courts frown upon absent a complete lack of prejudice. A common way in which parties attempt to constructively amend a pleading is by inserting new and unpled claims or defenses into a motion for summary judgment or a response. *Orbit Corp v. FedEx Ground Package Sys.*, No. 2:14cv607, 2016 U.S. Dist. LEXIS 155212, at *67-68 (E.D. Va. Nov. 8, 2016) (finding that a claim was not properly before the Court because it was "asserted for the first time in Plaintiffs' brief in opposition to summary judgment, and because Plaintiffs have not moved to amend their second amended complaint to advance such a claim") (citing *Harris v. Reston Hosp. Ctr., LLC*, 523 F. App'x 938, 946 (4th Cir. 2013) (holding that the district court "did not err in

refusing to consider" the plaintiff's "new legal theory [raised] for the first time in opposing summary judgment," noting that the "complaint guides the parties' discovery, putting the defendant on notice of the evidence it needs to adduce" and that permitting "constructive amendment of the complaint at summary judgment undermines the complaint's purpose and can thus unfairly prejudice the defendant") (internal quotation marks and citations omitted) (citing *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1292–93 (9th Cir.2000); *Deasy v. Hill*, 833 F.2d 38, 40–42 (4th Cir.1987); *Josey v. John R. Hollingsworth Corp.*, 996 F.2d 632, 642 (3d Cir.1993)); *See also United States ex rel. DRC, Inc. v. Custer Battles, LLC*, 472 F. Supp. 2d 787, 795-96 (E.D. Va. 2007) (declining to treat new theory, first asserted in opposition to summary judgment motion, as a constructive amendment of complaint; doing so "after the close of discovery . . . would seriously undermine the fairness of the litigation and unfairly prejudice the defendants"), *aff'd*, 562 F.3d 295 (4th Cir. 2009)."A party is not entitled to wait until the discovery cutoff date has passed and a motion for summary judgment has been filed on the basis of claims asserted in the original complaint before introducing entirely different legal theories in an amended complaint." *Priddy v. Edelman*, 883 F.2d 438, 446 (6th Cir. 1989) (citing *Addington v. Farmers' Elevator Mut. Ins. Co.*, 650 F.2d 663, 667 (5th Cir. Unit A July 1981), cert. denied, 454 U.S. 1098, 102 S.Ct. 672, 70 L.Ed.2d 640 (1981); *Acri v. Int'l Ass'n of Machinist & Aerospace Workers*, 781 F.2d 1393, 1398–99 (9th Cir. 1986), cert. denied, 479 U.S. 816, 107 S.Ct. 73, 93 L.Ed.2d 29 (1986); *Jones v. Hamelman*, 869 F.2d 1023, 1026–27 (7th Cir. 1989)).

Here, by ambushing the Defendants with Ponzi scheme allegations at this stage in the litigation, the SEC is attempting to constructively amend the complaint to add a theory of liability and basis for civil penalties that the Defendants did not apprehend or agree to when they entered into the consent judgments – well after the discovery cutoff, and after the Defendants made their decision to bifurcate and waive their right to a jury trial. Allowing the SEC to insert these allegations into the case at this stage of the proceedings would be extremely prejudicial to the Defendants for several

reasons. First, Defendants absolutely would not have agreed to a no-admit no-deny bifurcation if they were facing allegations of a Ponzi scheme; they would have exercised their constitutional rights to face those allegations head-on at trial. *See* Declarations of LaForte, McElhone, and Cole. In the context of a bifurcated settlement, Defendants agreed not to deny the allegations of the Amended Complaint for the purpose of the SEC's motion for final judgment and waived their Seventh Amendment right to a jury trial. Defendants did so understanding the scope of the actual allegations against them and recognizing the implication of not being able to deny them. *See* Consents at ¶5. However, had Defendants known they were going to be accused of an insidious financial crime in the SEC's subsequent motion, they would have elected to defend themselves before a jury. The fact that Defendants do not get the benefit of a jury trial shows just how prejudiced they are by the SEC's assertion of a brand-new theory at this stage of the litigation.

Second, if the SEC is allowed to proceed, the Defendants will have an extremely limited period in which to take discovery and develop their defenses to the SEC's unpled Ponzi scheme allegations. The SEC filed the subject motion on April 15, 2022 (approximately 4½ months after the Judgments against the Defendants were entered) and the Defendants have until July 1, 2022, to respond to the motion.[2] Accordingly, the Defendants will have only 2½ months to conduct discovery on this brand new issue (which was first raised in the SEC's April 15, 2022 motion) and to develop their defenses. This pales in comparison to the amount of time Defendants would have dedicated to discovery on this issue had the SEC actually and timely amended its Complaint to assert Ponzi allegations (in which case the Defendants would have had the entire period of time between the deadline to amend pleadings and the discovery cutoff to conduct discovery on this issue). The time allotted for Defendants' response to the motion would have been sufficient if the SEC's motion seeking disgorgement and

[2] The deadline was established by the Court's Order [D.E. 1221], which made clear that no further extension will be granted.

penalties was limited to the allegations of the Amended Complaint, but it is not nearly enough time for the Defendants to conduct discovery relating to the new and unpled Ponzi scheme allegations and prepare a meaningful response.

Finally, assuming *arguendo* that adequate discovery could be conducted in this limited time period, the Defendants would need, at a minimum, a multi-day evidentiary hearing to address the SEC's Ponzi allegations (which, again, Defendants did not consent to, and are not obligated to accept as true for purposes of the subject motion and response). To the extent the Court does not intend to take evidence on this issue or devote sufficient time to the adjudication of the unpled and unproven allegations of a Ponzi scheme – which are central to the SEC's request for disgorgement and penalties – the Defendants will be severely prejudiced by the introduction of the SEC's Ponzi allegations.

For all of these reasons, the SEC's new and unpled allegations of a Ponzi scheme should be struck in their entirety from the subject motion, the Defendants should not have to respond to such allegations, and the SEC should be prohibited from asserting such allegations at any subsequent hearing. Given the absence of factual support for the Ponzi allegations, the Defendants believe that the SEC chose not to plead a Ponzi scheme in Amended Complaint because they realized they could not prove it at trial. But regardless of the SEC's motivations, it should not be permitted to underhandedly declare Defendants Ponzi schemers now, after the Defendants agreed to a bifurcated settlement and entered Consents. The prejudice that would result is evident, as the Defendants had no notice that the SEC was alleging they were Ponzi schemers and, if they had been put on notice, they could and would have sought additional evidence in discovery and insisted on a jury trial. *See Kipu Sys., LLC*, 2020 WL 9460639, at *9; *Schmidt*, 2011 WL 13172508, at *2. The SEC's new theory is not merely a different characterization of the facts pled in the Amended Complaint, it is a brand-new allegation that the Defendants would have fought vigorously at trial had the SEC pled a Ponzi scheme. The SEC's conduct is tantamount to a plaintiff filing a lawsuit for breach of contract, and when the

defendant admits to breaching the contract and agrees to a trial on damages, the plaintiff seeks to interject at the damages trial allegations of fraud and request punitive damages. Notably, because Defendants LaForte and McElhone asserted their Fifth Amendment Rights against self-incrimination before trial, the SEC has expanded the scope of the litigation at this stage and is seeking an adverse inference against LaForte and McElhone on claims that were not before the Court and not part of their decision-making process when they determined whether or not to testify. The SEC continues to attempt to further deprive the Defendants of their due process rights when the playing field is already tilted in the SEC's favor. This Court should put a stop to these tactics and adjudicate the disgorgement and civil penalties motion based upon the allegations in the Amended Complaint pursuant to the Consents.

2. In the Alternative, the Defendants Should Be Relieved from the Judgments, and the Case Should Be Restored to the Active Docket

For all of these reasons, the SEC's new and unpled allegations of a Ponzi scheme should be struck from the subject motion, and the SEC should be prohibited from asserting such allegations at any subsequent hearing. However, if the Court is not inclined to strike these allegations, the Defendants respectfully request that they be relieved from their Consents and the Judgments pursuant to Federal Rule of Civil Procedure 60(b), which states:

> (b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:
>
> (1) mistake, inadvertence, surprise or excusable neglect;
> (2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
> (3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
> (4) the judgment is void;
> (5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

Defendants' request for relief from the Consents and Judgments pursuant to Rule 60(b) is warranted for several reasons. First, Defendants consented to the Judgments based on an understanding that the SEC would seek disgorgement and/or penalties based on the allegations of the Amended Complaint – rather than unpled Ponzi scheme allegations that were raised for the first time *after* the Judgements were entered. For the reasons discussed *supra*, the SEC's bait-and-switch tactics are improper and constitute misrepresentations or misconduct which warrant relief from the Consents and Judgment pursuant to Rule 60(b)(3). Second, because the SEC's untimely assertion of the Ponzi-scheme allegations would deprive the Defendants of due process and would be extremely prejudicial (for all of the reasons enumerated above), it would be inequitable to apply the Judgements prospectively, and relief from the Judgments is justified under the totality of the circumstances. Accordingly, the Defendants should be afforded relief from the Consents and Judgments pursuant to Rule 60(b)(5) and/or Rule 60(b)(6). Finally, even if it were not improper or prejudicial (it is both) for the SEC to raise unpled and unproven Ponzi scheme allegations for the first time after the Judgements were entered, it is clear that the Defendants never anticipated, and had no reason to anticipate, that the SEC would accuse them of being Ponzi-schemers, or that the SEC would use such allegations as the cornerstone of its request for an enormous disgorgement award and an extraordinarily large penalties in the post-Judgement proceedings. Thus, at a minimum, relief from the Judgment is warranted based on mistake, inadvertence, surprise or excusable neglect, pursuant to Rule 60(b)(1).

Conclusion

For the reasons stated above, the Court should strike the SEC's unpled and unproven Ponzi scheme allegations, which were raised for the first time in the SEC's Motion for Final Judgments. The SEC should not be allowed to bait the Defendants into a bifurcated settlement and then add in allegations significantly worse than anything that was alleged in the Amended Complaint after the

close of discovery, and after the Defendants have waived their right to a jury trial. Therefore, Defendants, Lisa McElhone, Joseph W. LaForte and Joseph Cole Barleta respectfully request that this Court enter an order striking all allegations or mentions of Par Funding being a Ponzi Scheme in Plaintiff Securities and Exchange Commission's Omnibus Motion For Final Judgments Against Defendants Michael Furman, Joseph Cole Barleta, Joseph Laforte, And Lisa Mcelhone [D.E. 1214]. Alternatively, if the Court is not inclined to strike the SEC's Ponzi scheme allegations, Defendants requests that they be relieved from their Consents and the Judgements entered based on those Consents pursuant to Federal Rule of Civil Procedure 60(b), and that the case be restored to the active docket so that Defendants can have their day in court.

Dated: May 4, 2022.

S.D. Fla L. R. 7.1(a)(3) Certification of Counsel

Counsel for the Defendants hereby certify that we have conferred with Amie Berlin, counsel for the SEC, and were informed that the SEC opposes the relief sought in this Motion.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 4, 2022, I electronically filed the forgoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record via transmissions of Notices of Electronic Filing generated by CM/ECF.

By: */s/ David L. Ferguson*
DAVID L. FERGUSON

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

COMPLETE BUSINESS SOLUTIONS GROUP, INC. d/b/a PAR FUNDING, *et al.*,

Defendants.
_____/

DEFENDANTS LAFORTE, MCELHONE, AND COLE'S MOTION TO DESIGNATE THEIR MOTION TO STRIKE AND ALTERNATIVE MOTION TO BE RELIEVED FROM CONSENTS AND JUDGEMENTS [D.E. 1224] AS AN EXPEDITED MOTION, AND REQUEST FOR AN EXPEDITED RULING

Defendants, Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta (the "Defendants"), pursuant to Local Rule 7.1(d), move for an expedited ruling on their Motion to Strike Ponzi Allegations from Plaintiff's Omnibus Motion for Final Judgments, or in the Alternative, Motion to Withdraw/Be Relieved from their Consents, Vacate the Judgement of Permanent Injunction and Other Relief, and to Return the Case to the Active Docket (the "Subject Motion") [D.E. 1224] and as support state as follows:

1. On May 4, 2022, Defendants filed the Subject Motion requesting that the Court strike unpled and unproven allegations of a Ponzi scheme from Plaintiff's Omnibus Motion for Final Judgments [D.E. 1214], or alternatively, relieve the Defendants from their Consents and the Judgment of Permanent Injunction and Other Relief entered against each of them [D.E. 1007 to 1010 and 1017 to 1018] and restore this case to the trial docket so that they may have their day in Court.

2. As set forth in the Subject Motion, Plaintiff's unpled and unproven Ponzi scheme allegations are extremely prejudicial to the Defendants. If the Subject Motion is denied, the

Defendants will need to conduct extensive discovery related to the Ponzi scheme allegations, and will dedicate significant time and resources to rebutting these allegations in their Response to Plaintiff's Omnibus Motion for Final Judgments – which must be filed on or before July 1, 2022.

3. Conversely, if the Court grants the Subject Motion and strikes the Plaintiff's Ponzi scheme allegations, Defendants will not need to respond to Plaintiff's Ponzi scheme allegations. Similarly, if the Court grants the Defendants' request for alternative relief (*viz*., if the Court relieves the Defendants from their Consents and Judgments and restores this case to the active docket) then no response to the Plaintiff's Omnibus Motion for Final Judgments will be required at all.

4. For these reasons, it is in the interest of the parties and the Court to obtain a ruling on the Subject Motion well in advance of the July 1, 2022 deadline for Defendants' Response to Plaintiff's Omnibus Motion for Final Judgments. At the same time, Defendants are mindful that the parties require time to fully and adequately brief the issues raised in the Subject Motion, and that the Court needs time to analyze these issues and rule.

5. In consideration of these factors, the Defendants respectively request that the Court issue an expedited ruling on the Subject Motion on or before June 15, 2022.

S.D. Fla L. R. 7.1(a)(3) Certification of Counsel

Counsel for the Defendants hereby certify that we have conferred with Amie Berlin, counsel for the SEC, and were informed that the SEC opposes the relief sought in this Motion.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of May, 2022, I electronically filed the forgoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record via transmissions of Notices of Electronic Filing generated by CM/ECF.

By: /s/ *James M. Kaplan*
JAMES M. KAPLAN

IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH
CASE NO. **20-CV-81205-RAR**

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff
vs.
COMPLETE BUSINESS SOLUTIONS GROUP, INC., ET AL.,
Defendants.

August 21, 2020

PRELIMINARY INJUNCTION VIA VIDEO DAY 2

BEFORE THE HONORABLE **RODOLFO A. RUIZ, II**,

UNITED STATES DISTRICT COURT JUDGE

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P R O C E E D I N G S

(The following proceedings were held in open court via Zoom teleconference.)

THE COURT: All right. Good morning, everyone. Sorry, we're a few minutes late here getting everything good to go. All right. I see, pretty much, looks like everyone is logging on, so we can get everyone kind of backed on here, and we'll get started in just a moment.

All right. Well, good morning to everyone. Again, apologies for a little bit of a delay here in getting started. We had some technical issues here in chambers, but we're good to go now.

If I could start off by getting everyone's appearances for the record today. This is Case Number 20-81205, Securities and Exchange Commission versus Complete Business Solutions Group Inc., doing business as Par Funding et al. Starting off with the SEC, if I could go get appearances for the record, please.

MS. BERLIN: Good morning, this is Amie Riggle Berlin on behalf of the U.S. Securities and Exchange Commission.

THE COURT: Okay. Thank you for that.

And on behalf of -- we'll go through, I guess, down the line. If we want to start off with -- let's, maybe, do our receiver's appearances, if we could. Let's start with that.

MR. ALFANO: Good morning, Your Honor. Gaetan Alfano

for the receiver, Ryan Stumphauzer, who also is present along with co-counsel, Timothy Kolaya.

THE COURT: Okay. On behalf of Lisa McElhone?

MR. FUTERFAS: Good morning, Your Honor. Alan Futerfas for Ms. McElhone. Good morning.

10:26

THE COURT: Good morning. On behalf of Dean Vagnozzi?

MR. MILLER: Good morning, Your Honor. Brian Miller and Alejandro Paz for Akerman on behalf of Dean Vagnozzi.

THE COURT: Okay. On behalf of John Gissas?

10:26

MR. SMALL: Good, morning, Your Honor -- excuse me. Good morning, Your Honor. Dan Small from Holland and Knight on behalf of Mr. Gissas, my colleagues Chris Iaquinto and Chad Vanderhoef who may be on and off the call.

THE COURT: Thank you. On behalf of the Trust; the LME Trust?

10:26

MR. FRIDMAN: Good morning, Your Honor. Dan Fridman from the Law Firm of Fridman Fels & Soto on behalf of the Trust.

THE COURT: Okay.

10:27

And I do know that we had a couple of late-night resolutions as to two of the defendants, but I don't know if counsels are on the line today for them. The first one I do -- I think I do see Mr. Cox there. If you want to go ahead and state an appearance for Mr. Abbonizio, I believe -- or Mr. Furman, I'm sorry. Go ahead.

10:27

MR. COX: Correct, Your Honor. Good morning, Jeffrey Cox for Mr. Furman.

THE COURT: And --

JIM SALLAH: Your Honor, Jim Sallah as well. I'm on --

THE COURT: Oh, great. Thank you, Mr. Sallah. And do I have anybody on the line for Mr. Abbonizio?

MR. MARCUS: Yes, Your Honor. Good morning, Jeff Marcus and Jason Mays, we're here.

THE COURT: Okay, great. And I don't know if I've already covered counsel for Joe Cole.

MS. SCHEIN: Good morning, Your Honor. Bettina Schein on behalf of Joe Cole. Thank you.

MR. RAIKHELSON: Andre Raikhelson on behalf of Joe Cole.

THE COURT: Thank you. Okay.

Any other folks -- I know that I jumped around a little bit -- that have not been able to state their appearance yet? I know that we have entities and some of you are standing in for entities as well as some individual defendants, but go ahead, anybody else who has not been in appearance, please.

MR. FROCCARO: Judge, I always seem to forget, but James Froccaro for Joseph LaForte.

THE COURT: I know, that's on me, Mr. Froccaro. I'm sorry about that.

MR. FROCCARO: I guess I don't make a great impression, Judge, I'm sorry.

THE COURT: No, you do. You're always -- you always look good here. And it's like the Brady Bunch, you've got to understand, I've got like a million boxes, so sometimes I got some people in the direct line, and then I've got them on another screen and then I forget. So my apologies for that.

All right. Anybody else that I may have missed?

MR. FRIDMAN: Yes, Your Honor, Dan Fridman, again. I'm local counsel for Mr. LaForte.

THE COURT: Thank you for that.

And I think that might have covered it. All right. So, obviously, I have -- today I think I've broken my own personal record. I think the first round we had 140. I'm looking at 197 participants on today's call. So I know that we have a lot of investors again that are going to be watching and listening today as I stated in the last call. Please, you know, just make sure that you're muted. I welcome everybody to be here and listen to the proceedings, but I don't want anybody to unmute and break up the record.

Remember, we are not only recording this, but we're having a court reporter next to me that's off-screen writing everything down as well. And please be careful on the group chat. I know some of the investors were sending messages to the Court. I can't really answer anything, as I stated in the

beginning. The best thing to do, as I know from the receiver's report last night, is to continue to contact the receiver, go to the Par Funding website. Read everything there. That is the best source of information.

10:29 And I did want to also begin by just kind of announcing, because last night we did enter some consents. So just to be clear, the Court has entered one as it pertains to Mr. Abbonizio. One as it pertains to Mr. Furman. I do know and I will try right away to address a separate asset-freeze

10:30 order for Abbonizio that I don't think I've gotten a chance to enter yet.

Am I correct on that, counsel for Mr. Abbonizio, that that's still pending? I've got to get that to you right away. Mr. Cox, we got to get that to you, right?

10:30 **MR. COX:** On behalf of Mr. Furman.

THE COURT: I'm sorry, it was Mr. Furman. Not Mr. Abbonizio, that's right. It was a separate order for Mr. Furman. So I'm going to try to get that done today as well so we can get that unfrozen.

10:30 Now, I wanted to check in because I thought that there was also a possibility as we line up our queue of testimony today. Mr. Gissas and Mr. -- on behalf of Mr. Gissas, Mr. Small was going to have a portion of argument this morning, but I understand that maybe also like Furman and Abbonizio,

10:30 Mr. Gissas is close to reaching a resolution.

Ms. Berlin, you want to update for that and then I'll hear from Mr. Small?

MS BERLIN: Yes, Your Honor. We are close to an agreement and I think there are just -- there are some details that we need to add to the proposed order, concerning some of the bank accounts. And so I'm hopeful that today perhaps even during the lunch break that, you know, I will reach out to Mr. Small at that time so it can be resolved. But we did not present anything concerning Mr. Gissas earlier this week. Really, I think the expectation for the Court is that you will have the settlement papers this afternoon.

THE COURT: Very good.

So Mr. Small, I just want to check with you in light of that representation. Is there any need for you to make any other arguments today? Because I did have a portion of my hearing today dedicated to giving you an opportunity to make your argument, but I don't know if you need that anymore.

MR. SMALL: Your Honor, thank you so much. I agree with Ms. Berlin, we have been working hard on it. The receiver has been great. They had almost a four-hour meeting yesterday with my client to go over the accounts and some other issues.

Unfortunately, as I said before, it's been frustratingly slow and in part due just because it's a small business, and everything is mingled with everything else, and the records are not as clear and concise as we might like them

to be.

I had actually just had to run to put a tie on because I wasn't even expecting to be on the hearing. But Ms. Berlin and I did exchange -- exchanging messages and I think that's correct, Your Honor. I think I will -- I think we're close enough that it would -- I don't want to waste the Court's time with an argument back and forth.

So if in the unlikely event that we don't reach an agreement today, I've reviewed the papers, I've reviewed the declaration of Mr. Gissas, the declaration of Janet Versikasin's (ph.) assistant, and I'm happy to rely on those opposition papers.

THE COURT: Okay. And if anything changes, of course, at any point and you feel that you need to chime in, just let me know. I know that you guys are almost close to finalizing everything, but there may be something you want to present some clarification on behalf of your client.

And, for what it's worth, you have a very nice picture up of yourself with a tie on. So you really don't have to put a tie on at all. I -- you could have been in a T-shirt, and it really wouldn't have done anything. I would have been fine. I mean, you've got this nice portrait. I should start thinking of that. Then, I could move around more freely. I'm kind of strapped to the bench with this thing.

So, but feel free to stay comfortable. You don't have

to worry about getting dressed up for me. All right? Because it looks real nice on the Zoom.

MR. SMALL: I had a T-shirt on, and I always think when I'm addressing the Court, I should do it live, so I ran and put on a tie.

10:33

THE COURT: That's very kind of you. Thank you for that.

MR. SMALL: I'll leave the picture on.

THE COURT: Thanks.

10:33

So I did want to kind of go through -- I'm going to throw it over to Ms. Berlin here for an update, but I did think it was valuable to just briefly note the progress the receiver has made.

I reviewed the report yesterday, and I was heartened

10:34

to see that there is a continued discussion with former employees. Not so thrilled to see that the forensic examination indicated that perhaps some of the access was not inadvertent and part of a so-called automatic update. So that wasn't too exciting to read.

10:34

But I will share that one thing I was thinking about at the end of the hearing over the last few days was the enforceability of the agreements, and I mean by that the Merchant Cash Agreements.

And one of the things that had popped in my mind --

10:34

and I'm glad the receiver mentioned it -- was how the

Pennsylvania State courts are addressing them, because one of the things I thought as we were trying to figure out if we were going to find a memorandum of law addressing the legality of these agreements was, well, as we're waiting for that, perhaps we can find out what Pennsylvania judges are thinking about these rates because, obviously, the usurious nature of some of the loans I think is probably something I've encountered, you know, on the state bench on some agreements before.

10:34

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And I don't know -- I'm not as familiar with Pennsylvania state law on that point, but it sounded like from the report of the receiver, that some of the agreements have been enforceable. And that obviously matters for all of us because to the extent there's going to be collection efforts, the receiver, understandably, does not feel comfortable going into state court because trying to collect on an agreement that's unenforceable or runs afoul of usury laws in the State of Pennsylvania or elsewhere.

I know there's a conflict of loss concern there, but I was heartened to hear that maybe, just maybe, as we wait for the more formal memoranda that bless these agreements, perhaps we are still going to be able to go out and recover some of this money from the merchants, which I know is where a lot of the investor funds have been tied up, and I don't want to stand in the way of that.

And it would be, I think, important to note on the end

of that comment that Fox Rothschild, I read -- I read their report. I know that they have filed essentially -- or Shutts & Bowen has filed a notice of appearance on behalf of Fox Rothschild.

10:36 I am heartened also to see that Fox Rothschild is, through the work of their counsel, pulling all the records, going through everything they need to review. They're producing things, I think, for the receiver.

They've also, understandably -- I wasn't surprised by 10:36 that -- clarified considerably the scope of the representation. They had made it very clear, and I can imagine why, that Fox Rothschild has said, "Listen, we did a lot of collection, but we weren't on the security side of this thing. So I've gotten the name of some of the lawyers on the report."

10:36 But I didn't want to -- maybe before we turn it back to the injunction hearing -- because the investors are on the call, and at the end of the day this is about them and trying to recover what we can.

So I thought it'd be best, maybe, I'll turn to 10:36 Mr. Alfano to give me a little more flavor. And then I know Ms. Soto is on the line as well on behalf of Fox Rothschild, just to quickly go through anything else I may I have missed. But as far as I can tell, there's a lot of cooperation, and we're in a better place than we were 48 hours ago. I mean, 10:36 that -- that's the net of it, I think.

So, Mr. Alfano, tell me what you're thinking because I know we've got some privileged stuff that I see lurking still; third party folks and all of that. But what's the latest? Because you've been working on getting this and I think you got your check also that we were waiting for, the 300 grand. So tell me what's going on with that.

MR. ALFANO: We did receive the check, Your Honor, thank you.

We conducted our own research and, again, it's not comprehensive at all given the time frame that we're dealing with but have determined that there are a handful of Pennsylvania cases that address the issue, and the issue being the enforceability of the MCA agreements under Pennsylvania law. And those courts have concluded that under Pennsylvania law, the agreements are enforceable. But, again, that's primarily based upon our research.

The one opinion that we received from Offit Kurman, which has been mentioned, is very narrow, very conditional. So while it's helpful, I'm not confident that that's a sound-enough basis alone for the receiver to have reached any conclusions.

But again, doing our own research, we're in a point where we believe that the agreements, again, under Pennsylvania law, are enforceable. There are some caveats.

There is at least one court that has analyzed it under

Rule 12 based on the 12(b)(6) motion that is accepting that perhaps in a conflict of law's analysis, other state's laws may apply.

We're also aware of other circumstances in which other
10:38 states analyzing similar MCA agreements under their, you know, the laws of that particular state have found those agreements not to be enforceable and to be usurious.

So that's where we are. We think that we have enough confidence to begin the process of hiring back employees and
10:38 considering starting collections perhaps as early as next week.

We have received cooperation through Shutts & Bowen with respect to Fox Rothschild. But it would be -- it would be to everyone's best interest if we could simply cut through the red tape and just have these law firms provide us with whatever
10:39 they have on it.

I still think that there are privilege issues that we need to work through, but tentatively and conditionally, we think that we're prepared to proceed under Pennsylvania law.

THE COURT: And Mr. Alfano, what say you on the -- I
10:39 don't know if it's really termed a request -- but Fox Rothschild has kind of indicated -- and I'll hear from them a second -- that they do have an interest and obviously a relationship with Par Funding on the collection side.

Has there been a discussion? Because they have
10:39 requested one or the other: "Let us withdraw because we don't

want anymore part of this." Or, "Let us go try to collect." I don't know if the receiver has made a call on that, but I'd like to know, maybe, because until that's resolved, obviously, even if we think we're good on Pennsylvania law, we need any marching orders.

10:40

So what's your take on that? Have you made a decision? Maybe you're still talking to them; I wanted to know.

MR. ALFANO: The receiver hasn't made a decision on that yet, Your Honor. We're still trying to get our arms around all the cases that are out there.

10:40

And I didn't put this in the report, and perhaps I should have, but I've been in touch with the administration of the Philadelphia court system here where the majority of the confessions and judgments have been filed. I think by last count, there are over 1,300 confessions and judgements that have been filed in the Philadelphia system.

10:40

And the Court is prepared to issue, essentially, a blanket stay of all litigation involving the receivership entities for the time being. That will allow us to preserve the status quo that hopefully should reduce activity by Fox Rothschild's counsel of record.

Your Honor, in a perfect world, we would simply have had the time and the luxury to -- if the receiver chose to, to simply substitute out Fox Rothschild in those cases -- if that

10:41

was the receiver's decision. And again, that's not necessarily the decision at this time.

The difficulty is, again, the volume of cases. I mean, there are just an enormous number of cases here in state court and Philadelphia with others in federal court here in Philadelphia.

And also the expense to the receivership estate of having to go in and file pleadings in each of those individual cases, including substitutions of appearance. So we're still working through that issue. We're trying to deal with it as comprehensively as possible with an eye towards saving as much in the way of filing fees and other litigation expenses.

There have been, Your Honor, 25 cases -- which you know we have petitioned before you in those cases -- where there was a confession and judgment filing. There was -- before -- again, this is all before the receivership was created.

There was enforcement activity, there were garnishments that were issued, but because of self-imposed delays in the Philadelphia court system, what happened is the merchant settled with Par. And despite that settlement, garnishments were issued, accounts were frozen.

We've been to Your Honor for relief from the litigation stay to try to help those merchants to get those accounts unfrozen, and we're continuing to see other issues

like that and are trying to work through them.

THE COURT: So I think the important thing -- and before I toss it over to Ms. Soto on behalf of Fox Rothschild -- is to, I guess, give me, maybe, a sense of the timeline if there is one on -- and I know you're still in discussions, but I was hoping that perhaps maybe by next week -- at some point early next week, I'll have at least some guidance from the receiver after you've consulted with Fox Rothschild as to whether or not you're going to allow them to continue collection efforts, whether they're going to withdraw and let the receiver kind of take the helm.

And, of course, I'm always standing by to lift the litigation stays as we determine what we can collect on. But can you give me a sense just because I want to -- I know that they're trying to get clarity about their continued engagement in this matter.

They're still going to be producing stuff, and they're working on the requests. And they've indicated, of course, that there may be privilege. And I will share once we're done with today's hearing, obviously, the Court will begin drafting the preliminary injunction order, and making rulings and going through all of that.

The bigger question is -- there is going to be a privilege concern next week, understanding that I've referred the first of those motions to compel to my magistrate, I may

have some time to look at those things if they're still outstanding after there's been a lot of meet and confer.

But do you have a sense, I guess, Mr. Alfano, when you guys might make a judgment call on whether or not Fox Rothschild should continue collection or withdraw? What do you think the timing might be?

10:43

MR. ALFANO: And I know, Your Honor, and here's why. Again, I have the list of the 1,300 or so cases that have been filed as confessions of judgment in Philadelphia. And, again, the Court's, here, blanket order, you know, may help us in that respect.

10:44

But I've asked for updated lists of other cases, cases beyond the confession-and-judgment cases, in which Fox Rothschild is counsel to the receiver.

I believe the most recent list that I received this week stated that there were about 60 cases, some of whom have more complete information than others in terms of docket numbers and venues.

10:44

I was -- in our discussions yesterday, I was told that there could be as many as 150 cases outside of the confession-and-judgment cases in the city in which Fox has served as counsel of records and receivership entities.

So, I think, until I can get a more comprehensive list of those cases, it would be difficult to answer the question.

10:44

Now, we have shared with Fox and, of course, they're

counsel of record already on these cases, the cases in which we have, in fact, entered our appearance for a specific reason. So, you know, they're essentially relieved from their responsibilities in those matters.

10:45 But until I know whether it's 150 or -60 or some number in between and the venue of those cases, docket numbers, that sort of thing, I'd asked for, you know, one- or two-line status reports.

And the suggestion was that that maybe too difficult 10:45 right now with the timing. And while that would be helpful, I think just having a complete list would allow the receiver to move forward with that decision.

THE COURT: Okay. So you guys keep me posted. I mean, I think we're making some progress and getting clarity on 10:45 the collection efforts, which is good.

Let me turn it over to Ms. Soto. Do you want to -- I know you're making notice of appearance. You're also for Fox Rothschild, I didn't give you a chance to know when we started.

So do you want to go ahead and state your appearance 10:45 and a brief update? I've received the report that you gave us, but anything else you want to add to that? Go ahead, please.

MS. SOTO: Thank you, Your Honor. I'm on the call for representing Fox Rothschild along with my partner, Peter Levitt. He's also on the call, Your Honor. And thank 10:46 you so much, first and foremost, for reading our status report.

We have made Herculean progress over the last few days. What our goal was with the document production was to have a methodical, systemic, and organized fashion to produce all of these numerous, countless records that we're being asked to produce.

10:46

Really, Your Honor, the most exigent circumstances situation is this pending litigation. And this is something that we really wanted to address the Court about and get guidance.

We are in a position where we have hundreds and hundreds of these cases where investors are reaching out to us. And we are, in fact, not able to respond to them. We're getting angry phone calls, angry voice mails, letters that are desperate, people are in very hard times right now.

10:46

10:47

And they are getting the impression that Fox Rothschild is treating them like they are invisible, we are stonewalling them, we are not giving them options. So like we said, we are happy to withdraw if the Court would like us to do that. We are happy to continue the representation, Fox Rothschild, that is their position.

10:47

But ignoring these individuals is not a possibility, Your Honor, because the reputation of Fox Rothschild is being tarnished. That's not how they do business. That's not how they want to be portrayed. They don't want to not respond. So the quicker, faster that we could possibly get this resolved,

10:47

Your Honor, that would be absolutely imperative at this time.

Again, we're going to continue to assist the receiver. We produced over 850 records already within two and a half days. That was countless hours of obtaining these documents.

10:48 And like we said, Your Honor, we're happy to assist. We want to help the Court. We want to help the receiver. We want to help in any way, shape, or form. We're -- we stand, you know, we stand in a position of wanting to respond to the requests of the e-mails and the voice mails. But it's really 10:48 getting to the point, Your Honor, where people are threatening bar complaints. They're threatening lawsuits.

I fear with the level of anger that there are safety issues with my client because we're not responding, and we're ignoring people. That's not fair and appropriate. So we'd 10:49 really like to get this resolved as systematically, quickly as possible.

I know that Mr. Levitt was taking the laboring oar on the document production, and we've been doing that. And if there's any possibility for the countless hours that we have -- 10:49 as me, being Fox -- has put into all of the document production, we'd ask to have some reasonable compensation for that time and effort that's been put in and the continued time and effort.

We anticipate, Your Honor, to continue to keep working 10:49 with the receiver and continue to keep uploading ShareFile

documents on a rolling basis. That's what we would like to do, and we stand to answer any questions at any time for the Court.

And we -- and I don't want to take up a lot of everyone's time, Your Honor, but we're happy to have a case management conference with Your Honor, with the receiver, and the SEC to just address specific issues that deal with Fox, these individuals, and any litigation that's pending.

THE COURT: That may be a good suggestion. I don't know if Mr. Alfano, if you agree. Perhaps one of the things we can do is once we're done here, touch base at some point next week and maybe have a brief hearing where the receiver and Fox Rothschild and the Court can try to see if there's a status we can have to try to figure out what's going on with production or the options on representing individuals in these cases going forward because I do think -- I can understand -- I am not surprised.

I mean, I've also been in receipt of a lot of investor communications, so I can imagine the frustration. And right now, really, the best thing we can do is direct everybody to the website which, you know, I know that that is, you know, small comfort in some cases for investors who just don't necessarily understand what's going to happen with the collection efforts because we don't have the clarity we're still in need of.

But I'm amenable to that if down the road -- if you

guys, after meeting and conferring, want to jointly request some court time to work through something, we can do a status at some point in the middle of next week. That may make some sense. So I'm amenable to that, I'm open to that.

10:51 And I think the most important thing right now as you're producing, on a rolling basis, is to figure out what is going to happen with your continued representation; either let you guys out or give you the green light.

I mean, I think that being in limbo is not a good 10:51 thing for anybody, and I'm also trying to manage some of the costs because I know that, you know, this is all -- we're trying to, you know, save as much money as we can and save time.

So I know, Mr. Alfano, I don't want to belabor it. I 10:51 just thought it would be good for the investors to hear that out of the gate; that you guys are working. And I will stay tuned on that front. You let me know if you need any additional involvement from the Court, especially, on any kind of production stuff.

10:51 And in the meantime, let's see if we can make a decision on what we're going to do with Fox Rothschild's continued representation because I want to give you guys at least a couple more days here to meet and confer. But I think time is of the essence so that we don't feel like they are 10:52 having their reputation damaged, in large part just because

things are frozen. And, you know, people might not understand that. So I think you agree with that; right, Mr. Alfano?

MR. ALFANO: I do, Your Honor, thank you.

THE COURT: Yeah. All right.

10:52 **MS. SOTO**: Your Honor?

THE COURT: Yeah, go ahead, Ms. Soto.

MS. SOTO: Thank you so much for letting us be heard. We are so grateful, and we look forward to assisting the Court, the receiver and the SEC in any way, shape or form.

10:52 **THE COURT**: Okay. Thank you very much for that.

So with that being said, we're going to now move to resuming our preliminary injunction hearing.

And Ms. Berlin, I'm going to turn to you. So here is the order I had that we left with on our last hearing on

10:52 Tuesday, if my memory serves me right.

We had a discussion we were going to get into up front, which I'm hoping that is -- it's been minimized a little bit as to admissibility of exhibits that were suggested by defense counsels. And I know that you were going to meet and

10:53 confer a little bit with Mr. Miller and there was discussion on that.

And I do believe that Mr. Miller is going to request, similar to the SEC, access to put up his slides or anything else he may want as a demonstrative today, which like your

10:53 PowerPoint is not admissible, it's simply demonstrative.

And after that, I was going to hear from a combination of Mr. Fridman and Ms. Schein to figure out their position on behalf of the Trust, et cetera.

Then, at that point, I'll check in again with Mr. Small to see if he needs to chime in on behalf of Mr. Gissas.

10:53

And then we will hear from Mr. Vagnozzi, and that would be his, obviously, his live testimony.

And then when that's done, there will be a brief rebuttal by the SEC. So my plan is to finish this today with that order.

10:53

Before I get started -- because I had this, kind of, on the top of my list -- I'll turn it over to you, Ms. Berlin, if there's any updates, of course, generally you want to make, the floor is yours. And then, of course, if you could turn to the situation on the exhibits. But go ahead. Go ahead, Ms. Berlin.

10:54

MS. BERLIN: Thank you so much, Your Honor. We filed a status update yesterday about the amounts and the frozen funds, and we have now heard back from every financial institution where any of the defendants have bank accounts. So we were able to file that yesterday.

10:54

So with respect to the exhibits, we had hoped to work things out, and we did -- I started conferring about -- I think it was about a week and a half ago, about some of the exhibits.

10:54

Unfortunately, we were not able to reach any sort of an agreement on those. So I'm not sure if they wanted to move in their exhibits, and if so, how the Court would like to address the objection.

10:54 **THE COURT:** Yeah. I think that what we would have -- what I hoped to do was similar to what we did in your case where I ruled on some of the objections that were lodged by -- I know that Mr. Furman had one that we dealt with, Mr. Miller and Mr. Futerfas.

10:55 And we, of course, addressed those in favor of the SEC allowing admissibility and finding -- I don't think, in fact, there was ever an issue on authenticity. But most of the objections really went to the weight of the evidence.

You will recall the main exhibit dealt with some of 10:55 the property purchases by Ms. McElhone. So I've already ruled on that, similar to the way we did it before the SEC, I think what we need to do is -- and I believe the exhibits are Mr. Miller's.

So I would turn to him and give him the floor to let 10:55 me know what it is that he intends on moving in.

MS. BERLIN: It's not Mr. Miller. We don't have any objections to Mr. Miller --

THE COURT: Oh, I'm sorry, Ms --

MS. BERLIN: -- on the exhibits.

10:55 **THE COURT:** Okay. So what is the exhibit? I'm sorry,

I thought it was Mr. Miller's.

MS. BERLIN: It's okay.

THE COURT: What was -- what were the exhibits -- whose exhibits are we taking issue with?

10:55 **MS. BERLIN:** Mr. Futerfas did not introduce any exhibits on -- when we had our initial hearing on Tuesday, and so, I believe, we were going to use the last few days to try to resolve the objections on those --

THE COURT: Okay.

10:55 **MS. BERLIN:** -- for him to introduce. But no, we've -- I've advised Mr. Miller that I won't have any objections to his exhibits.

THE COURT: Okay. Well, that's a good thing to take care of anyway because I assumed he was going to deal with it with Mr. Vagnozzi. So I'm glad that Mr. Miller and you have got a streamlined presentation when that witness is called, which is great.

So Mr. Futerfas' exhibits, tell me which ones are the ones you're seeking to move in and then I will get the prompt from -- one by one, I'll hear the objections, and then I can go ahead and make a ruling on those.

So go ahead Mr. Futerfas, you want to let me know by the ID, and then I can pull it up and figure out exactly what it is?

10:56 **MR. FUTERFAS:** Yes, Your Honor. Good morning. Let me

find -- we had indicated to the SEC that we're available yesterday to confer about these. We never heard are from the SEC, but I understand. I'm not casting any, you know, any blame because I know that -- I know that Ms. Berlin has a lot
10:56 of -- is juggling a lot of different things with respect to this hearing. But we never heard from the SEC yesterday, so I had assumed that they didn't have any objection -- continuing objections.

So I'm going to do the best I can to quickly go to
10:57 those exhibits. And, in fact, the exhibits, Your Honor, that I think she's referring to are exhibits that my co-counsel, Mr. Fridman, is going to be relying on significantly during his presentation, which is to start in just -- as soon as we're done with this discussion.

10:57 These are exhibits to Ms. Lau's affidavits. I believe -- let me see if I can find them.

MS. BERLIN: I wonder if it would be helpful to state which exhibits that I have objection to.

THE COURT: Yeah, absolutely. I mean, if we could
10:57 move in -- if we have an agreement to some of them, great. So tell me what it is in particular you have an issue with, and that way we can streamline it.

MS. BERLIN: Thank you, I do. I guess, maybe, perhaps trying -- or if we can get clarification on whether they intend
10:58 to move all of their exhibits in or -- just so I don't address

anything we don't need to.

THE COURT: Sure.

Mr. Futerfas, are we seeking to move in everything you have in?

10:58 **MR. FUTERFAS:** We are. I think, maybe, the one objection I did hear from Ms. Berlin about yesterday were two paragraphs from Mr. Camarda's affidavit. And maybe this is what she's referring to because it's the only objection I heard from her about yesterday.

10:58 And let me go to that, Your Honor, because I think we can resolve that right here. Let me just pull it up. Okay, Your Honor. I'm with you.

So when Mr. Camarda's declaration, which is Trust Exhibit 148-11, in that exhibit, let me find -- here it is. In

10:59 that exhibit at paragraphs 12 -- I'm sorry, Your Honor. Let me just make sure I have the -- exactly the paragraphs that the SEC has brought to my attention. Ms. Berlin could you bring to --

THE COURT: Ms. Berlin -- listen, Ms. Berlin, why

10:59 don't you go ahead and tell me what you've got issue with so I can rule on this so we can keep going. So go ahead.

MS. BERLIN: Thank you so much.

THE COURT: Yeah, just tell me what the SEC's problem is and I can get a ruling going. What have we got?

11:00 **MS. BERLIN:** That's wonderful. Yes. Exhibits 1

through 3, these are -- these purport to be Euler Hermes insurance policies. They're not authenticated. No indication of what these really are.

THE COURT: Can you tell me -- can you tell me the label? You have them as 1 through 3, you're talking by tabs or are you talking by a Trust exhibits because I have them by numbers like 80, 81, things like that.

MS. BERLIN: Yes. So this is -- would it be helpful to get the docket entry number on their exhibits or --

THE COURT: No. I think the easiest thing -- I mean, unless we have different binders. I have a binder that was an exhibit list for the preliminary injunction to be brought by defendants, LaForte, McElhone, Barleta and the LME Trust that have them as -- that are labeled pretty much Trust exhibits and I have a key with the numbers. So I don't know if we're working off the same binder. That's what I'm looking at.

MR. FUTERFAS: Your Honor, their exhibits --

MS. BERLIN: No.

MR. FUTERFAS: There's a Euler Hermes Insurance Policy, there's exhibits -- Trust Exhibits 148-3, 148-4, 148-5, a letter from CBSG counsel confirming insurance coverage that's Trust Exhibit 148-6.

THE COURT: Okay. So and my tabs are pretty much in the 40's.

Are we looking at the same thing, Ms. Berlin? Is that

what you're looking at as well?

MS. BERLIN: I am. Those docket entries are what it shows at the top of each page.

THE COURT: All right. Give me one moment because the problem is, for the purposes of the court reporter, I want to make sure that we're referring to it in the right way.

So we, obviously, are working off of different numbers. We have them in the binder marked, but I'll refer them also as the docket entry so that we don't have any confusion. So let me get to them real quick.

So the first one I think was 148-3; is that right, Ms. Berlin?

MR. FUTERFAS: Yes, Your Honor.

MS. BERLIN: Yes.

THE COURT: Okay. So I have 148-3, 148-4, 148-5, and I can -- I think 148-6. All right.

So go ahead, Ms. Berlin, the objections you have on -- in that order. You want to go ahead and repeat them again?

MS. BERLIN: Okay.

THE COURT: I think the first one was a Domestic Markets Policy Declaration 148-3?

MS. BERLIN: Yes. There -- with respect to docket entry 148-3, the issue here is authenticity on this document.

The same objection for 148-4 which is -- it looks just like a chart that says Euler Hermes North America. There's no

indication of who created it or what it is, really.

Exhibit C, the same issue of authenticity. And the same issue with D.

I have other objections, but I think it makes sense to discuss these first because they all have the same sort of objection.

THE COURT: Okay. So you want to address the authenticity concerns first, Mr. Futerfas?

MR. FUTERFAS: Your Honor, these are -- I mean, I think these records are very clear on their face exactly what they are. They -- I mean, there seems to be no question what they are.

It's a Domestic Markets Policy Declaration. It describes the policy amount, the period of time. It is signed by various people, by various counterparties to that declaration. It is an endorsement to Complete Business Solutions.

And the most important thing here is, Your Honor, that, you know, there's no indication -- Ms. Berlin has no information that this is not accurate. And unless it says as well that the receiver has been in control of the books and records and has had access to the books and records of Par and CBSG since about July 28.

So the SEC, with the receiver's access to the books and records can easily go into the books and records of the

company as they, quite frankly, they should have done before making an objection and confirm that these documents are actually in the books and records of the company. Or call the insurance company and confirm that it's in the -- that this is a real contract with the insurance company -- operate --

11:04

THE COURT: Let me streamline this a little bit, okay?

So, Ms. Berlin, I'm looking at it. Look, I -- the only one I have an issue with would be 148-4, which looks like Excel spreadsheet that in my view, under 901-A, I don't know that I have enough evidence to support a finding that the matter in question here is what defendants claim it is.

11:04

You know, I can authenticate through appearance, content, substance, internal patterns, other characteristics in conjunction with certain circumstances under 901-B4.

11:04

And I'm looking here, I mean, there's plenty of Eleventh Circuit case law to support that I don't necessarily have to get a, you know, records custodian here to confirm some of these.

I think that when you're looking at some of these policy declarations, they're pretty clear what they are, what the policy limits are, I'm not so concerned, for example, on 148-3 for -- or 148-5, which I think look like premiums for Euler Hermes.

11:05

You know, to me it's pretty clear that I can feel comfortable that these documents purport to be what

11:05

Mr. Futerfas and the defense say they are.

Now, I will concede, though, that the 148-4, again, that looks like an internal document that's just been put together. I can't really feel so comfortable about that necessarily.

11:05

You know, I'm not really sure other than it has entities with the Euler ID. It looks like a collection of different identification numbers and a policy credit limits on 148-4.

11:05

So I may be a little more disconcerting on that one, but the other ones I don't really have a problem with.

What is your alternative argument that you have indicated, aside from authenticity on these?

MS. BERLIN: No. I mean, it's simply the

11:06

authenticity. It is --

THE COURT: Oh, I thought you had something else.

MS. BERLIN: -- these are authentic. No, I apologize. I have nothing else on these; it's just authenticity. And with -- and then, I was just saying just to move on, if -- you

11:06

know, we just want to preserve our objection if those are admitted. And then we have some objections to other exhibits.

THE COURT: Okay. So, I mean, I think that -- look, I mean, even as I look at this credit limits, you know, there's enough case law supporting the idea that, you know, some

11:06

official-looking nature of the records found in defendant's

possession provides sufficient authentication.

I mean, I know you can argue, well, Judge, we're having a lot of manipulation, we got people going into the G Suite, et cetera. I get why the SEC's maybe a little bit worried. But when you look at the nature of the credit limits, I've got to tell you, I'm not too worried about being able to look at these and feel like I'm looking at something that is accurate and authentic.

So with that objection obviously preserved, the Court's going to overrule the objections on the subset of documents in the 148 range.

And, you know, I think it's important before you move to any other exhibits, we're going to talk about this in just a moment.

One of the arguments, you didn't get a chance to address it when we spoke at the last hearing. One of the arguments that comes part and parcel with underwriting was lack of insurance. I think that its, on its face, I got to assume that the SEC wants to, perhaps, change their argument a little bit on that because there is insurance.

Now, I understand that you may say the insurance is woefully inadequate, given the exposure or perhaps because I think it was a total -- Mr. Futerfas had pointed out this in his explanation -- he wasn't sure if it was a total of 75 million or how many it was.

But I'm curious; is your view, generally -- and not to delve too much into argument -- but is your view, generally, that the representations, as to the level of insurance in place, minimize the risk inappropriately or misled investors into believing the risk was minimized? And that upon review, these insurance policies are either substandard or woefully insufficient to cover the exposure and the risk?

Because I don't think we can say, and I don't think an order by this Court can say there was no insurance, because I'm looking at it, and it's been advanced, but perhaps I'm missing something on that point. Can you address that before you move to the other exhibits real quick?

MS. BERLIN: Absolutely. Our rebuttal evidence includes evidence that that's a fact that there is no insurance.

THE COURT: All right. So let's save it for that.

MS. BERLIN: (Inaud.) argument.

THE COURT: Let's save it for that. All right. We'll save it for that.

But for now, I'm admitting these exhibits over SEC's objection. So we're good to that. So tell me the next -- and again, we have moved everything in absent what you're flagging for me.

Give me what else in the binder that Mr. Futerfas has moved in you take objection with so I can rule. Go ahead.

MS. BERLIN: Certainly. With respect to E and F, we wanted to discuss relevance, but we won't waste the time arguing. The Court can give it whatever weight -- you know, we won't object to those being admitted. And so the Court, you know, obviously giving it whatever weight it chooses.

11:09

With respect to Exhibit G, this is a motion that was denied.

With respect to -- I'm so sorry -- with respect to Exhibit I, which is our next main objection, Exhibit I, Your Honor, is a declaration from an individual named Vincent Camarda. And in his declaration -- we asked the defendants when they -- we first received this last week, to strike this and pull this declaration, and they would not.

11:09

The issue is that there is a law that prohibits the SEC from acknowledging whether or not there is any exam. And this is a declaration where the declarant is making representations that there wasn't. He was subject to an SEC exam recently, and the SEC found that this was a legitimate business and other findings.

11:09

11:10

We are prohibited by law for even addressing whether there even was an exam. I can't even acknowledge to this Court -- we can't admit or deny that there even was one.

However, if this declaration remains in evidence or it's admitted into evidence, then, according to the laws, we would have to go -- I would have to go and seek authorization

11:10

from the five commissioners of the SEC in order to provide a response to this Court with the evidence about what is in this declaration.

THE COURT: Can you give me the other -- and Mr. Futerfas you might have it ready. She's saying Exhibit I, and I'm, obviously, working off her binder. Can you give me the docket entry?

MR. FUTERFAS: Your Honor, and it's actually -- what Ms. Berlin proposed is actually striking two paragraphs.

THE COURT: Right.

MR. FUTERFAS: In the exhibit.

THE COURT: Yeah. It's striking only a part of it. That's what I'm -- that's what I'm hearing too.

MR. FUTERFAS: And I think the Trust Exhibit, it's Trust Exhibit 148-11.

THE COURT: Thank you. Okay. All right.

MS. BERLIN: Within that, Your Honor, it's Exhibits 26 and 27. If that's helpful. It's on the very last page of that exhibit.

THE COURT: And this is -- I have it here in front of me; 148-11. And, I guess, let me ask you first, Mr. Futerfas, any objection? Because all they're asking for is striking a couple of paragraphs that, quite honestly, I don't know that they're make-or-break paragraphs, but I want to ask you before --

MR. FUTERFAS: I know -- you know what, Your Honor? I agree. Just so the record is clear, it's paragraphs 26 and 27 --

THE COURT: Yeah.

11:11 **MR. FUTERFAS:** -- of Mr. Camarda's declaration. And I can just read them, it's very simple. In that declaration, he says quote, Important for this Court's consideration AGM Capital Fund just successfully completed --

MS. BERLIN: Your Honor, object -- can we object to

11:12 this being read into the record?

THE COURT: Sure.

MS. BERLIN: -- problem.

THE COURT: Listen, I'm looking at it. It's just 26 and 27.

MS. BERLIN: Yes.

THE COURT: They're conclusions that were being made. Honestly, I don't think that this -- you know, we already know, quite honestly, that the commission has taken an issue with these conclusions. And there's a credibility concern here.

11:12 And I don't need to open up a whole door to rebut this, with everything else I have. I just don't -- yeah.

So for the purposes of the Court. I don't think it needs to be admitted. Those paragraphs will be stricken pursuant to the agreement because they don't really make or

11:12 break anybody's case in this. I just don't want to have a side

show on that. All right? Okay, great.

So I've taken care of that. What else do you got, Ms. Berlin, so I can try to wrap this up? Keep going.

MS. BERLIN: Yes. Exhibit J is a declaration for -- from an attorney for the entities. I guess his privilege would now be with the receiver, but he has provided a declaration to the defendants with various legal opinions. And it -- well, it's going on about the issues this Court has already advised all the parties that we are not resolving this case. But if the Court chooses to consider this, we have a counter legal-opinion declaration on this issue. But it is not -- we do not want this to be part of the case that's relevant to any claim at all.

THE COURT: Okay. So --

MS. BERLIN: We would ask that this Court not admit it.

THE COURT: Go ahead and give me, Mr. Futerfas, the tab name.

MR. FUTERFAS: I will give it to you, Your Honor. It's Trust Exhibit 130-1.

THE COURT: Thank you. Okay. And, look --

MR. FUTERFAS: It's the declaration of a Mr. Norman Balz, B-A-L-Z. And this is the first -- Your Honor, just so Your Honor's aware, 11:12 a.m., on Friday, August 21st, is the first notice at all I have that the SEC objects to this

affidavit, which was filed on August 12th, 2020; nine days ago. This was filed as an exhibit to one of our motions. It's already in the Court's docket. It's been docketed. It's been in the Court files for -- since August 12th; nine days.

11:14 **THE COURT**: And it's -- is it Norman Balz? Is that the one we're talking about?

MR. FUTERFAS: It is.

THE COURT: All right.

MS. BERLIN: It is. It is.

11:14 **THE COURT**: 148-12. Let me be clear. I mean, at the end of the day, most of what is the concern here is other than a historical review of what happened and the business model, you know, when we get into paragraph 17, we talk a little bit about some of the findings from the EDPA and some of the

11:14 concerns about the nature of the Merchant Cash Advance business.

Again, to me it's not a matter of admissibility, it's just a matter of relevancy. We have talked a little bit already about this concern. It's not really a factor for the

11:15 preliminary injunction because I'm not going to make any rulings on the legality of the Merchant Cash Advance business, which we just talked about earlier. Right?

I mean, the receiver themselves is getting some state courts that said they're fine, not usurious, and others that they're looking into.

So I just -- it's a relevancy thing. I don't think I need it, and I'm not going to admit it because it's just not part of really what's at stake in this preliminary injunction here, Mr. Futerfas. I mean, I don't see anything that is really -- I mean, I'm not going to be ruling on that. That's why I don't think I need to worry about it.

MR. FUTERFAS: Can I respond?

THE COURT: Yeah. Go ahead.

MR. FUTERFAS: To the extent what we heard on Tuesday for four and a half hours, was the SEC impugning -- impugning in multiple, colorful adjectives, the defendants' state of mind, their scienter, what they thought, all of this scienter language that just went on for four and a half hours from the SEC.

I'm not -- we're not using necessarily -- well, actually there are two uses of this declaration. The first is -- as I indicated in my beginning of my work on Tuesday afternoon -- the first is that, yes, there are claims in the SEC amended complaint where the amended complaint says they charged 400 percent interest. They characterize these things as loans.

So I do have a charging document drafted by the SEC, which makes averments about the nature of the business. This does go and that's -- that complaint forms of the basis of the motion for preliminary injunction. So this affidavit

addresses, by a lawyer who worked on a lot of this litigation, aspects of the SEC's amended complaint. That's number one. So the first point of relevancy is it simply addresses some of the allegations made or suggested in the amended complaint; number one.

11:17

The second aspect of the relevancy is simply that to the extent the SEC is making these -- all these claims about the scienter of the individuals who worked at Par, this affidavit also shows that there were lawyers, who were working on behalf of the company, who were litigating these agreements in various state courts. And it shows the results of that litigation in the state court.

11:17

So it addresses both -- so it's a frontal rebuttal to the suggestions made in the SEC complaint on the one hand. And it addresses, in part, the scienter arguments that the SEC has made.

11:17

Again Your Honor, I'm not asking you to -- this affidavit doesn't have to be the be-all and end-all. Your Honor is going to consider all of these things and give them various weight in the total amount of data that Your Honor is considering. But, I think, we can't just reject it out of hand because it does address claims made in the amended complaint.

11:17

THE COURT: Here's what I'm going to do. I'm going to -- what I'm going to do is, in terms of admitting it and considering it, there's a lot in this document that, I think,

11:18

is outside the scope of what we're dealing with particularly as to interpretations of law, conclusions of law about whether these are loans or not.

First of all, I'm not going to take an affidavit. I mean, conclusions of law are for the Court anyway. I'm not -- this doesn't work this way. An evidentiary hearing does not base itself on what three guys tell me in an affidavit about what they think regarding the usurious rate of what's happening in the EPA.

11:18 But even still, I'm not going to have that make that call. I mean, for the preliminary injunction elements, I'm not. Now, in terms of overall getting a picture of what's going on, it does give a little litigation history. There's no harm in that, I got in other places. It just tells me case is filed. I know most of that.

So what I'm going to do, Ms. Berlin, is the Court is going to only be considering this for more of a background and more along the lines of showing a little bit of state of mind, but not for any legal conclusions, not for any determination as to whether these instruments should be regulated.

So there are some values to this, but I don't know that I would just say I'm not going to consider it. I think the majority of it is outside the scope of this hearing. But I don't want to just kick out the affidavit because I can see at least, you know, some generic language in the beginning telling

me a little bit about how this works. A lot of it, quite honestly, is an opinion from an individual about the SEC's motives.

None of that really is relevant for me. I'm going to look at this as black and white as possible, whether it fits into what a preliminary injunction showing needs to have. So, hopefully, that gives us enough piece of mind because I don't want to be caught up in something like this for much longer.

MS. BERLIN: Understood. May I, please, just reply and --

THE COURT: Yeah. Briefly, please.

MS. BERLIN: -- give my objection very briefly.

THE COURT: Yeah.

MS. BERLIN: First of all, it's not the trial. The complaint is not the operative document here, it is our motion for preliminary injunction. We have not made any allegations about the regulation of this as a loan or something else. That is not our jurisdiction. It is not what this case is about. That is clearly what they want to make it about, but that is not what this case is about.

It is now going to require us -- we will present rebuttal evidence about the history of the litigation, and then all of these things that have nothing to do with the case at all. So that the record is clear, if the Court is going to rely on that lawyer's representation of the litigation history

instead of him simply providing you the cases.

And finally, I would ask the Court not to consider Norman Balz's declaration as evidence of state of mind which is what I'm understanding the Court to say because we do no have a single -- there is not a single thing in this case that has to do with scienter about whether this is a loan or a Merchant Cash Advance Agreement.

So it has no bearing, first of all. And second of all, the scienter has to do with the disclosures they made to investors. And that is all.

So Norman Balz talks about nothing of that and considering making a scienter determination based on other lawyers they hired in other cases that have nothing do with disclosures to investors or securities laws, I am concerned that that is just not applying the -- making the -- looking at the correct set of facts or law for scienter determination so we would preserve our objection.

THE COURT: Understood, and like I said, he it does have in Paragraph 14 -- when I talk about historical, he's listing lawsuits. So that's what I mean by historical. I'm not talking about his litigation outcome.

So I don't want the SEC to believe that this is now being taken as gospel, but it is something that is giving, at least, a view of all the pending litigation from this individual. Like I said, I mean, this is not one of the

principal players for purposes of the mindset.

And I understand that the Court is going to -- you know, I'll screen through it and be very careful, but, obviously, any scienter arguments that this being used to advance will not succeed and they will not persuade the Court, if it really is outside the scope of the main players and their understanding of the notes as opposed to an understanding of the legality of the agreements, which is not going to be reached in my ruling.

11:22 I do not expect to be having a whole explanation of the MCA business and loan models and all of that because I just think that's outside the scope. But I want to be clear, we don't need to have a full rebuttal on this because the Court is looking at it for the most limited of purposes and I do not think, at the end of the day, there's more than enough evidence that the defendant is getting moved in that has a lot more weight and a lot more value than this one affidavit.

So the Court's made its ruling. It will consider it only for the most limited of purposes. And with that being said, let's move on the next objection, please.

MS. BERLIN: Yes, thank you. Our next objection is the affidavit of Aida Lau. It says here we don't have a binder with your number, but --

THE COURT: It's 148-13 --

MS. BERLIN: All right.

THE COURT: I've got it right here. Let's go.

MS. BERLIN: Okay. Super. Our issue is that this Aida Lau is the individual at issue in the receiver's status reports. She is the person who went and downloaded the thousands of documents. And the defendants, that's what they have asked you to consider.

That is attached to the declaration, and we are moving to strike this declaration in its entirety and all of the exhibits to it. If they hacked into the system to obtain these documents during the receivership, then they should not be allowed to utilize them. And I understood we have the -- the Court needs to hear the full report about how they know for a fact that Aida Lau did this. We can, but instead, I would just ask that the Court to rely on the receivership report.

THE COURT: All right. So, yeah --

MS. BERLIN: But this is it.

THE COURT: So look, the bottom line on this one is, we don't need to get a into a technical evidentiary battle on admissibility. I think that we can all agree, given what I've heard from the receiver and looking at the declaration, that Aida Lau's testimony and Aida Lau's credibility is a major issue for the Court.

And I can tell you in no uncertain terms that the Court is not going to reach a determination on a preliminary injunction, hanging its hat on Aida Lau's testimony, given the

forensic results that I saw in the receiver's report. I think that it casts doubts on the weight, I think the argument really is not even so much admissibility, it is more about this should be given zero weight given that her credibility is severely questioned by the receiver's investigation.

11:24

I'd rather, as I would with most of these things, instead of wasting too much time asking to strike and keep out, point out the issues that the Court knows how to manage weight, I'm the sole factor finder if it's not something that I feel comfortable with, Trust me, you're not going to see a single citation to it anywhere in my I order, if it's not something I can bank on.

11:24

This would be one of those things because I don't have her here; I'm not going to hear from her live. I have way too many concerns about Ms. Lau and her access to the G Suite.

11:25

So, again, I will say this to Mr. Futerfas to streamline it. I'm not going to strike it. I'm not going to throw it out. I'm just going to point out that she's got credibility concerns, and the Court is very, very likely to give this little or no weight. And that should make this issue a moot point. But, Mr. Futerfas, anything else you want to add on this?

11:25

MR. FUTERFAS: Your Honor, all I want to say is this: There were -- there are obviously exhibits next to that affidavit, which we are -- which Mr. Fridman and the Trust is

11:25

relying on and will be discussing. What weight Your Honor gives those exhibits, Your Honor will determine. And I think that's what Your Honor's saying.

THE COURT: It is. That's what I'm saying. I'm not saying I'm going to strike it. I'm saying the objection is preserved by the SEC. The Court will deal with it from a weight and credibility, not an admissibility point. So you're good on that.

MR. FUTERFAS: Can I respond? I have a response.

THE COURT: Yeah.

MR. FUTERFAS: Very quickly.

THE COURT: Yes.

MR. FUTERFAS: Hopefully move on to the hearing.

THE COURT: Yes.

MR. FUTERFAS: First of all, we dispute the receiver's discussion of Ms. Lau. We are hiring our own forensic computer specialist who will examine the same data. And many times there are different interpretations. That's number one.

Number two. And this is really what I want Your Honor to think about when Your Honor's considering the weight of the documents. The receiver and the receiver's counsel and the SEC have had access to the books and records of Par and CBSG since late July, let's call it August 1st -- whatever it is, July 28.

And they have had access to Mr. Klenk. Who, we by the way, introduced and introduced to the receiver and made sure

the receiver spoke to Mr. Klenk. That was, you know -- we assisted in that regard to make him available to the receiver.

They have now had their four weeks to look at Par financials. They didn't do it before the case, but they certainly have had weeks now, from August 1 to August 21; three weeks to look at financials of Par. They have not produced one shred of evidence that the information in these exhibits -- and I'm asking Your Honor just to consider this for weight -- is inaccurate.

11:27 Even the affidavit of Mr. Klenk or the declaration. He had the opportunity to look at Aida Lau's declaration, he had the opportunity to look at the exhibits. And while he discussed how account receivables were categorized by auditors, he did not take any issue with the raw data and how Par categorized them in those exhibits. You don't find one word by Mr. Klenk, in his declaration, saying this exhibit is wrong or this exhibit is not how Par analyzed the information -- the money flows in that business.

So that's very, very important. Nothing the receiver says or the SEC says indicates that any number in those exhibits is not accurate. So I know --

MS. BERLIN: Your Honor.

THE COURT: Okay. Let him finish. Let him finish. Go ahead, Mr. Futerfas.

MS. BERLIN: Sorry.

MR. FUTERFAS: I know that Your Honor is going to consider them for weight and will give them -- give these numbers whatever weight Your Honor determines, but when Your Honor hears from Mr. Fridman shortly, Your Honor can obviously assess these documents and give them whatever weight.

11:28

But I do think Your Honor has to -- I'm just -- and I know Your Honor does, that it's one thing to say, you know, let's -- if Ms. Lau accessed (inaud.) or did something like that, that's one issue. But the other issue is, are the numbers being presented to be actual numbers of Par? Are these real documents? Are these real numbers? That's a very different issue.

11:28

And I suggest that the SEC and the receiver and whoever else have had weeks to determine that, including with Mr. Klenk and they haven't rebutted or offered any evidence that those numbers are not accurate. So I just ask Your Honor to consider that, as you hear from Mr. Fridman.

11:29

THE COURT: All right. And, Ms. Berlin, this can be addressed by you in your rebuttal, okay? I don't want to waste any more time on additional argument at this time. Save it for your rebuttal argument on this point. What other objections do you have, please, so I can move on?

11:29

MS. BERLIN: We are not going to make anymore objections.

THE COURT: Thank you.

MS. BERLIN: We think it's loud and clear. We have the same, you know, same arguments I just made with respect to L through Q.

THE COURT: Okay. And --

11:29 **MS. BERLIN:** -- evidence, relevance and --

THE COURT: Okay.

MS. BERLIN: -- and Aida Lau, again.

THE COURT: Okay. And I will -- and just so that I have my record clear, is that 148-15, I would think? Or 14 --

MS. BERLIN: Yes.

THE COURT: -- 15 and I don't know how deep it goes, 16 maybe and --

MS. BERLIN: 148-14, 148-15, 148-16, 148-17, 148-18, and that's just relevance. These appear to be settlements that

11:30 the SEC entered in other cases. And then 149 -- I'm sorry, it's documentary 148-19 is another declaration from Aida Lau.

THE COURT: Okay. So --

MS. BERLIN: And may I just ask a question --

THE COURT: Yeah.

11:30 **MS. BERLIN:** -- for purposes of clarification so I can make sure the right witnesses lined up for rebuttal?

With respect to all the representations that Mr. Futerfas has made about the SEC, what we have had access to and (inaud.), I mean, I'm just curious, is the court accepting

11:30 attorney proffer? Is that what's happening or do I need -- or

do we -- shall we be calling witnesses on rebuttal for some of these things?

I am just a little confused because I -- there hasn't really -- there's been a lot of argument without any evidence and I just want to confirm that the Court's only considering things that are in the record and that are evidence. And if I don't hear it with an exhibit or a witness, I'm not going to respond to it.

THE COURT: Correct.

MS. BERLIN: I just want to make sure that's correct with the Court because I don't want to waste time.

THE COURT: No. And I would urge you to continue with that understanding. What the lawyers say --

MS. BERLIN: Thank you.

THE COURT: -- is not evidence and the Court will not consider it as such it's merely argument to contextualize evidentiary presentations. But my order will be going through the record and it will be going through admissible evidence and giving it the weight it deserves, utilizing argument, of course, to get a better sense of context.

But no, there is going to be no determination of what is going on here and any ruling based on arguments from either yourself on behalf of the SEC or any of defense counsel's unless there's fact by evidence. And I will just to make a formal ruling -- as to your objections, they're going to be

overruled.

But the Court, again, is very mindful of the relevancy especially with, for example, judgements of other cases, which don't really do anything for me, just because, you know, an argument of "Hey, the SEC doesn't normally do this and they're picking on us when they should go after Goldman." Look, that's great. I mean, I understand that, and we're not Wells Fargo, and this is not supposed to be the way SEC does business.

11:31

Well, I mean, I'm not here to make that call. The SEC decided they wanted to enforce this action, they've got to prove it. I'm not really going to sit here and have my analysis be weighing in favor or against an injunction because they have taken it easy on another defendant in an unrelated case.

11:32

It doesn't matter to me, but I'm not going to not admit it because I can understand it's a contextual thing, just the weight is minimal at best. The same thing with anything else from Ms. Lau.

So with that being said, that should resolve all the objections. The evidence is moved in, as I've already stated, with some of the objections being overruled, but with the record preserved, and with clarification as to weight and, of course, with those two paragraphs and the one affidavit that were essentially removed, by agreement of counsel.

11:32

With that being said, I definitely want to hear from

11:32

Mr. Fridman before we break for lunch and Ms. Schein. So I'm going to turn it over to them for their presentation of evidence and then, I think at the conclusion of their presentation we will break and resume with Mr. Vagnozzi's testimony.

11:33

And then, after that's done, we'll hear the SEC's rebuttal and hopefully that will be the end of our hearing.

So with that being said, Mr. Fridman and Ms. Schein, I don't know whichever one of you wants to take the lead, I turn the floor over to you guys.

11:33

MR. FRIDMAN: Thank you, Your Honor. This is Dan Fridman on behalf of the Trust. Your Honor, I have prepared a brief PowerPoint that will, I think, assist the Court in following the short points that I'm going to make. There are about 22 slides. May I have control --

11:33

THE COURT: Yes. Yeah.

MR. FRIDMAN: -- of the screen.

THE COURT: Yes. Let me just go ahead and attempt and then I should -- either I or my CRD should allow you to have control.

11:33

MR. FRIDMAN: Okay. Can you see that?

THE COURT: Yes, I can. Okay. All right. There we go. We're set.

MR. FRIDMAN: All right. Well, thank you again, Your Honor, for passing me to through today instead of going Tuesday

11:34

evening. What I hope to do with this presentation, Your Honor, is to address some of the concerns that I heard Your Honor express during the course of the hearing on Tuesday.

So once again, I'm here on behalf of the Trust, and I want to start with the arguments that the SEC has made in support of freezing the 14.3 million that they have frozen in the Trust.

The allegations against the Trust are extremely thin. They only appear on Page 14 of their TRO motion, and here is what they say. They say, "LME 2017 Family Trust, as set forth above, owns Par Funding and McElhone is the grantor of the Trust. Between July 2018 and September 2018, Par Funding transferred at least 14.3" -- I guess, that's supposed to be million -- "of investor funds to the Trust, for no legitimate purpose."

And that's it. And in support of that statement, they cite to the declaration of Melissa Davis, which is Exhibit 13 and paragraph -- just one paragraph out of her declaration.

Now, incidentally, Your Honor, we did try to conduct the deposition of Ms. Davis and that was not permitted, it didn't happen. So my -- I will raise the concerns that we have about Ms. Davis's declaration as they relate to the Trust and some of the broader points on the defendants. But Your Honor should be aware that we have not had the chance to depose her on this.

But we do find significant concerns on the statements that she's making. There's two parts to this. There's the 14.3 million of investor funds that she says were transferred, and then there's a second part of the clause, "for no
11:36 legitimate purpose." That has -- that statement has no support. If you look at her affidavit, there's no statement about purpose. It's just a thorough way of lying that the SEC added into that.

So let's go to the next slide; Slide 2. So there --
11:36 Your Honor, this is excerpts from the declaration of Melissa Davis, which is Exhibit 13 to the SEC's TRO motion. And there are three parts of this exhibit that I want to call Your Honor's attention to.

First, she suggests that investor funds -- this is in
11:37 Paragraph 8 -- "Investor funds were commingled in the Par Funding accounts with funds from other sources." This term, "other sources" is doing a lot of work here. And this term "other sources" is a big gaping hole in her declaration. It's a $1.2 billion gaping hole in her declaration that she ignores
11:37 and doesn't address. And I will talk about that a little bit more in a moment.

The next part of her declaration that I want to focus the Court on is Paragraph 10 where she writes that, "Incoming investor funds and agent funds Par Funding, received during the
11:38 period of July 2015 to June 2020, totals $492 million. So

that's how much money she alleges came in from investors or what we call creditors in this case.

And then, finally, it's Paragraph 16 and this is the only support for the freeze on the Trust that the SEC has brought to Your Honor's attention. Paragraph 16 says, "Between July 2018 and September 2018, Par Funding transferred about $14.3 million to the LME 2017 Family Trust from Par Funding account containing commingled investor funds."

That's it. It doesn't speculate as to the purpose of the transfers, but the purpose should be pretty obvious since the Trust owns Par Funding, it is permitted to take distributions from retained earnings, from the operation of Par Funding. So there's nothing nefarious about this.

So the only question here is whether these were as the SEC claims; investor funds, or were they part of, you know, the investment of investor funds and operation of Par Funding.

THE COURT: Mr. Fridman, as you're moving on let me ask you a question in this regard. So I'm following your concerns on the freeze. I don't know necessarily -- I mean, the argument has been multifaceted on the LME amount, but is there not also a concern -- you mentioned that there's nothing nefarious about some of this money coming in.

Isn't one of the arguments that's been advanced, that the investors were not advised of the fees that were being recouped by fund managers -- whether we want to talk about

McElhone or, you know, Macki -- but the idea that it wasn't necessarily disclosure about how much they were going to make off the investments?

And that that is what these funds, these so-called commingled funds -- that when they call them investors funds, that, as you said, there's nothing wrong with them taking those funds as part of -- I don't want to call it compensation -- but isn't there a concern or is there something that you want the Court to focus on as to the argument that they never advised the investors of just how much they were going to take off the top? I mean, is that -- isn't that part and parcel of this?

MR. FRIDMAN: Your Honor, I don't believe that the SEC is alleging that the Trust couldn't take fees from the income of the fund. I think what their claim is is that they couldn't take investor money coming in.

But what I'm about to show Your Honor is that that hole -- that I pointed out here in the Davis declaration of the other sources -- when you look at the big picture of how much money flowed through these accounts, the argument that a $14.3 million transfer in those months was investor funds, falls apart.

I understand Your Honor's concern about disclosure and I'm going to address that during the course of the presentation.

THE COURT: Okay. And that -- I guess one of the

things, as you're going through it too, that I'm curious about is, just from the standard that the SEC has to meet, I know that your concern really on behalf of the Trust is the Trust assets being frozen.

11:42 But what am I going to do if I can't figure out what's investor funds and what's not? Meaning that it's been some argument that there's no real accounting to show a lack of commingling and, I guess, my concern is, maybe, down the road we can find and do a better breakdown of the funds moving in and moving out of that Trust.

11:42 My bigger concern is if I don't have enough evidence to support that we can, maybe, separate the two things and make a finding, obviously, the SEC's feeling is, we have to allow this freeze to remain until we do so.

11:42 Is there even a way, to your argument, to show that these are truly not funds being reshuffled into the LME account but more that they are fees and that we can trace that? I don't know if there's evidence to that or what do you think about that?

11:43 **MR. FRIDMAN**: I'm going to get to the affidavit of Mr. Klenk, which I think concedes that there are fees that there's a 10 percent fee that they were paid and that there's nothing wrong with that.

In addition, the SEC's burden, Your Honor, they have

11:43 accountants, they have the access to the company's books. They

have not attempted a tracing analysis here. There are, you know, in cases where investor money is involved, sometimes you use the lowest intermediate balance. You look at the difference between how much investor money came in, how much operating income was generated, and did that operating income ever go below the amount of investor income when fees were being paid? That analysis hasn't been done.

11:43

MS. BERLIN: We object, Your Honor, to any representations about what the SEC has and has not done in this case.

11:43

THE COURT: All right. We'll save it -- well, let's -- we'll save that for the rebuttal. Go ahead, Mr. Fridman, you were saying.

MR. FRIDMAN: At a minimum, Your Honor, I don't see it in what the SEC has put before the Court, any analysis here. It's not reflected in Ms. Davis' declaration, either and we would certainly love to depose her on the -- on these issues.

11:44

But the point we're making is, there has been no attempt to trace assets. It's been more of a shoot-first-ask-questions-later approach. And as I'm going to show Your Honor here, because of this hole -- this other source's hole that masks $1.2 billion in funds that aren't accounted for in her declaration -- because of that, they're basically trying to say, "Well, we're entitled to grab anything we see," without doing the tracing analysis. That has not been

11:44

done.

Okay. So let me move on from the Davis affidavit. So I've pointed out in the Davis affidavit that she is alleging that funds were commingled. Investor proceeds were commingled in the Par Funding accounts with funds from other sources including Par Funding business operations. That's not true.

11:45

We point this out not because commingling investor proceeds with operational revenue is improper. It's not improper. And the SEC doesn't allege that commingling is part of the theory of their case. That this is not a commingling issue that they're raising. But we point this out to highlight some of the errors in Ms. Davis's declaration.

11:45

As Mr. Futerfas pointed out in his presentation, Par Funding had several bank accounts and funds from creditors were not deposited in accounts into which the MCA wires were initially deposited. Now, all transfers were effectuated to operate the business. Those accounts, as we will describe in a moment, were segregated. And Ms. Davis's analysis of these funds has a big hole.

11:46

Let me talk about these accounts. There were seven accounts. There were three ACH Processing accounts into which the MCA transfers were deposited. These accounts were also referred to as -- and this is important -- Par Funding (PREF) and Priority Payment Systems. These were the ACH accounts that received the MCA deposits; the wire transfers.

11:46

And those were segregated into three capital accounts into creditor-investor proceeds were deposited. And which were largely used to fund new MCA business. And the other operating account was used to pay expenses.

11:47 All right. Moving on to Slide 4. The SEC's financial analysis contains a major oversight. The way Ms. Davis breaks this out in her declaration, she point out that there is 124 million in investor-creditor funds, 367 million in agent funds. And again, this mystery other sources which she does not

11:47 quantify. So we have been able to quantify that other sources number for the Court.

And this is coming in through Exhibit A to Ms. Lau's declaration. I understand there's a concern about her credibility because of the access issues. We do want to have

11:48 the opportunity to rebut the allegations that are being made against her. Not going to do that here. And Your Honor can weigh this information, give it the weight that Your Honor would like.

But what I want to point out here is, here's the other

11:48 category: Total deposits; $1.257 billion. And those 1.257 billion were deposited into the ACH wires accounts I described earlier. And this 1.275 -- $1.257 billion is completely ignored by Ms. Davis's declaration.

I would also point out in this chart -- this is more

11:49 of an aside -- that the factor average rate was about 1.33,

meaning for every dollar they put in they got $1.33 back. It shows the performance of this.

All right. Moving on to the next slide, so here it is all filled in with the other funds. Now, when you look at this in context, Your Honor, you see that when you take this as a whole, there is about $1.257 billion not accounted for by the SEC's accounting expert. And what's the upshot? The upshot is that they cannot say -- without doing a proper tracing -- they cannot say that the $14.3 million that was paid to the Trust -- which is an owner of Par Funding -- was investor funds because the company was generating all this income from operations going through the accounts.

So in our view, again, since we haven't been able to depose in Davis, this is for us, severely undermines her credibility and the completeness of her declaration. And the basis, which is -- again, as I argued in the beginning, which is very thin -- for the freeze against the Trust.

So that is the first point we'd like -- we were making here with Ms. Davis's declaration. It vastly overlooks the vast majority of the funds in the accounts that came from MCA principal and earnings.

I want to talk about the Form D filings also. The SEC has morphed this case from what it is, which is an alleged Section 5 violation. And has turned it into something that is trying to sound more nefarious, a more egregious case. But the

evidence doesn't support the SEC's characterization.

As the Court, I believe, recognized on Tuesday, this is not a Ponzi scheme. No one is saying this is a Ponzi scheme. This was not a business that was losing money. It was a profitable one that consistently paid creditors and investors, whom I believe, we noted -- or noted that the investors were generally satisfied. That is all true. And the SEC isn't saying anything different than that.

11:51

But in an effort to turn this case into something that it is not, and to justify an emergency ex parte action, the SEC needed an allegation that suggested some misuse, in quotes, of proceeds. And relying on the declaration of Ms. Davis, which, again, overlooks a lot of the account activity, that's what they came up with. And they pointed to two filings with the Commission in 2019 and 2020, which the SEC alleges, falsely stated; that none of the proceeds of the offering -- the money that was taken in by the creditors -- were used to pay commissions to executives, like Ms. McElhone or Mr. Cole.

11:52

11:52

But in order to tie these payments to investor funds, they cite to Exhibit 13; the flawed declaration of Ms. Davis, who did not completely understand how the accounts were segregated and ignored 1.257 billion in the account. And the SEC has not challenged this. This has been an exhibit in our papers this whole time and they haven't -- they've had opportunity to come up with rebuttal affidavits and they've

11:53

11:53

never given us one.

Let's go to the next slide; Slide 8. So this is from Ms. Lau's declaration of August 14th, 2020. So she was the accounting manager for a company that provided accounting services for Par Funding. She understood the company's cash flows and accounts. And she reviewed Par Funding's financials between 2017 and 2019 and concluded the following:

First, the consulting fees paid to executives like McElhone and Cole were key to new MCA business not creditor-investor proceeds.

Second. On a quarter-by-quarter basis, the amount of merchant funds deposited into the business; the $1.257 billion that were deposited over the life of the company, and ignored by Ms. Davis, always exceeded the amount of consulting fees paid to owners and executives. And because these merchant funds, which she calls "operational income," always exceeded the fees, there was not and could not have been a need to use investor proceeds for these fees, as Ms. Davis and the SEC are suggesting.

So the statements in those Form D filings were not false. They were accurate. So in this issue goes to the likelihood of the SEC to succeed on the merits. Now, we will -- we do intend to have a forensic -- independent forensic accountants to help us make these points to the Court.

But at this very preliminary stage, again, with me

coming in, you know, a week ago into this case, I think just based on the declaration itself -- just based on the face of it, Your Honor can see that there are issues here. There are significant issues here.

11:55 Go to Slide 9. This is an excerpt from Docket Entry 106-1. And it's a financial summary from January 2019 to June 2020 of CBSG. If you go through the column of expenses, and you add up the commissions, you see that Par Funding paid -- sorry, I am looking at the wrong column. If you look at

11:56 consulting fees paid to owners and executives -- it's the consulting column -- Par Funding paid $26.7 million in consulting fees during that time period. If you add up across the column.

And if you add up the column of interest payments that

11:56 were made, you get a total of 53.7 million. So the fees never exceeded the interest paid.

So now on Slide 10, we have the supplemental declaration of Ms. Davis. It's Docket Entry 89-1. There are additional errors in her analysis. But we'll stop by pointing

11:57 out one more error.

If you look at Paragraphs 6 and 7 of her supplemental declaration, she references two transfers of investor proceeds totaling just over $108 million out of Par Funding to Priority Payment Systems and Par Funding (PREF) containing, quote,

11:58 commingled investor funds. She says, "On February 21st, 2020,

Par Funding began to make transfers out of the Par Funding accounts which were labeled as Par Funding (PREF). During the period from February 21st, 2020 to June 30th, 2020, these transfers totalled $45.9 million." And goes on to say that, "Although labeled as Par Funding (PREF), these transfers were also payments to Priority Payment Systems from the Par Funding accounts."

But these accounts were accounts -- these are inter -- intra company transfers. These are all accounts owned by Par Funding. So these aren't funds leaving the accounts as she's --

THE COURT: You're muted. You -- yeah, you got muted. You said something about the money leaving the accounts and then it got muted. Go ahead, Mr. Fridman.

MR. FRIDMAN: Yeah. I thought Your Honor didn't like where I was going with this.

THE COURT: No. No. I don't know why that happened, that wasn't me. Go ahead.

MR. FRIDMAN: So the bottom line here, Your Honor, is these were intracompany transfers. These are transfers between accounts owned by Par Funding. These weren't funds that left the company, as it seems Ms. Davis is insinuating or implying in her declaration.

And, again, we believe this comes from a lack of understanding of the company's accounts and the business. And,

again, this goes to the weight of Ms. Davis's declarations on which the SEC's injunction is based. And it's being used to justify freezing $14.3 million of the Trust and millions for other individuals as well.

12:00 All right. Let's move on from this. I believe Your Honor asked on Tuesday about our position on whether these are securities. Our position is that these are not securities. This is briefed in our papers. And we discussed this in our memo in opposition and Docket Entry 148. So I'll just go over 12:00 this briefly.

We believe the Reves Analysis here should not be overlooked while the notes are presumptively securities under the securities laws, Reves provides two exceptions to short-term notes, which we believe are clearly applicable here.

12:00 The exceptions are: Where the short-term note is secured by a lien on a small business or some of its assets and (2) Where the short-term notes are secured by an assignment of accounts receivable. Separately, you know, I know there's a dispute about what is a short-term note. We find support that 12:01 the notes in this case are -- have been considered short-term. The SEC stated in a release -- that's Release Number 27152, that 12-month notes are short-term. The SEC has also publically stated in public statements that treasury bills maturing in one year or less are short-term.

12:01 Moving onto Slide 12, I put on the screen security

agreement that's documents at Docket Entry 28-14. And if you look at the security agreement, it says that "In order to secure the loans made by the secured party to the debtor and to induce a secured party to revise the terms of such loans debtor which is to grant security interest and substantially all of its assets including, without limitation, its inventory accounts receivable and general and intangibles to secured party."

So, we think, this is written into these agreements and falls into these exemptions.

It goes on to say, on Page 8 that, "There's a grant of security of security interest in consideration of a loan made by secured party to debtor. Debtor, hereby, pledges transfers and assigns to secured party and grants to secured party and agree that secured party shall have a continuing lien upon the security interest in all of the collateral."

Moving on to Slide 14. We know from the SEC's description of Par Funding that it advances funds to small businesses in exchange for security interests in its receivables. Slide 14, this is an example of an MCA agreement. This was filed either last night or this morning.

This is an example of an MCA agreement between Par Funding and a merchant. Here is Economics and Family Incorporated to whom Par Funding is advancing funds. In Paragraph 5, shows how the merchant, in exchange for the

funding, assigns to and makes Par Funding the absolute owner of its receivables. As a result, Par Funding -- each Par Funding note-holders' funds were ultimately secured, not only by a lien, but by a lien with a corresponding interest in the --

12:04 **MS. BERLIN:** Your Honor, I'm sorry. I have to object. This document is not in evidence. And it's not authenticated. We object to it, and we object to it being read into evidence since it's not.

THE COURT: I don't know if Mr. Fridman is being used 12:04 more of a demonstrative than someone that you're admitting. Go ahead, if you want to respond to that.

MR. FRIDMAN: Actually, Your Honor, I assumed that this was part of the discussion we had before my presentation on objections from the SEC. So, maybe, we had a 12:04 misunderstanding about that. I'm happy to respond, though, if there's an objection now.

THE COURT: I believe there is. Go ahead.

MR. FRIDMAN: So, Your Honor, again, this is -- we've got to keep in mind this a preliminary injunction hearing. The 12:05 evidentiary standards are certainly relaxed as opposed to being in a trial. And we believe this document is a business record. It is self-authenticating, has Indicia of Reliability, and Your Honor can give it the weight that Your Honor would like.

THE COURT: Yeah. At this point, understanding the 12:05 objection, I'm going to overrule the objection. I'm not as

concerned from an authenticity perspective and I do think it is useful for the Court.

Again, I will determine the weight given once I hear the full presentation of evidence and the SEC's rebuttal, but you may proceed. That objection is noted for the record, it's overruled. Go ahead, Mr. Fridman.

MR. FRIDMAN: The point we're making here is, you know, these transactions were done in an effort to comply with the law and make sure that the I's were dotted the T's were crossed and this is evidence that the Par Funding notes were falling under the exception, as noted in Reves, that's all.

Let's move on. So I want to make a quick point about a recent case, Liu versus SEC. It addressed the commission's right to employ equitable remedies of disgorgement. And it also addressed the meaning of the term "disgorgement." The Court held that disgorgement is an equitable remedy not a penalty, as long as it does not exceed the wrong doer's net profits. And because disgorgement is limited to net profit, the calculation must deduct legitimate expenses. So the SEC's right to an asset freeze is based on its right to disgorgement.

So in assessing the assets to be frozen, it appears that the SEC overlooked Liu because Ms. Davis does not attempt to calculate what net profits were, what expenses were. Again, this was more of a "we're going to try to grab all the money without doing the -- what we need to do to trace the funds and

to calculate what the appropriate level of disgorgement would be in this case.

So the bottom line here is that the SEC simply asked the Court to freeze every dollar raised in the offer without 12:08 accounting for the deductions relied -- it relied -- required by the Supreme Court decision in Liu. The SEC has had the financials. It just didn't make a reasonable calculation of the net profit that is directed by the Liu decision. And that's another basis where we think Ms. Davis's analysis is 12:08 incomplete and does not support the injunction against the Trust.

Moving on to Slide 17 -- and we're almost through. At the end of the day, this case is not about fraud. This is not about whether Par Funding was a profitable business, it was. 12:08 This is not about whether investors were paid back, as this Court rightfully noted. Investors were largely satisfied. This is not a Ponzi scheme. The Merchant Cash Advance business Par Funding operated was real and was profitable.

This is not a case about misappropriation. No one is 12:09 alleging that anyone stole investor proceeds. So the closest the SEC comes close to even suggesting assets were ever at risk of dissipation is the erroneous allegation that those two Form D's were filed, and misrepresented the source of Cole's and McElhone fees.

12:09 But as we've shown, through the flaws in Ms. Davis's

declaration and ignoring the operating income of the company, that is not supported, that is not a foregone conclusion. We discussed the SEC's efforts to justify bringing the case as an emergency action through its unsupported allegation that investor proceeds were used to pay executives and owner fees. Ms. Lau's declaration and the company's own financials support this point. But a declaration provided by the SEC also provides corroboration.

12:10 In the declaration of James Klenk at Paragraphs 7 and 8, he states as Ms. Lau did, that these case owners were paid not to investor proceeds -- not to investor proceeds, but to new MCA business.

In Paragraph 7, Mr. Klenk says, "Each quarter, CBSG would transfer out an amount equal to 10 percent of the total CBSG had funded in Merchant Cash advances during" the -- "that time period including companies owned by Cole, Abbonizio and Lisa McElhone, and/or the LME 2017 Family Trust."

12:11 Well, 10 percent of what was funded in Merchant Cash advances is not the same as investor funds. That is completely different. And Mr. Klenk supports that point.

So this is not a case about any fraud. If we go to Slide 19, the SEC's own introduction in the amended complaint and the TRO motion is at odds with the presentation the Court heard on Tuesday. They allege a matter involving unregistered sales of security. A non-scienter-based offense. And then

12:12

describe the company's decision to change its structure under the advice of counsel, from it's use of sales agents, to the use of agent funds.

So the bottom line here is, the use of agent funds is not illegal. More importantly, while the SEC made claims on Tuesday about how the spread paid to agents were tantamount to a commission, it did not charge a violation of Section 15 of the Exchange Act, in this case. So as a result, these allegations that commissions were paid without disclosures to investors are hollow.

And I'll leave it to Counsel for the agents to discuss those disclosures further, but it should be noted that if the SEC seeks to impute allegations regarding representations made by agents to others, it failed to present evidence to support its claims and appears to be improperly grouping the conduct of separate parties.

Under Janus Capital Group versus First Derivative Traders, the cite is 564 U.S.135. "No defendant can be liable for any alleged misstatements that are not attributable to him or over what she has no ultimate authority."

Moving onto Slide 21. So the SEC has not met its burden for an injunction, in this case. As the Court knows in order to conclude that an injunction is necessary, here to stop --

MS. BERLIN: If Your Honor, we just -- I'm sorry, I

have to object again. We're not seeking an injunction against Mr. Fridman's client who is simply a relief defendant. And he doesn't have standing to make arguments about the relief sought against the other defendant. The simple issue before the Court and the relief defendant is standard is simply whether they received money and they didn't have a legitimate claim to receive it. That's it. A relief, defendant, by law, is an innocent party and we are not -- you know, we're going down another road with another red herring, and I've let it go for awhile, but this is going to be a very long rebuttal, if I have to then prove claims we didn't charge against the Trust.

THE COURT: Well, I don't want to necessarily to want to interrupt his presentation. I understand that. I think -- let me allow -- I understand that your argument is he limited on his counsel's role for the Trust, but I think that for purposes of context, he's stepping a little outside of that because of the way the money flows into the Trust, it has some relevancy to his case.

So, Mr. Fridman, I don't think this is a big feature of your presentation anyway. So can you, maybe, just streamline and end this point?

But, I think, to Ms. Berlin's point, maybe, when you end here, let's drive it home because one of the things we're going to talk about at the end of today is how every -- and you mentioned this already -- how we have a little bit of

commingling on whose being drawn under what conduct. And your client, in particular, as you started with, is really about the flow of that money and the Davis concerns and the Lau concerns in the affidavit.

12:15 So there could be -- again, it's very possible and I think you would agree with me, that the Court could have a situation where it feels compelled that the evidence supports some of the injunctive relief against individual defendants and not against your client because it is a little bit lower. 12:15 Similar to when we talked about, for example, with Mr. Small and Gissas, who was under a negligence theory and not have -- did not have the same scienter. So there is levels to what we're talking about here, but I'll let you go ahead.

I'm going to overrule that objection to the extent we 12:16 need this for a little more context, but maybe when you end here, let's address that because I think it really goes to just your client's interest and the injunctive relief requested against them. So go ahead.

MR. FRIDMAN: Yes, Your Honor, and I'm almost 12:16 finished; I'm wrapping up here. Although, I should -- I am local counsel also for Mr. LaForte. I, you know, I do -- I did start out in that role and I'm still counsel of record for Mr. LaForte.

And in addition, in an effort to streamline this 12:16 presentation for all the defendants that are kind of in the

same position, I'm trying to make sure, as what I've committed to the Court that I wasn't going to -- we were not going to repeat portions of each other's presentations.

THE COURT: I agree. And for that reason, that's why I'm allowing you to continue. So that's absolutely fine with the Court. Go ahead.

MR. FRIDMAN: All right. All right. So there is no need for an injunction. The SEC is seeking to enjoin $14.3 million of Trust funds and additional funds held by individuals. In order to conclude that an injunction is necessary to here to stop future violative conduct, it must consider the degree of scienter involved and the egregiousness of the alleged conduct, among other factors.

And the SEC knows these factors are important and it worked hard to suggest that this case is more serious than it actually is. The evidence presented by the SEC -- much of which failed to do anything other than provide background on the business -- does not warrant an injunction by this Court.

And I'll conclude here with 522. One critical thing that the SEC has not shown, Your Honor, is a threat of dissipation. And Your Honor, I believe, is aware that the defendants knew about the emergency asset freeze four days before the TRO was issued, freezing assets because there was some issue with how it was sealed, and an article popped up on Bloomberg. And this e-mail shows Brett Berman from

Fox Rothschild receiving this Bloomberg note on July 24th.

So what did the parties do when they found about this? Nothing. The SEC does not allege that the parties immediately embarked on a campaign to move monies out of the Trust or move property around. They didn't do anything. There has been no showing here of a threat of dissipation.

12:18

And, in fact, in -- I think I described to Your Honor, that I was attempting to facilitate some cooperation between the parties and the receiver. Ms. McElhone had a $300,000 check uncashed that was issued before the TRO was ordered, and she turned that over to the receiver this week.

12:19

So, you know, the SEC has also not shown that there is a strong and compelling reason that this dissipation reason to freeze funds, especially when, you know, people are also trying to live. Their bank accounts are frozen, they have no access to money just to pay for themselves, we're in a middle of a pandemic right now; these are difficult times for everyone. And they haven't met that burden.

12:19

So I'll -- that concludes my presentation, Your Honor. And we appreciate your consideration.

12:19

THE COURT: Mr. Fridman, let me ask you, and maybe I missed it. How much money do we have in the LME Trust now?

MR. FRIDMAN: How much --

THE COURT: Fund wise, yeah. I'm just -- what's the latest -- do we have a latest update on the numbers? This is

12:20

to your dissipation point. And, maybe, I missed it. I'm just curious.

MR. FRIDMAN: So the injunction is for 14.3 million. I don't have an accounting of everything that's in the Trust. There are different businesses. The SEC introduced an exhibit showing that there are properties that are held through the Trust. So I don't have an accounting, as of yet. We just have retained an accountant to help us with the case.

THE COURT: Oh, okay.

MR. FRIDMAN: If that's important for Your Honor, I can come back with an answer.

THE COURT: No. And it's okay. I mean, I just was curious if we had it off the top of our head, that's fine. Thank you for that.

So then, I don't know, Ms. Schein, did you want to add any other arguments with -- on top of what has been presented now by Mr. Fridman?

And Mr. Fridman, one thing I will ask, if you can do us a favor and send us the P -- or the PowerPoint to my NEF. Can you submit that? Just e-mail at us directly, it's not an exhibit, it's a demonstrative, but it synthesizes evidence in the same way that I'm going to ask the SEC to send me theirs. Okay?

MR. FRIDMAN: Will do.

THE COURT: Okay. Thank you.

So Ms. Shein, I want to turn it to you to see -- I know you wanted also to make some arguments on behalf of your particular client or add on to what Mr. Fridman said. I'll give you the floor, please. Go ahead.

12:21 **MS. SCHEIN:** Thank you, Your Honor, yes. I'd like to present sort of a summation of my co-counsel, Mr. Fridman's excellent PowerPoint presentation, and also make remarks for my client, Mr. Cole. Thank you, Your Honor.

So as you know, my esteemed co-counsels on Tuesday and 12:21 again today, showed compelling evidence why the SEC's application for a preliminary injunction is flawed and should be denied. The facts here, which have been put in the record, show that Par Funding, through bank records, third party financial records, and books and records of Par, itself, is a 12:22 very -- was a robust, thriving business prior to the TRO.

And the SEC's Florida assertions are no substitute for these facts, and the due diligence that the SEC should have done prior to bringing this TRO. Now, as Your Honor knows, I represent Joe Cole. Before the TRO, he was the chief financial 12:22 officer of the company. And this thriving MCA business, as Your Honor also knows, employed at least 70 people. 12 of those people were (inaud.).

So the principal claim in the amended complaint against Mr. Cole is that investor funds were diverted to him 12:22 and others and that Mr. Cole -- and I know Mr. Fridman showed

this in some of his PowerPoints -- made material omissions when he and others did not state that they received investor funds. And that's found at the amended complaint, Paragraphs 18, 19, and 239.

12:23 However, Your Honor, there's no way that the SEC can prevail on this claim. And, Your Honor, in determining whether to grant the preliminary injunction, has to consider the likelihood of success on the merit. And there is none. There's no material omission because the consulting fees paid

12:23 to Mr. Cole and others did not come from investor funds.

And as the PowerPoint presentation showed, the SEC has failed to prove, through Ms. Davis's declaration and simply cannot prove, that the fees did come from investor funds. The SEC's theory presented through Ms. Davis's declaration, as

12:23 PowerPoint presentations showed, failed to identify a colossal 1.2 billion in payments for merchants.

Her declaration suggested to the Court that the only funds available to pay consulting fees was the gross amount of investor funds which came into the business from July 2015 to

12:24 June 2020. And that total was $492 million. The SEC's assertion, through Ms. Davis, shows a complete misunderstanding of this MCA business and the financial structure of the company.

Investors knew the numbers because they received

12:24 monthly reports on the performance of this MCA business. And,

Your Honor, the MCA's factoring business is extremely dynamic. When Par received back a dollar from the merchants, that dollars was used to fund new factoring agreements. So one dollar invested by a merchant -- I'm sorry. One dollar
12:25 invested by an investor would be used over and over again as it is returned by the merchant to provide new funding for other merchants.

But the SEC, through Ms. Davis, was not aware of this business. The actual business of Par, the factoring business,
12:25 according to Ms. Davis's declaration, did not exist. So Ms. Davis's declaration talks about the $492 million in investor funds. Of that amount, Your Honor, $180 million in principal has already been repaid. And over a hundred million dollars in interest has been paid to investors.

12:25 That is why many investors are currently listening to this hearing, and why they are up in arms about the SEC's TRO and takeover and shutdown of this formerly thriving business. Ms. Davis's declaration underscores that the SEC really didn't know anything about how this business functioned, what its
12:26 finances were, and how proficiently its financial models worked.

The bottom line is that the SEC missed, entirely, the income side of the business; the 1.25 billion in merchant payments. Your Honor, that's 2.5 times the amount of investor
12:26 money received during that time frame.

Turning back to Mr. Cole's consulting fees. They were, as you heard through the PowerPoint presentation and the declaration of James Klenk, which was part of Mr. Fridman's PowerPoint presentation, and which was submitted by the SEC at
12:26 Paragraph 7 and 8, the amount of consulting fees were (inaud.) directly from Mr. Cole to approximately 1 percent of the dollars amounts of cash advanced to merchants pursuant to the factoring agreements for one quarter.

Those consulting fees had nothing do with investor
12:27 funds. In fact, the SEC cannot prove that one dollar of investor money did not go to merchant funding. And that's what the SEC has to show. It's an element they must prove.

Likewise, the SEC cannot prove that the consulting fees that Mr. Cole received did not come from merchant
12:27 payments. And that's an element that the SEC has to prove. They cannot and will not, Your Honor, but -- because that's not what happened. The SEC cannot prove either element necessary for Your Honor to grant this preliminary injunction on Mr. Cole.

12:28 So Your Honor, I have to correct one other error in the amended complaint. It's at Page 8 Paragraph 19. Since the third quarter of 2016, Mr. Cole has received a total of $5.5 million in consulting fees. He did not receive $14.7 million in consulting fees, and he does not have any ownership interest
12:28 in (inaud.) ventures, as the SEC claims. That $5.5 million,

over the course of almost four years, is represented, usually, as 1 percent of the total Merchant Cash advanced for each quarter, as set forth in James Klenk's declaration at Paragraph 8.

12:29 And that percentage was also subject to prudent management decisions. For instance, in the second quarter of 2018, a decision was made to cap consulting fees, and Mr. Cole received a quarter of 1 percent of the Merchant Cash advanced for that quarter. So Mr. Cole's consulting fees, at no time, 12:29 were related, in any manner, to investor funds. The calculation of those fees had absolutely nothing to do with investor funds.

And just to note, Your Honor, this -- the first quarter of 2020, Par Funding processed the largest amount of 12:29 Merchant Cash agreements. But due to careful management, a decision was made to take no consulting fees, due to the oncoming coronavirus pandemic and the deleterious effect on the economy.

So this business that the SEC does not understand and 12:30 addressed with no facts, but a lot of -- lots and lots of dramatic hyperbole, made a decision not to take any monies for consulting fees in order to tactfully manage the finances due to the emerging coronavirus (inaud.). They also did not take in any new investor funds in 2020.

12:30 So, Your Honor, the SEC's only claim against Mr. Cole

is that he made a material omission because he did not say that investor funds were used to pay his consulting fees. However, as you've heard, the SEC has not and cannot prove this because he did not receive consulting fees from investor money.

12:30 Since there was no material omission, there was no violation. And because there was no violation, there's no reasonable likelihood that a material omission will happen in the future. A preliminary injunction against Mr. Cole is wholly unsupported by the facts not warranted, and most

12:31 respectfully, Your Honor, this preliminary injunction against Mr. Cole should be denied.

And just -- I'd like to add to conclude my remarks, Your Honor. The Court and receiver has heard our pleas to rehire the 70 skilled, experienced employees. And I am very

12:31 heartened to have read the receiver's report last night, in which the receiver stated that they've been interviewing the former skilled employees and intend to hire some employees back.

Now, we have already provided all the current bank

12:31 account information and ACH Processing accounts to the receiver and to the SEC over 14 days ago. The -- currently, the freeze of the bank accounts and the ACH Processing accounts has resulted, over the course of the prior four weeks, since the TRO, in a loss of $25 million in merchant payments.

12:32 In addition, due to the freeze, $5 million of investor

interest and return of principal cannot be paid, as well, due to the freeze.

On behalf of Mr. Cole, Your Honor, I would like the Court and the receiver to know that he's ready and willing to work with DSI and the receiver to immediately assist to restart the company. And because he was formerly the chief financial officer, there's no one who knows more about the financial accounting and ACH operations of the company than Mr. Cole.

So I thank you, Your Honor, for hearing my remarks. And I hope Your Honor will deny the preliminary injunction that the SEC seeks because it's wholly unwarranted. Thank you.

THE COURT: Thank you for that, Ms. Schein. I do appreciate it. Let me ask you a question. You know, representing Mr. Cole and just, you know, I'm looking at what's happened in the last 48 hours. I'm looking at a resolution with Furman, I'm looking at a resolution with Abbonizio.

I'm seeing, you know, to your point just a moment ago, folks who are willing to say, "I'm going to get out of this space" you know, "I'm not going to go out and make any more offerings, I'm not going go out and put out any more notes, quite honestly, the climate is not one that would even support it anyway because we have everything going on with coronavirus."

And it just, you know, we have -- and I will say it. I mean, it's not a criticism of the SEC, but I would be the

first to tell you and those that saw the attempt that I put in place up front to limit some of the powers that were given to the receiver. I have been concerned from the beginning and I don't want to call the word "overreach," but there has been -- it's been a very heavy-handed approach.

12:34

And the more evidence I hear, and the more investors I see, you know, and now that I've seen two parties, essentially, agree to try to, in an orderly way, sit down under the Court's -- just -- you know, jurisdiction, with the receiver involved, try to get a better sense of where the monies are, try to get these investors made whole, stop, maybe, the issuance of any new investment in the Par Funding model, but not stop attempting to seek collection efforts through merchant loans.

12:34

I guess, what I'm trying to say is, you know, before the Court finds itself drafting a preliminary injunction order and going through all of this, it just -- I get the impression that if we had everybody sit down with the receiver -- and I will be frank, I mean, I think Mr. Cole, obviously, has unique issues -- Ms. McElhone does too, given their background, given the disclosure. But we know that there needs to be this future harm prospect as well.

12:34

12:35

And I just wonder if your client and, you know, for purposes for Mr Fridman's representing the Trust and the local counsel also, if they're willing and they're able -- similar to Abbonizio and Furman -- to say to the SEC, "Look we're not

12:35

going to be in the business anymore. We will take the regulatory action to get out of this space in this civil suit." And the parties sit down and say, "We all agree that we got to make investors whole. We got to try to unwind this ball of wax."

12:35

And then, we can, maybe, litigate down the line whether to trial set or otherwise about disgorgement issues and all that. Is there a path forward for the remaining defendants, in your view, to sit down and outside of the emergency need that has been driving this litigation, to come up with a resolution going forward? Because I now have half the defendants on their way out of this case and the other half, understandably, different; in a different place.

12:35

But I still see the common threads about the nature of the business; the money flows. And to Mr. Fridman's point, you know, and I'm going to hear about this in rebuttal, but the dissipation concerns, which I will confess, is probably the number one thing that drove everything that I did in the beginning, anything ex parte. You have to understand, I get one side of the story ex parte.

12:36

12:36

So, of course, this is why we need these hearings because I need to see money moving so that I feel that there's a legitimate concern because I got to protect investors. But if I have assurances that money is not moving, and everyone is trying to find where the money has gone, and money can be

12:36

attributed an actual model that worked, and loans that were recouping rates that are not held to be usurious by state courts, you know, it just seems that do we really need to go to this extreme, whereby, the Court is going to have to go through a full-blown-injunction analysis if I see some common ground here.

12:37

And I don't know the level of communication that your client has had and I know that there's other concerns your client has that Furman, Abbonizio, and Gissas do not have. And the receiver has indicated to me there's a level of cooperation different between the different defendants.

12:37

But you're speaking now on behalf Mr. Cole. What's your sense -- I'm curious of the possibility that there be a frank conversation about reaching some agreement, and Mr. Fridman to that point, as well, for the Trust? Do you have any sense of that?

12:37

Is this something where your client feels very strongly that this business model is something he should be able to participate in the future and that he didn't make any regulatory mistakes? Or is he willing to say, "Okay, I didn't disclose." Or "I had to disclose to the investors." All right, I get it. I'm not going to issue any more of these funds. It is what it is. Let's just sit down and work out a number here that we can all walk away from and protect the investors.

12:37

12:38

Is that too black and white; nuts and bolts? Or is there something that we can work out? I'm just -- your take on that?

MS. SCHEIN: Your Honor, I certainly appreciate all these questions and we'll certainly inquire, but we feel very strongly that there was, first of all, there was no dissipation. Second. We did provide all the banking information that was 14 days ago to show that there was, at the time, when the TRO was ordered ex parte, there was approximately $25 million in those accounts, and there was other monies.

And because it's such a dynamic business, you know, monies come in every day. They have approximately a million dollars in ACH payment from merchants coming in daily. So that's the income of the company. So, you know, Your Honor, I feel strongly that there should be preliminary injunction granted.

THE COURT: One second, Ms. Schein. I have --

MS. SCHEIN: Mr. Cole because was the SEC has not met its burden.

THE COURT: Ms. Schein, give me one second. I'm sorry. Whoever is unmuted, there's a Chuck Fray (ph.) that's unmuted. You need to mute your phone, please. All right. Go ahead. Go ahead. You were saying, Ms. Schein? Go ahead.

MS. SCHEIN: Your Honor, we will certainly consider

your questions and review them and we will speak with the receiver. But I also want to emphasize that Mr. Cole was the chief financial officer and he was involved in the accounting and the management -- and the prudent management, I might add, of the business.

12:39

So we'll certainly contact the receiver after this preliminary injunction hearing, and we will endeavor to work with the receiver as we have done in the past, providing information and directing the receiver to speak with Mr. Klenk, which they did. And we'll continue to do that. But in terms of the preliminary injunction, I think, that the SEC has not met the elements required to grant it. But we'll continue to inquire.

12:40

Thank you, Your Honor.

THE COURT: Yeah, thank you. I just wanted to, kind of, take the temperature of where those conversations were at.

12:40

Mr. Fridman, go ahead.

MR. FUTERFAS: No. Your Honor, can I --

THE COURT: Oh, I --

MR. FUTERFAS: Mr. Futerfas for Lisa McElhone.

12:40

THE COURT: Yeah. Go ahead, briefly. Go ahead.

MR. FUTERFAS: Yeah. I wanted to -- I really, truly appreciate Your Honor's remarks. And they have kind of moved me to interject here because I think what Your Honor is hearing and what Your Honor is hearing from Mr. Cole who, even though

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he's the defendant, he's telling the Court, he's telling everybody, "I can get in there, I can open up this business, work with DSI, get this thing restarted and a I can do it quickly and I want to do that."

12:41 On behalf of Lisa McElhone, I want Your Honor to understand this. The first two or three weeks of these proceedings, let's just say August 1st, we were in such a defensive mode, you know, there were a lot of attacks on the defendants, on the Trust coming from the SEC, coming from, you know, other -- maybe, the receiver, whatever, and really, we were in a very defensive posture trying to defend what, I think Your Honor is understanding, is a real ongoing business.

And so a lot of what we were doing is just kind of fighting in our papers and just saying, this is a real business. You're attacking us saying we did all these terrible things, but this is a real business we didn't, you know, steal anyone's money.

But what I think what Your Honor is saying, what I hear Your Honor's saying and which I whole-heartedly agree, is what Your Honor is saying, okay, that was three weeks ago, now we're in August 21st, now, maybe, we are in a different place. Everyone has a better understanding about this business. Can we kind of work forward, collectively, to assist investors and get them repaid? And my answer is one thousand percent.

That's why I said in my remarks Tuesday afternoon,

Ms. McElhone doesn't have to be working in this business. You know, I'm sure Mr. Froccaro was saying Mr. LaForte does not have to be working in this business. But we would absolutely support a more collaborative and less defensive effort, rather than people, you know, pointing the fingers at our clients every minute, a more collaborative effort where we all get together, like Your Honor says, in a room.

I know we can do that in a live room these days, where the live rooms do seem to work well. And say what are we willing to put together here, collaboratively, to get assistance from people with knowledge like Mr. Cole. Hold together all the information we all have both on the receiver side and the DSI side and on the defense side, and make something happen for the receiver. We -- I mean, for the investors.

I am -- I'm willing to start that process 6 a.m. tomorrow morning. I'm willing to start that process now. And that's why, at the end of my remarks on Tuesday afternoon, what I said was on in behalf of Ms. McElhone. You know, Your Honor is going to make whatever legal determinations we -- you make at a preliminary injunction and we're, obviously, making our arguments.

But at the end of the day, on her behalf, she wants more than anything, what Your Honor just proposed. She wants more than anything, instead of everyone, you know, throwing

accusations all over the place -- which has kind of been our experience --let's put the accusations aside, let's get down to work together and let's figure this out quickly, get this shop open again in some respect, getting in merchant fees and start paying investors.

So we would -- I didn't want Your Honor -- Honor's marks -- remarks to be -- think that they're unheard by me or by Ms. McElhone. And I am sure without speaking to them, and Mr. Fridman would echo those remarks. So we are 100 -- we're in 1000 percent favor of trying to do that and trying to do that immediately.

THE COURT: Okay. And thank you for that. Mr. Fridman, let me hear from you to make some comments, and then what we'll do is, we'll take our lunch break. And when we get back from the lunch break, we will proceed. And, actually, what I'll do is, I'll double-check here with Mr. Small before we break.

But I expect when we return, we'll hear were Mr. Vagnozzi and then we'll have Ms. Berlin's rebuttal. But, Mr. Fridman, I wanted to give you the floor a minute, since I'd addressed also the Trust. Go ahead.

MR. FRIDMAN: Excuse me, Your Honor --

THE COURT: Oh. Mr. Alfano.

MR. ALFANO: After Mr. Fridman -- this is Mr. Alfano, may I speak?

THE COURT: Yes, of course.

MR. ALFANO: May I speak after Mr. Fridman?

THE COURT: Yes, absolutely, please. Yeah, go ahead Mr. Fridman, yeah.

12:45 **MR. FRIDMAN:** Thank you, Your Honor. To answer Your Honor's question, we have always been willing to help and collaborate and try to find another way to resolve this.

That does not involve putting the Court through an injunction. We -- I did have, when I first joined the case, 12:45 conversations with the SEC and with the receiver's counsel and have been trying to work towards something that protects the interests of the Trust and moves us all forward because, at the end of the day, everyone wants the company to succeed and progress and move forward. No one wants to obstruct that.

12:45 So, you know, we are certainly open -- completely open --to discussing alternative ways to resolve this, short of an injunction.

THE COURT: Okay. Thank you to that, Mr. Alfano, yeah. Let me turn to you as well.

12:46 **MR. ALFANO:** Thank you, Your Honor. Two things: First of all, we did ask each of the individual defendants, including the Trust, if they would interview with the receiver early in this process so that we could get a better understanding of things and no one responded to that request.

12:46 In fact, we received one request from one of the

defendants, Mr. LaForte, to interview the receiver, which made no sense to us. So we tried. We're still willing to try. We would welcome the opportunity to sit down with each of these defendants in an open and transparent way and have them answer the receiver's questions and DSI's questions. I think that would be in everyone's best interest.

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Mr. Cole, previously, had suggested that that interview could only occur if it was protected under Rule of Evidence 408. We would not agree to that because we felt that that restricted the receiver's ability to deal with the information that we might receive.

So if everyone will agree that in an unprivileged, open way to sit with the receiver for an interview, we would be happy to talk to each of the defendants, Your Honor.

There's something that I -- additionally, I'd like to clarify. Mr. Futerfas, in his remarks and arguing about exhibits -- and I apologize for going back there -- stated that "Receiver's been there for three weeks, has access to the financial data." That's not the case. I mean, there are certain financial data, for instance; the Quickbooks data, we're only receiving access to today, and we do not have a complete financial picture of the company. So to suggest that is simply not accurate.

But more importantly, there was a statement made that the receiver hasn't refuted certain data, Ms. Lau's affidavit,

the data in the affidavit. But, Your Honor, I think, it's important for, perhaps, others on this call to appreciate that the receiver isn't a litigant here. It's not our responsibility to come into this proceeding and refute evidence or corroborate evidence. And I would just make that point, Your Honor.

12:47

THE COURT: And thank you for that. And I think just to put a finer point on that, you know, this has been, at least, in a the limited time that the Court's been involved in this case, a bit of a problem. Obviously, I have very different pictures painted of this ongoing business and competing declarations, as I -- as we would ordinarily really have in most preliminary injunction hearings.

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And one of the challenges the Court has had is, although, I see a way forward, it is a method that would require a lot of transparency that we don't necessarily have yet. This is very akin to what the Court felt was the need to expand the receiver; it was the same idea.

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We started, and the Court started with a much more limited view of how much leeway I wanted to grant the receiver and the SEC in investigating this case. And I felt that we were somewhat stymied with the direct type of information and answers we needed to find ourselves in a place to, perhaps, work out a resolution to this case.

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And that process, you know, I think continues. I

think we see positive developments. We see some increased access. Truth be told, some of that is only because the Court expanded the receiver order or else we might be in where we were a week ago. But I think that there's a better picture forming of the company and what's going on, but it is not a complete picture.

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And I think you can all -- we can all agree, the Court is similarly looking at a picture where there are gaps, whether we want to call it a Davis declaration gap, whether we want to call it a Lau gap by destruction or purported destruction of the forensic examination of evidence or alteration of numbers. There are gaps in the narrative of this company that make it difficult for the Court to necessarily adopt one version of events.

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And so that is why you hear me, repeatedly, saying that credibility determinations will have to be made and we'll hear from Mr. Vagnozzi later today, which I think will assist the Court greatly one way or the other. But it is challenging because we obviously have a very different picture painted by the SEC when you hear from defense counsels and you look at some of the books.

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And so I think that to Mr. Alfano's point, in a perfect world, we would have Cole, McElhone, the Trust and everyone sit down across the table from Mr. Stumphauzer, Mr. Kolaya, Mr. Alfano, with a frank discussion about what has

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been happening and what things mean because if you have players that understand that, they're not going to be able to navigate this marketplace anymore and are willing to make that concession, then I think that there would be a way forward to try to unwind the ball of wax here and figure out exactly where all the money's gone and try to keep all investors calm.

But since there hasn't been that level of communication and transparency, the investors on the call need to understand that that is why we are on this current path and it's too difficult for the Court to get a complete picture until we get there. I'm doing my best with the evidence I have, but it will still result in me having to going forward and addressing a preliminary injunction.

So I just felt that at this point, given that we're getting close to the end of the defense's rebuttal arguments. And we're going to hear from Mr. Miller and Mr. Vagnozzi and then hear from Ms. Berlin on some of the finer points -- that it was worth talking about it.

Because I always believe as cooler heads prevail, and as we see certain defendants reach agreements, that, perhaps, other defendants are looking at the SEC and thinking, maybe there's some wiggle room here for to us sit down and concessions we're willing to make and the ability to, kind of, get more transparency for the investors' benefit on a business that, although the legality of it, I understand in the

receiver's eyes, is still being somewhat questioned, as far as I can tell was making a profit pre-coronavirus.

And so there were some positives, here, understanding they took, really, advantage of a difficult market that is, in my view, somewhat unregulated in the MCA world, in making loans to small business that couldn't otherwise qualify for them. And we can talk about the veracity of those loans and underwriting and insurance.

But at a very basic level, there was an economic model here that was making some money. And I don't believe in throwing the baby out with the bath water, if there's something to be salvaged. But I am in a position now where I'm walking down the road of having to deal with an injunction, and I just thought it would be worthwhile to mention that.

And I'll look at the evidence, but it would be in everyone's best interest to have the parties be open and transparent, if possible. So, you know, that's just where I'm at. I mean, we'll continue to let this play out.

I do want to take a break for lunch. It's just a little bit before 1:00 o'clock, and have everybody come back at 2:00 o'clock to get Mr. Vagnozzi to begin his testimony through Mr. Miller's direct examination. Anything else pressing, at this point, before we take about an hour and 10 break so everyone can stretch out, eat something, et cetera?

Yes?

MS. BERLIN: Yes --

THE COURT: Go ahead, Ms. --

MS. BERLIN: Oh, I'm sorry, Mr. Small.

THE COURT: And thank you, Mr. Small, I meant to touch base with you first, I'm sorry -- because I didn't know if you felt the need to address any points for Mr. Gissas or where you're at, at this point. Go ahead.

12:52

MR. SMALL: I feel a bit like the tail of the dog here, Your Honor. And I did want to clarify -- I'm sure it was unintentional of Mr. Alfano -- said they asked each defendant to meet and they all said no. Mr. Gissas kind of is outside the realm -- I think, he was talking about Mr. Gissas has met at least two, I think, or three lengthy meetings directly with the receiver and his people are trying very hard.

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MR. ALFANO: Yeah, that's correct. That's correct, Your Honor. He's met the proposed (inaud.).

MR. SMALL: I'm a bit of the tail of the dog. I mean, generally, I am very hopeful. I mean, the reality is, as I've said in the pleadings, Mr. Gissas is a relatively simple 70-year-old fellow. He doesn't have the money to go through a long process like this.

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And I was hoping that I wouldn't need my tie today and still hoping that Ms. Berlin I can resolve things over lunch and I can -- I won't need my tie this afternoon, I can do other things, including working with my client who is working very

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hard to provide some additional material that the receiver requested.

But I just -- I guess I have to say that if Ms. Berlin and I are not able to resolve anything over lunch there, I would request the Court a very short -- it won't be more than 10 minutes, it's just a couple of very quick points that I think I need to clarify on the record after lunch.

THE COURT: Absolutely.

MR. SMALL: I'm hopeful that you won't see me after lunch, Judge.

THE COURT: Absolutely. And what I'll do is, I'll prompt you when we get back, just after 2:00 o'clock, to see if there's anything you want to add before I turn it over to Mr. Miller and Mr. Vagnozzi.

Ms. Berlin, I don't want to eat too much more time of our break, but what else do you want to add before we return.

MS. BERLIN: A few quick things. One: I wanted to ask Mr. Fridman if he can also e-mail all counsel the PowerPoint. We did the same.

THE COURT: Sure.

MS. BERLIN: So -- because I plan to use it for rebuttal. Two: If anyone want to discuss any resolution at any time please reach out to me. It's actually a very simple process, as your codefendants will tell you, if you speak with them.

I did want to point out to the Court, just to add on to what Mr. Alfano said, Your Honor. These defendants -- other than Mr. Gissas -- but Mr. Vagnozzi and the others did not file, as you know, the accountings the Court ordered, Mr. Cole didn't show up for his deposition. So there is, you know, what we're hearing today is a very different posture than they've taken throughout this case.

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So if anyone wants to talk to us at any time, it's a very simple way to resolve it. You can call me during the lunch break, everyone on this call has my cell phone. And feel free to reach out.

12:55

And finally, Your Honor, I just wanted to point out that I was not aware of the -- I mean, I wanted to make sure that all the defendants understood. The injunction the SEC is seeking is an injunction against violating the federal securities laws in the same way that we allege they violated it.

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And I am not aware of the profitability of the company being an element or relevant to this case. It seems like the Court thinks that is relevant. So we will be presenting rebuttal evidence and most likely having Ms. Davis testify live about those issues in our rebuttal. So I just wanted, you know, give everyone the heads up since it appears that it's somehow relevant to an inquiry about whether they violated the federal securities laws on misrepresenting and omitting things

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that have nothing to the profitability of the company.

But I'm getting the signal that the Court is finding that to be an element. And so we will, therefore, follow that signal and present a rebuttal case about the profitability of the company. I haven't seen any evidence about that, in this case, so far. I've heard attorneys talk about it, but I haven't seen it. But we sure can -- we can present what we know, if the Court thinks that that is necessary. I just don't -- that's going to take a while, but we can do it.

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THE COURT: I think let's -- let me try to clarify, maybe, my comments were misconstrued. What I'm trying to say -- number one, I don't think the last time I checked that the Court adds elements that are necessary under a statute. So I don't think you need to waste your time presenting something because I'm creating an obligation that the SEC does not have to meet. Don't waste the Court's time on that because what I'm going to look --

MS. BERLIN: Okay.

THE COURT: -- at is the law that's applicable. What, I think, you need to focus on in your rebuttal -- instead of us simply getting a narrative about this business because, let's be frank, the reason why we find these issues is because the SEC's opening case was one that presented a very long narrative about this business instead of, in my view, what would have been more effective, which would have been to focus on what

your injunctive relief is. Give me a PowerPoint on that, and show me evidence links to those elements that satisfies your burden.

Instead, what I received was four hours of a narrative, which I appreciate. But I also have read hundreds of pages. I know what's going on. What you need to do is satisfy your burden. Show me in rebuttal, the elements of what you're trying to show, your proving the violation of those securities laws, what that entails, and what in the record, based upon your presentation, satisfies those elements. What I don't want to have is you present anything that is not required by law.

So I would strongly recommend that so that we focus it. One of the issues is white noise. White noise from the SEC and white noise from the defense. I'm tired of hearing white noise. If I'm going to write an order that grants or denies this, I want to say, the SEC is asking for X against these defendants. Their violations are for these securities laws and we have shown by preponderance of the evidence under the SEC's burden under the case law, this piece of evidence and this piece of evidence satisfying that. That, to me, is all that needs to be shown.

I think what's happening is, we are conflating some of that burden with other concerns like; the receivership's work, the asset freezes, which are a bigger concern for many folks

that -- than, really, preliminary injunctive relief in terms of securities laws in the future. I need to make sure that we cut out those types of concerns because, really, that is for another day.

12:59 As we have stated multiple times, this is not the trial. This is to focus on the injunctive relief under the securities laws that you've alleged violations of, as to each defendant. I count about four or five different counts, whether it's under 17, 10, 5, whichever one that you're -- you

12:59 have set forth, we just want to make sure that we take away the evidence.

I have 17 binders, probably more with everybody's submissions. We've got to focus on what declarations are probative of what violations, what spreadsheets or evidence

01:00 pulled out of the company is evidence of dissipation. What evidence we have that we're going to have future violations. That's the stuff that we really need, if this thing is going to hold any water one way or the other when I write it. So it's really important that we try to narrowly tailor it.

01:00 What I don't think you need to worry about is rebutting arguments from defense counsels that do not go to the merits of any of the counts that you have alleged because I'm not going to look at that. I want all the spreadsheets, I want all the PowerPoints, but I'm going to spend my time cutting out

01:00 the fat for the next two weeks while I write this thing.

You want to help me, then you need to show me what it is you guys have proven under what securities laws. Don't get caught up in the narrative because we're spending a lot of time about the profitability and I don't disagree with the SEC, that's not even relevant. You know? Let the receiver figure out if they can go collect.

What does that have to do with violations of securities laws? Did you disclose what you had to disclose? Did you hide the ball from investors? Did you let them know about the fees? Did you do the underwriting you promised? Did you go out and get insurance? I mean, I'm giving you the bullets. All right?

So I need you to sit down over this break and in the rebuttal and respond to these concerns, especially, what I just saw from Mr. Fridman on the Trust. I want know, what can I do? Maybe, you want to bring her live, that's great. But I want to know, am I dealing with commingled funds? Am I dealing with proceeds or am I dealing with investor money that they stashed in a slush fund in the LME Trust and that money is to the investors; the hundreds that are listed in this call. Are they sitting watching that money get used to buy property and for personal expenses? That's a problem with me.

Or, as Ms. Schein just said, is that money coming in because this has been a profitable business? So in a way, yes, some profitability does have relevancy for what you're telling

me is, essentially, investor money sitting and being dissipated in that LME Trust fund. So well, you can't just dissect one or the other, but I don't want a presentation of all of the other profitability stuff. And, like we just said a minute ago with Mr. Futerfas, on an affidavit that tells me about what's happening in the Pennsylvania state courts.

What I do want to know is, how successful has he been about following the money, and can we put a finger on that and you satisfy your burden before I keep freezing everybody's assets. So these are, I guess, the Court's thoughts and marching orders so you can tailor your rebuttal --

MS. BERLIN: Thank you.

THE COURT: -- accordingly. Okay?

MS. BERLIN: I appreciate that. Thank you so much.

THE COURT: You're welcome.

MS. BERLIN: I want to make sure not get wrapped up in some of the red herring issues.

THE COURT: Yeah. And I'm not going to --

MS. BERLIN: Thank you, Your Honor.

THE COURT: -- do that either. So with that being --

MS. BERLIN: Thank you.

THE COURT: -- said, unless anybody else has any pressing needs, I do want to give us all a chance to eat something, meet and confer with your respective clients, and just a little bit after 2:00, I'll resume the call. Anybody

else need to be heard on anything pressing before we break?

MS. BERLIN: Your Honor, I wonder if we could have a little more time because I --

THE COURT: Yeah.

01:02 **MS. BERLIN:** -- I'm going to make revisions and I also want to talk to Mr. Small, and I might even reach out to some other counsel just to see if things can be resolved before that break ends.

THE COURT: I'll give you an extra 30 minutes. Let's

01:02 wait. Let's do it all --

MS. BERLIN: Thank you.

THE COURT: -- until 2:30 so everybody has some time. I'd rather just -- rather see streamlining of issues and it will save us some time, especially, so you can work with,

01:03 maybe, Mr. Small a little bit more before we get Mr. Vagnozzi testifying. Okay?

MS. BERLIN: Okay, great. Thank you.

THE COURT: All right, everybody. We'll see you at 2:30. Have a nice lunch break.

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(Thereupon, a luncheon recess was taken.)

* * *

A F T E R N O O N S E S S I O N

THE COURT: Okay. If we could call everyone back to order. Thank you all, again, for your patience and for allowing the Court to buy some time to the SEC, as well as to
03:02 counsel for Mr. Gissas, Mr. Small, so they could work out some final details.

So we'll go back on the record in Case Number 20-81205. I'll turn to you, Ms. Berlin. Do we have an update as to the ongoing discussions with Mr. Small on behalf
03:02 Mr. Gissas?

MS. BERLIN: Yes, we do, Your Honor. Mr. Small, he e-mailed me that he will be filing the consent and proposed orders shortly. I think he's doing it right now, you should be seeing those soon.

03:03 **THE COURT:** Okay. Very good. So, Mr. Small, I take it then -- I have allotted another -- a little window of time, but I want to make sure with you, are you comfortable then taking a pass on that so that I can go onto Mr. Miller?

MR. SMALL: Yes, Your Honor. The tail of the dog can
03:03 go wag somewhere else.

THE COURT: All right.

MR. SMALL: Just to tell you that -- just, we have reached an agreement. We had a call during lunch with the receiver and the SEC. We're all working together. The
03:03 agreement is, essentially, that an amount that's been

determined of funds that are still in the account that were frozen that are Par related-interest will go to a separate account set up by the receiver and all the other of Mr. Gissas's accounts will be unfrozen. So that's what we had proposed and we're delighted that everybody is in agreement.

THE COURT: Very good. Thank you for that. And again, that you -- way if you have the tie back on, you can take it off. Because you're -- we're all done. Of course, you're more than welcome to continue to stay on and listen in as we move the case along. But as soon as you guys submit the necessary documentation, the Court will review it, as I did with Furman and Abbonizio last night, turn it around, and make sure that we get all this stuff done so we can unfreeze what we need to unfreeze. Okay?

MR. SMALL: Thank you, Your Honor. I'll stay on until we file and then I'll go off.

THE COURT: Very good, thank you. All right, so with that being said, that means that we are on deck for the last portion of the defense's case which would be to call Mr. Vagnozzi. That's going to be for Mr. Miller. And do some examination.

Then after that, I expect to hear some rebuttal points from Ms. Berlin before we conclude. So I will turn it over to Mr. Miller. I want to see if there's anything I need to be aware of about ever we go ahead and call Mr. Vagnozzi.

MR. MILLER: Yes, there is, Your Honor. And also could I ask your CRD to make sure to give me the share-screen privileges to make sure that --

THE COURT: Yes. Absolutely. I'll make sure she's on the -- she's our cohost here so I'll make sure she gives you the share screen as well.

MR. MILLER: All right. I'll give it a try here. It should work.

THE COURT: Let me know and I -- there we are. Okay.

MR. MILLER: All right. Okay. I will get out of that for a minute and come back into it.

THE COURT: Okay.

MR. MILLER: I think that worked to get out of it; right?

THE COURT: Yep.

MR. SMALL: Okay. Excellent. So thank you, Your Honor. I do have some good news for you. It's probably not the kind of news that you might completely want to hear, but we really have taken to heart what Your Honor said about trying to streamline this presentation. We've been going at this for a long time over Tuesday and now this afternoon. And it's been very instructive and very helpful, and I think the issues that Your Honor is interested in has become more clear and we really want to focus on what are the disclosure issues that are the subject of the case.

So I am prepared to streamline this and, I believe, I can get this all done in an hour or less. I hope that's the case. I've been proven wrong on these things before, like many lawyers, but I will certainly give that my best shot. And the way I want to steam like this -- streamline this, rather, Your Honor, is that, as you know Mr. Vagnozzi already testified.

He's the only one of these defendants who was willing to and did sit for sworn testimony. I think that is noteworthy. He did do that. He was deposed for about six or seven hours and we have the transcript of that. Ms. Berlin cited to some of those things in her presentation, I have some of my presentation, and, I think, we don't need to have him come and re-testify when he's already testified.

Instead, what I want to do, if it's all right with Your Honor, is streamline this and present the argument we've got with respect to the documents, the exhibits, and his testimony that he's already given. I think that will make things move a lot more smoothly for everybody.

THE COURT: Absolutely. I think that's a great idea. We can use his deposition, transcript, and testimony. We don't have to deal with, you know, going through much more of a live examination and then, that way you can weave it in with some of your argument and that's perfect. Let's go ahead and do it that way. Absolutely.

MR. SMALL: Excellent. That's what I tried to do to

try to streamline this. I will, at the beginning, want to move in Exhibits A through J. I understand Ms. Berlin did not have any objection.

THE COURT: That was my understanding too. Ms. Berlin; is that correct?

MS. BERLIN: That is correct.

THE COURT: All right. We'll be moving all those in at this time. So those are all in.

MR. SMALL: Excellent. So that way, officially, they're in evidence. So let me begin, Your Honor, by saying it's been a very active three weeks, as everybody on this call knows. And during that time period, I've had the real pleasure to get to know Dean Vagnozzi and learn a lot more about him and spend a lot of time with him.

It's probably not exactly the way he would have preferred to meet me, but I have had that real pleasure. And he's a man whose life really has been turned upsidedown over these last couple weeks, as a result of the SEC and the receiver's actions, both in terms of his family and his business that he is had locked out of, his name and reputation. So it's been a very stressful time for him.

And I don't say that to diminish, for one second, the fact that he recognizes and I recognize that there's a lot of other people's lives who've been turned upsidedown in this, over the last three weeks too. And we've got 271 people on

this call -- which, if I could, just for a moment, Your Honor -- really moves me for having been a lawyer practicing for many years both in Washington D.C. and here in Miami.

What many of the people on this Zoom call watching probably don't understand, is the way these hearings usually work. It's not like the movies or television where we have a packed gallery of people watching. It's usually just the judge and the lawyers all by ourselves in a lonely courtroom. So to me, it's really a moving testament to the American system, the independent judiciary we have and the interest in democracy that people have, that all of these people have been willing to spend their time to attend this hearing.

And I know that a lot of them, their lives have been turned upside down as well. We've got employees at two companies that were thriving businesses who worked really hard, spent a lot of sleepless nights. Thought they'd overcome the challenges of the pandemic only now to find themselves in the unemployment line. Hopefully, many of them will be able to get back to work, but for the moment, they're facing the problems that so many millions of Americans are facing right now.

And we've got investors who are not getting the payments that they are expecting from these (inaud.) even though they were getting them prior to the receivership. And Mr. Vagnozzi's got his other businesses, that Your Honor's aware of, that have nothing to do with Par and there are people

there who are expecting payments that are sitting in the bank or checks sitting in a drawer, with respect to life insurance, premiums, real estate investments, and other things, that he would really like to get to them and is delayed as a result of this process.

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Now, we're working very actively with the receiver to try to get that done. And I think those discussions are going well and we want to continue to do that. But it's turned a lot of people upsidedown. So I don't want to lose sight of that. And let me try to get back into the shared screen. I forgot to do that. Okay. Can you see it, Your Honor?

03:10

THE COURT: Yep. Yep. Yep, I got it. There we are. We're good.

MR. MILLER: Excellent. So anyway, as I mentioned, I'm Brian Miller and also Alejandro Paz from Akerman. We represent Mr. Vagnozzi. And, I think, we're going to talk more about this. But this is a disclosure case is what this is. It never should have been filed on the expedited basis that it has been as Dean Vagnozzi. We'll talk a lot more about this, as we go through the evidence and the injunction standard.

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But the way these cases normally operate -- and, Your Honor, I started out my career at the SEC in Washington, D.C., that's where I started working -- you have an investigation that is brought -- people at the SEC gathers documents, they take testimony from people.

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There's a procedure called a Wells Submission which was established by a commission -- a committee of the SEC created 20 or 30 years ago, where they said, before we bring a case against you, we want to give you the due process and the opportunity to come in and explain why we shouldn't do that. So that's the Wells Submission Process. That's the way these kind of cases normally proceed and that's the way they should have proceeded here.

I fully recognize there are exceptions to that, Your Honor. There are cases where there is a complete scam going on. You think about a Madoff situation. Scott Rothstein that we had down here where there's fictitious assets fabricated, forged documents. Of course, in those circumstances that normal process can be overlooked. But that's not what we have here. We don't have that kind of situation.

We have a business that was ongoing and we have quibbles with the disclosures that were made before people purchased these promissory notes. And it's also important, Your Honor, to keep in mind the distinction between the parties we have here. Par was running their business. Dean Vagnozzi was running his business. He's not a part of Par. He's never been employed there, he doesn't have any ownership stake in it. He doesn't have any firsthand knowledge of its business. You will hear more about that. Everything he knows, he learned from Par.

Mr. Vagnozzi is a very experienced insurance professional. That's his background. We'll talk a little bit more about his background. He has these other lines of business as well. He tried to do everything right by using
03:12 private placement memos created by his longtime securities counsel, to deal with the sophisticated investors who are buying these products, to try to do everything right.

He also tried and did do everything right in terms of segregating the monies that come in from people. They were put
03:13 into separate accounts for each separate legal entity, and he used them exactly as they were represented to be used. There's no deceit about that.

The other thing that's very interesting here and part of the SEC case, is that Mr. Vagnozzi has already been
03:13 investigated by the SEC. He was investigated extensively by them and we'll share with you some of those documents that the SEC relies on in this case -- while they settled with him two weeks before filing this case.

On July 14th of 2020, he settled a longstanding
03:13 investigation with the New York office of the SEC, thought he was done with these issues. And then less than two weeks later, he's (inaud.) in this case. We already talked a little bit about the coronavirus and the pandemic. We all know that caused the problem in the entire economy and, unfortunately,
03:13 Par was no exception to it. And I have said this several

times, Your Honor, we don't know if there was anything done wrong with Par. And if there was, Mr. Vagnozzi and his funds were one of the largest victim here.

So let's speak for a minute about some of Mr. Vagnozzi's background. And this is in the book, which is Exhibit A, which he wrote, called A Better Financial Plan. I'm not going to belabor this point, but he started out in the computer and consulting business. He was -- in the outline that's in his book -- he invested in real estate on the side, like a lot of people did, some single-family homes trying to flip them, when he realized that, you know, that's fine. And you can make some extra money on that. But to really try to make more money and more profits for yourself and better investments, you need to pool that money with other people.

And that's the essence of what we're talking about here, is private people getting together, clients he has, people getting together to pool their money to get an opportunity to something that they wouldn't otherwise have an opportunity to get. He's saying he thought the same methodology to the agent, and the agent funds that we're going to hear about in a few minutes.

The private placement memos are in evidence in B through E, I think. Yes. I think it's B through E. And each of these have these disclosure in them. It's clear there were disclosures and risk factors all over the place. So I want to

highlight a couple of things here.

First of all, Mr. Vagnozzi treated these as securities, Judge. So just to be clear, our position, we're not taking the position that these are not securities because he got legal advice on this and he treated them and offered them as security. That's clear as to Mr. Vagnozzi.

03:15

And he disclosed that they were a high -- involved a high degree of risk. That only may be purchased by people of substantial means who have no need for liquidity and who could afford the total loss of their investment. He also talked about the risk of the Merchant Cash business. Unfortunately, this one was prescient. Worsening economic condition may result in decreased demand for Merchant Cash advance financing and cause default rates to increase. Unfortunately, that's what happened with respect to the coronavirus.

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We have here more of the same disclosures, which were contained in all of the private placement memos. More details of the same kind of character advising people that these are high-risk investments that they should look at and do their own diligence first before they invest in them, which as I'll explain in a few minutes, most people did.

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And that's exactly what it says here. Investors are encouraged to consult with their own attorney, business-tax advisors, anyone they want regarding the risks and merits of the investment. And Mr. Vagnozzi did encourage people to that.

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This was not a high-risk pressure sales pitch, where someone comes into the office and they're tried to force to sign on the dotted line. Mr. Vagnozzi encouraged people to go down, and they did go down to Par to find out more about the business directly from Par.

03:17

The private placement memos also disclosed the compensation that we paid. We talked about this in our brief. It explained that he, the manager and sole member, would retain the difference between the amount paid to the ABFP Fund by Par, and the amounts that were then paid on to the purchasers and the promissory notes.

03:17

And to be clear, it's not as the SEC alleged where he's getting more than they're getting or the vast majority of this. The notes offered anywhere between 8, 10 up to 15 percent interest and now, as you know, the notes offer 4 percent interest, and he gets paid a total of 5. So right now, if he were getting paid, this company is only getting that 1 percent spread and that's disclosed in the documents. This is a disclosure case and these things are disclosed.

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In addition, the investors had to fill out a questionnaire attesting to how much they have in terms of their assets, their net worth, their ability to invest in this and, potentially, if things go wrong, lose the investment. And investors all signed this document.

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The Fund 3, as an example here, was limited to what we

03:18

call only accredited investors under regulation D. And, I think, Your Honor is a little bit familiar with that. But I think it's important here, Your Honor, this relates to the method of soliciting, for lack of a better term; trying to find people to purchase these investments.

03:18

If you're doing an offering under Rule 506(b), which is part of Regulation D that's referred to here, what the SEC says is, you can go out and you could actually advertise, you can do what you want to try to find people interested in buying this, when you limited it to these accredited investors. The SEC said a few years ago, we need to expand the ability for small businesses and get -- for businesses to get access to capital in this country, and that's one of the ways they did it.

03:19

03:19

Okay. Let's talk for a minute about the ways that the funds operated. As mentioned, there were separate legal entities formed by his counsel. They were held in segregated bank accounts, unlike -- it appears to me -- maybe, some of the other people put money all the money into one pot.

03:19

Mr. Vagnozzi created separate bank accounts for every entity so that there was no commingling of funds. And that was discussed in his deposition at Page 46, Lines 22 to 24, as well as Page 43, Lines 16 to 21. A hundred percent of the money that people committed to buy a note from the ABFP Fund was passed onto Par in exchange for a promissory note from them.

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The only fee was that $100 processing fee at the beginning. So all the money came in and then all the money went to Par. And that is the money came back from Par the interest rates -- the interest payments came in and Mr. Vagnozzi's funds paid the contractually agreed interest rate to the note holders, and pursuant to that disclosure we looked at a minute ago, kept the balance as disclosed in the PPM.

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They never missed a payment of interest or principal until the March 2020 pandemic. I think, there's no dispute that that Par had a great track record and that's going to be critical when we talk about the scienter and the injunction issues later on, Your Honor. We have no reason to suspect that there could be any problems here, given the tremendous track record and success that Par had.

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There was a restructuring of the promissory notes after the pandemic. There's documents in the record where Mr. Vagnozzi had multiple conversations with the note holders about whether they wanted to accept this exchange offer or not. No one was obligated to do it. The majority of people did it but not everyone did.

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And that was all done with additional disclosure, which are how our other exhibits, which I think if I get them correct here, it was Exhibits G through J are the Exchange Offer documents, which are in evidence. As I mentioned now,

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they pay 4 percent interest after the pandemic, and ABFP received 5 percent. So that's what the financial situation is now.

I want to go back, Your Honor, to something I started saying at the beginning about the way the SEC conducted this case. It's undisputed that Mr. Vagnozzi was subject to an SEC investigation by the New York office, not the Miami office (inaud.), but the New York office that he settled on July 14th of this year, without admitting or denying the allegations.

And even though the terms of the settlement -- what the SEC ultimately agreed with him on where they had an issue, had nothing to do with Par, it's clear as day that they investigated the Par promissory notes. They investigated Mr. Vagnozzi with respect to it.

32 out of the roughly 215 exhibits that the SEC has offered in evidence in this case, Your Honor, 32 of them were produced by Mr. Vagnozzi to the SEC in that New York investigation. We have listed them here. He also gave 637 pages of testimony in that case. He produced 90,000 pages of document to them. That's the way things are supposed to be done.

Instead, what's happened, in this case, is apparently all of that was disregarded and there was a rush to judgment to filed this case without really looking at the whole record that are already been produced and developed in the other SEC matter

by the New York office. So it's unfortunate that the SEC is retreading old ground, but that is what we have here.

And this is just an example of this, Your Honor. This is Exhibit 181 and I highlight this because, I believe, Ms. Berlin mentioned this document the other day, which is an e-mail where Mr. Vagnozzi was discussing one of the funds that would invest a portion of its money into Par promissory note, and the majority of it into life insurance policies.

And Ms. Berlin insinuated that this was somehow hidden and it was subterfuge and Mr. Vagnozzi wasn't being forthcoming with her, with the receiver, with the Court about this. Well, you can see, Your Honor, this document was produced by Mr. Vagnozzi to the SEC in this letter pursuant to their earlier subpoena in the New York action.

So it's just one example of the unfortunate hyperbola that we see here, the narrative. The white noise that Your Honor mentioned. It's unfortunate but we do to deal with it because it's in the case. This isn't the way that this needed to be done. Instead, we should have just focused on what the allegations are.

So, let me first talk, Your Honor, about the SEC's allegations around the agent funds. Your Honor's familiar with this, that the SEC alleges that Mr. Vagnozzi somehow conspired with Par to come up with the scheme to bring in agents and create agent funds in response to a subpoena from the State of

Pennsylvania.

Well, Your Honor, first I'm going to show you it's a red herring. Second, I'm going to show you it's not true. These agents, as I mentioned, are all insurance investment professionals. They had their own clients. They're, generally, what we might call sort of the one-man band. That's what a lot of insurance agents in this country are where they have a small office, a small staff.

They don't have the back office support and the expertise like Mr. Vagnozzi's developed, in order to make sure they're creating separate legal entities, doing it right with lawyers, creating private placement memos, keeping segregated bank accounts, keeping all of the accounting clear so that there is no question about commingling money.

These other agents don't really have the capacity to do that, whereas Mr. Vagnozzi does. So that's why he has created and spoken to people consistent with his thought in Exhibit A about this idea of doing your own funds with your own clients. There's nothing wrong with that, Your Honor. What SEC rule does that violate?

The SEC has pointed to nothing to say that there's something inherently wrong with creating the structure of helping other agents work with their own client. And there really isn't anything wrong about it. This exhibit we have here is just an example of one of these agreements. They were

formal agreements between Mr. Vagnozzi and these other agents to do this back-office and advice work for them. Exhibit 42 is just one example of those.

In addition, second bullet point, Your Honor, I think 03:26 is important because you'll see in the documents in evidence, that these weren't just people selling Par promissory notes. Mr. Vagnozzi worked with these people to set up their own structures to do other things like he was doing as well as potentially to participate in the other things he was doing 03:27 like real estate, like life insurance policy investments, like litigation funding and so forth. Things that have nothing to it with Par Funding, and that's all in evidence. We can see that this is not some scheme to create a bunch of agent funds. Just to go out and raise money for Par Funding.

I don't want to spend too much time on this, but we 03:27 have about six agent affidavits here and you can see they're the same self-serving rather boilerplate affidavits. The SEC, obviously, drafted these for people. I think those ought to be disregarded. In that kind of circumstance, it's not helpful to 03:27 put in boilerplate affidavits that, obviously, were not drafted these people.

Now, I said this was a red herring, which it is. And I also said that it's contradicted by the factual record; the SEC's theory. And it is. So if we could review, Your Honor, 03:28 this is the SEC's alleged timeline with respect to the agent

funds, that Ms. Berlin spent a lot of time the other day talking about and showing documents.

And the SEC's theory is, January 3, up to then, they're using finders to sell promissory notes. Mr. Vagnozzi was one of them, there's no question about that. And then, suddenly on January 4th, Par receives the Pennsylvania subpoena. The SEC theorizes that even though it was never addressed to Mr. Vagnozzi, somehow he got sent a notice about them -- (inaud.) rather, there's zero evidence to show that.

03:28 And then on January 11th, he suddenly e-mails agents about the new agent fund model. So, I think, this whole thing is a red herring and white noise. But it's not true. It's contradicted by the SEC's own evidence, and let me show you that, Your Honor.

03:29 First of all, here's the Pennsylvania State Subpoena, Exhibit 77. I just blacked out the person's name for confidentiality purposes. This is not one of the sealed exhibits to be clear, Your Honor. And it shows that this subpoena was issued to Complete Business Solutions Group, Inc., Par Funding, not to Mr. Vagnozzi.

And we see that right here. This is from Exhibit 77. Subpoena, who's it addressed to? It's addressed to Complete Business Solutions Group not to Mr. Vagnozzi. There's zero evidence in the record that he received this at that point in time. Obviously, he did find out about it later, to be clear.

But the theory is, he knew about it right away and came up with this new plan and new scheme. And what was this supposed scheme? To use agent funds.

Well, let's look at this, Your Honor. This is November 5th of 2017. And I really would urge the Court later to take a full look at this Exhibit 118. It's an e-mail in November of 2017, several month before where he says, "We're going to give agents two options, one of them, do their own MCA fund." Merchant Cash Advance Fund in November of 2017.

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Again, in December of 2017, he says to various professionals he's working with and agents, "When we met in King of Prussia in November, I told you I'd be rolling out my funds in January and there'd be more clarity." That's December before the State of Pennsylvania's subpoena. So what's the real timeline? We can see the corrected timeline here, Your Honor.

In November, he's talking about doing this with the agents. He was starting working on the private placement memos and setting up these agents funds. In December, he e-mails them again. On January 4th, Par first receives the subpoena. It's a red herring, but the theory is contradicted by the SEC's own evidence.

Let me switch gears, Your Honor, to -- oh, I'm sorry. Before I switch gears, I just want to say. I thought Mr. Fridman made very good points about Section 15 and the

Janus Case in his presentation. I don't want to repeat those, but I adopt what he said with respect to that -- with respect to the agents.

So then let's focus, Judge, on the meat of the case. What we should have been doing all along. This shows that this should just be treated as an ordinary case, where the SEC -- I respect that they have a different view of the facts, and they've made their allegations, they're free to do that. They should have filed this as a normal lawsuit. We go through discovery and eventually we get to trial, not as an ex parte TRO asset freeze and receivership, because these are just disclosure claims which really don't go to misappropriation of money, dissipation of assets. The SEC didn't have any of that.

So I want to start and address these specific disclosure allegations the SEC's made against Mr. Vagnozzi. And let's start, Your Honor, with the ones, I think, we can dispose of out of hand, easily. They raised a number of things, like Lisa McElhone had some order entered against her in the State of Oregon, with respect to mortgage practices. There's no evidence that Mr. Vagnozzi knew about that. I don't even think the SEC suggested that.

The SEC claims that people weren't told about this Fleetwood Lawsuit, this RICO lawsuit against the John Does for the SEC. And another example of hyperbola tries to make this out like this is, actually, a lawsuit against all the investors

on the phone here today.

Mr. Vagnozzi was asked about it in his deposition and he didn't -- he wasn't familiar with it. He even asked Ms. Berlin, "What's RICO mean? I don't even know what that means." There's no evidence that he knew about this lawsuit. So he can't disclose something that the SEC can't even show that he knows about.

The same with the 2000 Merchant lawsuits. The adverse opinion audit that we spent a lot of time on the other day, there's no indication the SEC hasn't shown that he knew about that or was involved in it or had discussions about which audit opinion should be the right one.

The 10 percent profit sharing that the SEC alleges the Par defendants were doing, same situation. They're real estate purchases. There's no evidence that the SEC has presented to show that he knew any of that stuff. So he, obviously, can't disclose something that he (inaud.) knew.

The SEC does make an allegation -- it's not clear to me that it's directed to him, but if you make an allegation that, after the exchange offering, people were supposedly offering a 15 percent interest rate to some people off on the side, whereas the public investors -- not the public, but the majority of people were getting the 4 percent post-exchange offer, there's zero evidence, I think, A, that that even happened. I don't know if it did, but B, there's zero evidence

that Mr. Vagnozzi knew about that or got it because he didn't get 15 percent. He got 5 percent after the exchange offer.

So that's unsupported as to him as well. And that's a lot of the SEC's disclosure claims, which don't really have anything to do with them. Some of them, of course, they do alleged against him. So we need to talk about those.

03:34

Let's, begin, Your Honor, with the default rate allegations and the underwriting practices, due diligence-type disclosure allegations. I kind of lumped those together, I think they're of a similar nature. I think, Your Honor, sort of looks at it the same way.

03:34

So with respect to the default rate, the allegation is that it was disclosed that Par had a track record of a 1 to 2 percent default rate. Mr. Vagnozzi relied on that information that was provided him by Par. Remember, he didn't work there. He doesn't own Par. He doesn't know what the actual situation is.

03:35

And he also relied -- this is important about scienter, negligence as well under the Section 17 claims, and the need for injunction. He relied on the consistent track record -- he had been working with Par since 2016 in some capacity on a professional basis -- that they always made their principal and interest payments. That he saw it; he went down to their offices, he saw there were dozens of employees working there, that this was a thriving business, that they were making

03:35

money, they were paying their obligations when they were due.

So in light of all those facts, it's a really high bar for the SEC to try to establish that Mr. Vagnozzi knowingly or negligently passed along this 1 to 2 percent default rate.

03:36 And by the way, Your Honor, I don't dispute that he and that his people said sometimes, but a lot of the time and a lot of the documents in the record, Your Honor, are Par employees meeting with Mr. Vagnozzi and his people, and them talking about Par's business, them talking about the 1 to 2 percent default rate, them talking about the underwriting practices.

So yes, Mr. Vagnozzi's there, and as I mentioned, he welcomed and encouraged people to try to get information straight from Par because they know way more about it than he does, and they did say this consistently. So there's no basis to suggest that Mr. Vagnozzi knew that there was anything wrong with a 1 to 2 percent default rate disclosure.

THE COURT: Can I ask you, Mr. Miller, at that point like I'm -- I know that there's -- you're right, in that some of the disclosures and some of the pieces of evidence don't, necessarily, involve Mr. Vagnozzi. So you'll get something that really is Abbonizio's statement or you'll get a Furman one, and so you're right, we've got to almost pluck out of the matrix of evidence, from the SEC what actually involved them.

One of the ones that, I think, is more directly

connected to him, was supposedly the one that had an individual posing as a potential investor, right? There was one in, I think in March 2020, where Mr. Vagnozzi is describing the investment and, I think, it stood out because then he calls it, 03:37 quote-unquote, like the crack cocaine of investments, you get a check every month. And then he ensures investors that they're thoroughly vetting everything.

And, I guess, part of the argument there in that particular exchange, that he doesn't disclose there had been 03:37 two regulatory actions at that point, nor does he necessarily disclose the true -- I don't know if I want to call it the true nature of the default rate, but that it is somewhat a sales pitch that doesn't really tout exactly what's happening.

What -- like, give me an example. Like that one 03:38 exchange there. Let's take that as an example. That's one of the few that, I think, is supposedly only Vagnozzi with a potential undercover or an investor. What do I do with that? Is your view, Judge, that's a lot of, you know, that's a lot of fluff; there's nothing there. He's just -- he's either 03:38 posturing or he's just being a salesman or it's puffery or -- but there's no real mis-rep, there's no real requirement there that he needs to give them a breakdown of every regulatory action.

Tell me, like in that, kind of, example that is, you 03:38 know, they're littered throughout the complaint. But what do I

do with something like that.

MR. MILLER: I think Your Honor is right. That is puffery, that's what that is. That's classic kind of puffery. That -- I'm, obviously, familiar with the document Your Honor is referring to. There was a meeting with someone where Mr. Vagnozzi met the person. They exchanged pleasantries for a while, you know, compared notes on where their kids were going to college, that sort of thing. There's then a brief discussion by him about some of the products that they could, potentially, discuss.

I noted in our brief, in that document, he does affirmatively disclose in Pennsylvania action against him and then there is that comment about the crack cocaine. I can tell you exactly what that means, it's perhaps not the greatest choice of words. But the point is that it -- what his point was, it's consistent. And once you get in this and you're consistently getting your interest paid with the track record that Par has --

THE COURT: Yeah. You're hooked. You're hooked. Yeah, you get -- you're hooked. I -- yeah. I get the expression, that was fine. Of course, yeah, I get it.

MR. MILLER: So and you really have to -- I think Your Honor's right, you have to parse each person's statements individually. And he's being sued individually, here. I represent him individually. You can't then look at what

happens after he walks out of the room and what the other person working at ABFP said. I don't think that person said anything improper either. Of course, Your Honor --

THE COURT: I'm sorry. Whoever -- is someone -- someone is not on mute, please mute.

MR. MILLER: Looks like it's Tom someone.

All right. I think he went muted. Okay. Should be good. All right, go ahead.

MR. MILLER: So in other words, Your Honor is right. In view, under the Janus Case and other cases, you do have to look at what each individual person is saying and what is Mr. Vagnozzi saying in that statement. And to the extent he's talking about the 1 to 2 percent default rate, they have to establish that he knew or had reason to know or was severely reckless in not knowing that that was false.

And I have some of the other documents, which we can get into in a second that form the basis for that. The basis is, what he learned at Par and you also saw, Your Honor, our brief. And he testified about this to the SEC in the New York case that he spent $18,000 he said, in that testimony doing due diligence before he started doing work with Par.

So it's not like Mr. Vagnozzi just went at this blindly and parrots whatever he's told. He sees a track record, he sees a business that is successful. He sees documents -- and we'll look at one in a minute this showed that

1 to 2 percent default rate. And under those facts, those disclosures are not a false. And if he is engaged in puffery, in other discussions, that's not a violation of the securities laws. That's not the specific mis -- omission or misrepresentation that the SEC is alleging here.

03:41

Your Honor was right, when you said you really need to focus down on, okay, what is misrepresentation? What is the exact omission? And why does the SEC think that was material and made with scienter? So these other things sort of puffery statements -- puffery by definition is not material because it's puffery. I don't know if that answers Your Honor's question.

03:42

THE COURT: Yeah. I was curious about that example that's perfect. Yeah, go ahead, please. I don't want to interrupt. Go ahead.

03:42

MR. MILLER: No problem. Anytime you have a question, please. So this document was in -- oh, I forgot to put which exhibit this was. I think it's 199 that the SEC used, where it talks about the 1 to 2 percent default rate. And I think this is an interesting document as well. This is something that Ms. Westhead used in her affidavit. And you'll see here, Your Honor, this also highlights that -- he's not just selling Par promissory notes. There's mentions of the real estate litigation funding, et cetera. I thought that was (inaud.).

03:42

So anyway, Your Honor, here is the document I wanted

to show you. This is in Exhibit 206. And this is really hard it see. But Your Honor will look at it after the hearing and you will see that's the column I highlighted with the percentages that are in the 1 to 2 percent range.

03:43 I mean, there are other examples of these kind of documents in the evidence that's before Your Honor, where they're not just pulling this 1 to 2 percent number; he's not just pulling it out of the air. This is based on documents that he's seeing being given by Par. So the SEC can't

03:43 establish scienter with respect to this, when you see documents like this.

And the other thing that's really interesting, Your Honor, is what is the misrepresentation? I thought this was a very interesting question the other day. (Inaud.) the SEC

03:43 well, if it's not 1 to 2 percent, what is it? The SEC cannot tell us. How can you possibly say that this is a material misrepresentation to disclose an historical default rate of 1 to 2 percent, when you can't prove the falsity of the statement? If you can't tell us what it is, then you can't

03:44 prove that it's false.

So the SEC can't meet its burden on this, the high burden that it faces on an injunction motion. This is related to it as well the underwriting practices. I think, that kind of ties together with the default rate. We already talked

03:44 about a lot of this so I'm not going to dwell on it. He did

the diligence. He relied on the information provided by Par and their track record.

He also, as I mentioned, encouraged to and did have clients speak directly with Par. It wasn't a high-pressure sales pitch. Take your time. Go down to the Center City, as they call it in Philadelphia.

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And I apologize to all these Philadelphians watching on Zoom. We're not -- we're in Miami, so we're not as familiar with the city.

03:45

But he encouraged them to go down to the Center City and meet with Par and find out more about the business themselves, kick the tires. These are the two affidavits that the SEC produced, in this case, where perspective note purchasers admitted that they went down to the offices to get more information.

03:45

Here's another example, 208. And this person said that he made the decision to buy the promissory notes, he says based on Vagnozzi's representation. And what I saw in my site visit (inaud.) Philadelphia offices.

03:45

Now Your Honor, let me switch to the next disclosure topic, which is the allegations that Mr. Vagnozzi didn't disclose, background issues with respect to Par Funding and its people. And we outlined this in our brief.

I think, it's undisputed that at the beginning,

03:46

Mr. Vagnozzi didn't know about Mr. LaForte's background. At

some point, yes, he did learn about it, and I think, it's also undisputed based on, I think, Exhibit 199 that they sometimes discussed it with people, but they didn't discuss it in every circumstance. We don't hide from that fact. We recognize that those, sort of, are part of the facts here.

But why wasn't it discussed? Because it's really not material. It's sensational, don't get me wrong to talk about the fact that this man that has a criminal background, and it's splashed all over the SEC case and splashed all over the news. But when you're talking about an investment in promissory notes of a 60-, 70-person business, that's a functioning business, lending to thousands of small businesses, who are paying them back, with a track record of making all the interest payments, making all the principal payments.

Mr. Vagnozzi wasn't going in business with Joe LaForte. He was entering into a business relationship with Par Funding. That's an important distinction and we really shouldn't conflate those things. So you have to look at the business record and I think, Your Honor, so far, I haven't seen anything to suggest that Par Funding was doing anything illegal that impaired the ability to pay back these promissory notes.

So it really is kind of irrelevant what this man's background was when you just asked. Everybody, of course, deserves a second chance in life and that's why we cited to Regulation S-K. The disclosure rule adopted by the SEC itself

for public companies and registered offerings, which says you don't have to disclose someone's background from long ago. Do you have time frames in that context? And it's five years for a promoter, which that seems to be what the SEC claims
03:48 Mr. LaForte was or he's a director and executive officer; ten years.

The SEC pooh-poohed this -- they're pooh-poohing their own regulation to say, oh, well that's -- we understand that's our regulation and it's good enough for General Motors that
03:48 they don't have to disclose something from their CPO (inaud.), but it's not good enough for this little private placement. That doesn't make any sense, Your Honor.

And the only argument the SEC raises to that, is this notion it's Rule 12(b)(20) the (inaud.) -- the concept, rather,
03:48 that once you speak on the subject, you have to be complete on the subject. Well, they're taking it way too far. Just because you talk about someone's business, is not speaking on the subject of that person's personal integrity and criminal background or lack there of.

03:49 The courts interpret this concept narrowly. It has to do with the fee (inaud.) you're disclosing. So if they started talking about, "Well Mr. LaForte has an impeccable record, never been in jail." I agree with you, then that concept would apply. But if they're just saying, "This business has a great
03:49 track record, really profitable business, well run, they're

making money, they're paying their people back." That's not sufficiently tied in a nexus to disclosure about his criminal background. So that's why it's just not material.

With respect to the other regulatory actions against Par, those also were learned about at some point in time by Mr. Vagnozzi. He, obviously, couldn't know about them before they happened. And then he did learn about them, at some point in time. The testimony here, I think, is the same that it was, in fact, recognized and discussed when people brought it up. Mr. Vagnozzi didn't hide from it, but he didn't tell a hundred percent of people this. We recognize that.

But those issues related to other issues. Whether the finders had to register as a broker before getting some type of finder's fee. That's what those other regulatory actions in Pennsylvania and New Jersey relate to. They don't relate to whether the promissory note disclosures are accurate, whether the promissory note holders are getting paid back. So it's just not relevant to that and it wasn't material and that's why he didn't get into those details. It's not a sufficient basis for an injunction, Your Honor.

Now, let's talk about the regulatory action against ABFP and against Mr. Vagnozzi, himself. That, I think, falls into a different category. And here is his testimony at Page 268, that he said, "Whenever it came up, and it came up all the time because it was in the front page of the business section

of the Philadelphia Inquirer and everybody asked us about. So we talked about it frequently and often. We're not bashful about it." "If it came up, meaning if an investor asked you about it, you'd give him the information; is that correct? And 03:51 he said, "Yes. And we would tell a lot of people about it if they didn't ask."

So, I think, this issue, which we would agree, Your Honor, is more closely tied to Mr. Vagnozzi because it's an action against him as opposed to an action against Par. While, 03:51 don't get me wrong it's also irrelevant to the ABFP income funds because that Pennsylvania settlement had to do with whether he needed to register as a broker or not. And he, eventually, settled it because, like many people, you can't necessarily fight these things, and you make a business 03:51 decision to settle it.

So I don't really think it was that relevant, but it is of a different character because it is against him. And the disclosure -- the testimony shows that it's in a different character, that he was very often affirmatively disclosing that 03:52 action to people.

I want to touch on an few things, where I think the SEC has engaged in a little bit of hyperbole, in this case, which, I think, Your Honor understands. That's true so I don't want to spend too much time on this, but this is one of the 03:52 slides that the SEC showed really to try to sensationalize that

the defendants reaped massive profits, that the income funds got $25 million and the income fund too, got $13 million.

Well, the implication seems to be that that money that got hidden or taken away from people, that's the Par promissory notes we're talking about. That's not some secret massive profit.

03:52

The SEC also likes to make a lot of noise and white noise about the radio advertisements and the different (inaud.) and meetings that Mr. Vagnozzi had, so they had this graphic here. There's nothing wrong with advertising on the radio and Mr. Vagnozzi testified about this.

03:53

And he said in his deposition about these ads, "They never promoted the Merchant Cash investments. They were centered around the fact that we had alternative investment that had nothing do with the stock market. These were general ads." Nothing wrong with that, Your Honor. There's nothing wrong with advertising (inaud.) fund.

03:53

I'll get back to the injunction point in a little bit, but it's important to note here, Your Honor, he also testified -- you'll see that he stopped doing these ads a few weeks ago. So that's important for the injunction point. He's not even doing this advertising (inaud.). We'll get to that (inaud.), as Your Honor knows.

03:53

This is about the meetings, the website, same kind of kind of thing. I think, this is a lot of white noise and

hyperbole. The SEC also put in a number of affidavits from people who purchased notes. They have the same kind of boilerplate, where they're saying the same thing over and over again. I think, the Court can disregard those. They don't really carry much weight.

03:54

And really, Your Honor, there's, like, kind of a double-edged sword here. The SEC was arguing the other day that we shouldn't be talking about what disclosures were in the PPM and what people told because reliance is not an element of a 10b-5 claim for the SEC. Well, that cuts both ways then. These self-serving affidavits from people really aren't relevant to the injunction issues either, Your Honor, by that same logic raised by the SEC.

03:54

We saw this before, as well. These various affidavits drafted by the SEC and put in front of people to sign said, "Oh, I had no idea we could lose all our principal." "Oh, I had no idea we could lose our principal." Over and over and over, again. Well, there's the PPM disclosure that said in black and white, you have to be able to afford to sustain a complete loss of your investment.

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So let's wrap up the substance and then I'll briefly summarize, with respect to whether there's a need for injunction. There is no need for injunction here, and the key point is as Your Honor said, Mr. Vagnozzi's out of the game, at this point. And I'll talk about these details.

03:55

I do want to first start by pointing out that this allegation in Paragraph 72 of the SEC's complaint, this demonstrative clause, if Your Honor looks at Exhibit 158, which is that April Zoom meeting, you'll see that he was discussing other products, and he was discussing people selling things in a registered fashion; just what the SEC's complaining about.

03:55

So you can't use that exhibit to try to say that he has a propensity to re-violate the law. It's clear as day that he stopped selling any Par-related promissory notes on March 10th of this year. He hasn't done it since. He has no intention to do it since. And he has stopped the ways in which he was doing things previously, prior to this lawsuit being filed, which is evidence that he is not at risk of violating what the SEC thinks is a violation, again.

03:56

The SEC pointed out the other day, Your Honor argued that because the defendants are subject to prior regulatory actions -- and I thought Mr. Futerfas, I think it was, did a remarkable job pointing out, you know, the hundreds of violations against people like Wells Fargo and JPMorgan Chase, et cetera. That alone is not evidence that a court can rely on to enjoin somebody under the case law issued here, which has to show that the person is at a likelihood to repeat the violation.

03:56

If the SEC could show that he ignored those prior orders, he ignored the settlement, he didn't change what he was

03:57

doing, he kept on as an unregistered broker and finder in violation of what the State of Pennsylvania said. If the SEC could show those facts, then, maybe, that argument might have some merit, but that isn't the situation. Instead, what we have here, Your Honor, all the way across the board, I think, even at Par as well as clearly, that the (inaud.) of Vagnozzi is adherence to those prior settlements.

03:57

So that's not a basis for an injunction. We cited the Skyway Case in our brief, Your Honor, with respect to an obey-the-law injunction. We think the law is pretty clear in the Eleventh Circuit that's not something the Court should do. And given the fact here, that he is out of the game, that there's no evidence that he violated anything in the past, that's exactly what the SEC is asking Your Honor do, which the Court cannot do to issue that type of obey-the-law injunction.

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I talked before about Mr. Vagnozzi's reliance on his counsel, the money he spent on them, the private placement memos that would be needed, the advice that he got from counsel, and this is relevant to the alleged propensity to re-violate.

03:58

If you have a track record, which he does, of getting counsel on issues of compliance, that defeats the argument that the person's a cowboy off on his own about to violate the law again unless the Court enjoins him.

We discussed a lot of this already, Your Honor, that

03:58

the last sale of Par promissory notes was on March 10th of 2020. He's not selling any Par notes. There's testimony about that in his deposition. I thought I had written down the age or maybe -- oh, I think, it was in the cites I gave Your Honor earlier, actually, where he said that. He has no intention to sell Par promissory notes. And this all goes into the balancing of equities.

And I made this point in the brief, Your Honor, which I think the Court understands, that pursuant to Regulation -- Rule 506(d) of Regulation D, The Private Placement Rules. Because of the New York SEC settlements from a couple weeks ago, that puts him quote, out of the game, at the moment. That's already been dealt with by the SEC, after a 90,000 document production and testimony and the right kind of process. There's no need for this Court to do it, again, because that issue has already been dealt with under that prior settlement and Rule 506(d).

So let me, kind of, I'll stop sharing and wrap up here, Your Honor. I -- before I, finally, summarize, I want to address the points that Your Honor was raising with Ms. Schein and the other lawyers this morning, which I thought were very, very good questions.

And, yes, Mr. Vagnozzi has been cooperating with the receiver and will continue to do so. Unlike other people. And I don't know, I'm not going to get into it, but I don't

represent them, I don't know what happened or, or didn't happen; that's not my issue. But, Mr. Vagnozzi sat for a deposition for six or seven hours, Your Honor.

The receiver was there, the receiver chose not to ask any questions. He -- in a letter I sent yesterday or the day before regarding payment of the life insurance premiums that need to be paid, which are sitting there piling up in the office, Mr. Vagnozzi gave a very detailed e-mail that he asked me to pass along to the receiver about how he wants to go into the office with them, help them understand those issues, to get that done, to make sure that there are not more losses here.

There's already been too much unnecessary loss and too much unnecessary upset of people's lives. We've got other products where Mr. Vagnozzi is ready, willing and able to get into his office and we're working on it, so I'm not suggesting that there is stonewalling. I understand this is a process. We are working on it.

But there are these other assets he has; the real estate investment in New Jersey, where he's got money sitting in the bank ready to give to people pursuant to a dividend. There's life insurance policies that are maturing where the carriers are paying money that needs to be processed and then given out to people. This process needs to get going again and he is willing to do that.

And we take Your Honor's admonition to heart we will

redouble our efforts to try to work with the SEC and the receiver, to try to get these things done and see if we can find a way to get things started again. I can't help with getting Par started again because Mr. Vagnozzi didn't work there. I -- you know, that's between them and the receiver. I can help and Mr. Vagnozzi can and will and is ready to help with respect to getting the ABFP businesses back and going again. Because right now all the employees are getting ready to file for unemployment.

04:02 And Mr. Vagnozzi, as I laid out in our papers, Your Honor, has his accounts frozen by the bank even though he's not subject to an asset freeze. These are things we are anxious to try to work out and we will work very hard to work these out because we do take seriously Your Honor's admonition. And if we can make some good progress on these things between now and September 4th, we, absolutely, will do that.

So I appreciate Your Honor's time, and Your Honor's flexibility in allowing me to try to truncate our presentation. I hope I was able to succeed here in doing it. I go back to one of the things that I -- some of the things I said in the beginning to kind of wrap up.

This isn't a Ponzi scheme. This isn't like a Rothstein or Madoff situation here. Par, by all indications, was a profitable business that was paying its debts and engaging in transactions with small businesses. It got

impacted by the coronavirus. Just like so many people in this country did. That seems to be clear and, I think, Your Honor understands that as kind of the backdrop of this case.

It's unfortunate, it's the backdrop. It really is not directly tied to the injunction issues, as to Mr. Vagnozzi, and whether he didn't disclose something he should have, and whether there's any need, when he's out of the game, to enjoin him in the future.

But it is an important part of the backdrop because, as I said, I joined the SEC straight out of law school and I was really proud and really humbled to be a part of that agency, but it has its mission to try to protect investors. That is their mission and, unfortunately, I feel like that mission has gone a little bit off the radars, in this case.

But there is another bulwark against that, Your Honor, which is yourself. The Article III Judiciary and the Court. That's why this is so important and we really appreciate Your Honor parsing the facts, parsing the defendants, not looking at hyperbola and white noise. Not lumping people unfairly together but delving into the facts as to Mr. Vagnozzi.

After which I'm confident, Your Honor, that you will find that there's no basis for an injunction against him, an asset freeze or anything else. And, hopefully, he can get back to doing the other parts of his business that he does so well, and we can get back to not dealing with constant emergencies

but litigate this based on an orderly discovery path and see what eventually happens. Always, always keeping in mind Your Honor's admonition to try to resolve it, if we can.

So unless Your Honor has any other questions, I really appreciate your time.

THE COURT: No, that streamlines it for me. I want to thank you for doing that for the Court, Mr. Miller so we focus really on the key issues that relate to your client, which I do appreciate, so thank you. And then that covered all -- most of my concerns. And I do appreciate you taking to heart just the procedural history and the efforts we're trying to make to see it there's a middle ground.

One thing I wanted to do, and I was thinking about this over the break. Before I hear from Ms. Berlin, who will present a rebuttal and then we will conclude this preliminary injunction hearing, that I think everyone should be commended for working very hard around the clock to get us through quite a bit of evidence that has been presented by both sides.

I think, looking at the universe of exhibits, and I want to make sure I get everything right here. So -- correct me if I'm wrong -- we now -- we can now focus, really, on a subset of remaining defendants. And, I think, we should kind of take a moment here and regroup and figure out exactly where we're at, about who's left in this case, and who is subject to relief and who are the main parties at issue, now that we have

had some of the different entities in receivership, other folks have resolved individual defendant's issues.

So right now, if my memory serves me right, and my notes are right, obviously, we have Mr. Vagnozzi represented by Mr. Miller. We have representing Joseph LaForte, we have Mr. Froccaro -- because I promised I'm not going to forget him again. So I'm going to call him out right away, right out of the gate. All right?

MR. FROCCARO: I'm here, Judge.

THE COURT: So -- and I know that Mr. Fridman's also been assisting a little bit with Mr. LaForte, but I know Mr. Fridman is really here on the LME Family Trust. And then, I know that Mr. Futerfas has been involved with Ms. McElhone and Joseph Cole has been really represented also, primarily, by Ms. Schein.

So I, think, if my memory serves me right, that we have -- those are the key players that are left; right? McElhone, Cole, Vagnozzi, the LME Trust. And I -- am I correct that I'm not missing anybody? That those are the people that are left now that we have Gissas out, Furman out, and we also had resolved some of the action with Abbonizio. Are we -- is that -- am I correct that I have the universe of defendants left?

MS. BERLIN: Yes, you are, Your Honor.

THE COURT: Okay. Because, obviously, we know coming

CBSG, Full Spectrum and ABFP is all in the receivership. So one of the things I was thinking because we've had -- and this is really to Mr. Miller's point earlier and I think Mr. Futerfas hit on it and Mr. Fridman hit on it too -- each one of these defendants is in a very different place.

I mean, you can't even compare. Allegations of Mr. Vagnozzi are not to be lumped with McElhone or not to be lumped with Cole or certainly not to be lumped against the Family Trust. Each person stands on its own evidence and should be handled as such.

Of course, when we began the case ex parte, everybody was lumped together. I mean, if you look at the complaint in and of itself; right. At some points, you're not really sure is it, you know, is it Mr. Abbonizio at the dinner? Is Vagnozzi there? Is it Furman? There's a lot of moving parts.

So one of the things, I think, would benefit everybody -- and I want to just float this idea out to the parties, then, maybe, we'll streamline things, especially, as it pertains to your individual clients -- is if I gave the counsels that I have mentioned whose clients are in the game right now -- so that would be Mr. Futerfas, Ms. Schein, Froccaro, Miller and Fridman, I think I have those five key counsels who are representing in some capacity the remaining defendants -- if each one on behalf of their respective clients e-mails to the Court and copied the SEC and the same is in the (inaud.), a

proposed findings of fact and conclusions of law coming out of this hearing.

Why do I think that's important? Number one, because I think when you guys start to crystallize everything you've seen from the SEC, we can eliminate, as we've said, some of the white noise that doesn't pertaining to your clients, because, you know, there's stuff with Vagnozzi that is Vagnozzi's issue. There's stuff with LME that's LME's issue.

And since it's not been structured that way, it makes sense that each party be permitted to synthesize everything with the applicable law next to it, and then I'm going to have the SEC do the exact same except they will subdivide their case with proposed findings of fact, conclusions of law per each of these remaining defendants.

And I'm prepared to give you guys until Wednesday to complete this task. I can live with ten days. I'm going to get an order on this by September 4th no matter what. But I strongly believe that to advance the ball for the Court and, quite honestly, to put pen to paper because I still have -- maybe, it's the optimist in me, but I still believe that by giving everybody a chance to have the cards on the table, which we have not had until today.

I mean, we know most of the defense lawyers told me this from the beginning, "That I have one hand tied behind my back, Judge, we're going ex parte; I don't know what's

happening here." Now you've seen the SEC's case. You know more. You've presented a little bit on the fly on some of this. The SEC has seen your case and is going to rebut it.

But it just seems like it would make sense because one order that will synthesize all of these things together, has to not only set the framework for the case but has to have subheadings per individual defendant and what they are being accused of doing. Without doing that, we're going to, you know, inappropriately in my view, commingle evidentiary submissions against one defendant versus another, and I don't want to do that.

And I don't think anyone knows the record pertaining to their individual clients better than the lawyers who represent them. You know, to Mr. Fridman's point earlier, Judge, I'm only here on one issue. I mean, and the injunction on me is not even the same scope as it on Vagnozzi. So it's even the scope of relief that I, quite honestly, think the SEC would be well served in narrowing depending on the defendant.

And I go back to Mr. Miller's point; you obey-the-law injunction is not favored. So I want to get a real sense of exactly what we're going to be doing. And I know Ms. Berlin will address it in rebuttal, but I'm prepared to give you guys until Wednesday. I'm not going to put a cap on the pages. I'm going to lift that cap, it's what you need to give me findings of fact and conclusions of law, but I want it scoped out to

your clients.

Because let's be frank, there could be a scenario where I find that there's an injunctive release satisfied for one but not all. I may find that, for some reason, LME is out. Vagnozzi's out, but Cole's in or McElhone is out, and Cole is in. It's not one-size-fits-all. And I think if we parsed it out this way with everyone's presentations, I'm in better shape because everyone can then flag specific exhibits.

I mean, I have the PowerPoints, but when you break it
04:12 down with the facts applying to your clients, it's the best way for me to crank out a preliminary injunction that will pass muster. And I still can get it done by the 4th, if I give you until Wednesday.

And, of course, if something happens because you've
04:13 all represented, you're trying your best, it's between now -- and you guys, I mean, we're all working around the clock on this so it's almost five days. If you guys get a hold of Ms. Berlin and someone peels off between now and Wednesday, fine. I'm going to spend the next four or five days
04:13 synthesizing the slide shows. I can wait on writing in the nitty-gritty until I get what you guys are going to give me on Wednesday.

And I am going to set it, like, Wednesday at noon because I'd like to start writing by the afternoon. So, I
04:13 think, if I give you guys no handcuffs on page limits, focus on

your clients, Wednesday by noon findings of fact, conclusions of law for those lawyers who remain with their clients and the SEC, it would make life a lot easier for the Court and, I think, it would make for a better order.

04:13 So let me hear before I turn it to Ms. Berlin any objection from the defense counsels? I'll start -- I'll just go down in order. Mr. Froccaro, is that going to work for you?

MR. FROCCARO: Yes, Your Honor.

THE COURT: Mr. Miller, how does that sound?

04:13 **MR. MILLER:** Perfect, Your Honor.

THE COURT: Mr. Fridman?

MR. FRIDMAN: Yes, that sounds good, Your Honor.

THE COURT: Perfect. Mr. Futerfas?

MR. FUTERFAS: We welcome the opportunity, Your Honor.

04:14 **THE COURT:** All right. Great. Great. And, I mean, you write it how you think the evidence is presented, and I will, obviously, be overhauling everything. But I just need the synthesis of it in a way that makes sense so that we don't put our foot in the wrong place on the evidence.

04:14 Ms. Schein, I'm sorry, I wanted to hear, are you okay with that timetable?

MS. SCHEIN: Yes, Your Honor, I am.

THE COURT: Okay, great. And we'll put a paperless order together at the end of today to get that synthesized.

04:14 And, Ms. Berlin, we're going to do the same for you also, so

that you can kind of synthesize everything. And I think it will make for a more tailored order and give the parties a better sense of where they stand by buying you guys a few days as you draft, to keep the lines of communication open through the receiver.

04:14

So, you know, we're right on schedule here, it's about 4:15. Ms. Berlin, the last act is yours. You have a rebuttal case, we talked about it before break. We want to focus on the key points raised for each of the defendants. I'm going to give the floor to you.

04:14

My hope is that we will conclude in the next hour or so. Give you a chance to go through the highlights of the evidence, the rebuttal evidence you believe will counteract or show scienter for some of these folks, the understanding of what was going on at Par Funding, et cetera. I'm not going to cap you, but I think, you have a presentation that will take us to the end of the day so that we can finish the preliminary injunction hearing.

04:15

So -- and by the way, so everyone understands we're not going to, necessarily, file these proposed findings of fact or conclusions of law. What I'm going put in my orders, that you e-mail it to me and copy all other counsels. We don't need to file these as exhibits. These are proposed findings of fact conclusions of law from each party, Wednesday at noon, to be e-mailed to my general NEF inbox copying all other parties.

04:15

That's how we're going to do it. And I'm going to take this all of this under advisement because I just know that without it, it will be a tight turnaround December 4th and this will help me get -- make sure I rule on this quickly.

04:15 Now, Ms. Berlin, when I turn it over to you, in a minute, one of the things I want you to address, you know -- and I want to make sure I'm not missing the boat, this is to Mr. Miller's point. You talked a little bit about this is not clearly an obey-the-law injunction. You want to make sure that 04:15 these folks do not go out there and get involved in this world of securities. This is an injunction to prevent that. To make sure they're not going out there and engaging in this practice anymore, violating anymore securities laws.

One of the things that I'm really curious about, and I 04:16 want to know in your presentation and, maybe, it will be in your proposed findings of fact and conclusions of law. I get from the defendants' side, that if they defeat the preliminary injunction, okay, then the TRO falls, the freezing of assets, in my view then, will also fall because it's all tied together.

04:16 So I want to make it clear. Obviously, the receivership continues, but if I were to decline, if I were to deny the preliminary injunction, I would almost certainly have to call an immediate hearing for those parties that aren't enjoined, to figure out what am I going to do with the receiver 04:16 in play with any funds that are frozen.

But one flip side of that is, let us assume that you prevail, let's say, hypothetically, across the board. What impact, if any, does that have on the asset freeze? Because the conclusion of your order will, literally, be -- as you stated earlier -- that we're preventing these folks from going out and doing anything. But are we intending, by virtue of the preliminary injunction, to do anything with the freezing of assets?

Because I, looking back over the lunch break, was reviewing it, and I don't think that the relief you're requesting will alter or change any of the scope of freeze; that that continues to just be status quo. But now on -- not on the TRO standard. The preliminary injunction will solidify the asset freeze. But you're not asking to expand it, modify it, by virtue of this hearing.

Whereas, the defendants, if they prevail on denying it, would, obviously, request that everything be unfrozen, and that we let the receiver, you know, maybe they even ask for a monitor. Who knows what would happen after I deny it? But we know that this is all driven by a TRO.

Can you tell me, before we get into your rebuttal, what you envision? Your ultimate relief, if you prevail here on the asset freeze? Because one thing I --

MS. BERLIN: Yes.

THE COURT: -- I need to know that because let's be

honest. That's what all the -- all my guys care about right now. I mean, yeah, okay. Most of -- and Mr. Miller even said it; right? They're not jumping up and down because they want to issue exchange notes. They don't care. What they want to know is that they're going to get access to their bank accounts and be able to run the business, and maybe even wind it down and give investors their money. So what is going to happen on that relief? I need to know. Can you answer that?

MS. BERLIN: Okay. Yes, of course. So, I mean, I'll answer that but then, if I could just clarify one thing --

THE COURT: Yeah, go ahead.

THE PLAINTIFF: -- so there's nothing misunderstood about the relief the SEC is seeking. So with respect to the asset freeze, it doesn't even have to do with the relief we're seeking. The remaining defendants haven't given us their accounting; told us about their money. That's why we don't have, you know, a resolution.

Look at the individual defendants who did that. You see the orders, Your Honor. You see that we carve away everything that doesn't have to do with Par Funding investor money. Carve away all those companies that have nothing to do with investor money. I wish the remaining defendants would speak with us. We've asked, in writing, over and over again for proposals. Three did it. The remainder refused. And so if they would give that to us, it would be the same now as it

would be if we had the relief continuing.

We tried to make sure that we are not capturing too much, that we have the Par Funding money. Certainly, you know, we have required them to give us that information because they are the ones who know where the money is, and how their companies operate.

So, I think, the key thing here is, Your Honor, we need to make sure that if there is any asset freeze that we can ensure that it's, specifically, linked to the Par Funding investor money and the Par Funding related funds. Because the goal is, that if there's disgorgement at the end of a trial, that there's still money there. So right now, through this hearing, we are not seeking to expand upon anything. And, I think, you should see that because the orders that we are providing to the Court reflect that.

Instead, what we're doing is, when defense counsel will speak with us and work with us and provide an accounting like the Court ordered, we can, actually, tailor it better and ensure that it's proper. And that's what I would be doing going forward as well. So I don't see an expansion unless, you know, maybe a receiver will find something and come to you, but no.

Now, with respect to -- and if I could just, briefly -- we are not seeking an injunction to kick them out of the industry, I keep hearing this. That's not what's being

sought and we're not -- there's no obey-the-law injunction that's being requested. There's, obviously, everyone here knows those aren't (inaud.) in the Eleventh Circuit. We don't seek them. We didn't ask for one.

04:20 What we asked for would be a continuation of the -- what -- a continuation of the temporary restraining order, which says that they're not going to violate these particular securities laws, in these particular ways. And it outlines specific (inaud.) Conduct, that would be -- that they're 04:20 prohibited from doing. So we've never requested that and we're not -- I just want to make sure all the defendants know, maybe, that's why they don't want to settle is they think that's what we are seeking but we aren't.

THE COURT: So to be clear, the relief, ultimately, 04:21 really what it is, it is simply taking the same parameters that you've achieved in the TRO, which now are facing the scrutiny of the preliminary injunction hearing -- not the ex parte, show cause, you know, everything we've satisfied up to this point. That basically we're going to take that -- and this is what I 04:21 expected.

But, I think, it's important that we talk about this openly because you hear a lot of talk about the freeze being commingled with the elements of the preliminary injunction. And what we want to be clear on is there is going to be no 04:21 expansion of any freeze. It is just going to establish that

freeze under the grounds of Rule 65, under a preliminary injunction framework with an evidentiary submission.

So that -- it's really more the procedure by which we maintain everything in place. We'll, now, be doubled down because we have the preliminary injunction. But the freeze, itself, is not going to be expanded. And as you stated, it's really going to be limited to the relief that you've already requested, TRO, just through now a preliminary injunction.

So -- and I think that's important that we keep that in mind because, you know, the relief here is what we're looking at. And I think would you agree with me, let me ask you: In the SEC's view, if I were to find that, let's say, I'm going to give -- just like one defendant does not have the ability to maintain the preliminary injunction -- let's say, I think, four of the five or whatever that remains, that one of them there's not a satisfaction of the burden. Is there -- what is -- would the SEC agree with me, at that point, that if that were the case, then we would not have the grounds to continue an asset freeze over that particular defendant? And I'm curious --

MS. BERLIN: No.

THE COURT: Okay. So let -- that's what I wanted to ask you. So if you don't prevail in the preliminary injunction, I want know what is your view on the impact of the freeze. Tell me about that.

MS. BERLIN: Yeah. So the preliminary -- the asset freeze -- the standard for obtaining an asset freeze is lower. And that's outlined in our motion, for a temporary restraining order. So the burden for obtaining the asset freeze is a lower burden.

And so if the Court were to find, I mean, the Court found that we made our prima facie case on the TRO. If the Court finds that the defendants' evidence that they presented today and Tuesday were so overwhelming that we no longer meet our burden and takes that away, we would still ask the Court, well, doesn't the evidence still meet the burden -- the lower burden. For assets reasons, there is a lower burden. So it would not automatically extinguish the asset freeze.

THE COURT: So, okay. So, look. I mean, we need to -- this is important for the investors to understand and for everybody to know what the stakes are; right? Because let's just take a minute and realize what was just shared and what the position of the SEC is, and I totally understand it. That, really, the only relief coming out of this, okay, is one about continuing on the TRO parameters so that they don't continue to violate in the way they've been alleged to have done so up until this point.

But even if that were not to succeed, there is, essentially, a secondary argument that it doesn't mean that things get unfrozen. Because at the end of the day, there is a

separate burden and analysis about how far the SEC's been able to divine where these funds have gone. And so I want -- I think that's really important because I think what's happening is a lot of us are assuming it's part and parcel of the same thing.

And some folks are thinking, "Well, if I overcome the preliminary injunction, I'm going to get my money out of this freeze." And the reality is, the SEC is not, at all, advancing that position. In fact, it's a dual track, as you've pointed out. I mean, the freeze is one thing and the receiver's his own thing and the preliminary injunction's the other thing.

04:24

But I think that's, actually, extremely interesting and important for the investors to also understand. And I will be honest with you, that goes back to my earlier point which you have kind of touched on already, Ms. Berlin, about how you settled out with Gissas and everybody else. That the irony of this is, I get the sense that most defendants are not quibbling with the relief that you want in this preliminary injunction hearing.

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You just heard Mr. Miller say, "My guy is not even going out there anymore." And then you hear necessarily that Cole and everybody else doesn't want to offer anymore securities. So the irony of this is, we're fighting over something that most defendants, honestly, in my view, aren't that concerned about. What they're concerned about is the

04:25

freeze.

And so in a way, you know, if they were to say to the SEC, "Hey, you know, what? We'll live with the injunctive relief because, at the end of the day, we're not going to go back in this business or we're not going to commit these offenses, but we've got to talk to you because we got to get our money out. And we need to show you an accounting, which is has been the problem."

04:25

As you've stated from the beginning is, we can't move on the freeze and the Court can't sleep at night unlocking money that my receiver can't figure out if it's commingled or not, what streams it's coming from. Like we heard from Mr. Fridman, this stuff is coming from investor proceeds or is it coming from -- or, maybe, Merchant Cash proceeds and not investor funds.

04:25

04:26

The source of the money is the biggest problem. And we don't know, necessarily, how all remaining defendants have allocated the funds and where they are. And so I need everyone to understand that it could be a hollow victory. Because, if for some reason the Court finds preliminary injunction loses, I still, then, would need motions.

04:26

Arguably, I think, I would get motions from the different defendants saying, "Judge, we would now ask, in light of your findings in the preliminary injunction motion, that you would also modify the freeze." And the SEC is going to come

04:26

back and say, "Your Honor, the freeze has nothing to do with the preliminary injunction. We don't have enough evidence to know that these aren't ill-gotten funds or these funds aren't taken from investors. So you should freeze until these guys come and sit for depo or talk to us."

04:26

I mean, I am a fan of breaking this down in plain English. That's the reality of what's happening here. This is not a silver bullet one way or another for the asset freeze. And the investors got to hear that because we spent two days; 16 hours, and at the end of the day, it's why I keep saying, if you guys, on the defense end, are not interested in getting in this market and doing this anymore, and are willing to step back from it, then you're -- you got the keys to your own jail cell.

04:27

04:27

Get an accounting to Berlin and Stumphauzer, find out where the money is and I will, in the stroke of a pen, I will unfreeze your assets. I am not trying to hijack investors' money. I want this business to work. But I can't do it unless I know how everything is accounted for. And that's why I've got forensic accounts in there, DSI's in there, and I'm hoping that I get the answers to this without having to go through the injunctive process.

04:27

But, I just think, it's important we recognize that because my order is going to either (A) affirm the TRO and put everything in place and say this freeze continues, nothing gets

disrupted, don't go out there and do anything that we've said you can't do or (B) no, you didn't prove it so there's no more TRO.

You can try to play in this market, although, people like Miller can't -- like Mr. Miller said, like, can't anyway -- the client can't anyway -- Vagnozzi wouldn't. But, you know, that still doesn't mean that I'm going to fight with another round with everybody on the freeze. And I just, you know, I just want to point that out. Because I think that we are all fighting real hard over the injunction and I don't know that it's going to give everybody the relief they want.

So I just want to set the stage on that. I want everyone to be clear what the parameters are. It doesn't change the goal, which is, this TRO needs to be handled legally and swiftly by September 4th. But I just want all the defendants and their clients, and I want the investors also to understand, that this is not, necessarily, you know, the cure for what ails you.

Even if I agree with the defendants, the SEC is going to come back and we're going to argue over where's the money. Follow the money. And how did it get there? And that's still going to require defendants to figure out a way to give the SEC piece of mind or, maybe, come straight to me and show me records that, even if the receiver and Ms. Berlin disagree, in your view, are sufficient for me to unfreeze something.

And I will tell you that's a tough sell until I can figure out which way the money's moving. So that's just -- I just need to set that up because I think what we all don't want to lose sight of the ball here. But that's really important. Okay? So I don't want to belabor it. It's 4:30, it's a Friday.

I want to turn this over back to Ms. Berlin so she can make her points on the preliminary injunction, but I just want everyone to understand -- and then I'll hear from any of the defendants with final points, but I don't want to mess up where we are. So, Ms. Berlin, go ahead, your presentation and rebuttal, please.

MS. BERLIN: Yes. And to just to confirm, yes, the only thing that defendants are arguing against right now is an injunction telling them not to continue violating the federal securities laws.

THE COURT: Right.

MS. BERLIN: (Inaud.) -- so if they violate again we can just file a motion for contempt or, you know, come back to this same Court instead of filing a brand new case --

THE COURT: And to your point, why are we saying that? Because we've spent two days now; right? Talking a lot about frozen money. A lot about frozen money, and I don't want anybody here to think, well, I've had -- made a heck of a case against the SEC. Why is my stuff not unfrozen? I don't want

investors waiting for an order on September 3rd or 4th and going, "Wait a minute. Judge Ruiz filed X and Y, but I haven't gotten my money unfrozen. Things aren't up and running."

Just be aware that it's a separate track from what's going on. So I just think that's really important for us to recognize the import of this hearing. So I'll hear any final points from defendants before I conclude, but with that being said, go ahead, Ms. Berlin, the floor is yours.

MS. BERLIN: Okay. And I am so sorry to ask you this, Your Honor, but, I think, you might remember at our status conference I said that I was not going to call Mr. Vagnozzi as a live witness because I would just handle him on cross. And I always let opposing counsel know I, you know, use a declaration instead, but I wasn't aware. So I have a cross-examination prepared for him. I guess, I -- to make those points that I was -- I had relied on that to make some of our points.

As I told the Court last week, I was not calling him on direct so that I could call him on cross, so I, probably, need -- if I could, please, get from the court -- maybe, 15 minutes because I'm going to have to pull the evidence or maybe the deposition transcript, I'm not really sure. But I guess this was one of those, like, gotcha moments in a preliminary injunction hearing; not our norm.

Can I just have, maybe, 15 minutes to try to see if I can present Vagnozzi's testimony in another way? And I don't

want to go through the excerpts and spend a lot of time. I might just ask to move in his whole transcript. But because it was not planned for, I wonder if I could just -- maybe, if we could just take a brief break and let me regroup because I need to present this differently now.

04:31

THE COURT: All right. I'll give you 15 --

MS. BERLIN: Okay.

THE COURT: -- minutes. I'm going to give you 15 minutes. I will tell that you I really think with final comments made by everybody, it's a late day. Let's shoot -- we've got to finish this by 6:00 o'clock. I'm going to give you about an hour with a little extra change. So you got about 15 minutes, it will be 4:45 when I start. So, I think, within an hour and you streamline it, we should be able to hit all the rebuttal.

04:31

04:32

Remember, of course, you are getting findings of fact and conclusions of law, so you do get -- everyone's going to get a closing argument on paper come Wednesday. And why do I do that? Because it's Friday at 6:00 o'clock, and everybody, probably, needs to go have a beer or, at least, disconnect from Zoom, and I'm not trying to make everybody hang in here till Saturday morning.

04:32

So just remember, you don't got to hit it all. If you've got some of the transcript, you want to put in there, that's fine, I can live with that on your Wednesday submission;

04:32

okay? So 15 min --

MS. BERLIN: Thank you.

THE COURT: -- yeah. Mr. Miller, do you want to add something real quick? I'm going to do that quick break.

04:32 **MR. MILLER:** Yes, Your Honor, I'll admit it was a change in plans in our part. I have no objection if Ms. Berlin wants to put in the entire transcript. I have no objection.

THE COURT: All right. So think about what you want to do. When we come back in 15, we can move that whole

04:32 transcript in; all right?

MS. BERLIN: May I ask one quick question?

THE COURT: Yeah.

MS. BERLIN: Thank you. Since we are doing the findings of fact and the conclusions of law due Wednesday, I --

04:32 do I -- do you want -- still want me to walk you through all of those again today or should I just hit my bigger rebuttal points and then end? I can put that in my proposed findings of fact and conclusions of law instead of repeating it now (inaud.) that you --

04:33 **THE COURT:** Yeah. Yeah. That's --

MS. BERLIN: Even faster.

THE COURT: -- that's part of why I did it because I figured that you can -- I want big sweeping -- I want you to hit the high notes on this, get -- go through some of the key

04:33 rebuttal issues you had; everything from insurance or

underwriting or any points you have on Vagnozzi's last piece from Mr. Miller. That's what I need. I want big picture so we make a clean record, and you give me those high points because the minutia is going to be now in your proposal that everyone's going to get to make. And that's why it makes life easier for everybody on this.

04:33

MS. BERLIN: I think this is so wonderful. Thank you for the fabrication, 15 minutes, we're going to do this as a bird's-eye view, big point.

04:33

THE COURT: Beautiful.

MS. BERLIN: Thank you.

THE COURT: You've got 15 minutes everyone. You know, smoke them if you got them. All right? We'll see everybody in 15 minutes.

MS. BERLIN: All right. Thank you.

THE COURT: Okay, bye.

MS. BERLIN: Bye.

(Thereupon, a brief recess was taken.)

THE COURT: Okay. Per the SEC's request, I gave another 10 minutes or so, I'd like to see if everybody's ready to go so that we can allow the SEC, through Ms. Berlin to put on its big picture rebuttal points before we conclude the hearing. So with that being said, Ms. Berlin, are you ready to go? Do you need a couple more minutes or we're good?

05:00

MS. BERLIN: I am.

THE COURT: All right. Excellent. Okay. With that being said. I will turn it over to the SEC for their rebuttal. Go ahead the floor is yours.

MS. BERLIN: Thank you, Your Honor. So one of the critical things that the Court is going to learn, in hearing this rebuttal, is that much of what you have heard from the defendants is patently false. And I want it to be clear before I provide my rebuttal presentation, that I am not asserting that they're -- that the counsel have made false representations to the Court. Of course, they only know what they're telling this Court through their clients.

But it shows their clients are lying to them. They're lying to the investors and, ultimately, lying to this Court as well. May I please have permission to share the screen?

THE COURT: Yeah.

MS. BERLIN: Thank you. So one of the points that the defendants made repeatedly in support of their Section 5 decision to security argument, and to tell this Court that they have insurance, was that they're selling accounts receivable, and that they have insurance and everything is protected and that it's only because of COVID that everything fell apart.

And let me point out, that was no evidence, whatsoever, that COVID caused any problem, whatsoever, for CBSG. The defendants have said it. They didn't present any evidence of it. We certainly aren't stipulating to that.

And, in fact, you're going to find, Your Honor, that much of what you heard, like I just said, is just patently false.

You'll have to -- I'll ask you to bear with me as, unfortunately, I'm going to toggle a bit between my folders because I was planning on utilizing some of this with Mr. Vagnozzi. So since he's not being called directly, we are going to do it here a little differently.

Ben Mannes is the CBSG Par Funding compliance officer, Your Honor. And I'm also going to show you a declaration from him, in a few minutes, with some additional evidence about it. I want to start by showing you they had no insurance. All the defendants; Mr. Vagnozzi, Mr. Cole, Mr. LaForte, Ms. McElhone, they all knew there was no insurance.

They all touted it as a major part of this investment. And unfortunately, the investors believed them. They thought their investment was safe. And believe it or not, when April came and the defendants went to the investors and said, "We are running insolvent, we need to restructure these notes." So many investors asked -- and you'll see their declarations, they're in evidence -- "What about the insurance?" And they were told, "Well, the insurance doesn't cover a COVID pandemic." They blamed it on COVID, when in truth, it's not because of that, and they all knew they never had insurance coverage.

This is just a similar memorandum from April 3rd, 2020 to Joe Cole and Joe Macki, which is also Joseph LaForte. And I'd like to, if the Court will allow me, just to walk through this document and to read it.

05:03 **THE COURT:** Yeah.

MS. BERLIN: "In November of 2018, CBSG was referred by Rock Funding to an insurance broker named Anthony Bernato, who claimed to have developed a new set of policies that covered the advance factoring Merchant Cash Advance factor through Euler Hermes; a major international insurance carrier.

Over the following 6 months, CBSG spent upwards of $1.2 million in premiums to cover numerous accounts, securities above-average risk at CBSG. When some of those accounts defaulted, CBSG attempted to file claims covering those amounts and was informed by Euler Hermes that they could not process the respective claims until CBSG heard these 3rd party invoices between the merchant on the accounts and the customers.

Upon the hiring of this DCO, Mannes, the author of this document, in the summer of 2019, an intensive reconstruction of merchant-client communications, applications, and collections activities was performed, as well as contact with Euler Hermes at the VP level.

What was gleaned from this project lasting six months, was that CBSG was mis-sold on the type of insurance they were buying, as Euler Hermes had never developed a type of coverage

for advanced factoring. Covers traditional factoring designed to fund a client who has a contract with the customer and needs funding to meet that obligation and conveyed these requirements for invoicing documentation and policy documents and
05:05 applications sent to the broker and signed by CBSG designee Anthony Zingarelli (ph.), on October 9th, 2018."

And we're going to pause here. What this means, is that by no later than October 2019, the insurance company had notified the defendants that the insurance policy doesn't cover
05:05 their type of business. It covers the type of business where there's an invoice and the documentation; a regular business transaction, not Merchant Cash Advance funding. It's not covered and they've known it from the beginning.

According to vice president, Ryan Wimberly, at Euler,
05:06 "When a claim, due to merchant insolvency and/or bankruptcy, a complete record of all relevant information accessible and essential repository is necessary to include the MCA agreement and all necessary contractual info, proof of delivery, invoices between" -- it says here, "B to B, business to business
05:06 invoices between the merchant and their debtors; the merchant's debtors. The collection activity was clear, uniform communications stating account balances, agreement summaries, and payment histories corresponded to the merchant and other items."

05:06 It goes on, Your Honor, to say that they realized that

this insurance policy in October of 2018 did not cover them. And so they suggested that CBSG should explore their legal right for their inability to pursue any claims or refunds from this insurance carrier, Euler Hermes, as the contact in due diligence on these insurance brokers and carriers revealed that no credit coverage exists for Merchant Cash Advance factoring.

THE COURT: Ms. Berlin, I don't know if you haven't activated the slides because, I mean, I'm following but I don't know if you wanted to go into the slide mode.

MS. BERLIN: Yes.

THE COURT: Okay.

MS. BERLIN: Thank you, Your Honor.

THE COURT: Yeah. Yeah, thanks.

MS. BERLIN: They learned that no credit coverage exists for Merchant Cash factoring companies. And they learned this when they submitted these merchants to the insurance carrier. They were first advised -- if you look back on Page 1 -- they were first advised in October 2019, they then hired chief compliance officer Mr. Manus and he's memorializing here that in October and September of 2019 part of his job was to go see if they had any legal rights they could pursue --

THE COURT: Ms. Berlin -- Ms. Berlin, I think -- you don't have up what you're reading. We're all looking at an element to the PowerPoint slide that's not up. So I'm not following what you're talking about.

MS. BERLIN: Oh, no I'm so glad you told me that.

THE COURT: Yeah. No, that's what I just meant.

MS. BERLIN: Thank you.

THE COURT: Can you -- I don't know if you want to close this. Whatever you're reading, we're not seeing it. Can you try to get that -- you have the shared screen, but you've got to figure out what you're looking at.

MS. BERLIN: Thank you. I'm so sorry. My tech-support teenager is not at home right now or I'm sure I wouldn't have this problem. I'm sorry so sorry.

THE COURT: Let me know when you're ready because you're reading from some e-mails --

MS. BERLIN: Thank you.

THE COURT: -- and we're not seeing what you're reading from.

MS. BERLIN: I am -- thank you for letting me know. And let me see if there is a way for me to share this. Meeting controls. You are sharing. One moment, Your Honor. And I apologize.

THE COURT: Sure.

MS. BERLIN: I did, actually, try to have her available earlier when I thought I would need this. Let me just see. I see. Let's see if this works.

THE COURT: Okay. That -- I think, now you have the -- yes. I think I see now --

MS. BERLIN: Wow.

THE COURT: I think we see now what you were reading. So if you want to scroll back a little bit.

MS. BERLIN: I am so sorry. May I go back to the --

05:09 **THE COURT:** Yes, please go back.

MS. BERLIN: I apologize.

THE COURT: Please go back. Yes.

MS. BERLIN: I apologize. So as everyone knows now, I am not the most tech advanced, but let's see if we can do this. Do you have the insurance memo visible?

05:09 **THE COURT:** Yes. Yes. Got it. Yes.

MS. BERLIN: Oh, wow. Okay, I feel so accomplished. All right. So the first document I wanted to show you is from April 3rd, 2020. And it is from Ben Mannes, and I would -- I have also a declaration from him that I will present next. It states his position, who he is. But he is their chief compliance officer.

He's sending this e-mail to Joe Cole; and this is Joe LaForte. And he's saying, "Attached is a drafted memo we discussed yesterday. And sending them this draft of the legal memo regarding the insurance issue." Then the attachment is this, which is a confidential memorandum. It is from Ben Mannes, the Par Funding Full Spectrum Chief Compliance Officer, to Joe Cole and Joe Macki. And this document, Your Honor -- and I'm going to show you several others -- shows they

did not have any insurance.

So Your Honor might have wondered why I was being very -- I'm sorry I was difficult about those authentication issues earlier with the insurance policy documents, but, I think, you might -- it's going to become clear why.

On April 3rd, 2020, Ben Mannes, the chief compliance officer sent this memo to Joe Cole and Joe Macki, to the legal counsel -- I'm sorry to legal counsel -- and, Your Honor, the receiver, I just want to point out -- (inaud.) the attorney/client privilege for the company because this is in a letter to their legal counsel.

In this letter it states that, in November of 2018 that CBSG purchased -- and I just summarized in the first paragraph, I'm not going to read the whole thing -- purchased an insurance policy. Spent more than $1.2 million on it back in 2018. And upon the hiring of the chief compliance officer in the summer of 2019, part of his job was to find out why this insurance policy they had did not cover Par Funding.

He did an intensive reconstruction and what he learned is that Euler Hermes has never developed any coverage for advanced factoring. They don't do this kind of insurance coverage. They don't provide MCA insurance. And what I'm going to show you is that every one of the defendants remaining in this case knew about it, including Mr. Vagnozzi because he was also touting it.

And you're going to see an e-mail from the insurance company -- they actually wrote him directly because they heard he was saying it to people, and they told him to stop because they were worried people were being misled. But you're going to see they just continued, and they continued even in this hearing to tell the Court that they have insurance.

So according to -- this is on Page 2 of this document -- the insurance policy never covered Merchant Cash Advance. They figured this out when they filed, according to this document, their first claims. And they realized, when they filed these first claims that nothing was being covered. They found out they had purchased the wrong insurance back in 2018.

The documents they provided this Court as exhibits today -- that I was being difficult about authenticating because I knew that they were not updated insurance policies that were in place -- those have never covered Merchant Cash Advance, and they have always known it. They have known it from six months in. They know it today.

And they have still all told their lawyers, and it's being presented as evidence, that they have insurance coverage. And they don't and they never have. They also say here that they were trying to -- and it goes through, in this document, which I -- I would like to introduce as a rebuttal evidence that they've known all along they've never had insurance

coverage.

And the date of this is from April 3rd, 2020. It was a letter that they wrote seeking legal advice from their attorney because they're asking for advice here; "Hey, we're 05:13 telling investors that it's all because of COVID and we thought we had insurance. Uh-oh, what do we do? Our insurance doesn't actually cover this." Which they've known all along. And that's what they're seeking advice on.

And it's one massive lie, a lie to the investors, a 05:14 lie for years. They were told about it. I'm going to show you lots of documents showing they were told, all of them, by the insurance company, by the chief compliance officer. They still even came into this Court and waived it around, introduced it as an exhibit, over my objection that it wasn't authentic. 05:14 Told this Court it was true and it's not.

So all these investors, Your Honor, yeah, they thought they had insurance. So why would this COVID tragedy be such a big deal, if in fact, it even did affect the finances the way they claim it did, which there's been no evidence of, I would like to point out.

But even if it did, they all found out they had to go down to these 4 percent notes and that everything was in dire straits because this insurance -- what they told investors, and it's in our other exhibits that we filed with our motion -- 05:14 that its insurance didn't cover COVID, didn't cover pandemics.

All a lie. Everything has been a lie. And they have lied to this Court for two days and in all of their response briefs and in their exhibits.

And if this does not indicate to the Court the need for injunctive relief, I don't know what does. And I am going to show you some additional proof about the fact that they knew all along that they did not have the insurance. Just one moment. I'm going to just because I have toggle between documents.

05:15 **THE COURT**: Sure. That's all right.

MS. BERLIN: I'm just going to hide my screen for a moment because I do have other things that probably shouldn't be shared, if that's okay.

THE COURT: Yeah.

05:15 **MS. BERLIN**: Thank you. I'm going to pause the share. Okay. Thank you. Sorry, Your Honor.

THE COURT: That's all right.

MS. BERLIN: Now, let's see if I can figure out how to share my screen again, I think I can. I am a pro now. Look at that.

05:17 **THE COURT**: All right.

MS. BERLIN: So this another rebuttal exhibit, it's the declaration of Ariel Benjamin, Ben Mannes. He is the chief compliance officer for Par Funding. In this rebuttal exhibit -- and first before we move on, I would like to move

05:17

the letter that I just showed as rebuttal evidence, I would like to move that into evidence.

THE COURT: All right. That will be moved in at this time.

05:17 Thank you. Next, we have the declaration of Ariel Ben Mannes. He states that he began working at Full Spectrum in June of 2019. In Paragraph 3, he's saying his job, he was hired and assigned to, actually, review these problems because they didn't have insurance on their projects.

05:17 Joe Cole Barleta, personally, asked him to address this issue because there was a problem.

And Joe Cole Barleta, according to Paragraph 3 of his declaration, told him they needed him because Euler Hermes would not process their claims for any of the 2018 insurance

05:18 policies. So they have known about this for a long time and hired someone to address it. But they're telling the Court something and the investors something else completely.

No -- Paragraph 4, no CBSG claims were ever promised by Euler Hermes because the policies do not cover MCA

05:18 transactions. He goes on to note that on numerous occasions, he told Joseph Cole Barleta, he told Joseph LaForte, he told Perry Abbonizio, and the agent fund managers; Dean Vagnozzi, Vince Camarda, John Gissas. All of them were aware that the policies bought by Par Funding did not cover the actual

05:18 business of Par Funding. They never covered MCA transactions,

they do not cover the types of transactions performed by CBSG.

It goes on to say, "They knows this because I told them verbally by a phone, in person at our office and/or in writing more than once beginning in the summer of 2019 through the spring of 2020." He then attaches one of the exhibits showing -- this is Exhibit A to his declaration. And Exhibit A is an example from August 7th, 2019, where he's writing to Joe Cole and Joe Macki. And this is from their chief compliance officer.

05:19 And he says, "We signed a policy that described a business model we don't fit. They never read our MCA agreements. They did due diligence upon underwriting our policy." He goes on to say, "They don't provide coverage for this kind of claim. I don't know what we should do. Should we 05:19 file a lawsuit against the insurance agent? Because he sold us a lot of -- an insurance policy that doesn't cover us."

He goes on to show another memorandum that he sent in July of 2019, where he is telling -- and it's between him and Anthony Zingarelli. And below you'll see additional evidence, 05:20 which is why -- and he's claiming here in these memos that -- he says, "We don't provide loan guarantee insurance. We provide accounts receivable insurance."

And so Euler Hermes is explaining to Par Funding, "They don't cover your kind of business. We provide accounts 05:20 receivable insurance, which requires an invoice, you don't do

that. This is loan guarantee insurance that you would need. And we do not cover loan guarantee insurance."

And you will even seen see further down, there is a request as to whether it will cover investors and investment funds. And they say, "We do not cover investment funds either." They never covered this. It says, (inaud.) to our claims department, there are no invoices. If there are no invoices, there are no accounts receivable. And there is nothing we are covering."

And this is going to go through other points they make in rebuttal. They keep talking about accounts receivable. And accounts receivable is when you buy an invoice that someone is going to pay. I could buy an invoice that a company has sent out to a third party and I may choose to buy it so I'm the person who gets paid back, instead of the original lender. That's what an account receivable is. This is not that. They don't have any invoices.

Upon learning this, the insurance company told them, "We don't cover this, and we never will." They also said, "We do not provide loan guarantee insurance." None of this was ever covered, still isn't, never was, they all know it, and they keep repeating it even to the Court. Note that none of the defendants testified. They all had their lawyers -- they told their lawyers and the lawyers presented what their clients told them.

And, again, I -- I'm not -- I don't want to disparage anything, but I just need to point out the rebuttal evidence that is so different from the arguments that we heard.

In addition, in Paragraph 8, Your Honor -- and you're 05:22 going to see that I was very happy to agree to Brian Miller putting in all of his PPM's as evidence today and had no objection. And you're going to see in the (inaud.) materials even more evidence than I had, that we filed with our initial case about how they were saying, we're going to, you know, 05:22 sure, he might say it's high-risk, but you're going to -- you see the investor declarations that you saw with our initial filing.

He was telling people it's safe, it's insured, it's all good. And, in fact, there was an insurance policy that 05:22 covered A Better Financial Plan or that concerned A Better Financial Plan. It was included in the CBSG insurance policies.

Remarkably, they come into this Court and tell you Par Funding is totally different from CBSG; they have no relation. 05:23 Oh, except that we kind of -- we covered -- we bribed on insurance policies, and we need to provide other things for them. They included CBS -- ABFP in the CBSG insurance policy. This policy did not provide any coverage of either.

Mr. Mannes advised Mr. Vagnozzi of this fact and he 05:23 called Perry Abbonizio, again, when the COVID crisis did hit in

March and April, just to double-check that the coverage didn't claim anything. And they were like, "Yeah, it doesn't claim anything, we have been telling you that."

The issue with the lack of insurance continued being discussed until the appointment of the receiver. "Joseph Cole Barleta, Joseph LaForte, Dean Vagnozzi, Perry Abbonizio, and others constantly asked me about the status of insurance coverage and I told them, repeatedly and recently, nothing had changed. While we had paid premiums on policies, we had no ability to file claims through CBSG accounts covered under the policies as the policies did not cover the MCA type of factoring that CBSG conducts, where no 3rd-party invoice exists."

He goes on to say that "CBSG continued paying its policies." And you know that the defendants showed you one of their exhibits as an invoice where they're paying a lot of money. Well, yeah. And then it says, "For some reason they kept paying the insurance policy premium and they asked for a limited renewal on the policies where the PPM's were named as beneficiaries, even though all the PPM executives knew these policies didn't cover this at all."

And this all, basically, Your Honor, goes to scienter. It's so they can show -- just like they tried to show this Court, "Hey, look, we've paid for insurance." But they know they don't have insurance. But it allows them to repeat it and

you heard it yourself this week. "In an attempt to rectify the loss of premiums based on our clients, one of my jobs for CBSG was to locate an insurance provider that would take these types of transactions."

05:25 And he goes on to say that he talked to numerous insurance carriers and he was unable to identify or locate a single insurance provider that even insures MCA transactions. None of them do. It's that risky. And he repeated this back to Joe Cole and Joe LaForte. He also just adds and -- (inaud.), just because I don't want to move back to this, Your Honor, on this insurance note, that's all that Mr. Mannes has to say at this time.

But he also points out that -- we're going to talk about Aida Lau in a minute, that Aida Lau, she was transferred 05:25 out of the accounting department at Full Spectrum in late 2019. In 2019 after being counselled by her supervisor, she was moved to a different office and assigned to assist Joseph LaForte. And she was his assistant from 2019 until the receiver was appointed.

05:26 So in her declaration -- this is the same individual at issue in the receiver's notices about the documents -- she states that she's the accounting manager. According to the chief compliance officer, "She has actually been Joseph LeForte's personal assistant since 2019." So that's just 05:26 another falsehood that they have asked you to rely upon.

Next. I would like to point out to this Court one of the points that we made. And I heard the defendant say, "What's the big deal?" With the -- now, we're going to do some jumping around because we're going to try hit those high points, Your Honor, so bear with me and just slow me -- I know you won't hesitate to slow me down, but I really am going to try to hit the high points quickly and bounce.

Lori Boyogueno is the senior securities compliance examiner and enforcement administrator with PADOBS, which is the Pennyslvania Department of Banking and Securities. And one of the issues the defendant's raised is, "So what they got a subpoena from Pennsylvania in January? They responded in February."

And one of our arguments is, we showed the subpoena to this Court and we said by the time they responded to the subpoena, they had the agent funds in place. And we showed you they did. And we showed you Dean Vagnozzi was one of them and that they -- he said he had 20 guys lined up to open these funds and then they responded to the subpoena.

And just to make it, critically, clear, the Pennsylvania Department of Banking and Securities has provided a declaration to this Court to advise the Court that on January 4th, Pennsylvania DOBBS issued an investigative subpoena to Par Funding pursuant to their investigation of Par Funding. And they've attached the investigative subpoena that we looked at

earlier this week. And she writes that, "At no time did Par Funding produce any agent fund documents in response to our subpoena, nor did they disclose any agent fund documents at any time."

05:28 They kept this a secret. And as you know from the record, Your Honor, they responded. They got the subpoena in January, they responded in February, responded in September, and October 2018. And that timeline is all laid out in our memo, and I'll do it, again, in our proposed findings of fact. 05:28 The Pennsylvania Department settled with them in November of 2018.

Throughout that whole time, they never disclosed that they had simply converted their agents to agent fund managers, that they were still doing the same exact thing but doing it 05:28 through an investment fund, instead. And they never presented any of those documents, despite the fact that they were requested in a subpoena by a state regulatory agency for all their books and records and all their marketing materials.

And I'd like to move this into evidence, as well, as 05:28 the Ben Mannes Declaration that I just showed.

MR. MILLER: Your Honor, this is Mr. Miller. I would object to the Mannes Declaration with respect to Mr. Vagnozzi as improper rebuttal and beyond the scope. You'll recall we certainly didn't introduce the insurance policies that was 05:29 other defendants who -- we really have to separate everybody

out. We also didn't present any arguments in our brief or in our presentation about insurance either. So I object to that document with respect to Mr. Vagnozzi for (inaud.) rebuttal as not responding to the arguments that we presented in our case.

05:29 **THE COURT:** Okay. Ms. Berlin, briefly. And then I'll rule.

MS. BERLIN: Thank you, Your Honor. Two points, Number one, as Mr. Miller knew, I was going to take Mr. Vagnozzi's deposition directly and I would have asked him

05:29 about these questions, but I was told he was being called today. And I advised the Court and all counsel on the phone that I would do my direct during my cross. I was deprived of that today.

We could take another day and I could call him but I

05:30 would rather just introduce my direct evidence that I have for Mr. Vagnozzi right now. If Mr. Miller insists, I'm happy to call Mr. Vagnozzi and do the exam that I said I was going to do today. But I want to remind, that I did request the status transcript in case any of this became an issue. I asked in

05:30 advance if I -- and I said I was doing this way and asking Mr. Vagnozzi my questions during Mr. Miller's exam.

Next, Mr. Miller represented to this Court that the PPM's like everything out so beautifully. These PPM's, they are so clear and I have full disclosures of all of the risks.

05:30 Remember he's talking about it discloses, there's a high risk.

It discloses so many great things beautifully and honestly. This is one of the things that is a patent false, big fat lie.

And I'm going to show you in the findings of fact and conclusions of law, we're going to link it back to all of those declarations that are in the record and show you how many investors said Mr. Vagnozzi told them about insurance. You can hear them say it, and you're going to see it in his offering documents that Mr. Miller has told you are ever so honest and clear. So this is absolutely rebuttal evidence to Mr. Miller's arguments and we would like to introduce it.

THE COURT: All right. The Court will be --

MR. MILLER: I would like to respond.

THE COURT: Yeah. I think we've heard enough on this argument. I don't want to belabor it, okay? It's going to be moved in within the Court's discretion. I think it's not so far outside the scope that it would be improper examination. So you've made your -- noted your objection for the record. This will be moved in at this time. Please proceed.

MS. BERLIN: Thank you, Your Honor. Next, the defendants provided two declarations to this court from agents and managers. So these are the only investors they could find who would provide any declarations stating that they were -- told the truth and those are exhibit to the CBSG defendants' memorandum. So they have two. One is from Vincent Camarda and one is from an attorney. And they both state in their

declarations that they have agent funds. So we can rely on the face of their declarations to show that.

What we want to show the Court is, is that's not the norm, that the agent fund managers might get the full disclosure. They stated, in fact, "They opened their books and records to me, they showed me everything, it was -- I saw it all, they were all honest, they told me he was a felon."

That goes into our whole argument, Your Honor, that the agent fund managers, they're -- like, Mr. Vagnozzi and others, they're in the inner circle, they are told the truth. Just like the two investors, the two agent fund managers who gave declarations for the defendants in this case. We believe that Mr. Vagnozzi and other agent fund managers might have known as well.

And to contrast that from the agent fund managers who said they were told everything, and they were given a correct financial statement, this is the declaration from Andy McKinley. He had a little bitty fund, called the Jade Fund, LLC. And he's saying that he went to the Par Funding office three times and he met with them, as part of his due diligence, and that Par Funding gave him the document attached to Exhibit A before he purchased a promissory note. So he, personally, purchased across a promissory note.

He also states, obviously, he would have wanted to know if Par Funding was really operating in a $6 million loss.

And this goes to the whole issue we covered the other day, Your Honor, about the two sets of audited financial statements; how they have one that they show to some people, and one that they show to another.

05:33 **THE COURT**: Well, yeah. You they told me they got the one that's got the loss and then they asked for the 1.2 million, I think it was on the positive, but they got a negative opinion and it doesn't --

MS. BERLIN: Yeah.

05:33 **THE COURT**: -- it doesn't follow anything with GAAP; right?

MS. BERLIN: That's correct. And so this is an affidavit from someone saying, "They showed me this one and it's the -- it's not the truthful one. It's the adverse -- the 05:33 one with the adverse opinion with the higher numbers. So that's in total contrast to the other people who said, "Oh, yeah, we went there and we were shown everything." Well of course, because you're very big agent fund managers who bring in a lot of money for this company. That's our argument on 05:34 that issue. But it just goes to show the difference.

Next, I'd like to show you something from James Klenk. We looked at this yesterday, I'm not going it belabor anything in this document, but I want to point out a few things. First of all, I heard a lot about the profitability of the company. 05:34 And I want to remind everyone, there's been no evidence

presented that this was a profitable company or that it had problems due to COVID.

It's one of those the defendants say it so often, maybe, we all start thinking it might be true. Even I am, like, really? That happened? I hadn't seen that, because it doesn't exist.

There has been no evidence presented to show that at any time. But the only -- the only time -- and this is from the accounts alert CBSG -- he tells you in his declaration that the only time they've ever had an audited financial statement was for 2017. That's the only year ever.

So, you know, we talk about, what's the truth? What's the house money, as they call it? Really, the question is, what are the profits? What is the profitability of this company? Is this -- what is it? And we don't know the -- even Melissa Davis would tell you we will figure out, we don't know yet if it's a Ponzi scheme because we're just now getting access to some of the corporate records that are required for that. There's no affirmative determination about whether or not it is.

However, we can tell it was from the one year of an audited financial statement. And that's what I like to show this Court. The correct audited financial statement is attached as Exhibit A to Mr. Klenk's declaration, which is already in evidence.

Your Honor, I'm going to toggle to another screen where, I think, it's going to be easier to see. May I pause it for just a moment?

THE COURT: Yeah.

05:36 **MS. BERLIN:** Thank you. Sorry, Your Honor, just one moment. I'm going to try to put this all in one place, make it much faster. What we're going to show you is that we can all see -- and this is probably why they didn't want another audited statement -- how simple it is to see the Ponzi scheme in the 2017 audited financial statement.

MR. FUTERFAS: Your Honor, this is Alan Futerfas. I object to the words Ponzi scheme. (Inaud.) They didn't allege it in the complaint. She sent that. It's wrong. It's untrue. I'd ask that Your Honor strike it from the record. Thank you.

05:37 **THE COURT:** All right. Well, thank you. We're -- unfortunately, we don't have a jury out there that's going to take note of any of these things. The Court is very, very acutely aware that from the beginning, I don't take that word lightly. This has never been anything but a registration and

05:37 disclosure-type case. I know that there is financial concerns, but it's very clear to me that the Court would never be using those terms. So I'm going to disregard them in terms my analysis. So you don't have to worry about that for all the defendants that may be concerned.

05:37 Go ahead, Ms. Berlin.

MS. BERLIN: Yes. And I will not use that word myself so there's no issue. The reason I used is because the defendants have repeated it dozens of times for two days. Your Honor, this isn't a Ponzi scheme. The SEC did not find it's a 05:38 Ponzi scheme. It's not a Ponzi scheme. They've been saying it and proving it -- I am simply rebutting their assertion. And so I will not use the word, but I will simply show that the are using investor funds to pay investors and that there's no other way that they could be in business. And, again, this is -- 05:38 just to be clear, Your Honor, this only for the year 2017 because that's the last year -- they never had another audited financial statement completed after this.

THE COURT: Well, right. And look, I just -- again, I don't want to belabor this point, but, you know, I've got a lot 05:38 of investors on the lines and listening, so I want to be -- I want to make sure everyone understands, you know, the specter of the Ponzi scheme has been there simply because the financials as far as the SEC has looked and looked.

There are late-stage investors in this game that did 05:38 not get three or four years of direct returns, like maybe, some of the earlier players did. And so there's been some dispute, I think, that the SEC, because of the lack of audited financials to get a better picture of what's going on, there has been concern that perhaps investors that put in money later 05:39 on, those funds were used for payouts from those from the front

end who are getting their investments paid at every turn.

But I will point out that theory, in my view, hasn't really been borne out by documents. It's not that we may not uncover more when we see more, but right now, all I have are the financials that, I think, are missing, you know, we don't have everybody audited financials every year. We have an investment profile and an unaudited financial statement that shows a $6.7 million loss, was my memory, and then later on, we had that contested.

05:39 So, again, I want to be clear that's not the basis of this case, but there has been some concern from the beginning -- and I know the receiver's been looking into it about the economic model and the stability of this business. I also know that it's difficult because this is happening in the middle of 05:39 COVID. So there's this kind of misconception, perhaps, that is this COVID and receivable-driven or is this really more about we are running out of funds through the life of how this was being played out with investor monies?

But none of that -- I want to be very clear, although, 05:40 I know this has been mentioned a lot -- I don't expect anybody to be put in this in findings of fact or conclusions of law because it doesn't really go to the scienter issue, the regulation issue, the disclosure. This is really a disclosure problem, I think.

05:40 And, I think, Ms. Berlin, you know that. That's

really how you phrased it from the beginning, is that's the thrust of it. But I know this has been floating around because some of the economics behind this are a little hard to follow, given the nature of the defaulted loans, which we know, if they're not paying, something isn't really checking out just right. Right? I mean, if you're getting those returns but we have half of the portfolio defaulted, how are we paying back these returns without using investor money to do so?

I wanted -- I want to point that out really for the benefit of those listening in, it's just some of the over-arching concerns. I am not going to call this a Ponzi scheme, it's not alleged to have been one, I don't have the evidence to do that. But I will tell you that just common sense, from an economic standpoint, it does seem that some of the stuff here has been a hard to square up. But, as far as I'm concerned, the whole case is about whether there was disclosure requirements necessary for this and these are the things we're talking about today in the rebuttal; the investor, the underwriting, the insurance, et cetera. So let's not belabor it too much more, but I just wanted that to be to clear.

So let me go ahead and turn it over back to Ms. Berlin. Go ahead.

MS. BERLIN: Thank you. Yes. And I am just, I agree with every -- obviously, Your Honor, and the reason that I'm

raising this is because the defendants have been arguing, affirmatively, that it's not a Ponzi scheme. And so I asked the Court and I want to make sure that we are responding to that issue.

05:41 **THE COURT:** It's all right. Move on, move on. Don't worry about it. You've responded to it. Let's go. Move on.

MS. BERLIN: Okay. Thank you, Your Honor. So looking at -- these are the 2007 financial statements. And if we look at PDF Page 8, which is on Page 4, this is where I showed the

05:41 other day that they have a net loss of $6 million. You'll see just a few things to point out here, none of which is disclosed. We've talked about disclosing payments and their -- the defendant argues, "Who cares?" Well, they have a net loss of $6 million but they are paying consulting expenses, which

05:42 I'm going to show you, it goes only to themselves of $33 million. So they're operating at a loss.

THE COURT: Hold on, I think we've got to switch it because you're still on the audit.

MS. BERLIN: Oh. Thank you.

05:42 **THE COURT:** So please go ahead and pop that off and let me get the statement you're looking at, please.

MS. BERLIN: Thank you very much, Your Honor.

THE COURT: Yeah.

MS. BERLIN: I'm not doing it. I thought I was doing

05:42 a pretty good job of this, but no. Oh, let me see. Oh, my.

Oh, I am. I meant to be on the audit. Can you see the audit?

THE COURT: No. Right now, we're looking at the e-mail that talks about the audit opinion from Friedman LLP, but I don't see any financials.

05:42 **MS. BERLIN:** Oh, thank you. Okay. Let me just -- sorry.

THE COURT: I think if -- (inaud.).

MS. BERLIN: (Inaud.) share?

THE COURT: Yeah. Okay.

MS. BERLIN: Can you see now?

THE COURT: Now we have a financial -- I don't know if you've got it zoomed in where you want it, but now I'm looking at a spreadsheet. There we go, yeah. I got the income from operations, there we go. Okay. Go ahead.

05:43 **MS. BERLIN:** Thank you. So this is the only financial statement ever to be done pursuant to GAAP for its entities so this is really the only financial input there -- a snapshot there is. And there's been a lot of questions and a lot of representations this week with no evidence whatsoever, what the

05:43 profits are and the house money and this and that.

And the bottom line is, no one has an earthly idea, the full picture, yet because they have chosen not to have GAAP compliant financial statements. But the one we can see from 2017, shows that they're operating at a loss. We went through

05:44 that earlier this week. It also shows that even though they're

operating a lot, they choose to pay $33 million in consulting fees, which I'm going to show you in a moment, they paid to themselves. So they ended up operating at a loss, they don't care. It's 2017 they have promissory notes out -- remember that's already happening by this time. But they're still paying themselves these massive fees.

And next I'm just going to scroll to PowerPoint Page 20. So on PowerPoint 20, we're going to take a look at Note 6, which is right here. And this is going to show you -- these are the consulting expenses for that year just so that we're clear -- they're paying -- they're operating at a loss. They're operating at a loss but they're paying themselves. And remember, we saw from the Klenk Declaration who these companies are; New Field Ventures is Abbonizio, Beta Abigail is Cole, and Heritage Business Consulting is McElhone.

And even though they're operating at loss they paid themselves $24 million. Then they paid themselves an additional 10 that's accruing -- and what that means is it's accrued by December 2017 but they're going to pay themselves in the following year. So even though they're operating at a loss, they're continuing to do that. And, of course, none this is disclosed to investors because nobody is getting this GAAP-compliant statement. Now --

THE COURT: So let me make sure. I'm sorry.

MS. BERLIN: -- company.

THE COURT: Let me now interrupt so I understand exactly what I'm looking at. So this is the non-disclosed only audit, I think, the only audit we have; non disclosed.

MS. BERLIN: (Nodding).

05:45 **THE COURT:** We've talked a lot about fees and some of the compensation. And what you pointed out -- why don't you go back, if you could, to that line item. I just want to make sure we all see that so I know exactly what I'm looking at. These are entities -- because, I think, I didn't recognize the

05:46 names of some of those entities. So this is a little new to me, I think.

MS. BERLIN: Go back to the entities or go back where the losses are?

THE COURT: Well, I mean, I see the losses but the

05:46 payoff to entities -- because, I mean, look, one thing -- we've all talked about this almost 6.7 million of losses that then they wanted to get a different audit opinion and that only the insiders, according to the SEC, that are in the more -- the group circle, if you will, of folks of fund -- the fund inner

05:46 circle knows the real financials and was maybe was aware of this. Everyone else is looking the negative opinion 1.2 positive financial statement; right? But I did not know also that the thrust also of the loss was because of payouts to the individuals who have these, I guess, they're consulting firms

05:46 they've created; is that correct?

MS. BERLIN: Yes. And that's where in the Klenk Declaration, he states whose consulting firm is whose. And, yeah, they have consulting companies agreements with themselves, Lisa McElhone is an owner, she has a consulting agreement with herself. Cole has his own (inaud.) company of their own and they get paid millions and the company is operating at a loss.

THE COURT: Okay so that --

MS. BERLIN: So I wanted to --

05:47 **THE COURT:** Yeah, no. I don't mean to interrupt but, I think, it's important that we take a moment and look at that. That we have one financial statement, okay? And in that financial statement, I mean, because we're wondering where we are in the company now and we're trying to look at the 05:47 trajectory of the company. We're looking at a 2017 year-end that shows -- and let's be frank, I mean, I don't think -- I can do the math pretty quick -- but I know that if they're not consulting expenses to themselves of 33 million, they're making a profit. Is my mind correct on that? I think that's simple 05:47 math; right?

MS. BERLIN: Yes.

THE COURT: So we're operating at a net loss that we're selling as a 1.2 million profit and the thrust of that is a $33 million consulting expense to the principals who were 05:48 operating this including McElhone and, I believe, was also Joe

Macki or LaForte -- who was else was -- I can't remember because I don't have the Klenk Affidavit in front of me. Who was, I guess, who had their fingerprints on the consulting expenses other than McElhone?

05:48 **MS. BERLIN:** So McElhone is Heritage, a (inaud.) company, so it's McElhone, it's Cole, and it's Abbonizio.

THE COURT: Okay.

MS. BERLIN: And then LaForte has his own, which we're going to see in a second. He calls it, like, a broker fee and

05:48 he get 5 percent of everything.

THE COURT: Okay.

MS. BERLIN: So but I was just pointing out the biggest one here and I'll put them -- the other small, you know, the other ones in my statement. But I went through this

05:48 the other day and I realized I might have gone through it too quickly. But in listening to all the defense arguments of who cares, they can take whatever money they want, there's nothing illegal about taking money they want.

That's not -- this is a case about you're projecting

05:48 this as one way to investors and to this Court. We've heard this week and I waited to present this as rebuttal because when we hear through these -- from these (inaud.), we're hearing through their clients. They still claim this is a successful company, they have insurance. I've shown you there was no

05:49 insurance. This is a different thing. They care more about

paying themselves than operating this company as a profit.

And, Your Honor, keep in mind the timing. December 2017. They're offering notes. They're ramping up this agent fund system in January of 2018, right after they get this. So these are the numbers. They -- my point here is that it's dishonest, what they represented, and that they care more about paying themselves than even keeping the company profitable. But this is the only snapshot that the company would be reliable because it's the only GAAP compliant thing.

05:49 **THE COURT**: Got it.

MS. BERLIN: Now, I will show you this one thing just to go back and then I propose (inaud.) we're going to put this. It's PDF Page 20. And this is the page that lays out who gets paid. Right? So it's Note 6. And we have the related properties, this is one. You're going to see this (inaud.) property (inaud.) that's Lisa McElhone, she's getting a little bit of money. The big ones are in PDF Page 20. There are her properties that we showed the other day and everybody screamed they're irrelevant.

You're going to see how these properties act -- financial health of the company and how this impacts, therefore, the investment of the investors because they're investing in this company. And it's being projected as very successful.

Here are the companies right here. It's on Page 20.

So you can see here we have 24 million that goes to these companies, as consulting expenses. And that's what we just saw on the first sheet that I just showed. And the remainder that takes them up to the 33 million is right here. And these are consulting fees but they're going to pay them in 2018 instead of 2017 is what that says. It's accrued consulting fees. And so this gives us a picture of how the company is operating and what's happening.

Next, we're going to go for anyone who is looking at it in a binder, we're going to go to Page 10. I'm just going to show you a little bit more about what this one snapshot that we have tells us about the company. So this is Page 10. And you see in the first line, Your Honor, you're seeing net loss --

THE COURT: Yeah.

MS. BERLIN: -- 6.695 million. And then we see that they funded -- down here the fundings of advances receivable. So that's how much they're giving out in loans. That's how much they're funding in their Merchant Cash advances or loans. They're funding out to a negative $191,099,000. So let see, we've been asking ourselves all week, how much did they get paid? And the defendant told you, "Oh, their -- like, it's so successful." Well let's see. So we can actually see exactly how much they got paid because it's right here.

These are the repayments. So the repayments are

$95,000. Okay? So they loan out 191 and they're getting repaid 95. So, obviously, they're getting repaid less than they're putting out. So but let just keep going down a little more. So this tells us a little bit, something about how
05:53 successful at the one point in time they had GAAP review they're loaning out 191, that those loans are only bringing in -- isn't it, yeah, it's just shy of half. Right? So it's like a half loss. Then we go down to -- so that's how much was repaid. And then let's go down to the net cash.

05:53 So, Your Honor, what we know is their net cash for their operating activity, meaning the business, activity is $58 million in losses. So they're operating -- meaning their business, meaning Merchant Cash Advance business -- is operating at a 58 or close to $59,000,000 net loss. So I've
05:53 highlighted that.

But then the issue is we're going to now look at -- you wonder everyone's checking that out. Oh, the investors -- oh, it's totally separate. Well, look, cash flows from investing activity: The advances to related parties -- which
05:54 if you look at that, that's in here, and I'll lay it all out in our proposed findings of fact -- but those are entities that (inaud.) said, look owns and that others related to them own. And then, repayments from related parties.

So the net cash that's used for investing is $1.4
05:54 million. That's it. The payment to investors -- so look, you

see everyone's following me so far, we see a negative. The net cash from the business is a negative 58 million. The net cash from investments is negative 1.4 million. So you wonder how much did they pay the investors? And they paid the investors 18 that year -- it was 18.6 million. That's right here. Repayments of investor loans. Do you see that?

05:54

THE COURT: Yeah.

MS. BERLIN: The repayment of investors loans is 18 million. So they paid out $18 million to investors; right? They borrowed $88 million from investors. So everyone understands, their net -- this is their net income -- if you can see my mouse moving. This is their net income from operations, meaning the business. They're operating these at a loss, but they have money coming in from investors. And they (inaud.) that's the only; right?

05:55

05:55

And they are paying out investors 18 million. Because their business is operating at a loss, which this is pretty simple, they're operating at a loss, they're operating at a loss. They have no positive cash flow. When they pay investors, they can't come from the MCA. We know the MCA's are operating at a loss. It can only come from this. It's coming from the investors. That's the only positive cash flow. So I wonder if the Court has any questions about this financial statement. It's pretty clear though, but --

05:55

05:56

THE COURT: No. I mean, I don't have any questions.

I think, just so that we're clear because we want to always stay focused on what we're trying to prove, if we're the SEC, which is registration of misrepresentations and omissions; right? So, I think, for purposes of -- and I assume this is
05:56 the kind of thing it will be crystallized in the findings of fact conclusions of law.

But just so that we're clear on how this fits into the other bigger picture, the idea is that only audited financial statement that is GAAP compliant has indicated what the SEC has
05:56 termed the misrepresentation and/or omission in that it was never provided to investors for them to realize that they were not recovering off of these loans and, therefore, the only positive revenue flow was from additional notes being issued and additional investors.

05:57 So in one way, one would say that anybody getting any payouts is from some other investors' money because it wasn't being generated off high-interest-rate percentages from these loans, most of which were either, probably, in default based upon this statement.

05:57 And, therefore, what this is showing in the SEC's case and what they're offering it for, so that we're clear, is you want to make it clear that because they were hiding the ball on this, in your view, and not showing this financial statement to investors, the investors were not able to make an educated
05:57 decision because it looked profitable, at least, when they were

shown the noncompliant 1.2 million profit that they got on that other statement, which is the one that was handed out to some investors.

Now, may I ask aside from this, obviously, we have a snapshot. And you mentioned that a couple of times. What do we have in terms of corporate tax returns for these guys for the last few years? What do they say because, I mean, at this point, I mean, you can play with this for tax purposes and we've talked a little bit about how they got certain opinions, but I want to know, I mean, this is two years ago. Show me now or do you have or is your concern that we don't have -- what are we getting now? What is the most recent return showing?

MS. BERLIN: So, as you know, they haven't filed their 2019 tax returns. We just got their 2017 and 2018 tax returns, which I can show you.

THE COURT: Well, this is '17; right? Isn't this '17 that I'm looking at?

MS. BERLIN: This is '17. Yeah, this is '17. Do you want to see their '17 tax return?

THE COURT: Well, no. I'm saying, this is '17 and I know that we had a little bit about what was being shown is not what I see here. What about next --

MS. BERLIN: Yeah.

THE COURT: -- year? What about the following year? You've already got next year's. Do you want to show me what

next year's are?

MS. BERLIN: Well --

THE COURT: '18? '18?

MS. BERLIN: -- this is the only year they had an audited financial done, was 2017.

THE COURT: So they have no audited financial statement for any other year?

MS. BERLIN: After they got this done -- so they -- it showed the incredible loss and Dean Vagnozzi demanded the non-GAAP compliant one with the adverse opinion, they never --

THE COURT: One at a time. One at a time. Go ahead you're finishing up. Go ahead.

MS. BERLIN: No, I meant LaForte. I'm sorry.

THE COURT: Yeah. Sorry, yeah. Go ahead.

MS. BERLIN: I apologize. Mr. LaForte complained about this and had them issue the one of the adverse opinion and they never had another audit completed again. And those facts -- both of those facts are in the Klenk Declaration, he's the controller of the company. And part of his job is working with outside accountant and auditors. So --

THE COURT: Well, let me ask you this. They didn't have any more audited. What about tax returns? Anything in tax returns that I can glean? Not audited financials. What -- do we have anything that we've seen that gives us more light without an audited financial about what happened in the

following year? What did they report to the IRS?

MS. BERLIN: So I'm not -- I don't know that we would -- I mean, are you asking if that their tax returns would accurately reflect the financial status?

05:59 **THE COURT:** Well, Again, I know that they may not, but I would like to get a -- I'd like to see what it is that they're reporting for next year. Listen, I get that I'm not in financial, we don't have one -- they never did one, but I'm curious, I mean, they got other issues on that front. But I'm

06:00 just wondering, what did they report? I mean, do we have a -- we must have a tax return. I'm sure the SEC pulled one. I'm curious, what did they report? I know that they could do many things for tax reasons, don't get me wrong. I know that might not reflect the true seriousness of the problem that you

06:00 believe started in 2017 and not earlier. But I'm just curious, anything gleaned from that that I should know about? Or is that just not really of value in the SEC's eyes?

MS. BERLIN: No. It is of value and we just recently received the 2017 and '18 tax returns. In fact, I've just

06:00 recently been speaking with their tax preparers about the 2019 returns. And that's something that Ryan and I are, both, looking at the returns. I could show them to you. I didn't quite yet feel prepared to, like, make an argument about them. Because as we get more information from the actual, the real --

06:01 I mean trying to find real corporate records. But I could show

you the tax returns right now, if you'd like to see them.

THE COURT: I don't need to, necessarily, get too deviated because I want to streamline this, but I don't want to belabor --

MS. BERLIN: Okay.

THE COURT: -- it too much. Would it help, maybe, since the receiver is looking at them, do you think that, maybe, I could hear a brief word from Mr. Stumphauzer who has, maybe, looked at the returns, just to give me a quick snapshot about if anything he's seen in there? I just think it would make a pretty good picture. I know we don't have audited financials. Guys, I don't want to put you on the spot, but Mr. Kolaya, Mr. Stumphauzer, you guys got a sense now that you just got these tax returns? What are these guys reporting? I, kind of, want to know. Anything in there that starts to, I mean, it might not jive at all with what I'm looking at with this -- with these financials but what have you guys seen so far?

MR. STUMPHAUZER: So, Your Honor, I do have copies of the 2017 and 2018 tax returns. I've got them in PDF form. Can I say, for sure, this is what was submitted order mailed in? No. But it looks to be a final tax return prepared by Rod Ermel Associates, which is an accountant, I understand it to be their tax accountants from Colorado.

And for 2017, they showed taxable income of $0. And

then for 2018, they report taxable income of $22.3 million -- - excuse me, $22.4 million. And, therefore, paid tax of 4.7 million.

THE COURT: Thank you for that. I just want to -- and I know that there may be some concerns about the underlying documents supporting these returns. But it's important for me, I mean, because we're focusing so much on one kind of audited financial statement that wasn't provided to investors and I know that's already part of the SEC's case.

06:02 06:03 06:03 06:03

But I was just curious about what that they represented that they actually brought in, when it came to their tax preparation for the following year. I mean, I guess they reported it at zero, I heard now, in 2017, if my memory is right. And the, 2018, I guess, 22 million is what I'm hearing. So, again, we're getting all sort of fluctuation there, but I think it's just trying to get a better sense of what's going on. All right. So thank you to for that. Mrs. Berlin go ahead and pick up where you left off.

MR. FRIDMAN: Your Honor?

THE COURT: Yeah, I'm sorry. Go ahead, Mr. Fridman.

MR. FRIDMAN: This is Dan Fridman. I'm wondering if, you know, in preparation of our findings of fact and conclusions of law, if the receiver can provide us with those tax returns? The tax returns that they have? We would like to see them and, potentially, use them in our final product. And

I will have some responses to Ms. Berlin's presentation as well, but very brief.

THE COURT: Yeah. And they're going to be real brief I'm not doing a sur-reply dance here. You've got three days and I've already gone overtime so we'll talk about how much time you're going to get. You're going to have to make that argument in your findings of fact, conclusions of law, I think, Mr. Fridman.

But with that being said, is there going to be any objection -- I'm not going to need to make this call right now, but, obviously, I don't want to be pulling evidence and that's not been introduced. I'm asking just for a little bit of, you know, backup just to for a little bit of backup just so I get a sense of what's going on. I don't know if the receivers even feel comfortable providing copies of these tax returns that you just got them. Any objection from the receiver on this, that we can get it to Berlin and she can submit it to other people? I don't want to put any of you guys on the spot if you're still checking them.

MR. STUMPHAUZER: Your Honor, all I would say is, I don't really have a position on providing these other than, number one, I probably want to make sure that these were, in fact, the ones that were mailed to the IRS, it certainly looks like that to me. Number two, I do know that there are a lot of rules that go to the privacy of tax returns, but subject to

that, I have no position at all. I have no problem providing what I have in front of me.

THE COURT: All right. Here's what we'll do. Let's -- so we don't get too side tracked, I'm not going to get in the way of that, and I would ask that you guys have had a very good job meeting and confirm Mr. Fridman and his client. See if that can be provided, please, without any issues, so we can look at it and incorporate it. Let me get back to Ms. Berlin, so if I have any time to let Mr. Fridman jump in and make a comment or two or anybody else when we wrap up, I want to do it, but I just don't want to run too much over time.

MS. BERLIN: Thank you. Now, Your Honor, it's important to note that a tax return would not reflect bad debt.

THE COURT: Correct.

MS. BERLIN: So. I wanted the issues right. Okay.

THE COURT: No. And listen, I just wanted it for context. I'm not trying to elevate it to the form of an audited financial statement, but I was curious because I know that we only have one snapshot that's GAAP compliant and I want to know what are they even reporting. And I know that the underlying financials may not match what's reported.

I just -- I just was curious. That's why, again, I don't, necessarily, know that it's going to make any difference for the Court. I want everyone to hear it even if the receive produces it. I don't know that that changes anything because

that's the status of the business not the status of representations.

And your argument has been it's a misrepresentation problem, look at what these guys are getting paid off the top, 33 million. To a $6 million loss but you're selling no matter $1.2 million profit, that's the issue here. It's not about you were profitable. Nobody cares, quite honestly, about profitable when it comes to misrepresentation. The investors care because they're getting paid. But I just want to be clear, it doesn't make or break anybody's case, nor does it serve as a defense simply because they report 22 million the next year.

I just wanted to know for context what we saw. All right? So I don't want anybody -- and if they want to get it, that's fine. But I don't know how much more supporting documents were in that tax return that anybody can look at. I want to focus on what's in evidence. That's what's going to carry today. So go ahead. Go ahead, Ms. Berlin.

MS. BERLIN: Thank you. Thank you. And yes, to be clear, that the true financial situation of the company and the fact that they manipulated to make their own needs and how they're using the money there and, of course, you know, started -- the only evidence that is in is Melissa Davis from Joe McElhone who says, the money is all commingled and they can argue it's not but it -- but that's the only evidence there is

is that it's commingled investor funds.

If there's -- everything is mixed in together. And we see how they're using investments. It goes to their scienter, it goes to the way they operate, whether they need the receiver, it goes to, you know, the representations about how successful the company is as well.

So Joseph Jason Rotunda, Your Honor, this is actually the director of enforcement for the Texas State Securities Board. And he read one of those response briefs in this case and made representations to this Court about the Texas case against the defendants. There's a Texas case against Mr. Vagnozzi, A Better Financial Plan and Par Funding. And he felt compelled to tell you the truth.

So the first page, he's telling you that they have been and are continuing to investigate and he tells you who, including A Better Financial Plan Complete Business Solutions Group, Perry Abbonizio. He tells you that in Paragraph 7, that they brought their -- they have an emergency cease and desist order that was issued. And that there -- in Paragraph 8, there's an opportunity to respond.

Because let me tell you, A Better Financial Plan, they filed their responses. In that case, A Better Financial Plan argued that it was an insurance company. The enforcement division is responsible for litigating the cases, and these are responsible for the management of all the cases concerning all

the defendants in this case.

What we have so far is, he is the person who knows what's really going on in Texas. He states here that these cases have not been settled, they have not been resolved pursuant to a hearing, they are very active, that he is familiar with the defendant's opposition to the preliminary injunction brief -- that's Paragraph 13.

He goes on to address it. Document Number 148, that's the defendant's response brief states: "As with the previous state regulatory issues, Par immediately engaged with the TSSB to remediate and resolve the issues and was on the cusp of signing a consent agreement to close the matter, when the SEC's actions interrupted that mediation." And he writes too, "This statement is not true. Par was not on the cusp of signing a consent agreement to close the matter when the SEC's actions interrupted the remediation."

He goes onto address the representation to this Court: "The Texas action was days away from being resolved with a financial penalty and remediated action when the SEC brought its motion." He says this statement is not true. "The Texas action, presumably referring to the emergency order, was not days away from being resolved with a financial penalty and remediated action."

He also goes onto tell you that it says in Paragraph 18, that in Texas the company hired excellent counsel and was

days away from finalizing an agreement. And he says that, too, is absolutely not true.

So this is another example of -- there's so much that's been represented to this Court and I've heard -- a few times I've been interrupted to say, you're only considering things that have evidence but if things are said over and over again, I know the Court is only considering things of evidence. But for some of these things, there are slivers of evidence that are presented and then a much larger argument made.

06:10 And, you know, this is another securities -- a state securities agency. This is two state securities agencies who provided declarations this week after reading the defendant's responses and wanted this Court to know the truth about the argument.

06:10 **THE COURT:** And so we're clear, and so we're clear, Ms. Berlin. So this -- how this fit in again. This goes to some of the earlier points you made that we heard about representations made to investors. We're wrapping this up, we're almost done. We don't really have anything outstanding 06:10 with the SEC or any other regulatory body in the states we're in. This is just pointing out the fact that they were far from what was represented to investors.

I just -- again, I'm fitting it in for what I know will come in your proposal on Wednesday. But that's where this 06:11 fit in, right? Because a lot of the argument has been, "Hey

we've have taken care of this, we don't have any regulatory concerns right now." Right?

MS. BERLIN: That -- that's right. That's one of the reasons and it's also relevant because the defendants argue that they don't need any injunctive relief because in all their papers, all of them are, like, every time they get told not to do it by another state, they change their ways. Why doesn't the SEC just ask them nicely to stop?

And Mr. Miller went so far as to say that the SEC's decision, which is made by the five commissioners of the SEC who vote and decide what cases we bring in and how, that what they did was improper bringing the case this way. Because if we had just asked them, they would have done things differently.

And Your Honor needs to know a little bit more about what has happened with Texas, the two Pennsylvania cases, the New Jersey case. Over and over and over again, nothing changes and they misrepresent to this Court the status of these very cases and then point to them. They pointed to these cases to Your Honor in their papers and say, "We have a track record of fixing things when they're brought to our attention. We don't need an injunction." And they cited -- if you look at the paragraphs Mr. Rotunda is responding to, that's how they're arguing it.

THE COURT: And you would you say that part of this

really goes to the idea that's been advanced regarding the future harm, meaning that -- I think, that part of the factor is not only from an egregiousness factor, but you're trying to illustrate that the need for this injunction is a present one.

06:12 It is not something that we can simply say, these guys are out of the game, there's no need for this injunction, there's no need for any of this.

Because you're trying to argue that this evidence would support that we have a continuing pattern or practice of

06:12 misrepresentation so as to justify the need for an injunction because future harm is evidenced by this kind of thing that even when they're winding down with a regulatory oversight, they continue to hold themselves out to not have any problems and this is kind of this repeated behavior.

06:13 I think, is what you're trying to show is justification for the future. Right? Because that -- we know that's one of the requirements, that it -- there will be a deterrence or there needs to be a concern for future harm. Right? Is that part of it as well.

06:13 **MS. BERLIN:** There must be. And, Your Honor, between February and now, they have had two -- this is their third regulatory action involving securities law violations. And that's just in a few months. And they told you several of these months they were, supposedly, too busy or harmed by COVID

06:13 to bring in new customers, which we're also going to show is

false.

But the point here is what more they've even misrepresented to this case the very status of their other securities matters trying to urge this Court that, look they're trying to do the right thing in Texas. It's all false. There needs to be an injunction and there needs to be protection for the investors. That's what all this is about.

All we're asking for is an order that says don't violate these sections of the laws until trial. And if you do, the SEC doesn't have to bring a whole new case and we do the whole new process again. We can just come to this Court and file a motion for contempt immediately. We don't have to go through any -- immediately and stop them in their tracks so more people aren't hurt.

And the reason we need this immediate relief is because there's a type of defendant, over and over, over again get caught by regulatory acts, and they don't care. And have told you all week this is no big deal it's just a technical violation of registration. It's no big deal, no one cares that they're a felon. Well, that's not the law. And we're going to talk about that and it might be -- and I understand, Your Honor, because some of my rebuttal evidence is pretty significant, you might want to just -- I will not be offended if you say, I've had enough it's after 6:00.

THE COURT: Well, I got to just say, I mean, I don't

know if you want to just hit on a few more points. I will tell you that the hearing will end today. We're not having a third episode. This is not trilogy. This is going to be part one and part two. It's been 16 hours total, and I've got a lot of people that have given everything they got, plus I need you guys to turn around and start -- after you've take a little downtime, start cranking out what I need by next Wednesday, so that I can then crank out what I need to do by September 4th.

So I don't want to -- I want you to focus on what is important for you to present to me here that would not otherwise be able to be highlighted in your findings of fact and conclusions of law. So go ahead, because I do want to give a least a couple of minutes for any final points from everybody before we conclude. So I'm going to turn it back to you.

MS. BERLIN: And may I move?

THE COURT: Yes, go ahead. Go ahead. You may move.

MS. BERLIN: Can I please move in my evidence that I've (inaud.) so far? These are all new.

THE COURT: Again. I'm going to allow all of this moved in. We talked a little bit about the evidentiary standard, especially, in these cases. And to the extent there's any objections, which I don't think there really is on authenticity or admissibility, the Court finds that all of these are valid. Most of them are declarations or financial statements with a requisite level of authenticity. So I'm

admitting all of your supplemental exhibits for rebuttal up until this point. So you're fine. All right?

MS. BERLIN: Thank you.

THE COURT: Yeah. Go ahead.

06:16 **MS. BERLIN:** So next we have, you know, we just heard Mr. Miller tell us all about how Mr. Vagnozzi and his company, A Better Financial Plan, there's so much about (inaud.), and they tried to fix everything when it happened. And this is a press release for immediate release that Better Financial Plan put out. And we'll file, you know, we'll file it so you can take a full look.

But this is -- you'll see it's from Dean Vagnozzi. He sent it in e-mail to all of his investors. And it's from him and it was a press release plus this e-mail, telling them -- and we had a portion of this before we filed. But this is rebuttal evidence that goes a little bit further, where he says that the SEC reviewed all my bank records and found no investors funds were mishandled or misused and determined that all investments offers were carried in a manner consistent with information provided to investors.

Now, Your Honor, at this point, I want to not only have this moved in, but I would like to have Mr. Vagnozzi's entire deposition testimony moved in because, you know, he -- you will see he's aware that this is not accurate. That's not what the order says. It's not what the SEC told him. But

he -- you'll see that in this press release, he utilizes an SEC order concerning another unregistered offering -- five, I think it was four or five others ones out of the New York office found that he was doing.

06:17 And as soon as he settles it, what does he do? He uses it to market and to lure more investors. And he tells them he thinks that this SEC action is the best sign of how -- I think he used the word -- legit things are. Because he's saying the SEC did not assert that it was fraud. They did not

06:17 assert this, they did not assert that. They found this. We don't blame them. But if there was a problem with their investments or how we managed your money, you would be is sure that the SEC would have found it. I hope you agree.

And he tells them the only problem we had was with

06:17 his -- the steak dinners that he has for people. And that he thinks that this SEC actually entering an order against him, even though it was a consent order is some of the best evidence for why people should trust him with their money now. So he actually somehow takes a regulatory action where there is

06:18 wrongdoing and flips it around to say, look at all the things they didn't find I did and you should trust me with your money again.

And so it never stops. I mean, this is three. This is July is when it ended, and it went on for three years.

06:18 During those three years, he was enlisting investors, he knew

all about the investigation, he never told any of them. And the other thing to note here is, he tells investors that he is getting ready to go public and it's a really big deal.

He is expanding on his business and he is expanding and going public. And so this is a recent e-mail just sent in July and received by investors. So, you know, while we may hear from Mr. Miller, we didn't get to hear Mr. Vagnozzi. So I don't really take that as evidence, but I wonder if Mr. Vagnozzi would also tell us that he doesn't plan on going public now and doesn't have more plans to probably use this case the same way he's using the SEC's case to try to lure more investors.

Now, very briefly going through -- I'm just going to sift through and primarily, Your Honor, I just want to make sure there's no evidence in here that I haven't admitted.

THE COURT: Okay.

MS. BERLIN: I deemed that may be cross. I was going to ask him what default means to him. And, unfortunately, we never got an audit from him. We were hoping to ask him today if all of these companies, which we believe are ABFP funds, are really ABFP funds, but he didn't testify. This is just one of the examples of Dean Vagnozzi lying, and are a going to see a lot of this in my proposed findings of fact.

So this is from his website, a picture. But I asked him in his deposition a week ago, "Would you keep Joseph

LaForte updated about getting these individuals lined up to open the PPM's in connection with CBSG?" He says, "No." That was last week. And here is the evidence where he's literally e-mailing to Joe LaForte right from the beginning and throughout the whole time, where he's checking in with him, letting him know what's going on and he says, "I have 22 guys lined up for the next group of Asians coming in. I have a few guys ready to open their own PPM for you guys, as soon as mine is done." So it was just another lie about his actual involvement.

These are more funds that we believe all of these, believe it or not, are funds that he operates for Par Funding. Mr. Vagnozzi frequently disclosed these businesses from his brief, but he frequently disclosed and voluntarily disclosed the regulatory matters to clients before they invested in a promissory notes. And he claims that the SEC's own evidence confirms it.

Now, I'm not going into detail because we all know it's sealed. But I encourage the Court to look at that transcript. What are we going to do about this quote-unquote disclosure? If it only occurs -- you have to backup from where Vagnozzi tells you to look at the transcript. And look at Page 135. It comes up because she says to Mr. Vagnozzi that I -- (inaud.) she's a person posing as an investor. And she says yeah, I Googled some things about the company. And he's, like,

yeah, there's some bad things out there. And then, eventually, because she brings it up, he discloses it, which is entirely consistent with, like, his director of operations. Said in her declaration that she saw more than one hundred of his one-on-one sales presentations. And he doesn't disclose it, but if someone asks, then he discloses it, which is, by the way, not a disclosure.

When you're holding yourself out the way he does, and putting all over your website that the only law you've ever broken is when he got a speeding ticket. And that, you know, we've already filed that and that is misrepresentation for his advertising. And then he went on to say that the case was against him because they thought it was (inaud.).

And he doesn't even tell them what (inaud.) for. What happened (inaud.) true. And then he used it to vindicate. He actually goes on and (inaud.) pass before Mr. Vagnozzi testified. They go on to say it's validation that the company is, quote, legit.

So they're, once again, using, Hey, yeah, there's a regulatory action, but they didn't show that we were a Ponzi scheme. They didn't find this; they didn't find that. (Inaud.) the company, the same arguments, Your Honor, that you've been hearing from the lawyers, it's coming from the defendants. These are exactly the same arguments to investors. Well, they're not -- they didn't find this and this and this,

so it must a great company, really strong, really profitable.

Your Honor, there's no evidence of that. They're making same arguments to the investors. This is a new declaration of Jason -- Joseph Greenberg. It just goes on to say that no one ever mentioned the Pennsylvania action and it's relevant because he started investing with Mr. Vagnozzi.

THE COURT: Hold on. Hold on. I went ahead and muted. I think someone else was speaking. Go ahead.

MS. BERLIN: Thank you. That --

THE COURT: Are we on the right screen? Are we on the right screen, before you proceed? Because I think that we're having an issue that we're behind. We need to switch back to the other document, is the concern. All we have right now --

MS. BERLIN: Is it this one?

THE COURT: No. What we have now is the announcement. The announcement of the settlement with SEC for your investigation from A Better Financial Plan. I think you wanted to switch to your next -- your next --

MS. BERLIN: -- oh. Oh. So yes. I did. Hold on. I did not -- it's a good thing I'm not an IT person because I would probably do well. I am so sorry. I thought that I had this all set. And let's just see if this works. And so can you now see it has SEC seal?

THE COURT: Yes. Now it says -- it had Dean Vagnozzi and his record, and now you're on default and you show this is

the funds that -- now you're showing some e-mails. This, I think, was in support.

MS. BERLIN: This is.

THE COURT: Yeah. This was supporting some of the representations made by Mr. Vagnozzi earlier. Correct, yeah.

MS. BERLIN: Thank you. Okay. And so I had shown an e-mail where he was. He told me in his deposition last week, you're going to see in our findings of fact -- I'm not going to go through them all here. But there, like, you know, I have all (inaud.), all the lies. We'll put in this our findings of fact, hit the bigger points here. This is another one that Mr. Miller and I view differently about, agent fund raising money, and you'll see that fully flushed out in his deposition.

To be clear, Mr. Miller pointed out, oh, he raised this with him sooner, that's part of our case in chief, is that Mr. Vagnozzi raised this with an as Par Funding to use investment funds in 2016 and 2017 and they said no. And they explained why, and you're going to see his e-mails. (Inaud.) They're attached to our -- attached them to our proposed order where he says he wanted to do it this way with funds because he can then raise more money from unaccredited investors.

That's what he wants, he want unaccredited investors. And that's why he wants the agent funds because what he does, and you'll see in his operations directors declaration, she tells, you, Your Honor, what he does. Why he has all those

funds. As soon's he gets to 35 accredited investors, he just opens another one of the next number up. So that he can have, you know, however many.

I'm not saying -- what I'm saying is, here, that's why he was pushing for the funds for so long and they said no, and then they finally came back to him. He -- just showing all the attachments to my proposed order that he -- another one of the misrepresentations from his deposition and all the funds that he has. Unfortunately, he's not here to testify, so sorry I was zipping through those.

This is what I was talking about, Your Honor, but it probably didn't make any sense, maybe without the visual, which was --

THE COURT: Yeah, the Googling part. Yeah. I knew what you were talking about. But just -- you didn't have your slide show up with it because I read the papers. But, go ahead.

MS. BERLIN: Okay. Thank you. This is just another -- he tried to use -- these are all of his arguments he was trying to use the Texas case to raise more money, which wasn't true. I'm going to skip right through these because I already talked to you about this and showed you some documents.

I wanted to point out, we did not get the sworn accountings from these defendants, which to the extent they're arguing about what money they got and what money they didn't

get. You know, we believe that the Court should not consider that evidence because they didn't provide it, the Court ordered it. We asked for it repeatedly, Mr. Cole didn't even show up for his deposition.

06:27 You know, it can't be that the Court orders and we requested it. We didn't get it and they shouldn't be able to argue it now. This is to show you Mr. Vagnozzi's sworn accounting. He just said he couldn't provide one that was very detailed because -- and he cites to Liu and he doesn't give us really an answer.

Later on, he just tells us where his bank account are. And then, one of our exhibits, Your Honor, is our interrogatory showing you, literally made, we asked him one interrogatory question, how much he made. We asked him repeatedly for him to tell us, help us carve out these other companies, and he just refuses to meet or give us a proposal not even him or through his counsel.

Here, I want to point out and I'll provide the law in our findings of fact, but there -- puffery in the federal securities laws is not a thing that means it's not relevant. And the Eleventh Circuit had a ruling on that last week. So we'll brief that fully. The language discussed about puffery.

So, you know, I was going to -- there's no evidence. We have a lot of misrepresentations and Mr. Abbonizio -- Mr. Vagnozzi's PPM's and so we'll address those.

I did want to point out a few of the litigation things. They point out there was no big deal about keeping the conviction secret. I just want to make sure it's clear. We're -- unlike any regular private securities action, the laws are different in SEC cases. And here we don't look at things like reliance. It doesn't matter if people are harmed those are not elements to any claim because this is not a private securities action.

So we will put these cases into our briefs but so much of what we heard the defendants arguing, I couldn't figure out why some of what we were doing was relevant and then I realized, I think, they have us confused with a private litigant. Same thing with their legal argument about they read it in the press and so it's part of the total mix. That is used like well-established in it's not the law. And we'll provide it to you.

The same thing with the Rule S-K, the Supreme Court, I mean, that argument is absolutely bogus. We'll provide with you the case law. There's, you know, note that Mr. Vagnozzi didn't (inaud.) to any case law to support his argument, that's because there isn't any. The law is very clear. You know, you could you have rules for other things or a form that you have to fill out but that has nothing to do with, you know, the sections of the securities laws that are designed to protect investors from being lied to about things that are important.

It's a completely different thing. So you've got that from the Supreme Court, you've got the Southern District of Florida, and the district of D.C., and we could probably give you 20 more. Like, that's just basic, kind of, black letter.

06:29 And then there is nothing else -- Vagnozzi's arguments like (inaud.) says, he also argues it wouldn't have mattered, (inaud.), he was just a promoter. There's no evidence he was a promoter. The only evidence is that he was running the company, that's the only evidence in there.

06:30 Let's talk about this. Vagnozzi's argument -- this is another new rebuttal evidence, and I'm just trying to go fast here, but I want to slow down far a minute. We all know about this $18,000 in due diligence. So (inaud.), how does he not know who Joe Macki is? Now today, Mr. Miller said, he knew at

06:30 some point. In his deposition last week, he denied that he knew until he read an article in Bloomberg.

But regardless, the issue here is, what he knew and what kind of due diligence he did. And what you're going to see is one of our rebuttal exhibits is his e-mail with hits

06:30 attorney but they also copied Joe Cole from Par Funding where he sees what due diligence is being done.

Your Honor this is 2016. And we're asking you to consider these defendants have been this brazen, never have I seen a more aggressive defense at a preliminary injunction for

06:31 two full days demanding, this is such a powerful company,

strong, they're really going to help, they're so good. They follow the law, they fix it every time it's caught.

I'm showing you everything is a lie. There's no insurance, they didn't try to help the other state that they told you they did. The due diligence happened in 2016, it was very detailed. You're going to (inaud.), this is one of our rebuttal exhibits. It included the names of every director of the company, a schedule showing all the officers, how they're related, all the lawsuits, by the way.

Every -- all the lawsuits and there's that (inaud.) short we showed the Court that we filed, those lawsuits go back to 2013. I want to make sure something is clear. Defendants keep saying everything got worse after COVID. Your Honor, if you look at our summary chart of the lawsuits, they didn't start after COVID. It didn't pick up after COVID. It's been like that all along from 2013, the cases that they have been filing in Philadelphia and elsewhere.

The due diligence that was conducted for that 18,000 Mr. Vagnozzi got his money for it and the due diligence covered the very things that we claimed he should have known. He chose to stand up in front of you, maybe he chose not to testify but his lawyer -- he had his lawyer tell you that none of that really happened.

He also made this argument, I mean, the SEC can't introduce conviction under Rule 404 and 609(b) and, obviously,

we're not presenting it as character evidence or to impeach. We're arguing it as the factual basis of the misrepresentation or omission. So, I mean, it probably doesn't need noting but these are, obviously, irrelevant evidentiary arguments.

06:32 And then, you're going to see -- I'm skipping through things that you can see the law. I will put this in there so you don't have to go through it. The whole general argument that you heard, Mr. Vagnozzi's counsel tell the Court, "Well, they say it's risky, they point out it's a risky investment so, 06:32 therefore, he didn't have to say anything else." Well, that's not true.

And there's Eleventh Circuit case law on exactly what the law is on this. Nothing they've argued here hasn't been argued before. These are not new arguments, it's just that 06:33 they presented so many of these incorrect arguments, that it's going to take us a while to work it all out, but we will, and we will make sure that you have the correct law that applies.

Also, anything I can just put in my notice, I'm arguing there instead of here. And one more moment, Your 06:33 Honor, I just want to make sure that I can stop and I've shown you everything that's new evidence, so that I can make it's in. And, I think, it is but let me -- if I can have one moment to make --

THE COURT: Sure.

06:33 **MS. BERLIN:** -- sure, that would be a great thing.

These are just legal arguments that we will address later. We will go through the standards for injunction. Oh, am I sharing with all of you or no?

THE COURT: No.

06:34 **MS. BERLIN**: Sorry. Share screen, again. Okay. And I am wrapping it up here because anything I can show you in my brief, Your Honor, I will. I just want to point out that I heard a lot of talk today about demonstrative irreparable harm. Those are not elements in the commission action for injunctive
06:34 relief. So a lot what the defendants argued -- it's these things are explicitly not elements when the government is bringing a claim. We're not bringing a claim as an investor who has been harmed and damaged and we have to prove irreparable harm and all the other...

06:34 Those elements and a lot of the evidence they were trying to provide on that is not relevant. It's not even permissible to be considered, typically, in a trial. These things are excluded before trial so we don't have to deal with those sort of matters. This is simply a case by the Securities
06:35 and Exchange Commission to enforce the securities laws because they did not comply and it was an ongoing violation and ongoing unregistered offering and an ongoing fraud, which is why, you know, that's one of the reasons why we have to move quickly but after a very thorough investigation.

06:35 **THE COURT**: All right.

MS. BERLIN: I wanted to point this out, Your Honor, and I get it, this is it. We'll put all the rest in the brief. But it's very important to note, we have spent so much time on this note issue. And the law is -- they characterize it as a
06:35 security. It is one -- and we'll provide you with lot of case law, but including, like, (inaud.) a lot of others.

They characterize it as a security and actually file with the security yearly, saying they're a security, but that they're not registering. And it's in their offering documents.
06:36 So like Judge, you know, Goodman -- and that it was adopted in, you know, they get to -- they cite the law and the Supreme Court said their own characterization of investments as a security is sufficient to characterize it as one, but there's nothing else that would, you know, lead any investor to think
06:36 it's not an investment. But investors don't think they're buying, you know, a piece of a business or something. They know it's in the document that it's an investment.

And then the final thing, I just want to ask permission so it's not an issue when I file my rebuttal
06:36 exhibits, Your Honor. One of the things we have that we were presenting today were the excerpts of Ms. Lau. I'd like to just present and file her deposition. She's not a CPA. She doesn't know what GAAP is. She doesn't know what it is. She's not a CPA she doesn't do this kind of work, she doesn't keep
06:36 the records.

She doesn't, yeah, she doesn't -- she doesn't know any of this. This is her deposition two months ago. And she doesn't know if something's a loan or a sale. She doesn't understand questions about basic accounting questions. And it goes on and on. Like, am I purchasing -- she primarily does purchases of future receivable. She has no idea that's like a month ago, this is June 20th or something.

Now, she's in, like, their fight -- their expert witness. But it's important for the Court to see, actually, who she is and it's unfortunate that she wasn't present to appear. But we do have her -- we actually have her full transcript and so we know that this Court was a bit misled. She's not really -- she's not a CPA and she doesn't do this work on the business at all.

06:37 So we'd like to -- we'd also like to introduce this exhibit as well with the others that we've -- that I've shown you. I would file them with our proposed findings.

THE COURT: Yeah. Okay. So what the Court will do is I will be admitting that exhibit at this time and when you present again it needs to be as all parties and just so that it's clear, I think, it's already been sent out in a paperless order on Wednesday at noon. And we want to make sure that it's submitted in Word format to the Court.

But I -- if you want to deliver a copy of any supplemental exhibits that I have admitted that have not

already been delivered, I would ask that they be delivered at the same time so that I can look at any proposed exhibits that you want me to consider that have now been referenced in your proposed order, your findings of fact, conclusions of law.

06:38 I know some of this is not part of the initial production for that hearing that I had ordered, that would be great. So if there's anything else, that you have introduced today, please have a copy of that delivered to me by noon on Wednesday when the order gets submitted. And that will allow 06:38 me to cross reference what is going on. Okay?

MS. BERLIN: Thank you.

THE COURT: Yeah. And to the earlier point, you know, I understand that for some of this you streamlined, remember that the reason why it's important to me to get the findings of 06:39 fact, conclusions of law is because how this fits in to your proposed view of the case will allow you to put the applicable law matched up with the facts that you've' now moved in rebuttal.

So the legal argument, although, I understand would be 06:39 something you want to cover in more detail, the order and the proposal that you're going to submit, same as the defendants will submit their counter-proposals based upon what has been shown, should be able to outline what it is exactly that you believe matches the elements you must show for the preliminary 06:39 injunction.

So, you know, you can build that in however you think it's appropriate, it's not being done without any limitation. I don't have a problem with that as well. But, I don't think that, for purposes of the hearing, itself, you need to worry about presenting all of that now, since it can be broken down in your order. Okay?

MS. BERLIN: Thank you very much.

THE COURT: Okay. So does that conclude then, Ms. Berlin, with your rebuttal?

MS. BERLIN: Yeah. I would just like to add one more thing because I'm not sure -- just to make sure, you know, if it was helpful for everyone to hear earlier, the relief the SEC is seeking. So I know Mr. Fridman is very eager to speak. But that made me remember.

I want to make sure that everyone is clear that the Trust is a relief defendant. So there is no allegation of fraud or unregistered securities offering against the Trust. They are simply being -- they're simply a claim against them because if the SEC is successful against the defendants in a judgment at trial, then they are a party from whom money could be collected. Because they have received funds.

And that is it. Nothing more. And it is a very simple two-point question like a two-part test for a relief defendant. So, you know, I just want to make sure that Mr. Fridman understands that. So that he knows that's the

relief we're seeking. And his presentation is about the fraud and everything else and we're not arguing that.

THE COURT: And I would ask, as I've stated exactly to the defendants. The defendants, obviously, have their focus on their individual clients. You have the focus on all the remaining defendants. I expect that in your proposal on Wednesday, that will be clearly delineated so that there's no confusion that to the extent that there's conclusions of law based upon facts you've introduced, that the relief is carved out specific to that particular defendant since it is a narrower more tailored relief due to their role as a relief defendant. And I know that you will break that down because we don't want to lump them in. It's a different analysis for them as opposed to the individual defendant. So I just want to make sure that you understand that. Right? That's going to be broken down?

MS. BERLIN: Yes.

THE COURT: Okay.

MS. BERLIN: Yes, it will be.

THE COURT: And one final point that I will make on this issue. And I think this is important for everyone. We have spent a lot of time in the presentations, across the board, talking about our Supreme Court's wonderful opinion in Liu that is recent and very interesting. I don't know why we're spending so much time on Liu in this hearing. Liu, as

far as I know, is a disgorgement case.

We are not dealing with that now. And I don't know why -- I know a lot of defense counsels are looking towards what's going to happen, and I get it. But make no mistake, if you guys are given me proposals on Wednesday that give me a five-page analysis of the Liu decision, I don't really know why you're doing it because I'm not doing anything -- again, let's remember what we talked about.

We can talk about asset freezes later. It's a different standard. Arguably, a lower standard than that for the preliminary injunction. We can fight over on freezing assets through the receiver, as you've been doing, as we get accounting. And I understand there's no such thing as that punitive impact that the Supreme Court has reined into the disgorgement.

We're not going to have that happen. So I want to make sure everyone understands, I get the import of Liu, but for this particular hearing, I don't know how Liu plays a part in anything I need to rule on because I'm not going to be making a ruling on disgorgement, I'm not going to be making a ruling on that. I think that will play later as we get closer to trial on any asset-freeze issues. So I want to make sure, I think the SEC is with me on this because you haven't had a chance to rebut it, but I think that all this talk about Liu doesn't really play a part in what we're doing in this hearing.

Am I correct to on that?

MS. BERLIN: Absolutely. And so much of what they -- what was discussed and argued during the hearing has nothing to do with the very simple relief of a preliminary injunction, which is a very simple -- usually a very simple, swift hearing that lasts maybe a couple of hours. So I did not plan on rebutting things that I think are irrelevant to the Court's decision because I know the Court knows the law, so I don't need to spend time arguing things that aren't meaningful.

06:43 **THE COURT:** And I just -- and look --

MS. BERLIN: -- that or other things.

THE COURT: Yeah. And just remember, you can -- whatever you want to work in, but I just -- it's more for the defense counsel's so they know that I don't -- again, it's up to them. What they want to propose, I will, obviously, review all of this anyway, and the Court will be drafting what I think is appropriate for this case.

But I just thought it was important, just like I had a whole discussion about asset freezes and the scope of the injunction versus the freezing of assets that the Court's orders is not going to have an impact on the asset freeze, which is a separate and independent analysis. It has an impact on the merits -- success of likelihood on the merits, et cetera., going down the line. But I just don't know that defense counsel should be too concerned about disgorgement at

this stage of the proceeding. I don't think that's going to really play for what the Court has to rule on in this pending preliminary injunction.

So that's all I wanted to say. I know the SEC is in agreement. Now, I do want -- and we've got 15 minutes until 7:00 o-clock and everyone is tired and everyone's done a lot of work. I would like to try to wrap this up now, given that everyone's getting until Wednesday to collect their thoughts, try to recap a bit. Get me those proposals through Word format so I can that work diligently and get an order out by September 4th as promised to the investing public and everybody else on this call.

So let me just, quickly, please -- I'm not in the mood here to try to get another response to the rebuttal. You'll have a chance to do that in your orders. But if for something really pressing that I've got to know now and for purposes of -- if I still have Furman's people on the line -- that order's going to be issued momentarily. I've edited it, so it's going to be coming out now because then we've got to freeze $7800. He's got personal expenses so don't worry about that. Don't think I've seen Gissas' proposals yet, but when they come in, I'll do them.

Anybody else? Something brief? Mr. Fridman, I'll turn to you first and then Mr. Miller. But, again, guys, we're not entering more argument. We've had enough and the Court

takes it under advisement until I get your proposals on Wednesday. So let me turn -- I'll go to -- Mr. Fridman you wanted to go first and then I'll go to Mr. Miller. Go ahead.

MS. SCHEIN: Your Honor, may I have a chance?

06:45 **THE COURT:** Yeah. I'll give you all a chance but keep it to a couple minutes, guys. Listen, I haven't had to use the mute button yet, but if you start rehashing, I'm muting all of you. So let's go. All right. First -- all right. Don't make me have to use it I've gone, like, 16 hours and I haven't used it. So I'm willing to do it. All right. Go ahead, Mr. Fridman, what do you want to add?

MR. FRIDMAN: Thank you, Your Honor, I was going to say exactly what you just discussed with Ms. Berlin. The Trust is relief defendant, we are in a different position than the other defendants. And I want to make it clear that what we are seeking through this proceedings, Your Honor, is not to be frozen. Not to have the asset freeze in place against the Trust. So That's what --

MS. BERLIN: What?

THE COURT: Hold on. Hold on. Hold on. Hold on.

MS. BERLIN: I didn't know I wasn't on mute. I'm sorry. I'm sorry.

THE COURT: One second. Please. Okay. Go ahead, Mr. Fridman, you were saying? Finish up your point.

MR. FRIDMAN: I didn't expect a strong reaction, but

suffice it to say, Your Honor, that's our position. We will brief that issue for you. I don't want to get into a debate about it right now. It is late in the day. But I just want to make it clear that that is the position that they have not met
06:46 the standard to have us as a relief defendant and frozen because of their deficiencies that I pointed out earlier in the day, and I'm not going to go over them again.

THE COURT: Yeah. I assumed. I assume that was the argument. So, I mean, look, it's no surprise to me that was
06:47 what Mr. Fridman argued when it came to the Trust and he believed that there were gaps in the declaration that did not support that those funds were investor funds, and the SEC didn't satisfy their burden. I'm not surprised any of that. I knew that was the argument. So just remember, obviously, when
06:47 you structure your order, Ms. Berlin, you -- well, I know you will parse out what needs to be shown for the Trust and why you've shown it. Just like Mr. Fridman will point out he doesn't believe it's been shown. So I'll look at that when it comes through, but I agree that that's -- I know that's been
06:47 his argument since his presentation. So that's duly noted.

MR. FRIDMAN: That's all I have, Your Honor.

THE COURT: All right. Mr. Miller let me go ahead and hear you next, if I could.

MR. MILLER: Yes, Your Honor. My only question or
06:47 clarification is I'd like to get the -- whatever these

rebuttal -- they're called rebuttal exhibits are -- whatever is in evidence. We need those soon so that we can deal with the proposed findings of fact, findings for Wednesday.

THE COURT: That's a good point. I don't know -- I know you've been really good, Ms. Berlin, about putting things in shared drives, maybe that's the easiest thing to do. Is that something you can do and then they can download it? Is that possible? So you're on mute, I'm sorry. I'm sorry, Ms. Berlin, you're on mute.

06:48

MS. BERLIN: Sorry. Yeah. I always -- we always send it outright away. It will take me -- give me a couple of hours because I pulled them from different files as you could see. I didn't want to miss anything. And then, yeah, you'll get them from Alex or anyone from my office. As always, he'll send you the external link, and if you need anything, just let me know.

06:48

THE COURT: All right. Perfect. Thank you for that, Ms. Berlin, and, again, in my case, I just need you to just drop off a set for me in chambers like you did, like everybody's been doing. Okay? That's all I need.

MS. BERLIN: Absolutely.

06:48

THE COURT: Thank you for that. Mr. Miller, was that it? Are you good?

MR. MILLER: Nothing more from me, Your Honor.

THE COURT: All right. Thank you for that. Ms. Schein, go ahead.

06:48

MS. SCHEIN: Yes, Your Honor, thank you. I will not -- this has nothing to do with her rebuttal. It's something concerning, very much discussing the freeze -- freezes on the bank accounts. The receiver is controlling the CBSG company. And there are six bank accounts that are frozen. In those six bank accounts and through ACH linked accounts. In those six bank accounts, there's upwards of $18 million, first and foremost. And in addition there's $25 million worth of ACH Merchant Cash deposits that would have come in through the ACH linked accounts into those banks accounts for a total of $43 million that would have come into the CBSG during this past four weeks. So I, respectfully, ask the Court to direct the SEC to unfreeze those accounts so the deposit can get into those accounts. These accounts are not going to any individuals, they're CBSG accounts, the receiver controls those accounts and that's -- this is, again, as we said, Your Honor, to protect this money and not to dissipate their funds. They're frozen CBSG accounts with money in the accounts and with deposits waiting from the linked ACH accounts to be put into those accounts.

THE COURT: Well, let me ask real quick, just as to the comfort level. The receiver -- does the receiver want to be heard on that? Obviously, I'm leaving that -- that is the responsibility of the receiver to study that. I'm not going to order them to do anything other than the due diligence on that.

But, maybe, a brief response, you guys to share with Ms. Schein on that concern?

MR. STUMPHAUZER: Yes, Your Honor. I think this would be helpful to address, And I don't need more than a minute. But to be clear, you know, the bank imposes the freeze order but then, of course, you issued the amended receivership order, giving me authority to take control of the assets. So, literally, what I spent all day long yesterday doing and several of my staff members, was contacting the banks, going in the order of those which had the largest deposit, and starting process of transitions those accounts to me. I believe that one of the accounts, of course, I've been attending this, hearing, but one of the accounts that contains $7 million, if it's not already within our control, I would expect it to be by Monday. And there are a couple of other accounts that fit in that category. So that process is already very well underway. And as we've said to the Court before, we're still trying to loosen some money up for payroll, that's what we're going to use the $300,000 check for potentially. But we're trying to crank the collection process up as soon as possible, and, hopefully, our goal is to do it next week.

THE COURT: Okay. Great. And you guys have given me some updates on that so if we could just, as you've done the past, just keep us posted on some of those accounts as we, hopefully, are able to start bringing in some of these funds

that will, I think, be used to make some of the investors whole as soon as possible and as we try to get some of these employees back in the business and figure out if we can keep it alive and we don't find ourselves in a situation of liquidation.

06:52

We definitely want to have our collections and investor distributions being a priority. I've said that from the beginning. I know that it takes a little bit of time to get there. But I trust that with the control you guys are getting through the receivership, you can move expeditiously on that.

06:52

So, Ms. Schein, I will just turn it over for you to talk and stay in touch with the receiver because that's been the number one priority since this whole thing started. Get investor money and try to keep people's jobs. And to the extent we can do that without running afoul of the law, then we've done the right thing. And, again, I'm going to be working.

06:52

You guys are going to be getting me drafts and finding -- I'm going to be working on the order it doesn't mean that we're going to be continuingly working on the freeze concerns, trying to unfreeze anything we can where there's been backup that's been provided to the SEC and the receiver to give them, you know, peace of mind on accounting. Same thing with their continued effort to bring people in the business so that we can

06:53

try to get it up and running again, legally, and get back into the world of collections, like we talked about this morning when we started this whole thing. Receiver's also looking into Fox Rothschild and whether they're going to keep receiving or
06:53 to be doing the work on the receiverships of Pennsylvania. All of that is moving with a million parts, none of that is going to slow down while we're getting the preliminary injunction ruled on. And I'm obviously available if things pop up and we need to have another status on that. But I trust that the
06:53 receiver knows exactly what the priorities are and we'll let them do their job. Anything else that on defendant's end? Any other defendants need to be heard?

MR. FUTERFAS: Yes, Your Honor.

THE COURT: Go ahead, Mr. Futerfas. What do you got?

06:53 **MR. FUTERFAS:** Yeah. I just, at the beginning of this, I don't remember if it was 2:00 o'clock or what time it was, there was a lot of conversation about sealing -- not sealing, but freeze orders. And so I wanted the record to be very clear that FSP, the account of Full Spectrum Processing
06:54 was frozen by the SEC. The receiver has that account. They're in control of that company and, obviously, so the more quickly that business could be unfrozen and go back to work. CBSG, obviously, was frozen by the SEC order and I'm very happy to hear the receiver's report on that. And also, other Par
06:54 accounts were frozen by the SEC's order, and I assume and in

(inaud.) of the receiver is going to go ahead and open those and unfreeze those accounts.

So I wanted to make a distinction for not only Your Honor but, obviously, everyone watching and listening that there is the freeze of that occurred on the corporate side, which the receiver now apparently is endeavoring to undo, which is excellent. And then there's the freeze on the defendant's side. And on the freeze on the defendant's side, is the question of whether a dime of money that went to any of the defendant or defendant entities came from investor funds. And that's really an accounting what Your Honor, I think, has heard for the last four hours.

Aside from the representation part of the case, where they talked about the SEC spent a lot of time talking about Mr. Vagnozzi. But in terms of that fundamental question, did a dime, did one penny of investor funds go to a defendant? In my case, did one dime of investor funds actually go to Lisa McElhone? It turns out it's really an accounting question and that came to -- eventually came to that one audit report, which is the SEC spent a lot of time on.

What we'll endeavor to do in our filing on Wednesday, is try to explain to Your Honor that that report -- there's real reasons why that report was not appropriate. Principally because by the time that audit report was being prepared for 2017, 2017 had already occurred. What you're going to find is

that -- (inaud.) and this is going to be in our papers on Wednesday. What you're going to find is the time we're having discussions about how you're going to quantify and categorize different kinds of funds, whether it's Baghdad or write-ups or
06:56 whatever, the year had already ended and an additional information had already come into the -- was available for everyone because the year was completed and there were projections that the auditing firm was making that were actually now not -- didn't make any sense anymore because the
06:56 year was over.

THE COURT: All right. Well, I'll tell you what. I get the concern. I think the important thing is that you've just stated it, that we put that into your papers due on Wednesday.

MR. FUTERFAS: We will.

THE COURT: So that I can understand, specifically, why there is evidence that you and similarly to what Mr. Fridman did in declaration and Mr. Miller has done on some of the issues with Vagnozzi. Having evidence that you believe
06:57 falls short of the SEC to be able to rely on it to meet their burden, which is what you're pointing out is absolutely what needs to be flagged, which is really the findings of fact portion of anything you proposed, so that I can make a determination as to whether I agree with your approach on the
06:57 lack of evidence to that point. Okay?

MR. FUTERFAS: And in that respect, the tax returns, I know we talked about it before, but as soon as we can get the tax returns if a company is reporting income of $22 million and paying taxes on $22 million, that's a -- to our perspective, it's a very healthy thing. So we'd like those tax returns as soon as possible, Your Honor.

THE COURT: Yeah. And I think as Mr. Stumphauzer indicated, once he feels comfortable that they all check and out and had he doesn't have any reason to believe they won't, that we can also get that over to everybody the way the receiver has been providing certain documents. That's not a problem either.

MR. FUTERFAS: Thank you, Your Honor.

THE COURT: You got it. All right. Okay.

THE PLAINTIFF: Your Honor?

THE COURT: Yes.

THE PLAINTIFF: I have just one thing. Ms. Schein, she asked a question and I might be able to -- I have a document that, maybe, I can do a screen share and show everyone. Because we received the update on how much is actually held in the ACH account, and you can see how much (inaud.) during the receivership.

THE COURT: Yeah. Why don't you put that on there so we can finish with that. Let me -- go ahead and take over. Put that on there so that everybody can take a quick look

including the receivers before we finish up. Go ahead.

MS. BERLIN: Okay. You know how good I am at sharing my screen.

MR. KOLAYA: Your Honor, this is Tim Kolaya on behalf of the receiver.

THE COURT: Yeah?

MR. KOLAYA: As we wait for the screen share, one minor request pursuant to the amended receivership order in Paragraph 9. The receivership entities are to provide a sworn statement about known creditors, employees, and receivership property. That's due on Monday. We still don't have access to the Quickbooks account. We're, actually, in the process of getting it today, we hope by tomorrow we'll have that. So the request is a one-week extension from the 24th to the 31st. We have received no objection from Mr. Vagnozzi and Mr. Abbonizio and we just request, obviously, it's an expedited ruling considering that the deadline is Monday.

THE COURT: Yeah.

UNKNOWN MALE SPEAKER: Your Honor, we have no objections.

THE COURT: Okay. That's great. Why don't you go ahead. Mr. Kolaya, have you filed it as a motion yet? No, right?

MR. KOLAYA: No, Your Honor, we have conferring during the hearing and, obviously, understandably, everybody hasn't

gotten back. But we will submit an unopposed motion agreed order.

THE COURT: Perfect. Submit it and I'll just -- I'll grant it paperlessly and move it quick That's fine.

06:59 **MR. KOLAYA:** Thank you.

THE COURT: You got it. All right. So, Ms., Berlin, as we finish here, just to let us know what we have gotten so far, I think, I'll turn it over to you here, so that we see what the numbers are. Go ahead.

06:59 **MS. SCHEIN:** Your Honor, If I could just interject for one moment. There are six bank accounts, I provided all the information to the receiver and to Ms. Berlin as well as three ACH accounts. So this is one of the accounts and the receiver has all the information that was provided to the receiver and 07:00 to his attorneys a week ago, which shows the balances in those accounts and the bank statements. So I don't know what this one Actum has.

MS. BERLIN: So, yeah. So, Ms. Schein, this is --

MS. SCHEIN: I have no further comments, and I just 07:00 want to (inaud.) and wrap this up.

THE COURT: All right. Go ahead, Ms. Berlin.

MS. BERLIN: Okay. So there are several accounts and we, you know, put them -- they're all in the notice that he we filed yesterday that just shows the lump sums, but how much is frozen, right?

But because Ms. -- I thought I was being helpful -- I was just trying to be helpful, not offend Ms. Schein in any way. I thought this might -- that she might find this helpful to her.

07:00 This is the ACH account for an Actum that they have and it shows, you know, how much was frozen during that two-week period, 2 million. How much would have been received during that period like, 1.4 (inaud.) million. And the amount that was scheduled to go out during that same time frame of

07:01 about 1.7 million. And -- oh, yeah -- that's just some information that you might see about money that's being moved during the asset freeze.

And then these are the other companies that aren't related but that they provided information. But I was just

07:01 thinking because we just got this that you might be interested, Ms. Schein, just to see because you said a lot, that you're curious about how much is coming into these ACH, and how much am I missing out on and, et cetera, et cetera. At least this is one of them that kind of gives a very clear snapshot of what

07:01 they would have gotten, you know, what would have come in, what would have gone out. You know, I thought I would share with you, that's all.

MR. FUTERFAS: Sounds like that's not the complete list. (Inaud.)

07:01 **THE COURT:** All right. Well, listen, Well, you

guys -- you guys can -- listen. I appreciate the effort. All right? I appreciate the effort.

MS. BERLIN: Sorry. No good deed goes undone.

THE COURT: Obviously, we're not go resolve this today, what the ACH numbers are for six accounts. The important thing is that we continue to keep a line of communication open, so the receiver can get a healthy picture of what's sitting in these accounts and always remembering again that we're trying to preserve and save assets for the benefit of investors and for the benefit of the companies (inaud.) can be salvaged. So I don't think we need -- none of this (inaud.) more for educational background purposes but let's continue to try to get a better financial picture in the weeks ahead.

Go ahead and file that motion on behalf of the receiver. I'll grant it. We'll get the other one docketed from Furman. I've already docketed a paperless order requiring the proposed findings of fact and conclusions of law from the parties that know that what they're responsible for from particular defendants and the SEC by Wednesday.

The SEC will also be delivering, of course, a hard copy of the exhibits. Make all exhibits that were used in rebuttal available for all defendants through their file sharing mechanisms. I think that this will conclude the two-day preliminary injunction hearing. The Court will now

take the matter under advisement so that I can digest not only what has been presented over the coming days but then stay tuned for some of the analysis from the different parties, as to the strength and weaknesses of certain exhibits, and what the Court should consider over others in determining whether the SEC has met their burden. My goal continues to be, given the TRO extensions of September 4th, that the Court will answer an order as to the preliminary injunction by that time.

07:03

And I would remind everyone, including investors, that is strictly really focused on the ability of the defendants that are remaining in the case to engage in continuous behavior in this space for securities regulation purposes. It's not going to be speaking on the issue of funds and freezing. That is a separate issue I just want to reemphasize that for investors, but that doesn't mean we're not working on that at the same time. And I know the receiver will continue to that and wherever we can unfreeze an account we will. And the Court will promptly enter orders directing banks to unfreeze anything where there's been an agreement. Let's hope that we can focus on getting these proposals to the Court by Wednesday without needing any rush emergency intervention. I know that a lot of things in this case have moved at an unbelievable pace.

07:03

07:04

I know everyone's tired. I want to thank everybody for dedicating their time. It's the least we can do for the public who's anxiously wondering what's going on with this

07:04

company. So I appreciate everybody's time. We'll all be in touch, of course, and if anything pops up between now and Wednesday, let me know, but I look forward to getting everyone's submissions by noon on Wednesday.

07:04 Anything else that's on fire before I let everybody go?

MS. BERLIN: The only thing on fire is we have so much -- we've spent so much time and energy on -- the only thing for the Court is whether the defendants will consent to

07:04 an order where they agree not to violate the securities laws between now and the trial date.

MR. FUTERFAS: I object, Your Honor.

MS. BERLIN: Well, that's what we're speaking. That's what it is.

07:04 **THE COURT:** I'll say the following.

MS. BERLIN: Everyone wants to talk.

THE COURT: All right. All right.

MS. BERLIN: Fine. That's all.

MR. FUTERFAS: Is she ever done. Ever?

07:05 **THE COURT:** All right. Listen. Well, we're going to go ahead and do it. We will conclude the hearing now, but again, the only point that, I think, that she's trying to make is, as I've stated in the beginning, we have now resolved this issue with numerous defendants. We have until Wednesday. Of

07:05 course, if at any point negotiations are had between any of the

remaining defendants and the SEC, that will take the preliminary injunction off the table so that we can focus on the asset freezes and the accounting, I will enter it. And of course, there's no need to present something to me if one other defendant peels off from the case and feels they can resolve this with discussions with the SEC. But I will leave that, again, up to the parties to try to work this out.

All right, everyone, have a safe weekend, you know, stay safe everybody out there, with everything going on with COVID and for those of us that may be in the line of a tropical storm, stay safe during that as well, in case we didn't have enough things going on. So everybody, please, just stay safe out there. We will touch base next week. I look forward to your submissions on Wednesday. Anything else? Everybody good. All right. Take care, guys. Have a great weekend.

MR. FUTERFAS: Thank you, Your Honor.

MS. BERLIN: Thank you.

THE COURT: Thank you everyone bye-bye.

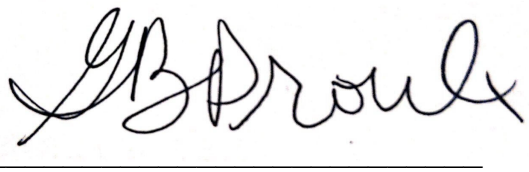
MS. BERLIN: Bye. Have a nice weekend.

THE COURT: You too. You got it.

C E R T I F I C A T E

This hearing occurred during the COVID-19 pandemic and is therefore subject to the technological limitations of reporting remotely.

I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.



09/08/2020

DATE COMPLETED

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IN THE UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
WEST PALM BEACH
CASE NO. **20-CV-81205-RAR**

SECURITIES AND EXCHANGE COMMISSION,
Plaintiff
vs.
COMPLETE BUSINESS SOLUTIONS GROUP, INC, et al,
Defendants.

August 25, 2021

MOTIONS HEARING

BEFORE THE HONORABLE **RODOLFO A. RUIZ, II**,

UNITED STATES DISTRICT COURT JUDGE

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P R O C E E D I N G S

(The following proceedings were held in open court and via Zoom teleconference.)

THE COURT: Good morning, everyone. Please be seated. Okay. We're here this morning, everyone, in case number 20-81205. This is the matter of Securities and Exchange Commission versus Complete Business Solutions Group, Inc., et al.

We have a number of folks that are appearing live here this morning, but I do know that we're also joined by individuals over the Zoom application.

So if at any point anyone that is watching on Zoom or anyone that is participating on Zoom is having any issues with the technology, please let us know. Our IT folks are trying to make this as seamless as possible for a hybrid proceeding for those that cannot make it in person.

So I'm going to attempt to have everyone state their appearances for the record here, those that are live first, and then we'll go to anyone that is on the Zoom application.

So I believe she is on Zoom, so I'll start actually with the Securities and Exchange Commission. Ms. Berlin, can you hear me? Are you there?

MS. RIGGLE-BERLIN: Thank you. This is Amie Riggle-Berlin, and I'm here -- and getting feedback.

THE COURT: Let's start off by muting anything else you have on because I'm hearing the feedback, and I don't think our court reporter is going to be able to take down a transcript with that.

So I don't know if there's anything else around you, Mr. Berlin, but we need to try to mute it. We're piping this in through our audio in the courtroom. Let's try this again. Do you still have that feedback?

MS. RIGGLE-BERLIN: I believe I still do. We're back.

THE COURT: All right. So that's not working very well. Let's go ahead and give you a second here while we try to figure out what's going on with your echo.

And let me get appearances for the record of those folks that are actually here. I do believe I have the receiver and receiver's counsel --

MR. ALFANO: Good morning, Your Honor. Gaetan Alfano.

MR. KOLAYA: Tim Kolaya, for the receiver. Along with

us is Ryan Stumphauzer. (Audio distortion)

THE COURT: So let's see if we can figure this out. Okay? I'm going to do this -- please call IT. We spent way too much time working on this yesterday for this not to be working this morning. All right. So at least we got our appearances for our receiver and company.

Let me go ahead, gentlemen, and go through on behalf of the defendants that are in court. Let's start appearances, if we can.

10:13 **MR. LEVINE**: Good morning, Your Honor. Your Honor, Joshua Levine on behalf of defendant, Joseph LaForte.

MR. FERGUSON: Good morning, Your Honor. David Ferguson on behalf of Joseph LaForte.

MR. SOTO: Good morning, Your Honor. Alejandro Soto on behalf of defendant, Joseph LaForte.

MR. MILLER: Good morning, Your Honor. Brian Miller from Akerman on behalf of defendant, Dean Vagnozzi.

MR. MARCUS: Good morning, Your Honor. Jeff Marcus on behalf of Perry Abbonizio.

10:13 **THE COURT**: All right. Okay. Now, we're going to go ahead and attempt to keep stating appearances for those that are on Zoom.

So I'll start off, if we could, I do believe we have a number of lawyers appearing on Zoom. Let's go ahead. Those

10:14 counsels that are on Zoom, if you could go ahead and please and

state your appearance. We're going to see if we can hear you. We're having a little bit of a technical problem, but go ahead, if you could, please.

(Audio distortion)

MS. SCHEIN: Bettina Schein for Jo Cole. (Audio distortion)

THE COURT: Those folks that can hear me, whoever is appearing on Zoom has to be muting -- has to moot their audio. So everyone that is trying to do this on Zoom (audio distortion).

10:15

For the record this is why the judge wanted to do this in person.

All right. Let's try -- I saw Ms. Schein. I heard her appearance for the record. Someone else? Who doesn't have it on mute? I will take that no one is able to hear anything that is on? Yeah, I don't think anyone can hear us.

10:15

MR. ALFANO: To the extent that helps, this was giving us feedback.

THE COURT: I still hear audio from people that are, I think, appearing on Zoom. So let me try, Ms. Berlin, can you go ahead and attempt to state your appearance again for the record and let me see how that goes. (Audio distortion)

10:16

MS. RIGGLE-BERLIN: Yes. Can you hear me, Your Honor?

THE COURT: I can. And I don't area any feedback either, so we have at least fixed your feed. Can you hear me

10:16

clearly?

MS. RIGGLE-BERLIN: Yes, Your Honor, I can. There's no feedback.

THE COURT: So that looks like we may have fixed it, whatever that is that we did. Let's try to keep it that way.

10:16

I'm going to try this also again and let Mr. Futerfas and Ms. Schein appear again. Let me try this one more time. Go ahead, Mr. Futerfas, and let's try and have you appear for the record and see how good the feedback is.

MR. FUTERFAS: Good morning. Thank you. Good morning, Your Honor. Alan Futerfas for Lisa McElhone.

10:17

THE COURT: All right. That was very clear.

And Ms. Schein, go ahead again and state your appearance.

MS. SCHEIN: Yes, Bettina Schein for Joseph Cole.

10:17

MR. RAIKHELSON: I'm also here for Joseph Cole. Can you hear me?

THE COURT: Yes, I can hear you, Mr. Raikhelson.

MR. RAIKHELSON: I'm local counsel.

THE COURT: Correct. All right. So I was able to hear all of you guys without any feedback, so I think we've figured this out.

10:17

And I'm going it try again, let's see, for my team on the defense side, I know you guys stated your appearance, but I kind of want to see what the echo, if anything, is still going

10:17

on.

Let's state our appearances one more time and let's see if we can speak. I think everyone can hear us, so we probably don't need those mics, but let's try. Go ahead, guys. Who do I have here in court on behalf of which defendant and which counsel. Let's try this one more time so we make sure everyone hears.

MR. LEVINE: Josh Levine on behalf of defendant, Joseph LaForte.

MR. FERGUSON: David Ferguson on behalf of Mr. LaForte as well.

MR. SOTO: Alejandro Soto on behalf of Mr. LaForte as well.

MR. MILLER: Brian Miller on behalf of Dean Vagnozzi.

MR. MARCUS: Jeff Marcus on behalf of Perry Abonizzio.

THE COURT: And I would ask Ms. -- let me try. Ms. Berlin, did you get a chance to hear everyone's appearances? Could you hear everybody that just appeared?

MS. RIGGLE-BERLIN: Yes, I could. Thank you, Your Honor.

THE COURT: Okay. Very good. I think we have overcome any technical challenges and don't worry. I know the time has been allocated. The Court will run over time to make up for what we lost trying to get technical glitches resolved.

So with that being said, anybody else that has not

appeared on the Zoom? I don't know if I've gotten everybody already, but if you haven't stated an appearance, any counsel of record on the Zoom that have not appeared, if you would go ahead and do so at this time.

10:18 **MR. GACHE:** Hi, Judge. This is Ron Gache from LOGS Legal Group, and we represent Lead Funding, and we're just observing today, Your Honor.

THE COURT: All right. That works for me. Anybody else? Okay. I think we've got everybody that's already been 10:19 appearing or that is going to appear today on for the record and everybody can hear each other.

Obviously, just as a reminder, those investors that are watching or that are participating and want to see what's going on, my hope is that you will continue to keep everything 10:19 on mute because the feedback makes it very difficult for us to hear what's going on in court and for everybody else who is participating over Zoom to get a clear feed.

So just a reminder again that everyone please keep it on mute. I will do my best for those folks that are on Zoom 10:19 that are going to be arguing today to turn to you and let you unmute it so that you guys can speak. I think the best thing though is keep it on mute until it's your turn to chime in so that we don't get too much feedback.

So let's talk a little bit about what we're going to 10:19 do today. The Court has set aside some time to address two

pending motions. The first one -- and not necessarily in this order -- although we can discuss how we want to address them.

The first one is the Motion to Discharge the Receiver, and that is at docket entry 649. And the other one is our Rule 41 Motion to Dismiss the Amended Complaint Due to Misconduct By the Securities and Exchange Commission and Related Constitutional Violations, and that is docket entry 663.

10:20

So those are the two we're going to address today. The way the Court, I think, sees this being most effective and efficient is to really ask a few questions and set the stage.

10:20

The briefing has been extensive, so I don't want anyone to reargue what you've already put on the papers. I've read it all. I've gone through a number of exhibits that guys have referenced, so I'm pretty familiar with all the key arguments.

10:20

I just have maybe some more pointed questions to ask, and then what we can do is you guys can have a little bit of time to add or supplement to your pleadings anything else you want to the Court to consider.

10:21

I think probably, to me at least, the easiest way to go about doing this is to hear argument under Rule 41. I want to take a step back. I don't believe that everybody signed off on the Rule 41. I think the 41 is really Mr. Futerfas, Ms. Schein, and Mr. Ferguson; am I correct in that? I think that's really your motion.

10:21

MR. FERGUSON: That's correct, Your Honor. And I intended to argue that with perhaps some assistance from my partner who helped me -- who did most of the drafting but the other lawyers that you mentioned also signed off on it.

10:21 **THE COURT:** Perfect. So I think the plan is I'll hear from you guys here in court so that Ms. Schein and Mr. Futerfas can chime in or echo. I'll turn to you twice on the Zoom after a little bit so that you can also add anything else that may be Mr. Ferguson and his partner have missed or haven't been able to touch on as much as you would like.

So guys, look, let me start with this. I mean, you know as well as I what the Rule 41 standard is. You know, the motion has a lot of information in it, but when it boils down to the legal standard, I need to essentially find, as the case law states, really almost a willful level of intent.

And some of the case law I pulled, independent of the pleadings, indicate that mere negligence is not going to be sufficient to justify a finding of willful misconduct in order for me to dismiss this complaint by the SEC under my power under Rule 41(b).

And so the way I look at the motion, you've pointed out a lot of what you have -- I think you would term sloppy investigation. Let me put it like that. I think that if I was going to give it the defense's best characterization, one of the things would be that it was somewhat negligent; that there

was not enough investigation done with investigators outside of Heskin; that this is a situation where, in your view -- and we'll talk a little bit more about it -- we've deputized a private attorney; he's gone ahead and done the SEC's work for them; there has just not been kind of the fulsome review of underwriting documentation and default rates and those types of issues that would ordinarily, in the view of these particular defendants, form the basis for a valid and well-thought-out SEC action.

10:23 And so my question to you guys is knowing that standard, knowing how high it is -- I think we can all agree it's a high burden -- can I, on this record, truly entertain a motion to dismiss?

This if, at best, I were to say, "maybe it's sloppy; 10:23 maybe they could have done better," and, of course, Ms. Berlin, you'll get a chance to respond. I know in your view you guys have done a thorough investigation, and it was only .06 of your documentation that relied on Mr. Heskin, and so you guys have more than enough of a good-faith basis to pursue this action, 10:24 and there was no direct action or direct commandeering of this individual as part of your investigation, and therefore this should be denied.

But I want to start with the defense and give them an opportunity to tell me why this rises to the level of Rule 41. 10:24 So maybe -- and I'm sure you have other things you want to

cover first, but that's kind of my first concern, and then we'll touch on other things.

But how am I really going to really do that with the existing case law? Let me turn it over to you. Go ahead.

10:24 **MR. FERGUSON:** And I appreciate that you read everything, and that you're asking this pointed question.

And I will tell you if we just have the sloppy investigation, I don't believe we would have brought this motion.

10:24 And it starts with a sloppy investigation from an obviously-biased source, and then you get some obviously-biased declarant, all from the same lawyer.

And they don't inquire or even -- it doesn't appear that the SEC even recognizes the bias they have, but what

10:25 happens is the SEC, for whatever reason, motivated to go after my client and the business, they take it further.

For example, you've got the Fleetwood declaration and their endeavor to say that there was sloppy underwriting. Fleetwood says that "I got approved before I got funded."

10:25 Counsel signs the pleading and says that -- I'm sorry. "I got approved before the onsite inspection." The SEC changes that to funded. That's not even what the declarant said.

And then in the reply -- in the response, pulls out some CRM document and says, "Look at this," which they didn't

10:25 even have at the time. That's a major problem.

And the beginning of the pleading is that this is a mob-like predatory loan operation charging 400 percent interest sometimes, and as high as 95 percent (sic). And that did come from Mr. Heskin. But the SEC did nothing, nothing at all to look into the MCA industry, apparently, to know that those allegations weren't true.

10:26

And then, you know, I'll skip over a lot of the other falsities, and we can talk about them, but if you bookend that opening with the defendants pilfered millions of dollars out of the bank account, the investors' bank accounts, and that's dropped on your desk, I couldn't imagine a scenario where you wouldn't enter the most drastic pretrial relief, TRO, asset freeze, and receivership. I get it.

10:26

And frankly, the allegations -- look, Your Honor, I've had to go head to head with Mr. Stumphauzer and his crew often to say we have got a job to do.

10:26

But in candor, I kind of understand now, as I've delved down into this, like, you know, they're stopping the processing and basically vapor locking this machine that advances and collects cash, in the face of the allegations that the SEC threw into this pleading.

10:27

And I imagine it's just a sign to understand, "wait a minute; this isn't an illegal loan sharking predatory loan operation." Without that, that wouldn't have happened. The investors would be in such a better spot.

10:27

And then "you stole the money." Well, of course you're going to take the bait, if you will, but it was just that, it was bait, because as you see in our papers, we point out it's quite clear now these aren't loans. That's not true. It's not usury. It's not 400 percent interest. The money wasn't stolen.

10:27

And what do we get from the SEC? The misconduct, I'm sorry, but in my mind continues on because they don't say, "oh, they weren't loans; we were wrong." They say, "what does it matter if they were loans? They still call them loans." And that's after they basically use the panko (inaud.) to blow the door off the company and take it over.

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And now they say, "well, it's irrelevant if they're loans, if they were selling hamburgers or hot dogs. I don't care." Well, of course they don't care. They baited you to do what you did and they got what they wanted. What did they say about when they stole the money? Not a peep. They just ignored it. And they made it up.

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Melissa Davis, their expert, who you relied on a lot, she said, "yeah, they took tens of millions of dollars out of the -- left $83,000 behind." But when Mr. Stumphauzer gets there and everyone now knows, there's 26 million dollars in the account. It didn't happen.

10:28

And what's even more unfortunate is the money that went to Georgia, that's a platform that disburses the cash

millions of hundreds of dollars dispensed that way, and they did nothing at all to check that.

And so now in the reply -- I'm sorry, in the response, the SEC says we already said at the preliminary injunction hearing that that was all irrelevant. They still don't talk about the theft accusation.

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Why are they complaining? They just don't get it. They don't get it. The defense doesn't get it because this is just a simple securities registration disclosure case. That's what they say now after they got the most drastic relief possible.

10:29

They -- all of this, I still would like to believe and my client would like to believe and the other defendants would like to believe that the company can still be salvaged and the note holders can still be made whole.

10:29

But none of that -- I can't imagine that if the SEC had done a more proper investigation, not made up allegations like -- so the Dean Vagnozzi concealed Joseph LaForte's identify from a 300-investor dinner.

10:29

And they attach the transcript -- the commission attaches the transcript to their TRO motion. When you look at it, Dean Vagnozzi grabs the PA system mic and says, "May I have your attention, ladies and gentlemen, meet Joe LaForte."

And it all adds up. Look, I've been practicing 30 years, I've seen a lot of people make mistakes, but I've

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started to notice over the years it's rarely do they make a mistake that doesn't advance their case.

And, here, if these are just mistakes, every single one of them advances their case. I can't imagine if they'd have pled a registration that should be registered and here are some disclosures, default, whatever it is, I can't imagine, Your Honor, that you would have entered a TRO asset freeze and receivership. And you're saying no, you wouldn't, right?

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THE COURT: There's absolutely -- listen, there's absolutely no reason why the Court, number one, let alone an ex parte one, which is to be granted only in the most extreme circumstances under case law, only to try to preserve status quo, only to prevent investors from losing money.

The narrative and the evidence presented to this Court, before the defendants were able to get really involved in the cases and start to get their hands on discovery, painted a stark picture that I believe -- and still believe to this day -- left me with no option but to do what was done.

I mean, if not, I ran the risk, based upon what was presented to me -- and I distinctly remember it because it was right around July 4th of last summer. And I was in my home looking at the documents and thinking if I don't move on this I'm going to leave a lot of investors out in the cold. And that was really what drove it.

Now, the challenge I'm having is as more and more

information gets before the Court and I look at what you're asking me to do here, you know -- and we'll hear from the SEC in a little bit -- they continue to maintain, again, that they -- and as I said -- and you put it clearly -- you know, that even if it's some negligence or, you know, not the type of investigation you would expect from a government agency like the SEC, that it wouldn't rise to the level of Rule 41.

10:31

I wanted to ask you, is there not perhaps a way -- because we are really on the eve of trial. I mean, we have this trial set in December, three months from now. Summary judgment deadline, I think, is September 24th.

10:32

You know, is this really the relief you think is appropriate? Why would I not allow this to go forward to trial, let this really get aired out in front of a jury? And I think you would be in good stead if this plays out in front of a jury, and a lot of your allegations and aversions, everything you've said here, your word aberrance in this, some of these breakdowns in the investigative process, get a little bit of sunlight.

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I would imagine that you would feel strongly about some sort of a sanction motion coming at that point, and I'm just curious, am I in the best position now, before trial, with the evidence I have, to take the extraordinary step of throwing this case out under 41-B, as opposed to perhaps waiting to see how things play out at trial, getting a little more of a both

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sides of the story with the ability of a cross-examination to really get into this? And then perhaps we can decide, you know, and if -- maybe it would be a directed verdict issue, I don't know, or even arguably maybe a Rule 11 issue, I'm not certain.

But I'm just trying to figure out, is this the vehicle to vindicate your client's rights? And if the argument's going to be, "well, Judge, it has to be this way because we can't stand this receivership another minute", which is really what I 10:33 garner from all these pleadings, is "we're choking off this business, we can't do this anymore, you've just got to at least let this company get back on its feet, shut down the receivership portion of it, and let's litigate this like a straight-up regulatory case for nondisclosure and let that be it."

I mean, is that really why you're telling me, "Judge, I can't wait for trial. I've got to do this now"?

MR. FERGUSON: Let me put it into my perspective, and I understand your position, and I can tell you candidly I would 10:33 have entered those same orders if I had been presented this as what you were putting in --

THE COURT: I think most of us would have, okay, based on those facts.

MR. FERGUSON: -- and that's a fact.

10:34 But -- so the question is, yes, I'm asking for the

complete relief. You could craft something intermediate, but this concept that "we're on the eve of trial, so let's just go ahead and air it out at trial," it's problematic for a couple of reasons.

10:34 First of all --

THE COURT: Yeah, tell me why, that's important.

MR. FERGUSON: -- we've got note holders out there. That's who -- they -- that -- if we win and get the company back, we want them made whole. If we lose, we want them made 10:34 whole as best as possible.

And three months, four months between now and trial, I think that -- and, again, I'm not taking a shot at Mr. Stumphauzer -- but I don't think they've really been focusing on or are capable of the collections that the defense 10:34 and the team that they've assembled could do. And I believe we can cover significant ground between now and trial and bring in money back in for investors, and that's -- that should be the most important goal.

And to say -- and it's a pragmatic question. "Well, 10:34 we're almost at trial; can we just get there?" I don't think so in this case for a couple of reasons.

The investor issue that I just told you about, fairness, but also the SEC, the commission, needs to -- there needs to be ramifications for baiting you into signing these 10:35 orders, this most drastic preliminary ex parte remedies

imaginable.

And if you allow that to happen, and you think it's a reasonable thing, the problem is you're rewarding that very conduct. And they're going to come back and try it again, and other folks that I might not represent or know right now and maybe represent in the future are going to get burned in the same way.

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And, you know, the funny thing is this is supposed to be about protecting the investors who invested in an opportunity that the SEC says should be registered and they didn't get the right disclosures.

10:35

But the SEC doesn't seem to care about those investors at all. They won't even admit. They come here and say, "We got this wrong, Your Honor, and here's how we can fix it." Or maybe they could go collect something.

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No. They just -- I'm sorry, but they just doubled down. They recklessly accuse us of fabricating evidence, which is completely false. We take a snapshot of QuickBooks, and we put on top who the declarants were so that you can tether that document to what we're talking about.

10:36

They couldn't possibly believe that we were trying to sneak by you a QuickBooks entry that has declarants' names on it because the declarations would have -- were filed by the SEC came later, it's clearly for the purpose of this litigation.

But they're misbehaving -- their misbehavior

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continues. And I believe, Your Honor, if you are not inclined to grant the entire relief, I -- at a minimum, I believe you should take a look at letting us, under perhaps the monitorship of the receiver, let us try to collect some money in these months. Let us do something.

10:36

The SEC has to pay some price here, and letting them going to trial and defending themselves is not enough of a price.

THE COURT: Let me ask you, What would be the court order -- I don't think it's really a court order. But what is the federal rule of the court order that you claim the SEC violated for purposes of Rule 41?

10:37

Because I, as you would expect, I'm tethered to what the standard is for Rule 41. That's what you're seeking relief under. I go back to my point earlier that it's a high bar, and the mere negligence is not going to satisfy.

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What -- I mean, unless you're saying that they're -- assuming -- I got to assume and correct me if I'm wrong -- but you're not seeking to enforce Rule 41 under a court order federal rule, but, instead, you are essentially asking me to use my inherent authority based upon what you believe is a finding that can be made that this was brought frivolously or in bad faith.

10:37

So I want to make sure I get exactly our theory. So the argument, am I right, Mr. Ferguson, that you say, "Judge,

10:38

we want you" -- it's not a court order issue. It's "we want you to invoke your power under Rule 41-B because we have shown you that this has been brought frivolously or in bad faith."

Is that -- am I right in that?

10:38 **MR. FERGUSON:** One hundred percent, Your Honor --

THE COURT: Okay, okay.

MR. FERGUSON: -- because the case was -- there was no order.

THE COURT: Right.

10:38 **MR. FERGUSON:** The case was, in its inception, was borne of this, and we believe that it's well beyond willful. It -- I'm sorry, well beyond negligence. It's willful and their response, it continues, the willful misconduct.

THE COURT: And what do you make of going back to the

10:38 more nuts and bolts, you know, the motion -- and you've pointed out -- talks a lot about your belief that they have exclusively relied on the Heskin and DiPrieto information to kind of build the case?

MR. FERGUSON: Let me address that.

10:38 **THE COURT:** Yeah, let's go through this because one thing that you saw, there is a response, and I want you to respond.

The SEC has asserted that it contacted them, not the other way around, right? They didn't say, you know, I know one

10:38 of the arguments was that, you know, Heskin went to them, kind

of handed them a case and they ran with it.

They're saying they contacted them, which I think everyone agrees they're allowed to do, and that, more importantly, the SEC continues to say that the investigation was well under way, right? That they have said, "Judge, this is but one piece of already very developed investigation. And so even if we took information from Heskin, it doesn't show that we were doing this in bad faith."

What do you make of that?

10:39 **MR. FERGUSON:** Let me address that.

THE COURT: Yeah.

MR. FERGUSON: Again, if it was just this Heskin, the declarant, just that, this motion wouldn't be before you.

THE COURT: Okay.

10:39 **MR. FERGUSON:** But that's the platform for the rest of the misconduct that occurs after that.

And this suggestion that they contacted Mr. Heskin, I have no reason to -- I can't dispute that with the thousands and thousands of documents I've looked at. I hear it now. I understand it.

10:39 The contention that, oh, counsel -- trial counsel for the commission typed up the declarations, okay, but that would mean counsel should know that funded is an important switcheroo there when you go from approval.

10:40 And I actually believe the SEC has made up this

approval if they're typing up these declarations to show you how the approval part doesn't work.

But, again, if that was just it, but they're not being candid about that, either, because they say, well, we've -- I'd say "dump." They'd say we've got hundreds of thousands of documents, and this is just .06 or whatever it is of the documents. And, look, Your Honor, look how robust our investigation was because of all of these documents.

10:40 Well, let's look at -- I think the telescope is sort of turned around backwards there. Let's look at the material facts here. If you look at the allegations in the complaint, I would wager -- and, again, this is fun with statistics -- but I would wager that Mr. Heskin's information and the declarants' information, which they didn't go bother to get anyone else's declarations, accounts for probably 90, 95 percent, if not more, of the allegations in the complaint.

So what that tells me is whatever they got, however long they were working on this, whatever they got wasn't material -- wasn't material enough to really show through in the complaint, the amended complaint, and the emergency TRO motion.

So that's not even candid when they're saying that. And, again, if it was just that, I wouldn't be sitting here right now. I'd be working on something else probably in this case, but that -- the fact is that's the platform, and from

there, it's not that the SEC just made a few more mistakes or got a little sloppy; they went all out, made up a big lie about the theft of money, absolutely said things happened in transcripts that they filed that didn't. Joe Cole met at a
10:41 dinner to talk about acquiring a bank to avoid usury loans, Your Honor, that don't even apply, first of all.

But when I read that transcript over and over, it's not in there, that Mr. Vagnozzi concealed Joe LaForte's identity. "Ladies and gentlemen, meet Joe LaForte." It just
10:42 -- this isn't accidental, this is willful, and they wanted -- and I think what I believe, probably they know because the commission does this, that if they can bait you into that relief and you freeze everybody's assets and you take over the business, the defendants eventually cannot defend themselves,
10:42 and they end up for giving you -- giving the SEC -- they're out of money, they're dried out, they've got nothing, and they signed financial affidavits confirming that, and they sign a consent judgment for the whole kit and caboodle.

And the settlement says "as long as you didn't lie on
10:42 your financial affidavits, we're never going to collect from you", and they don't have to worry about a motion like this. And now they do. And here we are. And they should pay the price.

THE COURT: What do you make -- what do you make, for
10:43 example, taking one example of some -- and I know that your

view is that you've produced kind of a mosaic, if you will, of shortfalls in the investigation. You know, we could spend a lot of time talking about the investor dinner and whether or not someone was trying to hide their identity. We can talk about how much was really completed before Heskin came into the picture.

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And the SEC's response indicates -- and we don't know, quite honestly, whether they needed Heskin, in your view, to make the case or not. But at least the timeline indicates that it didn't get started with him; that there was some ongoing investigation, and the commission had gone ahead and essentially blessed and authorized the investigation back on an August 2019 e-mail to the investor merchant client. There was some indication already of what was ongoing, and they had provided that form 1662.

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What do I make, for example -- like in underwriting, just to give you an example. When we talk about underwriting, we know that they did get a declaration of the former CBSG assistant, they had looked at some of the representations on the website, there were some documents that indicated onsite inspections were not occurring before a deal was approved. There were some other declarations. That's just, you know, I'm just trying to give you an example. There may be flaws.

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MR. FERGUSON: May I -- yeah, and I want you -- but my point is --

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THE COURT: I'm sure you're going to tell me there's some flaws in that, but, again, I go back to my other point: There may be flaws in it, and some of that is to be played in my view before the jury, but I have to find, essentially, I don't want to say it's almost a black-and-white situation, but I'm so hesitant because the case law on 41 requires such a high bad-faith finding, I would essentially have to find that they had made up things out of whole cloth.

MR. FERGUSON: Let me address that.

THE COURT: Yeah. Go ahead.

MR. FERGUSON: So, Ms. Jones, let's talk about her.

THE COURT: Sure, yeah.

MR. FERGUSON: She -- she commit -- she --

THE COURT: Yeah, Jones.

MR. FERGUSON: -- she's a -- she's, as we set forth, she's a disgruntled employee who was terminated and brought a case against the outfit. But this concept of approved before the onsite inspection, Your Honor, as we try to break out and isolate it in our reply, that's made up by the SEC.

THE COURT: What is made up by the SEC?

MR. FERGUSON: That there's an approval process.

THE COURT: Oh, oh.

MR. FERGUSON: That it's approved. There is no such approval because in this arrangement here, the company has no obligation to fund until and only if it chooses to do so, and

it does so after underwriting.

And so this approval makes it sound like you get a letter you're pre-approved for a million-dollar loan, Your Honor, you know what happens next. You send in your stuff, and
10:45 if you really want the loan and you clear underwriting, you get the money, but if you don't, you don't get it or you get it at a higher rate.

That approval thing is another problem made up by the SEC. And, here, if there's this ongoing investigation because
10:46 what I see is a hasty investigation, and it was rushed. But if there's an ongoing investigation, well, then they could have used their subpoena power to discern that the money wasn't stolen from that company in Georgia. Where are other merchant declarations?

10:46 Frankly, when I first read the complaint -- I've done some FTC work -- when I first read the complaint, Your Honor, there's a complete disconnect with this complaint because you take these 14 merchants who are all in litigation, and most of them owed money to Par, and you start this case and you read
10:46 the factual allegations.

And about halfway through the factual allegations, I put it down and go this reads like an FTC case because then you get to the claims and it's about securities. But why are they so concerned with these 14 merchants that Mr. Heskin brought
10:46 that they'd been investigating for so long? Why don't they

have any other merchant declarations? Why is it just this source?

You know what else? Where are the investor declarations? Where are the investor witnesses? They're not there because this isn't some long, well-thought-out investigation that at the very end comes across Mr. Heskin and they use .06 of it for his information. They -- I'll give it to them, they reached out and called him, but from that point, they rushed this. You see Mr. Heskin's e-mail, the blast to all the clients: "I need this rush, give me this back," yes, no, yes, no, yes, no.

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And, again, this approval thing is a ruse because they're trying to make it look like they didn't do any background checks, they didn't do any due diligence, and they approved it, meaning they're obligated to give them money, and then do this sham of an underwriting process.

And, Your Honor, rather than walk you through three notebooks and all the competing charts, I think you've got it there, you see we've provided evidence that there were background checks, there were onsite inspections, and the SEC says, well, who's Metro Inspections? We don't know if they're real. How do we know who they did? Well, it's got our logo and Metro's, that they did it for us and we paid for it. And all of -- but all of that is just a misdirection now.

But the point being I reject that this record supports

some long, well-thought-out, well-conducted investigation and Mr. Heskin comes in late. The indicia is the opposite, and if you look at what we filed, they found him, they wanted to do my client, they wanted to take him down, and they wanted to -- and
10:48 the way they knew to do it was to put the false allegations in front of you, get you to take the bait, get you to enter these drastic orders and here we are.

THE COURT: I guess, one of my concerns is the way you stated that just now, I think, shows why I'm so hesitant. The
10:48 indicia, you know, the way things look, our view of underwriting versus their view of underwriting.

Boy, do all these things sound like that's why we have a jury system. They do not sound like the type of reasons why a Court should step in to a regulatory investigation and toss
10:49 it, essentially, an extension for bad faith or willfulness.

I mean, you've got to -- and I know in your view you've gotten there already, but my view, at least in the case law, is, I mean, you have to catch them red-handed in the sense that if I had communications that knew full well that these
10:49 guys are the subject of a SEC vendetta, they didn't do anything wrong, I mean, I don't have that with this record.

What I have, again, I think in your best day is a very swift and maybe not thorough investigation, perhaps too much reliance on certain individuals who had an axe to grind,
10:49 perhaps it could have been more beneficial to seek other

merchants that were not in active litigation.

All of these things, though, go to credibility. All of these things go to weight. You know, even these simple things like whether or not the underwriting really is being mischaracterized by the SEC. If it is being mischaracterized -- and this has been an argument from the beginning -- that the SEC has not fully understood the factoring business and how this works. That may be true, and so one would say, well, the way they have painted this business makes it look like there's something nefarious, and the reality is there's not. That, again, could be a negligent type of pleading. It might be sloppy. It might depend too much on limited testimony from individuals who have very mixed motives.

But when I think of bad faith -- and I -- this is not me speaking, it's the Eleventh Circuit. I mean, what we need, really, is that kind of willful misconduct for me to exercise my inherent authority to dismiss a claim. I mean, you guys know this. It's a drastic, very serious sanction, and I just keep pointing to some of what I've seen here on both sides indicating that the best I can concede to you is that this was not done in a way that we would expect the government to conduct a thorough investigation.

And if I give you that, that is something that I'm sure will be displayed for jurors to see. It will be litigated at summary judgment. But, boy, does it concern me that it

falls just short of what I would need to be able to grant 41 relief.

That's just really where you have me. And I'm not saying that I can't get there. I'm just saying I think you recognize it's a tough lift because you'd be asking me to essentially go through all of these pieces of evidence.

And let me tell you this: Let's say, that I believe you 100 percent on, for example, the Joe Cole and disclosure issue, where you said clearly, look, they introduced him for who he was, no one's hiding the ball here, this is completely a misstatement.

Even if I gave you that or I were to give you, you know, that they relied too much on the 14 litigation, that's not still getting me to bad faith. That might be getting me to a kind of a poor investigation, but it's not getting me to bad faith. You know? That's where I'm a little bit stuck, I guess.

MR. FERGUSON: Well, Your Honor, our position is when you stack all this up, it's --

THE COURT: Right. All of it together is enough, right?

MR. FERGUSON: -- if you pull one thing out, but at some point you got the person wearing dark sunglasses at night, they're -- it's raining, they don't have windshield wipers, they're speeding, they're on their Blackberry, at some point an

accident is so willful that it crosses the line and it becomes willful disregard for the truth, falsity, rights and the law. And I think we're there, Your Honor.

THE COURT: Okay. Okay.

10:52 **MR. FERGUSON**: And this underwriting concept, that's another sort of willful misdirection. They wanted to take this business down on a securities claim, so they just -- they throw this underwriting, but we don't have any investors saying I didn't get paid because the underwriting is so bad or that none 10:52 of these -- we're talking a lot about underwriting and, frankly, I don't even see this.

At trial, I'm going have to talk about it if we have to go to trial, but what I'm -- I'll go ahead and preview my opening, this is not an underwriting case. That's a 10:53 misdirection by the SEC, it's a misdirection of you, and if I had to go to the jury, it'd be a misdirection of the jury.

But if this is an SEC case, they want to say, oh, you should have registered, you should have disclosed. That's the case they should have brought, and if they were doing a 10:53 long-term investigation like that -- and I am not -- I do not have a let's go do Joe LaForte, ha-ha, let's make up some stuff. (Nodding). If I did, you know, this hearing, yeah, I don't even know -- (voices overlap)

THE COURT: I don't know if we'd need a hearing.

10:53 **MR. FERGUSON**: Yeah, but on that, I'm going to -- I'm

going rest on you stack it all up and it crosses the willful line.

THE COURT: Let me ask you this.

MR. FERGUSON: May I just say one last --

10:53 **THE COURT**: Yeah, I'm sorry, go ahead. Yeah, finish your point.

MR. FERGUSON: -- yeah. And you said that, you know, dismissing a claim is a drastic sanction. I'm saying it's the right solution to a drastic remedy that was procured

10:53 improperly, but, again, I'm telling you, Your Honor, we would cooperate. If you came up with something less than that, if you didn't think that was the appropriate sanction, we would work with you, and if that needed further discussions, status conference to work it through quickly, we would do that.

10:54 But I do believe that given the drastic relief that they procured wrongfully, that the commission procured wrongfully, that the sanction is less drastic than what they did here.

THE COURT: And let me put it this way. I think --

10:54 and I know all of you guys and defense councils on the line would agree with me -- that, really, the Rule 41, I believe is driven by your good-faith belief that this was done willfully and not a thorough investigation, but at its very core, and I've gone over this really from your rely, as I read it again

10:54 yesterday evening, and really from most of the pleadings in

this case for the last six months, I think you would agree with me that you would be just as satisfied if the Court were to essentially order the receiver to extricate itself from the business.

10:54 I mean, at the end of the day, what I gleaned from all of the defense counsels' positions is really an overarching concern with the receivership. It's been the hallmark, I think, even pleadings like this, although they do spend a lot of time pointing out what you believe are flaws in the SEC's

10:55 investigation.

I think and you've stated it just now in that you recognize that there may be an intermediate level of relief that doesn't rise to the level of dismissal because I think even all defense counsels continuously emphasize that this is a

10:55 registration and disclosure matter, and if this was litigated as such, there wouldn't be so much of a battle.

That would really go back to the nature of the case or the truth of this claim, and it can be litigated and done in your view a lot more swiftly and cleanly if we found a way to

10:55 get Par Funding essentially back in business without the receivership in play.

And so I don't want to misstate your position, but my sense is, from even this Rule 41, just like it's being echoed in the companion motion we're going to talk about later, that

10:56 your biggest concern, even at this case, continues to just be,

Judge, let us litigate it with the individual defendants and the registration issues and the disclosure issues.

But we have pulled in -- and I think in the defense view, without reason -- we've pulled in the entire business model and this is now a collateral casualty to what should have been a much more streamlined regulatory investigation.

I mean, isn't that really what it boils down to? I mean, if you guys walked out of here today with some adoption or understanding of a plan to have the receiver wind down his involvement and see what this big operation could get up and running again, that probably is the number-one relief that all the defense are -- not only the ones in this motion, but everybody else that's on this defending a player, in this case, is seeking; is that right?

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MR. FERGUSON: Your Honor, what you're saying makes sense and, yes. But you started with, Would be more satisfied if Mr. Stumphauzer was shown the door versus the relief I'm asking?

THE COURT: I think you want the relief you're asking for, sure. Yes. Yes.

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MR. FERGUSON: That's what we're entitled to, and no offense to Mr. Stumphauzer, but as everyone knows, my partner and I have butted heads with him for months about things that have happened, but, frankly, we blame the SEC for what they did for all of that.

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And it's ironic because this Rule 41 motion came -- I filed it late at night, right after we got the response to the other motion we're going to argue, and the SEC jumped in to defend the receivership and says, "Why are they fighting with the receiver? They should be fighting with me."

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You know, I'm reading that as my secretary's uploading this Rule 41 motion. The point of that is we would have fought them sooner had we got our documents sooner, and, you know, the SEC says, "Oh, why are they bringing it now?" Well, they've been dumping -- you know, they dumped like seven terabytes of documents on us. We got as many as 150,000 documents, you know, a month ago or so ago.

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So it took me this long for Josh and I to do this, but the SEC has basically -- they threw the grenade, blew up the place, and are just sitting back, and Mr. Stumphauzer is taking the lead and basically spent a lot of time, I think, trying to figure out if the SEC's allegations were right, looking for theft and improper conduct and trying to decide if this business was crooked, as the SEC alleged.

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So a long-winded answer to your question: We would certainly be satisfied with relief that got us back in to try to recover money and make money for the investors. That is absolutely the most important thing that we could do other than, if the case is going to continue, defend ourselves.

10:58

THE COURT: Okay. And I agree. I mean, I understand,

and your view is you filed it, seeking the dismissal, and, in your view, the inherent power of the Court would justify that, given this record.

You've heard kind of my concerns about what that takes in terms of funds necessary under Rule 41, but you've also conceded that if the Court doesn't feel we've gotten there, that there would perhaps be alternative measures the Court could take, and one of those, as you pointed out, would be to at least step back from the receivership issue, and I understand that.

Let me -- obviously, I've allowed you to go on, and I don't want to lose my train of thought because I don't -- Mr. Futerfas and Ms. Schein, I do know that you're all on this motion, too.

But I -- if you would indulge me, I'd like to let the SEC respond before I hear a little more from the other defense counsels that are signed off on this motion because I will forget some of the things we've touched on, and I'm sure the SEC wants to respond some.

So, Ms. Berlin, you can still hear me; is that correct? I hope so. Oh, let me see. I can see you speaking, so I think you can hear me. I just don't hear you. There we are. Okay. Can you hear me now?

MS. BERLIN: I can. Can you hear me as well?

THE COURT: Okay. I can hear you. Make sure you

project a little bit. I think everyone else's microphones are off. I'm going to turn to you.

So my issue here -- and you've heard me say it, it's not a big surprise given the case law -- that we have arguments made by the SEC about the timing of the investigation. We have arguments made that it wasn't fully relying on Heskin and DiPrieto, that, as you pointed out, .6 percent of the investigative file comes from him.

11:00 You have arguments that you have independent sources on underwriting shortfalls that the SEC, when you look at the timeline, did complete an investigation and justified the relief they sought.

And you've pointed to a number of e-mails and exhibits that I've reviewed that would indicate if not directly opposed 11:00 to the representation that defendants made in this motion, at least would call into question those representations, thereby making it more difficult for a willfulness finding to be made. And at best, as I stated, perhaps it would be some sort of a negligent or rushed investigation.

11:01 Now, I know you take issue with that. I'll turn to you. Again, I don't know if this rises to the level of Rule 41 because of how high that burden is. But the idea of willful contempt and finding or exercising my power in this regard, I think, is -- I'm very wary of it, let's put this that way, 11:01 given this record.

But go ahead and some response if you would to the reply and some of the arguments made by counsel. Go ahead.

MS. BERLIN: Thank you, Your Honor.

So first and foremost, the defendants cannot present any case where a Court has ever reviewed an SEC or any other government agency investigation to opine on whether a thorough (audio distortion) the Court's opinion of an SEC investigation could give rise to a Rule 41 violation.

In order for the -- this is a -- for this Court to have jurisdiction over an SEC investigation, we did not address that in our response brief because they didn't frame it that way. They framed it as a state actor issue, and we addressed that.

So I'd like to back up, Your Honor, and address, first and foremost, the defendant -- if the Court is going to opine on an SEC investigation, there would have to be some base or showing that the Court has jurisdiction to do so, and it does not. And the defendants cannot and will not be able to cite case law on that.

SEC investigations are under the full discretion of the agency. There's no case where a court opines on what they think about the investigations, nor could that ever be (audio distortion).

THE COURT: Sorry, Ms. Berlin, it's cutting in and out a little bit, so I don't know if you want to get a little

closer to the computer or we're going to turn it up a little bit here, but I wasn't able to hear exactly what you said in that last comment. Go ahead.

MS. BERLIN: Yes, I could hear another person speaking, so can you hear me okay now? Is there any --

THE COURT: Yeah, I can hear you now. Let's -- hopefully, that the audio picks up. Go ahead.

MS. BERLIN: Certainly. I'll back up.

We addressed the issues they raised in their motion. Today they're painting and framing it a bit differently, whereas I'm hearing discussion about the SEC investigation, where it might have been negligent, whether there were issues there, and whether the defendants' view of an SEC investigation or that they could even ask the Court to review it. And all of that is improper. That wasn't the way I (audio distortion) framed.

I'm hearing feedback, Your Honor. Are you as well?

THE COURT: Yeah, I mean, it's not even feedback. You're just cutting in and out.

(Thereupon, an off-the-record discussion was had.)

MS. BERLIN: Is this better, Your Honor?

THE COURT: Yes. Go ahead.

MR. FERGUSON: If you mute the Court audio, then we can't hear anything.

THE COURT: Ms. -- okay. Let's try again. Let's see

if she can keep going. Maybe unmute me for a second, so I can tell her to just keep talking.

MS. BERLIN: Your Honor, can you hear me okay?

(Thereupon, an off-the-record discussion was had.)

11:04 **THE COURT**: Mr. Raikhelson, go ahead and -- go ahead and -- if you can hear me, go ahead and mute yourself.

Ms. Berlin, I'm going to just mute our court audio so that so you can speak uninterrupted without that breakdown. So I'm turning it over to you. Okay? So go ahead and speak. At 11:04 this time, I'm going to mute our court audio so (voices overlap) can hear you.

MS. BERLIN: Your Honor, I'm not sure if you can hear me.

THE COURT: Can you hear me, Ms. Berlin? Ms. Berlin 11:04 can you hear the Court? Can you hear me, Ms. Berlin?

MS. BERLIN: I can.

THE COURT: Okay. What I'm going to try to do is mute the microphone. That way, no audio comes from our courtroom and it should prevent you from being chopped up. So you're 11:05 going to get a little bit of uninterrupted air time here.

One thing I will say before you start speaking just so I can kind of get ahead of it, my understanding is we're not arguing over the nature of the investigation, okay? That's not what we've discussed. Mr. Ferguson and I are on this 11:05 conversation at least for the last 30 minutes or so, and my

view was he was pointing out what he believes are flaws in the investigation that his evidence, at least in the way he's portrayed it and he's framed it and pointed to the record, he believes that it shows that representations made in the initial
11:05 pleadings in this case were not supported by the record, indicate an investigation that was not fulsome, and rise to the level of a bad-faith case that would trigger inherent power under Rule 41.

I haven't really spent a lot of time talking about
11:06 state actor. I'll talk about that in a little bit, but, really, at its core, it's a Rule 41 inherent power due to bad faith. And I don't think it's about how your investigation was conducted because that's not what matters to me.

I agree I don't have jurisdiction over how the SEC
11:06 does what they do, but once you file a pleading, now I do. When you're in my house, now I do have jurisdiction over it and I'm looking at your pleadings.

And the way the pleadings are framed, Mr. Ferguson is pointing out, along with Ms. Schein and Mr. Futerfas in their
11:06 motion, they believe that the pleading has a lot of it glaring deficiencies that rise to the level of more than mere negligence. They rise to the level of willfulness and bad faith because there's gaps not only in the investigation, but it exclusively relies on a subsection of merchants with an axe
11:07 to grind, it relies on Heskin too much, and it misstates the

nature of the business, the underwriting, little things like Mr. Cole trying to hide his identity is somewhat rebutted by representations made at the dinner.

All of that stuff, as I understand Mr. Ferguson's argument, builds essentially a narrative or a picture of an investigation that, in the view of the defense, was motivated by the SEC just wanting to stick it to these defendants and take down the company in progress.

That is the argument that's being made. So I agree with you, this isn't about the investigation. It's about when you put pen to paper, did you have a good-faith basis to make the allegations you did? That-- that's really what it is and you stated you did.

So I'll turn it to you. I'm going to mute my microphone. Let's go ahead and have you respond to that.

MS. BERLIN: Thank you, Your Honor.

And I'll -- since you're going to be muted, perhaps I'll just take a pause every so often just to make sure that there's something that you wanted to say since I won't be able to hear you. Does that sound acceptable? I just don't want to keep speaking if the Court has something it wanted to add or ask.

(Thereupon, an off-the-record discussion was had.)

THE COURT: That's fine. Can you hear me? You can go ahead. I'll try not to stop you. Go ahead.

MS. BERLIN: Thank you so much, Your Honor. So, you know, to begin with -- and I'll just restate it because I know I was breaking up before, and I think the Court did hear me based on the comment just made.

11:08 But, obviously, the defendant has not presented anything to provide this Court with jurisdiction to opine about the investigation or could it. And instead what they have done is they have examined the initial pleadings a year after they were filed, and comes to the Court with pure hyperbole and

11:08 speculation about what the investigation entailed.

The investigation is not public. They do not know what the investigation entailed. However, they do have the investigative record that we produced to them a year ago and that they did have at the time of the preliminary injunction

11:09 hearing, which demonstrates quite clearly that their arguments are just patently false and without basis.

I heard the Court state that the amount received from Shane Heskin was 0.6 percent. It's actually point -- it's 0.06 percent. And the defendants presented to the Court it ends up

11:09 being -- it's more than 50 bases that they claim are false in the preliminary injunction motion that was filed, or the TRO motion that was filed a year ago.

And we went through every single one of those and spent more than 130 hours going back and basically reexamining

11:09 the matters that were set for a hearing a year ago. And in the

reply, they identified three things that they claim that we missed or ignored out of what they asserted, and I will address those three matters.

First, they claim that the -- Mr. LaForte, that the November 2019 dinner shows that they identified him using his real name. And what is happening here, Your Honor, is they're going back through the evidence and sort of trying to find something that's helpful to them without looking at what we actually asserted or the transcript itself.

In our motion for temporary restraining order and in that particular paragraph, we argue that the misrepresentation in this case is that Mr. LaForte's criminal record was not disclosed to potential investors and that he used an alias to conceal his true identity from investors.

We present a lot of evidence. We present e-mail messages where he's using his alias, Joe Mack. We present recordings with their covers, where that's not disclosing his criminal record. We present a lot of evidence with the TRO motion about the fact that he did not disclose and no one disclosed Mr. LaForte's criminal record to the investors.

That is the misrepresentation at issue. The fact that he uses an alias goes to show how he did it and also his scienter and the efforts to which he went to conceal who he really was. They attach the transcript of the November 19 dinner and explain and argue that the hearing in this case that

they spoke to 300 investors. At no time was his criminal record disclosed. They identified a section of the transcript where they used his real name. That's great if they used his real name at a dinner.

11:11 They didn't disclose his criminal record to any of these potential investors, which is what we argue. The full transcript was filed. The argument, the misrep [sic] that we're alleging is fraud is that the company is being run by a convicted felon and that investors are not being told about that.

Now, they have pointed out to an argument, Your Honor, on this one occasion, they used his real name. Great. They could have argued that a year ago, that's wonderful they used his real name once. It's undisputed that they didn't disclose his criminal order or anything about Mr. LaForte. Here's how you spell his name, everybody can Google it, not that that would even be a defense because it's not.

They didn't disclose his criminal record. That's what this case is about. We have presented a lot of evidence from investor declarations saying I spoke with him, I always thought his name was Joe Mack, to e-mails from him using his fake name, to his e-mail address, which is his fake name, his business card, which is his alias.

These are issues for a jury. They can present this to a jury and say, hey, look, here's one time that they used his

real name, they didn't disclose his criminal record, and we will argue they won't be able to show you any instance where they disclosed his criminal record. That's the claim.

For scienter, he actually made efforts to conceal his identify. Here are 50, 100, whatever it is, examples of him using an alias. And the jury will make a decision about this.

But for them -- for the defendants to come to this Court and argue that the SEC intentionally misled or we concealed or this dinner is all we have, it's absurd.

The entire transcript is attached. The TRO motion in that paragraph discusses two things: It talks about how he -- they never disclosed his criminal record and also that he uses an alias.

We attached the transcript in full. At the hearing, they could have come back, they could have said, hey, here's one place where they used his real name.

Your Honor, that doesn't change our charge. They didn't disclose his criminal record. A transcript doesn't have it. And we presented not that transcript to say he used an alias there, but e-mails, investor (inaud.) docs and a lot of evidence showing the use of his alias.

So what they're doing is (inaud.) one time where someone referenced his real name. They still didn't disclose his criminal background, and they're trying to turn this into something that it is not. Nothing was concealed. The full

transcript, as in all transcripts, were attached. And if that transcript, and if it's clear on the audio that they used his real name at some point in the transcript, that wasn't concealed from the Court on purpose. They haven't identified any argument for that. We presented the transcript in full for the Court's review. The defendants had it, they could have pointed it out to us or to the Court and made that argument a year ago and the Court could have considered it.

But even pointing it out now, if they used his name at some point in the dinner, it doesn't change a thing. It doesn't make any difference and it doesn't have anything to do with the massive amount of evidence that was provided. They're simply speculating that the SEC knew about it, that we could have concealed it. They haven't argued that we filed a false transcript, that we intentionally -- that it doesn't say his name and it should. So I'm just a little mystified about that particular issue.

The second thing that they argue is that the SEC claimed that Mr. Cole told some undercover agents about their desire that they were starting a bank and that one of the benefits could be to avoid usury laws.

They argue that we don't address that in our reply brief, and I apologize, I missed that, as you know, Your Honor, because we had to file a very lengthy chart and a lot of evidence to show what was really going on in this case in a

very short period of time.

I didn't, but it's very simple. The transcript attached to -- the transcript we cite in our TRO papers specifically includes Mr. Cole discussing that. And what he says, and it's on page 420 of the transcript, is he says from -- I'm starting on page 24 during the same undercover discussion on the transcript that we filed.

11:15

There is a discussion. Mr. Cole is the male speaker. And it is discussed, while we're talking about the bank, Mr. Chessler, one of the people who was there, says, "Well, there's no usury under federal." And Mr. Cole starts speaking and he says, "That's right, no usury." And one of the undercover says, "Isn't that the key?" And Joe Cole says, "The key."

11:16

11:16

So I apologize that I missed that argument in their papers. It's in the transcript that we filed very clearly, page 420, line 24 through page 421, line 9. They're talking about starting the bank and that a key is that there's a lack of usury.

11:17

The third thing that they mention is, oh, that they transferred money out. They argued, well, Your Honor, you would never have entered a TRO if you had known that the money that the CBSG, quote, transferred to the Georgia bank account back in June, that they later put that money back into the account.

11:17

Your Honor, we filed our motion. It was very clear that, in Melissa Davis's declaration, that we had our bank records through June. The declaration states and we have the documents that they transferred all this money out. And the
11:17 defendant, if they wanted to make the argument, well, after you got that bank record and before the injunction was entered, we put some of that money back into the company, that's something that they could have argued.

But even then, Your Honor, so there's nothing false
11:17 about Melissa Davis's declaration, nor can they claim there is. What they're arguing is that they subsequently put some of that money back into the company.

Even if that's true --

MR. FERGUSON: Your Honor, I've got to object.

11:18 **MS. BERLIN:** -- okay, and even if we looked at that and we found the same thing, it doesn't matter.

That wasn't the sole basis for a seeking a TRO. We provided this Court with evidence and argument that was unrebutted, and they still haven't even presented it to this
11:18 Court in their motion, that they transferred investor funds to themselves, that Lisa McElhone had gotten more than $14 million of the investor money that was -- that commingled investor money, what was referred to as investor funds for (inaud.) because it included investor funds, which is the key. That she
11:18 took 14 million, that Joe Cole and Perry Abbonizio took money.

We presented evidence that they used some of that money to purchase real estate property. We presented evidence that they channeled this investor fund -- these investor funds through companies owned by the defendants under consulting agreements, when these companies did no work. We presented evidence they sent it to Heritage and Eagle 6 and several other companies that the defendants own.

We presented all of that evidence to the Court for our TRO motion, showing they were misappropriating investor funds. We also presented the evidence and the transcripts showing they were planning to start a bank and that they would then have -- and our concern was -- the means for having a bank and controlling the flow of their own funds.

All of these things were presented with evidence. Their one issue today is, well, the one thing of 22 million that Melissa Davis put in her declaration was taken out in June, and I'm not sure when they're claiming it happened, but at some point we put that money back into the company.

They should have presented that a year ago, but even if not, even if the Court was reopening day three of a preliminary injunction hearing today, it's a distinction without a difference because that wasn't the sole basis for the TRO nature of this case. The issue was that the investor funds were being dissipated and sent to the defendants themselves to the tune of millions and millions and tens of millions of

dollars, and that the defendants were creating a bank.

THE COURT: Ms. Berlin, can you -- (voices overlap)

MS. BERLIN: (Audio indiscernible) one of many things that formed the basis for the emergency relief. And saying on this particular one, we could put this money back into the company. Well, if that's true?

THE COURT: Ms. Berlin, can you hear me?

(Voices overlapping)

THE COURT: There we go. Ms. Berlin, Ms. Berlin, can you hear me? I'm sorry. Okay.

11:20

MS. BERLIN: Yes.

THE COURT: Just I wanted to just point out something you had mentioned. There had been an objection here by Mr. Ferguson, but I assume I know what it is.

11:20

You had mentioned something about Ms. Davis's theory of really coming from the -- her declaration on the funds moving around.

Just for clarity's sake, I know that there's been some issue with Ms. Davis and her breakdown of the funds really in the form of the defendants' use of the Glick report.

11:21

But I just wanted to double-check my recollection of the TRO phase of the case. I mean, I know a lot more now from what the receiver has uncovered in terms of money flowing into different consulting vehicles and real estate ventures.

But I just want to make sure I understood. Your

11:21

position was that Ms. Davis's declaration showed at least or indicated in the good-faith belief by the SEC that some of the funds or significant portions of funds were being directed to the individual defendants and away from the investors.

11:21 Did I -- I want to make sure I understand that argument. You -- you had stated that earlier; am I right on that?

MS. BERLIN: That's right. Ms. Davis presented two declarations, one with our TRO motion we presented, the second

11:21 one in advance of the preliminary injunction hearing. During the preliminary injunction hearing, we discussed those.

Those declarations showed that -- I think it was more than 13 or 14 million went to Ms. McElhone or to the relief defendant, which is her trust, which is why that trust is a

11:22 relief defendant. That monies went to entities that were owned by Mr. Cole and Mr. Abbonizio, and we went through those amounts.

At the preliminary injunction hearing, we also showed their own financial statements showing the forwarded funds to

11:22 these companies. We discussed with the Court how they call it consulting fees, but, in reality, that money is flowing to the defendants' corporations and to Ms. McElhone's trusts, and that these amounts of investor funds went to those locations, went to the defendants to the tune of -- you know, I don't remember

11:22 the number off the top of my head because this was a year ago

of what our numbers were at that time. Of course, now we know it's a lot more than we said then, but it was a quite a bit, they were funneled.

We also filed with the declaration or the chart made by the SEC showing the flow of money to and the purchase of properties which the receiver subsequently used to seek those properties to bring those properties into the receivership. But we did not bring this case and the TRO was not based on the transfer of -- that one transfer was, you know, we talked in our papers and we present evidence about how they're funneling money to themselves, their companies, the trust that's owned by Ms. McElhone.

We amended their complaint for one reason, which would -- because we learned that the trust, one, we forgot, I think, the word "God" beginning trust, but we also had learned after filing that the trust was owned -- the grand tour and the beneficiaries are LaForte and McElhone.

So we presented evidence about the flow of money to that trust, the flow of money to (inaud.) Abigail, (inaud.) Heritage, Eagle 6, that those -- and presented evidence that those are all the defendants' companies. And that they were starting a bank, and that they were concerned about the usury laws and that we were concerned about the monies not only going off to the defendants' personal accounts and business bank accounts, but to that as well. And in our papers and in the

presentation of evidence in support of the TRO. So even then --

THE COURT: Well, and just to be clear -- and just to be clear, Ms. Berlin, because I reviewed the charts prepared. I would assume you would also rely -- I believe it's Docket Entry 692, Document 692, which was the spreadsheet that you guys have prepared that maintains the evidence that you believe you had at the time. The TRO was sought. That would disprove some of the defendants' arguments, or at least -- let me say this way -- maybe not disprove, but at least contest the arguments made by the defendants that the declarations you've made have been false.

You know, for example, the Fleetwood one which you talked about earlier, you have maintained that the SEC's theory is that the QuickBooks exhibit that is being utilized for that dealing with underwriting is not one that is in its native form and somehow manipulated, right?

So my point is that going back to why I'm concerned about the standard, your argument is -- and I know it's -- you believe it's stronger than this -- but at a minimum, the SEC has provided in the evidence heading into today's hearing, that the 34 pages of charts, for example, that you guys have provided, that there has at least been a colorable showing that everything that was included in the TRO was based in some sort of independent investigation.

And, therefore, even if the Court were to credit a defendant's argument that this is rushed or not verified to the level it should have been by the SEC, it would not legally rise to the level of the relief under Rule 41 because it would be almost impossible. Even with all of the evidence that's been advanced by the defense, there's enough in the SEC's breakdown of what they have looked at to state, or at least disprove, that it was willful or done in bad faith; is that correct?

11:26

MS. BERLIN: That's part of it, Your Honor. We absolutely agree that they cannot show, they cannot use a legal standard, but if I could just clarify two -- a couple of things --

THE COURT: Sure.

MS. BERLIN: -- that you just stated?

11:26

THE COURT: Yeah, go ahead.

MS. BERLIN: Thank you so much.

So our -- the TRO papers are based on the, I mean, on the evidence presented with the TRO. (Audio distortion) I cannot discuss, talk about or tell the Court about the investigation and what it showed and what we did. I am prohibited by law, and the defendants will know they're speculating.

That chart is in response -- that is something that we prepared to respond to Docket Entry 663-22, which was the defendants presented a chart where they purport to show why the

11:26

11:27

merchant declaration is false, and so we're simply responding to it and showing that their chart is completely false, borderline frivolous, and showing what the evidence really does show about those merchants --

11:27 **THE COURT**: Well, and my point is this: My point is again -- and I don't know why we keep arguing about the investigation because I made it clear that that's not -- that's neither here nor there.

The argument here is it's Rule 41 for evidence in the 11:27 record of a bad-faith or willfully negligent, really, investigation. And what I'm trying to lay a record on and be clear on is even if I credit the defendants with their arguments of negligence, it has to rise to the level of bad faith to use the Court's inherent power.

11:27 And forget about what the investigation had. But as the record sustains here today, there's enough declarations, and one could argue about them. I mean, that's what will happen at trial. One can argue about the veracity of some declarations, but this is not a situation where the SEC filed 11:28 the case that was essentially a figment. I mean, there is evidence, one could argue that if it's strong enough evidence to justify some of the relief requested, but from a bad-faith perspective, there was evidence independent of Heskin. There was evidence, as far as I've reviewed binders coming into 11:28 today, of different declarations. I agree the defendants are

right, it's a subsection of merchants, it's not the whole pool.

But, again, nothing requires it to be for purposes of overcoming a bad-faith allegation. You have 14, you have 14. And even if some information is procured from Heskin, that's not fatal, either. And even if one were to maybe dispute the characterization of Mr. LaForte's disclosures and his criminal record as you've stated, that's not really the angle the SEC's pursued.

11:28

All of these things that the defendants are arguing makes up enough of a bigger picture to show bad faith. You would say to me, and based upon your representations in your papers and the charts you've prepared pointing to the evidence you guys have relied on to date, you would say that, at best, there may be a dispute about the strength of the evidence, but this is not the bad faith you would need to find that the SEC has essentially just made this up and targeted these defendants in a way that would trigger the Court's inherent authority to dismiss the case, an extreme sanction under Eleventh Circuit precedent.

11:29

11:29

Am I correct in that?

MS. BERLIN: Yes, Your Honor, you are absolutely correct in that.

THE COURT: Okay. Let me ask you something else before I get to state actor, and I'm bleeding together this relief with the other relief, but it's just something that I

11:29

want to ask the SEC. And maybe there isn't a way to do this and maybe there is, I don't know.

I have Stumphauzer and Kolaya and Alfano in here with DSI doing all this work, spending countless hours chasing money, trying to get investor returns, trying to recoup money that you have stated now, again, and we have seen some evidence of, moved out of perhaps CBSG and Par Funding coffers into those of consultants or property-holding companies that were controlled by certain defendants.

11:30 We've talked a lot throughout this case about the end game here. What was of the purpose of the receivership? Why did it get implemented? You've seen and I'm sure the receiver has seen and the defendants have seen the Court issued an order not that long ago that stopped liquidation of some personal property because I felt it was premature to do so prior to trial, and continued to be of that belief that this is supposed to be a status quo operation.

You've also seen a lot of argument about this business being purportedly thriving. I don't know because we all know that there was a note exchange right about when the SEC got involved that seems to suggest the returns were not going to continue on the pace they were at. One could sit here and say that it's economic conditions, one could sit here and say it's COVID. We're never going to really know because we got involved right around then.

But my question to the SEC is: If this case is genuinely about a certain number of defendants who've already (inaud.) to preliminary injunctions and about their failure to disclose their criminal history, their, quote/unquote, fees, whatever they were billing because investors didn't know how much of the monies they were gaining was going to them as part of their own, you know, draw or take from the returns.

11:31

If that's really what the case is about, does the SEC foresee a situation, any permutation of what's currently going on here, where this business with, again, oversight monitoring, however you want to call it, we could explore what's going to happen to this business model, but extricate from it all the individuals defendants that, up until this point, are dealing with the allegations regarding registration or failure to disclose and register, failure to abide by registration requirements?

11:31

11:32

Do you see any way in which Par Funding and this model, at some point, could pivot to trying to continue in the MCA business, or is the SEC's view, Judge, at this point, we have to wait until the whole trial goes down. Then at that point, we have to see if the jury returns a verdict in favor of the SEC against some of these individuals so that we can at that point, as the receiver has said multiple times, start figuring out how these investors can get some of their principle back?

11:32

11:32

But that's what I've been told, and I'm just curious. I've been presented with a plan here, I've looked at it, I don't know how viable it is. We're going to talk a little bit about an ongoing CLA audit that was never completed, that was in its final stages.

11:33

What is, for lack of a better word, the end game? Because at the end of the day, I'm not going to have the receiver on this company -- and then forget the individuals defendants. I'm talking about just the business itself.

Does the SEC foresee a way in which the receiver could begin to wind down his involvement or position or transfer it to more of a monitorship and put people in place in Par Funding that would restart the business? Or is that something that is just not -- and I'll hear from the receiver on this as well later -- but is that something that's just not foreseeable until the trial is concluded?

11:33

11:33

I'm just curious what the SEC's view is on that.

MS. BERLIN: Thank you, Your Honor.

It's that there's -- there's several pieces that I need to discuss to answer that. I wish I could just say yes or no, I would like to just provide the Court with the information that we have available --

11:33

THE COURT: Yeah.

MS. BERLIN: -- and how -- what form would the conclusion of it provide.

11:34

So, first of all, the receiver, it's important to note that the receiver is -- did not simply discard all of the CBSG employees, but, in fact, put someone in, which is Brad Sharp with DSI, to oversee its operations. And so there are still CBSG employees, CBSG accountants who are there helping to operate, collect, and continue the CBSG work. It's just that it's currently being done without the defendants, and it's done with DSI there.

11:34 So what the Court was just discussing, I think is sort of happening with DSI and with the former CBSG employees. Some of the former CBSG employees, I think it's maybe six of the CBSG accountants who were there are still there, and then some others who have been retained.

But now we have the assurance of knowing that it's being properly run and money is not being misappropriated or diverted.

We did not file -- the SEC did not file its expert report in response to the Glick report, and that's because it's -- I don't believe it's something for the Court to examine, but if the Court wants to see it now, of course, we would file it.

The Glick report is the defendants' expert witness. They hired an expert; he gave an opinion. The SEC also hired an expert, and our expert and Mr. Glick will, you know, go through it at trial if this isn't resolved on summary judgment.

Our expert looked at everything independently of DSI and the receiver and did its own, Melissa Davis and Tomit Tapira (inaud.) and did their own independent analysis and reached the same independent leap conclusions as DSI. And --

11:35 **THE COURT**: By the way, is that conclusion GAAP-supported?

MS. BERLIN: Well, I mean, yes, and she's an accountant and she did --

THE COURT: Okay, no, I'm just making sure because

11:36 that's -- as you know, that's been one of the big things, is that the argument has been the Glick report is under GAAP principles, DSI is not, so it matters that the Court would be receiving, perhaps, whenever the expert reports are due -- I think it's two days from today -- and maybe it's best that the

11:36 Court hold off on the receiver discharge motion until I can see it.

But I think that's one of the concerns that has been repeatedly shared with the Court that, you know, there's a dispute about principles and methods used, and the

11:36 GAAP-approved methods of Glick should be looked at as a much stronger financial picture than what DSI was able to do.

But just so that I understand, you know, your view is that we now -- or you are aware -- that there is an SEC expert that is kind of the countervailing and computer expert to rebut

11:36 the Glick expert, also using all understood GAAP principles in

his analysis; is that right?

MS. BERLIN: The issue is the methods that are used. So Mr. Glick utilizes --

THE COURT: He used accrual, right? And DSI used cash. And the argument has been that the accrual basis is a better, healthier financial picture and that DSI looked at cash and that cash did not show exactly what was going on in the company as it really existed.

Now, we all know just the way it works that the accrual can also be very misleading because the accrual can paint a picture, but it also depends on the future and how some of these loans are going to be repaid and how things are going.

So if you don't have good reconciliation between your cash and your accrual methods, you could really be floating up a company that doesn't really have much in its coffers or anything at all, and that's been one of the disputes, I think, between DSI and Glick.

Now, Glick's view is the MCA model -- if I understand it correctly -- really drives under an accrual analysis that cash is a worthless analysis.

Am I going to get from the SEC an expert report that has the same method used by Glick, or is it also looked at in the cash analysis as DSI, and then we're going to get into an accounting expert battle at trial as to what more appropriately paints a picture of this business as a growing concern?

What's the SEC's take on -- and you know the expert report, I haven't got a chance to review it and I don't think it's due yet, but what's your view? Do we have a much more straightforward accrual analysis by the SEC that rebuts the Glick accrual analysis or is it more the DSI cash analysis?

11:38

MS. BERLIN: So the SEC's -- I'm going to answer that also in two pieces.

So the SEC provided -- it has an expert report, and we have a completely different approach than Mr. Glick, but -- and so there could foreseeably be a battle of experts, and our expert finds that, you know, without the inflow of investor funds, this could never continue. This operation could not continue, and that investor funds were used to pay prior investors, and the analysis and the methodologies that are utilized are similar to those of DSI and (inaud.) explains why.

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11:39

However, Your Honor, and then I will just state that as a practical person who tends not to utilize expert witnesses at trial because a battle of two accountants, you know, is what it is. It's a battle of two accountants for the Court or a jury to discern.

11:39

But I can tell you what is (audio distortion), and I think that will -- to me, this is the most compelling thing. Whether it's accrual-based, cash basis, however they want to look at it, at the end of the day, okay, I think we can all agree that we would look at how much money was going out and

11:39

how much money was coming in. How much was there? Was this really profitable? Is it only profitable based on like the money that they hope to one day get back, meaning accounts receivable? Did they have enough money to keep themselves
11:39 afloat without some investor money coming in? The answer to that is no.

Unless CBSG started raising money from investors again, okay, they cannot -- they do not have the ability to make more loans or more MCA. And, again, if there are
11:40 complaints, as we call it, MCA loans, it's -- an MCA loan doesn't matter. They don't have money to give out to whatever you want to call it without investor money coming in.

And that's the point that I don't think anyone can or would dispute. I've never heard it disputed. Mr. Cole, in his
11:40 own deposition testimony -- and you'll see this on summary judgment -- did a expert report. We'll present it to you with the cold hard facts of what was going on there.

And Mr. Cole, the CFO, admitted in his deposition testimony that he agrees with our numbers, which is that the
11:40 CBSG gave out about $1.2 billion-with-a-B to merchants over the course of its business. It got back from those merchants about 1 point -- that same amount, plus some people say 7 million, some say 14 million. Either way, you're looking at (audio distortion) percent back, more comes back, so $1.2 billion
11:41 dollars goes back over this whole time period.

And the amount that it brings back into its coffers from its business is only 7 to 14 million dollars more than it ever gives out. Well, they owe investors hundreds of millions. They've paid themselves more than the amount that's come back from CBSG. So (audio distortion) uses the biggest number, $14 million was the big -- not even profit, before expenditures -- is the big number that they get back, and that's what I think the number Cole used in his testimony.

11:41

So maybe that would cover the amount -- not even -- that went to Lisa McElhone and her companies? The business, however you want to look at it under whoever's accounting method, nobody disputes the numbers of how much went out through the business, how much came out through the business. And that number that comes back, it's like, you know, 1 percent, 1 and a half percent of what's going out? That's Not even enough --

11:41

11:42

THE COURT: Let me ask you something, though, Ms. Berlin. You would agree with me that, just so I understand, the relevancy of the model, the relevancy of the business itself, the MCA business, the Par Funding business itself here, is really only relevant as it pertains to disclosures made or not made by individuals involved in the corporation.

11:42

So meaning that whether it be default rates, whether it be, you know, underwriting, whatever it may be, all of the

11:42

facts pertaining to the business model because the business model is not being sued, right? The MCA business is not being sued. No one here really is -- and we said this earlier in the case -- is contesting whether it's a loan, a cash advance. It's individuals who, in your view and the SEC's view, have lined their pockets with money that should have gone to the investors, which has been from the beginning the reason why the Court has authorized the receiver to chase down any and all funds to get them for the benefit of investors, if they should have found their way to them as opposed to some of the individuals in a company.

You know, and so since that's not really what this is about, the business model, I guess all of these representations about its profitability or, in your view, its lack thereof, are less of a concern for me than the representations that were, in your view, in violation of SEC regulations and federal regulations made to hapless investors who did not know necessarily what they were getting into, which is really what the SEC has maintained this case is about.

So the way I see it, is we should be having a trial in the coming months about, were there representations made in violation of securities laws? Were these notes that did not receive the regulatory oversight they should have under law? And then at some point -- at some point, there will be a coffer, there already is, of money that has been recovered by

the receiver.

Investors will have to make a decision. They will have to, through some form of recordkeeping, make claims from that amount of money, that pot that's been recovered, and they will at that point have to decide, you know, do I want to take my money out of this concern? Do I want to go ahead and take my ball and go home because I was misled?

11:44

Some investors made decide that they want to double-down and continue in the MCA business. I don't know. Par Funding obviously is not going to be what it was, and there's some folks still in there from the company. But I don't think there's a universe if the SEC proves their case where McElhone or LaForte are going to play any role in this business.

11:44

And so the reason why I'm asking this question -- where is the end? -- is at some point I'd like to know when the receiver's role will finish and whether or not this company will be reevaluated under new leadership perhaps and maybe monitoring, or as is the defendant's concern, fully liquidated.

11:45

There are defendants who maintain that this model was somehow profitable and successful, and investors that I think maintained that if given the opportunity, they would have stuck with Par Funding. At some point, I think we will give them that decision. We will let that be the investor decision. But the hope is if they make that decision, they will have full

11:45

information, that the market requires for them to be able to make it an educated way.

So the roundabout thing I'm getting at here is just trying to get a sense at trial, when we get all this out there, what's going to be the exit?

11:45

And I think the receiver said multiple times that it's not something they can do until the trial, which I agree with, but we have another motion here to let the receiver out, put him in a monitoring role. You've heard that it's even relief requested as a subset of what is being sought under the 41 motion, and that this could be done by perhaps keeping all the individual defendants out of the game and let this money be hunted down by people that defendants believe know the business model better. And I don't know if that's accurate.

11:46

11:46

The receiver will be asked today to maybe opine as to the proposal that's been forwarded to me, and whether that's even realistic given the current circumstances of this business, this Docket Entry 663-34.

But I guess, Ms. Berlin, I'm trying to get a sense of, do you agree -- does the SEC agree with me that this is really not about attacking the business as much as those folks that use that business and didn't disclose the way it was being used to investors.

11:46

I just don't -- it's a big-picture question, but it continues to be a problem throughout this case because this is

11:47

getting too far away -- and I'm going to be very blunt -- it's getting too far away from the regulatory oversight and more into day-to-day management of this company, which is not what the court signed up for and it's not really what I want this litigation to be about. We're spending more time fighting over that and the business model than we are about what these people did when they made representation to adopt the business.

And I just hope as we get to the last phase of the case, summary judgment, and trial, that we keep our eye on what the case is about.

Do you understand what my concern is?

MS. BERLIN: (No answer).

(Thereupon, there was a brief pause due to technical issues.)

MR. FERGUSON: Your Honor, before we switch this talking portion --

THE COURT: Yeah.

MR. FERGUSON: May I just --

THE COURT: Yeah, I'm going to go back because I got to let you get a little air time on the state actor doctrine, so I'm going to go back to that. I just needed to get this question out and then I'm going to pivot back.

MR. FERGUSON: And I'll keep it brief and then --

(Voices overlapping)

THE COURT: And I got to let Mr. Futerfas, he wants to add a little, and then I'll switch to the other motion, and

we'll have -- we will -- and it's okay. We're going to go over time, but it's fine.

Ms. Berlin, can you hear me at all right now? Can you hear me, Ms. Berlin? (Audio distortion) For those that have been following along, sorry. Something happened here.

11:54

For those that can hear me, those folks who are appearing on Zoom, please keep it on mute. Other than me having a conversation with counsel, I'll prompt you, but if someone chimes in or, more importantly, if someone connects by phone, which is what apparently happened, it snapped the communication here and we were unable to keep talking.

11:54

So just try your best if you could, we're going to try to have you guys piped in to the court system now in just a moment, but let's just -- come on in, guys. We're trying to get this figured out.

11:55

I think at this point everyone should be able to hear me. We're going to try to pick up where we left off. I don't know when I got cut off, so my hope is that, Ms. Berlin, enough of what I was expressing was covered.

But, again, just so everyone knows, if you are watching or following along, please just make sure not to call in because it could cut off our audio, or to chime in on Zoom until I prompt you.

11:56

So I'm going to try to hear from Ms. Berlin here, and then my plan is to move to Mr. Futerfas and then back to and

11:56

then to check in with Ms. Schein and then move back to Mr. Ferguson, and then I have one or two little final questions on the 41 issue, although we touched on the discharge a little bit here of the receiver, which is the other motion.

So, Ms. Berlin, again, I'm not sure how much you heard about my concern, but what I was trying to figure out here is a little bit about the end game and how the SEC envisions this playing out. I think you've maintained that it needs to be tried, and only then and once tried, we can then figure out if

11:56 principles can be returned or if there is any way to save the company.

I think one of the overarching problems has become the purpose of the receiver is to recover funds, but not liquidate and not let the company essentially, you know, be defunct. And

11:57 so I don't know how realistic it is, but I think what's happening here and what I was sharing earlier before we got cut off is that I want to get a, I guess, assurance that this case continues to be focused on individual defendants and the lack of disclosure or regulatory compliance by those defendants as

11:57 opposed to getting caught up in the business itself.

Now, some of that is intertwined because representations about the business's profitability are part and parcel of the SEC's case as to misrepresentation. So I understand that. And that's what the case will be about.

11:57 But once we have gotten through that, there will be a

discussion about how the receiver's going to extricate themselves and what's going to happen to this company and its employees. And I don't know that there's a future of this company with the current or former leadership involved, but I wonder if there's a view by the SEC that this MCA endeavor should continue altogether.

Do you have any thoughts on that, on what the SEC's kind of long-term plan is once they get through just what the case is really about, the regulatory issues?

11:58

MS. BERLIN: First of all --

THE COURT: One second, Ms. Berlin.

(Thereupon, there was a brief pause due to technical problems.)

THE COURT: All right, for everybody that's there, I'm going to give you guys a phone number to call and we're going to open a conference line. I'm going to be off the Zoom. I'm going to mute it. You should be able to still see some video, but I don't want to waste everybody's time, and this is unacceptable. So we're going to go ahead and get everyone to appear over the phone.

12:02

Ms. Berlin, I would recommend you want to keep the audio off, but I would call in on the separate line, same with Ms. Schein and Mr. Futerfas. Please feel free to call in, we're going to give you guys -- I'm going to open up a line right now and we're going to give everybody that number, and any investors that wish to call in as well, feel free to call

12:02

in because I do not believe the audio is something you're going to be able to hear. (Audio distortion).

All right. Can everybody hear me? Because what we're doing here is we're going to switch to telephonic. Apparently, the Zoom systems are not working right now and we're having some issues. So what we're going to do is we're going to do this telephonically. So those that are not appearing in court right now are going to get an opportunity to call in.

Can everybody hear me right now?

12:03 **MS. BERLIN:** Yes.

THE COURT: Okay. Here's what we're going to do: We're having some issues with the Zoom. We're going to have everybody just call in telephonically because for some reason the system is not working. And it's happening to multiple courtrooms right now up here, so it's not just ours. I don't know what's going on with Zoom.

I'm going to give the phone number and a code to dial in, and I would ask, let's get anybody that wants to call in is free to call in. I think what I can do is I'm going to leave my computer audio on because if my computer audio is on you can hear me talk. And at least you can hear what I'm saying for those that want to stay on the Zoom.

But if you want to call in, if you're counsel, I need you to just call in to the line, so that we can go ahead and have you guys be heard on the record. It's not working here to

speak over the Zoom.

So, Ms. Berlin, Mr. Futerfas, Ms. Schein, I'm going to give you guys a number now. If you guys have a pen handy to write it down so that you can call in, and then we'll pick up where we left off, okay? All right, and Mr. Raikhelson as well. All right, what's the phone number?

12:04

All right, it's 1-877 -- and this applies to anyone that is on the call that can hear me. If you want to call in we're going to switch to telephonic. 1 (877) 402-9753. The access code is 9372453. The security code is 0918.

12:05

So one more time. Those that need to appear, counsel needs to call in now: 1 (877) 402-9753; code 9372453; security code 0918.

I'm going to leave the Zoom active. I'm not going to shut it down, but, again, I don't know how well the audio will be heard, so give it a chance, guys, if you want to stick around and watch on it, but I need at least the lawyers to please call in.

12:05

So I'm going to wait one moment and then we'll continue where we left off.

12:06

(Thereupon, a brief recess was taken.)

THE COURT: Do I have Ms. Berlin on the line? Okay. I hear beeps. I need to just know if I have counsel on the line, so I'm looking for Ms. Schein, Mr. Futerfas, and Mr. Raikhelson, I think, are the only three.

12:06

MS. BERLIN: Your Honor, this is Amie Riggle Berlin on the line.

THE COURT: Okay. I can hear you, Ms. Berlin. Can you hear me clearly?

12:06 **MS. BERLIN:** Yes, Your Honor, I can. Thank you.

THE COURT: Okay, very good. Okay. All right.

Do I have any other counsel on the line on behalf of the defendants?

MS. SCHEIN: Your Honor, it's Bettina Schein on the

12:07 line. Thank you.

THE COURT: If you are dialing in, you need to mute. Please mute. If you're on Zoom, please mute it. I hear Ms. Schein. I know that Ms. Berlin's on the line. Someone has obviously got me on speaker or mute. Needs to be muted. So

12:07 you need to mute your computer or your phone, please.

UNIDENTIFIED INVESTOR: Sorry, how do we do that?

THE COURT: I'm not IT, whoever asked how to do that. You've got to figure it out, okay?

MR. RAIKHELSON: Your Honor, this is Andre Raikhelson.

12:07 I can -- I'm local counsel for Joe Cole Barleta. Can you hear me?

THE COURT: Yep, I can hear you just fine. So I got you, I got Ms. Schein, and I'm looking for Mr. Futerfas to call in. I don't know if he's there.

12:08 **MR. FUTERFAS:** I am on, Your Honor.

THE COURT: Okay. Thank you.

MR. FUTERFAS: I am on, Your Honor.

(Voices overlapping)

THE COURT: Just go ahead and mute yourself. We'll deal with it in a little bit. I just need to get Ms. Berlin on there so that I can finish discussing, then I want to have Mr. Futerfas and Ms Schein on there so I can touch base with them.

Anybody else that's beeping in is probably an investor or the public. You're free to follow along. I'm going to leave the Zoom going, again, so if you want to put a face with the voice. But please mute. You have to mute. Whoever is listening, you have to mute. You cannot have your line open. You have to mute your phone or your Zoom. Okay.

So, Ms. Berlin, we're going to try this. Can you hear me? We're going to try this one more time. And let me let you -- let me set up. Let me tell everybody what we're going to do.

The Court's going to do the following. It's 12:10. The Court has one status conference at 1:00 o'clock. We're going to go until about 12:30. I'm going to let everybody take a break for lunch, and then we're going to keep going. I'm going to move some stuff around that I have this afternoon that can be moved. I've already consulted with my CRD, and this hearing has been, to me, has been interrupted by technology.

And so my view is I want to continue the hearing. I'll give everybody that's personally here a lunch break, and we'll pick it up again at 2:00 o'clock so that we can have about another hour of argument because I feel that we've barely been able to get through everything I want to get through because of the interruptions.

12:09

So I want everyone to feel comfortable that we'll come back on at 2:00 o'clock, and I will go ahead and do some technological rigging in the interim.

12:09

But let's at least get the next 30 minutes hopefully uninterrupted, and then we'll try to kind of do a little bit of a reboot so I can touch base and clean up some points for this record when I come back in the afternoon.

So I want everyone to know that, so plan your

12:09

schedules accordingly. And I know that -- I think the defendants asked for more than the time I had allotted, so I think this should work for everybody.

Now, Ms. Berlin, I didn't get a chance to hear your response. I don't know -- again, we've been interrupted a lot,

12:10

but I'm going to turn it back to you to kind of give me a long-range picture and plan of the receivership issue and the focus of this case in its last phase of summary judgement and trial.

Go ahead if you could, please. I know that you heard

12:10

some of what my concerns were, and maybe give me the SEC's view

about Par Funding and whether Par Funding will be once again a going concern, not liquidated, and possibly with new leadership at the end of this case, which is something that has been referred to multiple times by defendants and their papers, as they seek to at least advance a plan for the Court to try to let Par Funding get back into the MCA game.

So can you address that for me?

MS. BERLIN: Yes, Your Honor, thank you so much. And I just want to check and make sure you can hear me okay.

THE COURT: I can hear you perfect, thank you.

MS. BERLIN: Okay, great.

So the SEC's position is that the receivership should continue and that it needs to be done in a way that maximizes the return for the investors. So that includes what the receiver is doing to go after funds to try to collect where they can.

The collections efforts do look different from the way the defendants did it. We presented some evidence from people who claimed that there were some threats of violence and other things in trying to collect, and I attached to our response brief a response brief filed by the U.S. Attorney's Office in a pending criminal case against Mr. LaForte that discusses an ongoing investigation. And also there are discussions with witnesses about the collections efforts of the defendants.

So the receiver is collecting differently than the

defendants might have, but I don't think that we can say that they're doing it -- that they should be doing it the way the defendants did.

There are claims that I think could be considered by the receiver that we've discussed with them to try to get funds from other sources, and I think all of that needs to continue.

12:12

The critical thing here, Your Honor, is that I don't think it's disputed that the company only had 14 million at the most ever coming back in from this business over the course of its lifetime, and that that wasn't enough to pay expenses. This company requires investor funds coming in, in order to continue operations and do more deals.

12:12

So I don't think there's a question that if they're not going to continue raising money from investors for securities offerings, and so as a practical matter then, how can it proceed or engage in more deals if the investor money that they rely upon to operate is -- has been ended, okay?

12:12

And that ended before the SEC came into this case, as they say. That's what their claim was in their exchange offering.

12:13

I would also add that, you know, our evidence shows that this was operating as, you know, what's commonly referred as a "Ponzi scheme" in the sense that they were paying investors with new investor money.

12:13

So how does it look at the end of the day? I think

that's something that the receiver has to contemplate, and the SEC will be supporting whatever maximizes the return. That could mean trying to collect money from third parties that were involved or perhaps negligent. It could involve the
12:13 liquidation of some of the properties and assets that have been collected.

But as far as CBSG operating, the receiver, you know, can speak more to this, but if there's no investor money coming in, I mean, there's no dispute. If you don't have money coming
12:13 in, you don't have money to give away or to loan out or to do an MCA with. And there is no investor money coming in, and that was their only source, right, of money to get out to these merchants.

So, in reality then, Your Honor, you know, how does a
12:14 company whose business is, you know, lending money from -- that it collects from investors and getting, you know, supposedly getting more back, how can it continue or go back into business unless it has a different stream of funds that it would be collecting to give out to investors?

12:14 So I just don't see it as anything that could be practical. I think the evidence is going to show that this was running as a Ponzi scheme, which is relevant to our allegations about the representations made to investors about its success and that it was a meritorious company.

12:14 And I think at the end of the day, the goal is going

to be to look everywhere, look under every rock, trace down every dollar of investor money, wherever it went, and collect it so that it can be given back to the investors.

But unless they were going to do another securities offering, right, that's how they were making the money to give out to merchants according to their business model. And that's -- so that's what they did, but according to what their business model supposedly was, it was giving -- it's dependent on that initial inflow from the promissory note sale.

12:15 So I don't see how that --

THE COURT: Okay. No, and I just wanted to get a sense of that, and when we get back from the lunch, I'll hear more from the receiver on the secondary motion, which is to discharge the receiver, and I know that the SEC has taken a position on that. The receiver, really at the Court's instruction, has not addressed that, in large part because their job used to be to collect funds, not respond to pleadings as much as possible so we can try to keep the costs down.

One thing I want to do is turn back to Mr. Ferguson and then hear from Mr. Futerfas and Ms. Schein, again, they need to add a little bit more, but I'd like to try to finish that argument that is focused on the Rule 41, and then we'll just take our break and then deal with about an hour of argument -- 2:00 to 3:00 o'clock, we'll deal with a little bit of a argument on the receiver, which I know there's other

counsels that have advocated for that, Mr. Soto and others who are not under the Rule 41.

One thing I didn't get a chance to talk about -- and, Ms. Berlin, I want to hear your point and then I'll turn it back to Mr. Ferguson -- there's really two arguments.

12:16

The main one is the bad faith and willfulness. There's a -- kind of a secondary state actor argument. I'll hear from counsel in a minute. I assume it's some sort of a due-process claim, but there is this kind of amorphous constitutional violation being asserted, and it would be natural under the Fifth Amendment, under the state actor doctrine case law.

12:16

But I just wanted to get the SEC's formal position on the record that I believe the way you've pled it and the way the evidence at least has indicated that there is no true direction by the SEC to Heskin so that it would satisfy the standard required for state actor doctrine to trigger constitutional and due process protections.

12:16

And by that, I mean that all that has been advanced to the Court, based on my review, is temporal proximity. No one can deny that when the SEC was building their case, Heskin was in communication. But it doesn't appear to me that there's enough record evidence to support a finding that the SEC directed Heskin to act as an agent and therefore circumvented the constitutional rights of the defendants.

12:17

12:17

And one of the arguments behind that, number one, you've pointed out there is no due process violation anyway. They were advised by counsel. Defendants actually, on some of the private suits with the MCAs, went ahead and dictated the scope of the deposition.

12:17

And so that's been kind of an initial argument. But you've pointed out that even if we ignore that for a bit, the reality is that there is just not enough evidence for the Court to find that the state has exercised coercive power over the private decisions of Heskin so as to, quote/unquote, deputize him as an agent of the SEC.

12:18

And I want to make sure that I've stated that position correctly because it is a large part of the Rule 41 motion, and, therefore, the Court is not persuaded that there's enough of a showing for bad faith to justify this sanction under the Court's inherent power.

12:18

I think I would also have to explicitly acknowledge that the Court is not satisfied the state actor doctrine has been satisfied or met under the case law.

What does the SEC want to chime in because we haven't talked about that at all, but it is a feature of the pleadings.

12:18

Anything else the SEC wants to add on that point?

MS. BERLIN: Thank you, Your Honor.

I think that the Court, as always, did a great job summarizing that very concisely, but the only thing that I

12:18

would add is the SEC also argued in our response -- and I think this is sort of the critical feature here -- is that the state actor doctrine would not have any applicability here anyway, like regardless of what the facts were because the issue is
12:19 that if we're dealing with the private lawsuit and a private SEC lawsuit, there is no place.

You know, this arises in the situation, the state actor doctrine, was that it was a criminal case or a state regulatory actor organization case where parties cannot assert
12:19 a Fifth Amendment right.

Here, the defendant testified and provided evidence in federal private lawsuits in the Eastern District of Pennsylvania. They chose not to assert their Fifth Amendment rights. They had that right there.

12:19 So even if the Court were to find Mr. Heskin was a state actor, which it cannot, there's no evidence (audio distortion) that he was not. But even if he was, which he wasn't and they can't provide anything other than speculation, state actor doctrine has no applicability. There can't be a
12:20 Fifth Amendment right or a Fifth Amendment violation or a due-process violation when you're looking at two civil cases, in both of which the defendants could have asserted their Fifth Amendment right.

So there -- where would the due process violation lie?
12:20 Are they claiming that in the Eastern District of Pennsylvania

where they were deposed that the Fifth Amendment doesn't apply, that they couldn't have asserted those rights? No.

So it's just a red herring argument, Your Honor. There's no reason to even proceed, and this case is very much like the Eleventh Circuit case that we cited at some point in the McKinn (ph.) case, both of which are directly on point for these issues.

And if I may, I just, very briefly because I know we've taken way more time than was anticipated, so if I could just briefly discuss one thing that I inadvertently failed to state on the court's prior question?

THE COURT: Yeah. Go ahead and then I'll turn it back to Mr. Ferguson and then touch base with Mr. Futerfas and Ms. Schein before we break for lunch.

Go ahead.

MS. BERLIN: Thank you so much, Your Honor.

I just wanted to point out, as the Court knows, questions have been made about the 14 merchant declarations, that was not the sole basis in any way for our claims about the underwriting issue. We had the undercover recorded transcripts where Mr. LaForte is explaining how you do underwriting for the vast majority of the deals. And these anchor clients who can (audio distortion) calls now and ask them for money. And then Ms. Jones, who also stated the same thing.

But we have an (inaud.) for Mr. LaForte, and that's

what we presented to the Court with our TRO motion. And we used these merchant declarations as examples of (audio distortion) just the Court wasn't sure LaForte admitted and what Ms. Jones, the underwriting assistant director, both stated.

12:21

So this isn't a case where we're coming forward and saying you didn't do underwriting and we're only relying on 14 merchants' acts, which, by the way, which are (audio distortion).

But it goes beyond that. We provided defendants' (audio distortion) limitations as well. And as far as the funding distinction the defendants made, the issue in this case, and we allege that they lied to investors, and we pointed the Court in our TRO papers to page 9 of their brochure, which states that they make a decision within 48 to 72 hours, that they don't rush the decision.

12:22

12:22

The issue and what our allegation is, it's not even about when the money left the bank account. It's when they made the decision. How long they took to do the underwriting. How long that process took. That's the misrepresentation that's in this case. That's what we allege they lied about and that's what the evidence will show at trial and that's what showed up on the TRO.

12:22

And then finally I just ask to strike in the reply, the defendants make an allegation to this Court about me

12:23

claiming that this isn't the first time that Ms. Berlin has presented (audio distortion). They cite to the Cramer (ph.) decision and tell this Court that in that case, Judge Merryday (audio distortion) in the Middle District found that, when I
12:23 presented him with untrustworthy evidence. They cite to the case, so there's no question there where or what it says.

And, yet, they've made this false and public defamatory statement, and it's sort of indicative of all (audio distortion) under the same way. That decision, Your Honor, and
12:23 I would ask that you please look at it. Because they wrote (audio distortion), where the issue was whether the Court would admit the investigative testimony of an unavailable witness.

And the Court sets the standard under Rule 807 and Rule 412 is whether or not it has the (audio indiscernible).
12:24 And the Court found that because the defendant, who at that point was a fugitive, had not been cross-examined, and had, you know, an interest that was posed to the remaining defendants, that it didn't have the indicia of trustworthiness to be admitted into evidence at trial.

So (audio indiscernible) SEC or that me, in particular, as she had claimed, was found to be untrustworthy or present false evidence to a court, it was a motion in limine, where the legal issue is, does this transcript bear the indicia of trustworthiness so that the Court should admit?
12:24 And it was a legal issue that was litigated, and the

Court ultimately decided that the defendants would win on that motion in limine point. But that is not how they (audio indiscernible) the Court. They filed something on the public record (audio indiscernible).

12:25 **THE COURT**: Okay. Ms. Berlin, that's all right. I'll take a look at the case, all right? No one here is going to make that a feature of the Court's ruling.

And, again, if anybody is on the phone call that is speaking that is not Ms. Berlin, then you need to mute your 12:25 phone, please. I'm getting a lot of feedback and I don't want to get to the point where I make this a closed hearing this afternoon, and no one can listen in, which is where we're headed if I don't stop having interruptions and people dialing in without muting.

12:25 So, Mr. Ferguson, let me turn back to you so that I can allow you to make some final points and, perhaps, address, if you would like, the applicability of the state actor doctrine.

And then I will ask if Ms. Schein or Mr. Futerfas 12:25 wishes to add anything else to the Rule 41. I think just to briefly summarize, there has been a presentation made by each side that indicates, again, this is an investigation that was in flux. Some of it, in the view of the SEC, was done prior to Heskin. Enough of it was done with evidence to support a lack 12:26 of bad faith.

And then, conversely, the defendants have positioned their argument to show that if you look at all of the investigative shortfalls, in the view of the defendant, that it should, as a whole, rise to the level of bad faith.

12:26 And the Court will ultimately have to decide whether Rule 41 case law would permit the Court to exercise its discretion this way based upon this record and a thorough review of all competing affidavits and declarations.

So, Mr. Ferguson, what did you want to add (voices overlap) this?

12:26 **MR. FERGUSON:** I'll keep it brief.

THE COURT: Yeah, it's okay, I don't want to cut you off. I just want to make sure that I don't miss anything on Rule 41 and from your co-counsels either before we break.

12:26 **MR. FERGUSON:** Thank you.

THE COURT: Go ahead. Yeah.

MR. FERGUSON: I really appreciate it.

Before I -- and I'm going to keep this brief, but I do want to address a couple of things because counsel is speaking

12:26 as if we agree to some things that we do not agree, and I do not want --

THE COURT: I don't think anybody agrees to anything in this case, so (voices overlap)

MR. FERGUSON: And I just want to check them off real

12:27 fast.

First of all, Ms. Davis is using the cash basis. We do not agree it is GAAP-compliant. Counsel said -- I think everybody will agree -- it doesn't matter if you use accrual or cash, the result is still that they needed investor money and were basically a Ponzi scheme.

We do not agree with that at all.

THE COURT: What would you say as to the comment, which got lost in all of our technical issues, which was a surprise to me. And I don't -- and we'll hear from Ms. Berlin this afternoon, but I don't expect to have that happen at trial. I think I literally heard her say -- this is the first time I've heard this and I have gone on record a couple of times explicitly stating this is a battle of the experts -- and for the first time today, I think I was just told that the SEC was not planning on calling an expert.

MR. FERGUSON: May I address that?

THE COURT: Yeah, I mean, unless I misheard that, I absolutely --

MR. FERGUSON: Yeah.

THE COURT: -- absolutely assumed it was going to be Glick versus the SEC's person, and now maybe that's not what the SEC plans on doing, and I got to tell you some of the risks of representations or alleged misrepresentations by the principles of this company, I think really depend on an expert coming in and saying you can't represent that default rate

because the economics behind the business do not stand for it.

I don't know how you would --

MR. FERGUSON: Let me respond.

THE COURT: -- yeah. What would you say? I mean, I --

(Voices overlapping)

MR. FERGUSON: I can shed light on it.

THE COURT: What did you -- what do you say because I did not expect that?

12:28 **MR. FERGUSON:** If, Your Honor, we have to go to trial --

THE COURT: Right.

MR. FERGUSON: -- I will be there. I can assure you Mr. Glick will be there unless something happens that he can't 12:28 make it. We're bringing an expert. The SEC is saying we're a Ponzi scheme, and we're going to defend ourselves and we're going to defend any representations that were made by the defendants. And the SEC, if they don't want to bring an expert, I don't think it'll go so well for them.

12:28 But I'll tell you this: I don't believe that I suggest that Ms. Davis will not survive a Daubert challenge. She will not pass it and we want that opportunity. Mr. Glick does not agree with her. We do not agree that we were a Ponzi. We do not agree that we needed new investor money to continue 12:29 to operate. We do not agree with that at all.

There was a reference to a representation made when there was a restructure. I contend that that was not made by my client or Par, and we can parse through that later. But be very clear, our position is that Mr. Glick and Ms. Davis will
12:29 have a showdown if and only if Ms. Davis can get around our Daubert challenge, and don't take any of those -- and I don't want the people listening to, for a second, believe that the defense agrees that this was a Ponzi scheme. That is not appropriate to make that argument in this case.

12:29 And I want you to also understand, shifting back for a second, to the substance of the Rule 41, I've got a few notes. There was a lot going on.

But please understand, Your Honor, we're not -- this isn't summary judgment. We're not here attacking the filing of
12:30 what the SEC now is locked in on what this case is about, a securities registration and disclosure case. This isn't a summary judgment motion.

So for the purposes of this motion, that's not what we're talking about. We're here looking for a remedy for the
12:30 preliminary relief that was wrongfully obtained that caused drastic, catastrophic injury to Par, the note holders, the defendants, and that's what this is about. So it's a little bit of a misdirection to try to start arguing summary judgment.

And some other points.

12:30 If you go back into the motion and the TRO motion, the

Vagnozzi investor dinner -- which wasn't just about Par, it was about other opportunities, too -- the SEC says that that's tethered to hiding Mr. LaForte's identity, and then the transcript reveals otherwise.

12:30 The other thing. The dinner with Mr. Cole about the bank. And I don't know if they're doubling down or it sounded like on the LaForte introduction like that doesn't matter again. And I'm not sure, it's a little convoluted, but the record is there and what they said in their TRO and what the

12:31 transcript says, it doesn't support that. I'd like you to key in on that when you're thinking about this.

The dinner with Mr. Cole, they double down and they say Mr. Cole said we're going to get a bank to avoid usury laws. Again, Your Honor, this is more of the same conduct that

12:31 we're complaining about pre-TRO and when the motion was filed. The transcript, he doesn't say that. So check that out and that should impact the veracity of counsel's argument because it's not there.

And you, Your Honor, you're all over the issues.

12:31 You're a smart man. Why on earth would Defendant Cole think he needs to get a bank to avoid usury laws for MCA advances that are not governed by usury laws? It's nonsense, Your Honor.

The most troubling thing I heard here today -- well, in addition to we agree that this is a Ponzi -- is now the SEC,

12:32 rather than saying we got it wrong about the theft of all the

money out of the coffers which caused you to, in part, hit the nuke button here, now counsel's arguing we're making it up, that we did take -- and this is what I heard -- that we did take the money, but we sent some of it back to the company.

12:32 That's not our position. That's not what happened. That money was moved from the business to the funding platform in the ordinary course of business. No money was taken.

THE COURT: Is your belief on that point -- I mean, I know that some of it has been in Georgia with the funding

12:32 platform.

MR. FERGUSON: Yeah.

THE COURT: What do you make of assertions early on in the case -- and, again, it's hard because I know you're pointing to the Court to what was represented at the TRO phase.

12:32 Some of this stuff has come out through the receiver's work.

But is it your dispute upfront that any of the money found its way to individual defendants inappropriately, meaning --

MR. FERGUSON: Yes.

12:33 **THE COURT**: -- do you believe that that funding or that money came got from investor funds to those individual defendants was open and obvious, everybody knew those -- that is the fees that they charge and that was properly disclosed, that this is not -- that they were fleecing investors, but that

12:33 this was the profit of their hard-earned work, you know, or

hard-earned gains for their hard work because of the MCA factoring? What's your view on that?

MR. FERGUSON: I do dispute the concept that a penny was wrongfully taken. Now, the Georgia money, you got my position, so now we're moving, too.

12:33

THE COURT: Right, we're talking about separate, right.

MR. FERGUSON: Not another -- not one penny was wrongfully taken or stolen by any of the defendants. And what you just said is our position that this was compensation consulting fees for work they did, and that's our position. And then we believe that the -- they just blew out the account and stole the money was just a easy way to bait you into doing the obvious.

12:33

12:34

THE COURT: And let me ask you, something like that, which goes back to my issue when I see a chart, and the SEC and I are having this discussion earlier, and I'm pointing and Ms. Berlin asked me or shown me where your underwriting statements are. And now I have at least her version of the declarations that formed the basis for the underwriting.

12:34

Something like this compensation argument, so we have a side telling me this is clearly consulting fees, we can prove it's consulting fees, we'll get people up here from the business to show you that this is not money being taken out inappropriately from the investors and they being unaware of

12:34

it.

And then I have some of the testimony or some of the documentation that seems to evidence that this wasn't necessarily disclosed in that fashion to investors.

12:34 How can I look at something like that, which is traditionally would be a jury issue or disclosure debate over the compensation for regulatory concerns and what they should have told investors, how can I look at that and say, well, you know, what that's clearly bad faith by the SEC, they don't have 12:34 a leg to stand on that that is a hundred percent, you know, a fleecing investors, it's clear it's compensation?

Because, I mean, there's a lot of grays there to me in this record. And then to ask --

MR. FERGUSON: Let me address it.

12:35 **THE COURT:** -- (voices overlap) when I see grays, I can't get you to 41. That's my problem.

MR. FERGUSON: Your Honor, as a lawyer, we all have to be careful what we ask for because if we get it and we weren't entitled to it, we're going to lose it later. Okay?

12:35 I'm not here to tell you that they -- that it's willful misconduct for them to throw that out there and challenge -- because -- but I think the theme of their paper is that apparently the operators of the businesses were not entitled to a dime in compensation, and if they got any 12:35 compensation, they stole.

I believe that some of that can be pared out at summary judgment, and if the case continues, some of that might be a jury issue and we'd stand there to defend it. I would be misleading you if I just told you, don't look there, that's -- you're wrong.

THE COURT: And that's -- and that's, look, and I appreciate that because, as an officer of the Court, that's important to me, and that's why, when I look at this motion, I said I get the argument, but I can't square up this record with the relief requested.

And let me tell you something: I think you're absolutely right. I think I would be swiftly reversed by the Eleventh Circuit on this record if I granted your motion. And I say that respectfully --

MR. FERGUSON: Well, Your Honor --

THE COURT: -- and I think it's a well -- I think it's a well-pled motion, but it's the standard that worries me. I feel like I have to get a level of hand caught in the cookie jar to exercise such broad and sweeping power, which is why in the beginning I said if you're right on this, we got another way. I mean, I get what you're saying. We really don't judge at this point. We decimated Par Funding, we've taken all this money out of the stream of the MCA loans, we can't get back to where we were, we can't put the genie in the bottle.

I would say I don't know that granting Rule 41 fixes

any of that other than you, I think rightly, are saying to the Court, exercise your discretion to prevent abuse by the government by the SEC in this fashion. And that is a good-faith argument to make to the Court that they should pay a price if indeed they went ahead and ran roughshod over defendants with no investigation, with no leads, no declarations or anything of that nature.

You know, but when I got a bunch of disgruntled people that they spoke with, yeah, I'm with you, their credibility is going to a little bit suspect. Your theory isn't a bad one: If we can get this thing to be shut down, then we don't owe our outstanding loans. I mean, that makes a lot of sense, right, everything gets frozen and now a bunch of disgruntled MCA borrowers, who are probably looking at confessions of judgment, are now going to walk.

So, again, I'm not disagreeing with any of this. I think all of this stuff might make a group of six or eight look at the SEC and go, well, wait a minute. Your case is built on no expert and 14 disgruntled portfolios. I mean, and maybe there are witnesses from the defense that say, listen, everybody knew that we had to take some of these monies for our work. This was not a non-disclosure issue.

But all of these things I'm pointing out to you, which I will contend are arguable flaws in the SEC's case, it's all about whether I can make a real finding here today that it

rises to the level of a Rule 41.

MR. FERGUSON: May I, Your Honor?

THE COURT: Yeah, yeah, you go ahead.

MR. FERGUSON: Okay. I might have misspoken. I want you to understand what my point was about review and reversal.

12:38

When we were talking about the compensation, what I'm saying is if our Rule 41 was based on the false allegations that they got paid and they were entitled to get paid and you should find that here, if that went up, I believe that would be subject to reversal. That's what I was conceding.

12:38

As far as the Rule 41 motion as it stands, the one we brought, I believe stacking the willful disregard, stacking it like the guy I gave the example driving down the street and crashing into somebody, at some point I believe in any of these numerous points, they crossed the line into willful.

12:38

I believe you could dismiss the case, whether -- it's your discretion at this point whether you decide to do so, think that's the right result, or something less, some other, that's all on your desk.

12:39

THE COURT: And you don't think the stacking -- you think it's not a stacking of inferences?

MR. FERGUSON: It's not inferences, no.

THE COURT: That's the key, right? Is it a situation where I'm taking, for example, the Heskin temporal proximity argument, and I'm going to make the leap.

12:39

MR. FERGUSON: That, I'm going to address that for a second.

THE COURT: Yes, address that for a second.

MR. FERGUSON: The state actor concept, it's real simple what we're pointing to, and it's more than just a temporal proximity. Mr. Heskin is a private actor, as you know. And the manual of the --

THE COURT: Of the SEC.

MR. FERGUSON: -- of the SEC, 3.1.4 states that they cannot utilize a private entity and utilize them in the furtherance of their investigation, and Mr. Heskin, a private adversary, a private litigant, he, after a protective order has been entered on certain subjects of what he can ask at Cole's deposition, he's communicating with the SEC, he's asking the questions the Judge (audio indiscernible) are not relevant and that you shouldn't ask. He's getting testimony, and then he immediately orders the transcript and sends it to the SEC.

So that's not just co-concurrence; it's working together. And Mr. Heskin is e-mailing the SEC and law enforcement. I believe that we've got -- we put e-mails in the record, where there's e-mails from Heskin to counsel, not -- two different counsels at the SEC and FBI agents.

Now, what I don't see coming back are e-mails between them talking, and I don't know what they did, but I would suggest people in that position, when confronted with an e-mail

like that, if they wanted to communicate further would probably do so by phone. I could never find that.

But we've got Heskin as the -- he's the hub of the FBI, the SEC. He's asking questions for the SEC. And, sir, it reads -- that Cole deposition transcript reads like a blueprint of the complaint that was filed, you know, weeks later.

And that's our position. That's it in a nutshell. It's no more exotic than that.

But I do not believe I'm stacking inferences because if that was all it was, it wouldn't be enough, but that, we've shown you the interaction there and what happened. And the things we're stacking are not inferences. I'm not asking you to believe that, through inferences, that the SEC said that the money was stolen when it was being funded to merchants in the ordinary course of business.

I'm not asking you to swallow an inference when I'm saying the SEC tells you that they concealed Mr. LaForte and introduced him by name, when they tell that this transcript -- and they tell you here in this hearing -- that this transcript supports Mr. Cole saying we're going to buy a bank to -- acquire a bank to avoid laws that don't even apply. Those are not inferences. It's misconduct. And the arguments continuing here, I believe, are enough.

And I believe you should grant our motion. I understand you were asked to fire a gun. You shot the gun.

And I'm asking you now to realize that was -- you shouldn't have done that, the preliminary relief, but I understand why you did it. And you're like, well, what do I do now? This is something you have to deal with, or what are the ramifications? If I wanted to grant that relief, what are the ramifications? How do I make it better? How do I make it as right as I can?

And that's on your table. We're here to give you information, respond to questions. But I just wanted to make those points and I want to leave with one final point.

Just the ongoing misconduct. We heard counsel talking about the merchant declarations. Counsel referred to Fleetwood.

THE COURT: Right.

MR. FERGUSON: Counsel -- we've shown you -- the counsel's own London report that she got from Mr. Heskin, bought and paid for by Mr. Heskin, which shown you in the papers, that he confirms that Fleetwood was funded on January 9, 2017.

Now remember there's a site, the deal starts on the 4th. There's a site inspection ordered that occurs on the 5th, and then it's funded on the 9th. We've shown you the wire, the money out of Par's account, but counsel keeps saying it was the 4th and doubled down here, and that's false. And London, her own expert, shows that that's false.

Chief, the counsel gets a printout. This is Exhibit

B-8 to the papers, and it's a CRM printout that talks about Fleetwood. It says data funding, 01-04-17, okay? Deal value, zero dollars; expected close, 8-17-2021.

This is obviously not -- this is a CRM. This is garbage in, garbage out. This is the data control at the company. This does not trump the actual bank records Mr. London's finding.

And what's really interesting to me, it's just last night, I think I was on the phone with Mr. Levine, he called me and he found this. And if you look at the declaration of Melissa Davis that's Exhibit B-5 that the SEC filed to basically show that the QuickBooks image that we gave you with the declarants names on the top is not how it is in QuickBooks. We weren't ever asking you to believe that.

But if you read Ms. Davis's materials that she attaches, she says I accessed the QuickBooks and here's some printouts from QuickBooks that show the last page of it is the Fleetwood services account, and it shows that the -- that it was funded on the 9th. The money went out on the 9th. It's in -- counsel's own declarant, Ms. Davis herself, confirms that counsel's argument to you based on this CRM printout, this continued argument that Fleetwood funded before the site inspection.

This is false, Your Honor. This can't be tolerated. See, what's going to happen here is if you let this slide,

they're going to do this again. The commission's going to do this again, counsel's going to do this again. And there has to be ramifications for this.

THE COURT: Okay. And let me ask this.

12:45 Just I know that Mr. Futerfas and Ms. Schein -- and whoever's on the line needs to please mute. I have investors that are not muting their calls.

So let me finish this first portion, which is simply we've heard argument on the Rule 41, although we've touched on

12:45 some other issues.

Before we break for about an hour and 15 and then I'll return just after 2:00 o'clock, then hopefully we'll see if we can get a clean line set up again at that time, and I may issue some information if we need to change the numbers, but we

12:45 should be able to all call in again and hear the remainder of the argument on the other side, and then we're going to touch base with the receiver as well.

Mr. Futerfas or Ms. Schein, I don't know if you want to add anything. I mean, Mr. Ferguson has kind of taken the

12:45 lead already in your motion. Quite a bit has been said on top of the papers is what I wanted to give you guys an opportunity to be heard on this Rule 41 motion before the Court rules.

And, you know, again, I think I've said it many times in this case. The difficult challenge in this case is because

12:46 we have a lot of evidence and a lot of different statements

made and deposition transcripts and moving parts, it is the case that begs for a fact-finder in the form of a jury to kind of make an ultimate determination of what are the underlying key issues in the case. And we'll see how much can be resolved at summary judgment.

But I will say that at this point I've made my concerns clear as to whether or not it would be a proper exercise in my discretion to dismiss the case. Given what I've seen, I find there to be some merit in the cutting of corners on some of the investigatory issues done by the SEC, but we know that that kind of at-most negligent type of behavior -- although there may be a strong public policy argument for the Court getting involved and reminding the SEC of its obligations -- it's a much different ball game to get to the world of bad faith to trigger Rule 41.

12:46

12:47

And I will note that a lot of the state-actor arguments that have been made, we know they're not actionable to kind of look and use the SEC's manual as a standard that can be enforced, per se, and there's some case law on that, although, again, I think it's part and parcel of the defendants' presentation that this was not the world's best investigation before they asked for a very big remedy.

12:47

And one would wonder what would have happened if we kind of pumped the brakes a little bit upfront before asking for a TRO, but we all know that presented with the evidence

12:47

that I have in front of me, I continue to believe it was the right call to protect investors, and we've let that operation try to drum up and get as much as we can in investor proceeds.

But, Mr. Futerfas, is there anything you want to add that hasn't been already argued on top of what you heard from your co-counsel?

MR. FUTERFAS: Yes, Your Honor, thank you. I appreciate your patience today. And I'm going to be brief, given that Your Honor's heard a lot already.

I want to start, and I would be very quick, but -- because I know we're going to talk about this after lunch -- but Ms. Berlin was asked by Your Honor, it's her report according to GAAP. Is it GAAP supported? And they took about five minutes to answer the question and never answered it. No, it's not GAAP-supported.

Then Your Honor asked, "Am I getting a report from your expert, Ms. Berlin, that analyzed this company under a (audio indiscernible) analysis?" And, again, she hesitated and waffled. The answer is no. The report that the SEC got and produced to us on August 13th is a rehash of a cash-basis analysis done by DSI. We could eviscerate that report. We will eviscerate that report at a Daubert hearing. It is easily and demonstrably destroyed, and I could do it after lunch with Your Honor in about five minutes.

Further, she made claims that this company was a Ponzi

scheme. How can she say that? James Klenk, who is the CFO of this company, or the chief financial officer of this company, or the controller and a CPA and continued to work for the receiver since the receivership was deposed by me for eight hours. He said this was not a Ponzi scheme. He said that this -- the numbers for this company were all made according to GAAP by him in 2018.

In addition, Your Honor, you've got three reports by Joe Brick. Three: An April 15th report; a July 13th report; and now an August 13th report. Those reports make clear that this company was absolutely profitable, that the information provided in the KPI reports is accurate. And more recently, in the August 13th report, which Ms. Berlin either didn't read or doesn't want to read, that shows clearly on an extraordinary analysis, okay, that credited funds from the -- came from investors, came from people that, okay, they were providing money under loan was solely used, solely used for MCA activity.

And none of those funds were used to pay consulting fees. None. And Ms. Berlin, who is not a CPA, who has no understanding of the financials in this case at all, has the temerity to say in front of three reports offered by one of the leading CPA firms in the country, much less South Miami, okay, in the country, who have examined this information in minute detail. Okay? And it can still repeat what she said before.

And I think that goes to the Rule 41 motion because

I'm going to take you back very quickly in one minute and say the following: The only thing I would add to Mr. Ferguson's excellent argument is this: When you read this complaint, this complaint, the first one and the amended complaint, it talks about bad underwriting, ROAM, 400 percent interest rate. It makes all kinds of claims.

Now we know underwriting? Your Honor, there was a 750-gigabyte storage of underwriting called ConvergeHub. The SEC never bothered to look at it. The SEC brought this case without ever calling the company, without ever serving a Wells Notice, without calling counsel. This company has excellent counsel in Fox Rothschild and other lawyers who are representing this company. No one got a phone call. No one got a letter. Nothing.

How do you take the guy -- how do you take Shane Heskin -- how do you take Shane Heskin with his 14 merchants out of 7,600, all of whom who want to avoid their obligations, and run with that and never place a phone call to a company that has 17 accountants, has outside counsel, has 70 employees, and has an outside accounting firm reporting millions of dollars of revenue every year and just shut it down?

How do you possibly do that at the SEC and not make the slightest inquiry of this company and just rely on Heskin and bring this case? That's crazy, Your Honor. That's just nuts.

So I don't know if Your Honor is going to find that it rises to the level of willful negligence or what it is, but as we go through this case -- and I asked Mr. Klenk at his deposition: You're a financial officer, you're a CPA, did the SEC ever contact you about the financial wherewithal of this company, the underwriting of this company, any of the operations of this company before they brought the case? No. Not a phone call before they brought this case.

And, Your Honor, everything else I'll add and I will -- I'm certainly available after lunch to talk about the motion that we made. Thank you.

THE COURT: Yeah, thank you.

And we're going to talk about the receiver because, look, a lot of the receiver concerns are echoed in the Rule 41. I just want to make sure we all recognize, as I've done repeatedly this morning into the afternoon, the standard that is required for Rule 41, and the Court understands the defendants' position.

Ms. Schein, do you want to add anything else to the presentation on the Rule 41?

MS. SCHEIN: Your Honor, I appreciate the Court's patience and attention to these important issues as the defense has brought at this time. Since the lunch hour is approaching, I will reserve for after -- the afternoon to reserve my comments, and I will rely upon the excellent presentation of

Mr. Ferguson to put forth these important issues, and also the additional comments by Mr. Futerfas.

Thank you, Your Honor.

THE COURT: Thank you.

12:54 So what we're going to do is it's just before 1:00 o'clock. Let me give everybody about like an hour and 15. If everybody will come back around 2:15 or so, or dial in by 2:15, give everybody a chance to kind of stretch out their legs, take a break.

12:54 I expect to go about one hour until about 3:15, no later than 3:30. I cannot push some of my hearings back beyond that. And, in fact, I have one in ten minutes, so I'm going to run to that next.

But I just want everyone to understand that what we'll 12:55 do this afternoon is we'll hear some argument on the other motion, which was just the motion to discharge a receiver. I do recognize that is joined by, I think, all defense counsels in the case, so I'll try to give everybody at least a little bit of time.

12:55 I don't know how, but what we did this morning was very effective that Mr. Ferguson kind of led the argument on the Rule 41. I don't know if one counsel plans on leading the receiver discharge argument.

MR. FERGUSON: If I may, Your Honor?

THE COURT: Yeah.

MR. FERGUSON: This was our plan, so I wasn't just hogging the mic, and Mr. Futerfas is going to take lead on that motion.

THE COURT: On the one?

MR. FERGUSON: Yes, sir.

THE COURT: Okay, so, Mr. Futerfas, when I get back, we'll start with you on the phone at around 2:15 so that I can hear your argument on the receivership portion of this. And I know that we have other counsels that haven't chimed in on the receivership, who are signed off on that block at the end. I'll just prompt them here in court to see if anybody wants to add to Mr. Futerfas's presentation.

So, with that -- and then, of course, I will at that time, Ms. Berlin, also hear from the SEC. And the receiver motion, I will also hear an update since I have the receiver here and his counsel, Mr. Alfano, I want to touch base with them, but that's better reserved for the secondary motion.

Ms. Berlin, there's not much else I'm going to have you add to the reply. This is a defense motion. I just want to be clear. I'm taking it under advisement here. But I want you to know that, obviously, I've heard your side of the argument, but I wanted to give the defendants a chance to finish off their points, okay?

So I don't any if there was more you wanted to add, but at this point, the Court is satisfied that it's got enough

evidence in the record to make a determination based upon the spreadsheets and evidence everyone's provided, okay?

MS. BERLIN: Thank you, Your Honor. I didn't plan to say anything further unless the Court has questions.

12:56 **THE COURT:** No, I don't. I just wanted to make sure. I don't have any other questions for the SEC. I just wanted to make sure, okay?

And, by the way --

MS. BERLIN: Thank you, Your Honor.

12:56 **THE COURT:** -- while we're on break also, when I come back, I do want to talk a little bit because I think it would be foolish not to.

I keep referencing the end game here. We were able, early on in this case when we had the preliminary injunction

12:57 proceedings, to keep a meet-and-confer relationship. That was very successful. And if you remember, when we dealt even with Mr. Vagnozzi, we were able to work out agreements on a lot of things.

You know, I know this case went to mediation early,

12:57 but I'm going to check in also this afternoon when I get back about where this case really should go. Do we have a case here that everybody thinks they need to dig in on as summary judgment approaches? Because we all know once we get to summary judgment and we start approaching trial, and you all

12:57 heard that the Court is 110 percent invested in seeing an end

to this case in the current calendar year of 2021.

I am fully putting my foot on the gas, and nothing will be ahead of this case on the current trial calendar. I need all parties to understand that this is -- we're getting into that kind of fishing and cutting bait time because once we get into summary judgment, the Court starts writing on those, possibly set this for OA.

12:57

Once I rule on these pending motions, we're going to get to a position where no one can really move the needle. And I don't know, Ms. Berlin, how much you've had a conversation with your opposing counsels. You always advise the Court every time that your phone lines are open. But, you know, there's a lot going on in this case, and it just seems like an inflection influx point today.

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After we get out of court, I urge the parties -- I urge the parties to see if there's an exit strategy. I'm not trying to say this is like getting out of Afghanistan, but the way it's going right now, I mean, we're getting to the point where I'm going to end up consuming my receiver for another four months. I've got defendants that I think are willing to come to the table, and, quite honestly, some of the individual defendants have bigger fish to fry in their lives right now with other investigations than this one. And I have a bunch of claims here that, quite honestly, I think the FCC, if they're worried about this business and these investors going out and

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misrepresenting anything to the public, I mean, it doesn't seem that it would be that tough to craft a resolution, and then all that we would really be arguing about is the monies that have been seized, what we have in the coffers, what goes to investors.

12:59

I mean, again, I see no upside to letting this thing play all the way through a trial if all it's going to do is then bring us to back to square one, which is we've got some problems with this firm collecting money. Now where does it go? Who does it go to? We line up the claims. That's going to be here now, that's going to be here later. These defendants, if they're willing to come to the table and try to figure out something that will keep them out of this business and keep the SEC calm, that they're not going to make representations in this space. They already have TROs, or preliminary injunctions, rather, that they agreed to.

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I just want to mention that, Ms. Berlin, because this is the kind of case that, at this point, I don't want everyone to just throw up their hands and think the only way out is a jury trial. Do you understand what I mean on behalf of the SEC?

01:00

MS. BERLIN: Your Honor, I absolutely understand, and I -- the defendants are well aware what a potential settlement would look like. I speak with them regularly and they know that they can -- I speak with them a lot. They can -- we can

01:00

have a settlement discussion anytime, and I've already laid out for them what potential settlements would look like.

And so I say it again and all defense counsel can hear me, and they know because I speak often that they can speak with us. And, you know, unfortunately, this particular hearing is example A of the lack of -- there was no conferral about this. I think that conferral is important. It needs to be maintained so that we don't waste time with matters including what occurred today.

And in the motions that were filed, there was no conferral, and anytime any defendant wants to speak settlement, our phones lines are open. They all have all of these -- both of my phones and my personal cell, and I remain willing to speak with them again anytime they would like.

THE COURT: Here is one thing I will probably do, so that you know.

I think the Court is -- intends on once I rule on these motions, the Court -- and, again, it's not the most artful solution, but in the hopes of restarting the conversation with literally about just under a month to go until the summary-judgment motions are due and about three months to trial, I practice using what I'd term an informal settlement conference, which mandates that all parties and their clients be accessible on the line, meet and confer for a minimum of a certain amount of time, we'll say two or three

hours, with the receiver present. And it's not something that requires judicial intervention. It's not an informal settlement conference presided over by a magistrate judge.

But it's almost like a forced meet-and-confer, where I'm requiring the parties to provide me with joint status report on the discussions that are being had.

Even if it doesn't generate some sort of resolution or at least limit the issues, I think it's important that everyone take stock of where we're at in the litigation because this next phase then becomes another round of briefing and battles. And, again, there's not a lot left in the case, and there's not a lot of runway left, and we're hearing about possible Daubert challenges and other things that are coming in the future.

The Court stands at the ready to go through all of them and get it to trial and try it, but I'm just -- I'm looking at the upside, if you will, of the SEC and their purpose as a regulatory body and what these defendants are looking to do with their lives post this litigation.

And it just seems to me that there should be an exit strategy here, something in the middle, where all parties may not be thrilled, but they'd rather walk away with a certainty that is not available to everybody if we put this in the hands of a jury.

Let's be -- let's put it this way: If the Court is having challenges getting its hands around exactly what

happened and all the moving parts, putting this in front of a jury will probably fare no better. And there's a lot of uncertainty there, and I think all parties should at least take a hard look again.

01:03 And now that we know so much more and the discovery deadline is fast approaching, in fact, I think it's in the next ten days, it's very close. So the discovery's going to close pretty soon, absent an agreement that it doesn't want to file on an existing deadline.

01:03 And I just want everyone to hear this admonition from the Court, and let's take the temperature down to close today's hearing and see if maybe we can try to, with everybody's as talented as they are on both sides of the ball here, we should be able to figure something out here that let's us walk away

01:03 with a resolution we can live with.

But with that being said, I'm five minutes late for my next hearing. I will be back here at 2:15 and we will all hear the second motion for about an hour and then I'll let you guys know where we're at.

01:03 Okay? All right, see you in a brief recess.

MS. BERLIN: And, Your Honor, we call back in?

THE COURT: Yes. I'm sorry? Someone else -- what was that? What was that?

MS. BERLIN: I just want to confirm that we call back

01:03 in. This is Amie Riggle Berlin. We call back in?

THE COURT: Yes, I think the easiest thing to do is to have everyone disconnect and we'll open the line at 2:00 o'clock, everybody can call back in, okay?

MS. BERLIN: Thank you. And when we resume, I'd just like to clarify something about the expert report that I think will be helpful. (Audio distortion).

THE COURT: Yes, that would be helpful.

MS. BERLIN: I think maybe you all just misunderstood --

THE COURT: That will be helpful for me, too. Why don't I hear from you and you can touch base on the expert thing before I move on in the next motion?

For those that are on the Zoom, it will just continue on. If you wish to have a view of the courtroom, I will leave that open. I'm just going to go ahead and mute it, as I've done, but we'll leave that open so that you guys can continue to watch the proceedings. Okay?

MR. FERGUSON: Your Honor, thank you for all the time you've given us.

THE COURT: Yeah.

MS. BERLIN: Thank you.

THE COURT: Sorry that it was interrupted by the --

MR. FERGUSON: No, thank you very much.

THE COURT: -- wonders of technology. All right. So I'll see you guys in about an hour and 15. All right? Thank

you.

(Thereupon, a luncheon recess was taken.)

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A F T E R N O O N S E S S I O N

THE COURT: Please be seated, everyone.

02:29 Okay. Let's go back on the record if we could and, please, if you are listening in on the phone or you have rejoined the feed on the Zoom -- because we do have the Zoom feed if you want to see what is happening as well as (audio indiscernible) -- you need to mute. I'm already hearing my 02:29 voice, so please mute any phones if you are dialing in.

All right. We're testing one more time here to make sure I don't hear anybody. Any echo? Okay.

So let's go back on the record. Case No. 2081205, *Securities & Exchange Commission v. Complete Business Solutions* 02:30 *Group, doing business as Par Funding, et al.*

We have everyone again present in court and some folks joining us on the phone. And we had left off with the Rule 41 motion, which the Court has now put under advisement, and we're going to turn now to the accompanying motion which is the 02:30 plaintiff's motion to discharge the receiver.

So on this one, I understand that Mr. Futerfas wanted to lead some of the argument and start off with him. I don't know, Mr. Futerfas, if you are online. Are you there?

DEFENSE ATTORNEY: Yes, I am, Your Honor, thank you.

02:30 **THE COURT:** Okay, great.

So similar to what I did with Mr. Ferguson, I'll talk to you a little bit about the receivership issue, and then I want to hear arguments you have in addition to what has already been extensively briefed.

02:31 You know, the one thing that I think jumped out at me the most, Mr. Futerfas, that I will say and I think you had hinted at this before we broke, is the argument we made in the past and that you noted and you've pointed to the record where the Court has repeatedly indicated that it will be beneficial

02:31 to get a sense of the financials through the defendant's view, and that is really come to pass in the Glick report, as you stated.

Now, we have heard some argument about the Glick report and its underlying numbers, and the Court has always

02:31 been very invested in seeing maybe a competing report, and I know you have pointed out that the DSI report should not be substituted as a competing report because it falls short of GAAP principles.

But you mentioned the CLA audit, and I'm going to talk

02:32 about that a little bit and we'll talk to the receiver about

that, I wasn't aware that the CLA audit was ongoing and that it was, according to your pleadings, pretty close to being wrapped up before the receiver came in. You know, one of the things, thinking out loud, that you put in your motion, even if the 02:32 Court is not, for example, fully persuaded that we could discharge the receiver at this point, you had suggested that at a minimum -- and this is also in your proposed plan -- that the CLA audit be completed, that it be allowed to at least finish its last phase. And we could talk about what that would cost. 02:32 Obviously, I'm always very cautious that some of these funds would come out of the investor pockets if the receiver ultimately allowed that or I ask asked for that to be completed.

But be that as it may, I don't know your position on 02:33 whether you think that is extremely valuable for the Court to have in front of it. The CLA audit materials are in progress. Maybe it wouldn't be a big lift to complete it. And I think it would give, I think in your view, some backup perhaps from an accrual basis to what was done in the Glick report. That -- 02:33 I'm not sure if the CLA will ultimately agree with the Glick report.

But I guess my -- the bottom line in all of this is even if I did that, and I'm going to ask the receiver later this afternoon to just kind of tell me what is even feasible, 02:33 if anything, in terms of your suggestion. I surmise that not

very much of it can be accomplished or implemented, given the collection efforts, but I do want to hear their take on what they've seen and kind of use some of the time for an update on their end.

02:33 But I want you to talk a little bit in your remarks here if we start on this how valuable you think and why you think it would be important to get the CLA audit, what you think we could realistically do at this phase to even excuse the receiver at such a late juncture in the case, given their 02:34 collection efforts because my understanding is, really, your entire plan thrives on this business being put back in operation.

And without that, we really aren't going to be in any better position than we are now with the receiver doing all 02:34 that they can to get money, to pull money, to get those funds from wherever they find them so that we can put those monies in the coffers here, waiting to find out what happens at trial before we can determine if people can be made whole, if we can get some of these investors their principal back.

02:34 And that's always been the guiding principle for the Court. And I will note, and I would ask that you maybe address it briefly, you guys have been very concerned, rightly so, with liquidation. The Court, as I stated earlier this morning, has already asked the receiver to kind of hold off on liquidation 02:34 efforts, and really that's to personal property because the

order had already made the limitation as it pertains to real estate.

But I did want to just bring that up again because I am of the opinion that we need to just hold on and try to keep this money, this pot of money growing, protected until we figure out the merits of what's going to happen at trial.

So that's just my initial thoughts to give you some guidepost, but I'm sure you have some things you want to flag for me. Remember, of course, I have read everything, so I don't want you to belabor anything, but if you want to hit some high notes on your pleadings and tell me some things you want me to focus on more than others, I'll turn it over to you.

So go ahead, Mr. Futerfas.

(Thereupon, there was an interruption by the AT&T operator.)

THE COURT: Whoever this is, you can go ahead and share any passcodes to join the call provided everybody can please mute their phone calls. Okay? Thank you.

All right, Mr. Futerfas, go ahead. The floor is yours.

MR. FUTERFAS: Okay, thank you, Your Honor.

So I'll start, Your Honor, with your question about the CLA audit. We know a fair amount about that audit, and that's because it was engaged in September 6, 2019. It's an audit of the tax year 2018. The company paid $200,000 for that

audit in, you know, in 2019 or 2020. We know that the CliftonLarson firm was paid 200,000 to date.

And, importantly, Mr. Klenk, who I had mentioned previously who still works at the company, he led the audit team from the perspective of the company. So he was the principal point of contact for CLA. He testified about that during his deposition a few weeks ago.

He also testified that by about July of 2020, around the time the receiver came in, that the audit was toward the ending stages or was in quality control. It was almost complete.

And he also testified that the only amount of money due CLA to complete the audit was $25,000. So he testified about that. Mr. Klenk, who is still at the company conducting -- he's a CPA for a long time, he conducted audits himself, and he spoke a lot about that process and his involvement in the CLA part of the process.

So the bottom line, Your Honor, is that CLA is basically awaiting instruction. They sent a letter to the company after the appointment of the receiver, basically saying that they were going to suspend the audit pending additional direction.

So I think with a nominal payment of $25,000, you've got one of the top ten accounting firms in the country who can take a look, and there are -- this was about 2018 tax year --

and finish the audit of that year.

And I would suggest that that's very important to do. You have -- Your Honor now has not one, but three reports from the Berkowitz Pollack Brandt accounting firm, forensic accounting firm. And these reports, they are complicated. You know, they're written by accountants for accountants. They're written by experts in the language that experts use.

But the bottom line in those three reports is the following: Number one, the overall factor rate that Par made on its money, so when Par provided funding of $100,000 to a merchant, the overall factor rate it received backed was 1.339. So it received about 40 percent on its money. And that's how it made money. It gave out money like a company builds cars and sells cars. It basically sold money for a profit, and so he analyzed that he found that, number one.

Number two -- and I'm just summarizing all three reports. They are dense. We have a lot of charts. Certainly, Mr. Klenk is well equipped to answer any questions at any kind of hearing or a proceeding, but the bottom -- okay, we got a (audio indiscernible) -- the merchant receipts dwarfed money that came in from creditors. Dwarfed it. He found that CBSG or Par was profitable and it earned literally hundreds of millions in revenue.

Now, that's very important. That's not money -- that's not a dollar being returned. It's not like a $100,000

went to a merchant, and the merchant paid $100,000 back. Revenue is a term used in accounting, used in IRS, used in tax returns, revenue means, basically, profit. It means money on top of -- it's basically if you sold a car, you had a -- you would get revenue from the sale of that car, and that's what revenue is.

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And he found that CBSG was profitable and it earned hundreds of millions in revenue. And he also found that reload, something that the receiver had mentioned a long time ago, made money. He explained why those were profitable, how reloads made money. He also found that the MCA profits, the profits derived from the merchant-funding business covered the operation's expenses, it covered all the interest payments to creditors, it covered commissions, and it covered all that, including whatever factoring losses did occur, and that the revenue, after all that, after all that, the revenue was $64 million. And you can find that analysis at paragraph 88 of his April 15th report.

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He found other things. These are dense reports, all three of them. He found that the underwriting was very strict with its company. Your Honor has heard about ConvergeHub, something that we believe the SEC didn't even know about or explored prior to filing the case because their job is an enormous database of 750 gigabytes of data, almost a terabyte of data, in which all of the underwriting data that came in

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from all the merchants was collected and processed and analyzed.

And only -- Mr. Klenk found that only 17 percent of the merchants who sought funding deals actually received funding. Seventeen percent.

That tells you if a company wanted to simply throw money out to merchants without an analysis or a consideration of whether they can abide by their contracts, their funding contracts, the number would be far higher than 17 percent. That's a lower number, and what that tells you is that there was strict underwriting that was in place, and, of course, we can prove that, and if this case goes to trial, we will prove that.

But, finally, the August 13th report by Mr. Glick, which was submitted as Exhibit -- I think Exhibit 2 to Mr. Ferguson's reply brief of just the other night, that was about this question of where did -- the very important question, Where did creditor or note holder monies go? Did they go to operations? Did they go to consulting fees? Where would they go? Where did they go?

And his analysis, which is very -- extremely granular, granular in terms of money flows, the dates of money flows in and out of Par's accounts, when money came in from creditors, when money came in from merchants, when those monies were disbursed for various purposes. This is a very detailed

analysis.

And he concludes that creditor funds were used only, only to fund MCA deals. They were not used to pay consulting fees. He's absolutely rock solid on that, that money that came in from creditors did not go to consulting fees.

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So what -- what's -- we also want to, just as we're filling out this picture, is when we deposed Mr. Klenk just a few weeks ago -- and Mr. Glick notes this in his reports -- you know, for a company to file tax returns, it has to file under accrual basis. The IRS requires filing the tax return on an accrual basis.

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And, by the way, I'm advised that every public company -- we're talking General Motors, Dell Computer, Delta Air Lines, Tesla, every public company has to file on accrual basis. It's required as a public company.

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And Mr. Klenk testified that when he came into the company, one of its principal responsibilities was to make sure that all the finances were GAAP-compliant. And he testifies that he accomplished that goal. He put all of these finances of this company GAAP-compliant.

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And when you start putting the picture together, well, look at 2017, the company reported 75 million in revenue; 2018, 123 million in revenue; 2019, 179 million in revenue.

Mr. Klenk testified that the outside accounts, this company not only had 17 accountants in-house, including

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Mr. Klenk as a CPA and another one that he identified who was just about to become a CPA or gotten her CPA certification, but in addition to that, there was a whole outside accounting firm.

That accounting firm had a direct portal into the QuickBooks and the financials of Par. Without having to go through any individual, they have an automatic direct portal where they can see the monies coming and going in and out of the various accounts. Okay?

And he worked with his -- with that CPA firm, and so I'm trying to put a picture together for Your Honor because it relates to this receiver motion that we made. And, you know, our concern was and is that, you know, when a receiver comes in, the receiver's job is, according to the Court's order and according to legal structure around receivership, is to secure the assets and protect the assets. Protect them.

And who are they protecting the assets for? They're protecting the assets for investors if there were for investors. They're protecting the assets for creditors of the company. Most of the individuals are not investors, actually. They're really creditors and note holders. The receivers protect them.

But it's also, under the case law, to protect the defendants because if at the end of the day, the SEC does not prevail on its case, and a lot of that that's there at the beginning and the defendants prevail, and at the end of the

day, there are no assets or very few assets, well, that's not fair to the defendants either, and the case law says that.

THE COURT: Can I ask you something about that, Mr. Futerfas? Ms. Berlin asked me about that last point and I hate to interrupt you.

MR. FUTERFAS: Yes, Your Honor.

THE COURT: I understand on the investor side and, you know, we've all seen the investor concern on the investments, the nature of the factoring, how they relied upon it. Some folks put a lot of money into Par Funding, et cetera, and they had gotten accustomed to a certain rate of return.

But when we talk about the defendants themselves, you know, you guys sought that I stop any liquidation of personal property, which I have done.

Do you really feel that we're in a position where the defendants have been put at risk as it stands now? And by that, I mean all we have done is seized and controlled properties, some personal properties, some real estate, bank accounts of the company, that belonged to or affiliated with certain defendants.

But I agree that the purpose of that was to determine what would happen at trial or some substantive motion stage. And then, of course, if the SEC doesn't carry their burden as they must, then we can go about unwinding that and returning those assets to the defendants, including allowing the

corporation to, in some form perhaps, continue its extension.

Do you believe right now that what we've done with the receiver is a lot? And I say this because a lot of the arguments, anti-receiver arguments, are had we put in a team that knew the MCA business, we would have continued with our profitability, note holders would have gotten paid, none of these loans would have dried up.

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My understanding is that theory is really hinging upon the idea, kind of combined with the Rule 41 motion, that once the SEC came in and some of these loans or folks that you had loaned money out to saw -- especially some of the ones that were in default, were not doing so well -- saw that the SEC was coming in, there was a quick willingness not to make good and to just basically default, and that had people with experience been running it, they would have continued to successfully pursued confessions of judgment, either through Fox Rothschild or anybody else, they would have continued to make loans, and ultimately we would not have had a dry-up of the income stream that, again, I wonder how accurate that is. We don't know because of COVID and other things. But we do know there was that note exchange before the pandemic, and that didn't seem to indicate that the financials were as strong as maybe in prior years.

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But am I correct that the receiver has done exactly what the Court has asked, which is freeze everything as much as

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you can, recoup as much as you can, no one ever told the receiver, nor could the receiver keep this business operating and continue loaning money, given that the first thing they have to do is determine the viability of the loans, whether there was sufficient underwriting, the legality of the loans and their rates in state courts?

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They have continued to seek the unfreezing of state court litigation, which I have promptly done every time. Most of it is in the Court of Common Pleas in Philadelphia. I'm just -- I'm troubled because I think a lot of the assertions about the receiver not doing what he needs to do really hinged on you guys wanted them to keep this business model going, and there was just no universe where I could have allowed that, what I mean with the time, nor could the receiver have allowed that without doing due diligence on all the outstanding loans.

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Am I correct that now is when you said enough of a picture has been painted that you have proposed this plan, that was Docket Entry 663-34, where you believe this business could restart again in some way, shape, or form?

Am I correct in that?

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(Thereupon, an off-the-record discussion was had.)

MR. FUTERFAS: Your Honor, I can answer --

THE COURT: Yeah, go ahead.

MR. FUTERFAS: -- (voices overlap) that. There's enough of a question.

THE COURT: Because -- and I'm sorry. We got interrupted there.

But my point was you said that the defendants needed to be protected. And I, you know, that -- it's the defendants until we have actually seen the SEC prove their case and the investors, it's both.

And I just want to make sure that we have some understanding that the receiver has done what I've charged him to do, and that that has not dissipated defendants' assets. It may not have done the income stream investors became accustomed to, but I can't say that we have not tried to freeze things and keep them status quo, especially since the Court stopped any liquidation of personal property.

Can you address that?

DEFENSE ATTORNEY: Yes, I would. I can. I think there -- I have a few answers to it.

The first answer is contained in Exhibit A to our initial motion, the motion we filed on July 13th. And you may not recall it today, but Exhibit A to that motion is a chart, a very detailed chart of what would have happened had the company continued to run as it was running on July 26, 2020.

And what we did in that chart is we showed how the -- what has happened since the receivership took over with respect to the finances of the company and what would have happened had the company simply continued to run as it was historically

running.

And the short form here, the short form is this: Had the company continued to run, interest would have been paid to note holders, an additional 27 million would have been paid to note holders that has not been paid since July of 2020. There are a diminishment of assets of about $58 million, and that number is arrived at all spelled out in exhibit A, where that number 58 comes from.

And then finally, the losses on current MCA contracts, right to return on current MCA contracts, was about 102 million since July 2020. So we have a total loss based on -- this is not based on guesswork; this is based on how was the company running, a company that was -- that was in the middle of audits, that had CPAs on staff, that was providing ongoing financial statements to potential investors, to -- there was even -- there's testimony in the deposition about a significant investment bank wanting to come in and buy the company or take a large piece of the company.

And Mr. Klenk was in the middle of those conversations. So this would -- this would be -- the numbers that I'm giving you are net earnings, Exhibit A. It's based on actual historical activity that's now been verified in a number of reports by Joel Glick.

THE COURT: And what do you make -- I'm sorry, Mr. Futerfas. What do you make of the argument we've heard

multiple times -- and I don't know how the Glick report ever addressed it, that the bulk -- I don't know if my numbers are -- off memory, I think it was something like 70 percent. But that the massive portion of the portfolio, which was consolidated among -- I don't want to say maybe it was less than ten counts.

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And we have talked a lot about those key accounts that formed a large portion of the portfolio. Many of those accounts are in dire straits, right? Some are either facing bankruptcy, others I think were dealing with criminal prosecution. That was such a large bulk of the portfolio that Par Funding was relying on.

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How can we sit here and prognosticate that we would have had that kind of return, knowing that so much of the portfolio is just simply incapable of generating or paying back these loans? Has there ever been any countervailing report that has shown that the financial position of this large chunk majority of the portfolio could recover or would have recovered? Or is the argument, well, Judge, that was a byproduct of the receiver coming in. And to that, I would say it doesn't look like that because the receiver came in, but these folks were already having massive financial issues and problems and had clearly gotten out over their skis in terms of how much they had borrowed. And then that kept getting renegotiated and reloaded with the principal players in Par

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Funding.

That corner of the portfolio makes it so difficult for me to sit here and think I put in a receiver, and that that receiver had not been in there, we would have had a better return. It's just it's -- I don't understand how mathematically we could make such a leap.

Can you tell me about that? How do we answer for all of those problematic merchants that we've identified that are clearly not in a position to repay or reload or do anything?

MR. FUTERFAS: There -- absolutely. There are a number of good answers to that.

First of all, Mr. Glick did address that very topic at pages -- paragraph 60 through -- it goes on and on. It goes from paragraph 60 to, I don't know, maybe -- I'm still looking at the report. He devotes pages and pages to that very question, and finds that, first of all, the -- some of the larger -- the larger merchants who received funds, it's part of a portfolio.

So there's a whole portfolio here that -- of merchants that were providing money and paying back money under contracts. Mr. Glick analyzes those merchants, that very merchant, analyzed the entire portfolio across the board and says that, overall, the rate of return was 1.339 percent. But that's just one answer.

The second answer is those merchants were paying. In

other words, when the receiver comes in and says -- the receiver said a lot of things when they came in. You know, when they came in and they addressed -- and then they commissioned a DSI report, which is a completely -- it's simply not worth whatever they spent on it. But in any event, when, you know, those merchants were paid. So you've got a historical record of all of these merchants, the larger merchants who got -- who received significant funding.

And all of them, you could look at the payment history. That's number 2. Those merchants were paying. Those payments are logged on the books and records of the company, and are observed by everyone analyzing the books and records of the company.

Number 3, neither DSI nor the receiver nor anyone has addressed the collateral. And Fox Rothschild collateralized these merchants ten ways to Sunday. There are, you know, Fox Rothschild was a very good law firm. There are all kinds of collateral documents. In some cases, there were personal guarantees. In other cases, there are first-edition wings and first-edition, you know, documents that Fox Rothschild did so that if there was -- let's say, you have 15 merchants and one or two does go bad, well, you've got huge collateral portions on those merchants. You've got some personal guarantees on some of those merchants. Fox Rothschild was not stupid and, quite frankly, some of the people running this company were not

stupid. They knew there was money going out there, and if there was a chance that someone would have a problem or a company would have a problem, they wanted to make sure they had collateral.

02:59 But if you go to back to the first question is, Was the money coming in? Were these merchants paying? And they were. So all this Exhibit A does, now that we've put together, has said if merchants were paying across the board as they had been paying as of July 2020, and you just brought that forward 03:00 eight months, six or eight months, to whenever this chart was prepared, maybe a year, whatever -- let's see, it would have been July, so almost a year -- and you simply bring that period forward, using the activity that occurred up until that date, this is what you have.

03:00 And one of the questions Your Honor asked me that what you have is 187 million loss -- one of the questions Your Honor asked me, "Well, how are the defendants harmed?" And I'd love to tell you the defendants are -- have been concerned about themselves, of course, but they're equally concerned with the 03:00 note holders. From day one, when we were filing papers with Your Honor back in August and we were providing this seven-point plan -- I think we provided that on August 13th a year ago -- this was all about the defendant saying we can't let this company fall apart. We can't let it get liquidated. 03:01 We can't shut down this thriving business. All these people

are going to get hurt, people that relied on us, people that thought we had a good company, we do have a good company, let's keep this active. And the defendants were hurt because they don't have that $187 million that's there. You don't have the
03:01 revenue coming in. You don't have an ongoing business.

And what the receiver has done is say, okay, we shut down the business, that money isn't available there. Now we're going to come to you, defendants, take any of the property that belongs to you or belongs to a trust, and we're going to
03:01 substitute money that would have been created from the operation of the business with money that the defendants received in consulting fees, et cetera.

And I want to segue for one second, Your Honor -- I appreciate your giving me this opportunity -- to this question
03:02 because all along, there's this question, and it's individuals who build a business, who work 18 hours a day for eight years and build a business that pays millions of dollars of interest, and significant rates of interest in some years, to note holders are not entitled to receive any compensation.

03:02 And what the receiver has done is created this paradigm, and the SEC as well, that, uh-oh, (shaking head) people got consulting fees.

Well, excuse me. If you tell me that an investment bank where the people who run that bank don't make money, you
03:02 show me a hedge fund where the people, where they get two plus

20 on the money on a hedge fund. I don't understand. These people are supposed to work 18 hours a day to build a company with 70 employees and not entitled to any compensation?

And now, Joel Glick's report of August 13, 2021, says, guess what? If you do a really deep dive, we can prove that none of the note-holder money actually went to pay the consulting fees. So the consulting fees came out of revenues from the business. That's in -- that's right -- that's straight as can be in the (audio distortion) August 13, 2021.

03:03 So, yes, the defendants have been harmed. The note holders have been harmed. There was money that could have been brought in that wasn't brought in. There's assets have been diminished. And I agree with Your Honor, we did make that point, and as a footnote, that, of course, the receiver comes in, and you're going to have a savvy merchant saying, "Oh, well, it looks like I can get out of this obligation."

Which is one of the reasons, quite frankly, that early on we suggested that a receiver -- we suggested directly to the receiver, keep Fox Rothschild on board. They know the business. They've been collecting these receivables for a year and a half, and they've been doing a darn good job. Don't let them go. Keep them on. They know the contracts, they know the playing field. They've litigated all these issues. And the receiver didn't do that.

03:04 So our complaint with the receivership is they

basically came in and they thought -- they basically thought this was a bad company, and we're going to prove it's a bad company. And I almost liken it to this idea that the people who believe the earth is flat. You know? I don't -- it's kind of like we believe the earth is flat. Now Mr. Klenk, who is our employee, might tell us, "This isn't a Ponzi scheme, this is a pretty thriving company." We don't care.

CLA was in the midst of an audit, a detailed audit, that only took $25,000 to finish in July of 2020. This receiver spent $25,000 inspecting jet skis. You know? I mean, receiving cars from the defendants that were worth $15,000. $25,000, you could have an audit of 2018, which would have shown this Court and everybody else, hold on, here's an audit, deep-dive audit of '18. Did this company make money or not? Would this company run properly or not? Did this company, according to GAAP, et cetera, et cetera.

They couldn't -- they didn't want to spend $25,000 to do that. Instead, they hired DSI. So it's almost like -- and then we tried to provide evidence. We tried to show information. Mr. Glick authors his April 15, 2021, report, which, it just knocks the DSI report out of the water, and the receiver doubles down. It's kind of like I don't care what telescope you show me. I don't care what image you show me, the earth is flat.

And it's just that's not, I think, what the receiver

should have been doing. And I think the receiver should have been impartially not taking a predetermined view of this company, but coming in and providing just down-the-middle, accurate information from accurate sources.

03:06 I do -- I know there are other things you want to talk about, Your Honor, but I do -- one of the pieces of your question was, What do we do now?

THE COURT: Yeah.

MR. FUTERFAS: And that was part --

03:06 **THE COURT**: And I was going to ask you to pivot to that because I think -- I mean, a lot of what you're covering, I think is notable, and I understand it puts a little more of a gloss on the pleadings, where you and your fellow codefendants believe we are at and why you believe that this was, in the 03:06 long view, not the right move for Par Funding.

And I know that a lot of that turns on the Glick report and some of the other items that we've been discussing in the Klenk deposition.

But I would because I do want to also -- of course, 03:07 the receiver has not been able to chime in today, and I'm going to turn to them in just a moment.

But I wanted to know your proposal going forward because, I mean, a lot of what we've talked about, we could sit here, similar to what happened when we talked to Mr. Ferguson, 03:07 and he readily acknowledged that the picture that was portrayed

of the current situation was one that had to be, by any jurist, I think, acted on immediately and led to the implementation of the path that we're on right now.

And I will say whatever anybody thinks of the receiver and how they've approached it, I think the collection efforts have been laudable and undeniable in that we at least have obtained quite a large number in terms of funds that are investor-related that can ultimately be used to, and if the SEC proves their case, make investors whole.

But going forward, let's talk pragmatically and practically. We have arguably three more months in the case. We have a summary judgment deadline coming up, and we are really at the tail end. Discovery is almost done.

And I'm going to have, by virtue of summary judgment or through a jury verdict, a much cleaner picture of where the SEC is at and whether or not they've been able to see through each one of these securities claims. And it just seems to me, practically speaking, I know that Mr. Ferguson said earlier that not even a minute more should be spent in allowing the receiver to continue to manage Par Funding and everything that has been done so far.

But just the sea change, you know, to try now at the end of the case, really at the end of the case's lifecycle, in my view, to try to somehow implement -- I'm looking at your proposal and say, okay, the receiver is going to turn into more

of a monitor or a local, and we're going to bring in -- I'm sorry.

Whoever's there -- someone needs to mute, please. If I can get a mute, please, for whoever has got their phone on, thank you.

03:09

So as I was saying, for me to now turn this ship around and say, okay, we're going to make the receiver kind of alter strategy, move into a monitor role, and then we're going to go ahead and essentially restart the engine and entertain loans, I mean, I'm looking at the report right now. It proposes that the Court not only have the receiver cease their collection efforts, but really to have Par Funding resume funding, quote, in a conservative manner to ensure sustainability and growth with company cash flows, to go ahead and rehire folks for collections.

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They obviously -- there's obviously some compliance concerns here that I think make sense, but, again, it would essential reopen and restart the business. And, again, that is such a sea change in how a court would imagine managing this with what is left. I mean, if we were in a different phase of the case, I might say, all right, well, let's talk about this.

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But with what is left, it just seems difficult for me to understand how would we even go about doing this if it's even possible, quite honestly, because as Ms. Berlin said earlier, these are through offerings of notes, so they're not

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going to be able to offer anything right now, not in the current position they're in, not with the regulatory concerns we have.

And I don't think there's a way -- let me put this way. I don't think there's a way to separate these two things because as I stated this morning, the big fight here has become a fight almost against the receiver, an arm of the Court, as opposed to fighting against the SEC as a true adversary on both sides of the V in this case.

The receiver has continued to follow court orders and has done its investigation as I have asked it to do. And what's happened is we find ourselves with almost a dual-track case. One is the defendants against the SEC which we argued under Rule 41 this morning, but there's this second part of the case, which is just -- and Mr. Ferguson alluded to it -- it's a fight between the defendants and how the receiver is doing his job.

And I would love to get my receiver out of this business. I would love to say, you know what? We're going to kind down collections. What we got is what we got. And that's really what the receiver said from the beginning: We'll evaluate claims when this thing is done being tried. And they said that to the investors who asked, and I've been seeing the reports.

But for me to say, okay, receiver, you're out, I'm

going to bring in and reopen the company and, by the way, your proposal also actually envisions a role for McElhone and Cole which I would never permit. There's not a universe where I would ever let any of the individual defendants who have their injunctions in place now that are borderline don't-break-the-law injunctions.

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But the reality is it would have to be a different crew that you guys believe has MCA knowledge to start refunding with notes, all of which, again, is subject to regulation and oversight.

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I just don't see a way where I could actually do any of this implementation and remove the receiver. I think it would be doing more harm than good. To me, it just seems let the receiver finish through trial, and let's -- it's kind of like I said when I entered the order on the -- and some of you saw it -- there was an order on a foreclosure of a mortgage. And we had a third party that was arguing the mortgage issue.

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And I put it very clearly in my order, I said I understand right now it's too premature. I want to allow a global settlement possibility that the receiver is pursuing to see if it comes to fruition. But I told them -- the bank, I told these folks renew the motion. Come back. If I can't have you guys sit on your rights as, you know, first in line, on this foreclosure, of this property, indefinitely.

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I would feel the same if the receiver was on this

indefinitely. If you look at the receivership cases, some of them are spanning decades and years. We've come up on just one year since the case was filed and we're just finishing discovery now. It's just I don't know why -- I mean, look, if
03:13 I had maybe a continuance or something happened, which I can almost all but assure you is not going to happen in this case because I'd want to see it through by the end of the year, maybe we could talk about something.

But right now with three months left, tell me,
03:13 Mr. Futerfas, how would you expect me to literally implement a whole new plan when I could actually figure out once and for all if the SEC even has a case, right? Because if the SEC doesn't have a case -- we talked about this this morning -- and falls apart, let me tell you, it's pretty easy for
03:13 Mr. Stumphauzer and his firm to turn around, start figuring out where this money's got to go back to, and they're done. And the investors will figure out what we're going to with this company, but the SEC lost and we move on, or maybe they lost in part.

03:13 It's a lot cleaner to exit that way than in the middle of trial prep, having the receiver pull out and implement and put in a whole new team, not to mention that's going to cost a lot of money, money that has been really secured for the benefit of the investors, just hire more staff, add more people
03:14 reemploy a firm to go chase collections.

How do you expect me to do any of that realistically, pragmatically, with the three months I have until the end of the case? That's my question. You've alluded to the future. How do you expect me to do that with three months left in this case?

MR. FUTERFAS: Your Honor, I will give you my view, and I know Mr. Ferguson or Mr. (audio indiscernible) give his view as well since he was part of that proposal. But what I would say to you is the very first piece of this, there are various piece.

The first piece is there's about 419 million out there in receivables, 419 million. And if Your Honor was to shift the paradigm, the first thing I would do is rehire Fox Rothschild immediately. They know every one of those deals. They collateralized those deals. They litigated where they needed to litigate. They know this better than anyone.

And what you've been seeing since they were discharged a year ago, is kind of a haphazard approach to collections by the receiver. And on this point, I have criticized the receiver about a lot of things, including the discharge of Fox Rothschild, but on this point, the receiver kind of put themselves in a difficult situation because you're jumping in to do the job that this law firm knew everything about and had been doing it for a year and a half, and doing it very effectively.

So first thing I would do is say let's bring in Fox Rothschild, tell them there's $419 million in receivables out there, go get it. You got contracts, you got (audio indiscernible) of judgment. You go get it. This would -- you've done it for the years before. That's number one.

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Number two, Ms. Berlin made a misstatement. She said that this company could only provide money to merchants based on money coming from creditors or note holders. That's just not true. It's just not true, period. She's not a CPA. She clearly hasn't read Joel Glick's August 13, 2021, report, which unquestionably makes clear that not a dime of note-holder money went anywhere else, but the fund -- didn't go anywhere else. Okay? It doesn't rely on that. The amount of inflows Mr. Glick's report shows, the amount of inflows from merchant activity far exceeded -- far exceeded the inflows from creditors.

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So once you start collecting this 419 million that's owed, you start bringing in money, that money can be put to work. One of the issues that has kind of been on the table in this whole litigation is, is the MCA business a lawful business? And there were various times, the SEC, the receiver, various times during this year they suggested this is the unlawful business.

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Well, one of our exhibits to our motion is a slough of cases, a page of cases by poor courts around the country

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upholding MCA contracts. Texas, California, Pennsylvania, New York, all over the place.

So these are valid, enforceable contracts. They've been enforced numerous times, okay, much to the consternation of Mr. Heskin and his clients, but they've been enforced numerous times. So you got 420-odd million out there that should be brought in. That money, when it comes in, could be put to work without raising a single new dollar from a creditor, not a single new dollar.

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And I think --

THE COURT: Let me ask you this, Mr. Futerfas let me ask you this.

I understand the Fox Rothschild point, and I, look, I've watched them seek litigation injunctions or lifting of the litigation injunction to recover on settlements. I know that there was a big argument made that there was a settlement on the verge of being consummated that was ultimately lost when the receiver was put in play.

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But I know -- and, look, I can't sit here and say that I know how much Fox Rothschild would have recouped versus the receiver. But I think we do have to recognize that, to the extent possible, they couldn't enter into this market and the collection of these outstanding loans without first ascertaining the legality of the underlying loans.

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Now, I know your view is if Fox Rothschild had done

that sufficiently already, and so we lost time by them having to go through and do that. But I have seen a number of consent judgments pursued, settlement negotiations pursued. It's tough, other than to say I guess if you had Fox Rothschild on top of what has already been done by the receiver, maybe we would have been able to recoup more, although, again, it's -- there's some costs coming with that of having Fox Rothschild go out there and doing that.

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Well, one thing that we keep talking about -- and I don't know if I've ever heard your position on it -- we really have relied a lot on the Glick report.

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You know, there's some issues with that report, too. I can sit here and say that DSI is not GAAP-compliant. I can give you that when we talk about cash services accrual, but I've never really heard an explanation from the defendants because you really want me to hang my hat a lot on Glick and make that essentially one of the key pieces of evidence to show profitability.

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But have you ever been able, or is there any evidence I can look at that has identified or at least explained a little bit about the credit losses and their allowance for credit losses by -- or the lack thereof that Glick did not include in his report? Because my recollection was that there's a problem, even though he is following some GAAP accounting methods, it seemed to me, from my recollection in

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reviewing not only the report itself, but some of the analysis regarding the report, that that credit loss under GAAP was not appropriately incorporated.

And then probably bigger news to me was -- and this is not Mr. Glick's fault -- but the data that Mr. Glick is using had never really, at least to me, been solidified. He acknowledged in his report -- I think it was at page 31, number 40 -- he never actually audited or otherwise independently verified the accuracy of Par Funding's internally prepared income statements.

That's a major problem because that's the whole foundation. I mean, I can design a profitability report that shows great numbers if the numbers are baked in with flaws when you give them to me. I don't know that what Glick has been using from the beginning are solid figures.

Now, that's why when I saw your CLA proposal, I said maybe CLA had better numbers, but, again, if they're depending on what's being brought to them, and we know there was a whole thing with adverse opinion with Freedman in the past.

I'm just -- I'm worried because if that has been a problem throughout the case of being able to really sink my teeth into one audit report that can be really used as gospel, I don't know that we have one. I don't know if the CLA one would be one, right?

What do you make of -- I mean, there are some issues.

I can't -- you guys really want me to hold on to Glick for dear live and find that that's a way I can put this thing back into play. But I don't know that I've really heard -- and, again, I thought it was a battle for the experts, but Ms. Berlin has showed me that maybe that comes up in a summary judgment, and I never really get someone to directly address these purported issues with Glick's reports. I hope I do. I hope some expert from somewhere can tell me that these are either over loan or they independently checked these numbers.

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But what should I do about those holes in the Glick report that were flagged for me that I saw independently when I reviewed it that gave me a little cause for concern?

Do you have an answer for me on that?

MR. FUTERFAS: Yes, I do, Your Honor. The -- both Joel Glick and Melissa Davis at the FCC have been working off the exact same information. There are QuickBook reports. The QuickBook reports from the company were taken over and grabbed, you know, taken over by the receiver when the receiver came in. Those are the same QuickBook reports that have been provided to outside auditors that have been relied on by their outside accountants.

And no one is suggesting that those QuickBooks are in any way inaccurate. Melissa Davis is not suggesting they're inaccurate. She's relying on them. Joel Glick is relying on them. They're also relying on deposit logs. The logs of

deposits that came in from the HCH processors, Mr. Glick is relying on those deposit logs. Again, those are like the essential foundational financial documents of the company. Melissa Davis is relying on those documents.

03:23 I think when you see Mr. Glick's August 13, 2021, report, the most recent one, I think he makes it pretty clear in there that he and Melissa Davis are relying on the same information. And, by the way, so is CLA, the top ten, you know, the big ten accounting firms.

03:23 So there's not really an issue where someone says we're looking at data that's funky data. The bottom line is when Mr. Glick went ahead and he corroborated or endeavored to corroborate the KPI reports, he went back to the foundational data to see if the KPI reports were accurate.

03:23 When he did his other analysis of -- the analysis of the income flows to see whether note-holder funds went to pay consulting fees, okay, when they went to consulting fees, he was relying on the foundational data, the same data Melissa Davis is relying on.

03:24 I want to address the other piece quickly, the piece about the -- that credit loss. That is an issue that we explored at some length at Mr. Klenk's deposition. It's a very well-known issue, and it does not affect -- it only affects profitability on the margins. You know, we're talking about

03:24 150 million in revenue in some years. Or what were the numbers

here? 187 million in some years. And you're talking about whether a, you know, 5 million should be allocated to an additional -- on one side, it should be a loss or not a loss. Or $10 million.

03:24 So you're not talking about an amount that's going to make a material difference in the profitability of the company. But, effectively, I think I can articulate it simply because I only understand it simply.

The IRS actually -- the IRS in 2016 said to Par --

03:25 said to Par in 2016, hold on a second, you're writing off bad debt too early. You're letting -- you're saying that, let's say, a merchant hadn't paid and let's say their RTR is $130, so $100 was funded, $130 was supposed to be repaid, so the RTR is 130. I'd like to return 130. And the merchant paid, let's

03:25 say, $15 of that $30 of profit. Let's call it that way.

And the IRS came in and said, hold on a second. That's $15 that that merchant didn't pay you. You're writing that off, okay? You're writing that off in, you know, in 90 days or 120 days or whatever period of time it was. We, the

03:26 IRS, think you should be waiting a lot longer to write that off because, you know, you might collect that down the road, and, by the way, if you take it as a write-off, your tax bill goes down.

So the IRS in 2016 took the position that Par was too

03:26 kind of aggressive in their write-offs. Then Par was dealing

with that, and they said, okay, we're going to adjust when we decide a merchant really isn't going to pay the balance that they owe us and really take it as a write-off.

So over the years, from 2016 to 2020, there's been this push and hold between when something's going to be put in the write-off bucket, which will decrease, obviously, at the end of the day, will increase revenue or whatever. It will be a write-off that will lower the tax bill by a hair.

And by the way, that was an issue that Mr. Klenk was working with the CLA very closely on. He provided a lot of information to CLA, and they were actually trying to figure out what is the right -- where do we draw the line?

So that's an issue well known to the accountants, well known to Par, but it's not -- the big picture is not material to the profitability of the company.

THE COURT: And let me ask you this. What about going back to the -- what we've been calling that large exception portfolio.

What would you say, given that the numbers seem to indicate that there -- to that portion of a portfolio, and I understated, I think, its percentage. I think it was closer to 82.4 -- or, well, excuse me, 82.4 percent received reloads.

But the main part of the exception portfolio, there seems to be some record evidence that more was extended to these particular merchants than was ever received. And so from

an exposure perspective, you know, we make a dig deal out of accrual versus cash method, but from an exposure perspective, it seemed that this is something that DSI concluded in their cash analysis, but I don't know that Mr. Glick ever was really able to address this, although I guess the only argument is he believed collectability was a lot higher and that there was a better chance of recovery.

We know now that the exception portfolio is in a bad shape. It's going to be hard to collect anything from some of those entities. How do I look at this Glick report and, again, say to myself that this exception part of the portfolio, as you were mentioning earlier, is truly a viable collection that we can go get, whether it's Fox Rothschild or the receiver or anybody else. Because I think it's pretty unrebutted that they never took in what they extended in terms of lines of credit, in terms of reloads, and that's such a big portion of the portfolio.

And I say this because a lot of the arguments for restarting the business would be, I think, completely dependent on a portfolio portion of this size. The exception line of accounts is such a big part. I mean, it just seems that unless those really were strong businesses with the ability to repay, and, historically, I don't think they ever worried they were going to repay more than they borrowed.

It just is hard for me to understand why putting in a

team now would necessarily change anything to the benefit of the investors.

And if you could just address that briefly, and then I do want to give the receiver an opportunity to chime in because we've covered a lot, and to give me a little update, and then turn back to you and then hear from the SEC.

But can you address that issue of the exception portfolio? Because -- and, again, I know the key arguments you're making and I've given you an opportunity here to really address them. I just am trying to get a better sense of the realistic possibility of disrupting the current receivership system.

And if you want to tell me, Judge, okay, kind of like Mr. Ferguson said, I can live with the fact that maybe you can't grant Rule 41, although I think it's warranted, but there are intermediate measures.

You seem to suggest, at a minimum, let them finish a CliftonLarson audit. And you've said that a couple times, and I don't know that I'm adverse about it, I want to hear what -- if it's even worth it, if it's kind of about having too many cooks in the kitchen. I'm going have a Larson Allen one, I'm going to have the DSI one, I'm going to have the SEC, and I'm going to have Glick. I'm going to have four different reports, different analysis.

I don't know if that's going to really help anybody to

spend investor money to get another set of numbers. So I don't know if that helps, unless you think it's like someone checking Glick's homework, and then now I have two similar audits with similar methods that could bolster the underlying conclusions from Glick.

03:30

Maybe that's why you think that's a good step in the right direction, but I'm trying to figure out if I'm not going to be willing at this stage of the litigation to get the receiver out of what they're doing and let them keep doing their job, then what other steps would you ask the Court entertain that could advance us to a place where maybe we look at Par Funding post-litigation to see if we can do something with it.

03:30

What would you suggest and how do you address that Glick shortfall?

03:31

And after you cover those, I'll pivot to the receiver.

Go ahead.

MR. FUTERFAS: Yes, Your Honor, very quickly.

Paragraph 61 of Mr. Glick's April 15 report, paragraph 61 states that the exception portfolio represents approximately 46 percent of the outstanding accounts-receivable balance, and it's comprised of 16 merchants divided into five groups. And then he goes on for pages to analyze that.

03:31

What I could say is some of these merchants, I know, at least from the work we've done, I know pretty well. B&T

03:31

Supply, it's a huge company. B&T is probably the largest. They're liable for 78 million, I think $78 million.

Then there's a giant company, its (audio indiscernible) backers, the people behind that company are very, very wealthy people. There are surety agreements blanketing B&T Supply. B&T Supply was paying.

And, you know, a lot of problems with the -- this cash method is this: You know, anyone who has a mortgage, a bank sends a extends a mortgage of $300,000. The person, the borrower pays the first six months. So the borrower pays, let's say, $10,000 or $15,000 over the first six months. Well, under a cash basis, anyone could say, hold on a second, you've only got cash on hand of 15,000. You've got a $300,000 mortgage out there. Well, under that analysis, every bank in the world is underwater and is basically ready for default.

That's not how the world works. That's not how financial institutions are analyzed. That's why they're not analyzed as cash. So -- and some of these merchants are very large. B&T Supply supplies Las Vegas with hotels. It's a very big company. They funded a professional stadium. There's a lot of information on them. And they also are heavily collateralized.

And what I would suggest, Your Honor, is at least if Your Honor's concerned with the exception portfolio, then there's a lot of money in that exception portfolio. It is

worth it to bring back the firm that made these deals that actually created this collateral.

Fox Rothschild created this collateral with some of these entities, if not all of them. They wrote it. They drafted it. They let them pursue it because if a law firm gets paid a quarter of a million dollars to pursue and leaves $200 million or $150 million, that's a pretty darn good return on the investment.

So at a minimum, I would say to do that, Your Honor.

03:34 **THE COURT**: Okay. And that -- and, look, I think that's, to me, a proactive proposition because you're saying to me, Judge, let's at least involve another firm to help collection efforts. That's inline with what I had wanted to do and what the receiver's been doing, but it would give them some 03:34 inside knowledge, perhaps from an outside firm that has been doing this a little longer, and maybe -- maybe the move here -- and I'll hear and see what they say -- maybe the move is to, at least in this last stage of the litigation, bring in some reinforcements and try to see if we can recover even more than 03:34 we recovered already.

I'm going to hear from them. I am curious to see what they think about it and what they think about any of the proposals. So I do need to turn to the receiver.

Yes? Did you want to add one more thing? Because I 03:34 don't want to cover too much without them responding.

Go ahead.

MR. FUTERFAS: Just the CLA.

(Voices overlapping)

THE COURT: Yes, the CLA.

(Voices overlapping)

THE COURT: Tell me what you think because I just don't know that it's worth it.

(Voices overlapping)

MR. FUTERFAS: Yeah, the CLA, that is, in colloquial language, a no-brainer. The receiver has spent about $9 million to date. That's what I think that the rate has been. $25,000 to finish an audit that's almost done, that at least tells everybody in 2018 -- it's just for 2018, but at least it says, in 2018, this is -- this company was profitable or not profitable, how profitable it was, how well it maintained its position, what its business was like.

That would be very valuable because if you get corroboration on 2018, then what you're really saying is, you know what? This was a real company. This was a good company. This was a thriving company. And now we've got all these people proving it in addition to all the accountants who looked at it over the years.

So I think that's a no-brainer investment, Your Honor.

THE COURT: Okay. All right. So let me do this.

I have not heard from the receiver since their last

report, and I've not had a status with them. Obviously, I'm sure there's more they want to cover to give us an update on collection efforts and maybe run through some of the more recent numbers.

03:36 So I don't know how the receiver would prefer to cover it, if you would want, Mr. Alfano, we can kind of start from the beginning. At some point, though, obviously, I think it would be beneficial to hear the receiver's position on any of these proposals and the most recent kind of modified one, which 03:36 would be, Judge, let's get the CLA audit done and let's bring back Fox Rothschild, which are two recommendations.

I will tell you that I can entertain modifications to assist the receiver pulling the receiver up and somehow putting in a plan to resume the business is almost dead on arrival, 03:36 given where we are in the litigation and what that would entail for what you guys have ongoing.

So, I mean, but I'm open to seeing if there's something else that can be done to help recovery efforts.

So I'll turn it to you, and if you want to step back 03:36 and tell us anything else about where you're at, please, the floor is yours.

Go ahead.

MR. ALFANO: Thank you, Your Honor.

And, again, I just want to make it clear to -- for 03:37 everyone involved that the receiver serves at the pleasure of

the Court, and we abide by the directives that Your Honor provides us.

So as far as where we are now, we are at $86 million in cash, $53 million in real property, which excludes the disputed Texas property and $3 million in personal property. We have no objection to adding to our forces, if necessary. We've retained Texas counsel to help us with several matters down there as well.

But let me say this about Fox Rothschild, and I say this guardedly. I have the utmost respect for Fox Rothschild, my colleagues at Fox Rothschild in Philadelphia. I think that their -- the statements attributed them in terms of their intimate knowledge and the work that they did to collateralize is way overstated and way overblown.

Fox got involved in early '20, essentially in a material way, recording confession to judgment after confession to judgment and filling up the Court of Common Pleas, which invariably resulted in litigation, both in the Eastern District and in the State Court in Pennsylvania.

One of the issues with Fox Rothschild is that they have historically represented Anthony Zingarelli, who is a counter party on several of the transactions that are at issue. He's also been described as the right-hand man of Mr. LaForte.

So we have serious concerns about utilizing Fox Rothschild, and it's not because we have any question about

their competency, but we don't want to create what could be an actual or a potential conflict-of-interest situation with Fox Rothschild, so we think we've acted prudently there.

We have retained Fox for purposes of transition, so that if they do work, some pleading is directed to them, we need records from them, they're paid for their time. But they're not within the receiver's confidences and vice versa, so that's our perspective on Fox Rothschild.

Let me just talk about briefly this -- the lack of practicality of the proposal. I mean, I can't imagine any scenario in which the receiver would be comfortable with Ms. McElhone or Mr. Cole back in the company in any way.

And, you know, with all due respect to Ms. McElhone, although she was very involved in the real estate transactions that have resulted in the various assets that are now part of the real estate portion of receivership, she's basically a figurehead when it came to the actual MCA business. That business, and we've seen enough e-mails, you know, until we're bleary-eyed from reading them.

That business was run by Mr. LaForte. You know, this fiction that somehow he was a ISO and he was simply providing leads, he was involved in every critical decision with respect to Par Funding, CBSG. There's no question about it. So there's no way that one could comfortably say, well, we'll take Ms. McElhone back into the business without getting

Mr. LaForte. And that's, again, completely unacceptable.

There's also no way that the receiver would be comfortable, given the allegations in the SEC complaint proceeding to either pay interest on existing notes right now, renegotiating notes, which is part of their proposal -- let's go out and continue the, you know, the note exchange that was underway.

03:40

I mean, given the allegations that the SEC has made, we would be, I think, uncomfortable, and it would be imprudent for us to step into that activity.

03:40

And with respect to collections, we're doing it ethically, we're doing it, as we view it, by the law. We're trying to be resourceful in terms of when we decide that it's necessary to pull the trigger on something as opposed to resolving it.

03:41

I mean, we have spent this first phase reconciling accounts, gathering information, trying to claw back assets. This next phase will be very collection-intensive, and there's the possibility that there may be additional claims, third-party claims that may come out of this if there's still a deficiency to be addressed.

03:41

But that's kind of the phase and structured approach that we've utilized. But, again, but even with collections, I mean, I don't think it's any secret that there was an ongoing criminal investigation in the Eastern District of Pennsylvania

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that deals, at least in part as we understand it, with the collection activity of Par.

So, again, for us to get back into this business would be not just impractical; it would be imprudent.

03:41 And would I in good faith stand before you and say, well, you know, we don't have to raise any more money, or we don't have to, you know, go out and, you know, potentially devolve into some of the collection activities of the former owners.

03:42 But could we take the 86, 87 million dollars we have now and plug them back into MCA deals? And, again, I think that would be completely irresponsible. You have Mr. Glick that says highly profitable, lucrative business, terrific business, and then you have the FCC's expert -- and I

03:42 understand that report may not have been filed or submitted yet, but it's been distributed, and the SEC's expert concludes that, essentially, Par couldn't continue to fund operations and make the necessary investor payments without raising additional investor funds.

03:42 So -- and I'm not here to break a tie, but given those circumstances, Your Honor, for us to risk the cash that we currently have to fund new MCA deals, again, I think it would be completely irresponsible under receiver.

THE COURT: Can I ask you a question, Mr. Alfano?

03:43 **MR. ALFANO:** Yes, sir.

THE COURT: And, again, I may not be able to be privy to it, and I don't know how much we know about it.

There has been that swirling criminal investigation since this case started last July, and I keep waiting and
03:43 waiting and waiting to find out -- I don't know if it's going to impact my case or not, but do we have any sense of what's happening on that side of the coin?

And I don't know how much any party can divulge on that, but when I saw this case come on my docket originally, I
03:43 did not think that it would be almost over a year before that side of what's going on here manifested itself one way or the other.

I'm just curious because that seems to kind of hang over my head a little bit, and I never really know if that's
03:43 heading in the direction with regard to Par. And I don't mean unrelated criminal charges that I know one of the defendants has. That's -- I'm not talking about felon and possession counts. I'm talking about a true criminal investigation. Is that something that the parties are monitoring? Can I get at
03:44 least, to the extent there is an update, some sense of what's going on with that or we don't really know?

MR. ALFANO: I can only really tell you what I know, Your Honor.

THE COURT: Sure.

03:44 **MR. ALFANO:** You know, what's within the confines of a

grand jury investigation. And what I know is we have been asked to produce massive amounts of data and documents, which I have done, pursuant to subpoenas.

We have also been asked to make certain employees available for interview, including interviews discussing the very same reports that the defendants are now touting to you as proof positive that this company was, you know, a profitable company. And we have provided the access to those employees.

That's all that I can say at this point.

03:44 **THE COURT**: And is it fair to say -- I mean, I'm probably overstating that you have the 86 cash on hand, but we've talked a little bit about in some of the reports, that the 53 million, or thereabouts, in property, hopefully, if we got to the point where that had to be actually liquidated, could generate more than what's there. But just trying to get my finger on the pulse of exactly -- if I had to add it all up, ballpark, it's probably what -- 140 million, let's say?

MR. ALFANO: At least, if not more. We're told by the property manager in Philadelphia, who also is a developer and is very familiar with the Philadelphia real estate market, that he believes, conservatively, those properties would be worth 5 to 10 percent more and would also be attractive as a potential portfolio sale if they were sold in bulk.

THE COURT: Do you recall -- and I don't know the number, the magic number when we started this litigation that

we were -- I don't want to say the number specifically was how much was outstanding, how much was tied up in loans, but how much investor -- in terms of investor proceeds, what was floating out there to recover?

03:45 I don't remember. I don't know why I think 289 million, but I keep -- that number popped in my head, so maybe that's something that I committed to memory.

But there was a number. I just want to know how -- I mean, again, we always have said we're hoping to knock down the

03:46 cents-on-the-dollar situation. We are incrementally getting closer and closer to whatever kind of magic, outstanding number there was. And we may very well be halfway there, based on what I'm seeing. But I want to make sure that I'm right on that.

03:46 **MR. ALFANO:** Sure, Your Honor. It's $364 million of principal, but if one were to treat -- and, again, I know I'm getting way, way ahead of myself.

THE COURT: Yeah, we're extrapolating quite a bit, I know, yeah.

03:46 **MR. ALFANO:** But if one were to treat the interest payments received by certain investors as a return on principal, we believe that that would reduce the number down to somewhere in the 280 -- $280 million range.

THE COURT: So, you know, in a way, I mean, we have

03:46 made great strides over the past year, I would say, in terms of

collection efforts.

And how are the collection efforts generally going forward? I mean, you've kind of indicated that we're going to maybe ramp up a little bit because we have probably have enough time to really digest the nature of some of these loans and their ability to go after some of these outstanding balances in account receivable. We expect to be maybe a little uptick here in the last -- in the next couple months? Or what's your sense?

03:47 **MR. ALFANO:** So, Your Honor, let me say this, and, again, I said it guardedly.

There's basically two businesses here. There's what would be considered the traditional MCA business, which has performed to a degree, and we believe that we're probably at the end of our ability to capitalize on that aspect of the business. I mean, there's some merchants that are paying routinely, there's others that we enter into modification agreements with, there's others that we try to achieve global onetime settlements with in order to settle their obligation.

Then there's the exception portfolio, which we believe is roughly 54 percent of the accounts receivable. Now, it's -- and I know Your Honor mentioned this and I'm not sure that the answers that you were given about it were necessarily accurate.

Those merchants were, quote/unquote, paying. That's what you were told. Well, they were paying because they were

continuing to receive funds, and so to the extent that anybody is counting, you know, that portfolio as performing or not subject to some sort of an allowance for a (inaud.) loss, the reality is once they stopped receiving funding, they basically
03:48 stopped paying. And we've only had one merchant that was ever net cash-flow positive in that group, and that was National Brokers to the tune of 1.7 million.

Now, that's over $200 million of accounts receivable in a very troubled group of merchants. And I know Mr. Futerfas
03:48 talks about B&T Supply. Well, B&T Supply is not Home Depot. All right? Let's be clear, all right? There's not a lot of transparency with their financial information. When we've spoken to their lawyers about the status of things and trying to resolve things, what we're told is that the principals of
03:48 B&T Supply pay Mr. LaForte somewhere between 6 and 7 million dollars of cash on the side.

So they dispute how much they owe. We claim -- we believe on a cash basis, just the cash that we advanced versus the cash that we got back, that B&T owes at least $20 million.
03:49 And, again, they dispute that.

They also dispute whether they can legitimately be charged for the additional $70 million in fees that's part of that account receivable.

Part of the challenge, Your Honor, is that if you look
03:49 at the actual cash exposure here, how much cash did we advance

versus how much cash are we likely to receive back, actual cash, forget the fees, it's -- we believe that's going to be an amount that's less than $100 million, that the bulk of this accounts receivable is made up of fees, and fees on fees, and at times, fees on fees on fees with no additional cash advances or funding ever having been provided.

03:50

So we think that this portfolio has its challenges. We're working very hard and trying to be very resourceful in terms of how we approach it. We do think that we are going to ramp up collections, but 53, 54 percent of this book is -- it's very troubled. And I could, if you'll permit me to just go, Your Honor, to the motion to discharge for a moment.

03:50

THE COURT: Yeah, sure.

MR. ALFANO: So the motion to discharge, the defendants who have moved with respect to that motion, they refer you to -- in that document, it's 649, and it's 649-1, which is the table that they've put together. They call it "CBSG Performance Comparison." Then they have the receiver's model and then they have their model. Irrespective of whose model you use, they conclude that there's $88 million of excess cash. Excess assets.

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03:51

THE COURT: Sorry, one second. Whoever is on the line needs to mute, please. If you have called in, you must put your phone on mute. I can still hear someone's phone. If you've called in, you must put your phone on mute, please.

03:51

Okay. Go ahead.

MR. ALFANO: So they basically are telling the Court that there's $88 million of what they call "net equity" -- excess cash, assets, however it's characterized, okay?

03:51 But there's not. And whether it's our model or their model, it's immaterial. There's simply not.

You start with $88 million. We've determined that there's $15 million that they've counted as AR. It was never funded; therefore, there's no AR. That reduces it down to 73

03:52 million. There's $39 million in bankruptcies -- National Brokers and Health Acquisition Corp. That's $39 million of receivables in bankrupt companies.

Now, we know National Brokers is riddled -- I mean, if they were continuing to pay, the company that had the same EIN

03:52 number filed for bankruptcy. We believe it's bankruptcy fraud. We've asked for permission to lift the litigation injunction to pursue them. We've notified the U.S. Attorney's Office of our concerns about what happened with this company. But irrespective, between National Brokers and Health Acquisition

03:52 Corp., that's $39 million in bankrupt companies.

So that brings me down to $34 million, okay? There was another $14 million of bankrupt merchants that we discovered very quickly, that they haven't even been accounted for yet.

03:53 Brings me down to 20. Now, you've heard all this kind

of great and powerful testimony about collateral and COJs, and, you know, we're going to do this and we're going to pursue them here.

Well, one of these exception portfolio merchants, they 03:53 actually did. It was a company called Big Red. And in January of 2020, they went to Philadelphia and they got a COJ against Big Red for 19.6, and represented by Fox Rothschild, a very, you know, capable firm. Haven't collected on it. I mean, that was there for months. All right? Just sitting there as a COJ 03:53 for months. And it -- not to fault Fox Rothschild, it's just the reality is that sometimes if you get to that stage, you've already lost the case, okay?

So that's 19.6. So that brings me down, effectively, to zero. And what that means is that for the balance of this 03:54 analysis, we have to collect a hundred percent of the accounts receivable. And the bulk of those accounts receivable are fees on fees, or fees on fees on fees.

And it's just not realistic. You've heard about, you know, security, you know, with Mr. Futerfas. Oh, it's we have 03:54 all this security, we have this security. CDH's (ph.) security was a hospital, an abandoned hospital in Williston where the tax liens alone pretty much eliminate any possible value.

A lot of the security that we have, Your Honor, are second and third and fourth mortgages on properties. Many 03:54 times, the value of that property, assuming it was just to be

sold at an arm's length transaction, doesn't even reach our position.

So we're completely out of the money. There are times where, theoretically, it could reach our position depending upon the circumstances of the sale. But because in so many instances, they didn't get a first-mortgage lien because, again, they were dealing with merchants and individuals who typically were not among the most creditworthy in either the credit markets or in the mortgage markets.

03:55 We're at a second or third or fourth position. But, again, if we were to foreclose, more often than not, there are substantial liens ahead of us, that I would have to take investor funds to cover that mortgage in the hope that if we could force the sale, there would be enough value in that sale 03:55 in order to recoup what we had to pay to the first mortgage holder, and then achieve a recovery for us as a second, third, or fourth mortgage holder. And, again, in many instances, that's not a risk that we would take.

You know, and I had a circumstance in California last 03:56 week, where there was a merchant that wanted to refinance and refinance in the kind of standard credit markets. It was a multimillion-dollar, you know, first lien possession. We held a second and a third mortgage position with that merchant. When they went to, you know, a reputable bank to get, you know, 03:56 commercially reasonable financing, that lender said, well,

obviously, we're going to take out the first mortgage holder. As far as you -- and this was Eagle 6. As far as Eagle 6 was concerned, we can cover the second mortgage. There's enough, you know, loan-to-value ratio there to do that, but we can't do anything with your third mortgage.

03:56

So we had to do a subordination agreement and, you know, we're now sitting in a second lien position, which at this point, isn't helpful because even if we were to declare it in default and foreclose, we would again have to transact, you know, several millions of dollars of first-lien positions ahead of us in order to try to get a few hundred thousand dollars of a recovery there.

03:57

So those are, again, some of the challenges. You know, I don't want to wade into the dispute between Glick and Davis as far as the various reports on who's right and who's not. At this point, I assume that'll be a matter to be resolved.

03:57

But I do want to talk about for a moment these KPI reports, which a lot of Mr. Glick's analysis depends upon and the defendants cite. And we know -- I mean, and Mr. Klenk -- and, you know, they love to cite Mr. Klenk's testimony when they think it's helpful. They ignore it when it's not. And when Mr. Klenk testified at his deposition, and is, I think unquestionably clear, is that those reports are misleading.

03:58

And the reason that they're misleading is because they

overstate the AR and they understate a subjective reserve for losses. And we know at least two ways in which they overstate the AR.

They, first of all, in consolidation deals, where they didn't fund a hundred percent of the contracted amount, they funded a portion of it, they still claim that that full contracted amount is actually AR. We know that's overstated but by at least $135 million in this KPI reports that they cite.

03:58 In syndication deals, what we've learned is that they claim 100 percent of the AR in a syndication deal, even though they have agreed to sell a portion and have sold a portion of that deal to some other company.

We're looking at the reloads. We think that the 03:58 reloads also are overstated. But even with what we know now, what -- and Mr. Klenk testified to this as well -- what we know now is that by virtue of having an overstated AR in the KPI report and a subjective, understated loss realization or a treatment of losses, they can then manipulate what it appears 03:59 to be the default rate, is what they call the RTR, to make it a very low number.

So we're continuing to work, you know, through that. But I just wanted to make sure that the Court had, you know, the benefit of that information.

03:59 And I'm happy to answer -- as far as CLA, I mean, we

can talk about CLA. We're not sure at this point in 2021 the utility of having, basically, 2018 numbers and what, if anything, that would show. Again, I think that their sense of where this audit was and how complete it was is, you know, is highly misstated.

04:00

You know, CLA wasn't retained to undertake a forensic audit, which is what they say in their pleadings. They were engaged to perform a standard audit. It was not a, quote/unquote, full-blown, top-notch deep dive. It was one partner, one manager, one staff.

04:00

We believe that the engagement partner, based upon public information about discipline, that that audit partner may have been involved in a discipline and perhaps a one-year suspension at the time that he was the audit partner in that engagement. It wasn't nearly complete. There were a list of open items, most critically of which was the GAAP analysis of the provision for an allowance for doubtful accounts.

04:00

The deferred revenue wasn't finalized. There was trial balance amount that CLA acknowledged was overstated because, Your Honor, as said previously, the work she included factoring revenue for syndication deals which needed to be excluded, although it wasn't excluded in their KPI report.

04:01

So we're not convinced of the utility of completing the CLA audit at this time. We think that our time and resources would be better spent trying to understand what the

04:01

actual financial condition of the company currently is.

THE COURT: Yeah. I mean it sounds to me that any additional efforts really wouldn't move the needle any more than all the work that's been done thus far. I mean, it makes it sound as if it's a inability to aggressively collect was what I'm hearing and what I've seen over the last three or four months is it's a bit of blood from the stone.

I mean, there's just nothing there to collect. Some of these entities are essentially almost judgment-proof. You can't do much with it. You're in subordinate positions. You're just not in a situation where, especially the exception of a portfolio, where they were essentially repaying with fresh reloads, fresh money loaned to them.

It's just this is not a situation where a huge portion of the portfolio is truly recoverable and that whether it be Fox Rothschild or anybody else could go out and do any better than what's been done so far.

And like you said, I mean, a lot of the problems here is, even with confessions, I mean, what good is it? It's the paper it's printed on. I mean, there's not -- the ability to really recover off that is minimal at best.

So it sounds like the best-case scenario, from what you're telling me, is we have the last few month here as we head to trial, trying to recover from the only portions of the portfolio that seemed to be functioning, that there is some

recovery to be had there. And then, of course, to continue to follow any money that has been diverted away from investors and into other endeavors, which is what we've done already, the seizures of property, personal, real estate, bank accounts, et cetera.

I'm curious, has there been any movement on that front, or have we pretty much found all the fountains we can find in terms of any funds that you believe really could have gone to note holders but ultimately went, whether you want to call them consulting fees or something else.

Do we have a sense of whether we found all of those pots of money? I mean --

MR. ALFANO: I do, Your Honor. And before, I just want to make sure that I was clear when I was talking about deposition testimony, so that was Mr. Klenk. And I hope I didn't get confused that with Mr. Glick, right.

THE COURT: Yeah I understood it to be Mr. Klenk.

Look, I think that you stated it accurately, Mr. Alfano, that most of what has been brought to the Court's attention is a mix between the literal court and client testimony.

I mean, those are the two things that have been advanced to the Court as grounds to do a serious, you know, look at receivership activity and entertain possibly changing course. And as you stated, I think that those two pieces of

evidence do not paint a picture that would somehow be improved by removing the receiver from the picture or trying to get back in this business or bringing an outside third party.

I think it overstates any type of success that we would have by changing the course we're on. I don't know that it would -- if anything, I think it could hurt us in trying to transition out of our current paths, but you were going to say something about (voices overlap) --

MR. ALFANO: I was going to answer Your Honor's question. And the short answer is that we think that we're close to the end as far as exhausting McElhone, LaForte.

We haven't really started with Cole, Abbonizio, and Vagnozzi. We know where we believe where those assets are, and it's just a question of getting the necessary bank accounts in order to tie that down.

THE COURT: Okay.

MR. ALFANO: So there is still, we believe -- and, again, I'm sure the defendants would oppose this -- but we believe that there's still additional assets that were acquired with investor funds.

And if I could just conclude with this one statement that, you know, you continue to hear, "well, no investor funds were used to pay consulting fees."

THE COURT: Yeah. I'm glad you mentioned that. We've got to talk about that; I wanted to finish with that.

MR. ALFANO: It's a complete misnomer. They never capitalized this company. I mean, any money that flowed through this company came from investor funds. And when you look at the cash in and out, it's 7 million according to DSI, 14 million according to the SEC's expert. And that's the net cash return.

So when they say, you know, we never pay -- we never took consulting fees with investor funds, it was all investor funds. The MCA money was just recycled and recirculated with virtually no cash return, certainly not the sort of cash return you would expect from a company that purportedly did $1.2 billion in transactions. So, ultimately, it's all investor funds at this point.

THE COURT: And I meant to also ask, you talked about it a little bit, in terms of where we go from here and how we see the -- I don't know if I want to call it an exit strategy. I want to confirm that the receiver continues, as we discussed before, to believe that the best course of action is to continue current collection efforts and amass as much as we can in term of funds and then let the trial play out. Let's see what happens.

And then and only then can the receiver, as an arm of the Court, begin to identify how we're going to go about the orderly payout or claim of investor funds that have been accrued. Right?

I mean, that is the only course of action, and at that point, we can maybe make a determination as to what happens with the few employees that we brought back. What do we do with the business model?

But that is, again, continues to be our game plan, if you will, is to wait to see the outcome of trial, and at that point, we can more effectively evaluate which way funds should be directed, whether to investors, to defendants, et cetera, right?

MR. ALFANO: Absolutely. That is certainly our approach.

THE COURT: And do you guys understand -- at least I wanted to touch base briefly. I don't think that the overhead was very high, but I assume that the receiver and the team understood why the Court ultimately felt compelled to stop any liquidation of personal property?

MR. ALFANO: Absolutely, Your Honor.

THE COURT: Yeah, I just felt -- it just made more sense that we wouldn't go into that until we knew the outcome of any trial or any dispositive motion?

MR. ALFANO: Yeah, and, frankly, we were simply trying to take advantage of what we understand to be a very hard market for used vehicles. I mean, that was -- and avoid the storage costs.

THE COURT: Yeah. I mean, I agree. I think it's kind

of the same logic as to why I don't necessarily feel compelled to alter or change our proposed path and what we've done with the receiver, and not put anything else in play. It's kind of the same idea with that because we only have a couple months
04:07 left and, I think, the trial and I would hope to do that.

And I wondered -- and I know this is kind of a minor issue but we talked a little bit, you talked about having some more lienholder positions and all of that.

Do we have any sense of how conversations are going on
04:08 that one piece of property where we've had that third party that's come in and (voices overlap) --

MR. ALFANO: We've been unable to resolve it.

THE COURT: Okay. We still have some time. I haven't seen any renewed motion. But you guys understand also that
04:08 position, it's kind of what you just alluded to, that how much is that money really going to flow to you guys? Probably none of it. And so how much longer can I hold off the first lienholder at bay without them really having an opportunity to kind of close and foreclose on that?

04:08 I just wanted to give it a shot, and if I can't do it, I may end up having to lift it for that one party, so don't be stunned by that. I just think that really I'm not forfeiting anything that could come to the investors because I just don't think (audio beep) there's anything left based on that piece of property.

MR. ALFANO: I can tell you Mr. Kolaya was on with that merchant yesterday afternoon, still trying to resolve things.

THE COURT: Okay. Well, we'll make an effort on that.

04:08 Was there anything that either you or Mr. Kolaya wanted to add regarding any other arguments or evidence that we have heard today? Really, it's not for you guys to worry about the Rule 41. That's the SEC.

But is there anything you guys wanted to chime in on

04:09 that I may not have covered on either an update on current operations, or anything we've heard from the defendants as to the argument to discharge or remove the receiver?

MR. ALFANO: Yeah, may I defer to my colleagues?

THE COURT: Yes. Of course. Yeah, I don't know if

04:09 anybody wanted to add anything. That was the point. I just wanted to make sure that we make a clear record and if there's something else that should be brought to my attention, now is the time.

MR. ALFANO: Your Honor, we have nothing else to add

04:09 at this time. Thank you.

THE COURT: Okay. So, Mr. Futerfas, I don't want to belabor it too much. I think we've kind of heard the receiver's take on some of your proposal, specifically the Fox Rothschild one, the value they're trying to bring in or

04:09 complete the CliftonLarsonAllen audit.

I think that really what this comes down is differing opinions of the financial strength of some of these outstanding loans and their collectability. I think that logistically getting back into the game, the MCA game, has got a whole host of problems.

I was never truly considering that option, just not only because of the procedural posture of the case and where we're at, but just the complications that come with allowing Par Funding folks to come back in at this stage of the game to try to start loaning funds again, I think would be playing fast and loose with investor money, which I don't feel comfortable with, and the receiver's indicated they had obviously don't, either.

But I'm in a position here where, given the financial stability or, really, instability of some of the exception portfolio, not of all of it, and the fact that they have done what they can with the functioning portion of the portfolio that was paying, and the acknowledgment that, really, I don't know that inserting another firm, other than it maybe costing us more would move the ball any further, especially since they are in touch with Fox Rothschild when it comes to transition files and things of that nature, and they're obviously paid for their time.

It doesn't seem, at this stage of the game, that it would make much sense and improve the investors' financial

position by discharging or altering the receiver. It's just based upon the record I have before me and what the receiver has done and the way they have found the condition of some of these loans, and the fact that, really, we were just getting repaid with our own money, I mean, it doesn't sound -- and we can fight over the consulting fees and that's not really an issue here for the receiver, so much as it just shows a little bit of the financial picture.

04:11 And I understand that you guys want me to hold on to Glick and Klenk enough to disturb this. But when I look at, again, just the hard numbers of the outstanding loans, I am just not persuaded that changing up the course right now, inserting a third party, getting in the MCA business, none of that really would change or improve the investor's position.

04:12 I can't sit here and look at this record. I can't sit here and look at 142 million when you combine cash on hand, real estate, and personal property collected, and say there has not been a fiduciary duty adhered to by the receiver to the investors where they have not acted in the best interest of the investors and also at the direction of the Court.

At this point, it's (inaud.) that they have done everything possible to get us closer and closer to the outstanding loan amount, the money that was out there. We all know getting to 364 million, or 280 if we deal with interest payments, is going to be a very, very difficult endeavor.

We're somewhat halfway there and may, with some conservative real estate estimates, be a little more than halfway there.

I know that's not what the investors want to hear. I know the investors want to get it all back, and we're going to keep trying to do that, and we have three more months of collection efforts to go. And I know that if there is another dollar to be added to the recovery, it will be added.

But I can't, on this record, sit here and say that it would make any sense to take the receiver out of play with the recovery they've done just over a year into the game, and not, if anything, put investors more at risk than they are today.

And I think this is just a financial reality. We can argue until we're blue in the face about MCAs and knowledge of MCAs and the types of loans and this type of market, but we really can't argue with the financial position of the borrowers, the folks that were extended these loans and their ability to pay us back and our ability to collect on those through judgments or just simple straightforward settlement negotiations, which have really been undertaken at every step of the way. That's why I keep lifting litigation injunctions in hopes we can negotiate and get some of this money back.

But we've heard it here today. The exception portfolio is not in great shape. Some of it is bankruptcy stays are in place, it's going to be difficult, and we're just very far down the line. Par Funding, so everyone understands,

was, you know, second and third holders. They're not frontline to be able to capitalize on some of these outstanding loans and get these monies back.

And so I have to say that this it is not a situation where if I saw, you know, if I saw wastefulness, if I saw dilatory behavior, if I saw ineffective collections, but anything that's been termed "ineffective" is not a reflection of receiver efforts; it's a reflection of the financial markets that they're in and the borrowers that we're dealing with and the portfolio that was structured way before the receiver came into play.

So, you know, this lack of capitalization, I think, has come to the forefront. I don't think it was something created by the receiver. I don't think it was something that was created by market forces or conditions. I think it's just the reality of these loans, unfortunately, not being collateralized as they were represented to be or at least not having the diligence behind them that we hoped for.

And maybe we were loaning money on a wing and a prayer and hoping these things were going to get repaid. But with this kind of reloading, and instead of paying back Par with another loan or another extension, you heard, everyone just heard the numbers.

This is not a situation here where I look at the Glick report and I look at Klenk and I say to myself, well, the

receiver is at fault. It's the economic model here, and it's not that I'm maligning the MCA business. That's not what the case is about.

It's just the financial realities of what's outstanding. I can't create a better picture. Unfortunately, it is what it is, and if I were to pull up the receiver at this point, I think it would damage ongoing efforts, ongoing negotiations. And with only three month left in this case until we get to trial, I don't think that's in the investors' best interest.

So I don't know, Mr. Futerfas, if you can understand my concern as to why I don't want to disrupt the apple cart here with what we have. I'll just give if you want a minute or two, if you want to just maybe make a comment on some of what Mr. Alfano shared regarding his findings. And I don't think he's really getting into the reports. He's just painting a financial picture of what these loans were like, and I don't think this is about having the wherewithal of factoring and how that works.

I think this is just, unfortunately, these individuals are not going to be able to pay back what they borrowed. And I don't think I would have changed that Fox Rothschild do it or Par Funding trying to collect on it. I don't know that any of that would have improved this financial picture.

So what, if anything, do you want to add,

Mr. Futerfas, on this point or in response to anything you heard from receiver's counsel? I'll turn back to you briefly.

MR. FUTERFAS: Your Honor, I'll talk for a few seconds, but I know that Mr. Soto wants to address a few things that Mr. Alfano said.

THE COURT: Yeah, I'll turn it to him.

I wanted to finish with your comments and let me turn to Mr. Soto. So go ahead and -- any final points before I turn to (voices overlap) --

MR. FUTERFAS: Well, I would say very briefly, Your Honor is this: The reason we want CLA done and the reason it should be done is because it just seems to be a very unusual circumstance that for eight years dozens of CPAs have been all over this business that -- including expert CPAs outside the business, inside the business, audits being done, tax returns being filed showing hundreds of millions of dollars of revenue. And (audio indiscernible), the receiver started this receivership with 26 million in the bank, and now has about $55 million, okay? They have collected 30-something, $30 million.

That $30 million used to be collected basically every month by this company, okay? Every month. And not just by -- not just from the exception portfolio, but across the board.

So we've gone from a company that no one had any problem with, that had audits, that on and on and on, to all of a sudden, this money's not collectible and the company's no

good.

And it's just impossible. It's just impossible. And the reason we suggested that CLA be done is because, at least in 2018, there will be yet another confirmation that this company was real and profitable.

And with that, I'll turn it over to Mr. Soto. Thank you.

THE COURT: Okay. Go ahead, Mr. Soto. Let me turn it over to you. Go ahead on the issue of the receiver of this charge.

MR. SOTO: Yes, Your Honor, thank you so much.

So what we've heard from the inception of this case from the receiver is we just can't collect as much as they used to collect. But the reason isn't because of anything that we're doing. It's just there are problems with this portfolio that are insurmountable, that no one could overcome.

There is collateral out there, but it can't be collected, really, and even if you have a judgment, it just sits there. We know that Fox Rothschild was collecting money, but we're telling you, Judge, we the receiver were telling you it just -- that just can't happen anymore. It stopped happening.

And so one thing I've heard the Court say is this portfolio, the exception portfolio, is in trouble, specifically, and I don't think it's because of market

activity, even though COVID, an unprecedented financial turmoil that followed it, happened at the very inception of the -- just before this case was filed in March of 2020.

And the SEC comes in, sues this company, imposes a receivership, and what we're trying to do is untie those things, right? We're trying to untie, what effect did the receivership have on the recovery efforts here? What effect did COVID have on this business? Those are unanswerable questions.

04:19 But what I can tell you, Your Honor, is that if you look at the numbers in this case, the financials, and you ask about the Glick report, what the Glick report says is look at this company, it had 77 merchants to date. Of those merchants, 4,000 roughly closed over the eight, nine, ten years of its existence. And this company was collecting, essentially, $1.40 for every merchant dollar that it put out. That's its history. That's not six months of history. That's years and years of history that's been ignored by the DSI report, by the receiver, by the Melissa Davis report.

04:20 And I don't know that you assess any company in this land and ignore eight, nine, ten years of profitable collections activity.

I'd like to put the CLA report into some sort of context and then I'll address this question of the exception portfolio.

THE COURT: And can I ask you before you turn to that, when you say "collection," is it your estimation -- you heard Mr. Alfano's comment about capitalization -- is it your estimation that this was truly money that was being generated and paid back and not, again, Par Funding being paid back with its own reloads or its own money?

MR. SOTO: I'll answer that question, and it's in the Glick report. And I know we're relying heavily on it, but he is a forensic accountant and I'm just a lawyer.

THE COURT: By the way, as you address the Glick report, maybe you could do the same as the -- do you have the same confidence in the Glick report despite perhaps some concerns regarding the underlying numbers that were provided to him in his evaluation and some of the concerns on the credit side?

Do you share any of those concerns as you kind of tell me that that's a report I can bank on? Because I keep going back to those. I don't know -- I know that Mr. Futerfas pointed out that that's not necessarily a fatal thing, but I'm just curious, do you share any of the concerns that were raised about the Glick report perhaps having some underlying methodology that didn't account for all of the different ins and outs of the MCA model? Or maybe not, I don't know.

MR. SOTO: I'll answer those two questions.

So the first question had to do with, was this company

really getting money back or was it a result of reloads? And if you look at the Glick report -- and I'll answer your questions about, concerns about it.

The Glick report says quite clearly reloads are not an indication of a merchant's inability to pay, in and of themselves. What you have to look at are other factors that the DSI report just doesn't undergo. It doesn't undergo the analysis. What it does is it demonizes a reload, which is essentially a refile. It demonizes a reload and says reloads are bad, and then it says 86 percent of reloads, that's too high.

There is no rule, no principle, no market average that they look at. They just say too much, too high, we're not comfortable.

That's not something the Court should rely on.

THE COURT: Well, I'm really not.

MR. SOTO: Okay.

THE COURT: I'm not so worried about DSI. I'm probably not being -- looking at Glick, did Glick look at whose -- what -- whose monies are they paying them back with? Are they paying them back with more loans on top of loans, or are they paying it because they're truly capitalized? They went out and actually generated a profit and paid back the loan. I never understood a Glick -- and I don't think it's Glick's fault. I just don't know that Glick was the answer to

that.

MR. SOTO: I'll tell you the answer, and this is why you should rely on Mr. Glick.

THE COURT: Okay.

04:23 **MR. SOTO:** Actually, now I want to correct something that Mr. Futerfas said. Mr. Glick does not opine with respect to the collectability of the exception portfolio. In fact, he's very careful. I worked very closely with him. He's very careful not to opine with respect to that.

04:23 But I'll tell you and I'll say -- and I'll repeat something that a number of people in this room have already said. You said -- your words, I believe, were, how could we prognosticate the collectability or the profitability of this exception portfolio based on what we've seen? Others have said 04:23 the same thing. We can't.

But what I'd like the Court to sort of recognize is that we have a company that started with three people who put on an advance, and from that, built it time after time after time over the course of 4,000 closed deals that we can 04:23 objectively at that no one can dispute, where they collected $1.40 for every dollar they advanced. That's indisputable, inarguable.

So what happens is in March of 2020, COVID hits. It affects everybody. This is a company that advances money to 04:24 small businesses and they start having trouble. What do they

do to answer one question that was asked here, which is, can this company advance money without new investor dollars coming in?

Well, our expert says that they can, but I have a better answer for you. They actually did do that. They did that in March, they did that in April, and they did it in May of 2020 when they stopped taking in investor money because the future was unpredictable, and they were sending out advances of merchant money and making money on that during that period. It's inarguable; it happened.

So can they do it now? They've done it before. They did it under COVID conditions. The economy is back up and running. They can do it again. That's not something we even need to worry about. We know they can do that.

THE COURT: But how did they do that? Did they not do that by issuing and thriving off investor notes and money that then gets sent out and never actually making anything back on the loans themselves?

MR. SOTO: Well, here's -- see, the thing is --

THE COURT: And, again, you mentioned the exception portfolio's collectability. I think Glick is pretty much agreeing with all of us that these are dead-on-arrival loans. I mean, these guys, he doesn't know, but I think he knows better than to say I think we can get money out of these guys because we know that they're in financial straights.

But the whole idea, as you pointed out, not necessarily that it's to capitalize, but that they've been able to be successful. Sure. They continue to generate funds from the investing public. They got the investing public to expect that they could generate a certain return, and they did that very successfully for many, many years. I don't doubt that.

The problem I'm always having is I can't necessarily figure out, even if I look at the financial years prior to the one at issue with kind of that, what you claim to be a kind of a good run of profitability, it just seems, from everything I've looked at, that it never really came from loans that were fruitful necessarily. Maybe some portion of it did, but it seemed that most of the time they really thrived off influxes through promissory notes, and that that money kept being loaned out and that ultimately whatever they got back in really never exceeded what was being borrowed. I mean, there was always that deficit.

And that maybe is the most recent financial picture, I'll give you that. Maybe they did better years prior, and that's one of your points is that we should look at this more as an economic condition thing and not as a purported mismanagement thing. I agree, we're never going to really truly understand exactly what market forces could have impacted this, but I have to say that I'm just a little concerned that we would attribute this to these loans being extremely well

capitalized and secured. I just -- I looked for that in the record and I haven't been able to really see that. Maybe I'm missing something.

MR. SOTO: Judge, that's why the CLA audit is so important.

THE COURT: Okay.

MR. SOTO: That's why we're saying, Judge, remember, we are representing the defendants here accused of the things that you're suggesting, right, and look at what we're doing.

THE COURT: (Voices overlap) the SEC.

MR. SOTO: The SEC, not you. And look at what we're doing. We're saying, hey, there's a CLA audit that was done by a reputable auditor, and we're asking that it be finished. We're asking that someone take a look at that. We're not asking that it be hidden or be thrown under the rug.

If a defendant accused of nefarious activities with respect to a business is asking for the judge and the jury and everyone to look at the audit that was done, please complete it. At this point if it's completed, will we be involved in it? No, it will be the receiver. We will have no oversight. It was in quality control. What little I know of accounting and auditing needs, it was walking into the end zone. It was --

THE COURT: Let me ask you a question: Do you think it's that valid to do something that would snapshot a company

that long ago? I mean, given that we're in 2021. It's a 2018 -- (voices overlap.)

MR. SOTO: Judge, my whole point here is that the moment that the SEC filed this suit -- and I want to make clear. When you say what damage has been done, you said there's no universe, and I will answer your question.

There's no universe where I would have allowed merchant advances to continue. Imagine any business. If you walk in, you shut them down -- an airline, stop flying your planes; a law firm, stop sending out invoices -- how quickly will that company die?

And what we're saying here and what you're asking is, Could the SEC's imposition of this suit and the receivership plus COVID have impacted this? My goodness, of course. Of course, it did. And, of, course that's what's happening here.

And so what I say is, if you want to look at this company, stop asking Glick or Davis or whomever to say, What do you think is the crime? That's the cause. You know what a better way to look at this is? Eight, nine, ten years of real activity, where these people who are accused of wrongdoing were running this business with no one looking at it, with no receiver oversight, making a dollar, forty every dollar they advanced. The CLA audit that's independent of us, this is a reputable auditing company.

(Voices overlapping)

THE COURT: Whoever's on needs to mute, please. If you are on the call, you need to mute.

MR. SOTO: What we're suggesting is that we're so confident that it's going to corroborate what I'm telling you today and what Mr. Glick has said and what Mr. Klenk said during his deposition and I will address that one little thing --

THE COURT: I'm sorry, Mr. Soto, someone is still on. Whoever is on the line and is listening to this hearing, I will have to close the line if you keep speaking. You need to mute your phone, please.

MR. SOTO: We are so confident that --

(Voices overlapping)

MR. SOTO: I don't think he knows that he's --

THE COURT: I don't think he knows he's not on mute.

MR. SOTO: (Inaud.)

THE COURT: Yeah, just give me one second, let's see if he's going to finish his conversation. If you can hear me, anybody that's on the line, I need you to please mute or disconnect. Thank you.

All right, let's see what we get.

So you were saying, I'm sorry, you're saying that the CLA audit could corroborate how things were going. Should I be worried?

Let me ask you a practical question: Do you guys want

to pay for it?

MR. SOTO: I'll have to speak to my client. I don't have this $25,000 in my back pocket right now.

THE COURT: Oh, I know. I'm just asking, and this is a practical question.

The defendants all tell me they want it because I don't know how excited I am about spending more investor money on an independent audit. I mean, every dollar matters, but, I mean, I would imagine the receiver -- I don't know. It's a fair question.

If the defendants teamed up and said pay the last amount, we will pay the remainder of the CLA audit, we just want the Court to permit it, we front the cost, and the receiver has to go in and provide access so the CLA audit can be finished, would the receiver take issue if they funded the cost on the CLA audit?

I'm asking. It's a fair question. I don't know if anybody -- you can meet an confer. And I don't want to put you guys in a position, but I really see no reason why I would say no. If the defendants say it's in the last quality control stage, we'll talk to our clients, we'll front it, I have no problem telling the receiver make the rest of that year available and bring them in and let them look at it.

I mean, that, to me, seems like a very fair thing if the defense thinks it's going to really help give me a better

financial picture, and we're at the last phase of it, all we need to do is make sure the receiver makes it accessible.

And I would be willing to go ahead and entertain a proposal order from the defense team that they will front the cost and CLA can go on and finish the audit. Does the receiver have any major concerns about CLA ever finishing the audit.

MR. STUMPHAUZER: Your Honor, the first thing I'd want to do -- conceptually, I have no problem with it at all. And I think once the process starts, you're going to see the kicking and screaming on the other side of the aisle.

Initially, though, I have a couple of concerns. So one is there's the extremely strange scenario where the partner that they hired, we believe, based on public records, was actually barred from auditing for some period of time, at least for public accountings, provide the public accounting oversight board.

THE COURT: Okay.

MR. STUMPHAUZER: Really unclear what the backstory is there, so we'd have to look into that a bit.

My other huge concern is that I think, operationally, the only people that would be able to really help complete their tasks is Mr. Klenk, who right now is one of the accountants at the company and we're short-staffed. I think we'd also have to peel someone off from collections realistically, and that would be my big concern.

But I can also tell you that -- I mean, I just don't know how else to say this, but what do you think a top ten accounting firm is going to do when the controller of the company is saying our KPI figures are overstated? What is the audit firm going to say when the -- you know, and I encourage you to read the Klenk deposition. There's a transcript, and it doesn't say a lot of what was said today.

And we also have papers that show all their outstanding requests. The notion that they were approaching the end zone is nonsense. In fact, the only real accounting issues in the case, I think you nailed it. The only accounts that matter: Accounts receivable, which is offset by -- they hadn't calculated allowance, they hadn't gotten the information for an allowance. Not even their own company's own controller would tell you the allowance is correct. How's that audit going to go?

So, you know, I'm not conceptually opposed to it. I think it actually will very much show the shortcomings of the Glick report, but what I don't want to do is directly interfere with collection staff. That would be an issue.

So what I would like to do, if it's okay with Your Honor, is consult with DSI, try to figure out if we think, even though there's an accountant that could be brought back such that someone would be able to attend to the auditors and get them the information they need without diverting it from my

main task, which is trying to collect money.

And what we've seen is, you know, there are a limited number of people that have real historical, institutional knowledge, and we're trying to be very defensive with them to keep them from working on tasks that are not directly related to collecting funds.

04:34

So -- but, look, conceptually, I think it's a good idea. And one of the many reasons why -- I don't want to even get into the expert reports -- but you were just told that Glick said -- or you were told a couple things.

04:34

There were tax returns that claimed hundreds of millions of dollars of profit. The reason that you haven't been shown those -- it would obviously be a good exhibit to show you -- is they don't exist. That's just not true.

04:34

Also, you were told that Glick opined that the money coming from investors was, excuse me, the money coming from merchants was sufficient to pay investors. And now we read the Glick report. Because what he says is the gross cash coming in from merchants was enough to pay investors. So in other words, if I advance you an MCA of $10 and you pay me back 8, and I advance you $10 and they pay me 8, defense says we got $20 to pay back the investors. I'd say, no, that's -- that's just not how the world works, right? When we pass money back and forth, that's not profit. He's looking at the gross number coming back.

04:35

04:35

So I think it would be helpful to get a truthful account of what's happening. I have no fears about how that audit would come out. I know how it's going to come out. They're going to -- (voices overlap)

04:35 **THE COURT**: Well, let me ask you this.

I mean, one thing that we could say -- and, I mean, and, again, I don't know if CLA's issues with the partner and what was going on. I mean, part of the -- I don't want to say the attractiveness of re-employing them is that they had already done some of the work. But I have always said from the beginning that the difficulty here is -- especially now that I understand that the SEC expert, I don't think is doing an accrual basis, they're doing cash. It doesn't really necessarily -- it doesn't hurt me, but it doesn't help me to the extent that it would be a counter way to understanding where the link, if any, they had to shortfall.

I have been very concerned about saying, you know what? The parties should be required -- SEC and the defense and the receiver -- to come to an agreement on one single independent audit with both accrual and cash bases of the company that would be the agreed-upon financial picture of the company.

The problem with that is the amount of time that would take, the amount of resources that would take. You know, at this stage of the game, really? I mean, for what -- at what

cost? I mean, we're trying to finish the case. I mean, I don't see why -- that's not going to help anybody. I mean, it would maybe help me if I was in trial and I was trying to figure out, you know, what is the real financial picture? Do I have an independent expert that we can rely on?

And that's not going to happen here. We each have two experts, as many times happens with experts that are going to have very different views on the economics behind the business and what's happening.

But it's just I want to do something that is worthwhile, and I don't know. Doesn't sound like the CLA audit being completed -- especially if it was 2018 and it was that far along to begin with -- I don't know how valuable it will be.

But maybe the best thing to do is not pull the trigger on that day and give you guys an opportunity to even discuss what that would look like and see if the parties could come to an agreement, CLA or otherwise, about the need for some sort of independent audit. But I don't know.

My fear is, again, it would have to come within reason for the receiver to not be pulled away from collection efforts because that hurts the investors' bottom line, too. So I don't know what you think about this, but --

MR. STUMPHAUZER: I apologize. I just realized there's probably one more thing I should add, and it may be

well be the case that the one of the attorneys in the courtroom can.

I should also add that I, personally, have not had, I don't think, any contact with CLA. My law partners have. I don't know that we've ever asked them if they would be willing to complete the audit. As you can imagine, these accounting firms are quite protective of their reputation because it is currently the subject of a federal securities litigation that you haven't even decided on yet.

04:38 So I just want to give one more caveat I got from resources: I have to make sure they're willing to do it.

THE COURT: Sure. Okay.

Well, let me turn back to you, Mr. Soto. Obviously, I'm considering it. I think that we're in a position now where 04:38 at least the receiver had some concerns, I think justified ones. And perhaps the parties could at least discuss this a little further to see if they think it can be accomplished if CLA is even willing to undertake the engagement if you think it's worthwhile.

04:38 And, ultimately, I'd like to know if the defendants were to propose something to the Court, whether it be CLA or somebody else, after conferring with the receiver that could look at really an accrual basis methodology with numbers that we all can kind of agree with a little bit because, you know, 04:38 the KPIs are a concern and from the Klenk testimony, I'm a

little concerned about the baseline of information being used by CLA and by really anybody, we got to make sure it's the right numbers.

But I'm not adverse to it. So, I guess, the best thing I can tell you is I'm not necessarily entertaining a discharge or a change in receiver operations, but I am willing, if the parties want to bring me the proposal on some sort of independent audit in this last window of time, that we go ahead and explore that. I think it should be explored. I know the Court would like it and I think it would be beneficial, especially if it was someone that specifically looked at the Glick report in doing their evaluation and also, quite honestly, looked at whatever the SEC has already provided in their expert report. I don't see why not.

I mean, I think we should have all the experts on the table. We have three reports, I believe -- the SEC's, DSI's and Glick's. And I hate to keep adding more analysis to this. One would think that of the three, I should be able to discern which one is the one I can trust. But each one has either a different accounting method or a different underlying set of numbers that gives me cause for concern.

So maybe, maybe this is something you guys can think about, but I can at least assure you that if you guys come up with a proposal and run it by the receiver, even if it has some objections to it, I can at least take a look at it and give it

an earnest review and see if maybe I can give the defendants someone to finish off either 2018 or conduct a fresh look at the most recent year before COVID, however we want to really look at it. I'm open-minded to that -- to that suggestion.

04:40 So I'm sorry to interrupt. But go ahead, you were saying about the CLA, I think, generally and where we were at on the loans. Go ahead.

MR. SOTO: Yes, Your Honor, just to address the one question you had of those three reports, only one is signed by

04:40 a forensic accountant who actually followed GAAP, so that might give you some guidance with respect to the one that you ought to be paying attention to.

With respect to the KPI report, I want to make something clear because it's hard to follow all of the things

04:40 that you're hearing, and I want to make sure that you understand the discrepancy that the receiver's now raising or suggesting that Mr. Klenk referenced during his deposition.

So the picture is this: There is a fraction based upon two numbers that the company has collected from its own

04:41 bank statements that make up this KPI report. And those two numbers, one divided over the other, create this percentage that we've been talking about, the default percentage. One of those numbers is the total money wired out by the company, okay? And the other number is the amount of factoring loss

04:41 that this company sustained.

Now, the issue that they're raising is that the total money wired out, which would make the numerators here, is overstated because that number includes not just cash that went out, but cash that the company promised to send out in contracts.

And so what they're saying, essentially, is it's an accrual-based number, and it is including those numbers that were promised to be wired out, but, in fact, may not have been wired out. And I think Mr. Alfano said his estimation is that the difference is somewhere in the neighborhood of $100 million, $150 million -- I forget exactly the number.

I'll tell you what we did in order to avoid their problem. And by "we," I mean Mr. Glick. Mr. Glick underwent a cash analysis of the money that went out for that total wired-out number, so he looked at bank statements. He didn't review contracts. He didn't do that particular analysis on an accrual basis. That was his second report, which was verifying the KPI report. He looked at cash, he looked at bank statements, actual money that went out.

And when he did that analysis, the number that he got, instead of the number being 1.19 -- I think, in the KPI report, Your Honor, if you look at it through June of 2020, it says 1.20 because it's -- instead of 119 [sic], they used 120 [sic] -- he got 1.16. In other words, the number -- the difference is immaterial. It's absolutely immaterial.

And I challenge anyone to look at the cash and defy the number that he got. He looked at every bank statement. It took him months to do this work, and what he did was, just you had a question about, Can we rely on his numbers?

04:43 Mr. Futerfas is right. Ms. Davis and Mr. Glick are really looking at the same data. In fact, DSI looked at the same data. We used -- Glick used some of the ACH information that they provided because that's one sort of bank account. We know that from the mistake they made, thinking that money had 04:43 been wired out, and it, in fact, went to ACH account, which is a bank account. He looked at bank statements and he looked at QuickBooks.

And he reconciled all of that, and his second report said the KPI report is accurate. And he looked at cash. He 04:43 didn't look at that on an accrual basis. So this mistake that you're hearing, this misleading thing that Mr. Klenk testified about, I also encourage. I don't want to waste the Court's time. I encourage you to read the transcript. This is what he was complaining about and we verified that in the second 04:43 report.

So I'll just say this: You asked a question earlier. And you said: Have the defendants been harmed here? And this goes back to the motion to dismiss. This is the harm that happened here. The harm that happened here is that the SEC 04:44 rushed in, shut this company down. And now, as a result, it

hasn't been able to lend a dollar in over a year, and that's no fault of the receiver. It's just what you said. You could not imagine a universe where money could be loaned out.

You also had this receiver come in and try to figure this company out, the legality, whether to fire Fox Rothschild, to do all of these things, and it's caused significant damage to this company, to these investors who own this company, and, obviously, to the defendants.

04:44

And what we're asking and what we're suggesting, Your Honor, is that any business that you shut down in this way is going to suffer irreparable damage. And that's why we felt so strongly about the motion to dismiss and the damage that's been caused.

04:44

And that's why we feel that, just as you said, whether we resolve this case tomorrow, whether we go to trial, and have an answer, at the end of the day, we're going to have this company, and a profitable Par is the best thing for investors.

04:45

And what we're suggesting is that a profitable Par is a Par that is advancing money. If someone comes into my office tomorrow and says you can't issue another invoice to any other company, you go to an airline and say you can't fly any planes, it's going to shut down and they're going to be dead in a week, they're going to be dead in a month.

04:45

And that's what's happening to this company that these investors are relying on, that everybody on the phone

listening, too, is relying on. And it can't survive under those circumstances.

So, yeah, three months matter, three days matter. This company was collecting a $2 million a day, 28 million, $30 million a month, on average, before this happened.

It's not the receiver's fault that he can't advance loans and collect money on new business, but it is a fact that we have to deal with, and the proposal that Mr. Futerfas has put forward is one that would address that, and it would help investors, it would help the defendants who believe that they're going to be vindicated at the end of this, and that this company is going to of more value to everyone if we do it that way.

And there is a path forward, we're happy to sit and talk and figure that out. But it shouldn't be I'm going to throw up my hands and say it can't be done because that's a lot of guesswork.

THE COURT: I guess, my only -- and I totally understand the position of the defense on this -- and I guess my one concern, to kind of see it through the Court's eyes, you know, if I came into a company -- and you use the example of the airlines.

If I have some evidence that indicate that those airlines are flying with engines that don't work and that the wings could fall off, I'm not letting anybody get on the plane.

If it's your firm and they're coming to work and I had wind that you were disbarred, no one should be using you as their attorney. If I have investors that are investing in a company and they are not being told that the money that they're putting in that they're thinking is being factored is actually being used to buy real estate in Colorado, or being used to buy someone else's Patek Philippe watch, then I think I have a responsibility to make sure that those investors know what they're getting into.

04:46

So I understand the examples. The concern I have in this case is I do want to protect of the investors. I understand that the defendant's model is, well, the best way we can do it is maximize the return on investment. And I agree, in a perfect world, I wish I could have every investor get exactly what their promissory note promised them at the rate promised.

04:47

The challenge I'm having is I'm balancing that with a case -- a case that has yet -- absolutely, I want to make this clear -- has yet to be made by the SEC. And it will be their burden to do so. But a case that purportedly, allegedly, these are representations that have been made to these investors that are either inaccurate or, more importantly, are not being fully explained, or the disclosure is not as fulsome as it should be so the investors that made this decision made it with eyes wide open.

04:47

04:48

And we're going to hopefully get to the bottom of this in the near future, but I absolutely understand your concern that what I did here, because it is a business that thrives off continuous loans, it's very hard once you shut it down, and all you're going to be doing is trying to scrap back what's out there. And I agree, and it has been -- I make no illusions about it. And the many investors that have been with us all day, and they know, and I know many of them are frustrated, and some of them just want to see the case come to an end; some of them just want to see some of their principal come back, and that's why I urge the parties again -- and I was directly speaking to Ms. Berlin about trying to find a way that we can put this behind us so that Par can try to find a way forward if there is a resolution to be had, and I hope we can find it.

04:48

But I do understand the balance. The balance really is, you know, I have to protect the investors due to the investments they made, that they made blindly without, perhaps, the regulatory disclosure required by law versus the fact that now their money's locked up in there, and I have essentially stopped it from being factored and multiplied and generating more proceeds. And I know that.

04:49

Now, the big challenge is we're all operating on half-truths and information, mostly because we don't understand the market well enough to really predict, especially with an exception portfolio, would they truly have made what they were

04:49

promised they would make, even if they had been completely advised of people's criminal records or default rates, whatever it may be, underwriting? Would they really have generated that number? I agree with you, it's hard to tell. COVID makes it
04:49 difficult. Small businesses were hit hard. I think the exception portfolio and its financial condition can't be really recast any other way. It's a very tough group of loans to recover.

But I will say this. I don't know that we're in a
04:49 situation now where I will be comfortable, with the record I have before me, tossing out the full receiver operation. But as I've stated, I am comfortable if you think and you can come up with a proposal on some sort of an audit, whether it's CliftonLarson going forward or somebody else, I was speaking
04:50 with the receiver -- any proposal forward is something I will take seriously.

But I think that that would be an incremental step to trying to continue to develop clarity, instead of, with three months to go in the case and discovery almost complete and some
04:50 relief on the horizon, deciding that it would be best for investors to pull the receiver out because I'm just not in a position, quite honestly, to put that money to work, you know, the way you would want me to.

I just can't take, you know, the number Mr. Alfano
04:50 gave me, I can't take 86 million and put it back in the MCA

game because it would be just, quite honestly, way above and beyond what I'm responsible for doing, which is trying to at least collect for investors and protect.

And, obviously, that decision should be left to investors; it shouldn't be mine. If an investor wants to roll the dice and get back in this game after this case is over, be the -- have the gumption, go for it, talk to Par or Par's successor, and we can see if people are able to recover what they were initially promised.

I just don't think I'm in a position now, and I think it would be really a mistake to pull out the receiver at this stage of the game. But like I said, that doesn't mean that I'm not open to intermediate steps, and if you guys can come up with something and you think that that audit would really help shed light on financial conditions going forward, then I think we should meet and confer with the receiver, and maybe we can come up with some sort of proposal.

MR. SOTO: Thank you, Your Honor.

THE COURT: Okay, thank you.

Now, I know we have gone on very long and it's almost 5:00 o'clock. I think I allotted two hours for this hearing and have used probably four or more. And I thank the investors who stuck with me. And I do know that some of that was eaten up by technological difficulties.

Ms. Berlin, I don't know that there's much that you

need to add. Most of this, really, you've put in your papers. I know you object to the receiver being discharged.

Obviously, what was important to me was to hear the defendants' arguments for discharge and hear the latest from the receiver as to whether they thought any of these proposals were possible. And I've left an open door for the parties to meet and confer to try to figure out if there's an independent audit they want to explore that might be more along the lines of what Glick did.

04:52 But anything else you want to add -- briefly, please -- in response to this motion?

MS. BERLIN: Yes, Your Honor. Your Honor, may I add something?

THE COURT: Is that Ms. Schein? I'm sorry.

04:52 (Voices overlapping)

THE COURT: Okay. Is that you, Ms. Schein? I'm sorry, is that -- Ms. Schein, is that you? I'm sorry. I didn't mean to speak over you.

MS. SCHEIN: Yes, I'm sorry, Your Honor. (Audio 04:52 indiscernible) that I would like to --

THE COURT: Go ahead. What did you want to add? What did you want to add? Go ahead, let me give you the floor. What did you want to add on this?

(Voices overlapping)

04:52 **MS. SCHEIN:** Yeah, very briefly. And I appreciate my

co-counsels having set forth all this on the record.

Your Honor, I'd just like to make it crystal clear, I know investors are listening and Your Honor has considered the idea of removing the receiver. I just want to say, just up front, that one of the investors has contacted me and indicated that he would be willing to come to Philadelphia -- he does live in Pennsylvania -- and assist in getting the company back up on its feet.

So I put that out there, Your Honor, just to say there are people and investors who are willing to come in who know the business inside out because they are investors, in part. So that's one issue I wanted to raise with the Court for your consideration.

In addition, I also think that there is some confusion with regard to the financials. And I know the receiver kept bringing up the exception portfolio, but the defense undertook it, based upon what Your Honor has said, to get the report from an expert forensic accountant. And the defendants went ahead and did that.

And as to the underlying information that the accountant used, we have to be clear on it. The accountant used bank statements, QuickBooks, and ACH, which is the type of bank account, as my co-counsel has said. That was the information used to form the extensive reports that Mr. Glick prepared.

And those are reports that I think we all can rely on and that have come to conclusions that wholeheartedly and completely dispel the SEC's claims about the consultant fees, about the default rates, and about all of these other misreps [sic] that the SEC has put forward.

So -- and that is our expert report. It's -- your report that deals with our report by Bradley Sharp is really, most respectfully, Your Honor, not worth the paper it's written on. He's not an accountant. He's not a CPA, and that report is not an analysis that you can go to the bank with.

The report by Glick is the expert report. So I just wanted to be clear on that, Your Honor, to clarify a few points. And, also, the fact that the issue with reloads I know the receiver brought up, but that issue is in the Glick report, and that -- the issue was covered by the careful, thoughtful, thorough analysis done by Mr. Glick, which came to the conclusion that a very small percentage of the full 100 percent of merchants -- I think less than 14 percent of merchants received reloads.

So as Mr. Soto brought to your attention, every dollar went out, 40 cents came back on that dollar. We're talking about lots of dollars that went out.

So, Your Honor, I just wanted to emphasize those points. I appreciate Your Honor taking the day to hear us on these very important motions, and I just wanted to suggest to

you that there is a way forward in removing the receiver and putting in place, for the next three months until trial, people, including investors, who are willing to come to Philadelphia and to resurrect the company.

04:55 Thank you, Your Honor.

THE COURT: Well, I will say -- thank you, Ms. Schein.

I will say this: As I indicated earlier, I was going to require, and I'm still going to require what I term an "informal settlement conference." What I may do in there, and 04:56 I can put it on the record here today, it's really more than just an informal settlement conference. Obviously, if the parties were to find common ground in a long-term resolution, that would be ideal.

But it should also be used to discussed these 04:56 proposals, the proposal that Ms. Schein has come up with, the one Mr. Soto and Mr. Futerfas have suggested, and Mr. Ferguson has brought up, to talk about the potential of an audit, to get a better financial picture, cross-referenced with Mr. Glick.

All of these things I think are worth a very 04:56 legitimately dedicated meet-and-confer conference with all parties and their clients, at least clients that are an arm's-length away or a phone call away. They don't have to be in person. We can do it over a video conference, you can do it over the phone. But I think it requires an inflection point 04:56 now, with discovery closing and summary judgment fast

approaching and trial on the horizon, that we at least sit down and try to take a look at this big picture before we find ourselves in another round of motion practice, which is quickly approaching.

04:57 And so I just put that on the record, and I think that's one of the times we should also use to discuss your proposal, Ms. Schein. And I urge the parties to look in to that and explore that, and maybe the defendants can also propose to the receiver any sort of a follow-up audit on the

04:57 CLA numbers.

Do I have any other defendants on either one of these motions? I've heard, I think, from most of the individuals who have argued them or drafted them, and I know people have been kind enough to concede their time to their colleagues so we

04:57 don't have too many people arguing.

Anybody else here in court on the defendants' side need to be heard on any of these motions? Okay. I think we're okay, and I think I heard from Mr. Futerfas and Ms. Schein, anyone on the line.

04:57 So then I meant to go back, just to put a final point on it.

Ms. Berlin, do you have anything you want to add, really only on the receiver discharge issue? And let me just say this, Ms. Berlin, before you chime in, I haven't looked at

04:58 the -- at your expert report yet, the one that I understand is

a cash -- I think it is GAAP-compliant, I hope.

And the next question is: I hope that it looks at some of the numbers that Mr. Glick has proposed so we can at least get a better sense, even though it may be cash basis versus accrual.

04:58

But I urge the SEC also to be heavily involved in discussions in the informal conference -- settlement conference in the hopes of not only finding common ground, but maybe having some give and take on what the SEC thinks is the right way to go here with the trial approaching.

04:58

But I just, you know, I want you to understand that after today's hearing, you know, the Court is eagerly anticipating the summary judgment that you plan on filing.

And I want to see and I hope to see that the SEC has been able to put together at least some financial data that would clarify some of the concerns raised by the Glick report and that would fit perhaps a little closer to the narrative that was advanced by the SEC when this case began.

04:58

I think there's a lot more nuance here than meets the eye, and I know there's a lot of different episodes that led to the SEC's ultimate decision to press forward on this case.

04:59

But I think it's also important that the SEC figure out what is the goal here. I understand the goal to be obviously to help investors, but really if these defendants are cause for concern by the federal government in their actions in

04:59

the financial marketplace, that steps be taken to correct that, and then we can move on trying to resolve things with investors.

But spending more time and money prosecuting this
04:59 case, if there is a resolution to be had early, I think would be foolhardy. And so I hope that the SEC sits down and does make a concerted effort to try to find common ground with the defendants here so that we can, if it's possible, we can at least explore the possibility of something global resolving the
05:00 SEC's concerns, while also keeping in mind that investors are standing by, waiting to see the outcome of this case, and our hope is to protect them and try to return to them what money we've already been able to obtain.

Is there anything else, Ms. Berlin, though, that you
05:00 wanted to add before we conclude today, briefly? Go ahead.

MS. BERLIN: Yes, thank you.

The defendants and receiver just spoke for about three hours, and I just need about five minutes to address what they were saying.

05:00 First of all, I just wanted to state that the defendants' motion to discharge the receiver, which the SEC filed a response to. You know, the defendants' argument today is focused on the profitability of the company, and that is not the standard for not only their motion, but was also not the
05:00 argument that was presented to this Court in appointing

receiver.

Instead, you know, first, they would need to show under their motion that there was some improper misconduct by the receiver, which they failed to do. They didn't present a
05:01 single piece, not a shred of authenticated evidence in support of either motion. So I'm not even clear how the Court could make any findings of fact about anything on that motion. That I was anticipating they might do it today, it didn't occur.

Next, on the receiver motion, the SEC filed a motion
05:01 asking for a receiver and telling the Court that the basis for the receivership was that the defendants were diverting money to themselves. And that is undisputed to this day. There has been no issue with that, no argument that it didn't occur. And that is the basis for the appointment of the receiver.

05:01 The Court made a ruling on the TRO on a very complete record, including more than, I think, all told, close to 200 pieces of authenticated evidence, and at a two-day evidentiary hearing, that this is not the first time the defendants have challenged the receiver.

05:01 The Court is well apprised of what the receiver has been doing. He has filed repeated status reports, and the defendants take it upon themselves to always file a response with Mr. Glick's position.

Nothing in the last year has altered the fact that
05:02 they took investor money and sent it to themselves. And there

has not been a single argument about that. The point for the receiver, Your Honor, was because there was an ongoing, unregistered securities offering, which was the basis for appointing a receiver. There's been no argument that that didn't occur, that there wasn't an unregistered securities offering, and that they didn't divert money to themselves.

On top of that, this case has the added feature of myriad misrepresentations and omissions to the defendants, which also served as the basis for the appointment of a receiver, and that the misreps were ongoing. The defendants haven't attacked that, either.

Instead, what they did through their Rule 41 motion is present the juries unauthenticated pieces of evidence, which the commission responded to, basically saying we are not claiming or agreeing that any of this is accurate evidence. But even if it was, they know that this doesn't pass muster. An even at that, they took aim at just a few pieces of the myriad pieces of evidence that this Court heard.

In essence, on the motion to terminate the receiver and the Rule 41 motion, it's a motion for reconsideration of the Court orders that it entered a year ago. They can't meet that standard, either, in addition to the ones in their motion.

Everything they argued today is something that they have known that they had access to, even their point about the merchants having litigation against CBSG, the Court -- the SEC

presented that. It's attached to the (inaud.) declaration, a chart of all the cases. The defendants knew that when we had the preliminary injunction hearing. They could have argued it at that time, but they chose not to. They were all heavily involved in that litigation. And as we argued in our TRO, most merchants were involved in litigation with them.

The defendants have basically made a full day out of making arguments based on, I guess, proffer because there's no authenticated evidence before the Court on anything. And I think that the goal here is to try to get some ruling from the Court that they can use in other matters unrelated to the SEC case.

The profitability of the company and audit of the company is not relevant to the SEC's claim. At all. We did not claim that their audit was improper. They heard it from Mr. Futerfas himself. He told you he wants the CLA audit to be completed and Mr. Soto said the same thing because according to them, it would prove that the Glick report is accurate.

The Glick report is their own expert report they paid for. I hope Mr. Soto agrees with it. You asked him if he did. He paid for it. That's their expert report. That's their defense to the case.

Whether there's an audit and what it says from 2018 is relevant to not a thing in this case, other than perhaps what that they want to use in another court. And the fact that they

want the investors to pay for it, meaning the receivership, is offensive.

If they wanted an audit, Your Honor, they've had a year to take discovery. They could have gotten it themselves. I urge the Court not to allow that to proceed. There is no way we could conduct summary judgment and a trial if an audit were to begin right now. The audit that was in process, which I understand is actually very far from completion, took a very long time. So are we delaying this case for a year to get an audit report that shows what? Nothing relevant to any misrepresentation, omission charged in this case and nothing relevant to the unregistered securities offering at issue.

I would like to discuss -- the Court has made some references to he hopes that the expert report is on a GAAP basis, he hopes it's on an accrual basis. There has been no finding that that's the proper basis to examine this company on. The defendants have provided their expert reports to the Court.

The SEC will address those issues at the proper time, which is summary judgment or trial. And those are not the proper bases for it, and I hope that no judgment has already been made that it is. And I would ask that the Court wait to see the expert reports and then make a determination.

As far as the -- everything on the Rule 41, it basically ends with the related receiver motion is nitpicking

and speculating being various pieces of evidence that were presented a year ago that the defendants chose not to raise at that time, failed to raise, and now they're trying to create a vehicle where they don't have to meet the preliminary injunction standard, they don't have to present authenticated evidence to this Court. They're hoping to get findings based on what they presented with their motions that they can use in this case and in other matters. And there has been no authenticated evidence presented upon which any fact could be found. Instead, even if everything they presented were accurate and were true, both motions utterly failed.

I would like to address briefly Fox Rothschild. As the defendants know, Fox Rothschild's lawyers and Fox Rothschild are witnesses in this case. The SEC deposed them in this case. As you heard from the receiver, the collections efforts of CBSG are -- they are currently being investigated by other agencies, and Mr. Berman, the Fox Rothschild partner, will be a witness that the SEC calls at trial. You will see his deposition transcript attached to our summary judgment motion. The defendants want you to make the receiver rehire him, apparently so he either has greater credibility with witnesses and the jury, or he has a conflict and can't be a witness. They're part of it. They're witnesses. They cannot be rehired. And the defendants know that.

THE COURT: Anything else?

MS. BERLIN: Yes. As far as some of the comments today that the Court made about wishing that the Court had known certain things at the time of the TRO, that was the point of the preliminary injunction hearing. There's been nothing raised that wasn't raised at the preliminary injunction hearing or that the defendants couldn't have. They presented no evidence, other than wild speculation that these merchants would benefit financially from this case being filed, or that they even still owe money to CBSG.

05:08 And if the Court wanted to consider that, we would have presented evidence to counter it. But they presented no evidence whatsoever because they can't. Instead, they have nothing but empty hollow legal arguments by the defense counsel, trying to avoid meeting the preliminary injunction standards of authenticated evidence, trying to avoid a summary judgment standard, and trying to avoid a trial standard.

They can meet none of those three, so they have created a separate vehicle, where we have a seven-hour hearing with no evidence where they can just argue a lot of what-ifs. And we take issue with that.

And finally, Your Honor, the defendants have complained today about the cost of the receiver. The defendants, if the Court looks at the bills of the receiver, a lot of the cost of this receivership has been responding to the defendants' argument, the defendants' motions against the

receiver, the defendants' taking evidence. The biggest -- what -- I am currently going through their records, and I believe it's going to show that their biggest cost has been the defendants, and today is no exception.

05:09 The receiver has multiple attorneys here today, had to prepare for the defendants to raise yet another attack. So if we want to talk about where investor money is being spent right now, it is being spent and has been spent for a year, in large part, responding to the defendants' arguments, which have all 05:09 shown so far to be unavailing.

And the motions before the Court are no exception. We would ask that if the Court is inclined to make any factual findings based on the unauthenticated evidence presented by the defendants, that it reserve ruling until summary judgment when 05:10 authenticated evidence is presented to the Court under the proper standard.

I have nothing further.

THE COURT: Okay.

MR. FERGUSON: Real quick, Your Honor, if I --

THE COURT: Please. Briefly.

MR. FERGUSON: In reverse order.

Fox Rothschild, they're going to be a witness in this case, irrelevant if they -- if they were allowed to collect against B&T or someone else. They give greater credibility as 05:10 a witness. Well, that could be resolved with an in limine

order, Your Honor.

Conflict? We would waive that. Responding -- the motions we've had to file with the receiver, I think if you thought they were not well founded, you probably would have stricken them fast, and we had to have -- bang heads a couple of -- few times, and I suggest to you that every one of those filings was in good faith by us, and I doubt highly that the receiver's lion's share of the 9 million paid to him and any expenses was responding to motions that Josh and I filed. That's just ludicrous, Your Honor.

And here they go again, the SEC, counsel, "Don't let them have an audit." Keep our hands tied behind our back. I assure you with my hands tied behind my back, I'm a much easier foe. I promise you that.

And if we want the proposed, we'll pay for the audit, and we want to work with the proposal with the receiver to get that done, it's -- I don't see how it could involve one minute of counsel's time and stop her from filing summary judgment.

And to closing, at the beginning of her last comments, she basically said that we agree that money was -- investor money was diverted. We do not agree that we diverted money. We do not agree that the defendants wrongfully paid themselves anything. We do not -- we wholly dispute commingling and we'll address that at the right time.

This -- it seems like she thinks we're at a summary

judgment here. She said, basically, that we don't dispute -- last point, we don't dispute the sale of unregistered securities. I want everyone listening, and you particularly, Your Honor, we certainly do. That was not at issue at today's hearing. We've asserted answers, affirmative defenses and denials, and we will address it at summary judgment, and if we have to, we'll do it at trial.

THE COURT: All right. Thank you for that, Mr. Ferguson. Let me just kind of --

MS. BERLIN: Your Honor, if I -- may I just -- this has nothing to do with the arguments, but just going forward, the defendants have made constant sort of attacks on me, being referred to the SEC as Amie Riggle Berlin, and I think the Court might be aware that it stirred up quite a bit of personal animosity, not only by the defendants and others, but I would just ask to be referred to during this case as the SEC counsel or Ms. Berlin, and that any sort of personal attacks about Amie or her be ceased because it is causing issues and they have manifested outside of this case.

THE COURT: Okay.

MS. BERLIN: And so I would just ask that we keep it professional and address the SEC as the SEC. Or address me as counsel for the SEC. This is not a personal issue with the defendant, but it's something that should occur in every single case before any federal court. It is not personal. I don't

address arguments about the defendants as the attorneys making them, but it is stirring up a frenzy.

And I think that, you know, that combined with the attacks on the witnesses, is having a chilling effect on the SEC's ability to make sure that we can procure witnesses who is are still willing and available to appear before the Court.

And so I would just ask that that instruction be provided.

05:13 **THE COURT**: Okay. Well, I think we're all adults here, I don't need to instruct anybody to do anything. We're all officers of the Court.

I think what we need to do is treat each other professionally. I think that is what our local rules require, our bar rules require, and this is a perfect example of why, you know, I -- I've been trying to tell the parties that we need to take down the temperature a notch. If the informal settlement conference is going to move the needle at all in any part or facet of the case, it's important that we go into it treating each other with respect and understand, even though we are all doing our best to advocate for our clients here, we want to make sure that everybody understands that we need to be professional.

So...

MR. FERGUSON: Your Honor, if I may?

THE COURT: Yes.

MR. FERGUSON: I want to be clear. I do not believe I've been unprofessional in any way. I've referred to counsel as counsel, the SEC as the SEC, and the commission. I don't believe the word -- the name, Amie, has come out of my mouth today. I'm not sure what I'm being accused of, but I'd just like to get your opinion of, Have I conducted myself professionally?

THE COURT: No, I don't think you have and I don't think anybody --

(Voices overlapping)

MR. FERGUSON: No, I asked if I had conducted myself professionally.

THE COURT: Yeah, oh, no. Unprofessionally was what I thought you were going to say. Professionally, you have, yes.

Listen, everyone here is doing the very best they can on behalf of their clients, and I will say this, and I understand the SEC's view of the evidence, but at the same time, this is an adversarial process, Ms. Berlin. You know that.

You know that I agree with you that we need to make sure we have all due respect paid to all parties. I don't think it's fair to malign defense counsel for attempting to mount a vigorous defense on behalf of their clients. It's what they are here to do, and I wanted to give them today's audience to do that. I think it's only fair. I think we had agreed

that the SEC has had ample opportunity to make their case up through today. And this is probably the first time in a long time that all defense counsels were given a worthwhile opportunity to make arguments, regardless of the underlying motions being granted or denied, giving them the air time to let me know their feelings and express their opinions of the evidence as it has developed, I think is part and parcel of a good adversarial system.

05:15

And we can not allow the proceedings to essentially devolve in the SEC on a runaway train going forward without allowing the defendants to at least have court time to make their arguments, to be able to show me evidence they believe will vindicate their clients. It's what the whole system is about, and I don't think that simply because we're very dedicated to fighting over some of these points, that anyone is trying to be disrespectful.

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But going forward, I just want to remind everybody, let's make sure that we respect one another and we understand that we're all officers of the Court in our representations to one another and to me, and, really, for the investing public and those that are watching the case, who are eagerly hoping that justice is done one way or the other and that everyone gets a chance to prove their case or defend their case.

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I will say this: I have reviewed both motions. It is not my nature to belabor a ruling on either one of them and, in

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fact, I'm going to rule from the bench on both of them.

I'm going to be denying both motions. I will begin by denying the Docket Entry 649, which is the discharge of the receiver. The reality is, I fully respect the defendants coming up with outside-the-box ideas on how to save this company. They're doing it because I, in the beginning, said I wanted to save the company. I did not want it liquidated, so the Court has had a vested interest in trying to maintain jobs, keep it going, find a way to let this company continue.

05:17 There may be such a way, but I don't think it's today, and it certainly isn't a procedure of mine to put in a receiver with three months to go and pull the receiver out and implement a new plan so close to trial, when we can hopefully get a final decision from jurors on some of these contested claims if we 05:17 don't resolve some of them in part beforehand on summary judgment.

The reality is there has not been a sufficient evidentiary showing in my mind that would indicate that the receiver has played a role in hurting or -- the company, 05:17 hurting investors, or in any way, shape, or form, advocating a fiduciary duties to the investors, to the company with obligations to the Court.

The difficulties that the receiver has encountered are difficulties that I think anyone trying to manage these MCA 05:18 loans would encounter. I don't think it's necessarily a lack

of specialization, and I can definitely say, having reviewed all of their bills and looked at all of their motions, that this is absolutely work that has to be done. They're chasing money for the benefit of the investors. It's what I charged them to do. It's what I think they should do.

Is Mr. Soto right that putting the receiver in has hurt the business? Yes, because the nature of the business was loans and the Court had to stop that business.

Why did I do it? As we've discussed, representation that I have seen, evidence that I saw at the temporary restraining order and preliminary injunction phase led the Court to believe that the investing public was not advised of certain material issues regarding these promissory notes, and because of that, I did not feel that these loans could continue.

But the receiver and the job they have done, I believe, has been exceptional. I do not believe it has somehow been dilatory or purposefully hurt the company. They're simply trying to evaluate what can be recovered, and that's all that they've been charged with doing.

I understand that there have been some issues with bringing in DSI, that we would prefer to have someone that is producing reports that are more GAAP-compliant. But I think some of the forensic work, I have to give the receiver the bandwidth to try to figure out the best folks to bring in while

keeping costs reasonably low and in check to try to recover money.

But when we get down to the brass tacks of what's been recovered to date, as we heard from Mr. Alfano today, 86 million in cash, 53 million in real estate, 3 million in personal property, we're getting to around -- if we appraise that real estate a little higher -- probably 150 million out of 280 million, which is that reduced amount from 364 due to interest payments. I don't think that anyone can look at that number and say that the receiver has not done what it needs to do.

05:19 05:20 05:20 05:20 05:20

Now, after we get to the trial phase, a couple more months away, is there going to be an exit plan? I'm looking for one. I want there to be one. This is not going to be what Mr. Stumphauzer's firm is going to be doing and Mr. Alfano's firm is going to be doing after this case is over. We need to hand this off and figure out what can be done, not only to get investors their money back and figure out how to unwind everything. Or, conversely, if the SEC does not prove their case, I have no doubt in my mind that the receiver can swiftly return assets that are not being dissipated, that are not being liquidated, pursuant to my orders, so that we can make sure that the defendants, if they ultimately did not commit securities violations, they must be made whole.

And I think right now all we're doing is trying to

maintain status quo. Does state quo hurt? It does. Is it better than us flying blind on MCA loans, when I wasn't sure and still am not sure about the underlying financials and underwriting of some of these loans? I think it is.

05:21 That's a decision that I have to make. And I understand that some investors are on board with it and others are not. I can only tell the investors that I continue to have their best interests in mind, and I know that the receiver does, too.

05:21 But there's just not enough in this motion. And I will agree with Mr. Ferguson and all the lawyers that have argued -- Mr. Soto, Ms. Schein, Mr. Futerfas -- it is well taken.

I do take some issue with the SEC believing that this 05:21 is somehow a bad-motion practice or that this is somehow frivolous or not supported by law. These are well-taken motions that have questioned my reasoning for implementing a receivership. And I think it was absolutely fine to not only file, but to ask for oral argument, and a whole day has been 05:21 given to address them because this is significant. It's important.

I know that some folks disagree with the course that the Court has undertaken, but I still continue to believe from what I've seen and what the receiver has done and what I've 05:21 seen with these MCA loans that are outstanding, this it is the

best choice in the cupboard. It is the best tool we have to continue to try to recover these assets.

So that motion is going to be denied for the reasons stated on the record.

05:22 When it comes to the Rule 41 motion, I will also have to deny that. It is Docket Entry 663, the motion to dismiss due to misconduct and related constitutional violations.

I will be somewhat brief, but the record compels that I make some findings. And the bottom line is what I started

05:22 with, is just a very challenging standard, and I think defense counsel understands it.

Rule 41(b) really triggers my inherent ability to dismiss a claim and provide for the efficient disposition of litigation if I note, as the Eleventh Circuit has said, more

05:22 than mere negligence or confusion, but I need to find willful misconduct.

I readily agree with the defendants on a certain point that there are some temporal proximities that trouble me. There is some investigative work that I think could have been

05:23 done better. I do believe that the SEC was well within its right to work with Heskin, and I understand that they can draw from private attorneys and other resources, but it doesn't rise to the level that we would need for me to swiftly dismiss a case of this nature.

05:23 There is enough record evidence presented by the SEC

in this case for me to determine that, at best, on defendants' best day, it was somewhat negligent and wasn't as thorough as it should have been. But does it rise to the level of willfulness or bad faith that would mandate? And that's a 05:23 factual and evidentiary finding I would have to make on the record to justify dismissal under 41(b). It just doesn't rise to that level.

We can argue about differences in opinion regarding what the SEC had in their investigative file at the time that 05:23 they proceeded with this case, but there's enough independent sources of information for the SEC to proceed with this case. And although there was somewhat of a mosaic of problems, as counsels has argued and Mr. Ferguson has made that point, I can't string together these pieces of evidence to get me past a 05:24 level of mere negligence. It would only be willful misconduct that would permit such a drastic remedy, and I just don't see it in this record.

I will also add that I don't believe that the state actor doctrine is even implicated here, given the parallel 05:24 proceedings. And if even if it were somehow triggered, I don't believe we have the nexus established where the state, in the form of the SEC, has exercised coercive power over private counsel in such a way so as to trigger the state actor -- action -- excuse me, the state actor doctrine.

05:24 And I will point out again, it seems like everyone has

been able to be afforded the due process that they're entitled to under constitutional principles under the Fifth Amendment, so I don't think it plays a role and I don't see anything, even if it did, that would rise to that kind of deputization that has been alleged of Heskin and others to make the SEC's case for them.

05:24

So based upon that finding, I don't have a situation here where I can grant the Rule 41. There's just not -- I'm unwilling and unable, quite honestly, to dismiss based upon my inherent authority, based upon the fact that I have reviewed and the lack of evidence and bad faith to warrant an extraordinary sanction of dismissal.

05:25

And, again, when we look at how much of the investigative file relied on materials to build the case from the private lawyer and his client, it is not at such a level that the Court will find the state actor happened, transpired, or somehow made the SEC's case essentially willful or bad-faith prosecution.

05:25

So what will come out from both motions will be brief orders, relatively short and to the point. They will simply state for the reasons stated on the record. They may or may not add a couple of case cites, but given that we have a summary judgement fast approaching -- I think September 24th -- given that our discovery deadline is fast approaching, and that I have digested this over the past two and a half weeks and

05:25

wanted to wait to hear from everybody to confirm my instincts on some of these motions.

I thought it best to rule today so there's no confusion and leave a blank slate because what we're going to do after today is the parties are going to be ordered to meet and confer in the next few weeks so see if there's anything that can be worked out, either to streamline issues for trial, streamline issues for summary judgment, settle, if possible, any claims, and, of course, as suggested by Mr. Soto and Ms. Schein, to talk to the receiver about the possibility, if anything, to bringing in someone else from a forensic accounting perspective, whether CLA or otherwise, to take a look at the financials and ultimately prepare perhaps another independent report that can give us more guidance as to some of the flaws that are purportedly in the Glick report.

So with that being said, I do not believe there's much left for the Court to address, but I'll turn just to the SEC on the line. Anything else for the Court to address before I let the parties go? SEC, anything else on the line?

MS. BERLIN: Thank you, Your Honor. I just wanted to clarify one thing. Is the Court making a finding that the SEC's investigation was negligent?

THE COURT: No. I said that on defendants' best day, they would be able to argue that --

MS. BERLIN: Thank you.

THE COURT: -- there was some negligence and corner-cutting on the investigation.

But I don't need to make such a finding. All I've got to do and all I've been asked to do is find under 41(b) if it's willful or not.

I understand the argument to be that it was willful. What I'm saying is even characterizing it with all inferences that they would ask for on a temporal proximity, at best, you get negligence. I'm not finding it, but, at best, academically, you would, and it would not rise to the level necessary for 41(b).

Does it that make it clear?

MS. BERLIN: Yes. Thank you so much, Your Honor. I have nothing to add. Thank you.

THE COURT: Okay. Very good.

How about on the part of the receiver? Anything, guys, you need to let me know about before we would let you get back to collections?

MR. ALFANO: Nothing at this time, Your Honor.

THE COURT: All right. Thank you.

Anything else from of the defense counsels present in court that you guys wanted to add?

MR. FERGUSON: No, Your Honor. I'm just speaking for all of us here, and I assume all the other defendants and counsel. We thank you for your time and attention and we

really appreciate it.

THE COURT: Thank you for the briefing. It made it obviously easy for me to kind of get a sense of what the realm of evidence was, and it guided the Court, so I appreciate that.

05:28 On the line, I didn't want to shut it off before I hear anything else from Mr. Futerfas or Ms. Schein on the line?

MR. FUTERFAS: No thanks, Your Honor. Thank you for the time today, very much so.

THE COURT: Okay. All right, guys, let's see what --

05:28 **MS. SCHEIN**: Your Honor, thank you for your attention.

THE COURT: -- yes. No, thank you guys.

MR. SCHEIN: I appreciate it.

(Voices overlapping)

THE COURT: No, I appreciate you and thank you, Mr. Futerfas, for your willingness to appear. I know -- and I know this has interrupted some of your vacation, but I really wanted to get this heard because I thought time was of the essence, if anything, to dispose of these motions one way or another.

05:28 You will see me require that informal conference. I hope that at least it moves the ball forward a little bit. I'm, you know, I don't want to be terribly optimistic, but I think that the parties heard a lot of evidence today, we've discussed it ad nauseam, and I continue -- maybe I'm just an

05:29 eternal pragmatist, but I continue to believe that there has to

be a middle ground here for us to try to let Par Funding do what it does in the future and get these individual defendants out of this game and figure out what the SEC is seeking in terms of relief, and hopefully narrow things down so you can
05:29 start getting investor money prioritized and back once we finish our collection efforts.

So with that being said, the hearing is concluded. Thank you, guys, again for the briefing. We are in recess.

(Thereupon, the above hearing was concluded.)

* * *

C E R T I F I C A T E

This hearing occurred during the COVID-19 pandemic and is therefore subject to the technological limitations of reporting remotely.

I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.

09/02/2021 _____

DATE COMPLETED GIZELLA BAAN-PROULX, RPR, FCRR

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