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.
_____/

ORDER DENYING DEFENDANT MICHAEL C. FURMAN'S MOTION FOR NEW TRIAL

THIS CAUSE comes before the Court on Defendant Michael C. Furman's Motion for New Trial [ECF No. 1129] ("Motion"), filed on January 12, 2022. Plaintiff filed a Response in Opposition [ECF No. 1146] ("Response"), on February 9, 2022. Defendant filed a Reply in support of his Motion [ECF No. 1181] ("Reply") on March 10, 2022. Having reviewed all the pleadings, and being otherwise fully advised, it is

ORDERED AND ADJUDGED that the Motion is **DENIED** as set forth herein.

BACKGROUND

This case is an enforcement action brought by the Securities and Exchange Commission ("SEC") alleging seven counts of fraud against Defendant Michael C. Furman. [ECF No. 119] ("Am. Compl.") at 47–52. It was alleged that Furman, along with other Defendants in this case, issued, marketed, and sold unregistered, fraudulent securities to fund short-term loans to small businesses—known as "merchant cash advances." *See* Am. Compl. ¶ 1. The SEC avers that in addition to violating the federal securities laws by selling unregistered securities, Furman also made false or misleading statements and omissions concerning the Par Funding offering in

violation of the antifraud provisions of the Securities Act of 1933 ("Securities Act") and the Securities Exchange Act of 1934 ("Exchange Act"). *Id.* at 29–50.

This matter went to trial on December 6, 2021. On December 15, 2021, the jury rendered its verdict, finding for the Government on all counts. [ECF No. 1101]. On January 12, 2022, Furman filed the instant Motion for New Trial on a wide range of grounds. *See generally* Mot.

LEGAL STANDARD

The decision to grant a new trial pursuant to Rule 59(a)(1)(A) of the Federal Rules of Civil Procedure is "committed to the discretion of the trial court." *Peer v. Lewis*, No. 06-60146, 2008 WL 2047978, at *3 (S.D. Fla. May 13, 2008) (citing *Montgomery v. Noga*, 168 F.3d 1282, 1296 (11th Cir. 1999)). Rule 59(a)(1)(A) states that a court may grant a motion for new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." When ruling on a Rule 59(a) motion for new trial, the trial judge must determine "if in his opinion, the verdict is against the clear weight of the evidence . . . or will result in a miscarriage of justice." *Ins. Co. of N.A. v. Valente*, 933 F.2d 921, 923 (11th Cir. 1991) (quoting *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984)).

Although no exhaustive list of reasons exists, a motion for new trial may be brought in several circumstances, including when "the verdict is against the weight of the evidence,[] damages are excessive, or [if], for other reasons, the trial was not fair to the [moving party]; and [a motion for new trial] may raise questions of law arising out of alleged substantial errors in admission or rejection of evidence or instructions to the jury." *Alphamed Pharm. Corp. v. Arriva Pharm., Inc.*, 432 F. Supp. 2d 1319, 1334 (S.D. Fla. 2006) (quoting *Montgomery Ward & Co. v. Duncan*, 311 U.S. 243, 251 (1940)). In assessing evidentiary rulings already made by this Court, the question is whether the exclusion or admission of evidence affected Defendant's substantial rights. *Perry v. State Farm Fire & Cas. Co.*, 734 F.2d 1441, 1446 (11th Cir. 1984). "Error in the

admission or exclusion of evidence is harmless if it does not affect the substantial rights of the parties." *Id.* Here, as the movant, Defendant bears the burden of showing that the ruling(s) affected his substantial rights. *Id*.

ANALYSIS

Here, the Court does not find that the jury verdict went against the weight of the evidence or that leaving the verdict in place would result in a miscarriage of justice. The Court will address each of Defendant's arguments in turn.

I. The SEC's claims against Furman were properly pled.

Furman attempts to relitigate the claims he previously raised in the jointly filed Motion to Dismiss [ECF No. 363] ("Motion to Dismiss"). He argues that the SEC's allegations of fraud against Furman did not meet the heightened pleading standard under Rule 9(b) because the SEC failed to state its claims against Furman with particularity. Mot. at 2. The Court's perspective on this matter has not changed since it issued its Order Denying Defendants' Joint Motion to Dismiss on May 11, 2021. [ECF No. 583] ("Order on Motion to Dismiss"). The Court continues to find the SEC's pleadings sufficient to satisfy the pleading standard under Rule 9(b). Order on Motion to Dismiss at 32–33 ("Specifically, the SEC alleges that 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. Am. Compl. ¶ 233. The SEC alleges that this representation was false. *Id*. ¶ 234. These allegations are sufficient to satisfy Rule 9(b)'s particularity standard.").

In support of his Motion, Furman cites to *Solomon v. Blue Cross and Blue Shield Ass'n*, 574 F. Supp. 2d 1288, 1293, for the applicable pleading standard under Rule 9(b). In *Solomon*, the Eleventh Circuit interpreted the particularity requirement to include four elements:

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.

Id. (citing *United States ex rel. Clausen v. Lab. Corp. of America, Inc*., 290 F.3d 1301, 1310 (11th Cir. 2002)). Here, the SEC identified the specific misrepresentation made to an undercover individual posing as an investor, Am. Compl. ¶ 233, when and who made the statement, *id*., the content of the statement, *id*., and what the defendant obtained as a consequence of the fraud—Furman raising in excess of $11 million dollars for Par Funding. *Id*. ¶ 114. In sum, the SEC satisfied the particularity requirements laid out in *Solomon*. 574 F. Supp. at 1293.

II. The Court's denial of certain documentary and testimonial evidence was not improper.

Furman argues that the Court's denial of certain documentary and testimonial evidence was improper. To grant a new trial on the basis that the Court erroneously failed to admit highly probative evidence, the moving party must "(1) clearly establish that the Court improperly admitted or excluded evidence, and (2) that the admission or exclusion of this evidence had a substantial prejudicial effect on the verdict." *Lockaby v. JLG Indus., Inc*., No. 04-60040, 2005 WL 8154687, at *4 (S.D. Fla. Dec. 13, 2005) (citing *Alexander v. Fulton County, Ga*., 207 F.3d 1303, 1326–27 (11th Cir. 2000)). The test requires that both prongs be met to warrant the granting of a new trial.

Moreover, "[t]he admissibility of evidence is committed to the broad discretion of the district court, and [the court's decision] will be reversed only upon a clear showing of abuse of discretion." *Lockaby,* 2005 WL 8154687, at *4 (quoting *Walker v. NationsBank*, 53 F.3d 1548, 1554 (11th Cir. 1995)). "If the Court reaches the second step in [the *Lockaby*] analysis it considers many factors—such as the number of errors, the strength of the evidence on the issues affected

by the error, and the prejudicial effect of the evidence at issue—in making its determination as to whether the erroneous decision had a substantial effect the verdict." *Id*. (citing *Peat, Inc. v. Vanguard Research, Inc*., 378 F.3d 1154, 1162 (11th Cir. 2004)). The Court will address each evidentiary ruling at issue in the Motion.[1]

a. The Court's exclusion of Joel Glick's testimony was proper.

Furman argues that the Court erred in excluding the expert testimony of Joel Glick. Mot. at 3–4. He contends he was unduly prejudiced by Glick's failure to testify at trial because he could not "effectively rebut" opinion-based testimony presented by the SEC. Mot. at 4. Upon careful review, the Court finds that Furman fails to clearly establish (1) that the Court improperly excluded Glick's testimony and (2) that the exclusion had a substantial prejudicial effect on the verdict. *See Lockaby*, 2005 WL 8154687, at *4.

To begin, Furman's argument presupposes that Glick's testimony was relevant to his case. As was extensively litigated prior to trial, *see* [ECF No. 1043], and again at trial, Glick's testimony about Par Funding's business model and accounting practices was irrelevant to the case against

[1] A summary of the charges against Furman is warranted at this juncture to better understand the Court's evidentiary rulings, especially as to relevancy. The SEC brought seven counts against Furman: three counts under Section 10(b) and Rule 10b-5 of the Exchange Act, three counts under Section 17(a) of the Securities Act, and one count under Sections 5(a) and (c) of the Securities Act. [ECF No. 1100] ("Jury Instructions") at 10. In simple terms, the SEC's case centered on whether Furman, in connection with the purchase or sale of a security, operated "as a fraud or deceit on any person" and/or made the following misrepresentations of facts or omissions: the success of Par Funding; that Par Funding founder and executive Joseph LaForte was a convicted felon; that the Pennsylvania Department of Banking and Securities had issued an Order against Par Funding for violating securities laws in connection with the offer and sale of Par Funding promissory notes; that the New Jersey Division of Securities had entered a Cease and Desist Order against Par Funding for violating securities laws in connection with the offer and sale of Par Funding promissory notes; that the Texas Securities Board had entered an Emergency Cease and Desist Order against Par Funding, Perry Abbonizio, and A Better Financial Plan ("ABFP") for violating securities laws and engaging in fraud in connection with the offer and sale of Par Funding promissory notes; that the New Jersey Division of Securities had retracted its order against Par Funding and had made positive findings about Par Funding; that the Pennsylvania Department of Banking and Securities had issued an Order against Dean Vagnozzi/ABFP for violating securities laws in connection with the Par Funding securities offering and had issued sanctions; and that Par Funding's merchant cash advances had an average 1% default rate. Jury Instructions at 11–24.

Furman. Resp. at 6. Glick was not hired to opine on "the actions of the agent fund managers, the registration and exemption requirements of the agent fund managers, or any of the statements or omissions Furman made to investors." *Id*. While just this finding alone could end the Court's inquiry, it will still proceed to assess whether the exclusion of Glick's testimony had a substantial prejudicial effect on the verdict.

Furman makes only generalized assertions in support of his argument. He states that, without Glick's testimony, he was unable to "effectively rebut much of the opinion-based testimony" from the SEC's lay witnesses, nor could he "show that PAR Funding's books and records were accurate." Mot. at 4. While the Court is sympathetic to the costs of requesting a transcript, these wholly unsupported arguments[2] fall far short of showing any "substantial prejudicial effect" on the verdict by Glick's exclusion.

In sum, the exclusion of Glick's irrelevant testimony was proper, and Furman fails to show that such exclusion had a substantial prejudicial effect on the verdict.

b. The Court's exclusion of certain investor testimony was proper.

Next, Furman argues that the Court's denial of testimony from several of Furman's disclosed investors was improper because he was unable to rebut the SEC's attack on his character for truthfulness, or to "establish that he disclosed certain misconduct to investors." Mot. at 5. The investor testimony proffered by Furman involved certain investors testifying that they had received full disclosures from Furman as to the risks of investing in Par Funding. Resp. at 7. As the SEC explains, Resp. at 5, the simple fact that Furman made some disclosures to certain investors is not relevant to whether, on other occasions and to other investors, Furman violated securities laws. *See United States v. Ellisor*, 522 F.3d 1255, 1270 (11th Cir. 2008) (citations omitted) ("[e]vidence

[2] For example, the Court is not in a position to guess what "opinion-based testimony" Furman may be referring to.

of good conduct is not admissible to negate criminal intent"); *see also United States v. Marrero*, 904 F.2d 251, 260 (5th Cir. 1990) ("The fact that Marrero did not overcharge in every instance in which she had an opportunity to do so is not relevant to whether she, in fact, overcharged as alleged in the indictment."). Accordingly, the investor testimony was not relevant and properly excluded.

Further, character evidence is not admissible in civil cases where it is being used to prove that the person (in this case, Furman) acted in conformity with the character trait. *See* Fed. R. Evid. 404(a)(1); *see also S.E.C. v. Acord*, No. 09-21977, 2010 WL 11505963, at *1 (S.D. Fla. Aug. 23, 2010). The exception to Rule 404 is found in Federal Rule of Evidence 608(a)—"evidence of truthful character is admissible only after the witness's character for truthfulness has been attacked." Fed. R. Evid. 608(a). In the Motion, Furman (who testified at trial) fails to identify any specific testimony presented by the SEC attacking his character for truthfulness. Mot. at 4–5. He simply states, "During the trial several of the SEC's witnesses alleged that FURMAN omitted or misrepresented certain information regarding aspects of PAR FUNDING and/or its officers and employees." Mot. at 5. That explanation is insufficient to establish that the SEC's witnesses attacked Furman's character, thereby triggering the proper use of Federal Rule of Evidence 608(a).[3]

In sum, Furman fails to show that the Court's denial of certain investors' testimony was improper. As a result, the Court need not address whether the exclusion of the aforementioned testimony had a substantial prejudicial effect on the verdict.

[3] Furman does argue that he was not going to offer the investor testimony for the truth of the matter asserted, but rather for purposes of independent significance. Mot. at 5. However, the Court can think of no independent significance of the testimony "of several of his disclosed witnesses who had invested with his companies and would have stated that FURMAN had fully advised them of the risks associated with PAR FUNDING." *Id.* Any testimony to that effect would seem to suggest something about Furman's character, in violation of Rule 404.

c. Furman fails to show documents were wrongly excluded.

Furman argues that he was prejudiced by the Court's refusal to allow Furman to introduce some documents into evidence. Mot. at 6. He describes these documents as "documents that [SEC witnesses] signed" or "documents [used] to refresh witnesses' recollection (including a text message between FURMAN and SEC witness Perry Abbonizio)." *Id*. Again, Furman puts forth generalized and threadbare descriptions of the documents he proclaims were wrongly excluded from trial. As a result, Furman fails to show that the exclusion of such documents had a substantial prejudicial effect on the verdict. Accordingly, the Court need not determine whether the exclusion of the documents was improper.

d. The Court did not permit the SEC to improperly deploy the law enforcement investigatory privilege.

"The law enforcement privilege is designed to prevent disclosure of law enforcement techniques and procedures, to preserve confidentiality of sources, to protect witness and law enforcement personnel, to safeguard the privacy of individuals involved in an investigation, and otherwise to prevent interference with an investigation." *Kahn v. United States*, No. 13-24366, 2015 WL 3644628, at *2 (S.D. Fla. June 10, 2015), order amended on reconsideration, No. 13-24366, 2015 WL 13655760 (S.D. Fla. Oct. 26, 2015) (cleaned up). The Eleventh Circuit has explained that "[t]he privilege will give way if the [party] can show need for the information." *United States v. Van Horn*, 789 F.2d 1492, 1507 (11th Cir. 1986). The Court must balance defendant's need for information into the underlying investigation with "the government's interest in confidentiality." *See Kahn*, 2015 WL 3644628, at *3 (citations omitted).

Furman argues that the SEC improperly invoked the law enforcement privilege. As a result, he was prejudiced in two ways: (1) by not being permitted to ask several of the SEC's law enforcement witnesses questions about the underlying investigation into Furman and Par Funding

and (2) by being wrongfully prevented from introducing evidence concerning the nature of the investigation and the receivership. Mot. at 7–8. Specifically, Furman contends that he was unable to ask the SEC's witnesses "questions which would have supported [his] defense." *Id*. at 7. Furman does not provide the Court with any examples of the questions he would have asked. Nor does Furman point the Court to any specific instances where the witnesses or the SEC improperly invoked the law enforcement privilege, or even discussed the underlying details of their investigations at all. In response, the SEC highlights that same point—that the law enforcement witnesses did not testify to any details about the underlying investigations into Furman or Par Funding. Resp. at 12. The witnesses were called to testify about the cease-and-desist orders entered against Par Funding and its executives, including the timing of the cease-and-desist orders and whether the orders were available to the public. *Id*.

The Court's analysis turns on whether Furman has shown a need for information pertaining to the underlying investigations. Put another way, Furman must show that his requested line of cross examination—questions pertaining to the underlying details of various law enforcement investigations—is relevant. It is not. The details of the underlying investigation into Par Funding are not relevant to the issue at hand—whether Furman told investors that certain cease-and-desist orders were retracted when they were not. This same analysis applies to Furman's second argument—that he was wrongfully prevented from introducing evidence concerning the nature of the investigation and the receivership. Again, the introduction of such evidence is irrelevant to whether Furman made misrepresentations to investors regarding the status of certain cease-and-desist orders. In sum, the SEC's invocation of the investigatory privilege was properly sustained.

e. The Court properly permitted the SEC to call a rebuttal witness.

"Rebuttal witnesses are a recognized exception to all witness disclosure requirements." *United States v. Frazier*, 387 F.3d 1244, 1269 (11th Cir. 2004) (quoting *United States v. Windham*,

489 F.2d 1389, 1392 (5th Cir. 1974)). And "[t]he trial judge has broad discretion in determining whether to admit evidence and witnesses not included in pretrial orders." *Luxottica Grp., S.p.A. v. Airport Mini Mall, LLC*, 932 F.3d 1303, 1320 (11th Cir. 2019) (citing *Calamia v. Spivey*, 632 F.2d 1235, 1237 (5th Cir. Unit A 1980)); *see also Travelers Ins. Co. v. Dykes*, 395 F.2d 747, 749 (5th Cir. 1968) ("Much considered and wise discretion must be accorded to a district judge as [s]he deals with the infinite variables of evidence."). "The purpose of rebuttal evidence is 'to explain, repel, counteract, or disprove the evidence of the adverse party,' and the decision to permit rebuttal testimony is one that resides in the sound discretion of the trial judge." *United States v. Lezcano*, 296 F. App'x 800, 803 (11th Cir. 2008) (quoting *United States v. Frazier*, 387 F.3d 1244, 1269 (11th Cir. 2004) (en banc) (quoting *United States v. Gold*, 743 F.2d 800, 818 (11th Cir. 1984)).

Furman contends that the Court should not have allowed the SEC to call Adam Weisenstine, an agent with the Federal Bureau of Investigation ("FBI"), because he had not been previously disclosed and was "purportedly called solely for impeachment of FURMAN'S testimony." Mot. at 8. However, the SEC called Weisenstine only after Furman testified that: "1) he was forced to talk to the FBI, and 2) he did not recall telling the FBI that he knew Defendant LaForte was a convicted felon as early as a year after he began selling Par Funding notes." Resp. at 13. The testimony offered by Weisenstine was clear rebuttal evidence. For example, Furman was asked if he told agents that he became aware of Joseph LaForte's criminal history within the first year of doing business with Dean Vagnozzi. [ECF No. 1088] ("12-10-21 Trial Tr.") at 118:22-25. He testified that he could not remember anything he said that day but that he remembered what he would have said. *Id*. at 119:1-3. In rebuttal, Weisenstine testified that Furman stated, within a year of doing business with Par Funding, he knew of Joseph LaForte's criminal history. [ECF No. 1098] ("12-14-21 Trial Tr.") at 44:14-22. This is exactly the type of rebuttal testimony contemplated "to repel" or "counteract" evidence of the adverse party. *See Lezcano*, 296 F. App'x

at 803. Thus, because Weisenstine presented proper rebuttal testimony, the SEC was not required to have previously disclosed him as a witness and the Court did not err in allowing his testimony.

f. The testimony of Bradley Sharpe was proper.

Contrary to Furman's position, which he has argued two times previously before this Court, *see* [ECF Nos. 1028, 1048], Mr. Sharpe did not provide expert testimony, and therefore, was not an improper expert witness. Mot. at 9–10. Furman makes the generalized assertion that "Mr. Sharpe was permitted to testify as to his opinions and conclusions regarding PAR FUNDING's business operations and customs within the Merchant Cash Advance industry." Mot. at 9. Again, Furman fails to cite any specific portion of the record and the Court is left to guess as to what testimony Furman is referring too.

Contrary to Furman's assertion, Mr. Sharpe was not permitted to testify as an expert. Mr. Sharpe's testimony was limited to the observations he made as a manager at Par Funding. Resp. at 14–15. These observations did not include, for example, Sharpe's opinion as to Par Funding's business practices or whether Par Funding's operations were typical of the merchant cash advance business. *Id*. Rather, Sharpe testified simply to what "he learned from his review of Par Funding's records." *Id*. at 16.

In Reply, Furman argues that the SEC failed to lay the proper predicate with respect to Sharpe's testimony[4] and that Sharpe's testimony about "the number of lawsuits as an indication of the default rate" was expert testimony. Reply at 9. In support, Furman cites to *Johnson v. Ford Motor Company*, a case which notes that "summaries of pending litigation [are] inadmissible hearsay." 988 F.2d 573, 579–580 (5th Cir. 1993); *see also* Reply at 9. As a threshold matter, whether a summary of pending lawsuits constitutes inadmissible hearsay is a separate and

[4] Again, without any citations to the record.

distinguishable issue from whether a witness is providing improper expert testimony. In *Johnson*, the only connection between expert testimony and evidence about other pending lawsuits stemmed from the court's summary of *Johnson's own arguments* in support of his desire to introduce evidence of other lawsuits pending against Ford—not from any proposition by the court that a summary of other lawsuits filed by or against a company is always tantamount to expert testimony. *Johnson*, 988 F.2d at 578–579. As a result, Furman cannot show that Sharpe's testimony as to other pending lawsuits against Par Funding constituted expert testimony.

III. There was no judicial bias against Furman.

Under 22 U.S.C. § 455(a), a federal judge must disqualify himself if his "impartiality might reasonably be questioned." *United States v. Spuza*, 194 F. App'x 671, 676–77 (11th Cir. 2006). To disqualify a judge under section 455(a), the bias "must stem from extrajudicial sources," not court rulings, "unless the judge's acts demonstrate such pervasive bias and prejudice that it unfairly prejudices one of the parties." *Id.* (quoting *United States v. Bailey*, 175 F.3d 966, 968 (11th Cir. 1999)). "The test for determining whether a judge's impartiality might reasonably be questioned is an objective one, and requires asking whether a disinterested observer fully informed of the facts would entertain a significant doubt as to the judge's impartiality." *Bivens Gardens Off. Bldg., Inc. v. Barnett Banks of Fla., Inc.*, 140 F.3d 898, 912 (11th Cir. 1998).

Opinions formed by a judge based on "facts introduced or events occurring in the course of the current proceedings" are not grounds for a recusal motion "unless they display a deep-seated favoritism or antagonism that would make fair judgment impossible." *Liteky v. United States*, 510 U.S. 540, 555 (1994); *see also Jaffe v. Grant*, 793 F.2d 1182, 1189 (11th Cir. 1986) (finding that denial of recusal motion was appropriate where the Court's statements reflected its "perception of the underlying facts of the case" and a party's litigation tactics). Furthermore, "expressions of

impatience, dissatisfaction, [or] annoyance" made in the course of "ordinary efforts at courtroom administration" do not establish bias or partiality. *Liteky*, 510 U.S. at 555–56.

Here, Furman presents the Court with a list of twenty-three alleged examples[5] of the Court's judicial bias. Mot. at 10–12. Because Furman fails to provide the Court with any record evidence in support of his allegations, the Court will keep its analysis brief. As the Supreme Court has explained, "judicial rulings alone almost never constitute a valid basis for bias or partiality motion." *Liteky*, 510 U.S. at 555. The Court's issuance of rulings that were not in Furman's favor does not show that the Court held any bias or prejudice against Furman or favoritism to the SEC. Neither do "expressions of impatience, dissatisfaction, [or] annoyance" expressed during a trial. *Id.* at 555–56. As such, a disinterested observer fully informed of the facts would not entertain a significant doubt as to the Court's impartiality. *Bivens Gardens Off. Bldg., Inc.*, 140 F.3d at 912.

IV. The Court properly denied Furman's Motion for Judgment as a Matter of Law.

Furman argues that he was entitled to judgment as a matter of law as to Count VII of the Complaint. Mot. at 13. While Furman does not explicitly say so, the Court discerns that Furman's argument is as follows: the jury did not have a legally sufficient evidentiary basis to find that Furman violated Section 5 of the Securities Act because (1) the SEC did not plead an integration theory; (2) the SEC should not have "pierced the corporate veil"; and (3) because Furman only purchased securities from Par Funding—he did not sell them. Mot. at 13–15.

"Under Rule 50, [a] party's motion for judgment as a matter of law can be granted at the close of evidence or, if timely renewed, after the jury has returned its verdict, as long as there is no legally sufficient evidentiary basis for a reasonable jury to find for the non-moving party." *Chaney v. City of Orlando, Fla.,* 483 F.3d 1221, 1227 (11th Cir. 2007) (quoting *Lipphardt v.*

[5] These allegations are wholly unsupported, as Furman has failed to provide any record evidence to support his claims.

Durango Steakhouse of Brandon, Inc., 267 F.3d 1183, 1186 (11th Cir. 2001)) (cleaned up). Whether before or after the jury's verdict, the job of the district court is to "assess whether that verdict is supported by sufficient evidence." *Id*. at 1227. To demonstrate a *prima facie* case for a violation of Section 5 of the Securities Act, the SEC must show that (1) the defendant directly or indirectly sold or offered to sell securities; (2) through the use of interstate transportation or communication and the mails; and (3) when no registration statement was in effect. *S.E.C. v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 806–7 (11th Cir. 2015) (quoting *S.E.C. v. Calvo*, 378 F.3d 1211, 1214 (11th Cir. 2004)).

As a preliminary matter, Furman argues that he cannot be found liable under Section 5 because the SEC failed to plead a theory of the case including integration or a theory of the case addressing "piercing the corporate veil." Mot. at 13–15. These arguments are misplaced and represent a fundamental misunderstanding by Furman of the case against him.

First, the SEC's theory of the case is that Par Funding engaged in a single unregistered offering. Resp. at 23. It is not the SEC's contention that Phase I and Phase II of the Par Funding scheme represented two separate offerings—rather, they were different phases of the **same single** offering. *Id*. As such, issues involving a theory of integration are of no relevance to this case.

Next, Furman posits that he cannot be held individually liable under Section 5 because the SEC did not "pierce the corporate veil" as to Fidelis.[6] At trial, the SEC did not present a theory of liability focused on Fidelis; the SEC presented a theory of liability as to Furman individually. Throughout this case, evidence was introduced regarding Furman's individual participation in the Par Funding unregistered public offering through his soliciting of investors to purchase Par

[6] The Court finds this claim particularly misleading given the parties' representations in their Joint Pre-Trial Stipulation. The parties listed "concise statement[s] of issues of law on which there is agreement." [ECF No. 1091] ("Joint Pre-Trial Stipulation") at 6–7. One such statement reads, "Individuals can be held liable under section 5 if they were a necessary participant or substantial factor in the illicit sale." *Id*. at 7.

Funding Notes; distributing Par Funding marketing materials; and informing investors of the specifics of investing in Par Funding, such as the amount of interest they could expect. Am. Compl. ¶¶ 58–60; *see also* Resp. at 23; Joint Pre-Trial Stipulation at 2. Thus, Furman's individual liability is the issue and any argument by Furman that the SEC needed to "pierce the corporate veil" is misguided.

Separate from those two issues, the core of Furman's Rule 50(a) argument is that he cannot be liable under Section 5 of the Securities Act because he only purchased notes from Par Funding, he did not sell them. Mot. at 13. However, the SEC put forward a plethora of evidence detailing Furman's role in locating potential investors and soliciting those investors to purchase securities from Par Funding. Resp. at 20–21. In other words, Furman was indirectly offering to **sell** Par Funding securities. Such activities put Furman squarely within the ambit of Section 5 of the Securities Act. *See S.E.C. v. Chinese Consolidated Benevolent Association*, 120 F.2d 738, 739 (2d Cir. 1941) (holding that a defendant who solicits orders, obtains cash from purchasers, and causes both to be forwarded to purchase the bonds is not exempt from registration requirements). In his own words, Furman testified that his investors would not have been able to invest in Par Funding without him. Resp. at 21. Together, the evidence is sufficient to show that Furman was a "necessary participant" or "substantial factor" in the illicit sale. *Calvo*, 378 F.3d at 1215. As such, the Court did not err in denying Furman's Motion for Judgment as a Matter of Law.

V. The Court did not err in refusing to include jury instructions on exemption.

At the close of trial, Furman asked the Court to include jury trial instructions on exemption. The Court refused. Furman argues that the Court's failure to include jury instructions on the

possible exemption of either the Fidelis or Par Funding notes from the registration requirements under Section 5 of the Securities Act warrants a new trial.[7] Mot. at 16–17.

The Eleventh Circuit reviews claims pertaining to jury instructions only for an abuse of discretion, to determine "whether the jury charges, considered as a whole, sufficiently instructed the jury so that the jurors understood the issues and were not misled." *Johnson v. Barnes & Noble Booksellers, Inc.*, 437 F.3d 1112, 1115 (11th Cir. 2006) (citing *Bearint ex rel. Bearint v. Dorell Juvenile Group, Inc*., 389 F.3d 1339, 1351 (11th Cir. 2004)) (citations omitted).

> If a requested instruction is refused and is not adequately covered by another instruction, the court will first inquire as to whether the requested instruction is a correct statement of the law. *See, e.g.*, *Bueno v. City of Donna,* 714 F.2d 484, 490 (5th Cir. 1983). If the instruction is a correct statement of the law, the court will next look to see whether it deals with an issue which is properly before the jury. *See, e.g.*, *Collins v. Metropolitan Life Insurance Co.,* 729 F.2d 1402, 1405 (11th Cir. 1984). In the event both these standards are met, there still must be a showing of prejudicial harm as a result of the instruction not being given before the judgment will be disturbed. *See Hunt v. Liberty Lobby,* 720 F.2d 631, 647 (11th Cir. 1983); *Somer v. Johnson,* 704 F.2d 1473, 1477–78 (11th Cir. 1983); *Miller v. Universal City Studios, Inc.*, 650 F.2d 1365, 1372 (5th Cir. 1981).

Pesaplastic, C.A. v. Cincinnati Milacron Co., 750 F.2d 1516, 1525 (11th Cir. 1985). "When the instructions, taken together, properly express the law applicable to the case, there is no error[.]" *Id*. (citing *Johnson v. Bryant*, 671 F.2d 1276, 1280 (11th Cir. 1982)).

a. The Court did not err in refusing to provide jury instructions on exemptions pertaining to Fidelis.

As stated (and re-stated) throughout the trial, the SEC did not bring charges against Furman pertaining to an "unregistered problematic offering" of Fidelis notes. 12-14-21 Trial Tr. at 114:12-

[7] Furman also argues that the Court inappropriately shifted the burden of proof to himself. Mot. at 17. The Court need not address this argument, as the exemptions requested by Furman would have amounted to incorrect statements of law, as explained herein.

17, 115:18-22, 116:2-6. This is made doubly clear by the parties' Joint Pre-Trial Stipulation, in which the SEC notes that whether Fidelis was exempt from registration was not relevant to any Section 5 claim brought against Furman because the problematic unregistered offerings were those of Par Funding and/or ABFP not Fidelis. Joint Pre-Trial Stipulation at 6. To the extent that Furman's argument is, again, based on whether the Fidelis notes were exempt from Section 5's registration requirements, that argument is rightly foreclosed. One is not entitled to a defense for a violation they are not charged with committing—and one is certainly not entitled to a jury instruction on an issue that is not before the jury.

b. The Court did not err in refusing to provide jury instructions on Rule 506(b) or Rule 506(c) exemptions pertaining to Par Funding or ABFP.

Furman contends that he was prejudiced when the Court did not provide jury instructions on exemptions as to Rule 506(b)[8] or Rule 506(c) for Par Funding or ABFP. Mot. at 17. At trial, the Court engaged in a lengthy analysis, and heard oral argument, as to whether Furman, who was not the issuer of the Par Funding or ABFP notes, could avail himself of the exemption claimed by Par Funding under Rule 506(b). The Court determined that he could not. *See* [ECF No. 1104] ("12-15-21 Trial Tr.") at 8–16. As was discussed on the record, the exemption under Rule 506(b) doesn't travel with the security, it is attached to the issuer. 12-15-21 Trial Tr. at 8:12-21. Because Furman is not the issuer of the Par Funding or AFBP notes, the 506(b) exemption does not apply to him.

Turning to Furman's argument that the jury should have been instructed on a Rule 506(c) exemption as to Par Funding and ABFP's offerings, this argument is a non-starter. The issuers of those securities did not claim any exemptions with the SEC as to Rule 506(c). *See* 12-14-21 Trial

[8] For sake of clarity, Rule 506(b) of Regulation D is considered a "safe harbor" under Section 4(a)(2). To the extent that Furman and the SEC address the exemption under Section 4(a)(2), the Court's analysis of Rule 506(b) and Rule 506(c) encapsulates such arguments.

Tr. at 122:3-12, 126-128. Furman cannot avail himself of an exemption that the issuers never claimed. Accordingly, any jury instruction as to this exemption was rightly excluded.

VI. The SEC's closing remarks do not warrant a new trial.

Furman argues that he was prejudiced when "the SEC argued, during its closing argument, that there was overwhelming evidence against Furman and his failure to disclose material facts because he did not present evidence from various investors." Mot. at 18. As explained previously, the Court excluded certain investors advanced by Furman from testifying on relevancy grounds. *Supra* Section II.b.

To start, a party must raise an objection to errors in the opposing party's argument. *Ruiz v. Wing*, 991 F.3d 1130, 1141 (11th Cir. 2021) (citing *Oxford Furniture Cos. v. Drexel Heritage Furnishings, Inc*., 984 F.2d 1118, 1128 (11th Cir. 1993)). If there are no objections made, the Eleventh Circuit reviews the "allegedly improper comments" for plain error. *Id*. Plain error is clear or obvious and affects those substantial rights that call into question the "fairness, integrity, or public reputation of judicial proceedings[.]" *United States v. Chubbuck*, 252 F.3d 1300, 1302 (11th Cir. 2001) (cleaned up). The Eleventh Circuit is "reluctant" to grant a motion for new trial as the result of counsel's remarks during closing argument. *See Vineyard v. County of Murray, Ga*., 990 F.2d 1207, 1214 (11th Cir. 1993). Upon careful review of the trial transcript, the Court finds no indication that Furman objected to any part of the SEC's closing argument. 12-15-21 Trial Tr. at 62–82, 99–105. Accordingly, the Court reviews the allegedly improper comments for plain error.[9]

[9] Again, Furman fails to provide the Court with any record citations or a detailed description of the comments at issue. As a result, the Court reviewed the entirety of the closing arguments made by the SEC. 12-15-21 Trial Tr. at 62–82, 99–105.

In closing, the SEC stated, "Mr. Furman told you in his opening that you would hear from investors, that you would hear from a lawyer who gave him advice. We didn't hear from any of those people. He didn't call them during this trial." 12-15-21 Trial Tr. at 62:24-25, 63:1-2. While this does appear to reference the properly excluded testimony of investors on behalf of Furman, this unobjected to statement does not call into question the fairness of the entire proceedings. The SEC presented multiple other pieces of evidence showing that Furman made material misrepresentations to investors—including recordings of Furman and emails sent to investors containing knowing misrepresentations. To say that the SEC relied on the above statement to prove its case against Furman would be a distortion of the SEC's case-in-chief. Because the SEC's statement at closing does not compromise the "fairness, integrity, or public reputation of judicial proceedings," the court does not find that a motion for new trial is warranted.

CONCLUSION

For the foregoing reasons, it is hereby **ORDERED AND ADJUDGED** that Defendant Michael C. Furman's Motion for New Trial [ECF No. 1129] is **DENIED**.

DONE AND ORDERED in Fort Lauderdale, Florida, this 16th day of June, 2022.

RODOLFO A. RUIZ II
UNITED STATES DISTRICT JUDGE