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'S, MCELHONE'S, AND COLE'S MEMORANDUM OF LAW IN OPPOSITION TO THE SECURITIES EXCHANGE COMMISSION'S EXPEDITED MOTION TO STRIKE DEFENDANTS' EXPERT REPORT

Defendants, Joseph LaForte, Lisa McElhone, and Joseph Cole Barleta (collectively the "Defendants") file this Memorandum of Law in Opposition to the Securities and Exchange Commission's (the "SEC's") Expedited Motion to Strike Defendants' Expert Report (the "Motion to Strike", D.E. 1303):

INTRODUCTION

The SEC seeks to strike a report prepared by David A. Dunkelberger (the "Dunkelberger Report", D.E. 1298-17) without citing a single case in support of its position. The Dunkelberger Report is referenced in, and made an exhibit to, Defendants' Response in Opposition to the SEC's Amended Omnibus Motion for Final Judgments (D.E. 1297), and attests to and validates certain forensic reports prepared by Defendants' expert, Joel D. Glick. (*See* 1298-17, p. 2). In that regard, it is similar to the Declaration of Ryan K. Stumphazer, Esq. (the "Receiver Declaration", D.E. 1214-1) that the SEC filed with its Amended Omnibus Motion for Final Judgments (D.E. 1252, the "Omnibus Motion"), which purports to attest to and validate calculations performed by the SEC's expert, Melissa

M. Davis. (*See* Motion to Strike, D.E. 1303 p. 2, stating that the Receiver Declaration summarized figures that appeared in the Commission's expert witness report). Notwithstanding this obvious similarity, the SEC asserts that the Receiver Declaration is properly before the Court, but that the Dunkelberger Report is improper and should be stricken.[1] As support for its position, the SEC contends that the Dunkelberger Report was not properly disclosed pursuant to this Court's prior scheduling order (which only contemplated proceedings through a December 2021 trial date) and pursuant to the applicable section of Rule 26 (which requires disclosure of experts a party may use *at trial*). The SEC also presents a vague argument that the Dunkelberger Report is somehow improper because it is "merely an opinion to vouch for Glick's report" and is "duplicative."

For the reasons discussed below, the SEC's arguments are without merit. This Court sits in equity and is charged with the responsibility of fixing the amount of disgorgement and penalties for each of the Defendants based on the available evidence – including affidavits, declarations, testimony and other documentary evidence. The Dunkelberger Report is relevant and admissible evidence that must be considered in connection with the Omnibus Motion. The SEC is free to challenge the Dunkelberger Report, but it cannot bar the report based on inapplicable procedural objections and other meritless arguments.

MEMORANDUM

1. The Court's Prior Scheduling Order Does Not Apply at this Stage of The Proceedings

The SEC contends that the Dunkelberger Report should be stricken because it was not disclosed prior to the August 11, 2021, deadline set forth in the Court's prior scheduling order. (*See*

[1] For the reasons discussed herein, the Court need not – and should not – strike the Dunkelberger Report. But if this Court decides otherwise, the Court should exercise its discretion to strike the Receiver Declaration on the same grounds.

D.E. 521, titled "Amended Order Setting Jury Trial Schedule[.]"). The prior scheduling order projected a December 6, 2021, trial date, and *did not* address the current proceedings – which result from the Defendants entering into bifurcated settlements and executing consent agreements in which they specifically waived their right to a jury trial (the "Consents").

After the Defendants executed their Consents, the Court entered a Judgment of Permanent Injunction and Other Relief against each Defendant.[2] These Judgments created procedures for addressing the remaining issues in the case (disgorgement and penalties), and specifically abrogated certain deadlines set out in the prior scheduling order. For example, the Judgements specifically permit party and non-party discovery even though the prior scheduling order stated that all discovery (including expert discovery) was to be completed by September 10, 2021. (*See* D.E. 521, p. 2). The Judgements also specifically empower the Court to address the remaining disgorgement/penalties proceedings "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)." (*See* Judgements at p. 5, Section II – Monetary Relief).

The Judgments entered by the Court make two things abundantly clear. First, the current proceedings are not governed by the Court's prior scheduling order (which terminated with a December 2021 jury trial). Second, the Court specifically provided that affidavits, declarations, testimony and documentary evidence could be presented during the disgorgement/penalty phase of the proceedings – and the Dunkelberger Report is an attestation of the type contemplated by the Court in the Judgments. Accordingly, the Court's prior scheduling order in no way bars the Defendants from presenting the Dunkelberger Report at this time.

[2] *See* D.E. 1008, D.E. 1010 and D.E. 1018.

2. Defendants Did Not Need to Disclose Dunkelberger Pursuant to Rule 26

Plaintiff's assertion that the Dunkelberger Report should be stricken because the Defendants purportedly violated Rule 26 is also unavailing. Rule 26 (a)(2)(A) provides that "a party must disclose to the other parties the identity of any witness it may use ***at trial*** to present evidence under Federal Rule of Evidence 702, 703, or 705 [*viz*. expert testimony]." (*See* Fed. R. Civ P. 26 (a)(2)(A)) (Emphasis supplied). A plain reading of this rule demonstrates that it *does not* apply to an expert who will not be called at trial. *See Arble v. State Farm Mut. Ins. Co.*, 272 F.R.D. 604, 605 (D.N.M 2011) (holding disclosure requirements of Rule 26(a)(2)(A) did not apply to an expert whose testimony was offered solely for a *Daubert* hearing because the plain meaning of Rule 26 (a)(2)(A) mandated disclosure of only those experts a party may use *at trial*); *see also Perea v. Conner*, No. CIV-13-00697 KG/LAM, 2015 WL 11111312 (D.N.M. Mar. 23, 2015); *Van Den Eng v. The Coleman Co.*, No. 03 C 504, 2006 WL 1663714, at *14 (E.D. Wis. June 9, 2006) (holding Rule 26 (a)(2)(A) did not apply to an expert that would not be used at trial to present evidence).

In this case, Dunkelberger clearly *will not* be called as an expert witness at trial because the Defendants have entered into Consents and waived their rights to a trial. The Dunkelberger Report was filed in connection with Defendants' Response in Opposition to the Omnibus Motion. This motion will be decided by this Court, *which sits in equity* and is specifically empowered to consider evidence such as the Dunkelberger Report in these proceedings. Accordingly, the SEC has no basis to ask the Court to strike the Dunkelberger Report pursuant to Rule 26 (a)(2)(A).[3]

[3] Furthermore, even if Rule 26 did apply, the Court would have broad discretion to determine whether to strike the Dunkelberger Report on these grounds. *See Edge Sys. LLC v. Aguila*, 708 F. App'x 998, 1003 (Fed. Cir. 2017) (holding district court did not abuse its discretion by refusing to strike expert testimony based on failure to serve the expert report before the discovery deadline); *see also Guevara v. NCL (Bahamas) Ltd.*, No. 15-24294-CIV, 2017 WL 6598546, at *2 (S.D. Fla. Feb. 13, 2017), *aff'd*, 920 F.3d 710 (11th Cir. 2019) (same); *Miele v. Certain Underwriters at Lloyd's of London*, 559 F. App'x 858, 862 (11th Cir. 2014).

3. The Dunkelberger Report is Not "Improper"

The SEC's argument that the Dunkelberger Report should be stricken because the subject of the report is somehow "improper" is equally unavailing. This argument appears to be premised on two contradictory assertions. On one hand, the SEC contends that the Dunkelberger Report is a new expert opinion that would require the SEC to conduct expert discovery and depose Mr. Dunkelberger. On the other hand, the SEC asserts that the Dunkelberger Report is "duplicative" because it is "merely an opinion to vouch for Glick's report[s.]" (D.E. 1303, p. 2).

With respect to the SEC's first position, the SEC's alleged need to conduct discovery regarding the Dunkelberger Report in advance of filing its Reply brief does not constitute grounds to strike the report.[4] With respect to the latter position, the SEC provides no support (because there is none) for its contention that the Dunkelberger Report should be stricken because it is "duplicative" or is limited to vouching for the opinion of another. These assertions – which *are not* supported by any case law or other legal authority – do not challenge the report's relevance or Mr. Dunkelberger's methodology or credentials. Accordingly, the SEC has not presented any grounds to strike the Dunkelberger Report based on its substance. Furthermore, the SEC's position is completely hypocritical because the Receiver Declaration (which the SEC revealed for the first time when it filed its initial Omnibus Motion) serves to vouch for and affirm the calculations and conclusions of the SEC's expert, Melissa Davis. In this respect (and others) the Dunkelberger Report and the Receiver Declaration are markedly similar and should be treated the same, and the motion to strike should therefore be denied.

[4] Defendants issued a subpoena to depose the Receiver in order to investigate the Receiver Declaration, which is materially similar to the Dunkelberger Report. The Receiver then moved for a protective order, and Judge Reinhart granted it on the grounds that the discovery sought was not proportional to the needs of the case. This ruling strongly suggests that the SEC's objections about its inability to conduct discovery regarding the Dunkelberger Report (even though the SEC has not actually sought to take such discovery) do not provide grounds to strike the Dunkelberger Report.

CONCLUSION

The SEC has not presented *any* valid grounds to strike the Dunkelberger Report, and is simply attempting to prevent the Court from considering relevant and admissible evidence which demonstrates material flaws in the SEC's Omnibus Motion. This Court sits in equity and is charged with deciding the Omnibus Motion based on the evidence submitted by the parties – including declarations, affidavits, testimony and documentary evidence. The Dunkelberger Report constitutes such evidence, and must be considered by the Court.

If, however, the Court decides that the Dunkelberger Report should be stricken, Defendants specifically seek leave to amend their Memorandum of Law in Opposition to the SEC's Omnibus Motion so that they may revise those passages that reference and discuss the Dunkelberger Report and supplement those portions of the brief with citations to other evidence as appropriate.

WHEREFORE, the Defendants respectfully request that the SEC's Expedited Motion to Strike Defendants' Expert Report be denied, and that the Court grant such other or further relief as it deems just, proper and equitable. In the alternative, if the Court grants the SEC's Motion to Strike, Defendants request that they be given five business days from the date of the Court's Order to file an amended response to the SEC's Omnibus Motion.

REQUEST FOR HEARING

The Defendants respectfully request a hearing on the SEC's Expedited Motion to Strike Defendants' Expert Report pursuant to Local Rule 7.1(b)(2). Defendants believe that a hearing would be helpful to the Court because it would provide further context regarding the legal and factual arguments presented in this Memorandum in Opposition. A hearing will also allow the Court to address the parties' requests for relief which are contingent on the Court's ruling on the Motion to Strike (if the Motion to Strike is denied, the SEC has advised that it will request an opportunity to conduct additional discovery, and a further extension of time to file its Reply in Support of the

Omnibus Motion; if the Motion to Strike is granted, the Defendants have requested that they be given an opportunity to amend their Memorandum in Opposition to the Omnibus Motion). The Defendants estimate that approximately 30 minutes will be required for the hearing.

Dated: July 18, 2022

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of July 2022, I electronically filed the foregoing 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*
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