

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION**

Case No.: 9:20-cv-81205-RAR

SECURITIES AND EXCHANGE COMMISSION  
Plaintiff

vs.

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

\_\_\_\_\_ /

**NOTICE OF COMPLIANCE**

COMES NOW, Defendant Joseph Cole Barleta (“Cole”), by and through his Undersigned Counsel, and files the instant NOTICE OF COMPLIANCE

1. On August 3, 2022, the Eleventh Circuit Court of Appeal sent correspondence to Glenda Powers of Courtroom Services pertaining to the transcript, which has long since been ordered. See Exhibit “A”
2. Although it appears the Eleventh Circuit Court of Appeal does not command either Joseph Cole Barleta (“Defendant-Appellant”) or Ryan Stumphauzer (“Appellee”) from taking any affirmative steps, in an abundance of caution, Defendant-Appellant Barleta shall file in this Court the Transcript of the hearing on appeal. Andre G. Raikhelson, Esq.

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
(FT. LAUDERDALE DIVISION)

CASE NO. 9:20-CV-81205-RAR

SECURITIES & EXCHANGE  
COMMISSION,

Ft. Lauderdale, Florida

PLAINTIFF,

April 21, 2022  
Thursday

vs.

COMPLETE BUSINESS  
SOLUTIONS GROUP, INC.,

Scheduled for 10:30 a.m.  
10:49 a.m. to 12:13 p.m.

DEFENDANT.

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**HEARING  
MOTION TO COMPEL  
(VIA ZOOM)**

BEFORE THE HONORABLE JUDGE RODOLFO A. RUIZ, II  
UNITED STATES DISTRICT JUDGE

APPEARANCES VIA ZOOM:

ON BEHALF OF PLAINTIFF:

**AMIE RIGGLE BERLIN, ESQ.**  
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1 APPEARANCES VIA ZOOM (CONTINUED:)

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3 ON BEHALF OF DEFENDANT  
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7 ON BEHALF OF DEFENDANT  
8 LISA MCELHONE:

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11 ON BEHALF OF RECEIVERS:

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15 RECEIVERS:

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21 STENOGRAPHICALLY  
22 REPORTED BY:

GLEND M. POWERS, RPR, CRR, FPR  
Official Court Reporter  
United States District Court  
400 North Miami Avenue  
Miami, Florida 33128

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1 (Call to the order of the Court:)

2 THE COURT: Good morning, everyone.

3 We're going to make sure everyone's been let in. I  
4 think we've got everyone here. Lisa, can you hear me?

5 And in the courtroom, how's audio; okay?

6 So I think everyone's ready to go, so we'll get started  
7 here. We are here this morning in Case Number 20-81205,  
8 Securities and Exchange Commission versus Complete Business  
9 Solutions, Inc. et al.

10 I would like to get appearances for the record.

11 On behalf of the plaintiff.

12 MS. BERLIN: This is Amy Riggle Berlin on behalf of the  
13 U.S. Securities and Exchange Commission.

14 THE COURT: And on behalf of the defendants, in  
15 particular, those defendants that are going to be the subject  
16 of today's case -- or today's argument, Mr. Cole Barleta.

17 Go ahead.

18 MS. SCHEIN: Good morning, Your Honor. Bettina Schein  
19 on behalf of Joe Cole.

20 THE COURT: Good morning.

21 And on behalf of the Receiver, who I know really is  
22 going to be arguing today's motion. It's really the Receiver's  
23 motion, not on behalf of the SEC.

24 Who do we have here today?

25 MR. ALFANO: Good morning, Your Honor. Gaetan Alfano,

1 and I'm joined by Timothy Kolaya and by Ryan Stumphauzer,  
2 Receivers.

3 THE COURT: Okay, very good. And I do see that one of  
4 the folks is Mr. Kaplan, I wanted to ask you, who are here on  
5 behalf of this morning, just so I know for my notes?

6 MR. KAPLAN: Good morning, Your Honor. James Kaplan, I  
7 represent Lisa Mcelhone. This is my first appearance.

8 THE COURT: Okay, very good. Thank you, Mr. Kaplan.

9 And I do see Ms. Mcelhone and Mr. Cole, I see, are  
10 present and listening in, so welcome to them as well.

11 So what we're going to do this morning is have some  
12 brief oral argument, and I'm going to share where I'm at with  
13 regards to the motion to compel. Let's just recap briefly  
14 specifically what we're talking about.

15 There has been a motion to compel documents that has  
16 been, you know, pending for a little bit of time now, filed by  
17 the Receiver, the Court's Receiver, that is looking to obtain a  
18 number of documents that would deal with Mr. Cole's accounts  
19 and, specifically, not only his accounts, but some of his  
20 holdings, his assets, et cetera.

21 And my understanding going into today's hearing is that  
22 counsel has objected in large part due to concerns regarding  
23 implication of Fifth Amendment privilege.

24 And so that the record is clear, the motion that we are  
25 handling today is Docket Entry 1188. That's the motion to

1 compel defendant Joseph Cole Barleta to comply with court  
2 orders.

3 And my concern, Ms. Schein, I'll look to you, and I  
4 know you are objecting to the production on Fifth Amendment  
5 grounds, is somewhat twofold, right.

6 What the Receiver's counsel's pointed out, first and  
7 foremost, is that these documents have been produced already as  
8 part of some disclosures that Mr. Cole provided to the FDIC  
9 some time ago, I believe, on or about 2019, September 24th,  
10 2019.

11 And so the first issue here is there has been,  
12 essentially, to the extent we are going to describe these  
13 documents as testimonial in nature, there has been a voluntary  
14 production of these documents already; not only were they  
15 voluntarily prepared and previously generated, but as we have  
16 seen in some of the case law cited, for example, in the Point  
17 Break Media case, that's 343 F. Supp 3d, 1282, and that relies  
18 on Hubbell, which both parties mentioned from the Supreme Court  
19 in 2000.

20 You know, we don't have a Fifth Amendment concern, once  
21 an individual chooses to voluntarily prepare a written account,  
22 it serves as a waiver of the Fifth Amendment rejection and,  
23 therefore, because there's already been production to the FDIC  
24 of these documents, we would not have the benefit or the  
25 ability of -- Mr. Cole would not have the ability to invoke the

1 Fifth Amendment privilege.

2 And, you know, that's close from the Fisher case, which  
3 you also both cited, from the Supreme Court in 1976 dealing  
4 with an IRS production, okay.

5 So that's the first issue I have, is there's been a  
6 voluntary component of it, there's already been disclosure,  
7 that would nullify or eliminate the Fifth Amendment privilege  
8 that you have invoked.

9 The second argument, really, is an alternative  
10 argument, but just as, I think, strong as the first, is the  
11 Foregone Conclusion Doctrine being relied on by the Receiver;  
12 and really that comes down to the fact that we do have what is  
13 termed "reasonable particularity," in terms of identifying what  
14 the documents are; because this whole request, the only reason  
15 the Receiver even knows what to ask for is because of this 2019  
16 Interagency Biographical and Financial Report that he found in  
17 the Par Funding records, and that's the one that laid out  
18 Cole's assets, which was cash on hand, marketable securities,  
19 real estate, a propriety interest, and other securities,  
20 retirement funds, mortgages, liabilities, et cetera.

21 So that's where he -- the Receiver -- got wind of these  
22 documents. And so knowing that these have already been  
23 disclosed -- or that these have been produced, their existence  
24 is known. There is no, you know, testimonial act, in the sense  
25 of using your mind to come up with the disclosures so that you

1 are evidencing the existence of certain documents and putting  
2 these things together.

3           The way I read the case law both of you have relied on  
4 is under this Foregone Conclusion Doctrine, the act of the  
5 production is not going to be testimonial even if -- as I'm  
6 sure we'll hear -- it will convey facts regarding existence of  
7 accounts, possession, authenticity, or location of certain  
8 assets, because the Receiver has shown with this reasonable  
9 particularity that when he sought production, you know, back.

10           When the requests for production were issued, he  
11 already knew this material existed.

12           Now, we know from a couple of cases, the In re Grand  
13 Jury case, which you both cited, that's at 670 F.3d, 1335, we  
14 know that it has to be specific enough, right, you can't do a  
15 blanket request because that would defeat the whole purpose.

16           But here it's pretty specific. The Receiver has  
17 pointed out that specific disclosure based on the 29C report  
18 when, I guess, Cole was trying to get a bank together, and so  
19 he knew these documents, he knows of them, he disclosed them,  
20 they were part of his disclosures in his financial report; so,  
21 based upon that, we have the request for production; so, the  
22 Receiver's not on a fishing expedition, he knows what's out  
23 there, and he's asking for these documents.

24           So I will sum it up by saying I have two concerns here  
25 that would defeat any Fifth Amendment invocation:



1           One is voluntary production of waiver argument, under  
2 cases like Point Break and Fisher and Sala, right, from the  
3 Southern District here, and then the other one is, there's a  
4 Foregone Conclusion Doctrine that's applicable here because we  
5 know these documents were produced.

6           So I am compelled, based upon this case law, it seems,  
7 to find that any production I require would not run afoul of  
8 the Fifth Amendment, but maybe, again, I'm missing something,  
9 and I know it's a sensitive issue, so I thought it best to hold  
10 a brief oral argument today and give you an opportunity on  
11 behalf of Mr. Cole to tell me if there's something in that  
12 recitation that I put forth now that is wrong or perhaps you  
13 think one of these things is inapplicable.

14           So, I'll turn to you, Ms. Schein.

15           MS. SCHEIN: Thank you, Your Honor.

16           And I appreciate Your Honor having reviewed the  
17 submissions, and we're all familiar with the case law, Fisher,  
18 Hubbell, and the In re Grand Jury, which are controlling here.

19           So with regard to the exhibit that the Receiver  
20 attached which sets forth some financial information of  
21 Mr. Cole, that's also prepared from August of 2019. So the  
22 motion to compel is, as of now, in 2022, and that's what we're  
23 opposing, is compelling Mr. Cole to produce documents  
24 currently.

25           So, in August of 2019, that was the case, but from

1 August of 2019 until August of 2020 when this case first began,  
2 that's a full year of -- and have been the same type of  
3 sentiment, finances change, accounts could be closed, accounts  
4 could be opened, assets could be used to pay household  
5 expenses, if there's -- and particularly, in 2020, in March of  
6 2020 the COVID pandemic began and a lot of businesses closed  
7 down and there was severe financial complications from the  
8 pandemic.

9 So, to sum that up, things change. So to ask -- to  
10 compel Mr. Cole now to provide financial information, updated  
11 financial information, would require him to really testify to  
12 the existence of bank accounts or other assets, the existence,  
13 the location of them, and that he has them, and that is just  
14 what the Hubbell Supreme Court said is not permitted and  
15 Mr. Cole is permitted to assert his Fifth Amendment, you know,  
16 act of production rights not to produce these documents as for  
17 now.

18 The Receiver can't say, Well, you know that -- let's  
19 say, hypothetically, that the Bank Account A exists and we know  
20 that Mr. Cole has the documents in his possession. Let's take  
21 a step back and look at the In re Grand Jury case in  
22 Eleventh Circuit. There the Government had in its  
23 possession -- they had executed a search warrant -- and they  
24 had this digital data in their possession. It was encrypted  
25 and they couldn't open it, and there was hearing with regard to

1 the encryption that isn't in that case.

2           There the Court said we can't compel -- even though the  
3 Government had the digital data in its possession, we can't  
4 compel the defendant to unencrypt it because that would violate  
5 his Fifth Amendment right, so that would be the first.

6           Here we have a case called Hubbell, where there was  
7 immunity granted, documents were produced, and then a criminal  
8 case was brought. And the Court set most of those,  
9 specifically, Hubbell asked the Court to -- there was the right  
10 not to produce these documents.

11           The documents called for in Hubbell are the same as to  
12 here. There are classes of assets, bank records, properties,  
13 you know, all sorts of assets. And although, yes, they were  
14 actually existing in August 2019 financial statements, it would  
15 be akin to having Mr. Cole sit for a deposition to be asked:

16           Do you still have Bank Account A? Where are the  
17 documents of Bank Account A?

18           Can you produce the rest of those documents? What is  
19 left in that account?

20           It's the same thing as him testifying, except if you  
21 read the case law, that would be what we rely upon, we are  
22 opposing this motion to compel because it is quite similar to  
23 the Hubbell case, and the 2019 -- August 2019 financial  
24 statements can't be a substitution for what the Court has said,  
25 is that the Government must know the existence of the

1 documents, like in Fisher.

2 In Fisher, the taxpayer had given the tax returns and  
3 the underlying accounting documents to his lawyer. The  
4 Government asked the lawyer to produce those documents. The  
5 lawyer said, I can't. So then the taxpayer objected on act of  
6 production grounds.

7 So the Government said, Those tax returns are in the  
8 lawyer's office, along with the underlying accounting  
9 documents, and those are the records we seek. We know they  
10 exist, we know where they are, they're in the lawyer's office.  
11 That was Fisher.

12 Hubbell was different. And Hubbell is just like this  
13 case, because we're talking about a full year before this case  
14 was brought, and part of the year. The pandemic had started in  
15 March of 2020. And I would say, you know, looking at this, at  
16 Exhibit 1, things change, and the order for Mr. Cole to  
17 respond, his response is testimonial in nature, and that's what  
18 the act of production doctrine protects against, Your Honor.

19 THE COURT: Let me ask you something, Ms. Schein, and  
20 that's an interesting argument. Really, your argument is  
21 focused more on the now absence of reasonable particularity and  
22 the foregone conclusion theory because of the passage of time.

23 So what you're pointing out is, perhaps, in 2019, there  
24 may have been a true sense of universe of documents, but now we  
25 are moving farther from that, and it's starting to take on a

1 testimonial nature, again, because it's not so foregone.

2 I guess my frank question to you is -- let's take up a  
3 hypothetical. There are two Par Funding entities here that are  
4 being scrutinized, and that's Beta Abigail, LLC, and ALB  
5 Management, LLC. And we know that the FDIC disclosures, if I  
6 understand them, noted that there was a number -- or there had  
7 been a lot of assets that had been amassed and may be related,  
8 perhaps, to some of those entities.

9 You know, what I'm curious about, Fisher talks a little  
10 bit about not needing to know the exact location of specific  
11 documents. It just seems odd that we have a situation where,  
12 let's say, the Receiver becomes aware of a current asset that  
13 is being held by Mr. Cole and, ultimately, he's asking or  
14 requesting production of documents within that asset.

15 The argument that you're making, I believe, is, Well,  
16 that asset may have since depreciated or the value of that  
17 asset may have changed and, therefore, we no longer have that  
18 foregone conclusion.

19 And then my response might be, Well, yes, valuations  
20 may have changed, the balance sheet on something may have  
21 changed, but its existence has not.

22 And so, to me, you know, I think about -- and I know  
23 you want me to travel more down the Hubbell line, but I wonder,  
24 why would it -- we have voluntary production and previously  
25 generated, Cole has, and maybe just an updated version of that

1 previously generated document, that would be one argument, I  
2 guess, that would be a waiver.

3 But, alternatively, I don't think that -- at least the  
4 way I read In re Grand Jury -- that the Receiver would have to  
5 know the financial situation before asking.

6 He knows that there was production of those financial  
7 years 2019 to these certain assets, sure, I don't doubt that's  
8 what you pointed out; but whether it would have changed the  
9 direction, maybe he doesn't any longer own some of them, maybe  
10 he sold some of them, maybe some of them are no longer as  
11 valuable as they were, but certainly, it seems to me, that  
12 there's been a showing that we know, you know, the Receiver  
13 knows that those documents are out there, they're updated  
14 differently, but they're out there.

15 What would you say to that, is that like that  
16 reasonable particularity, you know, condition a little too  
17 thin?

18 MS. SCHEIN: Your Honor, I think we have to be,  
19 at least, help be guided by the case law, and the case law says  
20 that if the production is testimonial in nature. So, as you  
21 point out, assets of Mr. Cole ask if it's a foregone  
22 conclusion. So the fact that this was -- this stated assets  
23 back in 2019, and that we all acknowledge that the stated  
24 assets -- someone suggested -- can change in a year,  
25 particularly, a year that includes the pandemic. That's the

1 issue.

2           The issue is not the doctrine at the time or documents  
3 that the Receiver can obtain from a different source, a third  
4 party. The issue is the documents that are being requested  
5 from Mr. Cole. So, for instance, the Receiver already has  
6 millions of documents, and it's my understanding the Receiver  
7 has Beta Abigail, and Capital Source 2000, and ALB Management,  
8 they have all these documents.

9           And they have them up to the nature of -- and when the  
10 receivership was disbanded in December of 2020 -- or 2021 -- I  
11 can't keep track at this point -- but in any event, the  
12 Receiver can then took over CS2000 and ALB Management, so  
13 already they have all those documents.

14           Those aren't the documents that they're seeking.  
15 They're seeking documents of -- they're seeking Mr. Cole to, in  
16 effect, testify, Yes, I have these documents and this is  
17 where -- and they're in my possession and this is the state of  
18 the affairs now. So that's what they're seeking.

19           It's not the documents that are part of the  
20 receivership. So that's -- you know, the case law says it's  
21 not the documents themselves that the Fifth Amendment has the  
22 production doctrine concerns.

23           It's the act of producing the documents, it's the act  
24 of verifying, Yes, I have the documents, and yes, they're in my  
25 possession. That's the issue here, and that's what the case

1 law, you know, discusses, and that's --

2 THE COURT: Sure, but the problem is -- the problem is,  
3 we know he has them. I mean, we know -- page three of the  
4 reply, we're looking at numerous, specific disclosures in a  
5 financial report to the FDIC. I mean, we're not talking about,  
6 you know, a minor disclosure; which was in seeking to,  
7 hopefully, you know, pursue other financial opportunities in an  
8 effort to acquire a bank.

9 And we know that those specific disclosures are found  
10 by the Receiver as he's going through this Interagency  
11 Biographical Report, and we know he disclosed, specifically,  
12 his ownership of certain property in Philadelphia with current  
13 mortgage balance and market values of the property.

14 He discloses about ownership of interest for ALB  
15 Management, Beta Abigail's, Capital Source, Florida Memory  
16 Lane, Complete Business Solutions, and Full Spectrum.

17 He put out -- ultimately, disclosed the beneficial  
18 current value of the interest in several companies -- again,  
19 many which I just mentioned -- and security interests of  
20 \$186,000 with Fidelity.

21 We know that he disclosed debts owed to him from  
22 Florida Memory Lane in the amount 81,000 and then the 401-K  
23 from Fidelity. So, these are quite specific. All of these  
24 disclosures, we know they exist. There is no testimonial  
25 component; to the extent there even is one, it's been waived



1 because it's been voluntarily disclosed.

2           So if the Receiver asks for documents related to these  
3 types of categories, or assets, that would satisfy the line of  
4 cases on the Foregone Conclusion Doctrine because these have  
5 already not only been produced, but we know that, for example,  
6 had he sold or has any sort of new mortgage balance -- to use  
7 your example, on the Philadelphia property -- that doesn't  
8 suddenly transform; voluntarily disclosed documents to the FDIC  
9 don't now get new Fifth Amendment protection because the value  
10 of some of those documents may have changed.

11           I mean, the reality is the documents are what they are.  
12 We know that they exist because they have been disclosed. So  
13 questions regarding those documents which we know about were  
14 even voluntarily turned over would not in any sort of  
15 decision-making process in the mind, as we know when we talk  
16 about the example of the lockbox and things of that nature; we  
17 know that at that point there has been already that type of  
18 disclosure in the voluntary production to the FDIC.

19           So now to say that this is showing or exhibiting mental  
20 state to the level that's testimonial and attaches -- or the  
21 Fifth Amendment protection attaches, I think, are ancillary to  
22 the case law, would be a run-around or a net run-around the  
23 whole reasonable particularity standards, because everything  
24 here, for example, the categories I've read, in his own  
25 financial report, what he did disclose about Par Funding, the

1 property he has. We know that documents containing his  
2 disclosures are there, that's what the spreadsheet told me he  
3 is holding. He doesn't have to go and pull documents from his  
4 bank account or call Fidelity and get the updated balance, he  
5 already turned them over.

6 So any documents that are seeking those same categories  
7 but may within them have updated financial numbers, to me,  
8 doesn't seem, at least, to transform the data in those  
9 documents into a new Fifth Amendment challenge. And that's my  
10 concern; and if any exists, and hear the response from  
11 Receiver's counsel on point, because the argument really is a  
12 nuanced one, but I understand it, is that this is now  
13 reinvigorated with Fifth Amendment protection, you would delay  
14 this particular disclosure and what's happening today  
15 financially with Mr. Cole.

16 So, from 2019, and we're now in 2022, so I can see this  
17 argument maybe, you know, really becoming stronger the more  
18 time that passes; like if you have documents from someone's  
19 bank situation 15 years ago, understanding that we've had a lot  
20 of turmoil with COVID, I can see why these balance sheets are  
21 going to be different.

22 But I don't seem to find any supporting case law that a  
23 difference within the substance of the document itself would  
24 transform that part into a new Fifth Amendment problem.

25 But again, I want to make sure I'm not missing -- now,

1 what's the Receiver's view on this?

2 MR. ALFANO: We don't think there's anything  
3 substantive that has changed -- or should there be, because  
4 Mr. Cole disclosed these assets in September of 2019 and in  
5 July of 2020, less than a year later, on the subject with that  
6 -- you know, so the fact that -- I mean, I would hope that when  
7 we discover more about these assets in over the last 18 months,  
8 or so, there hasn't been any changes in his assets.

9 I think that's important. And I think the fact we're  
10 now in 2022 is not as important as, theoretically, legally, he  
11 was supposed to have not done anything to transfer, impair, or  
12 otherwise diminish these assets.

13 But we know the documents exist. We know he owns a  
14 home in Philadelphia, that's evidenced by -- we know he has a  
15 mortgage, that's evidenced by a mortgage. We know he had  
16 accounts, and that's evidenced by accounts.

17 And what we're asking for are the documents relating to  
18 the assets that he disclosed at the time, and he claimed at the  
19 time that this was the entirety of his assets, so I think we're  
20 on solid ground in terms of making this requirement.

21 What I don't understand from Ms. Schein is whether he's  
22 prepared to concede that we can have the documents at least up  
23 through September of 2019, or is there some argument -- and not  
24 updated ones -- or is there some argument that we can't have  
25 any documents at all because of the act of production?

1 THE COURT: But let me ask first, that's a point, I  
2 don't know. Ms. Schein, do you have a position on that?

3 Again, obviously, I know that the Receiver wants, you  
4 know, guidance on the motion to compel. I don't know that  
5 anything further, there's any disclosures, turnovers, certain  
6 substantive documents prior to the assets solely, but what's  
7 your position on that?

8 MS. SCHEIN: First, I think we have to clarify for the  
9 Receiver that documents were not produced with the form that  
10 the Receiver attached as an exhibit, that's first and foremost.

11 But this is a listing of the finances, a snapshot in  
12 time, August of 2019, that there weren't documents produced.

13 So in order for Mr. Cole to comply with the requests,  
14 they have to take action. Let's say, you know, hypothetically,  
15 he'd had to go online and type in, you know, "Cole data" to get  
16 the documents. But that's Cole, being the Eleventh Circuit has  
17 said that that act of production in the In re Grand Jury case.

18 And so the current documents -- here, before we take --  
19 from the very beginning of August of 2020, in that year,  
20 financial conditions -- let's say, hypothetically to this  
21 argument -- have changed substantially and maybe the account  
22 doesn't exist, maybe all the living expenses during  
23 October 2020. We don't know if it's current, and the Receiver  
24 doesn't know, and I don't know it, but it would require  
25 Mr. Cole to take action conduct and, of course, and in some

1 cases he's sort of asking if he does have them; Oh, I have the  
2 documents sitting on my desk and I'm going to give them to the  
3 Receiver. That's not the case.

4 But, you know, documents have to be obtained by  
5 Mr. Cole in order for him to provide them. So he has to obtain  
6 the documents, whether it's from a bank or some third-party  
7 financial institution. So there were not documents provided  
8 with this financial report in August of 2019, things have  
9 changed.

10 In order to respond to the motion to compel for the  
11 production of documents there is a testimonial aspect to  
12 producing these documents, and that is covered by the  
13 Fifth Amendment and the case law supports that, particularly,  
14 in the Eleventh Circuit, Your Honor.

15 THE COURT: Mr. Alfano, do you want to add anything?

16 MR. ALFANO: I do, Your Honor. Well --

17 THE COURT: Apparently, there is no middle ground in  
18 terms of like a limited production. It's kind of, to me, an  
19 all-or-nothing thing. I'm prepared to rule on the issue  
20 because it has been -- some time has passed in regards to, and  
21 I wanted to brief it to say, as I understand it the nature of  
22 this, and you, and Ms. Schein, and your clients, but it just --  
23 again, it may be a philosophical difference on the  
24 applicability of the Foregone Conclusion Doctrine, as well as  
25 the voluntary nature.

1 I just -- I cannot imagine, for example, I think if you  
2 took this argument to its logical conclusion, you know, you'd  
3 only be -- you'd be trapped in a snapshot in time, right. You  
4 would never been able to obtain documents, truthfully, unless  
5 you got them right after they were voluntarily disclosed or you  
6 became immediately aware of them and they were immediately  
7 requested, with any sort of case, in either financial  
8 circumstances, or otherwise, would then require to re-boot the  
9 testimonial aspect of the documents, I don't read the case law  
10 or parse it out that way.

11 I think, though, what it does is it tries to set  
12 guardrails to prevent a Government fishing expedition in the  
13 Grand Jury case, and others, by generally requesting categories  
14 of documents. But we know that it's been voluntarily produced  
15 to the FDIC in seeking to try to loan or get involved in a  
16 bank.

17 And that's the source of the information of something  
18 that's been voluntarily disclosed. There is really no -- in my  
19 view, at least -- with respect to a testimonial aspect that  
20 attaches when you know what's coming.

21 I mean, whether or not it may be slightly updated, to  
22 me, doesn't necessarily change the equation, because, really,  
23 the case law is more focused on reasonable certainty or,  
24 at least knowing what's out there so that there's not a bunch  
25 of guesswork being done by the parties, and so simply changing

1 the valuation of something -- and I mean some of these things,  
2 truthfully, I think are not a concern, the mortgage, you know,  
3 we got a note, we know the house is owned, I mean, these are  
4 pretty obvious things, right.

5 I don't know that a lot of these documents are really  
6 requiring us to do some sleuthing. We know they're out there,  
7 it's just getting the paperwork on them. But there are some  
8 that have changed in value, a 401-K, or whatever it may be, I  
9 fail to see how that valuation changes that existence of that  
10 account, per se, is now once again shielded by Fifth Amendment  
11 protection.

12 It's knowing that that account exists that triggers  
13 your ability to use the Foregone Conclusion Doctrine.  
14 Ms. Schein, I don't know what your take on it is, at least  
15 that's how the case law seems to break.

16 MS. SCHEIN: Your Honor, what if the account doesn't  
17 exist any longer?

18 THE COURT: Well, that's a good point.

19 MS. SCHEIN: It's a closed account.

20 THE COURT: Let's say it's a closed account, right.  
21 Let's say it's a closed account, then why wouldn't we have a  
22 document saying it's a closed account? I mean, we have a  
23 request for production, right, and show me that you have any  
24 closed accounts, operational accounts, based upon what the --  
25 if there's any liquidated accounts, then I think, absolutely,

1 you would just simply show documentation that the account has  
2 been closed.

3 I can't speak without saying, you can't make them, if  
4 you don't have them, it's not in your custody, care, and  
5 control, and we got to make sure that we don't sit here and  
6 truly send you on that type of fishing expedition.

7 I would ask counsel, I would assume, that if it no  
8 longer exists, it's a closed account, liquidated, making up for  
9 the shortfall in income due to COVID, then you can request it,  
10 and then an account showing that there's no longer -- for  
11 example, let's say, hypothetically, ALB Management liquidated  
12 it, or sold it, or transferred it, right, Mr. Alfano, you'd  
13 say, Great, just to document facts; right?

14 MR. ALFANO: We would take those documents, and then we  
15 would move to -- whatever the next step might be, in terms of  
16 investigating this particular document.

17 THE COURT: Correct. You know, I think that's the  
18 reality, we don't want to kind of get ahead of ourselves. I  
19 think it's more about trying just what's there, a snapshot, and  
20 I think at that point in time, if there is, you know, closure  
21 of accounts, that they don't exist, that we will have to, at  
22 that point, make a determination as to what they want to ask  
23 for in response to something, and we can litigate that if need  
24 be, but I think, for now, if there's something that's no longer  
25 a growing concern, or it's been liquidated or sold, that could



1 be reflected in the documentation and then that answers the  
2 request; right?

3 MS. SCHEIN: Your Honor, I just want to add, let's say  
4 Mr. Cole doesn't have documents, that he has to go online and  
5 put it in -- and then that doesn't have the documents, that in  
6 and of itself is testimonial in nature. That's the production.  
7 It's not the documentation. It's the cases that distinguish  
8 between the documents themselves and the act of producing the  
9 documents; and I think that's the difference here, the  
10 intention here, it's the act of producing these documents.

11 ALB Management, Beta Abigail, and those other companies  
12 that are part of the receivership entities, they have all those  
13 documents, so they're not talking about Beta Abigail and ALB  
14 Management, and the other ones, so on.

15 We're talking about a small subset, that production  
16 testimony, I don't want the accounts. I used to have my  
17 expenses testimonial, that's testimony. So the document  
18 production is testimonial, and that's what the basis is here,  
19 Your Honor.

20 I don't want to be remiss and not raise it, because, I  
21 believe, you know, pursuant to the Eleventh Circuit and the  
22 Supreme Court, that the act of production is applicable to  
23 these facts.

24 THE COURT: And does the Receiver want to respond?  
25 Again, I haven't -- I think we're --

1 MR. ALFANO: I do, Your Honor.

2 THE COURT: -- I think we're overstating not only the  
3 case law, but I think that that's not necessarily how it works.  
4 I mean, the fact that there's an asset where he's turning it  
5 over does not become testimonial when we know that he already  
6 has that bank account, has said assets, he's already disclosed  
7 them.

8 So on one end, there may be a voluntary waiver due to  
9 the prior production of the CBSG, but on the other side of  
10 that, there's also a situation where we know that these exist,  
11 we know they exist. We know he's got these accounts, we know  
12 where they are, the location. There is no testimonial aspect  
13 to turning those over because there is nothing, in terms of  
14 mental impression or decision-making.

15 It is wrong, I think, to say that this is the simple  
16 act of putting in a password is now transformed into  
17 testimonial. In fact, that line of argument is somewhat  
18 rejected by the case law. It's really -- we know it's already  
19 in existence. We know the bank statement is in existence.

20 We know he has a bank account, it's been disclosed.

21 So provided with that doesn't transform the act of  
22 sending it over is not a situation where the mental impressions  
23 are being exhibited or utilized from a testimonial perspective.

24 But go ahead, Mr. Alfano, you wanted to...

25 MR. ALFANO: Thank you, Your Honor. I will just state

1 that no law firm's alike. We may have to go in a file drawer  
2 and pull out documents isn't akin to, you know, basically, the  
3 schedule, that's not testimonial.

4 And while Mr. Cole may believe that we have --  
5 quote/unquote -- all the documents, the Receiver's not that  
6 confident. And it's absolutely in the Receiver's right to  
7 require him to provide these documents; and frankly, it  
8 benefits the investors, because otherwise we have to spend a  
9 lot of time, a lot of money with third-party subpoenas,  
10 subpoenas to banks, trying to analyze data from other sources;  
11 and, you know, before we do that, or in conjunction with doing  
12 that, we'd like to have baseline information that Mr. Cole  
13 voluntarily disclosed -- quote/closed quote -- all of his  
14 assets in 2019.

15 And I think we're actually entitled to it, and I think  
16 we'd be remiss in our responsibility to try and recover any  
17 last-minute investors in so doing this.

18 THE COURT: Yeah, I mean, look, we have to remember the  
19 genesis behind this is the -- and that's why I mentioned,  
20 really, more from a hypothetical issue, but the Beta Abigail,  
21 ALB Management point of the motion was related to the  
22 co-mingling concern. I mean, that's really what this all blows  
23 from, is that that being the Receiver's view, to follow the  
24 money here and figure out, as the financial report indicated,  
25 in August 31st, 2019, there was, roughly, 7.7 million in assets

1 that he had amassed; and so that, really, where this whole  
2 request comes from is trying to square-up some of these  
3 numbers; and I don't believe -- and I'm sure we can all agree  
4 -- that whatever you were to get is not what he meant with the  
5 inquiry, that I suspect there will be other questions raised by  
6 whatever is produced.

7 But to require the expedition and the time and money  
8 spent to -- of course, to the detriment of the Receiver's --  
9 excuse me -- of the investors -- because that's the Receiver's  
10 time and money that ultimately needs to be compensated. We're  
11 trying to go the course, right, that the information that we  
12 know is from the FDIC report and was voluntarily turned over at  
13 one point already; and then we can work from there before we're  
14 dealing with trying to go into other banks and get, you know,  
15 third-party subpoenas out there and whatnot.

16 So, you know, look, I think the biggest point there,  
17 Ms. Schein, is that a lot of the arguments about, you know,  
18 decrypting and putting in passwords, they don't rise to the  
19 level of testimonial in the sense that they are physical acts  
20 by opposing counsel, so it is kind of the example of the  
21 lockbox key, which, you know, to me, that is pretty on point.

22 I don't think the act of collecting -- which is  
23 physical -- triggers the testimonial aspects of the mental  
24 impressions or thoughts that would be required to have them  
25 withhold the documents that we especially know exist.

1           So I will say this, I think at this point, you know,  
2 obviously, the Court will write something on it because I think  
3 it's just important that we make it clear, but I am inclined to  
4 grant the motion to compel based upon what I heard, and I just  
5 want to go through and check my own notes before formally doing  
6 so in an order.

7           And, Ms. Schein, and the stay is of such an order so  
8 that you can take it to the Eleventh Circuit, I wanted to check  
9 with you that is still something that you are requesting,  
10 because I will, respectfully, decline to do such a thing. I  
11 think the right way to do it is go to the Eleventh Circuit.

12           I mean, ordinarily, if I thought it was a very close  
13 call and it's going to open the door to something truly  
14 testimonial and problematic, I would be more hesitant, but I  
15 think the case law -- at least in my view -- is pretty clear in  
16 that truthfully a lot of these documents are known to the  
17 parties, maybe not as Mr. Alfano says in such detail as  
18 Mr. Cole thinks they are, based on what's been produced  
19 already, but I don't think it's a situation here where, you  
20 know, we're opening up a Pandora's box of documents and really  
21 implicating the Fifth Amendment to a level that I would be  
22 compelled to stay the implementation of the ruling.

23           Now, I don't have a problem, for example, if I grant  
24 the motion to compel, require these documents be, you know,  
25 turned over by a date certain, which is what I would do, and

1 then, in the interim, of course, the Eleventh Circuit is free  
2 to stay my order, if they wish. I'm just concerned also that,  
3 you know, we are -- hopefully, we are at the last phases of  
4 this case, motions for disgorgement have hit, responses are  
5 going to be due soon, other than dealing with that phase of the  
6 case -- and again, it's only for certain players because we  
7 have settled and I've entered judgment as to numerous  
8 defendants, so we're down really to a core group of individuals  
9 here who are contesting disgorgement but have already  
10 stipulated as to liability; and before I rule on that, right, I  
11 can't get the Receiver to wind down, and I'm desperate, quite  
12 honestly, to get the Receiver in a position where they know  
13 what they have amassed and accrued and can start working the  
14 formulas to see how much they could return to Receivers.

15 Now, I think this works a little bit because, from what  
16 I'm hearing, this is a duel-track type issue. On the one hand,  
17 we have the SEC, which is going for a disgorgement with these  
18 individuals, but the Receiver can at least do their job in  
19 collecting. I got a motion this morning already on Kingdom  
20 Logistics, I believe, that I need to address. So they're still  
21 doing their job to collect, at the Court's request.

22 But honestly, this is kind of right in the middle of  
23 that, right, getting documents from one of the principal  
24 players who is contesting disgorgement would be valuable for  
25 the Receiver to figure out if there are other sources of assets

1 that ultimately came from Par Funding and made their way to  
2 non-Par Funding, or non-CBSG-related accounts been sold by  
3 Mr. Cole, or others, the Court needs to know that.

4 And so, I think that this is the right way to go  
5 forward, but I would ask you, Ms. Schein, are you still -- just  
6 so I'm aware, because I will, you know -- I want to, as I'm  
7 writing it, is to make sure I fully understand your position,  
8 are you still seeking a stay or are you intending -- and you  
9 may intend a stay, one way or the other, I don't know.

10 MS. SCHEIN: Yes, Your Honor. I just wanted to -- I  
11 thank you, Your Honor, I just wanted to put something else on  
12 the record to correct the record.

13 THE COURT: Sure.

14 MS. SCHEIN: The financial reports that the Receiver  
15 attached as Exhibit 1 to their reply to compel, in it there's a  
16 list of \$6,370,651 that's listed under proprietary interest and  
17 other securities.

18 Just to be clear, that amount was put down as part of  
19 CS2000 and the entities that were taken over by the Receiver,  
20 so that's something that was part of what might have been, you  
21 know, in his financial statement.

22 But since it's been taken over by the Receiver, that  
23 was MCA's business that he had with Bill Bromley, and that's  
24 been part of the receivership after the expansion of the  
25 receivership, so that doesn't -- that's not part of these -- of

1 this financial -- these assets that's in CS2000, and that's  
2 part of the confusion -- just to be clear on that -- so that's  
3 6-million-300-some-thousand dollars.

4 THE COURT: Okay.

5 MS. SCHEIN: Okay.

6 THE COURT: All right.

7 MS. SCHEIN: With regard to your question, I'm sorry, I  
8 hope I answered your question.

9 THE COURT: No, no, no, I just want to make sure -- I  
10 mean, again, I completely understand. I mean, it's your  
11 client, if he wants to go ahead and take it up, that's why, I  
12 mean, I'm not going to rule from the bench, I want to write  
13 something so that you have something and at least my reasoning  
14 -- right or wrong -- is explained, so I totally understand.

15 MS. SCHEIN: Yes, Your Honor. I think that I may take  
16 it up, this is a very discreet issue of the Fifth Amendment,  
17 and, you know, it's an issue that I have gone through based on  
18 the case law and the Receiver has their view; and I think, you  
19 know, perhaps the Eleventh Circuit might want to impart their  
20 view on this.

21 THE COURT: I would say, one way or the other, it would  
22 be beneficial that you take it up, in the sense that it could  
23 give us even more clarity on the law on this case, right, so I  
24 -- and I don't know how many cases have done it.

25 We know that a lot of them derived more from Grand Jury



1 issues and Government issues, perhaps, even though the Receiver  
2 context, it could be all the more important for them to opine,  
3 so I -- I mean, quite frankly, I'd welcome it, that if they get  
4 involved they might send us another case, especially for those  
5 of us who are in this case, it will give us some clarity, so  
6 I'm good either way.

7 MS. SCHEIN: Thank you, Your Honor.

8 THE COURT: All right. Is there anything else the  
9 Receiver needed to chime in before I conclude?

10 I don't want to keep you guys too much longer. I  
11 wanted to make sure I wasn't missing anything before I ruled on  
12 this, and I wanted to hear from Ms. Schein.

13 Is there anything else that we need to address at this  
14 point? I think I did have this set for a status because,  
15 truthfully, it was really more about this discovery and  
16 production issue, and I know that everyone is working to get  
17 ready on this for disgorgement anyway -- I don't want to  
18 interrupt everyone's preparation because those will be coming  
19 up soon; and I, also, I will say that, aside from the Receiver  
20 motion that's been filed, the motion for trial, which I need to  
21 rule on, so...

22 But I know that things are moving towards the next big  
23 phase of the case, and I expect in the next month or two we  
24 will be having some hearings on that. I will say -- I know I  
25 don't have everybody here, but I certainly think that when we

1 get to the disgorgement phase that I want everyone live again.  
2 I do this to save everybody time and money, but I think I'm  
3 starting to leaning towards to having live hearings; certainly,  
4 when we get into disgorgement, I want to have people present.  
5 I don't want to do much, if anything, of that significance on  
6 Zoom, so I just wanted you to get kind of head's up that I'll  
7 be scheduling that when we get those motions ripe.

8 But is there anything else from the Receiver's end,  
9 guys, that needs to touch on before I conclude?

10 MR. ALFANO: Your Honor, the only thing, we are  
11 scheduled at the end of this month to provide our update for  
12 the first quarter of 2022, and we'll provide certainly that  
13 financial information, in terms of the assets of the  
14 receivership, and other data, as well as information that would  
15 be current as of the date that we filed. And we hope to have  
16 that to you before the end of this month.

17 We think that that would be, obviously, helpful for the  
18 Court and for the parties, it could be best to understand which  
19 assets are included in the receivership at this point and the  
20 value of those assets.

21 THE COURT: Yeah, yeah, and I don't want to get -- and  
22 also, we have had -- the last report had, you know, quite a bit  
23 of expansion, in my recollection, not only quite a bit of  
24 expansion, right, but I've listed a lot of litigation stays  
25 from the Court of Common Pleas in Philadelphia, so I'm looking

1 forward to kind of getting an update on any steps the  
2 Receiver's had in collections, as well; and hopefully, you  
3 know, I don't know necessarily where we stand on the exact  
4 balance, I don't want to quote you on it today, but I look  
5 forward to seeing kind of where in the shortfall is and how  
6 close we're at maybe getting to -- I don't want to call it a  
7 magic number -- but fine or if that's to make the Receiver's  
8 holes that's always been our goal.

9 MR. ALFANO: Your Honor, I have that information,  
10 generally.

11 THE COURT: Do you mind, if you can you share that with  
12 me for my notes?

13 MR. ALFANO: Not at all, of course, Your Honor, I can  
14 make sure we provide that. So we currently stand at a total of  
15 165 million dollars in both cash and real and personal  
16 property. Cash, all of which is unencumbered, stands at  
17 105,000; the personal property stands at, approximately, 60,  
18 and we believe that that property, particularly the real  
19 estate, is conservatively valued. We're using generally  
20 acquisition prices as the value.

21 What that number does not include is any valuation for  
22 any accounts receivable, rather, you know, merchants and  
23 counter-parties were not -- we know they exist and we're  
24 pursuing them and be happy to talk about the collection  
25 activities in our report, and otherwise, but we're not, you

1 know, ascribing any value to that right now because those are  
2 not actual cash or, you know, real or personal property assets.

3 It doesn't include the jet that the Government has  
4 seized. It doesn't include the brokerage account that the  
5 Government seized. We think it's, approximately, somewhere  
6 between 15 and 20 million dollars.

7 It does not include the face value of any life  
8 insurance policies. It doesn't include the value of any  
9 third-party claims, and doesn't include the fraudulent  
10 conveyance claim down in Texas.

11 And there has been a number of merchants and  
12 counter-parties since the Court has lifted the litigation  
13 injunction that we have pursued who have entered into  
14 settlement agreements with the Receiver, and at times, although  
15 our preference is to try to get a settlement in a lump sum, for  
16 obvious reasons, at times, in order to facilitate that, those  
17 counter-parties have asked for payments over time.

18 And we currently have somewhere between 10 and  
19 15 million dollars of payments over time that are due to the  
20 receivership through our -- you know, through these settlement  
21 agreements. And we're very careful with the settlement  
22 agreements -- to make it clear -- that if there's already an  
23 existing judgment in Philadelphia, for instance, or some  
24 existing, in the status quo, that if there is a default on a  
25 particular agreement, we go back to where we started, with the

1 only understanding is they get credit for that.

2 And so far, I think we've been fortunate, in terms of  
3 having counter-parties honor commitments to make it.

4 Generally, Your Honor, you know, at a high level, that's where  
5 we stand.

6 THE COURT: Yeah, I mean, it sounds -- and if you could  
7 remind me again, kind of -- I hate to put a total on it, but --  
8 and I don't have my reports and notes in front of me, so I will  
9 get to what our kind of end goal was, where are we at, in terms  
10 of full recoupment of having a shortfall? I know some of this  
11 gets you deals to perhaps make up for it by way of a  
12 disgorgement, but I don't know how realistic that will be, even  
13 if those judgments are issued, collections, and all that,  
14 challenges.

15 Do you have a sense of -- and again, I know it's hard,  
16 because right now, just by my numbers, without including the --  
17 you said, the 105 million, conservative, on the 15 million real  
18 estate side, for sure, given the way things are going lately  
19 market-wise, but, you know, you're not even including any sort  
20 of other claims in that, and let's just say he's added a jet,  
21 debits, you know, to maybe close to 185 million -- still a  
22 little conservative number -- and I agree with you, trying to  
23 count and include settlement amounts in the future is too  
24 precarious, I wouldn't want to let, you know, investors think  
25 they're going to recoup certainly on 15 million; that's our

1 hope, obviously, at the high end, perfect scenario, we know  
2 that will probably happen with those folks that have settled  
3 out and certainly can be collected, will.

4 But where -- where do you see us, in terms of our  
5 ultimate goal? I mean, I think it was 300-and-some million,  
6 but I may be misstating that.

7 Do you know, Mr. Alfano, kind of where our baseline  
8 number was when we all started?

9 MR. ALFANO: Your Honor, I think I can maybe answer it  
10 this way, in terms of the information that the Receiver  
11 provided in a declaration on, I believe it was last Friday, to  
12 the Court; that with respect to the Par Funding entity --  
13 keeping in mind we have CS2000 and other, you know, other  
14 receivership entities -- but with respect to the principal  
15 Par Funding/CBSG entity -- and this would include the agent  
16 funds that were responsible for taking money from investors as  
17 well -- the total of investor principal for CBSG/Par Funding,  
18 and the various agent funds, I believe, was 550 million  
19 dollars, and that Par Funding returned to investors 300  
20 million.

21 THE COURT: So, based on that, you're looking at, you  
22 know, let's say, 150 -- or 200 -- let me see, you said it was  
23 550 million?

24 MR. ALFANO: It was 550 minus 300.

25 THE COURT: Okay. Right. And that was what they

1 returned, so everything that we are working on now -- you know,  
2 for lack of a better word -- it's towards that  
3 250 million dollars -- I mean, I want to make sure because this  
4 is the problem -- you have to understand, make sure -- listen,  
5 I understand, Ms. Berlin, FDIC has its own involvement, okay,  
6 so we need to try to put this in layman terms, because I get,  
7 as you all know, 50 e-mails a day on this stuff, so I'd like to  
8 know from a very nuts and bolts perspective what we're dealing  
9 with today, in terms of real numbers.

10 So, Mr. Alfano, as you were saying, that amount that  
11 was left behind, do you kind of calculate that or connect that  
12 with what you currently been able to recover?

13 MR. ALFANO: I do, with a couple of exceptions,  
14 Your Honor, because some of --

15 THE COURT: Tell me what those are.

16 MR. ALFANO: Sure. We have the CS2000 is receivership  
17 entity, we collected cash and assets in connection with CS2000.

18 I don't know yet about the treatment of the two  
19 Multi-Strategy Funds, which were ABFP, Magnosi (phonetic)  
20 Multi-Strategy Funds, which were not pure MCA funds, but had an  
21 MCA component, and had other components, either life insurance  
22 policies or, in one case, a very liquid stock investment of  
23 about a million dollars. I'm not certain how those would be  
24 treated.

25 But in terms of -- just in terms of a larger picture

1 for the bulk of the Merchant Cash Advance, we understand that,  
2 you know, you know, 550 million was raised from investors and  
3 300 million has been returned; whether that was denominated as  
4 a return of principal or interest, we're not making that  
5 distinction, but just in terms of dollars in and dollars back  
6 from the investment, again, with the principal companies.

7 THE COURT: Right. I mean, look, I think, to state it  
8 another way, obviously, there's a lot of things we're not  
9 really sure about. I mean, you've mentioned a number of them,  
10 and we're not including, not only the other entities, CS2000,  
11 and everything else, not only situations with the 100 and --  
12 excuse me -- third-party claims and advance claims, but I think  
13 it's important, you know -- look, I'm a kind of a  
14 glass-half-full kind of guy, and so, you know, one of the  
15 things that needs to be reflected as we continue to move  
16 forward to disgorgement, I would like to have a moment where we  
17 can at least look back on the work that the Court and Receiver  
18 have done in terms of recovery and recognize, I think, as far  
19 as these types of recovery efforts go -- I don't think there's  
20 any other way to deem this at least some sort of a success in  
21 recouping funds.

22 I mean, if you're working off these numbers -- and I  
23 know that we get different sets of numbers depending on who you  
24 ask, so I understand that, but trying to put my hands around  
25 when this case, hopefully, within the end of this calendar year



1 is my hope comes to an end and the Receiver is finally  
2 determining pay-outs -- and that's going to change because  
3 they're going to continue to see how things come in with the  
4 settlements, et cetera, but -- and again, you correct me if I'm  
5 wrong -- 550 million, we know, and we know -- who knows how  
6 they deem the 300 million, it could have been principal, it  
7 could have factoring interest, whatever it is, you know,  
8 however they want to do it with the MCA business, 300 million  
9 went back to the investors, and so we had a shortfall of 250  
10 million. I mean, and if you really want to break it down as  
11 simple as that, I think that's true.

12           And so when you look at 250 million, you're telling me  
13 today that you have 105 million in cash and 60 million,  
14 conservatively, appraised assets, I have to believe --  
15 understanding that, you know, if you do the very rudimentary  
16 math -- you're at a shortfall of 250 minus 150 or 190, I mean,  
17 I'm just doing very basic math -- that yes, that is a big  
18 amount of money still out there that is not really being  
19 captured, but again, it's not taking into account a number of  
20 other funding or recovery sources, including, you know,  
21 possible fraudulent conveyance issues, third-party claims,  
22 collection activities, you know, other funds that we're not  
23 including in there, all of that, you know, and things like, you  
24 know, liquidation of the debt, for example.

25           So there are a number of other items that we cannot put

1 the dollar amount yet that I think it sounds like -- trying to  
2 be conservative about it -- we'll take a chunk out of what  
3 remains from the -- let's say 250 million shortfall when money  
4 was returned to investors.

5 So is that -- my summary there, Mr. Alfano -- I don't  
6 want to oversimplify -- but is that a fair kind of recap of  
7 where we're at right now?

8 MR. ALFANO: Absolutely, Your Honor. Pardon my voice.

9 And I would invite Mr. Kolaya or Mr. Stumphauzer to,  
10 you know, to discuss that item as well, because certainly they  
11 are knowledgeable.

12 THE COURT: Sure, I would welcome -- I mean, I didn't  
13 set it up for a full status and I know the report's coming, and  
14 so there's more of a discovery, but it was an opportunity to  
15 talk to you guys and I like to see how things are going, and  
16 we're going to get it in writing soon, but do you guys  
17 agree kind of with -- again, I know that I'm simplifying this  
18 big time, but the narrative here has mattered to me for a long  
19 time, because people have expressed -- really, the investors,  
20 who have expressed their doubts as to what we have done, or  
21 what we have accomplished, and know that they're not going to  
22 probably get their full return on investment back, they're not  
23 going to get their full principal back, et cetera.

24 But I'd like to telegraph to them the hard work that's  
25 been done by the Receiver, the invaluable work that's been

1 done, because these are not small numbers. I mean, over the  
2 course of -- and I forget, six years, I think, it's actually  
3 coming up now in July -- that over the course of two years, I  
4 think it needs to be said, that we have been able to marshal  
5 assets that they have the positive side of recovery, and that's  
6 not including what I know you guys are still doing, because,  
7 you know, counter-party issues and merchant issues, I'm not  
8 putting a number on that right now, but I know that there's  
9 some positive cash flow on some of these other funds that we're  
10 still trying to quantify -- and, of course, none of this takes  
11 into account should there be any sort of disgorgement, either  
12 by way of -- not only disgorgement -- by the way, and I meant  
13 to mention this, Mr. Alfano, I don't know -- did this number  
14 work into it any of the disgorgement that has been agreed to by  
15 certain parties, the numbers, they're not -- sometimes people  
16 like to get out calculators and re-insert numbers -- does any  
17 of this number go to that, or you're not including any of that  
18 either; right?

19 MR. ALFANO: No, it's part -- part of it does, because  
20 the extent that there's been either turnover of property or  
21 cash payments, those were included as of April 15th.

22 But there's other commitments with respect to those  
23 settlements that haven't been -- that are not timely yet, so  
24 they'll be, hopefully, additional payments in the future made  
25 over time.

1 THE COURT: Mr. Kolaya, do you want to jump in and tell  
2 me if you want to take a step back if I'm missing something on  
3 that? But I think, look, that's another -- there is some sort  
4 of duplicitous issues by the settlements that have been reached  
5 by the SEC with certain of the defendants, and I know that; and  
6 like you said, turning over the properties and stuff, but it  
7 doesn't stop it, if there's some money there, that it,  
8 hopefully, those are, pursuant to the settlement agreements,  
9 paid -- and I know that there's -- I've read them and reviewed  
10 them, there's a number of provisions ripe.

11 These sums are to be re-paid for the agreed-upon cases.  
12 I'm not looking at anything that's going to be litigated in the  
13 coming months, but it sounds like that's going to be included;  
14 and when you start adding that up, and everything else, I mean,  
15 I don't know how much will be left on the cutting room floor,  
16 but we are certainly heading in a very strong direction.

17 I never thought any investor would be able to make a  
18 full recovery on this case, it's just very difficult. No one  
19 ever wants to get their hopes up because we know how difficult  
20 these cases can be when it comes to unwinding all of these  
21 things, but it does sound like we're making some positive  
22 strides and we're going to come somewhat close, I mean, in  
23 terms of the recoverable we set when we started.

24 But do you agree with that assessment? What's your  
25 take on that?

1 MR. KOLAYA: Your Honor, I just want to make a few  
2 clarifications. From the 550 million raised minus the 300  
3 million returned in principal and/or interest, that is only for  
4 Par Funding/Complete Business Solutions Group.

5 THE COURT: Right.

6 MR. KOLAYA: And the, approximately, 165 million that  
7 we have in cash and other assets, that's for all receivership  
8 entities, with some exception of Mr. Alfano's claim, so I just  
9 wanted to clarify that there is going to be a larger delta,  
10 because there is a balance owed on other receivership entities,  
11 for example, CS2000 and some of the other related Merchant Cash  
12 Advance companies.

13 I also wanted to clarify as well that we're simply  
14 talking about how much is owed to investors versus how much is  
15 recovered. I want to make very clear that the Receiver is not  
16 taking any position today or of any kind about how the amounts  
17 we collected may or may not impact disgorgement numbers that  
18 should be awarded against the defendants.

19 That's not our purview or our beliefs.

20 THE COURT: Sure, because there is going to have to be  
21 an accounting at that point, once we get through the  
22 disgorgement phase of the case.

23 Now, you mentioned the larger delta. It's so hard to  
24 tell, do we know what we're going to be recouping, if anything,  
25 these other funds, right, solely on Par Funding and CBSG.

1           What sense do you have on the other funds and how much  
2 more investors' principal's tied up in those funds? We have --  
3 I know there's a number of different funds, that's the policy,  
4 there's so many funding, you know, and most introductory  
5 meetings here and the footnotes have issues with so many  
6 different entities that are all interrelated in a receivership,  
7 do you have a sense of how much of a swing I'm going to get on  
8 that delta or we don't really necessarily know yet?

9           MR. KOLAYA: I'm not sure we have a precise number to  
10 give the Court today. If that's something the Court is  
11 interested in, we'll try to get that prepared for the May 1st  
12 report. The number is one, the other receivership was in the  
13 tens of millions of dollars, not in that same -- not in the  
14 millions.

15           THE COURT: Sure. And are those -- never had any  
16 return on those, right, meaning outside the Par Funding, they  
17 returned a portion, those were put in a receivership and we got  
18 them and they did great, right, to the extent that there was  
19 anything left there; is that right?

20           MR. KOLAYA: Well, so, for example, one of the funds is  
21 Multi-Strategy Funds, and that Multi-Strategy Fund not only  
22 invested in some of the other MCA businesses, it also held some  
23 life settlement policies and a few of those policies have, in  
24 fact, matured, so we have received some money back on that  
25 particular fund.

1           And as far as the other MCA funds, we are absolutely in  
2 discussions, negotiations, and in some cases litigation of  
3 merchants, certainly, to get those e-mails as well.

4           THE COURT: Sure. I mean, that's how most of the  
5 litigation's done, I think, to get a total.

6           MR. KOLAYA: That's correct.

7           THE COURT: I mean, look, we know from multiple reports  
8 that when it comes to merchant cash-advance model and the  
9 recovery that the biggest challenge is that the top five, or  
10 whoever it is as the borrowers, aren't straight financial -- a  
11 lot of what we have, we've always said that from the beginning,  
12 that's what I have been shown in multiple reports given the  
13 financial statements, some of the primary borrowers, right,  
14 that we've talked about, so it's going to be a challenge on  
15 that front to make that kind of recovery.

16           But I will say -- and again, I go back to my other  
17 point -- I'll wait, obviously, for the May 1st report, but I  
18 think for purposes of just putting a bow on it today, even  
19 though we want to be careful in how we condition and explain  
20 how things are going, okay, it is important -- for example,  
21 when we walk into the disgorgement phase of the proceedings,  
22 I think it is important that we at least have found a very  
23 macro level analysis of where we stand.

24           We are kind of, I think, in the fourth quarter of the  
25 game here, we are in a position where we got through the

1 liability phase, we've settled on certain defendants, we have a  
2 quarter of the case left and it is very important. We have to  
3 closely analyze all the arguments that are forthcoming from  
4 Ms. Schein. So all that's going to come in, we're going to  
5 have hearings on that.

6           Once we get through that, though, I think the reality  
7 is back to the Receiver, right; I mean, once the Court has  
8 ruled on all that, that we have disclosure of whatnot, we're  
9 here to give you guys the bandwidth you need to wind it down,  
10 or at least begin working the numbers, right, because I know  
11 that the numbers may be garnished a long time, but you'll  
12 certainly be trying to at least figure out -- as you guys have  
13 said, through the investors, right -- that's what you work on  
14 and how you're doing that, what I do on the disgorgement, and I  
15 know you guys are going to keep trying to collect on the  
16 merchant side as much as you can, or any other assets that you  
17 may be able to procure, but I want to kind of walk away  
18 at least with the understanding that we are on this, and that  
19 it's always been known, but we have to also acknowledge that  
20 it's not a number to laugh at, I mean, it really isn't.

21           I mean, we've done a lot of work to get these coiffures  
22 as full as possible for the investors; and that the investors,  
23 I think, should know that, so we're not spinning our gears with  
24 merchants, that there's been plenty that's covered and there's  
25 more to come, we'll see how far we can get, but I know you guys



1 can get us there.

2 So, is there anything else you guys wanted on the  
3 Receiver side, any other updates?

4 MR. ALFANO: No, Your Honor.

5 THE COURT: Okay. All right.

6 MR. KOLAYA: Your Honor, the only other thing I would  
7 want to do is just backtrack for a moment the motion that's on  
8 for today.

9 THE COURT: Yes.

10 MR. KOLAYA: As somebody who practices in this district  
11 quite a bit and has a number of discovery hearings with the  
12 magistrate judges who particularly handle these issues are  
13 fairly persistent on 37(a)(5)(A), which is the mandatory  
14 fee-shifting for a motion when there's a failure to produce  
15 documents. Did Your Honor want to address that today or  
16 subsequently?

17 THE COURT: Yeah, it's a good point, because I know  
18 that you guys have addressed that and you've made that request.  
19 You know, it's a pretty -- as you know, under Rule 37, it's not  
20 discretionary, I mean, in a way, right; I mean, it's pretty  
21 straightforward, that there has to be that type of  
22 fee-shifting. And this is a matter that is litigated a little  
23 bit, obviously, the Receiver, you know, one thing that I think  
24 I have to incorporate in my order -- given that it is part of  
25 the request and traditionally with discovery matters I will

1 make a finding of entitlement and then I will supplement it  
2 later if I rule in your favor by way of affidavit.

3 But I think the bottom line that you're requesting is  
4 that the Court make a determination as to entitlement under  
5 Rule 37(a)(5)(A); right?

6 MR. KOLAYA: That's correct, Your Honor.

7 THE COURT: All right, I will take a look at that as  
8 well because I think it's part and parcel of the discovery  
9 motion. And you know, we have so many handled by Judge  
10 Reinhart, but I also handled some of these myself, it's just  
11 faster, truthfully, than giving this to him and doing the  
12 report, I didn't want to waste everybody's time and money on  
13 that, it's like a level objection.

14 So, I'll find that anything that I write-up, but that's  
15 important, so thanks for flagging that for me.

16 MR. KOLAYA: Sure.

17 THE COURT: Was there anything else -- and, Ms. Schein,  
18 obviously, I'm not making any determinations on amounts, you  
19 know, but the reality is it's a simple discovery fee-shifting  
20 issue. I mean, it's pretty standard, you know that, but is  
21 there anything you want to add on that point?

22 MS. SCHEIN: There is, Your Honor, thank you.

23 I would say that the Fifth Amendment right, I don't  
24 believe that a person should be penalized and they should be  
25 fee-shifting the Fifth Amendment rights. Mr. Cole responded to

1 all the requests during the course of discovery.

2 This request, I advised him, it's a Fifth Amendment  
3 issue and he has the right and did follow-up and strongly  
4 object to the fee-shifting for someone asserting their  
5 Fifth Amendment constitutional right. So that's just as  
6 important 37(a)(5), because he has responded to discovery and  
7 throughout the proceedings. And if Your Honor would like, I  
8 will provide all of those responses, but --

9 THE COURT: No, I will -- I will -- let me just turn  
10 back to Mr. Kolaya, one thing, and that's why I don't want to  
11 make a ruling, so without necessarily double-checking, but, you  
12 know, there is Rule 37 and there's Rule 37. One of the things  
13 I want to double-check is objections to production, that  
14 implicates constitutional concerns like this are not perhaps  
15 the dilatory type of -- or boilerplate objections to production  
16 that we ordinarily see that definitely should trigger fees.

17 And so, I don't know, Ms. Schein, do you want to bring  
18 -- I understand Ms. Schein's point, perhaps, not  
19 run-of-the-mill discovery on these particular documents, and is  
20 there anything you want to add -- and I'm going to check it  
21 independently, but I think if there's anything you want to add  
22 on that?

23 MR. KOLAYA: Your Honor, the only objections to  
24 37(a)(5)(A) is if the moving parties failed to confer in good  
25 faith prior to making the motion, that's obviously not the

1 case.

2 The second is if the opposing parties' non-disclosure  
3 was substantially justified, we think Your Honor will rule in  
4 our favor and order the production, which, it appears that you  
5 will be, that the position was not justified.

6 And then third is other circumstances which make an  
7 award of expenses unjust. I'm not aware of any case law that  
8 says making an objection specifically because it's  
9 Fifth Amendment grounds makes some part of expenses unjust.

10 Ultimately, the Receiver -- on behalf of the Receiver,  
11 the investors that had to incur these costs pursuant to  
12 documents that we're entitled to, so we think that the  
13 fee-shifting should be ordered in this case.

14 THE COURT: And I'll look at that, Ms. Schein. I mean,  
15 I want to check it. As we know, I think there's -- you know,  
16 there are different levels of discovery objection, and I agree  
17 with you, and I wanted to double-check, obviously, really, it's  
18 not a situation here that a slam-dunk on entitlement under 37.

19 But I will check it to make sure I feel comfortable  
20 that there should be that type of fee-shift and that I should  
21 award costs and attorneys fees in this particular discovery;  
22 because, again, I note that there are situations, certainly,  
23 where it's not necessarily warranted.

24 And in a substantial justification, I will tell you  
25 partly why I wanted to have the hearing was on the papers -- I

1 read everything, and you pointed out a couple of nuanced things  
2 that were not argued, as you know, necessarily, in the papers  
3 in that detail, and so I have to have a finding for that range  
4 is a privilege issue. Ms. Schein knows that. If I do that --  
5 obviously, if I don't, then, obviously, there will be no  
6 payment of expenses under (5)(a); okay.

7 MS. SCHEIN: Thank you, Your Honor, I appreciate all  
8 that; and, of course, you know my position on the status of  
9 that, and we have expunged all discovery.

10 I just want to make one more comment, Your Honor.

11 THE COURT: Sure, yeah, go ahead. Go ahead, yeah.

12 MS. SCHEIN: That the Receiver -- that the recovery,  
13 I just want to say that we will be submitting substantial  
14 papers on disgorgement.

15 THE COURT: Sure.

16 MS. SCHEIN: And I would just like to note -- this is  
17 my opinion, of course -- that the Receiver has collected a lot,  
18 and I -- in my view, it's due to the substantial underwriting  
19 that was done at the time the MCA business was operating, and  
20 at the time the Receiver shutdown the business there was  
21 at least 32 million dollars in the account at the time.

22 I just want to put that on the record, as I think those  
23 facts are important to note. But I thank Your Honor.

24 THE COURT: No, I bring it out, Ms. Schein, I think  
25 it's very important when we get to that phase of the litigation

1 that we, you know, we're going to need to be very careful,  
2 right, because the duplicative nature of disgorgement and  
3 ongoing collection is a concern for the Court.

4 I don't want to have a double-counting. I want to make  
5 sure that I get a good sense of what's already been turned  
6 over, what's been taken, and what necessarily -- and I think  
7 that we saw, for example -- and I think this is the date, I  
8 think in one of the introductory paragraphs of the SEC's  
9 motion -- they took great pains to point out that they don't  
10 want this to be -- for lack of a better word -- side show to be  
11 engaged in the lack of a sportsman sense, and they pointed out  
12 that what they want to do is they want to get a number, right,  
13 they want to get a number; and then once we get that number,  
14 then we can debate what has been collected in the Receiver's  
15 efforts and everything else.

16 And I'm going to try, I mean, I'll probably have some  
17 status conference before we get into the disgorgement hearing  
18 to set parameters as to how to create the record.

19 I intend to tell you briefly things to do, is just  
20 figure out what's should be disgorged now, what has already  
21 been collected that could offset that is certainly another  
22 argument, and I think we're going to have to talk about that,  
23 but I don't want to have a situation where I co-mingle them  
24 because that could be a situation where I come to the  
25 disgorgement amount and now, hopefully, that's already been

1 resolved in part, or you make an argument that some of that's  
2 already been taken; and if that's the case, then, obviously, we  
3 have to make adjustments when it comes to that.

4 But right now, I think it's more of a legal and  
5 evidentiary aspect of figuring out the number, and then we can  
6 go from there about how much we've collected.

7 But you're right, and I know you're going to point that  
8 out in your motion, but I say that just to help the briefing,  
9 you and Mr. Stumphauzer, your co-counsels, start preparing.

10 I urge you guys to spend the energy, not kind of  
11 worrying about, Hey, they're asking for this and we have turned  
12 it over; Hey, they want this, and they've already collected  
13 that, because it's less of a concern.

14 You're going to get to brief that. But what helps me  
15 the most, if you guys tell me, you're not entitled to  
16 disgorgement because this number had nothing to do with -- I'm  
17 giving a hypothetical, of course -- has nothing to do with  
18 Par Funding or has any connection to what happened here; and  
19 the SEC cannot pursue its disgorgement.

20 Do you know what I mean, Ms. Schein?

21 MS. SCHEIN: Yes, Your Honor, thank you.

22 THE COURT: Yeah, I just thought that would help  
23 everybody.

24 Ms. Berlin, do you want to attempt to add anything  
25 about anything we've discussed here today before we wrap up?

1 MS. BERIN: No, thank you. I was just going to remind  
2 everyone that, of course, if a number isn't ordered as  
3 disgorgement, then the Receiver doesn't have authority to then  
4 distribute those funds, which is why we seek the disgorgement  
5 figure in the final judgment; and then the Receiver can  
6 re-claim distribution, and we have a separate collections unit  
7 that starts looking at the collections issues and where they,  
8 basically, start getting involved.

9 I wanted to note the importance of an order that states  
10 the disgorgement that's here, because that's what the Receiver  
11 liquidate, hold onto -- that's what allows us to move to the  
12 collections' element, which is a different group at the  
13 Commission. But thank you, Your Honor. Nice seeing you.

14 And I will keep in mind that we'll be in person for  
15 that disgorgement hearing.

16 THE COURT: Yeah, I think it makes more sense to have  
17 it in person, it's easier for the court reporter and the  
18 importance of it, make life easier, yeah. I will get a head's  
19 up. I will coordinate when we get closer and get your replies  
20 and with everything being briefed, okay; with that being said,  
21 guys, I think we covered everything.

22 Mr. Kolaya, I have everything I need and May 5th  
23 report.

24 MR. KOLAYA: Your Honor, just one question briefly.

25 THE COURT: Yeah.



1 MR. KOLAYA: We've received numerous phone calls from  
2 investors on this and the briefing schedule and motions are  
3 totally briefed and a hearing can be set, but do you have any  
4 indication about when an order will be issued on disgorgements?

5 THE COURT: It's stuff our briefs in our current  
6 briefing schedule, I'm trying to ballpark it, we're probably  
7 not ripe.

8 I know Ms. Schein and her team are preparing responses.  
9 You got to think, we still got a little bit of a ways to go  
10 with reply time.

11 I don't think this is ripe; 30 days, let's say, I'm  
12 ballparking it, right, or thereabouts, probably inside that or  
13 inside May. I would like -- the minute it's ripe, I want to  
14 set a hearing -- that much you can share with investors, there  
15 will be a hearing on investors.

16 The minute it's briefed and ripe, I will set it.

17 How long to take an order? I don't want to get anymore  
18 investor e-mails than I do with an overdue order, whether I  
19 lock myself into a position; it's hard until I start writing  
20 it. I can give you a drop-dead, in terms of the summer in  
21 terms of making a ruling I have to have this done.

22 The Court plans on having something the end of the  
23 summer, if you think about a hearing in June, 60 days, I think  
24 it's realistic to say is that by the time we're in August, at  
25 some point we got something coming out, that much I can make a

1 promise on because it puts you guys in a position to hopefully  
2 start a claims process in the fall, and that's the only way  
3 we're ever going to see this maybe by end of year getting to  
4 the point we want to get to.

5 So that's, I think, a very solid, fair timeline, and  
6 I'm willing to hold myself to that cut-off, because I've got a  
7 sense we can get something done over the summer for sure.

8 MR. KOLAYA: Your Honor, thank you. I know it's not a  
9 firm date, but that's helpful because the investors are very  
10 curious.

11 THE COURT: It's pretty firm. You can tell them it's  
12 very firm, end of the summer; if I need to put in a little more  
13 elbow grease on it to get it out, then I plan on putting it --  
14 it goes to the top of the pile -- so to say, it's hard, you  
15 know, I don't want to jinx myself -- something can happen in  
16 the summer, criminal, mostly, that's my only concern; I do have  
17 a couple special-set Medicare trials that can pull me away.

18 I have a special set Medicare trial in the summer that  
19 may be moving, you never know, so that's why I thought I'd give  
20 myself some wiggle room, I'm not 100 percent on how long it  
21 will take. I look forward to the briefing.

22 We're definitely -- I'll tell you this, we're  
23 definitely going to set it as soon as we can, because I do  
24 think OA will be valuable is available for questions and  
25 probably late June, prepare and read everything the coming

1 month and get the calendar date set down; and I will probably  
2 try, as I have done in the past, because we're not in a COVID  
3 situation anymore, I've got to decide how I'm going to do it,  
4 because I don't want to have a million people in the courtroom.

5 But I have to see if I do have enough interest in  
6 people coming. Maybe I can figure out a way to have it  
7 telephonically done or people can call in and listen to it  
8 live. I will figure that out for the investors; if they ask, I  
9 will try to make it available for the investors to move along.

10 All right, guys, thank you guys for your time.  
11 Hopefully, you will have a great rest of your day, and I will  
12 try to work on this right away so you guys can get a ruling  
13 from the Court. Okay.

14 Good afternoon. Bye-bye.

15 (Proceedings concluded at 12:13 p.m.)

16  
17  
18 C E R T I F I C A T E

19 I hereby certify that the foregoing is an  
20 accurate transcription of the proceedings in the  
21 above-entitled matter.  
22

23 July 8th, 2022

24 /s/Glenda M. Powers  
25 GLENDA M. POWERS, RPR, CRR, FPR  
United States District Court  
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**UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

ELBERT PARR TUTTLE COURT OF APPEALS BUILDING  
56 Forsyth Street, N.W.  
Atlanta, Georgia 30303

David J. Smith  
Clerk of Court

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August 03, 2022

Glenda Powers  
Courtroom Services  
400 N MIAMI AVE  
MIAMI, FL 33128

Appeal Number: 22-11694-G  
Case Style: Joseph Cole Barleta v. Ryan Stumphauzer  
District Court Docket No: 9:20-cv-81205-RAR

TRANSCRIPT DUE: September 2, 2022 (30 days from appellant's certification)

We have not received your acknowledgment of the enclosed transcript order form and certification of completion of financial arrangements. We have assumed that the necessary financial arrangements have been made by the appellant for the preparation of the transcript, in accordance with appellant's certification, and accordingly we have fixed the date shown above for filing the transcript with the district court clerk.

Sincerely,

DAVID J. SMITH, Clerk of Court

Reply to: Lee Aaron, G/br  
Phone #: 404-335-6172

RPTR-1 Acknowledgment not recd