UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.
_____/

DEFENDANTS JOSEPH LAFORTE AND LISA MCELHONE'S MOTION TO CORRECT, AND FOR RELIEF FROM, THE FINAL JUDGMENT AND ORDER GRANTING IN PART PLAINTIFF'S AMENDED OMNIBUS MOTION FOR FINAL JUDGMENT

Defendants, Joseph LaForte and Lisa McElhone (collectively the "Defendants"), by and through their undersigned counsel, and pursuant to Federal Rules of Civil Procedure 59(e), 60(a) and 60(b)(1), respectfully request that the Court correct, amend and grant relief from its Order Granting in Part Plaintiff's Amended Omnibus Motion for Final Judgment (the "Order") [ECF No. 1432] and the Final Judgment as to Defendants Lisa McElhone and Joseph LaForte (the "Final Judgment") [ECF No. 1433], and as support therefore state as follows:

INTRODUCTION

In November of 2021, the Defendants entered Consent Judgments [ECF Nos. 1008 and 1010], pursuant to which the Court was to determine whether an order of disgorgement and civil penalties should be entered against them, and if so, in what amount. After considering the Parties' briefings[1] and conducting an evidentiary hearing on these issues, the Court entered its Order and Final Judgment

[1] The SEC's Amended Omnibus Motion for Final Judgment [ECF No. 1252], Defendants' Amended Response in Opposition [ECF No. 1329] and the SEC's Amended Reply [ECF No. 1341].

on October 25, 2022, which hold the Defendants jointly and severally liable for disgorgement of $163,084,186 (together with prejudgment interest thereon in the amount of $12,237,046.14) and assess civil penalties in the amount of $21,850,000 against each of the Defendants. As set forth in this Motion, the Defendants respectfully request that the Court grant relief from, correct or amend the Order and Final Judgment in three respects.

First, the Defendants ask the Court to correct the Order and Final Judgment by deducting the disgorgement amounts entered against Joseph Cole Barletta and Perry Abbonizio ($10,055,625 and $10,498,581, respectively) from the disgorgement amount entered against them. The Defendants believe that the Court intended to include these deductions in its disgorgement calculation because the SEC and the Defendants both advised the Court that these amounts should be deducted,[2] and the Court's Order expressly states that "deductions for Cole and Abbonizio's disgorgement amounts" were incorporated. (*See* Order, at pg. 26). As the Defendants will establish below, these amounts *were not* deducted, which resulted in the disgorgement amount assessed against them being overstated by $20,554,206. Accordingly, the Defendants request that the Court amend the Order and Final Judgment to correct this mathematical error so that the Order and Final Judgment reflect the Court's true intent.

Second, the Defendants ask the Court to reconsider and amend its finding regarding the amount Par raised from noteholders less the amount that was repaid in principal and interest (the "Net-Raise") – which is the starting point for the Court's calculation of Defendants' disgorgement. In the Order, the Court considered two competing valuations of the Net-Raise: the $250,217,479 figure used by the SEC, which is based on an analysis of Par's QuickBooks records performed by the SEC's expert, Melissa Davis; and the $246,400,000 figure used by the Defendants, which is based on a subsequent analysis performed by the Receiver's financial consultant – Bradley Sharp of

[2] This was the only point of agreement in the Defendants' and SEC's disgorgement calculations.

Development Specialists, Inc. ("DSI") – which analyzed the same QuickBooks records and performed adjustments and additional reconciliations to account for certain previously un-booked transactions reflected in Par's bank records. The Court appears to have adopted the higher Net-Raise figure proposed by the SEC based on the principle that the risk of uncertainty should be borne by the wrongdoer. However, this legal principle does not compel the Court to adopt the SEC's figure because the uncontroverted evidence establishes that Mr. Sharp's calculation of the Net-Raise is the most accurate figure and that there is no genuine uncertainty on this point. Under these circumstances, the Court's decision to use the SEC's calculation of the Net-Raise appears to be clearly erroneous, and would cause manifest injustice by recognizing an additional $3,817,479 in disgorgement based on an analysis that is indisputably incomplete and, thus, inaccurate. Accordingly, the Defendants respectfully request that the Order and Final Judgment be amended to use the Net-Raise figure presented by Mr. Sharp as the starting point for the Court's calculation of Defendants' disgorgement.

Third, if (and only if) the disgorgement amount is corrected (for either, or both, of the reasons discussed above), the Defendants request that the Court revise its prejudgment interest calculation based on the Court's new disgorgement amount. The Defendants also request that the Court amend (or clarify) the Order and Final Judgement to provide an explanation of the methods used by the Court to calculate the amount of prejudgment interest.

LEGAL STANDARD

Rule 60(a) allows a district court to "correct a clerical mistake or a mistake arising from oversight or omission." *See* Fed. R. Civ. P. 60(a). "A district court may act under Rule 60(a) only to correct mistakes or oversights that cause the judgment to fail to reflect what was intended at the time." *Phuc Quang Le v. Humphrey*, 703 F. App'x 830, 835 (11th Cir. 2017) (citing *Vaughter v. E. Air Lines, Inc.*, 817 F.2d 685, 688–91 (11th Cir. 1987)) (internal quotation marks omitted).

Rule 60(b)(1) allows a district court to relieve a party from an order or judgment based on "mistake." *See* Fed. R. Civ. P. 60(b) (1). "As a matter of text, structure, and history, a "mistake" under Rule 60(b)(1) includes a judge's errors of law." *Kemp v. United States*, 213 L. Ed. 2d 90, 142 S. Ct. 1856, 1858 (2022). "[W]here a district court's mistake was clear on the record and involved a plain misconstruction of the law and the erroneous application of that law to the facts, compelling policies of basic fairness and equity reflected by 60(b) may mandate amendment to conform its judgment to the law." *Nisson v. Lundy*, 975 F.2d 802, 806 (11th Cir. 1992) (citations and internal quotations omitted).

Rule 59(e) allows a district court to alter or amend a judgment in order to "rectify its own mistakes in the period immediately following its decision." *See Harris v. Wingo*, No. 2:18-CV-17-JES-MRM, 2022 WL 562263, at *1 (M.D. Fla. Feb. 24, 2022) (citing *Banister v. Davis*, 140 S. Ct. 1698, 1703 (2020)) (internal citations omitted). A district court may alter or amend a judgment "that is based on manifest errors of law or fact." *Jenkins v. Anton*, 922 F.3d 1257, 1263 (11th Cir. 2019); *see also Smalley v. Holder*, No. 09-21253-CIV, 2010 WL 11504501, at *1 (S.D. Fla. Dec. 13, 2010) ("To justify reconsideration, Plaintiff must establish: (1) an intervening change in controlling law; (2) the availability of new evidence; or (3) the need to correct clear error or prevent manifest injustice"). Rule 59(e) gives the court considerable discretion in deciding whether to grant a motion for reconsideration. *See Drago v. Jenne*, 453 F.3d 1301, 1305 (11th Cir. 2006).

ARGUMENT

I. The Order and Final Judgment Must Be Corrected to Provide the Intended Deductions for Cole and Abbonizio's Disgorgement Amounts

For the reasons discussed below, it is clear that the Court intended to deduct the $20,554,206 in disgorgement assessed against Joseph Cole Barletta and Perry Abbonizio from its calculation of Defendants' disgorgement – but inadvertently failed to do so. Because this constitutes a clerical error

resulting from oversight or miscalculation, the Order and Judgment should be amended pursuant to Rule 60(a). *See Paladin Shipping Co. v. Star Cap. Fund, LLC*, No. 1:10-CV-21612, 2014 WL 12685861, at *4 (S.D. Fla. Sept. 8, 2014) (Clerical mistakes which are properly corrected under Rule 60(a) "include inadvertent typographical and computational errors and omissions."); *see also Hale Container Line, Inc. v. Houston Sea Packing Co. Inc.*, 137 F.3d 1455, 1474 (11th Cir. 1998) (Correcting mathematical error in a damage award pursuant to Rule 60(a)); *Allied Materials v. Superior Prods. Co., Inc.*, 620 F.2d 224, 225–26 (10th Cir. 1980) (Permitting a judge to use Rule 60(a) to amend an award from $1,200 to $12,000 when he misspoke from the bench).

In Section I. A. i. of the Order, the Court discusses the Defendants' request for a deduction of the disgorgement amounts entered against the other defendants in this case and certain non-parties, and the SEC's competing position that only the disgorgement attributable to Cole and Abbonizio should be deducted. (*See* Order, pg. 17-18). In its analysis, the Court found that the disgorgement entered against Furman, Gisas, Vagnozzi and the non-parties had already been accounted for in the SEC's calculation of the Net-Raise and would therefore not be deducted from Defendants' disgorgement. In contrast, the Court specifically noted that "the SEC did not previously deduct [Cole and Abbonizio's] disgorgement from the ill-gotten gains of [Defendants]" and indicated that these amounts *should* be deducted. (*See* Order at pg. 17, FN 10). Then, at the conclusion of the section of the Order addressing Defendants' disgorgement, the Court states: "after incorporating deductions for Cole and Abbonizio's disgorgement amounts, legitimate business expenses, fees paid to outside consultants, and income taxes paid on behalf of Par Funding, McElhone and LaForte are **ORDERED** to disgorge **$163,084,186**." (*See* Order at pg. 26, underlining added).

Although the Order clearly reflects that the Court intended to deduct the $20,554,206 in disgorgement assessed against Cole and Abbonizio, the Court *did not* actually do so when it calculated

Defendants' disgorgement. The starting point for the Court's disgorgement calculation is $250,217,479, which is the SEC's calculation of the Net-Raise ($550,325,596 raised from the promissory notes, minus $300,108,117 in principal and interest repayments = $250,217,479). As discussed above, and as reflected in the SEC's own disgorgement calculation, this sum does not include deductions for Cole and Abbonizio's disgorgement.[3] From this starting point of $250,217,479, the Court then applied the following deductions:

- 8,620,102.26 in fees paid to outside consultants [$250,217,479 minus $8,620,102.26 = $241,597,376.74]
- $54,441,665.65 for Par's legitimate business expenses [$241,597,376.74 minus $54,441,665.65 = $187,155,711.09]
- $12,216,749.13 for FSP's legitimate business expenses [$187,155,711.09 minus $12,216,749.13 = $174,938,961.96]
- $11,854,776.23 for Par's tax payments [$174,938,961.96 minus $11,854,776.23 = $163,084,185.73]

The Court ordered the Defendants to disgorge $163,084,186, which correlates (almost to the penny[4]) with the above illustration of the Court's calculations – which *did not* include deductions for Cole and Abbonizio's disgorgement. Accordingly, it is apparent that the Court meant to, but neglected to, deduct the amounts of Cole and Abbonizio's disgorgements ($10,055,625 and $10,498,581, respectively), even though the Order stated that these deductions had been incorporated in the Court's analysis. If these amounts had been deducted, Defendants' disgorgement would have

[3] *See* the SEC's Amended Omnibus Motion for Final Judgments, ECF 1252, pg. 30 ("The Court should order McElhone and LaForte jointly and severally liable for disgorgement of $226,471,877, representing the amount Par Funding raised from investors ($550,325,596) minus the amounts Par Funding paid in principal or interest payments to investors and Agent Funds ($300,108,117)… and the amounts Par Funding paid to Cole ($13,247,011) and Abbonizio ($10,498,581))." In this Motion, Defendants have reduced the deduction for Cole's disgorgement to reflect what he has now been ordered to pay ($10,055,625), which is less than the amount the SEC sought in its Omnibus Motion.

[4] It appears that the Court rounded up to the next highest dollar.

been reduced to $142,529,980. For these reasons, the Order and Final Judgment should be amended to include deductions for the disgorgement amounts entered against Cole and Abbonizio ($20,554,206 total) from Defendants' disgorgement.

II. The Order and Final Judgment Should Be Amended to Adopt the Net-Raise Calculation Performed by Bradley Sharp

The Defendants respectfully request that the Court amend its Order and Final Judgment, pursuant to Rule 59(e) and/or Rule 60(b)(1), to adopt the calculation of the Net-Raise which was performed by the Receiver's financial consultant, Bradley Sharp of DSI. The Court was presented with two competing calculations of the Net-Raise in the Parties' briefings and at the evidentiary hearing on disgorgement – the SEC's figure of $250,217,479 (which is taken from a Declaration by the Receiver that reflects an analysis performed by the SEC's expert, Melissa Davis) and the Defendants' figure of $246,400,000 (which is taken from the Sharp analysis contained in a recent quarterly report filed by the Receiver). In the Order, the Court adopted the SEC's figure based on the legal principle that the risk of uncertainty falls on the wrongdoer with respect to disgorgement. However, that principle only applies when there is genuine uncertainty – which is not present here because the evidence establishes that the Defendants' figure is accurate, and that the SEC's figure is not.

Specifically, the testimony of the Receiver's counsel – which was admitted as evidence at the disgorgement hearing – establishes that the SEC's figure simply reflects Par's Quickbook records, while the Defendants figure reflects the same QuickBooks records after they were reconciled by the Receiver's financial consultant (Bradley Sharp of DSI) to account for additional un-booked transactions contained in Par's bank records. (*See* Disgorgement Hr'g at 17:20 – 18:11). At a prior hearing, the Receiver's counsel also explained why the $246.4 M amount contained in the Receiver's recent report was more accurate. (*See* ECF 1330-2: p. 11, l. 2-13). The Defendants cited to and relied

upon this testimony and explanation in their Response to the SEC's Omnibus Motion. (*See* ECF 1329, pg. 15-16). Importantly, these statements by the Receiver's counsel are the *sole* evidence explaining the discrepancy between the figures at issue – and this evidence credibly establishes that Defendants' figure is accurate, and that the SEC's is not. Indeed, after considering the Receiver's counsel's prior statements and the testimony he presented at the evidentiary hearing, the Court correctly observed that "the number that [Defendants] have from DSI is ***more accurate and captures more business activity*** than the number that the SEC's giving me." (*See* Disgorgement Hr'g at 19:23-25) (Emphasis supplied).

Notwithstanding the foregoing, the Court adopted the SEC's inaccurate and inflated Net-Raise figure when calculating disgorgement. In the Order, the Court accepted the SEC's figure because Ms. Davis "took two years to forensically analyze and reconcile Par Funding's QuickBooks records, bank account records, and promissory note records when issuing her report." (Order at pg. 15). However, Ms. Davis' report predates the Sharp analysis and was created without the benefit of the adjustments and reconciliations performed by Mr. Sharp. This is particularly important because Ms. Davis relied upon *prior* reconciliations to the QuickBooks records which were performed by Mr. Sharp when she prepared her Report. (*See* Davis Report, ¶ 21-25 and FN 22-23: reflecting that Ms. Davis performed her analysis using a copy of the QuickBooks that had been reconciled by the Receiver's financial consultants – *i.e.*, DSI – as of July 27, 2020). Given that Ms. Davis relied on Sharp's prior reconciliations in her report (thereby ratifying his methodology and work), the SEC should not now be allowed to question Sharp's subsequent reconciliations simply because they yield a more favorable disgorgement number for the Defendants.[5] This is of particular significance where, as here, the SEC

[5] At the hearing, the SEC's counsel also sought to cast doubt on Sharp's analysis by observing that he is not a CPA. This statement was highly misleading because Mr. Sharp's staff included qualified accountants who conducted the relevant analysis. *See* Declaration of Bradley Sharp (ECF 482-2, ¶ 4)

presented Sharp to the Court as a reliable witness in the trial of Michael Furman, and utilized his data, analysis and testimony in various contexts (including the Furman trial) throughout these proceedings. (*See* Disgorgement Hr'g at 16:16-17:5).

Under these facts, the Defendants have clearly met their evidentiary burden to prove that the SEC's calculation of the Net-Raise *is not* "a reasonable approximation" of their alleged ill-gotten gains, and that Sharp's calculation is. *See S.E.C. v. Warde*, 151 F.3d 42, 50 (2d Cir. 1998) (although the risk of uncertainty falls on the wrongdoer, "the wrongdoer is, of course, entitled to prove that the district court's measure is inaccurate") (cited with approval by *S.E.C. v. Calvo*, 378 F. 3d 1211 (11th Cir 2004)). Thus, there is no genuine uncertainty that would warrant adoption of the SEC's inaccurate and inflated calculation of the Net-Raise. *See* UNCERTAINTY, Black's Law Dictionary (11th ed. 2019) (uncertainty is "the quality, state, or condition of being in some degree of ***serious doubt***") (emphasis supplied).

Furthermore, even if the evidence did create a risk of uncertainty regarding which figure is accurate (it does not), it would be inequitable for the Court to adopt the SEC's figure under the facts of this case because – here – any potential risk of uncertainty was the result of the Defendants being denied a full and fair opportunity to prove that the SEC's figure is inaccurate. Specifically, during the discovery period permitted by the Court for the disgorgement proceedings, the Defendants issued a subpoena for deposition to the Receiver to address the discrepancy between the Receiver's Declaration and Sharp's analysis (amongst other issues). The Receiver moved to quash the subpoena, the Defendants moved to compel, and the dispute was heard by Magistrate Judge Reinhart on July 1,

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("I have overseen my staff's analyses of CBSG's books and records and have reviewed their work. My staff includes experienced forensic accountants maintaining CPA, CFF and CFE certifications"). But even if this were not the case, the SEC's critique is not credible given that Ms. Davis relied on Sharp's prior reconciliations and analysis when performing her work.

2022. At the conclusion of that hearing, Judge Reinhart quashed the subpoena, holding that the discovery sought regarding the discrepancy "was not proportional to the needs of the case." (*See* ECF 1330-2, p. 19 l. 9 – 20 l. 8).[6] Because Defendants were denied an opportunity to depose the Receiver, which would have allowed them to present additional proof that Sharps' calculation of the Net-Raise is accurate (and that the SEC's calculation is not), the instant matter is distinguishable from *Calvo* and other cases holding that defendants bear the risk of uncertainty. Under the facts presented, this Court – which sits in equity – shoudl not apply the rule that uncertainty should be construed against the Defendants with respect to the calculation of the Net-Raise.

For all of the foregoing reasons, the Defendants respectfully submit that the Court's decision to adopt the SEC's calculation of the Net-Raise was clear error which would cause manifest injustice by erroneously assessing an additional $3,817,479 in disgorgement against Defendants. Because the Receiver's counsel testified that Sharp's calculation was more accurate – and this was the only evidence presented which addressed this discrepancy – there was no risk of uncertainty for the Court to construe in favor the SEC. Accordingly, the Defendants respectfully request that the Order and Final Judgment be amended to use the $246,400,000 figure presented by Sharp as the starting point for the Court's calculation of Defendants' disgorgement.

[6] In his ruling from the bench, Judge Reinhart also stated that the Defendants could retain an expert to perform an independent analysis regarding the discrepancy between the Receiver's Declaration and the Sharp analysis. However, we know this *would not* have been permitted because the Court struck an expert report filed with Defendants' Response to the Omnibus Motion on the grounds that it was untimely (*See* ECF 1322). Judge Reinhart also suggested that the Receiver's statements could be admitted as evidence, and that the Receiver might stipulate to what he had stated. (*See* ECF 1330-2, p. 21, l. 8-18). The Defendants *did* present these statements as evidence, and the Receiver's counsel provided additional testimony at the hearing which affirmed that the analysis performed by Sharp was more detailed and accurate than the analysis set forth in the Receiver's Declaration and the Davis Report. But – for whatever reason – none of this was even mentioned in the Court's Order.

III. Pre-Judgement Interest Must Be Recalculated

The Order states that the Court has calculated Defendants' prejudgment interest to be $12,237,046.14 – but does not show the Court's calculations or specifically identify the principal amount upon which the Court calculated interest. Significantly, the SEC calculated its demand for prejudgment interest to be $10,952,117.55 (which is $1,284,928.50 *less* than the Court's calculation) even though the SEC sought disgorgement of $226,471,877.00 (which is $63,387,691.00 *more* than the Court awarded in disgorgement).[7] The stark contrast between these two calculations raises questions as to whether the prejudgment interest assessed against the Defendants in the Final Judgment was calculated correctly.[8]

Setting aside the question of whether the prejudgment interest calculation set forth in the Order was accurate, if the Court grants all or any portion of this motion and revises the Defendants' disgorgement amount, the prejudgment interest thereon will need to be recalculated as well. If the Court chooses to both deduct Cole and Abbonizio's disgorgement and revise its Net-Raise calculation, the disgorgement amount will be $138,712,501, and prejudgment interest should be correctly calculated on that amount. If the Court chooses to deduct Cole and Abbonizio's disgorgement, but declines to revise its Net-Raise calculation, the disgorgement amount will be $142,529,980, and prejudgment interest should be assessed on that amount. If the Court chooses to revise its Net-Raise calculation, but declines to deduct Cole and Abbonizio's disgorgement, the disgorgement amount will be $159,266,707, and prejudgment interest should be calculated thereon. Accordingly, the Defendants respectfully request that the Court revise its prejudgment interest calculation based on the deductions

[7] *See* ECF 1252 at p. 33 and ECF 1213-3 for the SEC's prejudgment interest calculation.
[8] If, for example, the Court assessed prejudgment interest against the Defendants for both disgorgement and penalty (as opposed to just the disgorgement) this would be an error since the penalty amount is not subject to prejudgment interest .

sought in this Motion, and also request that the Court provide an explanation of how the prejudgment interest was calculated for purposes of transparency. *See Mitra v. Glob. Fin. Cor.*, No. 08-80914-CIV, 2009 WL 2423104, at *1 (S.D. Fla. Aug. 6, 2009) (granting motion to amend the judgement to include an explicit statement of the amount of damages awarded, noting that "Rule 59 is the proper procedural mechanism to obtain a more complete and explicit recitation in the final judgment of the monetary amount of a judgment") (citing *Herzog Contracting Corp. v. McGowen Corp.,* 976 F.2d 1062, 1065 (7th Cir.1992)).

CONCLUSION

For all of the foregoing reasons, the Order and Final Judgment should be amended pursuant to Federal Rules of Civil Procedure 59(e), 60(a) and 60(b)(1), by: 1) deducting the $20,554,206 in disgorgement assessed against Cole and Abbonizio from the Defendants' disgorgement; 2) adjusting the Court's calculation of the Net-Raise from $250,217,479 to $246,400,000, which will result in a $3,817,479 reduction to the Defendants' disgorgement; and 3) recalculating Defendants' prejudgment interest and providing an explanation of how the Court calculated the prejudgment interest. If the Court grants this Motion in full, the amount of Defendants' disgorgement will be $138,712,501, and prejudgment interest should be entered thereon.

S.D. Fla L. R. 7.1(a)(3) Certification of Counsel

Counsel for the Defendants hereby certify that they attempted to confer with counsel for the SEC, Amie Rigley Berlin, Esq., about the relief sought in this motion in emails dated November 2, 2022 and November 14, 2022. In response to the second email, Counsel for the SEC advised that she would provide Defendants with the SEC's position by November 17, 2022 – but she did not do so. Accordingly, counsel for the Defendants have made reasonable efforts to confer with the SEC regarding the relief sought in this motion, but have been unable to do so.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 18th day of November, 2022, I electronically filed the forgoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record via transmissions of Notices of Electronic Filing generated by CM/ECF.

By: /s/ *James M. Kaplan*
JAMES M. KAPLAN