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.
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MOTION TO (1) MODIFY THE PRELIMINARY INJUNCTION TO REDUCE THE ASSET FREEZE (2) MODIFY THE RECEIVERSHIP ORDERS TO PRESERVE DEFENDANTS' DUE PROCESS RIGHTS AND (3) RETURN LIMITED ASSETS NOT NEEDED TO SATISFY THE FINAL JUDGMENT TO THE DEFENDANTS

Defendants Lisa McElhone and Joseph LaForte (collectively the "Defendants"), by and through their undersigned counsel, seek relief from the Court's Injunctions (DE 230 and 237, collectively the "Injunctions") and Receivership Orders (DE 141, 436, 517 *et. al.*, collectively the "Receivership Orders"), and ask the Court to: 1) modify the Injunctions to reduce the asset freeze against Defendants from $482 Million to $197 Million, which is the amount of the Amended Final Judgment (the "Final Judgment") entered against them; 2) modify the Receivership Orders to acknowledge Defendants' Due Process rights to seek certain relief on behalf of entities they owned or controlled prior to the Receivership; and 3) release a limited subset of assets from the Receivership Estate and order those assets be returned to the Defendants.

INTRODUCTION

The Receiver is currently in possession of over $393 Million in assets which the Defendants owned and/or controlled prior to the entry of the Injunction and Receivership Orders.

This is approximately double the amount of the $197 Million Final Judgment entered against them.[1] Notwithstanding, the Defendants remain subject to a $482 Million asset freeze, virtually *all* of their property and possessions remain in the Receivership Estate, and they were recently evicted from their home[2] – which they have owned free-and-clear, since 2016.[3]

In prior orders expanding the Receivership, this Court stated it believed the expansion was necessary "to effectively safeguard assets for the benefit of investors in this matter and to guard against potential dissipation." (*See* DE 436, p. 2). But now that the Final Judgment has been entered the Court is able to acknowledge the obvious – namely, that the value of the assets in the Receivership ***exceeds*** the amount of the Final Judgment by $196 Million (even using the Receiver's conservative estimates of value), and any concerns which might have justified the Receiver holding *all* of the property currently within the Receivership Estate has been vitiated. This is especially true where the expansive scope of the Receivership has caused substantial financial hardship for the Defendants, and has culminated in their eviction from their home.

As discussed herein, the Court should modify the asset freeze provisions of the Injunctions against Ms. McElhone and Mr. LaForte – which are currently set at $482 Million – because all liability and damages issues have been resolved as to the Defendants, and the monetary judgment against them has been fixed at $197 Million. Under these circumstances, there is no logical, legal,

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[1] In March of 2023, the Court entered an Order directing that approximately $2.5 Million in cash that was seized from the Defendants be credited to the Final Judgment, and that an IRA account for Ms. McElhone be liquidated and credited. (*See* DE 1525). The SEC has now applied the $2.5 Million in cash to the disgorgement portion of the Final Judgment – thereby reducing Defendants' obligation to approximately $194.5 Million, excluding post-judgment interest. The balance of the IRA account has not yet been credited. The Final Judgment is also subject to reduction based on the outcome of Defendants' pending appeal to the Eleventh Circuit.

[2] Their residence is located at 568 Ferndale Lane, Haverford, PA (hereafter the "Haverford Home").

[3] The Order expanding the Receivership over the Haverford Home (and other assets) stated that "tainted funds, which ***could*** be the subject of disgorgement, ***may*** be found in the entities and properties identified herein." (DE 436 p. 2) (Emphasis supplied). However, the Court never held that the Haverford Home was ***actually*** purchased with tainted funds, nor is there sufficient evidence in the record to independently establish this fact. Moreover, the Court entered the expansion order without conducting a hearing or allowing discovery on the issues presented – so the Defendants were never afforded an opportunity to establish that the Haverford Home was not purchased with tainted funds.

equitable or conceivable basis to maintain an asset freeze which is roughly 250% greater than the Final Judgement.

Furthermore, the Defendants ask this Court to modify its Receivership Orders to recognize that the Defendants have a Due Process right to seek limited relief on behalf of the entities they owned and/or controlled prior to the Receivership. Specifically, the Defendants have the right to file motions seeking to: 1) have the assets of these entities applied towards the Final Judgment; and 2) preserve their interests in the assets of these entities which may remain once the Final Judgment has been satisfied. As discussed herein, many of the assets at issue are or were owned or controlled (directly or indirectly) by the L.M.E. 2017 Family Trust (the "LME Trust") – a relief defendant that faces no liability in this action. Prior to the Receivership, the Defendants were the trustees and beneficiaries of the LME Trust and had control of the trust assets. The Court's Receivership Orders removed the Defendants as trustees and installed the Receiver in their place – but the Defendants are still the sole beneficiaries of the LME Trust, and as such have standing to seek certain relief in that capacity.[4]

With respect to the corporate defendants, Complete Business Solutions Group, LLC d/b/a Par Funding ("Par") and Full Spectrum Processing, Inc. ("FSP" and collectively with Par the "Corporate Defendants"), the SEC and the Receiver contend that these assets are not available to satisfy the Final Judgment against Ms. McElhone and Mr. LaForte because the Receiver and the SEC intend to stipulate to the entry of a monetary judgment on behalf of the Corporate Defendants themselves. (*See* ECF 1452). However, for the reasons discussed herein, the SEC has no cognizable claim for such damages – and even if it did, the Defendants have a Due Process right

[4] The Defendants recently asserted – in response to jurisdictional questions issued by the Eleventh Circuit Court of Appeals – that they have standing in their capacity as beneficiaries of the LME Trust to challenge this Court's order expanding the Receivership over the LME Trust. The Eleventh Circuit chose to carry this jurisdictional question with the appeal, demonstrating that the Defendants have raised a plausible basis for standing.

to be heard in connection with any consent judgment the Receiver wishes to make on behalf of Par (a business which the Defendants built from the ground up, and which was thriving and profitable prior to the Receivership).

Finally, Defendants ask the Court to immediately release a portion of the property within the Receivership Estate to the Defendants. In particular, the Defendants request the return of the Haverford Home[5] and approximately $3 Million in cash – a reasonable accommodation which would allow the Defendants to remain housed, cover their living expenses, and pay their legal fees (past and future, in this action and on appeal). Given the amount and value of the assets the Receiver currently controls, the Court need not be concerned that granting the requested relief would prejudice investors or compromise the ability to satisfy the Final Judgment out of the assets which will remain in the Receivership Estate.

Accordingly, the Defendants respectfully request that the Court modify the Injunctions and Receivership Orders in the following respect: 1) reduce the asset freeze as to each Defendant to $197 Million; 2) acknowledge Defendants' rights to seek relief (in this Court and on appeal) on behalf of Par, FSP, the LME Trust and the various legal entities owned by the LME Trust to the extent necessary to protect Defendants' Due Process rights with respect to the property they owned and/or controlled prior to the Receivership Orders; and 3) release the Haverford Home and $3 Million from the Receivership Estate and return such property to the Defendants.

[5] The Defendants would not oppose the Receiver taking an equitable lien against the Haverford Home and/or imposing a restriction against its transfer or encumbrance to ensure that the asset is preserved until such time as the Final Judgment is satisfied in full.

BACKGROUND AND FACTS

A. The Preliminary Injunction and Receivership Orders

At the outset of this action, the SEC moved by temporary restraining order for a preliminary injunction and other relief (DE 14, the "TRO Motion"), and sought an asset freeze of approximately $482 million (jointly and severally against Par, McElhone and LaForte) which purportedly represented "the amount of ill-gotten gains they received through their fraudulent and unregistered securities offerings." (*Id*. at ¶ 78). In the TRO, the SEC averred that the requested asset freeze was needed to "ensure that a future disgorgement order will not be rendered meaningless." (*Id*. at ¶ 77). After a hearing, this Court entered a preliminary injunction against each of the Defendants, upon consent, which included a $482 Million asset freeze. (*See* ECF Nos. 230 and 337). The orders restrained Defendants from directly or indirectly transferring, selling, disposing of, etc., "assets or property…owned by, controlled by, or in the possession of, whether jointly or singly, and wherever located" the Defendants. (*See* ECF No. 230, Section II, at 5).

In addition to the Injunctions, this Court granted the SEC's application to appoint a Receiver. As pertinent here, the Receivership Orders include an asset freeze that: restrains and enjoins anyone other than Receiver from assigning any Receivership Assets; vests sole authority in the Receiver over Receivership Entities and divests all others of such authority; bars anyone from interfering in the Receiver's control and management of the Receivership; and grants the Receiver sole authority with respect to managing, maintaining and winding down business operations (DE 141 at ¶ 3-6, 29 and 40). This Court subsequently expanded the Receivership to include the assets of numerous additional entities owned or controlled by Ms. McElhone, including the LME Trust and the companies and assets held in the Trust. (*See* DE 436, et. al.).

B. Consent Judgments Against the Corporate Defendants

On November 12, 2020, this Court entered a permanent injunction and other relief against the Corporate Defendants based on a consent the Receiver entered on behalf of the Corporate Defendants.[6] (*See* DE 387-1 and 391). The consent was entered "without admitting or denying the allegations in the Complaint" and stated:

> The Corporate Defendants agree that, upon motion of the Commission, the Court shall determine whether it is appropriate to order disgorgement of ill-gotten gains and prejudgment interest against the Corporate Defendants and a civil penalty against the Corporate Defendants pursuant to Section 20(d) of the Securities Act, 15 U.S.C. s 77t(d) and Section 21(d) of the Exchange Act, 15 U.S.C. s 78u(d).

(DE 387-1, ¶ 3). This language was adopted in the Corporate Defendants' Judgment in a section entitled "Disgorgement and Civil Penalty." (DE 391 at 9).

C. The Final Judgment Against Defendants

In November 2021, Defendants entered into a bifurcated settlement with the SEC whereby they stipulated to liability "without admitting or denying the allegations in the Amended Complaint" and agreed to allow the Court to determine the amount of disgorgement and penalty, if any, upon motion by the SEC. (*See*, DE 1008 and 1010). After receiving the parties' briefings and conducting an in-person evidentiary hearing, this Court issued a 49-page decision holding Ms. McElhone and Mr. LaForte jointly and severally liable for $153,224,738.24 in disgorgement, including prejudgment interest, and $43,700,000 in civil penalties ($21,850,000 each). (*See* DE 1450, the "Amended Order"). The SEC sought disgorgement and penalties against the individual defendants only (*i.e.*, Ms. McElhone, Mr. LaForte, Joseph Cole Barletta and Michael Furman), and did not seek monetary relief as to the Corporate Defendants.

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[6] Since the Court granted the Receivership, and compelled Fox Rothschild – longstanding counsel for the Corporate Defendants – to withdraw, the interests of Par Funding and FSP *have not* been represented by independent legal counsel in this action. The fact that the Corporate Defendants were not represented even in connection with the Consent Judgment – which exposed them to a potential damages award –is highly unusual.

The starting point for the Court's calculation of the Defendants' disgorgement obligation was the "the total sum that Par Funding raised from investors" less "the total amount the company repaid to investors" – *i.e.*, the net-revenues Par derived from the promissory notes at issue in this case. (DE 1450 at 17). From that starting figure, the Court sought to deduct the legitimate business expenses the Corporate Defendants were entitled to[7] under *Liu v. SEC*, 140 S. Ct. 1936 (2020). Accordingly, *the Court based its calculation of Defendants' disgorgement obligation on the ill-gotten gains of the Corporate Defendants*, rather than the Defendants' personal profit from the operation of these companies.

After the Final Judgment was entered, this Court filed an Order administratively closing this case. (DE 1453). This order clarified that litigation on all liability issues has been concluded, and that the case was being closed as to all defendants – including the Corporate Defendants. (DE 1453, p. 1). The order also stated that the Receiver had notified the Court it was "consenting to Final Judgments against the [C]orporate Defendants" and that the SEC could "seek to re-open the case for the purpose of entering the Receiver's Consent Judgments." (DE 1453, p. 1). As of the date of this Motion – nearly six-months after the Court's order – the SEC has not sought to re-open this case to enter a Consent Judgment as to either of the Corporate Defendants. As discussed herein, there is no basis for a separate finding of damages as to the Corporate Defendants, since Ms. McElhone and Mr. LaForte have already been ordered to disgorge the full amount of the Corporate Defendants' alleged unjust gains, and have both been ordered to pay the maximum Tier III penalty for each and every outstanding promissory note issued by Par.

[7] The Defendants have appealed the Final Judgment on several grounds, including that the Court *did not* deduct all of Par's legitimate business expenses. The Defendants accept the Court's calculation of the Final Judgment for purposes of this motion only – however, nothing in this motion should be construed as a waiver of Defendants' arguments on appeal.

D. The Assets Under Receivership

The Final Judgement against Defendants was for $196,924,738.24, which included disgorgement, penalties and pre-judgment interest. After the Final Judgement was entered, the SEC credited $2,532,885 towards the Final Judgment, which reduced this amount to $194,391,853, not including post-judgment interest.[8] Based on Defendants' analysis of the Receiver's most recent quarterly report (DE 1559), a conservative estimate of the current value of the assets in the Receivership Estate which are attributable to Defendants and the entities they owned and/or controlled (prior to the Receivership) is approximately $393 Million.

- **Cash Position:** The Receiver reports that, as of May 1, 2023, the cash balance in the Receivership is $118,635,643. (*Id*. at p. 2). The portion of that balance attributable to the Defendants, Par or other entities they owned and/or controlled prior to the Receivership (the LME Trust, HBC, ESC and others) is listed as **$99,327,928**. (*See* DE 1559-1, p. 19).[9]

- **Commercial Real Estate:** The Receiver controls 22 commercial, residential or mixed-use rental properties that were owned or controlled by the Defendants prior to the Receivership, and estimates the sale value of these properties to be **$44,284,000**.[10] (*Id.* at p. 17).

- **Defendants' Residential Properties:** The Receiver has not had an appraisal performed for the Defendants three residential properties – the Haverford House, 107 Quayside Drive, Jupiter, FL (the "Jupiter House") and 105 Rebecca Court, Paupack, PA (the "Paupack House"). Instead, he values these properties based on their acquisition costs ($2,445,000 for the Haverford House, $2,600,000 for the Paupack House, and $5,800,000 for the Jupiter House). This obviously does not capture the gains in the real estate market over the last three years. Based on discussions with realtors, the Defendants estimate the sale values of the Paupack House and the Jupiter House to be $3,500,000 and $13,000,000 respectively. Using these appraisal values, and the purchase price of the Haverford House, the three properties have an estimated sale value of **$18,945,000**.

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[8] The amount credited was for cash seized from the Defendants' properties at the outset of this case. (*See* DE 1525). The SEC is also required to deduct the proceeds of an IRA account for Ms. McElhone which is being held by the Receiver, but has not yet done so because the Receiver has not liquidated the IRA account – even though it was ordered to do so "forthwith" over two-months ago. (*Id*.).

[9] In prior Quarterly Reports, the Receiver identified these assets as belonging to "CBSG (McElhone Entities)." After the Defendants filed a motion seeking to apply these assets to the Final Judgment, the Receiver changed the identifier to just "CBSG." However, it is clear that many of the listed assets are not actually attributable to CBSG because they include – among other things – a portfolio of rental real estate valued at over $44 Million, which is owned by various single purpose LLCs controlled by the LME Trust.

[10] Defendants believe this to be a conservative estimate of value.

- **Art, Automobiles, Watercraft and Other Personalty:** The Receiver has valued Defendants' watercraft at $539,000, their art collection at $2,160,000, their two Patek Phillipe watches at $154,500, and their five automobiles at 777,600. Taking the Receiver's report at face value, these assets are worth **$3,496,000**. (*Id.*at p. 18).

- **Par's MCA Receivables:** The Receiver's most recent Quarterly Report reflects that the actual balance of Par's remaining MCA receivables is $311,600,000, but the Receiver has taken a $119,300,000 reserve to address potential collectability issues. Accordingly, the Receiver is valuing the MCA receivables at **$192,300,000**. (*Id.* at p. 4).

- **Other Accounts Receivables:** The Receiver has identified other accounts receivable which are attributable to Ms. McElhone's companies, HBC and ESC. After making certain adjustments, the Receiver has valued those assets at **$34,500,000**. (*Id.* at p. 6).

    - **TOTAL - $392,852,928**

E. Defendants' Efforts to Preserve Their Assets

At the outset of this case, this Court deemed it necessary to enter Injunctions freezing Defendants' assets in an amount up to $482 million to ensure sufficient assets would be available to pay potential judgments against Defendants. Now that all liability and damage issues have been resolved, and the Final Judgment in the amount of $197 Million has been entered against the Defendants, there is no need for the Court to maintain an asset freeze that exceeds the Final Judgment by $285 Million. Furthermore, the Receivership currently has about $393 Million in assets (see analysis above). These assets can, and should, be used to satisfy the Final Judgment, at which point all remaining assets which were owned or controlled by the Defendants prior to the Receivership, either directly or indirectly (the "Excess Assets"), would need to be returned to them. Defendants have recently sought to assert their due process property rights in order to have the Final Judgment satisfied and hasten the return of the Excess Assets. As described below, this Court has generally denied these motions as barred by the Injunctions and by the Receivership Orders.

First, Defendants moved to compel the transfer of a 2008 Cessna Model 680 jet and a stock account (which have a combined value of about $18 million) to the Receivership Estate

so these assets counsel be applied towards the Final Judgment. (*See* ECF 1468). The plane and the stock account are owned, directly or indirectly, by the LME Trust,[11] and, by virtue of the Expansion Order, are now property of the Receivership Estate. The Court denied Defendants' motion, finding they lacked standing because the Court has vested the Receiver with the sole authority "to take custody, control and possession of all Receivership Property. . . and to take into possession from third parties all Receivership Property[.]" (D.E. 1479 p. 2-3).

Second, Defendants moved for an order directing that cash held in the Receivership be credited towards the satisfaction of the Final Judgment, noting that the SEC had previously consented to having different assets under the Receivership (*i.e.*, cash seized from Defendants' properties and the balance of an SEP IRA account) credited. (*See* DE 1531). Specifically, Defendants requested that the Receivers' cash balance for certain entities that Ms. McElhone owned and/or controlled prior to the Receivership – which totaled $103,515,947 – be credited toward Defendants' disgorgement obligations under the Final Judgment. (*See* DE 1531 p. 2-3; *see* n. 2). The SEC vehemently opposed the Defendants Motion and this Court agreed with the SEC, finding that – pursuant to the Receivership Orders – Defendants had no right or standing to suggest that the Receivership Assets (which Defendants owned or controlled prior to the Receivership) should be used to satisfy the Final Judgment entered against them. (*See* DE 1540).[12]

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[11] The LME Trust owns the Stock Account and EUQO owns the plane. EUQO is owned by Par (which is also owned by the LME Trust).

[12] Defendants are mindful of the fact that the Court's order on the motion to credit Receivership assets cautioned that the Court would not hesitate to sanction Defendants for violating the Receivership Order or pressing frivolous arguments. The Court's comment appears to have been based on its belief that the Defendants had violated the Receivership Orders by claiming to "own or control" Receivership Assets and attempting to interfere with the Receiver's duties (by asking the Court to direct the disposition of assets controlled by the Receiver). Defendants respectfully submit that the instant motion does not violate the Receivership Orders, nor is its frivolous or sanctionable. To be clear, Defendants do not contend that they currently own or control all of the Receivership Assets discussed in this Motion; rather, they claim that they have a continuing interest in the assets by virtue of their prior ownership or control and/or their continuing status as beneficiaries of the LME Trust. Likewise, the Defendants are not asking the Court to take any action that would violate the Receivership Orders or Injunctions. Instead, they are asking the Court to modify the Receivership Orders and Injunctions so that they can assert their property rights as beneficiaries and entitlement to Excess Assets, and because equity and fundamental due process requires it.

Finally, Defendants opposed the Receiver's motion seeking authorization to market 25 properties the Defendants previously owned or controlled (directly or through the LME Trust) for sale, and to compel Defendants to vacate and surrender their residence (the Haverford Home) unless they paid certain obligations the Receiver claimed were owed. (DE 1484 and 1497). After significant motions practice, the Court ruled against Defendants, permitted the Receiver to market all properties for sale, and entered an order stating that Defendants were evicted from the Haverford Home and would have until noon on May 5, 2023 (three days from the date of the Order) to vacate the premises. (DE 1486, 1503 and 1563). The Defendants timely vacated their Haverford Home, as ordered, and have fully cooperated with the Receiver's efforts to take control of it.

MEMORANDUM OF LAW

A. Standard of Review

"A district court may exercise its full range of equitable powers, including an asset freeze, to preserve sufficient funds for the payment of a disgorgement award. " *SEC v. Lauer*, 445 F.Supp.2d 1362, 1367 (S.D.Fla 2006), *quoting FTC v. United States Oil & Gas Corp.,* 748 F.2d 1431, 1433–34 (11th Cir. 1984); *see also Levi Strauss & Co. v. Sunrise Int'l Trading Co.,* 51 F.3d 982, 987 (11th Cir. 1995). An asset freeze is "justified as a means of preserving funds for the equitable remedy of disgorgement." *SEC v. ETS Payphones, Inc.,* 408 F.3d 727, 734 (11th Cir. 2005) (per curiam). The purpose of ordering an asset freeze is "to make permanent relief possible." *FTC v. Gem Merch. Corp.,* 87 F.3d 466, 469 (11th Cir. 1996).

Concurrent with the authority to implement an asset freeze is the authority "<u>to release frozen personal assets, or lower the amount frozen</u>." *SEC v. Quiros*, 2016 WL 3032925, at *1 (S.D.FL 2016)(emphasis added), *quoting SEC v. Duclaud Gonzalez De Castilla,* 170 F. Supp. 2d 427, 429 (S.D.N.Y. 2001); *see SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1082 (2d Cir.

1972); *SEC v. Lauer*, No. 03-cv-80612-KAM, ECF No. 108 (S.D. Fla. Dec. 2, 2003); *SEC v. Dowdell*, 175 F. Supp. 2d 850, 853 (W.D. Va. 2001)).

"The SEC's burden for showing the amount of assets subject to disgorgement (and, therefore available for freeze) is light: 'a reasonable approximation of a defendant's ill-gotten gains [is required] ... Exactitude is not a requirement.'" *SEC v. ETS Payphones, Inc.,* 408 F.3d at 735 quoting *SEC v. Calvo,* 378 F.3d 1211, 1217 (11th Cir. 2004). "<u>But, the 'power to order disgorgement extends only to the amount with interest by which the defendant profited from his wrongdoing. Any further sum would constitute a penalty assessment.</u>'" *Id., quoting SEC v. Blatt,* 583 F.2d 1325, 1335 (5th Cir.1978) (emphasis added).

B. The Asset Freeze and Receivership Orders Are Excessive and Constitute a Penalty

An asset freeze of $482 Million constitutes a penalty because it is grossly disproportionate to the $197 Million Final Judgment that has been rendered against the Defendants. *Cf. SEC v. ETS Payphones, Inc., supra* (since asset freeze was for less than $21 million, and record supported disgorgement of $21 million, amount of freeze was reasonable). The Injunctions were intended to preserve assets which could be used to satisfy a potential disgorgement and penalty award pending resolution of this case on the merits. This Court has now decided the amount of disgorgement that is due the noteholders and assessed a maximum Tier 3 Penalty against each of the Defendants for each outstanding promissory note issued by Par. Simple math demonstrates that the $197 million Final Judgment imposed on Defendants is $285 Million less than the current $482 Million asset freeze. Furthermore, the assets under the Receiver's control exceed the amount of the Final Judgment by about $196 million (even using the Receiver's conservative estimates of value).

The instant motion to reduce the asset freeze contrasts sharply with the usual case in which

the modification requested would deplete assets needed for investor recovery.[13] Here, there is no justification to maintain an assets freeze that exceeds the Final Judgment amount by $285 Million or to continue to allow the Receiver to hold assets whose value exceed the Final Judgment by about $196 Million – let alone to evict the Defendants from their personal residence (the Haverford Home) so the Receiver can sell it from under them. Under these facts, the continuation of the current asset freeze, and refusal to modify the Receivership Orders to release property which is not needed to satisfy the Final Judgment, would be completely inequitable, amounting to an unlawful penalty, a seizure, a forfeiture or a taking. To remedy this inequity, Defendants request that the Court modify the Injunctions to reduce the Asset Freeze from $482 million to the amount of the Final Judgment ($197 Million) and modify the Receivership Orders (including the Expansion Order, DE 436) to release the Haverford Home and $3 Million from the Receivership Estate and return this property to the Defendants.

C. Relief Is Warranted to Ensure Defendants' Due Process Rights to Protect Their Property

Defendants also request that the Court modify the Injunctions to ensure that Defendants can file motions – in this Court and on appeal – to preserve and recover the Excess Assets without violating the Court's Orders and risking potential sanctions. Due Process entitles Defendants to be heard with respect to their property. Accordingly, the Defendants request that the Court Modify the Injunctions to recognize that Defendants have a Due Process right to file motions advocating that available funds be used to pay the Final Judgment and/or to seek the preservation and prompt

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[13] *See e.g. S.E.C. v. McGinn, Smith & Co., Inc.,* 2014 WL 675611, *3–4 (N.D.N.Y.2014) (declining to modify asset freeze where "the total amount of investor funds obtained through defendants' alleged fraud far exceeds the value of assets frozen by the SEC for the benefit of those investors in the event the SEC prevails in this action"); *S.E.C. v. Forte,* 598 F. Supp.2d 689, 692 (E.D. Pa. 2009) (declining to modify asset freeze where "it does not appear that the frozen assets will remotely cover the lost investments").

return of the Excess Assets.

At present, the SEC and the Receiver are threatening to reach an agreement by which the Receiver would consent to the imposition of penalties and/or other damages on behalf of the Corporate Defendants (in an amount to be decided between the SEC and the Receiver). Defendants are rightfully entitled to be heard on these issues and to oppose the requested relief because Defendants have a valid, subsisting and cognizable interest in the Excess Assets that the Receiver currently controls – whether individually, or as shareholders of certain Receivership entities, or as the sole beneficiaries of the LME Trust. That interest confers a due process right to challenge the Receiver's continued possession and dissipation of the Excess Assets. The Constitution[14] protects property rights through the Fifth and Fourteenth Amendments' Due Process Clauses and, more directly, through the Fifth Amendment's Takings Clause: "nor shall private property be taken for public use without just compensation."

> The due process clause does not impose upon the states a duty to establish ideal systems for the administration of justice, with every modern improvement and with provision against every possible hardship that may befall. It restrains state action, whether legislative, executive, or judicial, within bounds that are consistent with the fundamentals of individual liberty and private property, including the right to be heard where liberty or property is at stake in judicial proceedings.

Ownbey v. Morgan, 256 U.S. 94, 110–11, 41 S. Ct. 433, 438, 65 L. Ed. 837 (1921).

"Procedural due process imposes constraints on governmental decisions which deprive individuals of 'liberty' or 'property' interests within the meaning of the Due Process Clause of the Fifth or Fourteenth Amendment." *Mathews v. Eldridge,* 424 U.S. 319, 332, 96 S. Ct. 893, 47 L.Ed.2d 18 (1976). Here, Ms. McElhone and Mr. LaForte, who were the trustees of the LME Trust,

[14] John Locke, the philosophical father of the American Revolution and the inspiration for Thomas Jefferson when he drafted the Declaration of Independence, stated the issue simply: "Lives, Liberties, and Estates, which I call by the general Name, *Property*." And James Madison, the principal author of the Constitution, echoed those thoughts when he wrote, "as a man is said to have a right to his property, he may be equally said to have a property in his rights."

and remain the only beneficiaries of the LME Trust, have an absolute right and interest in defending their property interests with respect to the assets within the LME Trust, and also have a right to be heard with regard to their interests. *See Republic Nat. Bank of Dall. v. Crippen*, 224 F.2d 565, 566 (5th Cir. 1955) (holding that the district court erred in refusing to hear the claims of certain creditors in a bankruptcy proceeding and explaining that "the denial of due process ... is never harmless error"). *See also Parker v. Williams*, 862 F.2d 1471, 1481–82 (11th Cir. 1989) ("[P]rocedural due process is an absolute right .... Although the result in this case may work a hardship on [a party] with no change in the ultimate result, every party must have the opportunity to participate in the processes which may affect his or her rights in a significant manner."), *overruled on other grounds by Turquitt v. Jefferson Cty., Ala.*, 137 F.3d 1285 (11th Cir. 1998). *See also Sec. & Exch. Comm'n v. Torchia*, 922 F.3d 1307, 1318 (11th Cir. 2019) ("Although the word 'summary' connotes an abbreviated procedure, it does not permit the district court to deny the parties due process").

We live in a country that protects property rights and the Defendants have a legitimate and cognizable interest, as the beneficiaries of the LME Trust, in protecting the trust assets – including, in particular, the Haverford Home, which has been their residence for the last eight years. Our system of justice is founded upon fundamental principles of private property and the right to defend it. It is every American's right to protect their property and not have it taken from them without due process. At the very least, the Defendants have the right to be heard by this Court so that they may attempt to protect their interest in the Excess Assets. To allow the continued seizure of assets which far exceed the Final Judgment without permitting Defendants to be heard, is antithetical to fundamental due process under the US Constitution.

The requested relief is urgently needed because this Court, with urging by the SEC, has

recently suggested that Defendants cannot oppose or seek to prevent the SEC and Receiver from loading a backdoor penalty settlement onto the Corporate Defendants. Such a settlement would be wholly unlawful and unjustified for several reasons.

First, the SEC has effectively waived the right to seek an additional monetary judgment against the Corporate Defendants. Pursuant to the Corporate Defendants' Consent Judgments (which conceded liability, not damages) the SEC was granted the right to make a motion for disgorgement and civil penalties against the Corporate Defendants. (*See* DE 397, p. 9). This was the same right that the SEC was granted against Defendants. (*See* DE 1008 and 1010 at 5: "The Court shall determine the amounts of disgorgement and civil penalty upon motion of the Commission"). Yet the SEC did not seek monetary relief from the Corporate Defendants in its disgorgement motion (DE 1252) or at the evidentiary hearing addressing the SEC's claims for disgorgement and penalties (the "Disgorgement Hearing"), even though the Court made clear that the Disgorgement Hearing was intended to address *all* claims for disgorgement, penalties, or other damages. This was evidenced by the Court's adamance that the disgorgement proceedings would be the final step before this case moved to the next phase – the handling of investors claims.[15] Near the end of the hearing, amid a discussion of civil penalties, this Court stated:

> We need to get to the last phase of this case which is putting the receiver in a position to begin the claims handling process so that we can make people whole. The purpose of this disgorgement is not punitive. The purpose of the disgorgement is to get back to square one and get money to investors, and everybody moves on,

[15] *See* Disgorgement Hearing: T. 114-15 ("I want to get to the end because the investors deserve it. I've done everything I can to marshal assets. My receiver has been consumed with going after everything he can. We have, I think, amassed a really solid amount of funds to pay back investors. This is the last piece of that. Okay?"; T. 118: "The Court reserves ruling in order to give the parties an opportunity to reach an agreement as to disgorgement and civil penalties;" T. 119: "The reality is, both sides could disagree with me on so many different issues, that this could be easily tied up in appeals. And it's a huge sum. And the receiver will be stuck. My receiver cannot move without these numbers. You can't just run the numbers. So it's in everyone's best interest that we all can live by the number. [A settlement on numbers] will expedite resolution for the investor's benefit"; T. 120: "I don't want [the investors] to wait anymore"; T. 225: "And my hope is, obviously, that we can find a number that works for the Commission and works for all defendants, and, most importantly, works for the investors, so the investors take away from this that we continue to advance the ball.")

> deals with their penalties, and we're done. I mean that is what we are at now. We are at the finish line. (Disgorgement Hearing at T. 108).

Being "at the finish line" where "everybody moves on" is wholly inconsistent with the SEC seeking a new raft of monetary penalties against the Corporate Defendants. Nor would this Court have concluded that the Receiver had marshaled sufficient assets to pay investors if there was an opportunity, due to a later penalty loaded on to the Corporate Defendants, to transfer assets out of the Receivership to the SEC as penalties. (*Id*. at T. 115).

Second, there is simply no legal basis or justification for a separate monetary judgement against the Corporate Defendants given the methodology the Court used to determine Ms. McElhone and Mr. LaForte's disgorgement and penalties. This is because the Court *did not* base disgorgement on the Defendants' personal gains from the business (*i.e.*, what they were actually paid). Instead, the Court ordered Ms. McElhone and Mr. LaForte to disgorge the ill-gotten gains *of the Corporate Defendants themselves* – which the Court calculated by taking the amount Par raised from noteholders, then subtracting the amount repaid to noteholders and the legitimate business expenses of the Corporate Defendants which the Court determined were appropriate under *Liu*. The fact that disgorgement was not based upon Defendants' personal profit is an inescapable conclusion of the Disgorgement Hearing[16] and this Court's Amended Order.[17] Furthermore, the SEC's Amended Complaint expressly alleged that the Defendants and the Corporate Defendants were jointly and severally liable (*see* DE 119, Count VIII, alleging Control Person Liability), the Defendants' consented to these liability allegations for purposes of the disgorgement proceedings (*see* DE 1008 and 1010), and the Court based its findings on the

[16] *See, e.g.* Disgorgement Hearing at T. 69-70 (Court agrees to analyze disgorgement by considering business deductions); T. 125 (Receiver noting that "janitorial supplies" and "computer stuff" are part of "operating expenses" in terms of *Liu* deductions); *see also* T. 76-77, T. 110, T. 127.

[17] *See, e.g.* DE 1450 at 9 (disgorgement is based on "net profits from wrongdoing after deducting for legitimate expenses," quoting *Liu*); at 19-26 (deducting the legitimate business expenses of the Corporate Defendants, including payments to outside consultants and Par Funding's income taxes).

allegations of the Amended Complaint.[18] Because the Defendants have already been ordered to disgorge the ill-gotten gains of the Corporate Defendants – and there is no legal basis for the same sums to be disgorged twice – there is no legal basis for separate disgorgement against the Corporate Defendants (either by judicial fiat, or the Receiver's consent).

As for civil penalties, there too, there are no circumstances not already considered by this Court that would support separate penalties being imposed against the Corporate Defendants. This Court's imposition of civil penalties against Mr. LaForte, Ms. McElhone, and Cole[19] subsume any further determination of civil penalties against the Corporate Defendants because the analysis is the same. "[C]orporations may act only through their agents." *Braswell v. United States*, 487 U.S. 99, 110, 108 S. Ct. 2284, 101 L.Ed.2d 98 (1988); *Ray v. Spirit Airlines, Inc.*, 836 F.3d 1340, 1357 (11th Cir. 2016) ("In contrast to an individual, a corporation cannot act except through its officers, agents, and employees"). This Court fully considered the wrongdoing that Par allegedly committed when it assessed penalties against Par's actual and/or alleged *defacto* corporate officers (*i.e.*, McElhone, LaForte and Barletta). There is simply no basis for a separate penalty assessment against the Corporate Defendants themselves.

Finally, the Receiver does not have the authority to enter into a backdoor agreement with the SEC to impose penalties on the Corporate Defendants, and the Receivership Orders do not authorize the Receiver to deplete the Receivership Estate for the benefit of the SEC by consenting to meritless penalties against the Corporate Defendants. The Receiver's authority extends to the marshalling of assets for the disgorgement of funds *for the benefit of victims/noteholders*. (DE

[18] DE 1450 at p. 3 ("The Court begin by setting forth the facts as described in the SEC's Amended Complaint… Defendants McElhone, LaForte, and Cole have agreed that the allegations in the Amended Complaint shall be accepted and deemed true by the Court").

[19] This Court imposed $1,300,000 in civil penalties against Mr. Cole, Par's CFO, based on allegations that he misled investors in connection with Par's business. (*See* DE 1450 at 42-45).

141). Penalties, on the other hand, are paid directly to the SEC, and would not benefit investors. The Receiver is to act on behalf of the Receivership Estates, and is required to "pursue, resist and defend all suits, actions, claims and demands which may now be pending or which may be brought by or asserted against the Receivership Estates." (*See* DE 141, "General Powers and Duties of Receiver" and Section II sub. L) (Emphasis added). The Receivership Orders clearly do not authorize the Receiver to enter an agreement to deplete the assets of the Receivership Estate for the benefit of the SEC.

For all of these reasons, there is no basis for the Receiver to consent to a separate damages award against the Corporate Defendants that would deplete the Receivership Estate (for the benefit of the SEC, rather than investors) and reduce assets that should be used to pay the Final Judgment against Defendants. At the very least, the Court should recognize that Par has its own due process right to oppose penalties claimed by the SEC and to preserve the assets available to continue as a business. *See Helicopteros Nacionales de Colom., S.A. v. Hall,* 466 U.S. 408, 413–19, 104 S. Ct. 1868, 80 L.Ed.2d 404 (1984) (The right to procedural due process applies to corporations); *See also Citizens United v. FEC*, 558 U.S. 310 (2010). As a separate legal entity, Par has the right to assert that penalties have either been waived, have already been decided or have been incorporated into the Final Judgment. Moreover, the Defendants have the right to raise these Due Process rights on behalf of the Corporate Defendants by virtue of their subsisting interest in the Excess Assets. Indeed, if the SEC had moved for separate monetary relief against the Corporate Defendants at the appropriate time (*i.e.*, in the course of the prior disgorgement proceedings) the Defendants would have been afforded an opportunity to oppose the relief – and obviously would have done so.

REQUEST FOR HEARING

The Defendants respectfully request that the Court convene a hearing to allow oral argument on the instant motion due to the critical importance of this motion (which goes to the $197 Million Judgment against the Defendants and their due process property rights), and so that the Defendants may address the legal and factual issues presented.

CONCLUSION

Accordingly, the Defendants respectfully request that the Court: 1) modify the Injunctions to reduce the asset freeze against the Defendants to $197 Million; 2) modify the Receivership Orders to permit Defendants' to seek relief on behalf of Par, FSP, the LME Trust and other legal entities owned by the LME Trust; and 3) release the Haverford Home and $3 Million from the Receivership Estate and return such property to the Defendants.

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

Counsel for the Defendants hereby certify that they conferred with counsel for the Receiver, Timothy A. Kolaya, Esq., in-person, and have confirmed that the Receiver opposes the relief sought herein. Counsel for the Defendants conferred with counsel for the SEC, Amie Rigley Berlin, Esq., via email on April 25, 2023 and April 26, 2023, but Ms. Berlin has not advised whether or not the SEC opposes the relief sought.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 16th day of May, 2023, 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