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,
_____/

SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM OF LAW IN RESPONSE TO COURT ORDER

Plaintiff, United States Securities and Exchange Commission, ("SEC" or the "Commission"), respectfully submits this memorandum of law in response to the Court's Order for Additional Briefing on Lisa McElhone's invocation of the Fifth Amendment in response to the Court's Order that she provide an accounting.

BACKGROUND

On July 28, 2020, the Court ordered the Defendant Lisa McElhone, among others, to provide an accounting of her assets.[1] More specifically, within five calendar days of the Order, the Court ordered McElhone to:

[1] Dkt. No. 42.

> (a) make a sworn accounting to this Court and the Plaintiff of all funds, whether in the form of compensation, commissions, income (including payments for assets, shares or property of any kind), and other benefits (including the provision of services of a personal or mixed business and personal nature) received, directly or indirectly, by the Defendant making the sworn accounting;
> (b) make a sworn accounting to this Court and the Plaintiff of all assets, funds, or other properties, whether real or personal, held by the Defendant making the sworn accounting, jointly or individually, or for its direct or indirect beneficial interest, or over which it maintains control, wherever situated, stating the location, value, and disposition of each such asset, fund, and other property; and
> (c) provide to the Court and the Plaintiff a sworn identification of all accounts (including, but not limited to, bank accounts, savings accounts, securities accounts and deposits of any kind and wherever situated) in which the Defendant making the sworn accounting (whether solely or jointly), directly or indirectly (including through a corporation, partnership, relative, friend or nominee), either has an interest or over which he has the power or right to exercise control.[2]

As of this filing, McElhone has never provided the Court or the SEC with an accounting of any kind.[3]

On October 6, 2020, the Receiver filed a redacted version of a financial statement prepared by Lisa McElhone in June 2020 (before this matter was filed) ("McElhone Financial Statement") showing assets totaling $795,755,000.[4] As the Receiver explained in the Receiver's October 6, 2020 Status Report, the Receiver discovered the McElhone Financial Statement during its review of emailed communications contained

[2] *Id*. at 17.
[3] Declaration of Michael Roessner (Roessner Decl.) at ¶ 3.
[4] Dkt. No. 305-1. (Attached as Exhibit 1 to the Roessner Decl.).

on Par Funding's G Suite database, which included emails containing various drafts of Lisa McElhone's personal financial statement.[5] The McElhone Financial Statement identifies multiple categories of assets, which she is now required to disclose under the Court-ordered accounting.[6] Many of the identified items are now held by the Receiver, but not all, including Ms. McElhone's interests in Lacquer Lounge and her personal assets.

On November 22, 2022, this Court entered an Amended Final Judgment against Defendants Lisa McElhone and Joseph W. LaForte ("LaForte") (collectively referred to as the "Defendants") requiring them to disgorge $153,224,738.24 (including prejudgment interest) and for each to pay civil penalties of $21,850,000 ("Judgment").[7] The Judgment provides that all funds collected by the SEC be turned over to the Receiver.[8] As of December 15, 2023, the outstanding balance on the Judgment is $180,988,373.23.[9]

On October 6, 2023, McElhone moved to release several previously undisclosed accounts to pay legal expenses.[10] The SEC repeatedly requested that McElhone provide the location of these accounts, but McElhone refused to provide their location and, in

[5] Dkt. No. 305.
[6] *Id.*
[7] Dkt. No. 1451
[8] *Id.*
[9] Roessner Decl. at ¶ 2.
[10] Dkt. No. 1721.

her motion, indicated that she would only provide that information if she was ordered to do so by the Court.[11]

On October 20, 2023, the SEC moved to hold McElhone in contempt for failing to attempt to use the undisclosed accounts to satisfy the Court's Judgment.[12] On October 24, 2023, the Court Ordered McElhone to Show Cause why she should not be held in Contempt.[13]

McElhone's response to the Court's Order to Show Cause failed to demonstrate any efforts she has taken to comply with the Court's Disgorgement Order.[14] In the SEC's Reply, the SEC specifically requested that the Court again Order McElhone to provide an accounting.[15]

On December 6, 2023, the Court denied the SEC's motion to hold McElhone in contempt, because "the funds in question are frozen and therefore beyond Defendant's reach, the Court cannot hold her in contempt for failing to utilize these funds to satisfy the Final Amended Judgment."[16] The Court, however, noted "the need for an accounting of Defendant McElhone's assets." And that "Defendant has indicated that she will assert her Fifth Amendment privilege in response to any Court-ordered

[11] *Id.* at Fn. 1.
[12] Dkt. No. 1729.
[13] Dkt. No. 1732.
[14] Dkt. No. 1752.
[15] *Id.*
[16] Dkt. No. 1770.

accounting."[17] The Court, therefore, ordered the parties to submit briefing on the impact of Lisa McElhone's invocation of the Fifth Amendment in response to the Court-ordered accounting. On December 11, 2023, McElhone's Counsel provided the SEC with the location of the bank holding the accounts she sought to use to pay attorneys' fees, but has not provided any additional financial information.[18]

ARGUMENT

A. ORDERING MCELHONE TO PROVIDE AN ACCOUNTING TO MEET HER BURDEN OF PROOF FOR A DEFENSE OF INABILITY TO PAY THE JUDGMENT IS NOT COMPULSION WITHIN THE MEANING OF THE FIFTH AMENDMENT

As the SEC previously asserted, McElhone has not met the burden incumbent upon her to come forward with evidence showing "categorically and in detail" why she is unable to comply with the court's Judgment.[19] As discussed in the SEC's prior pleadings, to meet her burden McElhone must establish "categorically and in detail" that she has made "in good faith all reasonable efforts" to meet the terms of the court order.[20] More specifically, "the burden of proving plainly and unmistakably that compliance is impossible rests with the contemnor."[21] In fact, a putative contemnor

[17] *Id.*
[18] The SEC will move to have the funds in these frozen accounts turned over to the Receiver.
[19] *See* Dkt. No. 1758 (SEC's Reply Brief); *see also United States v. Rylander*, 460 U.S. 752, 755 (1983).
[20] *CFTC v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529-30 (11th Cir. 1992) (holding that, where the defendant presented no evidence of good faith efforts to meet the terms of the court order, for this reason alone the defendant did not meet his burden").
[21] *In re Marc Rich & Co.*, 736 F.2d 864, 866 (2d Cir. 1984) (internal quotes omitted).

must show that "all reasonable avenues for raising funds have been explored and exhausted."[22]

In lieu of providing an accounting showing her inability to pay, McElhone intends to assert her Fifth Amendment right to block inquiries into the identity and location of assets.[23] Invocation of the Fifth Amendment privilege, however, does not substitute for the evidence necessary to make the showing of an inability to pay or relieve McElhone from meeting her burden of production to avoid a finding of contempt.[24] Moreover, requiring McElhone to provide an accounting to meet her burden of proof for a defense of inability to pay is not compulsion within the meaning of the Fifth Amendment.[25]

Preservation of McElhone's Fifth Amendment right does not mandate that the Commission forgo seeking her to be required to disclose her finances to demonstrate an inability to pay disgorgement.[26] Nor does an invocation of the Fifth Amendment afford her the ability to choose not to present evidence in a civil proceeding with no attendant consequences.[27] While McElhone is free to invoke her Fifth Amendment right rather

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[22] *SEC v. Bilzerian*, 112 F. Supp. 2d 12, 26 (D.D.C. 2000) (citation omitted).
[23] Dkt. No. 1767.
[24] *Cf. Rylander*, 460 U.S. at 758-761 (in civil contempt proceeding, defendant was not excused from producing evidence of his inability to comply with court order based on his assertion of his Fifth Amendment right against self-incrimination).
[25] *Id.* at 758; *see also*, *United States v. Certain Real Property 566 Hendrickson Blvd.*, 986 F.2d 990, 996 (6th Cir. 1993) (assertion of Fifth Amendment privilege does not excuse burden of controverting government's proof in forfeiture proceeding); *Gniotek v. City of Philadelphia*, 808 F.2d 241, 246 (3d Cir. 1986).
[26] *See Rylander*, 460 U.S. at 758.
[27] *See Williams v. Florida*, 399 U.S. 78, 83-84 (1970); *see also Keating v. OTS*, 45 F.3d 322, 326 (9th Cir. 1995).

than submit a sworn accounting, the Court is then permitted to draw from her silence the adverse inference that she may have additional knowledge regarding the value and whereabouts of her assets.[28] In sum, she can continue to assert her right against self-incrimination, but cannot avoid or purge herself of contempt by relying on a Fifth Amendment assertion.[29]

Indeed, it is well-settled that the assertion of the Fifth Amendment can give rise to an adverse inference in civil cases.[30] The Supreme Court upheld the "prevailing rule that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them . . . ."[31]

Thus far, McElhone has invoked her Fifth Amendment Privilege against self-incrimination in response to the Court's Order for an accounting that would show her ability to pay the Judgment.[32] Thus, the Commission cannot determine the scope of her

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[28] *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976); *SEC v. Colello*, 139 F.3d 674, 677 (9th Cir. 1998); *see also, e.g., SEC v. United Monetary Servs., Inc.*, 1990 WL 91812, at *9 (S.D. Fla. May 18, 1990) (ordering full disgorgement amount sought by Commission after defendant asserted Fifth Amendment privilege thereby failing to carry burden to show basis for reducing amount).

[29] *See Armstrong v. Guccione*, 470 F.3d 89 (2d Cir. 2006), cert. denied 128 S.Ct. 486 (2007) ("The district court did not force Armstrong to take the witness stand; instead, the court recognized that if Armstrong failed to produce the missing items, he could avoid a finding of contempt only by demonstrating that compliance is impossible. Armstrong was subsequently held in contempt because he neither complied with the turnover orders nor demonstrated that such compliance is impossible.").

[30] *See Baxter*, 425 U.S. 308.

[31] *Id.* at 318.

[32] Dkt. No. 1767.

assets and income. For this reason, it is appropriate that the Court draw an adverse inference regarding the veracity of her assertion that she is unable to pay the Judgment.[33]

In *SEC v. Musella,* the court recognized that it is proper to afford a civil litigant stymied by its adversary's silence some means of moderating the potentially overwhelming disadvantage the litigant faces in establishing its case because the assertion of the privilege in a civil proceeding is materially different than in a criminal proceeding.[34] In *Musella*, an insider trading case, the two defendants refused to answer questions at their depositions, refused to testify about the existence of brokerage accounts in the United States or abroad, and declined to produce trading records.[35] The court emphasized that the defense strategy of asserting the privilege, "clearly cripples the plaintiff's efforts to conduct meaningful discovery and to marshal proof in an expeditious fashion, if at all."[36] Consequently, the court drew an adverse inference from the defendants' assertion of the privilege during a preliminary injunction proceeding,

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[33] *Baxter,* 425 U.S. at 318 (emphasizing that the prevailing rule is that the Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them). *See also Mitchell v. United States*, 526 U.S. 314, 328 (1999) (stating that "[t]he rule allowing invocation of the [Fifth Amendment] privilege, though at the risk of suffering an adverse inference or even a default, accommodates the right not to be a witness against oneself while still permitting civil litigation to proceed"). *See, e.g., SEC v. Tome*, 638 F. Supp. 629, 631-32 (S.D.N.Y. 1986) (holding that an adverse inference may be drawn in an SEC disgorgement action); *SEC v. Netelkos,* 592 F.Supp. 906, 917–18 (S.D.N.Y. 1984) (stating that the Court is fully justified in drawing an adverse inference in a civil case); *SEC v. Musella,* 578 F. Supp. 425, 429-30 (S.D.N.Y. 1984)(permitting an adverse inference from the assertion of defendants' Fifth Amendment privilege despite their being targets of a parallel criminal investigation).

[34] 578 F. Supp. at 429-30.

[35] *Id*. at 429.

[36] *Id*.

so that defendants' assets would remain available to satisfy any future court order to disgorge illegal profits.[37]

Here, the Commission is before this Court to satisfy the Judgment entered against McElhone. Based upon the foregoing, the SEC urges this Court to find that McElhone's election to invoke the Fifth Amendment regarding the provision of basic financial information leads to the adverse inference that she possesses assets available to pay toward the Judgment.

B. McElhone Must Produce Records, Which The Commission Knew Of Prior To Request for Accounting

In this case, the Court is confronted with a potential conflict between its "inherent power to enforce compliance with its lawful orders," and Lisa McElhone's right to raise her Fifth Amendment privilege.[38] For a disclosure to fall within the ambit of the Fifth Amendment privilege, however, an individual must show affirmatively each of the following: (1) compulsion; (2) a testimonial communication or act; and (3) incrimination.[39]

Like the Court's ruling on the Receiver's Motion to Compel Joseph Cole Barleta ("Cole") to turnover requested documents, the issue before the Court is: does Lisa McElhone's providing an accounting violate her Fifth Amendment privilege?[40]

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[37] *Id.*
[38] *Sexual MD Sols., LLC v. Wolff*, 2020 WL 2813146, at *1 (S.D. Fla. May 29, 2020); *In re Grand Jury Subpoena Duces Tecum*, 670 F.3d 1335, 1342 (11th Cir. 2012).
[39] *Id*. at 1341 (Internal citations omitted).
[40] Dkt. No. 1222 at 2.

Again, like Cole, McElhone prepared a summary of her assets *before* the Court ordered the accounting at issue in this matter. The Court-ordered accounting covers the same assets identified in McElhone's financial statement, including: real property, business interests, vehicles, personal property and accounts. Accordingly, the contents of documents required by the Court-ordered accounting "themselves are not protected by [McElhone's] Fifth Amendment privilege."[41]

Yet, "an act of production can be testimonial when that act conveys some explicit or implicit statement of fact that certain materials exist, are in the subpoenaed individual's possession or control, or are authentic."[42] As the Eleventh Circuit explained:

> [T]here are two specific ways in which an act of production is not testimonial. *Id.* First, when it is merely a physical act that is compelled—i.e., "where the individual is not called upon to make use of the contents of his or her mind." *Id.* And second, under the "foregone conclusion" doctrine, "an act of production is not testimonial—even if the act conveys a fact regarding the existence or location, possession, or authenticity of the subpoenaed materials—if the Government can show with 'reasonable particularity' that, at the time it sought to compel the act of production, it already knew of the materials, thereby making any testimonial aspect a 'foregone conclusion.'"[43]

In this case, the Court's accounting falls under the "foregone conclusion" doctrine because the SEC is aware of the existence of the documents sought in the Court

[41] Dkt. No. 1222 at 3.
[42] *In re Grand Jury Subpoena*, 670 F.3d at 1345–46.
[43] *Id.* at 1345–46.

Ordered accounting. McElhone cannot claim any Fifth Amendment protections over any of the records relating to the frozen accounts, including documents related to the account openings, wire transfers, and statements of these accounts. Because the act of production protection is grounded in the "testimonial" nature of disclosing the existence and possession of documents, the protection is unavailable when the government already knows the records exist.[44] Based on the applicable case law, those documents must be produced. Accordingly, ample basis exists for the Court to order McElhone to complete the accounting.

C. McElhone Must Produce Documents She Holds In her Corporate Capacity

McElhone's refusal to provide an accounting includes corporate accounts. As set forth in the McElhone Financial Statement and in her motion to release certain accounts from the asset freeze to pay legal expenses, she asserted control and sought to access accounts held by Eagle Union Question Two LLC and Lacquer Lounge Inc. or any other entities.

As McElhone has asserted that she can use these assets for her personal expenses, the Commission contends that they should be used to satisfy the Amended Judgment.

[44] *See, e.g., Fisher v. United States*, 425 U.S. 391, 411 (1976) ("The existence and location of the papers are a foregone conclusion and the [party] adds little or nothing to the sum total of the Government's information by conceding that he in fact has the papers. Under these circumstances by enforcement of the summons no constitutional rights are touched. The question is not of testimony, but of surrender."); *United States v. Norwood*, 420 F.3d 888, 895 (8th Cir. 2005) ("The production of documents the existence of which is a foregone conclusion is not testimony for the purposes of the Fifth Amendment.").

What she cannot do, however, is avoid providing records of these corporations pursuant to an invocation of the Fifth Amendment, because "the custodian of corporate . . . records holds those documents in a representative rather than a personal capacity," and thus "the custodian's act of production is not deemed a personal act, but rather an act of the corporation," which of course has no Fifth Amendment privilege.[45]

Accordingly, McElhone cannot refuse to provide the corporate records of Lacquer Lounge Inc., Eagle Union Quest Two LLC and any of the other entities identified on the McElhone Financial Statement based on her Fifth Amendment Privilege against Self-Incrimination.

CONCLUSION

For the reasons set forth above, the Commission respectfully urges this Court to require Lisa McElhone to produce records of which the Commission is already aware and corporate records in her possession, custody, or control as they do not affect her rights under the Fifth Amendment. Further, to the extent that McElhone refuses to produce any records regarding her current financial position, the Commission urges the Court to draw an adverse inference against her, finding that she has an ability to pay the

[45] *Braswell v. United States*, 487 U.S. 99, 109-10 (1988) ("[T]he custodian of corporate records may not interpose a Fifth Amendment objection to the compelled production of corporate records, even though the act of production may prove personally incriminating."); *Bellis v. United States*, 417 U.S. 85, 88 (1974) ("[A]n individual cannot rely upon the [Fifth Amendment] privilege to avoid producing the records of a collective entity which are in his possession in a representative capacity, even if those records might incriminate him personally.").

Amended Judgment. Should the Court reach the conclusion that she has the ability to pay something toward the Judgment and she has not, the SEC also requests that the Court grant such other and further relief as this Court deems just and proper to address her contumacy.

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Washington, D.C.

Respectfully submitted,

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