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.
_____/

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

On December 5, 2023, this Court entered an Order denying the SEC's motion to hold Ms. McElhone in contempt (ECF No. 1770). In that same Order, the Court directed the SEC to file a motion briefing its position on Ms. McElhone's invocation of her Fifth Amendment privilege in response to the Court's July 28, 2020 Temporary Restraining Order (the "TRO"), which directed Ms. McElhone to provide a sworn accounting. The SEC has now filed a Memorandum of Law in Response to Court Order which presents three arguments – none of which negate Ms. McElhone's right to assert her Fifth Amendment privilege in response to an order requiring her to create a sworn accounting.

First, the SEC erroneously asserts that Ms. McElhone has the burden to present evidence that she is unable to pay the Final Judgment entered against her in order to avoid a contempt finding. This argument has no merit at all, since the Court has already denied the SEC's motion to

hold Ms. McElhone in contempt.[1] However, the Court should note that the SEC concedes Ms. McElhone has the right to assert her Fifth Amendment privilege with respect to the Court ordered accounting in its discussion of the (already adjudicated) contempt issue. *See* ECF No. 1775 at 6 ("McElhone is free to invoke her Fifth Amendment right rather than submit a sworn accounting"); *see also id.* at 7 ("[Ms. McElhone] can continue to assert her right against self-incrimination, but cannot avoid or purge herself of contempt by relying on a Fifth Amendment assertion").

Second, the SEC argues that Ms. McElhone cannot assert her Fifth Amendment privilege in the face of a Court ordered accounting pursuant to the "forgone conclusion" doctrine. But this doctrine applies ***to the production of documents***, not the provision of ***actual testimony*** in the form of a sworn accounting. The SEC appears to conflate these two concepts in its Memorandum, as it sometimes asserts that Ms. McElhone must provide a sworn accounting, but elsewhere states that she must produce documents, pursuant to the "foregone conclusion" doctrine. The SEC's references to the production of documents is particularly baffling since the SEC has not propounded any document requests and does not specifically identify any documents it is seeking.

Lastly, the SEC argues that Ms. McElhone has no Fifth Amendment privilege with respect to the production of corporate records for Lacquer Lounge Inc. and Eagle Union Quest Two LLC because Ms. McElhone purportedly holds such records in a representative rather than personal capacity. But assuming, *arguendo*, this argument was correct, it would have no bearing on whether Ms. McElhone can assert her Fifth Amendment privilege in response to a court order requiring her

[1] For the same reason, the SEC's request that the Court draw "the adverse inference that [Ms. McElhone] possesses assets available to pay toward the Judgment" has no merit. ECF No. 1775 at 9. Even if the Court were to draw such inference, it would have no apparent application since the SEC's contempt motion was denied and a judgment has already been entered against Ms. McElhone.

to provide a sworn accounting of her personal assets.[2]

For these reasons, and as discussed further herein, the SEC has not shown any grounds to compel Ms. McElhone to provide a sworn accounting of her personal assets, nor has it demonstrated entitlement to any other relief. Indeed, the SEC has conceded that Ms. McElhone has the right to decline to provide a sworn accounting on Fifth Amendment grounds. Accordingly, the SEC's motion must be denied.

ARGUMENT

I. Ms. McElhone Has the Right to Assert Her Fifth Amendment Privilege in Response to an Order for a Sworn Accounting

The SEC has acknowledged in its Memorandum that "McElhone is free to invoke her Fifth Amendment right rather than submit a sworn accounting." *See* ECF No. 1775 at 6. Accordingly, there appears to be no legitimate dispute on this point. Notwithstanding, Ms. McElhone will provide a brief analysis demonstrating that her Fifth Amendment privilege applies in these circumstances.

As this Court noted in a prior ruling in this case, a defendant has the right to raise her Fifth Amendment privilege in "any proceeding, civil or criminal, administrative or judicial, investigatory or adjudicatory; and it protects against any disclosures that the witness reasonably believes could be used in a criminal prosecution or could lead to other evidence that might be so used." *See* ECF No. 1222 at 3 (citing *In re Grand Jury Subpoena Duces Tecum Dated Mar. 25, 2011*, 670 F. 3d 1335, 1342 (11th Cir. 2012)). For a disclosure to fall within this ambit of the Fifth Amendment privilege, an individual must establish the following three elements: (1) compulsion;

[2] The Court should also be aware that Ms. McElhone has now voluntarily provided the SEC with account numbers for the bank accounts held by these two corporations – so the SEC can seek records directly from those banks.

(2) a testimonial communication or act; and (3) incrimination. *Id*. at 1341 (citing *United States v. Ghidoni*, 732 F. 2d 814, 816 (11th Cir. 1984).

In this case, ordering Ms. McElhone to create and produce a sworn accounting would clearly satisfy these elements because the sworn accounting would constitute compelled testimony which could be used against her in an ongoing parallel criminal proceeding. Notably, Federal Courts which have considered this issue directly have held that a defendant *cannot* be compelled to provide a sworn accounting of her personal assets where the defendant asserts the Fifth Amendment privilege. *S.E.C. v. Dunlap*, 253 F.3d 768, 774 (4th Cir. 2001) (holding that injunction order and contempt order which required defendant to produce his personal records and create a sworn accounting of his personal financial assets implicated the defendant's Fifth Amendment rights, noting that the SEC itself acknowledged the defendant "possesses a valid Fifth Amendment privilege against production and testimony in his personal capacity"); *S.E.C. v. Cook*, No. CV 09-3332 (MJD/JJK), 2010 WL 11537512, at *9 (D. Minn. Jan. 25, 2010) (holding that defendant "cannot be required to prepare a personal accounting"). Here, the TRO clearly directs Ms. McElhone to create an accounting of her *personal* assets. *See* ECF No. 42 at 17. Accordingly, the Court cannot compel Ms. McElhone to create and produce such an accounting over her assertion of the Fifth Amendment privilege.

II. The SEC Has Not Shown Grounds to Compel Ms. McElhone to Provide a Sworn Accounting, Nor Has It Demonstrated Entitlement to Any Other Relief

The SEC's Memorandum is filled with vague and inconsistent assertions which make it difficult to determine what the SEC's position is and what, specifically, it is requesting. Despite this lack of clarity, three things are clear from a plain reading of the Memorandum: 1) the SEC concedes that Ms. McElhone has the right to assert her Fifth Amendment privilege in response to an order requiring the production of a sworn accounting; 2) the SEC fails to account for the fact

that the Court denied its motion for contempt (ECF No. 1770); and 3) the SEC is demanding that Ms. McElhone produce unspecified documents even though it has not issued a request for production of those documents or any other discovery in aid of execution. As discussed herein, the SEC has not (and cannot) demonstrate that any grounds exist for the Court to compel Ms. McElhone to provide a sworn accounting, nor has the SEC demonstrated entitlement to any other relief requested in its Memorandum.

a. Ms. McElhone Does Not Have the Burden of Proof

In the first argument section of the SEC's Memorandum, the SEC erroneously asserts that Ms. McElhone has the burden to come forward with evidence that she is unable to pay the Judgment. According to the SEC, to meet this burden, Ms. 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." *See* ECF No. 1775 at 5 (internal citations omitted).

This entire line of argument is taken from the SEC's prior contempt motion, and is simply inapplicable now that the Court has denied that motion. *See* ECF No. 1770. The burden shifting framework the SEC attempts to articulate (and the cases the SEC cites as support) deal with a defendant's burden of proof when she faces contempt for failure to pay a judgment. This framework has no application to a defendant's right to assert the Fifth Amendment privilege in response to an order for a sworn accounting. Indeed, the SEC directly acknowledges this in its Memorandum by stating that Ms. McElhone "can continue to assert her right against self-incrimination, but cannot avoid or purge herself of contempt by relying on a Fifth Amendment assertion." ECF No. 1775 at 7.

For the same reasons, the SEC's request that the Court draw an adverse inference against Ms. McElhone (because she has declined to provide a sworn accounting based on her Fifth

Amendment privilege) finds no support in the law or the facts. While some Courts have applied an adverse inference against defendants in the context of a contempt proceeding – under very different factual circumstances where (unlike here) the SEC has presented substantial evidence of the defendant's willful refusal to pay a judgment – the issue of Ms. McElhone's inability to pay the Judgment in this case is not before the Court because the SEC's motion for contempt has already been denied. *See* ECF No. 1770. Likewise, the SEC has not explained how an adverse inference could be applied against Ms. McElhone outside the context of a contempt proceeding. Even if the Court were inclined to apply an adverse inference against Ms. McElhone (despite the fact that the SEC has not articulated any appropriate grounds for doing so) it is unclear what effect the adverse inference would have since Ms. McElhone is already subject to a judgment.

In summation, the SEC has overlooked (or perhaps willfully ignored) the impact of the Court's Order denying its contempt motion and is proceeding under the false assumption that contempt is still a live issue. Because this is not the case, the SEC's arguments regarding Ms. McElhone's purported burden to prove her inability to pay the Judgment and the SEC's request for an adverse inference have no weight.

b. The "Foregone Conclusion" Doctrine Is Inapplicable

The SEC's second argument is that Ms. McElhone cannot assert her Fifth Amendment privilege in response an order requiring a sworn accounting pursuant the "forgone conclusion" doctrine, which provides that:

> 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 forgone conclusion.

In re Grand Jury Subpoena, 670 F. 3d at 1345-46 (internal quotations omitted).

Citing only to *In re Grand Jury Subpoena*, the SEC contends that "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 Ordered accounting." *See* ECF No. 1775 at 10-11. This argument is fatally flawed for several reasons.

First, the "foregone conclusion" doctrine applies exclusively *to the production of documents* which already exist and which the government can point to with reasonable particularity. Here, the SEC is asking the Court to compel Ms. McElhone to *create* an accounting and swear to its veracity (*i.e.*, to provide actual testimony), rather than requiring her to produce existing documents which the SEC is already aware of. The Eleventh Circuit has observed that "[t]he touchstone of whether an act of production is testimonial is whether the government compels the individual to ***use the contents of his own mind*** to explicitly or implicitly communicate some statement of fact." *In re Grand Jury Subpoena*, 670 F. 3d at 1345 (citing *Curcio v. U.S.*, 354 U.S. 118, 128 (1957)) (emphasis supplied). At a minimum, compelling Ms. McElhone to create a sworn accounting would constitute a testimonial act requiring her to use the contents of her own mind. *In re Grand Jury Subpoena*, 670 F. 3d at 1346 (holding that requiring the defendant to decrypt a hard drive that was already in the Government's possession would require him to use the contents of his mind and would therefore be testimonial).

Second, even if the "foregone conclusion" doctrine did apply to the creation of a sworn accounting (it does not), the SEC cannot show with reasonable particularity that it is already aware of the assets which would be identified in such accounting. The SEC attempts to liken its request to compel Ms. McElhone to create a sworn accounting to the Receiver's prior motion to compel co-defendant Joseph Cole Barletta to produce certain financial records pursuant to a Request for Production. In that instance, the Court found that compelling Cole to produce existing documents

pertaining to assets he had identified in a financial statement prepared before the inception of the case (which the Receiver already had in his possession) did not involve a testimonial act. But the SEC's assertion that the Court's ruling as to Cole supports compelling Ms. McElhone to create a sworn accounting simply because the SEC is in possession of a draft financial statement which the Receiver located in a June 15, 2020 email between Ms. McElhone and her husband is unavailing. The production of existing records pertaining to previously identified assets is substantially different from the creation of a sworn accounting.

Finally, the SEC's suggestion that certain financial records are not protected by Fifth Amendment privilege and must be produced[3] is clearly erroneous because the SEC has not issued any document requests (or any other post-Judgment discovery) to Ms. McElhone. It would be improper for the Court to determine whether the production of documents the SEC merely alludes to (and has not actually requested in discovery) would constitute a testimonial act and/or would be subject to the "foregone conclusion" doctrine. Put simply, the SEC is not entitled to an advisory opinion regarding discovery it has not actually sought.

c. Ms. McElhone Is Not Obligated To Produce Corporate Records

The SEC's final argument is that Ms. McElhone has no Fifth Amendment privilege with respect to the production of corporate records for Lacquer Lounge Inc. and Eagle Union Quest Two LLC. This argument fails for the same reasons discussed above – the SEC has not subpoenaed Lacquer Lounge Inc. and Eagle Union Quest Two LLC or propounded any document requests to Ms. McElhone seeking corporate records for these entities.

[3] *See* ECF No. 1775 at 10 ("the contents of documents required by the Court-ordered accounting themselves are not protected by McElhone's Fifth Amendment privilege"); *id* at 11 ("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… Based on the applicable case law, those documents must be produced).

The SEC's argument is premised on the assertion that the custodian of corporate records holds such documents in a representative rather than a personal capacity and therefore cannot invoke the privilege. But unless and until the SEC actually seeks discovery from (or relating to) Lacquer Lounge Inc. and Eagle Union Quest Two LLC, neither Ms. McElhone nor the Court will be able to determine in what capacity the SEC is seeking such documents from Ms. McElhone. Accordingly, it would be premature – and would also constitute an impermissible advisory opinion – for the Court to determine whether any privilege might attach to discovery requests the SEC *might* issue pertaining to these entities. Moreover, the SEC's entire argument on this point is a red-herring because it has no bearing on the issue currently before the Court – namely, whether Ms. McElhone can assert her Fifth Amendment privilege in response to the provision of the TRO requiring her to provide a sworn accounting of her *personal* assets. For all these reasons, the Court should not issue an advisory ruling on the propriety of compelling the production of documents (which have not actually been requested) relating to Lacquer Lounge Inc. and Eagle Union Quest Two LLC.

d. The SEC's Request For Relief Is Vague and Improper

In the Conclusion section of the Memorandum, the SEC drops any pretext that Ms. McElhone can be compelled to provide a sworn accounting, and instead asks the Court to require Ms. 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." *See* ECF No. 1775 at 12. While Ms. McElhone agrees with the SEC's tacit admission that she cannot be compelled to provide a sworn accounting over the assertion of her Fifth Amendment privilege, the SEC's request that the Court compel Ms. McElhone to produce documents which *have not* been requested in discovery and are only vaguely alluded to in the

SEC's Memorandum is completely improper and must be denied.

The SEC also asks the Court to draw an adverse inference that Ms. McElhone has an ability to pay the Final Judgment in the event that Ms. McElhone "refuses to produce any records regarding her current financial position." *Id*. The SEC then requests that, if the Court concludes that Ms. McElhone "has the ability to pay something toward the Judgment and has not" (as a result of the adverse inference) the Court should then grant "such other and further relief" it deems proper to address Ms. McElhone's purported "contumacy." *Id.* This clearly constitutes an improper attempt to relitigate the SEC's contempt motion – which the Court already denied. The SEC's request for an adverse inference and other relief to punish Ms. McElhone's hypothetical "contumacy" is further flawed by the fact that the SEC is urging the Court to grant such relief *if* Ms. McElhone refuses to produce "records regarding her current financial position" which the SEC *has not* requested through discovery.

To say that the SEC has put the cart before the horse would be an understatement. The SEC is asking the Court to compel Ms. McElhone to produce documents it has not actually requested or face a contempt finding which the Court already ruled it would not impose. There is no legal or factual basis for such relief, and the SEC knows it.

CONCLUSION

For the reasons discussed above, Ms. McElhone respectfully submits that the SEC has not shown entitlement to any relief, that the SEC's Motion must be denied in full, and that the Court should grant Ms. McElhone such other and further relief as it deems just and proper.

Dated: January 5, 2024.

KAPLAN ZEENA LLP
Attorneys for Defendant Lisa McElhone
2 South Biscayne Boulevard, Suite 3050
Miami, Florida 33131
Telephone: (305) 530-0800
Facsimile: (305) 530-0801

By: */s/ James M. Kaplan*
JAMES M. KAPLAN
Florida Bar No.: 921040
james.kaplan@kaplanzeena.com
elizabeth.salom@kaplanzeena.com
service@kaplanzeena.com
NOAH E. SNYDER
Florida Bar No.: 107415
noah.snyder@kaplanzeena.com
maria.escobales@kaplanzeena.com
julie.valdes@kaplanzeena.com

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 5th day of January 2024, I electronically filed the foregoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record via transmissions of Notices of Electronic Filing generated by CM/ECF.

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