IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. COMPLETE BUSINESS SOLUTIONS GROUP, INC., *et al.,* Defendants.	)	Case. No. 20-CV-81205-RAR

MEMORANDUM OF LAW IN RESPONSE TO RECEIVER'S MOTION TO APPROVE TREATMENT OF MERCHANT VICTIM CLAIMS

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Non-parties Radiant Images, Inc., Giane Wolfe, Tourmappers North America, LLC, Julie Paula Katz, Kara DiPietro, HMC Inc., Fleetwood Services, LLC, Robert Fleetwood, Pamela Fleetwood, Gex Management, Inc., Carl Dorvil, MH Marketing Solutions Group, Inc., Michael Heller, Sunrooms Group, Inc., Michael Foti, Petropangea, Inc., Johnny Harrison, Volunteer Pharmacy, LLC, Chad Frost, Sean Whalen and Yngyin Iris Chen (collectively, the "Merchants" or "Merchant Victims") respectfully submit this memorandum of law in opposition to the Receiver's request to have this Court approve its claim determination denying all Merchant claims in their entirety.

PRELIMINARY STATEMENT

If approved, the Receiver's Motion (i) to Approve Proposed Treatment of Claims and (ii) for Determination of Ponzi Scheme (*Securities & Exchange Commission v. Complete Business Solutions Group, Inc.*, et al, United States District Court Southern District of Florida Civil Action No. 9:20-cv-81205-RAR [DE 1843] (the "Motion")), would punish the true victims of Complete Business Solutions Group, Inc.'s ("CBSG") criminal RICO Enterprise and deprive them of their due process rights by summarily denying their long-pending complex claims without any discovery whatsoever or even affording them the right to call witnesses at trial. The evidence as to CBSG's RICO Enterprise is so voluminous and overwhelming that it has resulted in two grand jury indictments, one in the Eastern District of New York and the other in the Eastern District of Pennsylvania—involving merchant victims—who have now had their claims denied by the Receiver. Although the United States government is criminally prosecuting these Merchant Victim claims, yet the Receiver has summarily denied them—*without any basis whatsoever*.

The class action lawsuits which the Receiver seeks to summarily dispose of have been pending before various courts in Pennsylvania for nearly six years—filed as early as January 22,

2018—and were stayed at the Receiver's request almost four years ago on August 26, 2020. (*Fleetwood Services LLC, et al. v. Complete Business Solutions Group Inc.*, et al. United States District Court, Eastern District of Pennsylvania, Civil Action No. 2:18-cv-00268-JS [DE 102]). Since then, the Receiver has spent the better part of three years collecting monies from the victims of CBSG's predatory lending practices; by last count, the Receiver had collected more than $35 million from Merchant Victims and now endeavors to pay those monies out to investors, many of whom were certainly aware of CBSG's illegal lending practices (like the Chehebars who had consulting agreements with CBSG).

In order to insulate itself from any—certainly understandable—outcry from those Merchant Victims, the Receiver forced the Merchant Victims to submit to an administrative claims process that was designed to fail from the outset. Now, in order to clear the deck so that it may begin paying funds to CBSG's co-conspirator investors, the Receiver seeks to get rid of these lawsuits by summarily denying the claims and filing motions to dismiss or transfer those cases to this Court. The purpose of a claims bar is to prevent double recoveries, ***not*** to strip crime victims of their day in court. The position taken by the Receiver is especially inequitable because it seeks to punish Merchant Victims who stepped up to perform their civic duty by providing the evidence necessary to prosecute the SEC's claims in this action and compensate the very investors without even affording the Merchant Victims due process. At the very least, the Merchant Victims should stand shoulder-to-shoulder with any innocent investors who may have been defrauded by the Receivership Entities and not be leapfrogged by co-conspirators like the Chehabrs, who knowingly facilitated and profited off the criminal RICO scheme.

The Receiver's attempt to substitute its biased judgment for federal judges should not be countenanced. Lest there be any doubt of its intentions, just yesterday, the Receiver filed a motion

seeking approval of a settlement with Eckert Seamans, a co-conspirator who knowingly facilitated the criminal RICO Enterprise. (*See* DE 1861.) Despite the fact that the Merchant Victims were not a party to that suit and had no involvement in it whatsoever, the Receiver—true to form—now seeks entry of a court order barring a completely unrelated suit brought by these Merchant Victims against Eckert Seamans:

> This bar on civil actions includes but is not limited . . . continued assertion of any other actions filed against Eckert Seamans and relating to the Receivership Estate, including . . . *B and T Supplies, Inc., et al., v. AG Morgan Tax and Accounting LLC, et al.*, Case No. 1:23-cv-11241 (S.D.N.Y.); and/or the filing of any new action by the Receiver, Putative Class Plaintiffs, or any Investor against Eckert Seamans relating to Eckert Seamans's Activities. (*Securities & Exchange Commission v. Complete Business Solutions Group, Inc. et al*, United States District Court Southern District of Florida Civil Action No. 9:20-cv-81205-RAR [DE 1843] [DE 1861-1])

Despite the fact that the case for which the Receiver seeks to settle involves investors claims and not those of the Merchant Victims, the proposed settlement seeks to bar all merchant claims *despite receiving no compensation whatsoever*. In other words, the Receiver is asking this Court to not only deny the merchant claims against CBSG without affording them constitutional due process but also affirmatively foreclose their ability to seek redress for alternative solvent, culpable parties.

Not surprisingly, the legal bases upon which the Receiver bases its Motion *sub judice* do not withstand scrutiny. In support of its request seeking to strip jurisdiction from the Pennsylvania courts, the Receiver argues that the Merchant Victims' *involuntary* submission of an Administrative Claim in this action means that they had somehow consented to submitting their

nearly six-year-old class action lawsuits to the *sole and exclusive* jurisdiction of this Court.[1] The plain language of the Order does not support such an inequitable remedy nor does the law.

First, neither the Claims Administration Order nor the Receiver's Claim Form provide that Merchants submit to the jurisdiction of the Receivership Court. *See* DE 1467-1, 1471. The Claims Administration Order, for instance, says nothing about an Administrative Claim subjecting the Claimant to the exclusive jurisdiction of the SEC Action; rather, that Order required mandatory submission of Claims that the Receiver was required to "work in good faith" with Claimants "to resolve any disputes about the Claim before submitting them to the Court for determination."

Despite this obligation, the Receiver has approved $240 million in investor claims and only $10 million in non-investor claims; ***none of these non-investor claims includes Merchant Victim claims***. *See* DE 1759 at 3-4. Notably, the Receiver admits that it denied all claims if the claimant did not identify a Receiver Entity in which it "Invested." Moreover, the Claims Form says nothing about claimants being subject to exclusive or mandatory jurisdiction of this Court.

If the Merchant Victims consented to anything, it was for this Court to have jurisdiction only over ***Administrative Claims***—which were contractual and tax-related in nature,[2] ***not the much broader tort claims and interests in the class action litigations***. There is no mention in either the Administrative Order or the Claims Form that a party submitting a Claim Form was

[1] Merchants staunchly opposed being forced to submit their claims in the SEC Action but were ordered to do so. *See* March 16, 2023 order by the Court in the SEC action denying merchants and other non-party movants' motion to lift the Receiver's stay of litigation and prescribing mandatory submission of claims with the Receiver**.**

[2] Defined by the Receiver to constitute claims for "(i) any goods or services they provided for the benefit of the Receivership Estate . . . (ii) any taxes arising from or attributable to tax periods beginning on or after July 27, 2020 . . . which remain unpaid; or (iii) any current, future or contingent contractual obligations arising from any contract entered into by or on behalf of the Receivership Estate." *See* DE 1467, at 13.

agreeing to waive its jurisdictional rights as it pertains to long-pending litigation and there is certainly nothing in either that contemplates the dismissal of those actions. The consent to which Merchant Victims agreed was consent to the jurisdiction of the Receivership Court over the administrative Proof of Claim including, as the Order and the Claim Form explicitly state, "consent to be bound by the decisions of the Court as to the treatment of the Claim in a Court-approved distribution plan." *See* DE 1471, at 11. The Claim to which that language refers is a capitalized defined term and specifically refers to the Proof of Claim submission.

As detailed in their various class action complaints and summarized herein, the Merchant Victims' claims in the class actions are much broader than those submitted through the Proof of Claim and the legal standard by which those claims are adjudicated are wholly unrelated. The Administrative Claim to which the Receiver refers had only to do with the claims of all "Creditors and Investors" as the Notice of Claim plainly states. *See* DE 1467, Ex. 3. This is further made clear by the Documentation for the Proof of Claim that the Claims Administrative Order required, which calls only for investor-related documents. As the Administrative Orders states, "***Investors*** must include such information starting from at least January 1, 2017, through July 27, 2020" including: (i) documents evidencing the investment of funds; (ii) copies of each signed investment contract; (iii) tax forms related to any investment in, ownership of, or receipt of principal or interest from one of the Receivership Entities and (iv) any payments received from any of the Receivership Entities, whether such payments were denominated as the return of principal, interest, commissions, finder's fee, or otherwise. *See id.* at 7-8. The Order also precluded Merchants from submitting evidence, including marketing brochures and other marketing materials, that is relevant and necessary to prove the claims at issue here. *Id*. at 9. The Order, the Notice, the Claim Form and the Receiver's motion to establish and approve the claims process, all clearly establish that

the Claim to which jurisdictional consent applies are the narrow Administrative Claim of the investors—not the ongoing litigations by merchants victimized by CBSG's predatory lending. *See generally* DE 1467.

Second, even if the jurisdictional consent to which the Receiver refers did apply to the class actions, the motion should still be denied because the waiver of the Merchants' due process rights was not made voluntarily as the law requires. Rather, the Merchants were *ordered* to submit their claim because, though the claims process applied only to investor claims, the Receiver and the Receivership Court defined Claimants so broadly as to include parties, like the merchants, who had no chance at having their Claim approved. Thus, though the Merchant Victims may not have wanted to submit an Administrative Claim or thought the submission was futile, according to the Order they had to make a submission or risk their distribution be forever foreclosed:

> Any Claimant or Administrative Claimant who is required to submit a Proof of Claim, but fails to do so in a timely manner or in the proper form, shall: (a) be forever barred, estopped, and enjoined to the fullest extent allowed by applicable law from asserting, in any manner, any Claim against any of the Receivership Entities, the Receivership Estate, or its assets; and (b) shall not receive any distribution from or have standing to object to any distribution plan proposed by the Receiver. Further, the Receiver shall have no further obligation to provide any notices on account of such Claim and the Receivership Estate is discharged from any and all indebtedness or liability with respect to such Claim.

(DE 1471) at 9. Any putative consent to waive their due process right to litigate their claims and the claims of the class was certainly not voluntary—it was compulsory.

Third, enforcing the Receiver's overbroad interpretation of jurisdictional consent would result in an unconscionable and inequitable result. The Merchant Victims were forced to file Proof of Claims in a process which guaranteed those claims would be rejected in favor of distributions to investors who funded the predatory lending criminal enterprise that victimized the merchants

through fraud, usury and abusive collection practices that continue to this day. As the Receiver admitted in its most recent status report, it denied all claims if the claimant did not identify themselves as an "investor." And the money for those investor claims comes from bank accounts of the very merchants who were victimized by CBSG and certain of its investors—or even worse profit-sharing consultants who had full knowledge of all aspects of the scheme.

Finally, case law requires that the class actions stay in Pennsylvania. The identities of the parties and the claims differ and so concurrent jurisdiction is not present and even parallel proceedings would not strip the Pennsylvania courts of subject matter jurisdiction. Further, the first-filed rule supports the class actions remaining in Pennsylvania where venue has already been determined and is the law of the case. The merchants did not consent—voluntarily or otherwise—to jurisdiction in the Receivership Court, and the Pennsylvania courts should retain jurisdiction.

RELEVANT PROCEDURAL HISTORY & FACTUAL BACKGROUND

The first putative class action lawsuit was filed on January 22, 2018—two and a half years before the SEC action—against CBSG and the John and Jane Doe Investors for their involvement in a RICO enterprise that collected unlawful debt from small businesses and their owners, like the Merchants, using sham MCA Agreements that disguised the true usurious which charged annual interest of over four hundred percent. The Fleetwood case asserts claims for (i) violation of Texas' usury statute; (ii) attorney's fees pursuant to Texas statutory law; (iii) fraud; (iv) violation of 18 U.S.C. § 1962(c) and (v) conspiracy to violate 18 U.S.C. § 1962(A). Those claims are brought on behalf of a class of Texas-based merchants (and guarantors) who were similarly victimized by CBSG's fraudulent and predatory criminal scheme.

On July 31, 2020, the merchant victims filed a motion to certify a class of Texas victims who were similarly victimized by CBSG's criminal Enterprise. Five days later, the Receiver filed

a notice of litigation stay against CBSG issued by the court in the SEC action. The action was subsequently stayed at the Receiver's request. Prior to the stay, CBSG, through its counsel, staunchly opposed any discovery into the identity of the CBSG investors. During depositions in Fleetwood and the related HMC case before the EDPA, *HMC Inc. et al. v. Complete Business Solutions Group, Inc.*, 19-cv-3285 (E.D. Pa.), CBSG repeatedly lied about CBSG's organization and structure which prevented merchants from amending their complaint to name the specific John and Jane Doe Investors who were culpable in facilitating the Enterprise's criminal scheme. Numerous similar class actions were likewise filed in Pennsylvania. *See* Ex. A (case list).

On May 18, 2023, a United States Grand Jury from the EDPA issued a sixty-three count indictment against the principals of CBSG, *which included four counts of perjury from statements made in the Fleetwood action and the related HMC action*.[3] The indictment also included a count for witness tampering: "On or about March 11, 2020, defendants Joseph Laforte and Joe Cole, along with Attorney No. 1, met with two company employees, Person No. 4 and Person No. 5., and coached them to lie about defendant Joseph LaForte's involvement in, role at, and control over defendant Par Funding during an upcoming deposition in a federal civil lawsuit pending against defendant Par Funding."

The SEC, on July 24, 2020 (over thirty months after Plaintiffs commenced this case), filed an action against CBSG and numerous investors that were previously named as John and Jane Doe Investors herein but had not yet been identified through discovery. In support of its Complaint, the SEC cited affidavits from Pamela Fleetwood and Kara DiPeitro (who Joe LaForte threated blow up her house and later his brother Jimmy LaForte split her head open), and deposition transcripts taken in the EDPA actions. Most notable to the claims that the Receiver now summarily denies,

[3] *See United States v. LaForte, et al.*, 23-cr-198 (E.D. Pa.).

the SEC alleged that CBSG was "***in the business of making opportunistic loans—some of which charge interest in excess of 400%—to small businesses across America***." DE 119. In further support, the SEC cited a video obtained by the merchants in the EDPA action on November 21, 2019, advising a group of John and Jane Doe Investors that their funds would be used to fund "opportunistic" high-interest loans to small business loans exceeding 100% annually. In order to protect future investors from getting involved in this criminal and fraudulent scheme, more than a dozen merchant victims submitted affidavits in the SEC action demonstrating the false representations made to "mom and pop" investors and others.

I. Summary of the Merchant Victims' Claims.

The Receiver, through its various motions, seeks to dismiss and deny claims filed by merchants who fell victim to the predatory lending and abusive collection tactics of CBSG—***and who filed lawsuits years before the commencement of the SEC Action***. These abusive collection tactics, which still continue, include:

a) On March 2, 2023, at around the same time as the threatening calls to the Abbonizios, government witness K.D. [HMC] received a threatening call in a male voice from the same spoofed number that had called the Abbonizios. The caller said, "We're coming after you. We're going to split your head open."

b) Threatening physical harm to merchants if they failed to repay Par Funding, including advising one Movant that failing to pay Par Fund could affect "wives, households and children" and could make widows and telling multiple Movants that Par Funding would "blow up" their house;

c) Sending thousands of UCC lien notices to merchants' families, friends, neighbors vendors, customers and other business relations including, in one instance, the Movant's niece and to the school of the Movant's child;

d) Harassing the Movants, their spouses and employees with endless phone calls, email and text messages threatening to destroy their business and/or take everything they have;

e) Forging and doctoring confessions of judgments to obtain fraudulent judgments in jurisdictions with favorable judgment enforcement laws;

f) Obtaining hundreds of confessed judgments based upon the admittedly forged signature of an attorney and notary;

g) Confessing judgments against merchants for amounts that are grossly exaggerated and in instances where there was no breach of the underlying agreements and no basis for the entry of a confessed judgment and

h) Claiming its merchant agreements are legitimate purchases of receivables but forcing merchants to sign mortgages that expressly acknowledge the agreements are actually absolutely repayable loans that charge interest at rates exceeding 700% per annum in violation of various state criminal usury laws.

These tactics gave rise to a variety of claims for breach of contract, fraud, usury and civil RICO stemming from wire fraud, mail fraud and collection of an unlawful debt and extortion. *See*, *e.g.*, 18 U.S.C. § 1961. Most of these claims are asserted as class action claims that seek to vindicate the rights not only of the merchants but also those of potentially thousands of other similarly situated victims. Notably, the class action complaints include claims against "The John and Jane Doe Investors," which until this SEC action, were previously unidentified.[4] *See Lateral Recovery, LLC v. Cap. Merch. Servs., LLC*, 632 F. Supp. 3d 402, 450 (S.D.N.Y. Sept. 30, 2022) ("The RICO statute of limitations is satisfied so long as an overt act that is part of the violation and injures the plaintiff occurs within the four years prior to the filing of a complaint asserting the RICO claim.") (citing *Klehr v. A.O. Smith Corp*., 521 U.S. 179, 188-89 (1997)).

[4] Many of the Receivership Entities are likely the John and Jane Doe Investors, such as ABetterFinancialPlan.com LLC and the various ABFP Funds, MK Corporate Debt Investment Company LLC, United Fidelis Group Corp., Fidelis Financial Planning LLC, Retirement Evolution Group, LLC, RE Income Fund LLC, RE Income Fund 2 LLC, Capital Source 2000, Inc., Fast Advance Funding LLC, Beta Abigail, LLC, New Field Ventures, LLC, Heritage Business Consulting, Inc. and Eagle Six Consultants, Inc.

II. The Administrative Claims Process in The SEC Action.

Over their objections, the Merchant Victims were ordered to submit their claims through the administrative claims process. Though this claims process was intended only to approve the claims of investors and those who incurred administrative costs, the Receiver defined "Claimants" so broadly as to include the Merchant Victims. *See* DE 1467. The Receiver represented that all claims, including Merchant Victim claims, would be adjudicated in good faith. *Id.,* ¶ 14.

Based on the Receiver's own status report filed on November 27, 2023, the Receiver has approved $240 million in investor claims, and $10 million in claims for administrative costs. ***None of the approved claims include merchant victim claims***. In fact, the Receiver's own status report admits that it denied all claims if the claimant did not identify a Receiver Entity in which they "Invested." *See* Ex. D. In short, the merchant victims who filed their actions long before this SEC action, as well as provided witness declarations in support of this SEC action, have all had their claims denied by the Receiver—*without any explanation*.

ARGUMENT

I. The Merchant Victims' Claims Have Considerable Merit.

There can be no question that the Merchants' claims have merit as numerous courts have ruled that similar, or even less onerous, MCA agreements than the ones used by CBSG are, in actuality, loans with usurious interest rates. *See, e.g.*, *Lateral Recovery LLC v. Funderz.Net, LLC*, 2024 U.S. Dist. LEXIS 10134, *1 (S.D.N.Y. Jan. 19, 2024) (upholding RICO claims alleging similar conduct and agreements as CBSG); *AKF, Inc. v. W. Foot & Ankle Ctr.*, 632 F. Supp. 3d 66, 70 (E.D.N.Y. 2022) (finding similar MCA agreements to those of CBSG to be loans as a matter of law); *Fleetwood Servs., LLC v. Complete Bus. Sols. Grp.*, 374 F. Supp. 3d 361 (2019) (same); *Fleetwood Servs., LLC*, 2023 U.S. App. LEXIS 14241, *1 (2d Cir. June 8, 2023) (affirming

summary judgment on RICO claims based on similar MCA agreements to those of CBSG); *Lateral Recovery LLC v. Queen Funding LLC*, 2022 U.S. Dist. LEXIS 129032, *12-13 (S.D.N.Y. July 20, 2022); *Lateral Recovery, LLC v. Cap. Mech. Servs. LLC.*, 632 F. Supp. 3d 402 (S.D.N.Y. 2022); *New Y-Capp v. Arch Cap. Funding LLC*, 2022 U.S. Dist LEXIS 180309, *13 (S.D.N.Y. Sept. 30, 2022); *Haymount Urgent Care PC v. GoFund Advance, LLC*, 609 F. Supp. 3d 237 (S.D.N.Y. 2022); *Crystal Springs Capital Inc. v. Big Thicket Coin, LLC*, 2023 N.Y. App. Div. LEXIS 5083 (2d Dep't Oct. 11, 2023); *People v. Richmond Capital Group LLC*, 2023 NYLJ LEXIS 2487 (Sup. Ct. Sept. 20, 2023); *Davis v. Richmond Capital Group*, 194 A.D.3d 516, 517 (1st Dep't 2021); *LG Funding, LLC v. United Senior Properties of Olathe, LLC*, 181 A.D.3d 664, 666 (2d Dep't 2020). Indeed, the EDPA already denied CBSG's motion to dismiss the Fleetwood Class Action on the very basis that the MCA agreements were usurious loans.

The overwhelming documentary and other evidence demonstrate that the CBSG agreements are absolute repayable loans giving rise to the merchant's RICO claims for the collection of an unlawful debt. The essential characteristic of a loan is that it be absolutely repayable. *See* Tex. Fin. Code, § 306.001(1) (defining a "loan" under Texas law as "an advance of money that is made to or on behalf of an obligor, the principal amount of which the obligor has an obligation to pay the creditor"); *Rubenstein v. Small*, 273 A.D.2d 102, 104 (1st Dep't 1947) ("For a true loan it is essential to provide for repayment absolutely and at all events of that the principal in some way be secured as distinguished from being put in hazard."); *Eisenhardt v. Schmidt*, 27 N.J. Super. 76, 82 (Ch. Div. 1953) (same under New Jersey law). "To determine whether a transaction is a loan or a sale, courts ascertain the intentions of the parties as disclosed by the contract, attending circumstances, or both." *Korrody v. Miller*, S.W.3d 224, 226 (Tex. App. 4th Dist. 2003); *see also Endico Potatoes, Inc. v. Git Grp./Factoring, Inc.*, 67 F.3d 1063, 1068 (2d

Cir. 1995) (determining whether an assignment of accounts receivable is a loan "depends on the substance of the relationship" between the parties "and not simply the label attached to the transaction."); *Major's Furniture Mart, Inc. v. Castle Credit Corp.,* 602 F.3d 538, 543 (3d Cir. 1979) ("Courts will not be controlled by the nomenclature the parties apply to their relationship when it comes to determining whether a transaction is a loan or a true sale.").

Recent federal district and appellate courts, as well as various state courts, that have addressed whether MCA agreements like those issued by CBSG are really loans rely on several factors. Specifically, recent Second Circuit authority found that to determine whether MCA agreements are really loans, Courts are to consider at least three factors: "(1) whether there is a reconciliation provision in the agreement; (2) whether the agreement has a finite term; and (3) whether there is any recourse should the merchant declare bankruptcy." *Fleetwood*, 2023 U.S. App. LEXIS 14241, *3 (2d Cir. June 8, 2023); *see also*, *FTC v. RCG Advances, LLC,* 20-cv-4432 (JSR), 2023 U.S. Dist. LEXIS 174030, *2 (S.D.N.Y. Sept. 27, 2023) (finding same MCA agreements analyzed by the Second Circuit in *Fleetwood* to be loans). Other non-exhaustive factors courts consider in evaluating whether MCA Agreements are loans include: (4) whether the agreements identify particular revenue or accounts that were supposedly purchased; (5) whether the merchant is responsible for collecting the future receipts; (6) whether default is declared after just a few missed payments; and (7) whether the daily payment rates appear to be good faith estimates of merchant's receivables. *LG Funding*, 181 A.D.3d at 666; *Davis*, 194 A.D.3d at 517; *Haymount*, 609 F. Supp. 3d 237; *Queen Funding*, 2022 U.S. Dist. LEXIS 129032, at *12-13; *Cap. Mech. Servs. LLC.*, 632 F. Supp. 3d 402. Applying these factors to the MCA Agreements lead to the unavoidable conclusion that they are truly usurious loans.

The conclusion that CBSG's agreements are repayable loans are further supported by CBSG's conduct with respect to the Merchants:

a) Demanding that merchants continue to make payments under its form agreements even though its business had been shut down by the government in response to the COVID-19 pandemic and it had no receivables.

b) To secure certain of its agreements, CBSG obtained mortgages from the merchant's owners which mortgages admitted that Par Funding was a "lender," the agreement was a "Note" and a failure to make any payments under the agreement constituted a default entitling Par Funding to foreclose on the mortgaged property.

c) When merchants were unable to pay because their business revenues had slowed down, CBSG sent Gino, a convicted felon who has admitted to using extortionists threats to collect upon CBSG's agreements in violation of federal law.

d) Filing confessions of judgment against guarantors even though the guaranteed obligations had not been triggered.

e) Harassing merchants and their guarantors to make payments under their agreements by repeatedly sending UCC lien notices to merchants' customers, potential customers, friends, family and business colleagues solely to tarnish the merchants' business reputations and extort a lumpsum payment from the merchant.

II. The Merchants Are Entitled to Constitutional Due Process and Did Not Consent to Jurisdiction in the Receivership Court.

The entirety of the Receiver's argument that merchant victims relinquished their due process rights and stripped the Pennsylvania courts of jurisdiction rests on the theory that they consented to submitting to the jurisdiction of the Receivership Court by voluntarily submitting an administrative claim in this Action. The Receiver's argument fails for a number of reasons.

First, the Receiver is wrong in asserting that the merchants consented to submit their previously filed actions to the jurisdiction of the Receivership Court. The language from the Administrative Order and the Claims Form that the Receiver uses to support its contention says

nothing about the submission of an Administrative Claim subjecting the prior litigation of the Claimant to the exclusive jurisdiction of this Court.

Instead, any consent to which merchants agreed was solely to the jurisdiction of the Receivership Court over the Administrative Claim. This is clear from the language of the Order and the Claim Form explicitly states that Claimants who submit an Administrative Claims only "consent to be bound by the decisions of the Court ***as to the treatment of the Claim in a Court-approved distribution plan***." *See* DE 1471, at 11 (emphasis added). The Claims Administration Order, goes on to say that the Receiver is to "work in good faith" with Claimants "to resolve any disputes about the Claim before submitting them to the Court for determination." This is supported by the context of the claims at issues as the Merchant claims and interests in the Pennsylvania actions are much broader than those submitted through the Proof of Claim and the legal standard by which those claims are adjudicated are wholly unrelated. The language upon which the Receiver relies—in the Administrative Order, the Notice, and the Claim Form—all clearly establish that the Claims to which jurisdictional consent applies are the Administrative Claims and not the present litigation. For this reason, the Receiver's Motion should be denied.

Second, even if this Court were to find that the merchant victims did consent, the Motion should still be denied because the waiver of their due process rights was not made voluntarily. Instead, they were *ordered* to submit their claim under a claims process that was designed to adjudicate only investor claims. Forcing merchants to submit claims through a claims process that was knowingly and purposely designed to deny those claims cannot possibly be a knowing and voluntary waiver of their due process rights.

For a court to find that a party, like the merchant victims, have consented to waive their due process rights as the Receiver has argued happened here, that waiver must have been

"voluntary, knowing, and intelligently made." *See D.H. Overmyer Co. v. Frick Co*., 405 U.S. 174, 188 (1972) (holding that waiver of due process must be "voluntary, knowing, and intelligently made"); *Godinez v. Moran*, 509 U.S. 389, 393-94 (1993) (noting that only a competent person may "make a voluntary, knowing, and intelligent waiver of constitutional rights" under the "Due Process Clause"); *Jordan v. Fox, Rothschild, O'Brien & Frankel*, 20 F.3d 1250, 1269 (3d. Cir. 1994) (noting that a waiver of "the constitutional right to due process" must be "a knowing, intelligent, and voluntary waiver") (citing *Swarb v. Lennox*, 405 U.S. 191, 196 (1972)).

Here, the submission of an Administrative Claim does not meet the standard for voluntary waiver of their due process rights in this litigation. Because the Receiver and this Court defined Claimants so broadly as to include the merchant victims, they had no choice but to file a Proof of Claim. Had the merchants not submitted an Administrative Claim, according to the Court's Order, they would have risked that their distribution be forever foreclosed. Any putative consent to waive their due process right to litigate their claims and the claims of the class was certainly not voluntarily made and Receiver's motion should be denied.

Third, the equities of the case favor denial of the Receiver's Motion. The administrative claims process that the Receiver insists mandates denial of the Merchants' claims and a dismissal of the Pennsylvania actions or abdication of jurisdiction was a farce from day one. ***The Receiver denied every single merchant claim on the basis that they were not an investor.*** If being an investor was a prerequisite to asserting a claim, the merchants should never have been required to submit their claims through a doomed-to-fail process. The Receiver has admitted this fatal fact in its Status Report and has proven this fact by denying every single merchant claim. It cannot backtrack now by attempting to claim it denied these claims on the merits when he admitted he did not. And even if allowed to backtrack, he cannot argue in good-faith that he considered the

merchant claims in good-faith when he—***denied every one—without any basis whatsoever.*** Rather, in its Motion, it merely states: "[t]he Receiver has disputed the basis for, and therefore, denied these claims." DE 1843, pg. 20. Notably, the Receiver cites no legal authority whatsoever.

At a minimum, due process requires a claims procedure that is designed to treat claims as advertised. The Receiver never had any intention of treating the Merchant claims fairly when the prerequisite to having a Claim approved was to be an investor. Especially where the money for those approved investor claims comes from the victim merchants whose own claims were denied. This Court should not condone a result that strips merchant victims of their constitutional due process rights. Rather, the Court should deny the Receiver's Motion and direct the Receiver to litigate the merchant victim claims on the merits in the Pennsylvania actions. Constitutional due process requires it.

III. The Pennsylvania Actions Are Subject to the First-Filed Rule.

Nothing in the Receiver Order conferred exclusive jurisdiction on this Court and the Pennsylvania claims are considerably broader. In order to establish that a court has concurrent jurisdiction over a matter there must be complete overlap over the identity of parties and claims. *See, e.g.*, *Compl. of Bankers Trust Co. v. Chatterjee*, 636 F.2d 37, 40 (3d Cir. 1980) ("It is important to note, however, that only truly duplicative proceedings be avoided. When the claims, parties or requested relief differ, deference may not be appropriate."); *Lexington Ins. Co. v. Caleco, Inc*., 2003 U.S. Dist. LEXIS 1318, 2003 WL 21652163, at *5 (D. Pa. Jan. 25, 2003) (relying on *Complaint of Bankers Trust Co.'s* "truly-duplicative- proceedings" requirement to deny motion to dismiss or transfer subsequently filed action where previously filed action involved some overlapping issues but was not "truly duplicative"). Here, the Merchant Victims are ***not even a party*** to the SEC Action. Rather, the Pennsylvania actions are more comprehensive because they

involves all relevant parties and includes claims against parties that cannot be adjudicated in the SEC action. Thus, the Receiver's motion does not even get out of the gate on the first prong.

Further, even parallel proceedings do not strip a court of subject matter jurisdiction. Rather, parallel actions may proceed until one of them advances to a final judgment for res judicata principles. *See MasterCard Int'l, Inc. v. Argencard Sociedad Anonima*, 2002 U.S. Dist. LEXIS 4625, *30 (S.D.N.Y. Mar. 4, 2002) ("There is, in fact, a fundamental corollary to the existence of concurrent jurisdiction, which makes parallel proceedings possible: 'parallel proceedings on the same *in personam* claim should ordinarily be allowed to proceed simultaneously, at least until a judgment is reached in one which can be pled as res judicata in the other.'") (citing *Laker Airways Ltd. v. Sabena, Belgian World Airlines*, 235 U.S. App. D.C. 207, 731 F.2d 909, 926-27 (D.C. Cir. 1984) (quoted with approval in *China Trade & Dev. Corp. v. M.V. Choong Yong*, 837 F.2d 33, 36 (2d Cir. 1987)).

Finally, the first-filed rule mandates that this action remain with the Pennsylvania courts where venue has already been determined and is the law of the case. It is well settled that where "two actions involving overlapping issues and parties are pending in two federal courts, there is a strong presumption across the federal circuits that favors the forum of the first-filed suit under the first-filed rule." *Manuel v. Convergys Corp*., 430 F. 3d 1132, 1135 (11th Cir. 2005). Under the first-filed rule, when two parallel actions are filed in separate courts, "the court initially seized of the controversy should hear the case." *Collegiate Licensing Co. v. Am. Cas. Co. of Reading, Pa*., 713 F. 3d 71, 78 (11th Cir. 2013). The rule seeks to avoid wasteful duplication of judicial resources, to avoid piecemeal decision-making, and to avoid rulings which may conflict or intrude upon the authority of sister courts. *See Int'l Fid. Ins. Co. v. Sweet Little Mexico Corp*., 665 F. 3d 671, 678

(5th Cir. 2011). Thus, there is a strong presumption favoring the forum of the first-filed suit. *See Manuel*, 430 F.3d at 1135.

Further, under no circumstance should this Court compel transfer of these actions to this Court. The issue has already been litigated and won. The *Fleetwood* action was first filed in Texas, its own home state. CBSG successfully transferred the case to Pennsylvania based on the mandatory forum selection clause. *See* (DE 1). Venue has already been determined and is *res judicata*. Neither *Fleetwood* nor any other Merchant Victim should be forced to litigate in a foreign forum not of their choosing. Notably, the so-called claims submission form relied upon by the Receiver says nothing about agreeing to transfer venue of already filed actions and the Merchant Victims staunchly oppose it.

CONCLUSION

The Administrative Claims Process authorized by this Court required the Receiver to (i) provide the factual and legal basis for the denial of any claim and (ii) engage in good-faith negotiations to resolve any objections. The Receiver has not done either as the claims decisions concerning the Merchant Victims provided no basis for the denial of their claim nor has the Receiver completed the mediation efforts that this Court ordered back in December 2023. Although the parties worked diligently—and ***seemingly*** in good-faith—for many months and appeared to have reached a settlement-in-principle for many of the Merchant Victims (and perhaps a global settlement that would provide desperately needed relief to all Merchant Victims), these efforts have inexplicably stalled through no fault of the Merchant Victims. The Motion should be denied or at least stayed pending completion of these good-faith mediation efforts. It is the sincere hope that continued mediation efforts will resolve the Merchant Victim claims and provide protection to certain investors who may be left to defend alone against a series of pending class

actions if a global resolution is not reached. For these reasons, and as set forth below, the Court should deny the Receiver's motion as to the Merchant Victims.[5]

Dated: May 7, 2024

Respectfully Submitted,

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Counsel for the Merchant Victims

[5] No investor who knew about their own role in the criminal Enterprise should be paid ahead of those merchant victims who have been physically threatened and had their businesses destroyed at the hands of the criminal RICO Enterprise that is subject of at least two pending Grand Jury indictments in both this Court and New York. *See* Ex. E (New York indictment) and Press Release, United States Attorney's Office Eastern District of Pennsylvania, Par Funding Principals Charged with Securities Fraud, Extortion, Tax Crimes, Perjury, and Obstruction (May 24, 2023), available at https://www.justice.gov/usao-edpa/pr/par-funding-principals-charged-securities-fraud-extortion-tax-crimes-perjury-and

CERTIFICATE OF SERVICE

I certify that on May 7, 2024, I electronically served the foregoing on all counsel of record via the Court's CM/ECF system.

/s/ David S. Almeida
David S. Almeida