UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 20-CIV-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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SECURED CHEHEBAR INVESTORS' RESPONSE IN OPPOSITION TO RECEIVER'S MOTION TO (1) APPROVE PROPOSED PLAN OF DISTRIBUTION AND (2) AUTHORIZE FIRST INTERIM DISTRIBUTION

GEMJ Chehebar GRAT LLC, Albert Shehebar, Albert Chehebar, Isaac Shehebar, Isaac Shehebar 2008 AIJJ Grantor Retained Annuity Trust, Michael Chehebar, Ezra Shehebar, Ezra Chehebar, Ezra Shehebar LLC, Cherie Chehebar, Josef Chehebar, Steven Chehebar, Joyce Chehebar (collectively the "Secured Chehebar Investors" or "SCIs"), hereby file their Response to the Receiver's Motion to (1) Approve Proposed Plan of Distribution and (2) Authorize First Interim Distribution [ECF No. 2014] (the "Motion").

SUMMARY OF THE ARGUMENT

The SCIs' 2017 and 2020 Liens are valid and enforceable against the Receivership estate. There is no dispute that the SCIs perfected some of their liens in 2017 by filing UCC Financing Statements and that those liens remained perfected at the time the SEC commenced this action in 2020. Contrary to the Receiver's assertion, the 2017 UCC Financing Statements did not lapse in 2022 because this Receivership obviated any requirement for the SCIs to file renewal statements to maintain their priority.

The liens that the SCIs perfected in 2020 are valid and enforceable because the SCIs did not violate the Court's July 27, 2020 Initial Receivership Order [ECF No. 36] (the "IRO") by recording their existing liens. The IRO did not prohibit the recording of existing liens against Receivership Property. Moreover, even if the IRO prohibited the recording of existing liens against Receivership Property, the IRO did not apply to the SCIs at the time they recorded their liens because the SCIs had not received notice of the IRO. And even if the IRO applied to the SCIs and the SCIs' recording of their liens violated the IRO, the SCIs' liens remain valid and enforceable.

Additionally, the liens held by investors in the 2020 Exchange Offering and recorded by Albert Vagnozzi are invalid because the investors knew that their acquisition of the liens violated the Securities and Exchange Act. *See* 15 U.S.C. § 78cc(b)–(c). And even if the 2020 Exchange Offering investors had valid secured claims, their claims should be equitably subordinated to the SCIs'.

FACTUAL BACKGROUND

Between 2017 and 2019, the SCIs entered into various loan and security agreements with CBSG.[1] In making these loans, each SCI entered into a Promissory Note and Security Agreement

[1] A list of these loans is found in this matter at ECF No. 1330-28.

with CBSG.[2] The Security Agreements provided: "In consideration of the loan made by [the] Secured Party to Debtor, [the] Debtor" granted broad security interests in "all of the Collateral" belonging to CBSG. ECF No. 1842-1 at p. 20 ¶ 1.(c). The Receiver does not challenge that valid security interests were granted to all of the SCIs.

On January 11, 2017, GEMJ Chehebar GRAT, LLC, Albert Shehebar, Isaac Shehebar, and Isaac Shehebar 2008 AIJJ Grantor Retained Annuity Trust perfected their security interests by filing UCC Financing Statements in Delaware and Pennsylvania (the "2017 Liens"). *See* ECF No. 1189 at 15; ECF No. 1843-3 at 2; ECF No. 1842-1 at 25–39.

In March of 2020, CBSG ceased paying interest on the SCIs' Promissory Notes and explained to the SCIs that the cessation in interest payments was caused by the harm the COVID-19 pandemic inflicted on CBSG's MCA funding business. Ex. A (J. Chehebar Decl) ¶ 2. As a result, in April 2020, the SCIs contacted their counsel at Paul, Weiss, Rifkind, Wharton & Garrison LLP ("Paul Weiss") regarding the SCIs' concern about CBSG's financial viability. Ex. A ¶¶ 3–5. In June 2020, the decision was made that the SCIs would file UCC Financing Statements to perfect any unperfected security interests. Ex. A ¶ 6. Paul Weiss then collected documents it needed to prepare the filings during July and the first week of August 2020.

On August 7, 2020, Paul Weiss filed UCC Financing Statements in Delaware to perfect the security interests of the following SCIs:[3]

- GEMJ Chehebar GRAT, LLC
- Albert Chehebar
- Isaac Shehebar
- Isaac Shehebar 2008 AIJJ Grantor Retained Annuity Trust
- Michael Chehebar
- Ezra Shehebar
- Ezra Chehebar
- Ezra Shehebar LLC
- Cherie Chehebar
- Josef Chehebar
- Steven Chehebar
- Joyce Chehebar

[2] Examples of the SCIs' Promissory Notes and Security Agreements have been filed as Exhibit A (Promissory Note) and Exhibit B (Security Agreement) to ECF No. 1842-1.

[3] The UCC Financing Statements that Paul Weiss filed on August 7, 2020 have been filed at ECF No. 1842-1 at 41–65.

(the "2020 Liens"). The SCIs did not have notice of the IRO when they filed the UCC Financing Statements. Ex. A (J. Chehebar Decl.) ¶¶ 9–10; Ex. B (E. Chehebar Decl.) ¶ 4; Ex. C. (I. Shehebar Decl. ¶ 4.

ARGUMENT

I. The 2017 Liens Did Not Expire

Ordinarily, absent renewal, the 2017 Liens would have expired in 2022, five (5) years from their filing. However, because of the instant proceedings, the 2017 Liens remain valid and entitle the SCIs to priority. The Eleventh Circuit has explained that "given that a primary purpose of both receivership and bankruptcy proceedings is to promote the efficient and orderly administration of estates for the benefit of creditors, [the Eleventh Circuit] will apply cases from the analogous context of bankruptcy law, where instructive" when case law in the receivership context is not available. *Bendall v. Lancer Mgmt. Grp., LLC*, 523 F. App'x. 554, 557 (11th Cir. 2013). And in the bankruptcy context, "the rights of the creditor, as against the bankruptcy trustee, become fixed on the date the bankruptcy petition is filed." *Toranto v. Dzikowski*, 380 B.R. 96, 100 (S.D. Fla. 2007) (Jordan, J.). This is because the filing of a bankruptcy petition "operates as a stay, applicable to all entities of," among other things, "any act to create, perfect, or enforce any lien against property of the estate." 11 U.S.C.A. § 362(4). Regarding UCC liens, the question has arisen whether a lien remains valid after bankruptcy proceedings are initiated and, like here, a continuation statement is not filed. This is because Section 546(b) of Chapter 11 permits the "continuation of perfection of an interest in property" after institution of bankruptcy proceedings. 11 U.S.C § 546(b); *see In re Chaseley's Foods, Inc.*, 726 F.2d 303, 304 (7th Cir. 1983) ("Section 546(b) was intended to make perfection possible after a bankruptcy petition was filed when Section 362's automatic stay provision (11 U.S.C. § 362) would otherwise prevent perfection, and not to impose new requirements beyond those required for perfection under state law.").

Prior to Delaware's enactment of the current version of § 515 of the UCC, section 9-403(2) of the Delaware Code provided that "[i]f a security interest perfected by filing exists at the time insolvency proceedings are commenced by or against the debtor, the security interest remains perfected until termination of the insolvency proceedings and thereafter for a period of 60 days or until the date when it otherwise would have lapsed, whichever occurs later. . . . Under this provision, the security interest "remains perfected" during [a bankruptcy] case and no continuation

statement needed to be filed." *In re Essex Constr., LLC*, 591 B.R. 630, 635 (Bankr. D. Md. 2018). When the current § 515 was enacted, the provision was removed. Comment 4 explains as follows:

> **Effect of Debtor's Bankruptcy.** Under former Section 9-403(2), lapse was tolled if the debtor entered bankruptcy or another insolvency proceeding. Nevertheless, being unaware that insolvency proceedings had been commenced, filing offices routinely removed records from the files as if lapse had not been tolled. Subsection (c) deletes the former tolling provision and thereby imposes a new burden on the secured party: to be sure that a financing statement does not lapse during the debtor's bankruptcy. The secured party can prevent lapse by filing a continuation statement, even without first obtaining relief from the automatic stay. See Bankruptcy Code Section 362(b)(3). Of course, if the debtor enters bankruptcy before lapse, the provisions of this Article with respect to lapse would be of no effect to the extent that federal bankruptcy law dictates a contrary result (e.g., to the extent that the Bankruptcy Code determines rights as of the date of the filing of the bankruptcy petition).

Del. Code Ann. Tit. 6, § 9-515, cmt. 4. After this amendment to the UCC, courts were faced with the question of whether or not a UCC lien remains intact, despite its lapse after the initiation of bankruptcy proceedings, when it is now clear that the creditor could file a continuation statement under Section 546(b) and the UCC eliminated the bankruptcy tolling provision that previously prevented lapse. "[T]he majority of cases addressing this issue have concluded that the post-petition lapse of a properly filed UCC-1 does not render that security interest unperfected for purposes of its treatment as a secured claim in the bankruptcy case." *In re Short*, 651 B.R. 587, 610 (Bankr. D. Utah 2023); *see In re Wilkinson*, 10-62223, 2012 WL 1192780, at *5 (Bankr. N.D.N.Y. Apr. 10, 2012) ("[T]he Court holds that a creditor's security interest, perfected and valid at the commencement of a bankruptcy proceeding but due to expire during the pendency of the bankruptcy case, does not lapse where the creditor fails to file a post-petition continuation statement."); *In re Paloma Generating Co.*, 595 B.R. 466, 474 (Bankr. D. Del. 2018) ("Even if the First-Liens' UCC filings lapsed prior to the Petition Date, they are valid as to the Second-Lien Lenders who entered into an Intercreditor Agreement acknowledging the First-Liens and who are not 'surprised' by the existence of the First-Liens."); *In re Colony Beach & Tennis Club, Inc.*, 508 B.R. 468, 480 (Bankr. M.D. Fla. 2014) ("[T]he Court is compelled to conclude that Colony

Lender's secured claim against the property of the Partnership's estate did not become 'unsecured' upon the post-petition lapse of its financing statement.").[4]

"The rationale for eliminating the requirement for filing continuation statements during insolvency proceedings is that such a filing is not needed to protect potential creditors when the funds have been placed openly in the possession and control of the court. Thus, . . . perfection by refiling during a bankruptcy proceeding, given the bankruptcy trustee's open and notorious possession, would have 'no more than a ceremonial effect.'" *Avant Petroleum, Inc. v. Banque Paribas*, 853 F.2d 140, 144–45 (2d Cir. 1988). "Therefore as to the Trustee and existing creditors the 'notice' purpose of the continuation statement requirement is not served once a bankruptcy petition is filed. The only parties which can possibly be injured by failure to file a continuation statement once a bankruptcy proceeding is pending are creditors who obtain their liens after the financing statement expires. However, because the trustee takes possession of the debtor's property once a petition is filed, and this possession is open and notorious, these creditors should not need the protection of a continuation statement." *In re Chaseley's Foods, Inc.*, 726 F.2d at 308.

Courts have applied the same rational in the context of interpleader actions and held that the parties' rights are determined at the time the action is commenced. *See Avant Petroleum, Inc.*, 853 F.2d at 144; *Sch. Bd. of Broward Cnty. v. J.V. Constr. Corp.*, 2004 WL 1304058, at *8 (S.D. Fla. Apr. 23, 2004) ("Events subsequent to that date, *including the expiration of Ocean Bank's U.C.C.-1 filing statement*, have no bearing on the Court's determination." (emphasis added)). In reaching this result, courts have rejected claims that the analysis employed by courts in bankruptcy proceedings is limited to those cases because the UCC contained specific provisions addressing bankruptcy petitions and the need to file continuation statements. "While the inclusion of an exception for one class of proceedings, together with silence as to other classes, may at times support an inference that the drafters intended to create no exception other than the one noted, we are skeptical of such an inference here. The drafters [of the UCC] faced . . . 'a tangle of historic precedents concerning filing lapses during bankruptcy proceedings.' But as to interpleader, not only was there no such 'tangle' to attract the drafters' attention, we know of no case at all prior to

[4] The Receiver cites *In re 800 Bourbon St., LLC*, 541 B.R. 616, 626 (Bankr. E.D. La. 2015), as contrary precedent. But *In re 800 Bourbon St.*, is an outlier, which is not binding on this Court, and which has been criticized and not followed by courts within same district. *See In re Willow Bend Ventures, LLC*, 603 B.R. 293, 298 (Bankr. E.D. La. 2019) (declining to follow *In re 800 Bourbon St.*)

this one involving the lapse of a filing during an interpleader proceeding." *Avant Petroleum, Inc.*, 853 F.2d at 144. In holding that the failure of a secured creditor to file continuation statements did not impact their priority when its lien lapsed post-filing, the Second Circuit explained:

> The same rationale is applicable to the present interpleader action. As the district court stated, 'certainly the purpose of requiring the filing of a continuation statement would not be served with regard to existing creditors who already had notice of the creditor's perfected security interest and knowledge of the interpleader actions themselves on the date the interpleader actions were filed.' Since we see no evidence in the U.C.C. drafts, comments, or record of proceedings to indicate that the drafters gave any thought to interpleader proceedings, we are not persuaded that the retroactive unperfection provision in § 9–403(2) [now § 515] was intended to require the holder of the secured interest to make continuation filings after the property has been deposited into the custody of the court.

Avant Petroleum, Inc., 853 F.2d at 145. (internal citation omitted).

As recognized in *Avant Petroleum, Inc.*, the rationale is not a creature of statute, but one of reason, and it applies equally here in the Receivership context.[5] This Court's August 13, 2020 ARO, like Section 362's automatic stay provision, prevented the SCIs from filing continuations of their 2017 Liens. *See* Mtn. at 19 ("If they intended to continue the effectiveness of those 2017 liens or record new liens—which would have violated the IRO and Amended Receivership Order [ECF No. 141] (the 'ARO')—they were required to seek leave of Court to extend the liens."). But the fact that, as the Receiver argues, the SCIs could have asked to record continuations (unlike the bankruptcy context where a lien holder has a statutory right to record a continuation) does not mean that those liens became ineffective or that the priority of creditors changed after the date the ARO was filed. The same policy considerations behind the rule that priority determinations are made as of the date the assets of the estate become frozen, is equally applicable in proceedings such as these where property is preserved and marshaled under a court's supervision and control. This is because "a primary purpose of both receivership and bankruptcy proceedings is to promote the efficient and orderly administration of estates for the benefit of creditors. *Bendall*, 523 F. App'x. at 557.

[5] In the context of bankruptcy the rule is not a creature of statute. "The policy considerations that led to the application of the freeze rule before § 9-403(2) was adopted or in cases in which § 9-403(2) did not apply – including lien disputes not governed by the UCC – remain equally valid after § 9-403(2) has been revoked." *In re Essex Constr., LLC*, 591 B.R. at 638.

Accordingly, the 2017 Liens remain valid and the Court should determine priority as of the date of the ARO.

In the event this Court determines that the 2017 Liens are unenforceable, the SCIs whose claims' priority is based on the enforceability of the 2017 Liens have should have priority over those found to have Class 4 claims. This is because a lapsed financing statement is "deemed never to have been perfected ***as against a purchaser of the collateral for value***," Del. Code Ann. tit. 6, § 9-515(c), and the Receiver is a "Lien creditor," not a purchaser for value, *see id.* § 9-102(52)(D) (defining "Lien creditor" as "a receiver in equity from the time of appointment"). As comment 3 to section 9-515 explains,[6] "[t]he deemed retroactive unperfection applies only with respect to purchasers for value . . . it does not apply with respect to lien creditors." *Id.* § 9-515 cmt. 3; *see also id.* at cmt. 3, Example 2. The Receiver, as a lien creditor, has interests junior to the SCIs' 2017 Liens, even if they lapsed, and thus any distributions made to unsecured creditors are junior in priority to the SCIs as secured creditors.

II. The SCIs' 2020 Liens are Valid and Enforceable

A. The SCIs Did Not Record Their Liens Because of the IRO

As a preliminary matter, the Receiver incorrectly implies that the SCIs recorded their 2020 Liens in response to the IRO by pointing out that the 2020 Liens were filed ten days after the Court entered the IRO. *See* Mot. at 20. This is not correct. Although immaterial to the 2020 Liens' validity, the SCIs initiated the process of perfecting their security interests months before SEC filed this action and the Court entered the IRO. Ex. A (J. Chehebar Decl.) ¶¶ 2–6. And the SCIs' decision to perfect their security interests by filing the 2020 Liens was driven by their concerns that CBSG would default on the Promissory Notes. *Id.*

B. The IRO Did Not Prohibit the SCIs From Recording Their Liens

The Receiver argues that the SCIs' 2020 Liens are "ineffective and invalid" because they "defied" the IRO. *See* Mot. at 20–21. But the IRO did not prohibit the SCIs from recording their existing liens on Receivership Property. "In determining whether a particular act falls within the scope of an injunction's prohibition, particular emphasis must be given to the express terms of the

[6] "In construing Delaware's Commercial Code, Delaware courts have commented that the Official Comments prepared by the drafters of the UCC are useful in interpreting the Code as it is to be applied in Delaware." *Suburban Tr. & Sav. Bank v. Univ. of Del.*, 910 F. Supp. 1009, 1017 n.5 (D. Del. 1995).

order" and "[a]n injunction does not prohibit those acts that are not within its terms as reasonably construed." *Ala. Nursing Home Ass'n v. Harris*, 617 F.2d 385, 288 (5th Cir. 1980).[7] By its express terms, the IRO prohibited noticed persons from "hinder[ing] or interfere[ing] with the Receiver's efforts to take control or possession of the Receivership Entities' property interests . . . or hinder his efforts to preserve them." IRO ¶ 9. Nothing in the text of the IRO prohibits the recording of existing liens in Receivership Property because the recording of liens neither hinders nor interferes with the Receiver's efforts to control, possess, and preserve Receivership Property.

Recognizing that the IRO did not expressly prohibit the SCIs from recording their existing liens, the Receiver asserts instead that the IRO's "intent . . . was clear." Mot. at 20. But the Receiver's insistence about the IRO's "clear" intent is belied by the SEC moving the Court—on the same day the SCIs recorded their liens—to enter an Amended Receivership Order ("ARO") to "provide[] greater clarification of" and "ensure[] that there is no ambiguity whatsoever concerning" the scope of the Receiver's duties, authority, and powers. *See* ECF No. 105 at 2–3. In particular, the ARO specified for the first time that noticed persons were prohibited from "creating or enforcing a lien upon any Receivership Property." ECF No. 141 ¶ 29.A. Thus, contrary to the Receiver's argument that the "relevant language in the IRO and the ARO . . . is nearly identical" and that the ARO "merely reiterated" the IRO, *see* Mot. at 21, the ARO's addition of the prohibition on the creation of liens reinforces the conclusion that the IRO contained no such prohibition.

C. The SCIs Did Not Have Notice of the IRO

Even if the IRO could reasonably be construed to prohibit the recording of existing liens, the IRO's prohibition extended only to "persons receiving notice" of the IRO. IRO ¶ 9. And the SCIs did not receive notice of the IRO before they recorded their liens on August 7, 2020. Ex. A (J. Chehebar Decl.) ¶¶ 9–10; Ex. B (E. Chehebar Decl.) ¶ 4; Ex. C. (I. Shehebar Decl. ¶ 4. The Receiver cites no evidence for his conclusory assertion that the SCIs "cannot plausibly dispute that they received notice of the IRO when it was entered." *See* Mot. at 17. The Receiver was empowered by the Court to serve the Order upon any person that he deemed appropriate to inform

[7] All decisions of the former Fifth Circuit handed down before October 1, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

of the Order. *See* IRO ¶ 7. The Receiver did not do so prior to the SCIs' filing of their 2020 Liens. Having failed to provide notice to the SCIs, as he was empowered to do, the only evidence the Receiver proffers in support of his assertion that the SCIs received notice of the IRO by at least July 30, 2020 are emails and unsigned proposed declarations that show that the SCIs were aware that the SEC had filed an enforcement action because they were asked to provide statements by counsel for some defendants. *See* Mot. at 17; ECF No. 2014-1 ¶ 7; ECF No. 2014-2 ¶ 16. But being asked to sign a declaration regarding the SEC's allegations does not equate to notice of the IRO. *See* Ex. B (E. Chehebar Decl.) ¶¶ 2–3; Ex. C. (I. Shehebar Decl.) ¶¶ 2–3. And a person with notice only of the fact of the SEC enforcement action against CBSG is not a "person[] receiving notice" of the IRO. *See* ECF No. 36 ¶ 9; *Sec. & Exh. Comm'n v. Detroit Mem'l Partners, LLC*, 2016 WL 3951336, at *1–2, *6 (N.D. Ga. Feb. 11, 2016) (dismissing contempt action against nonparties for violation of Receiver Order that restrained and enjoined "all persons receiving notice of this Order" because the nonparties "were not aware of the Receiver Order" even though the nonparties' attorney had been in communication with the Receiver); *cf. Sec. & Exch. Comm'n v. Faulkner*, 2018 WL 888910, at *13 (N.D. Tex. Feb. 13, 2018) (holding individual in contempt for violating a receivership order where "[t]he evidence demonstrate[d] that [the individual] received notice of the September 25 Receivership Order's electronic filing as both an individual and through her counsel of record"). Accordingly, even if the IRO could reasonably be read to prohibit the recording of existing liens, the SCIs did not violate the IRO because the IRO did not apply to them.

D. The SCIs' 2020 Liens Are Valid Even If Recording Them Violated The IRO

Even assuming both that the IRO prohibited the perfecting of liens and that the SCIs received notice of the IRO, the SCIs' liens would remain valid and enforceable. The appropriate remedy for a violation of the IRO is not a declaration that the SCIs' 2020 liens are void *ab initio*. Rather, the appropriate remedy is for the Court to hold an evidentiary hearing to determine whether the SCIs should be held in civil contempt for violating the IRO and, if the Receiver proves the SCI's noncompliance with the IRO by "clear and convincing evidence," *see Sec. & Exch. Comm'n v. Complete Bus. Sols. Grp., Inc.*, 2023 WL 3844966, at *1 (S.D. Fla. June 6, 2023) (Ruiz, J.), order the SCIs to release their 2020 Liens by filing termination statements. *See* Del. Code Tit. 6, § 9-513; *Sec. & Exch. Comm'n v. Faulkner*, 2018 WL 888910, at *15 (N.D. Tex. Feb 13, 2018)

(holding an individual in civil contempt for filing a lawsuit against the receiver in violation of the receivership order and ordering the individual to dismiss with prejudice her lawsuit against the receiver "within 28 days").

The only authority that the Receiver cites for his assertion that the SCIs' 2020 Liens are "void *ab initio*" are the provisions of Delaware's and Pennsylvania's Uniform Commercial Codes pertaining to an "inaccurate or wrongfully filed record." *See* Mot. at 21 (citing Del. Code Tit. 6, § 9-518(a) and 13 Pa. C.S. § 9518(a)). But those provisions merely provide that a person may file an "information statement" that indicates the person "believes" that a record indexed under the person's name is "inaccurate" or "wrongfully filed." Del. Cod. Tit. 6, § 9-518(a)—(b); 13 Pa. C.S. § 9518(a)–(b). Nothing in either provision states that a filed record may be deemed void or ineffective *ab initio* by a court.

E. If the SCIs' 2020 Liens Are Not Valid, the SCIs' Claims Should Be Included in Class 4 of the Receiver's Proposed Distribution

In the event the Court determines that the SCIs' 2020 Liens are not valid, the SCIs' whose claims' priority is based on the 2020 Liens should be deemed Class 4 claims with priority over all Class 5, 6, 7, and 8 claims.

III. The Vagnozzi Liens Are Invalid

The Receiver seeks to subordinate the SCIs' claims to claims by investors who accepted the "exchange offering" from CBSG in 2020 (the "2020 Exchange Offering") and on whose behalf Albert Vagnozzi filed a UCC-1 financing statement on April 13, 2020 (the "Vagnozzi Liens"). Mot. at 12–13, 38–40 & n.12. According to the Receiver, the Vagnozzi Liens are "valid" and should be "afforded a priority claim over CBSG's assets, and, therefore, be included in Class 3, as secured investors." Mot. at 40. But the Vagnozzi Liens are invalid because (1) Albert Vagnozzi is an insider of the CBSG Ponzi scheme[8] and his knowledge as Security Agent is imputed to the investors on whose behalf he acted, and (2) the largest investors in the 2020 Exchange Offering are insiders of the CBSG Ponzi Scheme.

[8] The Court, over the SCIs' objections, determined that CBSG was a Ponzi scheme. *See* ECF No. 1976 at 33. The SCIs' arguments regarding the effect of the Court's Ponzi scheme determination are not a waiver of the SCIs' objections to that determination.

A. The Vagnozzi Liens Are Void Pursuant to 15 U.S.C. § 78cc Because Albert Vagnozzi Is An Insider of the CBSG Ponzi Scheme And His Knowledge Is Imputed to the 2020 Exchange Offering Investors

Section 29(b) of the Securities and Exchange Act provides that "[e]very contract made in violation of [the Act] . . . and every contract . . . the performance of which involves a violation of [the Act] . . . ***shall be void*** . . . ." 15 U.S.C. § 78cc(b) (emphasis added). Section 29(b) applies to the creation of liens if "the person . . . acquiring such lien shall have actual knowledge of facts by reason of which . . . the acquisition of such lien is a violation of the provisions of [the Act] or any rule or regulation thereunder." *Id.* § 78cc(c). The Vagnozzi Liens are void because Albert Vagnozzi's actual knowledge that the 2020 Exchange Offering violated the Securities and Exchange Act is imputed to the 2020 Exchange Offering Investors. *See In re Black Elk Energy Offshore Operations, LLC*, --- F.4th ----, 2024 WL 3800650, at *5 (5th Cir. Aug. 14, 2024) ("[I]t is a basic tenet of the law of agency that the knowledge of an agent is imputed to the principal." (cleaned up)).

Albert Vagnozzi—the "Security Agent" for the investors in the 2020 Exchange Offering—was an "insider" of the CBSG Ponzi scheme because he (1) is the brother of Dean J. Vagnozzi, a named Defendant in this case who was ordered to disgorge $4.5 million "representing net profits gained as a result of the conduct alleged in the Amended Complaint," *see* ECF No. 1861 at 26 (identifying Albert Vagnozzi as "Dean Vagnozzi's brother"); ECF No. 1160 (Final Judgment as to Defendant Dean J, Vagnozzi); and (2) "engaged in fraudulent conduct and participated in the unregistered offering of Par Funding promissory notes to investors," *see* ECF No. 1861 at 26. Thus, Albert Vagnozzi is either a "statutory insider" because of his familial relationship with Dean Vagnozzi, *see* 11 U.S.C. § 101(31), or a "non-statutory insider" of the CBSG Ponzi scheme because of his familial relationship with Dean Vagnozzi and because, as explained below, the 2020 Exchange Offering was not conducted at arm's length. *See In re Fla. Fund of Coral Gables, Ltd.*, 144 F. App'x 72, 75–76 (11th Cir. 2005) ("The cases which have considered whether insider status exists generally have focused on two factors in making that determination: (1) the closeness of the relationship between the transferee and the debtor; and (2) whether the transactions between the transferee and the debtor were conducted at arm's length."); *In re Moskowitz*, 2011 WL 6176210, at *4–*5 (N.D. Ga. Nov. 29, 2011).

Albert Vagnozzi also had actual knowledge that the 2020 Exchange Offering violated the Securities and Exchange Act. The SEC has brought a civil enforcement action against Albert

Vagnozzi and the Agent Funds he operated for violations of the federal securities laws based in part on the 2020 Exchange Fund. Compl. ¶¶ 9–10, *Sec. & Exch. Comm'n v. Westhead, et al.*. Case No. 1:23-cv-23749 (S.D. Fla. Sept. 23, 2023). In March 2020, Albert Vagnozzi "notified investors that because of the Covid-19 pandemic, CBSG would default on the notes CBSG had issued to the Agent Funds" and "offered [his] existing investors promissory notes issued by the Parallel Agent funds, which would replace the promissory notes . . . Capricorn . . . had issued to investors." *Id.* ¶ 9; *see id.* ¶¶ 73–75. The 2020 Exchange Offering was an unregistered securities offering that violated the Securities and Exchange Act *and which was knowingly and fraudulently conducted as part of the CBSG Ponzi scheme*. *See id.* ¶¶ 2–5, 10.

Thus, the 2020 Exchange Offering Investors, through their agent Albert Vagnozzi, had actual knowledge that the 2020 Exchange Offering violated the Securities and Exchange Act. Unlike the SCIs' 2020 liens, the exchange notes pursuant to which the Vagnozzi Liens were acquired are therefore "void" *ab initio* and are of no force or effect. *See* 15 U.S.C. § 78cc(b)–(c).

B. The Vagnozzi Liens Held By Insiders of the CBSG Ponzi Scheme Are Void Pursuant to 15 U.S.C. § 78cc

The Vagnozzi Liens held by entities owned and/or controlled by insiders of the CBSG Ponzi scheme are void for the additional reason that the insiders' knowledge that the 2020 Exchange Offering violated the Securities and Exchange Act is imputed to the entities. *See* 15 U.S.C. § 78cc(b)–(c).

The Receiver's chart reflecting his proposed distribution amounts, attached as Exhibit 28 to the Motion, indicates that at least 69% of the Receiver's proposed $95,807,810.68 initial distribution to investors in the 2020 Exchange Offering will be directed to entities that are owned and/or controlled by insiders of the CBSG Ponzi Scheme and who were sued by the SEC for "operat[ing] their own securities offerings in an orchestrated effort to funnel investor money to CBSG in exchange for CBSG promissory notes." ECF No. 2014-28 at 2; Compl. ¶ 1, *Sec. & Exch. Comm'n v. Westhead, et al.*. Case No. 1:23-cv-23749 (S.D. Fla. Sept. 23, 2024). For example, the Receiver proposes to collectively distribute over $66 million to Merchant Services Income Fund Parallel, Pisces Income Fund LLC & Pisces Income Fund Parallel, Capricorn Income & Capricorn Parallel, ABFP Income Fund, ABFP Income Fund 2, ABFP Income Fund 3, ABFP Income Fund 4, ABFP Income Fund 6, and Retirement Evolution Funds (All). *See* ECF No. 2014-28 at 2. Each of these entities were owned and/or controlled by Albert Vagnozzi, Dean Vagnozzi, or other

insiders of the CBSG Ponzi Scheme against whom the SEC has brought civil enforcement actions arising from the CBSG Ponzi Scheme because of their operation of these entities. *See* ECF No. 119 ¶¶ 33–34; Compl. ¶¶ 7–15, *Sec. & Exch. Comm'n v. ABFP Income Fund Parallel, LLC, et al.*, Case No. 1:23-cv-23721 (S.D. Fla. Sept. 29, 2023); Answer ¶¶ 4, 15, *Sec. & Exch. Comm'n v. Westhead, et al.*. Case No. 1:23-cv-23749 (S.D. Fla. Apr. 4, 2024). These CBSG insiders formed the Agent Funds to sell promissory notes payable by the Agent Funds to investors and then used the money raised from investors to purchase promissory notes payable by CBSG. *See* Compl. ¶¶ 3–9, *Sec. & Exch. Comm'n v. Westhead, et al.*. Case No. 1:23-cv-23749 (S.D. Fla. Sept. 23, 2024). Indeed, the ABFP Fund entities consented to the entry of final judgment against them that included permanent injunctive relief and disgorgement of over $99 million of net profits gained as a result of the conduct alleged in the SEC's complaint. Final Judgment, *Sec. & Exch. Comm'n v. ABFP Income Fund Parallel, LLC, et al.*, Case No. 1:23-cv-23721 (S.D. Fla. Nov. 8, 2023).

Because these investor entities were owned and/or controlled by CBSG Ponzi scheme insiders with actual knowledge that the 2020 Exchange Offering violated the Securities and Exchange Act, the entities also had actual knowledge that the 2020 Exchange Offering violated the Securities and Exchange Act. *See In re Spear & Jackson Sec. Litig.*, 399 F. Supp. 2d 1350, 1361 (S.D. Fla. 2005) ("[K]nowledge of individuals who exercise substantial control over a corporation's affairs is properly imputable to the corporation."). Accordingly, these entities' Vagnozzi Liens are "void," legally do not exist, and are not enforceable. *See* 15 U.S.C. § 78cc(b)–(c).

IV. The 2020 Exchange Offering Investors' Claims Should Be Subordinated to the SCIs' Claims

The SCIs object to the Receiver's inclusion of the Vagnozzi Lienholders in Class 3 as secured investors. Even if the Court determines that Vagnozzi Liens were not void *ab initio*, and that they are valid and enforceable, the Court should subordinate the 2020 Exchange Offering Investors' claims to the SCIs' claims. "Equitable subordination is proper where three elements are established: (1) that the claimant has engaged in inequitable conduct; (2) that the conduct has injured creditors or given unfair advantage to the claimant; and (3) that subordination of the claim is not inconsistent with the Bankruptcy Code." *In re N&D Props., Inc.*, 799 F.2d 726, 731 (11th Cir. 1986). "Under certain circumstances, the power of equitable subordination may be used to subordinate even the claim of a secured creditor." *In re Chira*, 378 B.R. 698, 712 (S.D. Fla. 2007).

"The principles of equitable subordination are also applicable in receiverships." *S.E.C. v. Spongtech Delivery Sys., Inc.*, 98 F. Supp. 3d 530, 551 (E.D.N.Y. 2015); *see S.E.C. v. Wealth Mgmt. LLC*, 628 F.3d 323, 333–34 (7th Cir. 2010) ("To implement an effective pro rata distribution, district courts supervising receiverships have the power to classify claims sensibly. This power includes the authority to subordinate the claims of certain investors to ensure equal treatment." (quotation marks omitted)).

All three elements required for equitable subordination of the 2020 Exchange Offering Investors' claims. First, as explained above, the 2020 Exchange Offering Investors engaged in inequitable conduct because they participated in the 2020 Exchange Offering to further the CBSG Ponzi scheme and to protect themselves in the event that the Ponzi scheme collapsed. *See In re Chira*, 378 B.R. at 712 ("[C]laims by insiders may be subordinated more easily than those of parties who dealt with the debtor at arm's length."). Second, the 2020 Exchange Offering Investors' creation and perfection of the Vagnozzi Liens have given them an unfair advantage over the SCIs and other creditors of CBSG. And third, subordination of the 2020 Exchange Offering Investors is not inconsistent with the Bankruptcy Code. *See In re Farrell*, 610 B.R. 317, 324 (C.D. Cal. 2019) (equitable subordination of a claim is not inconsistent with the Bankruptcy Code simply because it would deprive the claimant of the priority position to which she was otherwise entitled under the Code). Because they are insider investors, the Vagnozzi Lienholders should be included in Class 8 of the Receiver's proposed distribution.

V. Conclusion

Based on the foregoing, the Secured Chehebar Investors respectfully request that the Court deny the Receiver's Motion to the extent the Motion seeks invalidation of the SCIs' liens and subordination of the SCIs' claims to the claims held by investors in the 2020 Exchange Offering and any unsecured claims.

Dated: September 16, 2024

Respectfully submitted,

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EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 20-CIV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.
_____/

DECLARATION OF JOSEF CHEHEBAR IN SUPPORT OF SECURED CHEHEBAR INVESTORS' RESPONSE IN OPPOSITION TO RECEIVER'S MOTION TO (1) APPROVE PROPOSED PLAN OF DISTRIBUTION AND (2) AUTHORIZE FIRST INTERIM DISTRIBUTION

I, Josef Chehebar, declare and state as follows:

1. I am over 18 years of age. This declaration is based upon my personal knowledge of the facts stated herein. If called as a witness, I could and would competently testify to the following facts set forth below.

2. Starting on March 13, 2020, Complete Business Solutions Group, Inc. ("CBSG") ceased paying interest on the Promissory Notes that were held by me and my family members. CBSG explained that its cessation of interest payments was caused by the harm the COVID-19 pandemic was inflicting on CBSG's MCA funding business.

3. Because of CBSG's cessation of interest payments, I became concerned about CBSG's financial viability and the risk that CBSG would default on my family's Promissory Notes.

4. My family's Promissory Notes were secured by CBSG's collateral.

5. In April 2020, I contacted my family's counsel at Paul, Weiss, Rifkind, Wharton & Garrison LLP ("Paul Weiss").

6. In May 2020, the decision was made that my family would file UCC Financing Statements to perfect any unperfected security interests held by my family against CBSG's collateral.

7. My family members were aware that I was addressing these issues with Paul Weiss.

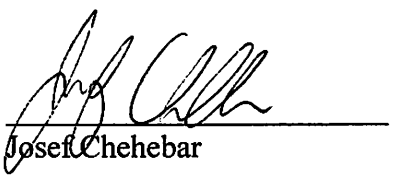
8. Paul Weiss filed the UCC Financing Statements on August 7, 2020.

9. I did not have notice of the Court's July 27, 2020 Initial Receivership Order at any time before Paul Weiss filed the UCC Financing Statements.

10. Had any of my family members been aware of any Receivership Order, they would have communicated the information to me. No such communications or discussions occurred prior to the filing of the UCC Financing Statements.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed the 16th day of September, 2024, in Brooklyn, New York.



Josef Chehebar

EXHIBIT B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 20-CIV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.
_____/

DECLARATION OF EZRA CHEHEBAR IN SUPPORT OF SECURED CHEHEBAR INVESTORS' RESPONSE IN OPPOSITION TO RECEIVER'S MOTION TO (1) APPROVE PROPOSED PLAN OF DISTRIBUTION AND (2) AUTHORIZE FIRST INTERIM DISTRIBUTION

I, Ezra Chehebar, declare and state as follows:

1. I am over 18 years of age. This declaration is based upon my personal knowledge of the facts stated herein. If called as a witness, I could and would competently testify to the following facts set forth below.

2. I participated in the July 2020 call with Brett Berman that is referenced in the emails attached as Exhibit 1 to the Receiver's Motion to (1) Approve Proposed Plan of Distribution and (2) Authorize First Interim Distribution.

3. I do recall the conversation with Mr. Berman and the topics discussed, and I have no recollection of the Court's July 27, 2020 Initial Receivership Order ("IRO") ever being mentioned or discussed during the call with Mr. Berman.

4. I did not have notice of the IRO at any time before the our UCC Financing Statements were filed on August 7, 2020.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed the 16th day of September, 2024, in Brooklyn, New York.

Ezra Chehebar

EXHIBIT C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 20-CIV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.
_____/

DECLARATION OF ISAAC SHEHEBAR IN SUPPORT OF SECURED CHEHEBAR INVESTORS' RESPONSE IN OPPOSITION TO RECEIVER'S MOTION TO (1) APPROVE PROPOSED PLAN OF DISTRIBUTION AND (2) AUTHORIZE FIRST INTERIM DISTRIBUTION

I, Isaac Shehebar, declare and state as follows:

1. I am over 18 years of age. This declaration is based upon my personal knowledge of the facts stated herein. If called as a witness, I could and would competently testify to the following facts set forth below.

2. I participated in the July 2020 call with Brett Berman that is referenced in the emails attached as Exhibit 1 to the Receiver's Motion to (1) Approve Proposed Plan of Distribution and (2) Authorize First Interim Distribution.

3. I do recall the conversation with Mr. Berman and the topics discussed. There was no discussion of any Receivership Order.

4. I did not have notice of the Court's July 27, 2020 Initial Receivership Order at any time before August 7, 2020, and was unaware of it until after that date.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct.

Executed the 16th day of September, 2024, in Brooklyn, New York.

Isaac Shehebar