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.
_____/

RECEIVER'S REPLY TO CHEHEBARS' RESPONSE IN OPPOSITION TO RECEIVER'S MOTION TO (1) APPROVE PROPOSED PLAN OF DISTRIBUTION AND (2) AUTHORIZE FIRST INTERIM DISTRIBUTION

Ryan K. Stumphauzer, Esq., Court-Appointed Receiver ("Receiver") of the Receivership Entities, files this reply to the response from the Chehebars [ECF No. 2041] (the "Response") to the Receiver's Motion to (1) Approve Proposed Plan of Distribution and (2) to Authorize First Interim Distribution [ECF No. 2014] (the "Distribution Motion"), and states:

I. Introduction

The Chehebars filed a Response in which they argue that: (1) the priority status they obtained through their 2017 liens was frozen by the Court's appointment of the Receiver, negating any need for them to file a continuation statement; (2) the Court's Order appointing the Receiver did not prevent them from being able to file new liens in 2020; and (3) the priority claims of investors who accepted the Exchange Offering and obtained a priority security interest in April 2020 should be rejected. Not only are these positions unsupported by applicable law, but they are also internally inconsistent. Accordingly, for the reasons explained in more detail below, the Court should reject these arguments and grant the Receiver's Distribution Motion.

II. Memorandum of Law

A. The Chehebars' 2017 liens lapsed and lost any priority status in 2022.

As the Receiver anticipated (*see* Distribution Motion at 18-20), the Chehebars rely heavily on bankruptcy principles to argue in their Response that they were not required to file a

continuation statement to preserve any priority status their 2017 liens might have maintained.[1] This, of course, is not a bankruptcy case. And the Chehebars do not cite a single case in which the purported "freeze" rule they are asking this Court to adopt was applied in a receivership action.

Bankruptcy proceedings are governed by very specific rules and procedures that are set forth in the Bankruptcy Code. *See* U.S Code, Title 11. The Bankruptcy Code consists of nine distinct chapters, including a codified provision that automatically stays litigation against the debtor for pre-petition claims, as well as "any act to create, perfect, or enforce against property of the debtor any lien to the extent that such lien secures a claim that arose before the commencement of the case." 11 U.S.C §§ 362(a)(1) and (5). There is also a well-established body of caselaw interpreting the rights and remedies that are available to debtors and creditors in a bankruptcy.

Receiverships, on the other hand, are different. There is no automatic stay that accompanies the initial appointment of a Receiver. Rather, the Receiver's duties—and the limitations on what actions other parties may take with respect to property under the Receiver's control—are governed by the language of the relevant court's appointment order. For example, in this case, the initial appointment order did not include a stay of litigation involving the Receiver, the Receivership Entities, or the Receivership Entities' property. [ECF No. 36]. As a result, the SEC (joined by the Receiver) filed an expedited motion three days after the Court entered the initial appointment order to request that the Court also impose a stay of litigation. [ECF No. 48]. In other words, unlike bankruptcy, there was no "automatic stay" of litigation upon the Court's initial appointment of the Receiver. The Court agreed and entered the stay of litigation that same day. [ECF No. 56].

As a result, the Chehebars' suggestion that there should be a blanket rule freezing the priority of secured parties' claims upon the appointment of a receiver is without any support, and inconsistent with the nature of receiverships. Indeed, the Chehebars' own actions in the days following the appointment of the Receiver in this case suggest that they, themselves, did not believe that the priority of their (and others') secured claims was frozen at that time.

On August 7, 2020—11 days after the Court entered the initial Order appointing the Receiver [ECF No. 36] (the "IRO")—the Chehebars filed new liens under which they sought to establish priority status as secured creditors on behalf of *all* the Chehebar family members.

[1] The 2017 liens were filed on behalf of Albert Chehebar, Isaac Shehebar, the Isaac Shehebar 2008 AIJJ Grantor Retained Annuity Trust, and GEMJ Chehebar GRAT, LLC (the "2017 Chehebar Lienors").

Included within these 2020 filings were new liens for the 2017 Chehebar Lienors. [ECF No. 1889-5]. In other words, despite their current argument that their priority secured status was "frozen" as of the appointment of the Receiver, the Chehebars nevertheless filed new liens on behalf of the very same creditors whose priority status was already reflected in the 2017 liens.

The Chehebars further argue that a continuation statement of an existing lien is not necessary in situations like receiverships and bankruptcy cases, because "the funds have been placed openly in the possession and control of the court." (Response at 6 (citing *Avant Petroleum, Inc. v. Banque Paribas*, 853 F.2d 140, 144–45 (2d Cir. 1988)). Although that may be accurate in a bankruptcy, the Chehebars did not believe that to be the case in this receivership. Indeed, at the same time they argue that issues regarding priority were frozen in time, the Chehebars are now taking the inconsistent position that they were free to record new liens on August 7, 2020, after the Court appointed the Receiver. (Response at 8). Both positions cannot be true.

Furthermore, one of the primary rationales for application of the freeze rule in a bankruptcy case is because the automatic stay prohibits any creditors from filing new liens after the debtor files the petition. *See* 11 U.S.C §§ 362(a)(5); *In re Essex Constr., LLC*, 591 B.R. 630, 635 (Bankr. D. Md. 2018) (explaining that no new "liens acquire validity after the filing of the petition" as a justification for applying the freeze rule in a bankruptcy case). But, once again, no automatic stay necessarily follows the appointment of a Receiver. Even the Chehebars—who filed new liens after the Receiver's appointment—acknowledge that the Court must scrutinize the language of the appointment order to determine whether there is a prohibition against filing new liens within a particular receivership. (Response at 8-9).

Courts presiding over equity receiverships sometimes look to analogous bankruptcy law when there is an absence of authority on a particular topic. *See Bendall v. Lancer Mgmt. Grp., LLC*, 523 F. App'x 554, 557 (11th Cir. 2013) (reciting the uncontroversial proposition that courts may "apply cases from the analogous context of bankruptcy law, where instructive, due to limited case law in the receivership context"). Of course, where there is applicable state law on an issue, this Court "need not rely on bankruptcy law for this non-bankruptcy case." *SEC. v. Forex Asset Mgmt. LLC*, 242 F.3d 325, 332 (5th Cir. 2001). Here, state law has spoken and controls this issue.

The Eleventh Circuit has clarified that the effectiveness of a filed lien in a receivership case is governed by state law. *See SEC v. Wells Fargo Bank, N.A.*, 848 F.3d 1339, 1344 (11th Cir. 2017). Section 9-515 of the Delaware Commercial Code states that a filed financing statement

lapses after five years and, upon lapse, "it ceases to be effective and any security interest . . . that was perfected by the financing statement becomes unperfected." Del. Code Ann. tit. 6, § 9-515(c). Given that state law squarely addresses the situation before this Court—the impact of a lapsed financing statement—there is no reason for the Court to look to bankruptcy cases (including the cases the Chehabrs cite, which rely on outdated provisions of the Bankruptcy Code) for guidance.

Rather, the Court should insist that claimants, like the Chehebars, follow the procedures this Court has imposed through its Orders, which were designed to promote the efficient and orderly administration of the receivership estate. These procedures—such as requiring claimants to seek leave of Court before filing new claims against Receivership Entities and Receivership Property, before filing new liens, or before filing continuation statements to prevent old liens from lapsing—ensure that the Receiver can carry out his duties of preventing the dissipation of Receivership Property and preserving receivership resources. It also provides other interested parties with notice and an opportunity to protect their own interests, without encouraging a race to the courthouse (or the recorder's office). Accordingly, the Court should decline to reward the Chehebars for their disregard of this Court's orders, and determine that the 2017 liens lapsed and, therefore, no longer maintain a priority security interest over CBSG's assets.[2]

B. <u>Absent an insider determination, the lapse of the Chehabars' 2017 liens would result in their claims being categorized as Class 4 Claims.</u>

The Chehebars appear to acknowledge that their 2017 liens might have lapsed in 2022, due to their failure to record a continuation statement prior to the expiration of the five-year term. (Response at 8). In an effort to hedge their bets, the Chehebars advance a fallback argument that their 2017 liens should nonetheless maintain priority over the claims of any investors who do not have a filed UCC lien / financing statement. (*Id.*) Through this argument, however, the Chehebars misinterpret the relevant provisions of the Delaware Commercial Code.

The Chehebars correctly cite to Del. Code Ann. tit. 6, § 9-515, which provides that "a filed financing statement is effective for a period of five years after the date of filing." Del. Code Ann. tit. 6, § 9-515(a). If a continuation statement is ***not*** filed prior to the expiration of the five-year period, the "filed financing statement lapses" and the "financing statement ceases to be effective

[2] The Chehebars acknowledge that the lapse of their 2017 liens would result in their claims losing priority to Class 3 Claims, which consist of other creditors with perfected security interests. (Response at 8). This would include, for example, the Exchange Offering Investors who obtained priority security interests in April 2020 through the lien Albert Vagnozzi filed on their behalf.

and any security interest . . . that was perfected by the financing statement becomes unperfected." Del. Code Ann. tit. 6, § 9-515(c).

Thus, the effect of a lapse is that the creditor's security interest no longer maintains the priority it previously enjoyed. The Chehebars point to the following provision of the code to argue that their secured position, despite a lapse, still maintains priority over Class 4 claims:

> If the security interest . . . becomes unperfected upon lapse, it is deemed never to have been perfected as against a purchaser of the collateral for value.

Id. Relying on one of the comments to this section of the code, the Chehebars distinguish a "purchaser for value" from a "lien creditor," because "[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, Example 2.

The Chehebars are correct. Their 2017 liens, even if lapsed, would maintain priority over a "lien creditor." (*Id.*). The Chehebars are mistaken, however, in suggesting that because "a receiver in equity" is defined as a lien creditor (*id*. § 9-102(52)(D)), the Chehebars' lapsed 2017 liens afford them priority over all investors "found to have Class 4 claims." (Response at 8). Class 4 claimants consist of investors who "did not obtain a security agreement that is supported by a properly-filed and valid UCC-1 financing statement." (Distribution Motion at 13). Although the investors in this class do not have *perfected* security interests that are supported by a UCC-1 financing statement, they nevertheless obtained security agreements from CBSG in connection with the issuance of a promissory note. In other words, Class 4 Claimants have security interests, but they do not have perfected security interests that enjoy any sort of priority status.

When comparing a creditor with a perfected security interest that lapsed to a creditor who obtained a security interest but never perfected it through filing,[3] the creditor with the lapsed security interest is "treated in the same manner as if the original financing statement had never been filed." *In re Highland Constr. Mgmt. Services, LP*, 497 B.R. 829, 835 (Bankr. E.D. Va. 2013) (interpreting provision of Virginia Commercial Code, which is identical to the Delaware Commercial Code that applies to the liens at issue here). Thus, claims of a creditor with a lapsed security interest (in this case, the Chehebars) will be on the same footing—and receive a similar, pro rata distribution under the Receiver's proposed Distribution Plan—as other creditors who

[3] A party who obtains a promissory note and security interest in connection with providing a loan is considered a "purchaser for value." *See In re Nitram, Inc.*, 323 B.R. 792, 797 (Bankr. M.D. Fla. 2005) (holding that "[i]t is well-established that a secured creditor is a "purchaser" for value).

never perfected their security interests. As a result, absent an insider determination, the Chehebars' claims that are supported by the 2017 liens would not have priority over Class 4 Claimants. Rather, they would fall within Class 4 and be treated similarly to all other Class 4 Claims.

C. <u>The Chehebars filed their 2020 liens in violation of this Court's Order.</u>

1. The IRO prohibited the Chehebars from filing new liens.

The Chehebars argue that they were permitted, without restriction, to file new liens after the Court entered the IRO. (Response at 8-9). It should not be lost on the Court that the Chehebars are taking inconsistent positions in their Response on the purported application of the "freeze rule." On the one hand, they suggest that the rights of all claimants were frozen as of the date the Court appointed the Receiver. (Response at 4-8). As a result, they suggest, bankruptcy principles eliminated the need for them to take action, after the Receiver was appointed, to preserve or maintain the priority status of their 2017 liens. (*Id*.).

The Receiver was appointed on July 27, 2020. The Chehebars filed their 2020 liens just 11 days later, on August 7, 2020. Thus, in the same filing, the Chehebars simultaneously argue that matters of priority were frozen as of the date the Receiver was appointed, but also suggest it was a free-for-all for secured creditors to race to the recorder's office after the Receiver was appointed, so that they could try to establish priority status for their secured claims. (Response at 8-9). Both of these positions cannot be true.

For the reasons argued in Section II(A), *supra*, the freeze rule does not apply to this receivership case. Moreover, the ability of parties to file new liens, or otherwise interfere with the Receiver's efforts to take control of Receivership Property, was not unfettered in the days following the appointment of the Receiver. Rather, any restrictions were governed by the language in this Court's appointment order. In some SEC enforcement actions, the court declines to appoint a receiver. In others, the court appoints a monitor, rather than a receiver. And, like here, courts sometimes determine that the appointment of a receiver is appropriate. The scope of the receivership—and any related limitation on the ability of others to take action with respect to the property under the Receiver's control—is governed by the terms of the Court's orders.

As previously explained in the Distribution Motion, the Court's IRO clearly prohibited interference with the Receiver's efforts to take control of Receivership Property, which includes the filing of new liens over Receivership Property. The Chehebars argue that the recording of a new lien does not interfere "with the Receiver's efforts to control, possess, and preserve

Receivership Property." (Response at 9). Of course it does. *See United States v. Johnson*, 21-4080, 2022 WL 612507, at *1 (10th Cir. Mar. 2, 2022) (affirming district court order holding party in contempt and invalidating lien because the act of recording the lien resulted in the "interference with [the Receiver's] work" and violated the district court's order). Following his appointment, the Receiver was responsible for taking control of and preserving Receivership Property, with the goal of ensuring that this property would be available for potential future distribution to claimants. If nonparties had unrestricted access to file new liens, encumber these property interests, and leapfrog other creditors after this Court had already appointed the Receiver, that would unquestionably interfere with the Receiver's duties.

2. Actual Notice

The Chehebars argue in their Response that they "did not have notice" of the IRO when they filed the 2020 liens. (Response at 9). In support of this statement, they attach three self-serving hearsay declarations from Josef Chehebar, Ezra Chehebar, and Isaac Shehebar. [ECF No. 2041-1, -2, and -3]. To be clear, the Receiver does not have evidence that the Chehabars received an email with a copy of the IRO, or that they reviewed the docket in this case and read the specific paragraph in the IRO that prohibited them from interfering with the Receiver's efforts to take control of and preserve the assets of the Receivership Estate.

The circumstances and timing, however, strongly suggest it was anything but a coincidence that the Chehebars filed their 2020 liens on August 7, 2020. In the Response, Ezra Chehebar and Isaac Shehebar each acknowledge participating in a July 2020 phone call with Brett Berman, the Fox Rothschild attorney who was defending Lisa McElhone and Joseph LaForte in the initial stages of these proceedings. [ECF Nos. 2040 at ⁋⁋ 2-4; ECF No. 2041-3 at ⁋⁋ 2-4]. Ezra Chehebar and Isaac Shehebar recall speaking with Mr. Berman about draft declarations he wanted them to sign, which the Defendants were going to use to oppose the SEC's motion for a preliminary injunction, but suggest they "have no recollection of the [IRO] ever mentioned or discussed during the call with Mr. Berman." (*Id.*).

On July 29, 2020, Mr. Berman, as counsel for McElhone and LaForte, filed a response to the SEC's Motion for Appointment of a Receiver and for an Asset Freeze. [ECF No. 43]. In that filing, McElhone, LaForte, and the other Defendants argued:

> At the July 27 status conference, undersigned counsel expressed our concern that the so-called "temporary" relief that the SEC sought to impose through an ***all-encompassing receivership and total asset freeze*** is anything but temporary and is

> ***unnecessarily destructive*** of Defendant's legitimate businesses and their personal rights. Such action ***will lead to the liquidation*** of Defendants' legitimate businesses.

[ECF No. 43 at 3 (emphasis added)]. On the following day, July 30, 2020, Mr. Berman sent an email to Ezra Chehebar and Isaac Shehebar, enclosing the draft declarations and indicating that they were "based on the notes I took from the call yesterday." [ECF No. 2014-1]. In other words, Mr. Berman's call with the Chehebars about signing these declarations was on the very same day Mr. Berman filed a response in this case in which he expressed great concern over the expansion of the Receiver's duties, which would "lead to the liquidation" of CBSG. (ECF No. 43 at 3).

Later that day, Mr. Berman prepared revised declarations based on a follow-up call he had with Isaac Shehebar, and then sent the revised declarations to Isaac Shehebar, who shared them with Eddie and Jojo Chehebar. (Exh. 1, Email from I. Shehebar dated July 31, 2020). These declarations contain strikingly similar language to the response Mr. Berman filed the prior day:

> I deeply oppose the Commission's ***objective to liquidate CBSG***, as it will place our $48,000,000.00 loan in ***substantial jeopardy***. . . . ***Liquidation of the company***, caused by the Commission, is not in the public's best interest.

[ECF No. 2014-2].

A few days later, on August 7, 2024, the SEC filed its Expedited Motion to Amend Receivership Order. [ECF No. 105]. The SEC attached the proposed Amended Order Appointing Receiver to that motion, which included the clarified language with the specific prohibition on "creating or enforcing a lien upon any Receivership Property." [ECF No. 105-6 at 11]. The Chehebars argue that the SEC's request to clarify the appointment order is indicative that the original appointment order did not clearly prohibit them from filing new liens. (Response at 9). In fact, the timing of this motion is suggestive of something entirely different.

The SEC filed its motion at 12:40 PM on August 7, 2020. (Exh. 2, Email Notification from CM/ECF for ECF No. 105). Ironically (or, rather, not so ironically), the Chehebars filed their 2020 liens that same day, August 7, 2020, beginning at 4:11 PM. (ECF No. 1889-5). Thus, just three and a half hours after the SEC filed a motion asking the Court to clarify that the appointment order prohibited the filing of new liens, the Chehebars proceeded to do exactly that. The timing is all too coincidental to suggest that the Chehebars—sophisticated businesspeople with their nearly $50 million principal investment in CBSG at risk—just happened to file these liens on the same day the SEC requested the entry of the Amended Order Appointing Receiver.

3. Inquiry Notice

If the Court determines there is a factual dispute concerning whether the Chehebars had actual notice of the IRO (or the SEC's request for the entry of the ARO), it would potentially be appropriate to allow limited discovery into this issue and conduct an evidentiary hearing. But that is not necessary because the Chehebars, at a minimum, were on inquiry notice of the entry of the IRO. The IRO does not require "actual" notice of the entry of the IRO; it simply refers to "persons receiving notice." [ECF No. 36 at ⁋ 9].

In the context of receiverships, interested non-parties who are aware of the receivership are deemed to have inquiry notice of the orders, deadlines, and other Court-imposed requirements that the district court judge enters. *See Florida Cmty. Bank v. BRI, LLC*, 10-61828-CIV, 2011 WL 13214327, at *2 (S.D. Fla. Apr. 26, 2011) ("Gajeski's actual knowledge that Florida Community Bank was in receivership put [] him on inquiry notice of the bar date."); *Intercontinental Travel Mktg., Inc. v. FDIC*, 45 F.3d 1278, 12 86 (9th Cir.1994) (finding claimant with actual notice of receivership was on "inquiry notice of the claims bar date"). Thus, regardless of whether they received actual, direct notice of the entry of the IRO, there is overwhelming evidence that the Chehebars were aware of the pending action and the appointment of the receiver. *See Elmco Properties, Inc. v. Second Nat. Fed. Sav. Ass'n*, 94 F.3d 914, 921 (4th Cir. 1996) ("Elmco may not complain of its lack of formal notice if it actually knew enough about the situation to place it on 'inquiry notice' as to the details of the administrative process."). Therefore, the Chehebars' "claims that [they were] unaware of the receivership . . . are unpersuasive and disingenuous in light of the overwhelming evidence and [their] own admissions." *See Peach Blossom Dev. Co., Inc. v. F.D.I.C.*, 5:12-CV-394 HL, 2014 WL 7215194, at *7 (M.D. Ga. Dec. 17, 2014). (finding that claimant did not file a timely claim in receivership where there was "ample evidence that [claimant] at the very least had inquiry notice of the receivership").

Moreover, the Chehebars were represented by well-credentialed counsel who filed the 2020 liens on their behalf. Josef Chehebar indicated in a declaration that he contacted the law firm of Paul, Weiss, Rifkind, Wharton & Garrison LLP months before the Receiver was appointed, in April 2020, concerning their promissory notes with CBSG and efforts to protect their security interests. [ECF No. 2041-1]. If that is true, there must have been some impetus for the Paul Weiss lawyers to proceed with preparing and filing those one-page boilerplate financing statements on August 7, 2020, after sitting on their hands for four months. Given that the Chehebars were

communicating with McElhone's and LaForte's counsel just days earlier about the "substantial jeopardy" they would suffer upon the expansion of the Receiver's duties and potential "liquidation of the company" [ECF No. 2014-2], it is no surprise that the Chehebars' lawyers at Paul Weiss moved promptly in the days after those phone calls and filed the 2020 liens.

Finally, attorneys are charged with constructive notice of matters reflected on a court's docket. *See Stevenson v. Orlando's Auto Specialists, Inc.*, 607CV500ORL19GJK, 2008 WL 11435664, at *4 (M.D. Fla. Sept. 15, 2008). Thus, the Chehebars' lawyers at Paul Weiss are charged with having constructive notice of the IRO, and this notice is properly imputed to the Chehebars. *See Gutter v. E.I. Dupont De Nemours*, 124 F. Supp. 2d 1291, 1309 (S.D. Fla. 2000). As a result, regardless of whether there is conclusive evidence that the Chehebars had "actual notice," they unquestionably were on inquiry notice or constructive notice of the entry of the IRO.

4. The Receiver is not seeking to hold the Chehebars in contempt.

The Chehebars incorrectly suggest that the remedy for the Chehebars filing the 2020 liens in violation of the IRO is governed by the standards for contempt proceedings. (Response at 10-11). To be clear, the Receiver is not asking the Court to enter a show cause order and hold the Chehebars in contempt for filing the 2020 liens. Rather, the Receiver is simply asking the Court to find that the 2020 liens are void and invalid, as they were filed in violation of this Court's IRO.

As this Court previously advised during a contempt hearing against Lisa McElhone and Joseph LaForte for diverting receivership assets, the Court will only enter a contempt order when there is clear and convincing evidence of a knowing violation of the Court's Order. Thus, even if the evidence suggests that a party violated an Order, the Court will only hold that party in contempt upon a showing that the party has been caught "dead to rights" in committing the violation. [ECF No. 1415, Transcript of Hearing on Sep. 12, 2022, at 98:1-8).

The Receiver does not believe it would be a wise use of receivership resources to conduct non-party discovery into the Chehebars' knowledge of the receivership proceedings, including their (potentially privileged) communications with lawyers in the days following the SEC's filing of this action. Nor is there any reason to engage in a contempt analysis. The Court simply needs to determine whether the 2020 liens were filed in violation of the IRO, which would result in the invalidation of the priority status of those liens. *See Johnson*, 2022 WL 612507, at *1 (affirming district court order invalidating lien that was filed in violation of court order); *United States v. Barnette*, 902 F. Supp. 1522, 1543 (M.D. Fla. 1995) (transfer of assets in violation of court order

deemed to be "null and void," in addition to a basis for contempt finding); *In re Albany Partners, Ltd.*, 749 F.2d 670, 675 (11th Cir. 1984) (actions taken by a party in violating restrictions imposed because of pending lawsuit "deemed void and without effect," including "actions taken by the party at a time when he may have been unaware of the" restrictions).

D. The Liens of the "Exchange Offering Investors" are valid and enforceable.

1. Albert Vagnozzi's role as a collateral agent does not invalidate these liens.

As a final backup argument, the Chehebars argue that the priority liens Albert Vagnozzi filed on behalf of the investors who accepted an exchange note ("Exchange Offering Investors") should be declared invalid. In an effort to label these victim-investors as "insiders," the Chehebars describe these liens as the "Vagnozzi liens." That, however, is a misnomer. Albert Vagnozzi, as a security agent for the agent funds that accepted the Exchange Offering, filed a UCC-1 financing statement that granted each of these Exchange Offering Investors a lien of equal priority.

These are not "Vagnozzi liens." These are liens of the investors who accepted the Exchange Offering. Under the applicable UCC provisions, a collateral agent who records a financing statement on behalf of a secured party is not itself a secured party. Rather, the agent is simply acting on behalf of the secured party, and the collateral agent's own actions or status have no impact on the validity or effectiveness of the financing statement. *See* Del. Code Ann. tit. 6, § 9-503(d). The commentary to this section illustrates how this concept is applied:

> Debtor creates a security interest in favor of Bank X, Bank Y, and Bank Z, but not to their representative, the collateral agent (Bank A). The collateral agent is not itself a secured party. See Section 9-102. Under Sections 9-502(a) and 9-503(d), however, a financing statement is effective if it names as secured party Bank A and not the actual secured parties, even if it omits Bank A's representative capacity.

Id., cmt. 3. That is no different than the situation here. The Exchange Offering Investors are Banks X, Y, and Z, and Albert Vagnozzi is Bank A. The secured parties under this financing statement are the Exchange Offering Investors, and not the collateral agent, Albert Vagnozzi.

The Chehebars cite general agency law to argue that an agent's knowledge may, in certain circumstances, be imputed to its principal. (Response at 12). But those general principles have no application to this specific situation. One of the primary concerns underlying the SEC's enforcement action against Dean Vagnozzi, as well as the parallel case against Albert Vagnozzi, is that these sales agents made a series of misrepresentations and omissions, and failed to disclose material facts, to their investors. [ECF No. 1 at ⁋⁋ 154-267; Case No. 1:23-cv-23749, ECF No. 1 at ⁋ 7]. "Under fundamental tenets of agency law, a principal is not charged with an agent's actions

or knowledge when the agent is acting adversely to the principal's interests." *Downs v. McNeil*, 520 F.3d 1311, 1320 (11th Cir. 2008). That is precisely the situation here.

Albert Vagnozzi's role as a security agent was limited to filing the UCC lien for the benefit of the Exchange Offering Investors. Thus, any other conduct on Mr. Vagnozzi's part beyond that pure ministerial act is irrelevant to the validity of the lien. But even if the Court were to consider whether Albert Vagnozzi was involved in or had knowledge of potential securities violations when he filed that lien, that knowledge is not attributable to the Exchange Offering Investors, who were the victims of these securities violations.

2. The Chehebars' efforts to label the Exchange Offering Investors as "insiders" miscomprehends the purpose of federal securities laws.

The Chehebars argue that some of the largest secured investors under the Exchange Offering, who would enjoy priority status through the enforceability of the lien Albert Vagnozzi filed on their behalf, were owned and/or controlled by insiders. (Response at 13-14). As a result, the Chehebars suggest, the liens CBSG granted to these victim-investors should be declared void. This argument fundamentally misunderstands the agent-fund structure, is not supported by the provisions of the federal securities laws the Chehebars cite in their Response, and would merely punish the victim-investors for whom the SEC filed this case.

To be clear, the Receiver has denied the claims of CBSG insiders or otherwise recommended subordination of their claims to Class 8 status. For example, the Receiver denied claims that Lisa McElhone, Joseph LaForte, John Gissas, and Michael Tierney filed in the receivership. The Receiver has also recommended that the individual claims from insiders who acted as agent fund managers, such as Shannon Westhead, who are seeking to recover their own personal investments into CBSG, be relegated to Class 8 claims.

In addition, the Receiver has included procedures in this claims process to ensure that distributions that are paid to agent funds will be for the benefit of the victim-investors, and not the agent fund managers who recruited those investors and managed the funds. The Court has agreed with the Receiver and incorporated those protections into the claims procedures in this case. [ECF No. 1976 at 30]. As a result, any amounts the Receiver allocates in distributions to the agent funds for these priority claims will be distributed to, and paid for the benefit of, the victim-investors, and not any person who might be considered an "insider."

The Chehebars cite to 15 U.S.C. § 78cc, and suggest that this provision of the Securities Exchange Act of 1934 (the "Act") requires that liens of agent funds that accepted the Exchange

Offering be invalidated. But the plain language of subsection (b) of that section of the Act makes clear that contracts are only deemed void "as regards the rights of any person who, in violation of any such provision, rule, or regulation, shall have made or engaged in the performance of any such contract." 15 U.S.C. § 78cc(b). As explained above, these liens were provided for the benefit of the victim-investors—for whom there are no allegations that they were aware of any violations of the securities law—and, therefore, their rights are not impaired by this provision of the Act.

Similarly, sub-section (c) provides that no liens shall be impaired, unless 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 Act. 15 U.S.C. § 78cc(c). Because these liens were for the benefit of the victim-investors in the agent funds, and not the agent fund managers who could potentially be labeled as insiders, this section of the Act does not operate to invalidate the liens these Exchange Offering Investors acquired as part of accepting the Exchange Offering.

Moreover, the Supreme Court has explained that this language regarding the voidability of a contract or the impairment of lien rights is not self-executing, but rather "render[s] the contract merely voidable at the option of the innocent party." *Mills v. Elec. Auto-Lite Co.*, 396 U.S. 375, 387 (1970). In other words, these provisions may be relied upon to prevent a party who commits securities fraud "from enforcing the contract against an unwilling innocent party." *Id*. They do not, however, "compel the conclusion that the contract is a nullity, creating no enforceable rights even in a party innocent of the violation." *Id*. Here, neither party to these security agreements—neither CBSG nor the Exchange Note Investors—is attempting to void the Exchange Note Investors' priority liens and, therefore, these sections of 15 U.S.C. § 78cc are inapplicable.

This rationale similarly applies to the Chehebars' arguments that the Exchange Offering Investors' claims should be subordinated to the Chehebars' liens. Without a finding, or even a suggestion, that the victim-investors were insiders or otherwise engaged in improper conduct, there would be no basis for subordinating the claims of the Exchange Offering Investors. *See In re N&D Props., Inc.*, 799 F.2d 726, 731 (11th Cir. 1986) (equitable subordination requires a finding that the "claimant has engaged in inequitable conduct"). Moreover, the Receiver, as the party whose property is impaired by the Exchange Offering Investors' liens, is not seeking to invalidate the priority lien rights of the Exchange Offering Investors.

III. Conclusion

For the foregoing reasons, the Court should reject the arguments the Chehebars have advanced in their Response. Any secured status the Chehebars' 2017 liens might have otherwise maintained has lapsed due to their failure to file a continuation statement. Moreover, the Chehebars filed their 2020 liens in violation of the IRO and, thus, those liens are void and unenforceable. As a result, absent an insider determination, the Chehebars' claims should be assigned to Class 4. The Chehebars also improperly attempt to label the victim-investors in this case—the Exchange Offering Investors—as insiders.

Finally, given the current amounts available for distribution, there is no need for the parties to engage in expensive discovery or for the Court to conduct an evidentiary hearing regarding whether the Chehebars are properly considered insiders. That determination would only be necessary if the Receiver's future proposed distributions were enough to satisfy in full the allowed claims of all Class 3 claimants. Because the Receiver does not currently contemplate distributing that amount of funds, the Court should preserve receivership resources, defer on determining whether the Chehebars are properly considered insiders, and assign the Chehebars' claims to Class 4 (subject to reconsideration in the event additional funds become available beyond the amount necessary to satisfy the allowed claim amounts for Class 3 claims in full).[4]

Dated: September 27, 2024

Respectfully Submitted,

STUMPHAUZER KOLAYA
NADLER & SLOMAN, PLLC
Two South Biscayne Blvd., Suite 1600
Miami, FL 33131
Telephone: (305) 614-1400

By: */s/ Timothy A. Kolaya*
TIMOTHY A. KOLAYA
Florida Bar No. 056140
tkolaya@sknlaw.com

[4] In that event, the Receiver would seek a determination that the Chehebars are insiders and, therefore, their claims should be relegated to Class 8.

PIETRAGALLO GORDON ALFANO BOSICK & RASPANTI, LLP
1818 Market Street, Suite 3402
Philadelphia, PA 19103
Telephone: (215) 320-6200

By: */s/ Gaetan J. Alfano*
GAETAN J. ALFANO
Pennsylvania Bar No. 32971
(Admitted Pro Hac Vice)
GJA@Pietragallo.com
DOUGLAS K. ROSENBLUM
Pennsylvania Bar No. 90989
(Admitted Pro Hac Vice)
DKR@Pietragallo.com

Co-Counsel for Receiver

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 27, 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 transmission of Notices of Electronic Filing generated by CM/ECF.

/s/ Timothy A. Kolaya
TIMOTHY A. KOLAYA

Exhibit “1”

Message

From: Isaac Shehebar [REDACTED]
Sent: 7/31/2020 11:23:22 AM
To: JoJo Bero Chehebar [REDACTED]
Subject: Fwd: Revised Declarations
Attachments: image001.jpg; ATT00001.htm; 112777215_1_Declaration Isaac Shehebar Rev ALB-C3.DOCX; ATT00002.htm; 112777054_1_Declaration of Albert Chehebar rev alb-C3.DOCX; ATT00003.htm

Sent from my iPhone

Begin forwarded message:

From: Isaac Shehebar <[REDACTED]>
Date: July 31, 2020 at 10:00:44 AM EDT
To: Eddie Chehebar <[REDACTED]>
Subject: Fwd: Revised Declarations

Sent from my iPhone

Begin forwarded message:

From: "Berman, Brett" <BBerman@foxrothschild.com>
Date: July 30, 2020 at 1:00:42 PM EDT
To: Isaac Shehebar <[REDACTED]>
Subject: Revised Declarations

Per our call a few minutes ago, attached are the revised declarations for your review. If you have no further comments, please execute and return. Thanks.

Brett A. Berman, Esq.
Partner
Co-Chair of Litigation Department

Exhibit “2”

From:	cmecfautosender@flsd.uscourts.gov
To:	flsd_cmecf_notice@flsd.uscourts.gov
Subject:	Activity in Case 9:20-cv-81205-RAR Securities & Exchange Commission v. Complete Business Solutions Group, Inc. et al Expedited Motion [CMID#1228987849]
Date:	Friday, August 7, 2020 12:40:30 PM
Attachments:	0105 - 0000 - Main Document.pdf 0105 - 0001 - Exhibit A.Vagnozzi Response.pdf 0105 - 0002 - Exhibit C. Email.pdf 0105 - 0003 - Exhibit D. Email.pdf 0105 - 0004 - Exhibit E. Declaration of Shane Heskin.pdf 0105 - 0005 - Text of Proposed Order.pdf 0105 - 0006 - Document 6.pdf

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U.S. District Court

Southern District of Florida

Notice of Electronic Filing

The following transaction was entered by Berlin, Amie on 8/7/2020 at 12:40 PM EDT and filed on 8/7/2020

Case Name:	Securities & Exchange Commission v. Complete Business Solutions Group, Inc. et al
Case Number:	9:20-cv-81205-RAR
Filer:	Securities & Exchange Commission
Document Number:	105

Docket Text:
Plaintiff's EXPEDITED MOTION To Amend Receivership Order by Securities & Exchange Commission. (Attachments: # (1) Exhibit A.Vagnozzi Response, # (2) Exhibit B.Composite of Receiverhship Order, # (3) Exhibit C. Email, # (4) Exhibit D. Email, # (5) Exhibit E. Declaration of Shane Heskin, # (6) Text of Proposed Order)(Berlin, Amie)

9:20-cv-81205-RAR Notice has been electronically mailed to:

Adam Michael Foslid afoslid@sfslaw.com

Alan S. Futerfas asfuterfas@futerfaslaw.com

Alejandro Paz alejandro.paz@akerman.com

Alex Louis Braunstein abraunstein@foxrothschild.com

Allison Beth Kernisky allison.kernisky@hklaw.com, angel.barber@hklaw.com

Amie Riggle Berlin berlina@sec.gov, jacqmeinv@sec.gov

Brett A. Berman bberman@foxrothschild.com

Brian Paul Miller Brian.Miller@akerman.com, kelly.connolly@akerman.com, kim.stathopulos@akerman.com

Daniel I. Small dan.small@hklaw.com, aida.guerrero@hklaw.com, christopher.iaquinto@hklaw.com

Daniel Lawrence Rashbaum drashbaum@mnrlawfirm.com, mordenes@mnrlawfirm.com

Daniel Scott Fridman dfridman@ffslawfirm.com, vpantin@ffslawfirm.com

Douglas K. Rosenblum DKR@Pietragallo.com

Fred Arthur Schwartz schwartz@kolawyers.com, eschwartz@kolawyers.com, joiner@kolawyers.com

Gaetan J. Alfano GJA@Pietragallo.com

James R. Froccaro jrfesq61@aol.com

Jason Mays jmays@mnrlawfirm.com

Jeffrey David Marcus jmarcus@mnrlawfirm.com, kmeyers@mnrlawfirm.com, mordenes@mnrlawfirm.com

Jeffrey L. Cox jlc@sallahlaw.com, cdp@sallahlaw.com, tah@sallahlaw.com

Joel Hirschhorn Joel.Hirschhorn@gray-robinson.com, andrew.sarangoulis@gray-robinson.com, anita.abrams@gray-robinson.com

Joseph A. DeMaria jdemaria@foxrothschild.com, jmiranda@foxrothschild.com, mmiller-hayle@foxrothschild.com

Robert F. Elgidely relgidely@foxrothschild.com, bserrano@foxrothschild.com, jmiranda@foxrothschild.com, mmiller-hayle@foxrothschild.com, rsolomon@foxrothschild.com

Timothy Andrew Kolaya tkolaya@sfslaw.com

9:20-cv-81205-RAR Notice has not been delivered electronically to those listed below and will be provided by other means. For further assistance, please contact our Help Desk at 1-888-318-2260.:

The following document(s) are associated with this transaction:

Document description: Main Document
Original filename:n/a
Electronic document Stamp:
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Document description: Exhibit A.Vagnozzi Response
Original filename:n/a
Electronic document Stamp:
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Document description: Exhibit B.Composite of Receiverhship Order
Original filename:n/a
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Original filename:n/a
Electronic document Stamp:
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Document description: Exhibit E. Declaration of Shane Heskin
Original filename:n/a
Electronic document Stamp:
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Original filename:n/a
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