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.
_____/

SECURED CHEHEBAR INVESTORS' NOTICE OF FILING PROPOSED ORDER DENYING MOTION TO (1) APPROVE PROPOSED PLAN OF DISTRIBUTION AND (2) AUTHORIZE FIRST INTERIM DISTRIBUTION

Pursuant to this Court's Order [ECF No. 2054], 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, hereby give notice of filing their Proposed Order Denying the Receiver's Motion to (1) Approve Proposed Plan of Distribution and (2) Authorize First Interim Distribution [ECF No. 2014].

Dated: October 21, 2024

Respectfully submitted,

BOIES SCHILLER FLEXNER LLP

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/s/ Marshall Dore Louis
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[SECURED CHEHEBAR INVESTORS']

[PROPOSED]

ORDER ON MOTION TO
(1) APPROVE PROPOSED PLAN OF DISTRIBUTION AND
(2) AUTHORIZE FIRST INTERIM DISTRIBUTION

THIS CAUSE comes before the Court upon Receiver Ryan K. Stumphauzer's Motion to Approve (1) Plan of Distribution and (2) Authorize First Interim Distribution ("Motion") [ECF No. 2014].

Having reviewed the Motion and all related filings, and otherwise being fully apprised, for the reasons set forth herein, it is hereby

ORDERED AND ADJUDGED that the Motion, is **DENIED**, as follows:

I. Background and Procedure

On December 21, 2022, the Receiver filed a Motion to Establish and Approve the: (1) Proof of Claim Form; (2) Claims Bar Date and Notice Procedures; and, (3) Procedure to Administer and

Determine Claims (the "Claims Process Motion") [ECF No. 1467]. The Court entered an Order granting the Claims Process Motion on December 23, 2022 (the "Claims Process Order") [ECF No. 1471]. By granting the Claims Process Motion, the Court approved a procedure for individuals or entities who believed they may have a claim against any Receivership Entity to submit a claim to the Receivership assets, and for the Receiver to respond to those claims. The Receiver attempted to resolve objections that he received from claimants, but more than 40 filings were docketed in relation to claims upon which an agreement could not be reached. The Receiver then filed a Motion to (1) Approve Proposed Treatment of Claims and (2) for Determination of Ponzi Scheme ("Claims Motion"), [ECF No. 1843]. Relevant here, on June 26, 2024, the Court entered an Order resolving the Receiver's proposed treatment of claims (the "Order Approving Claims Motion") [ECF No. 1976].

The Chehebars are a group of investors who have claimed throughout these proceedings that through the filing of UCC-1 liens, they are secured investors who are entitled to priority during the distribution process. At the time the Order Approving Claims Motion was entered, a dispute existed between the Receiver and the Chehebars as to two important points: (1) the validity of the Chehebar's UCC-1 liens (the lien priority issue) and (2) the Receiver's argument that the Chehebars are "insiders" (the "insider" issue) and if so, the impact that determination should have upon the Chehebars' claims. In the Order Approving Claims Motion, the Court noted the Receiver's suggestion in his Claims Motion that the lien priority and "insider" issues should be resolved during the next phase of this case, as part of the Receiver's motion to approve a plan of distribution of the assets of the Receivership Estate. The Court accepted the Receiver's suggestion and directed the Receiver to file a motion to approve a plan of distribution as soon as practicable, and deferred ruling on the lien priority and "insider" issues.

On September 3, 2024, the Chehebars filed a Motion to Bifurcate and Motion for Case Management Conference [ECF No. 2021]. The Court held a hearing upon the Chehebars' motion on September 5, 2024, and after considering the arguments of the parties, entered an Order that bifurcated the lien and "insider" issues, informing the parties that the Court would first address the enforceability of the UCC-1 financing statements, and then if necessary, the Court would reconvene to discuss setting an evidentiary hearing to address allegations that the Chehebars were "insiders" to the fraudulent merchant cash advance scheme at the center of this case. [ECF No. 2026]. Thereafter, on September 16, 2024, the Chehebars filed their opposition to the Motion [ECF No. 2041], the Receiver filed a reply to the Chehebars response [ECF No. 2049], and with leave of the Court, the Chehebars filed a Sur-Reply [ECF No. 2052]. The issue of the validity of the Chehebars' liens is now ripe.

II. The Receiver and Chehebars' Arguments

The Receiver argues that the Chehebars liens are invalid for different reasons. With regard to the 2017 Liens, the Receiver argues that although those lines were perfected in 2017, and were valid when the Receivership was established in 2020, the 2017 liens expired in 2022 when the Chehebars failed to file continuation statements. The Chehebars dispute this position and argue that they did not need to file continuation statements because the rights of creditors to the Receivership were frozen when the Receivership was established. The Receiver argues that the Chehebars 2020 liens were never valid because at the time they were recorded, the Initial Receivership Order [ECF No. 36 (the "IRO")] prevented their filing. The Chehebars respond that the IRO did not prevent their filing, although they acknowledge that the Amended Receivership Order [ECF No. 105 (the "ARO")], which was entered after the 2020 liens were recorded, would have prevented their filing if the ARO had been entered prior to filing of the 2020 liens. In the

alternative, the Receiver also argues that even if the 2017 and 2020 liens are valid, the Chehebars' claims should still be equitably subordinated because of their "insider" status. The Court will not address this alternate position here because the issue is inextricably intertwined with the "insider" issue that the Court has previously bifurcated and indicated will be taken up after resolution of the question of the validity of the Chehebars liens. The Receiver indicated that he intends to "hold back from the CBSG funds a sum of $36,513.666.61 for the purported senior secured claims from certain of the Chehebar Investors". This sum is intended by the Receiver to secure the interest protected by the Chehebars' 2017 Liens in the event the Chehebars receive an adverse ruling and pursue an appeal.

Finally, the Chehebars object to the Receiver's assertion, that investors who accepted the "Exchange Offering" recorded a UCC-1 lien that remains valid, entitling the beneficiaries to priority over unsecured creditors (the "Vagnozzi Liens"). Because the Vagnozzi liens secure a greater amount of money than has been claimed by persons the Receiver asserts would benefit from them, if the Chehebars 2017 liens are not valid, then there would be no money left to distribute to the Chehebars (because they did not participate in the "Exchange Offering"). The Chehebars contest that the Vagnozzi liens were ever valid and that they still exist. Instead, the Chehebars argue that Vagnozzi Liens were *void ab initio* and that they have been extinguished as a result of a disgorgement order entered in a SEC case that was brought against the agent funds that may have at some point been able to assert a right under the Vagnozzi liens if they had ever been valid. The Chehebars also argue that the Court should subordinate the rights of the exchange offering investors.

a. The Chehebars' 2017 Liens

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"). [ECF No. 1189 at 15; ECF No. 1843-3 at 2; ECF No. 1842-1 at 25–39]. The Receiver never contested that the 2017 Liens were perfected or that they were valid at the time the Receivership was established. Instead, the Receiver argues that the 2017 Liens expired after five (5) years and the failure of the Chehebars to file a continuation statement.

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). 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).

Consistent with the view that the rights of creditors against a bankruptcy estate are fixed on the date the petition is filed, bankruptcy courts have ruled that UCC-1 liens do not expire during the pendency of bankruptcy proceedings. "[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."). The cases relied upon by the Receiver are unconvincing and are outliers from the vast weight of authority. *In re 800 Bourbon St., LLC*, 541 B.R. 616, 626 (Bankr. E.D. La. 2015), is not binding on this Court, and 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 Court declines to follow the minority view that continuation statements may be required to be filed during bankruptcy proceedings for a UCC lien to remain valid and enforceable during those proceedings.

The Court agrees that the rationale is sound "for eliminating the requirement for filing continuation statements during insolvency proceedings" because "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). The same reasoning

applies even though the bankruptcy code was amended after the "freeze rule" had been established to permit a secured creditor to file a continuation statement during bankruptcy proceedings. *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.")

The rationale underlying the "freeze rule" in bankruptcy proceedings has also been applied in other forms of actions that, like a receivership, serve to address the rights of creditors to property held under the power of the courts. *See 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."). 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 this one involving the lapse of a filing during an interpleader proceeding." *Avant Petroleum, Inc.*, 853 F.2d at 144.

This Court has been unable to find any precedent in the context of a receivership, and the parties have cited none. As instructed, the Court will therefore look to the law from the analogous

context of bankruptcy, and apply it here. *Bendall*. As recognized in *Avant Petroleum, Inc.*, the rationale behind the "freeze rule" is not a creature of statute, but one of reason, and it applies equally here in the Receivership context. The ARO, like Section 362's automatic stay provision, prevented the Chehebars from filing continuations of their 2017 Liens. The fact that, as the Receiver argues, the Chehebars 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.

Accordingly, the 2017 Liens remain valid.

b. The Chehebars' 2020 Liens

The Chehebars 2020 Liens are valid. There is no question that the ARO prohibited the filing of liens and had the Chehebars attempted to file any after entry of the ARO, they would have done so in violation of the ARO. But that did not happen. At the time the 2020 Liens were filed, the only order in existence (that the Receiver argues prevented the filing of liens) was the IRO. But the IRO did not prohibit the Chehebars or anybody else from filing 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 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). 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 filing of existing liens because the filing of existing liens neither hinders nor interferes with the Receiver's efforts to control, possess, and preserve Receivership.

Without specific prohibitory language to rely upon, the Receiver asserts instead that the IRO's "intent . . . was clear." But that position is undermined when the Court considers the fact that the SEC moved—on the same day the Chehebars 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, the ARO's addition of the prohibition on the creation of liens reinforces the conclusion that the IRO contained no such prohibition.

Because the IRO did not prevent the Chehebars from filing their preexisting liens, the Court finds that the 2020 Liens are valid.

c. The Vagnozzi Liens

The Receiver seeks to subordinate the Chehebars' claims to claims by investors who accepted the "exchange offering" from CBSG in 2020 (the "Exchange Offering") and on whose behalf Albert Vagnozzi filed a UCC-1 financing statement on April 13, 2020 (the "Vagnozzi

Liens"). But all of those "investors" are in fact agent funds that actively participated in the fraud giving rise to this action, as well as several others that have been brought by the SEC.

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 of Albert Vagnozzi and the agent funds' actual knowledge that the Exchange Offering violated the Securities and Exchange Act is imputed to the 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)).

The Vagnozzi Liens held by entities owned and/or controlled by insiders of CBSG are void for the additional reason that the insiders' knowledge that the Exchange Offering violated the Securities and Exchange Act is imputed to the entities. *See* 15 U.S.C. § 78cc(b)–(c). In his Claims Motion, the Receiver included a chart reflecting his proposed distribution amounts. That chart reflects that at least 69% of the Receiver's proposed $95,807,810.68 initial distribution to investors in the Exchange Offering will be directed to entities that are owned and/or controlled by insiders of CBSG 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 CBSG against whom the SEC has brought civil enforcement actions arising from CBSG 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). 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). As the Exchange Offerings made clear, they were not for the benefit of third parties – investors who invested into the agent funds (not CBSG) – they were solely for the benefit of the agent funds.

Because these entities were owned and/or controlled by CBSG insiders with actual knowledge that the Exchange Offering violated the Securities and Exchange Act, the entities also had actual knowledge that the 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).

Moreover, on November 6, 2023, a Final Judgment was entered that disgorged over $110 million dollars from the agent funds that the Receiver asserts benefit from the Vagnozzi Liens. *SEC v. ABFP Income Funds Parallel, LLC, et al.*, SD Fla. Case No. 23-23721 (Final Judgment) (ECF No. 11). The Final Judgment provided that "disgorgement and prejudgment interest thereon are deemed satisfied by the amounts collected by the Receiver in…" the matter before this Court. The Receiver's quarterly reports in this case reflect that on October 31, 2023, the cash balance was $135,290,131, and as of January 31, 2024 it was $140,884,766. [ECF Nos. 1739, 1792]. That those disgorged funds were free of any possible liens being asserted by Vagnozzi or any of the agent funds is beyond question. In his September 13, 2024, filing, the Receiver noted that "[t]he amount of cash on in the Receivership bank accounts as of June 30, 2024, which is the end of the Application Period, was $160,279,955. All of the cash is unencumbered." [ECF 2038 at p.6]. The Receiver (who controlled the agent funds) was aware of the disgorgement of money from those funds. His position that the funds held in this estate were "unencumbered" is consistent with the fact that if the agent funds ever did possess liens through the Exchange Offering, those liens were extinguished when the agent funds agreed that the funds held by the Receiver in this case had been disgorged from them.

Regardless of whether the Vagnozzi Liens were ever enforceable, the agent funds lost any right to assert a lien over the monies in this Receivership when they agreed to their disgorgement and the court in *SEC v. ABFP Income Funds Parallel, LLC, et al*., entered a Final Judgment

disgorging those funds. Therefore, the Court finds that Vagnozzi Liens are not valid or enforceable.

III. The Court Will Hold an Evidentiary Hearing on the "Insider" Allegations.

Having disposed of the lien issues the Court will by separate Order set a hearing on the remaining "insider" issue. At that time the Court will also address the equitable subordination arguments raised by the Receiver and Chehebars. The Chehebars and Receiver are directed to meet and confer and present the Court with a proposed schedule for that hearing to occur. The schedule will include any agreements the parties have been able to reach as to disclosures and discovery in advance of the hearing to protect the Chehebars' due process rights.

The Chehebars and the Receiver will attend mediation within the next thirty days to attempt to resolve all pending disputes between the parties, including the scope and timing of discovery. If they have not reached a settlement, within five (5) days of concluding the mediation, the Receiver and Chehebars will present the Court with any agreements they have reached as to disclosures, discovery and timing of a hearing. By motion, they will each separately present any proposals that they were unable to reach agreement upon.

The question of how much a receiver should set aside and reserve for disputed claims is fact dependent and may be subject to modification in the face of changing circumstances. *See In re Reserve Fund Secs. & Derivative Litig.*, 673 F. Supp. 2d 182, 206 (S.D.N.Y. 2009) (approving distribution subject to monitor's retention of funds to make future payments, on a pro rata basis, to shareholders for indemnification expenses and management fees). To that end, in some cases, the "proper set-aside amount" to be retained by the receiver "is an academic question" at the time the court decides whether to approve a distribution plan, since one or more objectors may file an appeal or decide not to pursue spinoff litigation. *TCA Fund Mgmt.*, 2022 WL 3334488, at *17.

Having found the Chehebars' 2017 and 2020 Liens to be valid, the Court directs the Receiver to hold the sum of $50,871.124.89 (instead of the $36,513,666.61 proposed by the Receiver) from the first interim distribution.

DONE AND ORDERED in Miami, Florida, this ___ day of October 2024.

_____
RODOLFO A. RUIZ II
UNITED STATES DISTRICT JUDGE