UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.
_____/

LISA MCELHONE'S AND JOSEPH LAFORTE'S OBJECTIONS TO, AND REQUEST FOR EXCLUSION FROM, THE ECKERT SEAMANS SETTLEMENT AND "OPT-OUT BAR ORDER"

Defendants, Lisa McElhone and Joseph LaForte, by and through their undersigned counsel, hereby file their objections to the Settlement Agreement and Release proposed in the Receiver's Renewed Motion for: (I) Approval of Settlement Among Receiver, Putative Class Plaintiffs, and Eckert Seamans; (II) Approval of Form, Content and Manner of Notice of Settlement and Opt-Out Bar Order; (III) Setting Deadline to Object to Approval of the Settlement and Entry of Opt-Out Bar Order, Or Request Exclusion From Settlement; and (IV) Scheduling a Hearing [ECF No. 2081, the "Motion to Approve Settlement"]. As support therefore, McElhone and LaForte state as follows:

BACKGROUND AND INTRODUCTION

1. On December 24, 2024, the Receiver filed a Motion to Approve Settlement, in which he asks the Court to approve a Settlement Agreement and Release among the Receivership Entities,[1] the Putative Class Plaintiffs and Eckert Seamans (the "Settlement Agreement"). The Settlement

[1] Capitalized terms which are not defined herein shall have the same meaning ascribed to them in the Motion to Approve Settlement.

Agreement is expressly conditioned on Eckert Seamans receiving the benefit of an "Opt-out Bar Order," which would bar McElhone and LaForte – and every other person or entity, except for the U.S. Government and any Investors who take affirmative steps to opt-out of the settlement – from ever bringing claims against Eckert Seamans.

2. On December 26, 2024, the Court entered an Order Preliminarily Approving Settlement Among Receiver, Putative Class Plaintiffs, and Eckert Seamans [ECF No. 2082, the "Preliminary Approval Order"].

3. The Preliminary Approval Order requires that "[a]ny person who objects to the terms of the Settlement Agreement, the Opt-out Bar Order, the Motion, or any of the relief related to any of the foregoing, must file an objection, in writing, with the Court pursuant to the Court's Local Rules, no later than **thirty (30) days** before the Final Approval Hearing." *Id*. at 5.[2]

4. In the Motion to Approve Settlement, the Receiver suggests that anyone who wishes to opt-out of the Settlement Agreement (and takes the required steps to do so) *will not* be subject to the Bar Order. On closer examination, however, the "opt-out" built into the proposed Bar Order only applies to "Investors" – a defined term that ***does not*** encompass McElhone and LaForte, even though they are specifically identified as "Barred Persons."

5. Because the proposed settlement is expressly conditioned on the entry of a Bar Order which extinguishes McElhone's and LaForte's claims against Eckert Seamans – without their consent, and without consideration – the Settlement Agreement is clearly inequitable and would violate the United States Supreme Court's recent ruling in *Harrington v. Purdue Pharma L.P*., 603

[2] The Final Approval Hearing is scheduled for February 26, 2025, therefore, the deadline to object and/or seek relief is January 27, 2025. However, McElhone and LaForte have been granted an extension of time, through February 6, 2025, to object or seek other relief. *See* DE 2103.

U.S. 204 (2024), which prohibited bar orders which involuntarily eliminate the claims of non-consenting third-parties.

OBJECTIONS AND REQUEST FOR RELIEF

McElhone and LaForte object to the proposed Settlement Agreement on the grounds that it is expressly conditioned on Eckert Seamans receiving the benefit of an "Opt-out Bar Order" ***which does not actually permit McElhone and LaForte to opt-out.*** As discussed below, the Court's authority to issue a bar order which permits non-consenting third parties to "opt-out" is dubious in the wake of the U.S. Supreme Court's decision in *Harrington*. But even if an "Opt-out Bar Order" were somehow permissible, this Court cannot properly approve the proposed Settlement Agreement because it *does not* permit McElhone and LaForte to opt-out and instead extinguishes their claims without their consent and without conferring any benefit upon them.

McElhone and LaForte have claims against Eckert Seamans because they were ultimately subjected to liability (as controlling persons of Par Funding and other Receivership Entities) and a judgment of disgorgement in excess of $140 Million based, in significant part, on the actions of Eckert Seamans and John W. Pauciulo (a former Partner at Eckert Seamans) with respect to the marketing and sale of investments in Par Funding. McElhone and LaForte's efforts to participate in the mediation of the Eckert Seamans settlement were rebuffed by the Receiver. Notwithstanding, the Receiver is now attempting to cram down a settlement that requires a legally unsustainable bar order that precludes McElhone and LaForte from ever bringing claims against Eckert Seamans, without giving McElhone and LaForte *any* credit for the settlement proceeds realized by the Receivership Entities they formerly owned and/or controlled. Neither law nor equity countenance such an unjust result.

A. The United States Supreme Court Has Greatly Restricted – or Eliminated – the Availability of Bar Orders

The proposed Settlement Agreement and Opt-Out Bar Order are prohibited by the United States Supreme Court's decision in *Harrington*, which announced a sea change in the law with respect to the availability of bar orders.

In *Harrington,* the debtor, Purdue Pharma L.P., filed a Chapter 11 bankruptcy petition as a result of a deluge of litigation against Purdue and its long-time owners (members of the Sackler family) for their role in the opioid epidemic. *Id*. at 209. Understanding that these myriad lawsuits "would eventually impact them directly," the Sacklers began "milking" Purdue by increasing distributions to the Sackler family (and other entities they controlled) from 15% of revenue to 70%, thereby financially draining the company. *Id.* at 210-211. When Purdue ultimately filed for bankruptcy, the Sacklers offered to return $4.325 billion of the $11 billion they had realized from the "milking" scheme, conditioned on the entry of a bar order that would prohibit "the growing number of lawsuits against them brought by opioid victims[.]" *Id.* The bar order – which was agreed to by the debtor and approved by the bankruptcy court – enjoined all current and future claims against the Sacklers for opioid claims, without the consent of all of their victims. *Id*. at 210-212.

Prior to *Harrington*, the Circuit Courts of Appeals were split on the propriety of granting nonconsensual third-party releases – known colloquially as bar orders. *Id*. at 214, FN.1 (listing eight circuit courts which had decided the issue – five in favor and three against). *Harrington* resolved that split, holding that bankruptcy courts *are not* authorized to approve a release and injunction that extinguishes claims against non-debtor third parties without the consent of all affected claimants. *Id*. at 227. Ultimately, the Supreme Court held that bar orders are prohibited because the bankruptcy

courts have no statutory authority to grant such relief, rejecting Appellees' argument that a catchall grant of authority in the bankruptcy code imbued the courts with such power. *Id*. at 217-220.

In the Motion to Approve Settlement, the Receiver acknowledges that the *Harrington* opinion disapproved non-consensual third-party releases but offers this Court unfounded assurances that *Harrington* is inapplicable here because it purportedly only addressed the authority of bankruptcy courts – not district courts sitting in equity. *See* DE 2081 at 14-15. This argument is as transparent and self-serving as it is flawed. The Supreme Court's rationale in *Harrington* was not limited to bankruptcy proceedings – it was based on the absence of statutory authority permitting bankruptcy courts to issue bar orders. *See Harrington* at 217-220 (observing that no provision of the bankruptcy code permits bar orders, and expressly rejecting the argument that a statutory "catchall" imbues bankruptcy courts with the authority to grant bar orders). That same rationale applies – with equal or greater validity – in the context of equity receiverships, in which the district court's powers derive from common law rather than *any* statutory grant of authority.

Following the logic of *Harrington*, this Court cannot use its equity powers to extinguish claims against Eckert Seamans by affected claimants – like McElhone and LaForte – who have been intentionally excluded from the proposed Settlement Agreement and have not given their affirmative consent to its terms. *Harrington* eviscerated the rationale espoused by the Eleventh Circuit (in pre-*Harrington* cases) for allowing nonconsensual "bar orders" because, just as the bankruptcy courts are not permitted to rely on general grants of authority and catchall statutory provisions as the source of authority to enter bar orders, district courts cannot rely on their general equitable powers – no matter how broad – to supply them with such authority. *Sec. & Exch. Comm'n v. Stanford Int'l Bank*, Ltd., 927 F.3d 830, 842-43 (5th Cir. 2019) (Likening the authority of receivership courts to that of

bankruptcy courts and relying on bankruptcy case law, holding that the district court had no authority to enter a bar order, observing that "[t]he prohibition on enjoining unrelated, third-party claims without the third parties' consent does not depend on the Bankruptcy Code, but is a maxim of law not abrogated by the district court's equitable power to fashion ancillary relief measures… [and that] a court in equity may not do that which the law forbids").

Tellingly, while the Receiver urges this Court to ignore *Harrington* on the grounds that it purportedly only applies to bankruptcy proceedings, the Receiver places enormous reliance on bankruptcy law when it serves his purposes. Indeed, the Motion to Approve Settlement cites opinions from Bankruptcy Courts around the nation as support for the Receiver's arguments, and specifically cites *Bendall v. Lancer Management Group, LLC*, 523 Fed. Appx. 554 (11th Cir. 2013) for the proposition that circuit courts "**will apply cases from the analogous context of bankruptcy law, where instructive, due to limited case law in the receivership context**." *See* DE 2081-1 at 53 (citing *Bendall*, 523 Fed. Appx. at 557) (emphasis supplied). It is appropriate for this Court to look to bankruptcy case law because "bankruptcy and equity receiverships share common legal roots" and "courts often look to the related context of bankruptcy when deciding cases involving receivership estates." *See Stanford Int'l Bank, Ltd*., 927 F.3d at 842; *see also SEC v. Quiros*, 966 F.3d 1195, 1199 (11th Cir. 2020) ("given the similarity between bankruptcy and receivership proceedings, [they] often apply bankruptcy principles to receivership cases because [they] have limited receivership precedent") (citations omitted).

Accordingly, it is clear that the United States Supreme Court's holding in *Harrington* is applicable here, and prohibits this Court from issuing the proposed Bar Order.

B. The Limited "Opt-Out" Provision in the Proposed Bar Order Does Not Convert It Into An Enforceable Consensual Release

Critically, the Receiver's Motion to Approve Settlement (and the proposed Settlement Agreement itself) purport to present a *consensual* "opt-out bar order" when, in reality, McElhone and LaForte are clearly identified as "Barred Persons" with only the "United States of America" and "Investors"[3] being given the opportunity to opt-out of the Bar Order. *See* DE 2081-1, Section 5, iv. Indeed, the Motion to Approve Settlement clearly anticipates – and seeks to preemptively justify – barring the claims of non-consenting third parties who are excluded from the settlement:

> The Opt-Out Bar Order is "fair and equitable" to non-settling third parties whose claims against Eckert Seamans will be enjoined because those claims are questionable, at best, given their participation in the fraud, and they are being allocated an amount from the settlement and/or may pursue such claims in the claims process to be conducted in the receivership.

See DE 2081 at 21.

This statement evidences the Receiver's intent to enforce the Bar Order against McElhone and LaForte *without* affording them the opportunity to "opt-out" in order to preserve their claims against Eckert Seamans.

Finally, even if McElhone and LaForte had been afforded an opportunity to "opt-out" of the settlement and Bar Order, it does not appear that this would cure the fundamental defects in the Bar Order. Following *Harrington*, courts in different jurisdictions have reached different conclusions about whether an "opt-out" provision can satisfy the requirement of consensual release. *See e.g. In re Tonawanda Coke Corp*., 662 B.R. 220, 222 (Bankr. W.D.N.Y. 2024) (holding that "the mere ability to opt out of a release is insufficient to establish the consent required pursuant to *Harrington*); *see also*

[3] "Investors" is a defined term which *does not* encompass McElhone and LaForte.

In re Smallhold, Inc., No. 24-10267 (CTG), 2024 WL 4296938, at *10 (Bankr. D. Del. Sept. 25, 2024) (holding that, in view of the *Harrington* decision, "it is no longer appropriate to require creditors to object or else be subject to… a third-party release"); *but see In re Robertshaw US Holding Corp.*, 662 B.R. 300, 322 (Bankr. S.D. Tex. 2024) (approving of an opt-out release as an appropriate manner of meeting the requirement of consent under *Harrington*). To our knowledge, there is no post-*Harrington* precedent on this specific issue from the Southern District of Florida or the Eleventh Circuit at this time. Accordingly, the validity of an opt-out bar order has not been established and, for the reasons discussed, cannot pass muster in a post-*Harrington* world.

C. McElhone and LaForte Have no Right to Opt-Out of the Settlement Agreement and Bar Order

For the reasons discussed above, the Bar Order requested by the Receiver *is not* – on its face – permissible. But even if it were (it's not), the proposed Bar Order does not permit McElhone and LaForte to "opt-out" so as to avoid having this Court bar their claims against Eckert Seamans. As discussed above, McElhone and LaForte will receive no consideration for the proposed Settlement Agreement, therefore, it would be improper to involuntarily bar their claims against Eckert Seamans as part of the Settlement Agreement.

D. Request to Appear at the Final Approval Hearing

McElhone and LaForte intend to appear at the Final Approval Hearing, through their counsel, and request the Court's permission to do so, and the opportunity to present oral argument at the hearing.

E. Conclusion

For all of the forgoing reasons, McElhone and LaForte object to the proposed Settlement Agreement and Bar Order – in its current form – and respectfully request that the Court deny approval of the Settlement Agreement and decline to enter a Bar Order in favor of Eckert Seamans.

Finally, in accordance with the Preliminary Approval Order, McElhone and LaForte hereby advise the court that they intend to have their respective counsel appear at the Final Approval Hearing, and they respectfully request that the Court authorize their counsel to appear and present argument.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 6th day of February, 2025, I electronically filed the forgoing document with the clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on counsel of record via transmissions of Notices of Electronic Filing generated by CM/ECF; and via Email and Regular U.S. Mail to the parties listed on the attached Service List.

By: /s/ *James M. Kaplan*
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