

**No. 23-10228-A**

---

**IN THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT**

---

LISA MCELHONE AND JOSEPH LAFORTE,  
*Appellants*

v.

U.S. SECURITIES AND EXCHANGE COMMISSION,  
*Appellee*

and

RYAN K. STUMPHAUZER, RECEIVER,  
*Court-Appointed Receiver-Appellee*

---

ON APPEAL FROM THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF FLORIDA  
No. 9:20-CV-81205-RAR  
HON. RODOLFO A. RUIZ

---

**APPELLANTS' BRIEF**

---

James M. Kaplan, Esq.  
Noah E. Snyder, Esq.  
KAPLAN ZEENA LLP  
2 South Biscayne Boulevard  
Suite 3050  
Miami, Florida 33131  
Tel: (305) 530-0800  
James.Kaplan@kaplanzeena.com  
Noah.Snyder@kaplanzeena.com  
*Attorneys for Appellant Lisa McElhone*

David L. Ferguson, Esq.  
Seth D. Haimovitch, Esq.  
KOPELOWITZ OSTROW  
FERGUSON WEISELBERG GILBERT  
One West Las Olas Boulevard  
Suite 500  
Fort Lauderdale, Florida 33301  
Ferguson@kolawyers.com  
Haimovitch@kolawyers.com  
*Attorneys for Appellant Joseph LaForte*

Alan S. Futerfas, Esq.  
LAW OFFICES OF ALAN S. FUTERFAS  
565 Fifth Avenue  
7<sup>th</sup> Floor  
New York, NY 10017  
Tel: (212) 684-8400  
Asfuterfas@futerfaslaw.com  
*Admitted Pro Hac Vice*  
*Attorney for Appellant Lisa McElhone*

**APPELLANTS' CERTIFICATE OF INTERESTED PERSONS**

Pursuant to 11th Cir. R. 26.1-1, the undersigned, counsel for Appellants, Lisa McElhone and Joseph LaForte, hereby certifies that the following is a complete list of the trial judge(s), attorneys, persons, associations of persons, firms, partnerships, or corporations that have an interest in the outcome of the particular case on appeal, including subsidiaries, conglomerates, affiliates, and parent corporations, including any publicly held corporation that owns 10% or more of the party's stock, and other identifiable legal entities related to a party:

1. Alfano, Gaetan J., Counsel for Appellee, Ryan K. Stumphauzer, as Court-Appointed Receiver for Complete Business Solutions Group, Inc. d/b/a Par Funding and the other Receivership Entities;
2. Berlin, Amie Riggle, Counsel for Plaintiff/Appellee Securities and Exchange Commission;
3. Bowers, John J., counsel for Plaintiff/Appellee Securities and Exchange Commission;
4. Bradylyons, Morgan, counsel for Plaintiff/Appellee Securities and Exchange Commission;
5. Complete Business Solutions Group, Inc. d/b/a Par Funding, Defendant;
6. Conley, Michael A., Counsel for Plaintiff/Appellee Securities and Exchange Commission;
7. Ferguson, David, Counsel for Defendant/Appellant Joseph LaForte;
8. Froccaro, Jr. James, former Counsel for Defendant/Appellant Joseph LaForte;

9. Hardin, Tracey A., Counsel for Plaintiff/Appellee Securities and Exchange Commission;
10. Johnson, Alise, Counsel for Plaintiff/Appellee Securities and Exchange Commission;
11. Kaplan, James M., Counsel for Defendant/Appellant Lisa McElhone;
12. Kolaya, Timothy A., Counsel for Appellee, Ryan K. Stumphauzer, as Court-Appointed Receiver for Complete Business Solutions Group, Inc. d/b/a Par Funding and the other Receivership Entities;
13. Kopelowitz Ostrow Ferguson Weiselberg Gilbert, Counsel for Defendant/Appellant Joseph LaForte;
14. LaForte, Joseph, Defendant/Appellant;
15. L.M.E. 2017 Family Trust, Relief Defendant/Dismissed Appellant;
16. McElhone, Lisa, Defendant/Appellant;
17. Reinhart, Bruce, United States Magistrate Judge;
18. Ruiz, Rodolfo A., U.S. District Court Judge, Southern District of Florida;
19. Securities and Exchange Commission, Appellee;
20. Snyder, Noah E., Counsel for Appellants Lisa McElhone and the L.M.E. 2017 Family Trust;
21. Stumphauzer, Kolaya, Nadler & Sloman, PLLC, Counsel for Appellee Ryan K. Stumphauzer, Court-Appointed Receiver for Complete Business Solutions Group, Inc. d/b/a Par Funding and the other Receivership Entities;
22. Stumphauzer, Ryan K., Court-Appointed Receiver for Complete Business Solutions, Group, Inc. d/b/a Par Funding and the other Receivership Entities, Appellee; and

23. Pietragallo Gordon Alfano Bosick & Raspanti, LLP, Counsel for Appellee Ryan K. Stumphauzer, Court-Appointed Receiver for Complete Business Solutions Group, Inc. d/b/a Par Funding and the other Receivership Entities.

**CORPORATE DISCLOSURE STATEMENT**

In accordance with Federal Rules of Appellate Procedure 26.1 and 11th Cir. Rule 26.1-3(b), counsel for the Appellants certify that no publicly traded company or corporation has an interest in the outcome of this appeal. This Certificate of Interested Persons does not include all persons or entities who may be claimants in the receivership proceedings or Trusts or privately held entities now contained within the Receivership.

**STATEMENT REGARDING ORAL ARGUMENT**

Pursuant to 11th Cir. R. 28-1, Appellants request oral argument because this is a complex multi-party case involving extensive factual issues and record evidence developed over nearly three years of vigorous litigation. Accordingly, the Appellants believe that oral argument will benefit the Court in its determination of the factual and legal issues presented.

**TABLE OF CONTENTS**

CERTIFICATE OF INTERESTED PERSONS .....C-1

CORPORATE DISCLOSURE STATEMENT .....C-3

STATEMENT REGARDING ORAL ARGUMENT .....i

TABLE OF CONTENTS..... ii

TABLE OF CITATIONS .....iv

JURISDICTIONAL STATEMENT .....x

QUESTIONS PRESENTED AND STANDARD OF REVIEW ..... 1

    I.    Questions Presented ..... 1

    II.   Standard of Review ..... 2

STATEMENT OF THE CASE..... 3

FACT STATEMENT..... 9

    I.    The Receivership And Expansion Order..... 9

    II.   The Order On Disgorgement And Penalties And The Final Judgment  
          ..... 20

SUMMARY OF ARGUMENT ..... 27

ARGUMENT ..... 29

    I.    The District Court Violated The Appellants’ Due Process  
          Rights When It Granted The Receiver’s Expansion Motion  
          Without First Permitting Discovery And An Evidentiary  
          Hearing Or Oral Argument ..... 29

        A.  Appellants Were Entitled To Discovery And An Evidentiary  
          Hearing On The Receiver’s Allegations Of “Commingling” ..... 31

B.	The District Court’s Refusal to Permit A Response To The Sharp Report Unfairly Prejudices Appellants’ Opposition To The Expansion Motion.....	34
C.	The District Court’s Procedures Were Unequal To The Weight Of Appellants’ Interests.....	36
II.	The District Court’s Calculation Of Disgorgement And Penalties Constituted An Abuse Of Discretion.....	39
A.	The District Court Erroneously Held That The SEC Met Its Burden To Establish A Reasonable Approximation Of Appellants’ Ill-Gotten Gains .....	42
B.	The District Court Abused Its Discretion By Adopting The SEC’s Inaccurate Calculation Of The Net-Raise .....	46
C.	The District Court Abused Its Discretion By Refusing To Deduct Disgorgement Obtained From Other Defendants.....	52
D.	The District Court Abused Its Discretion by Ordering Appellants To Pay Excessive Penalties, Jointly And Severally .....	54
E.	This Case Should Be Reassigned If It Is Remanded.....	63
	CONCLUSION.....	67
	CERTIFICATE OF COMPLIANCE.....	68
	CERTIFICATE OF SERVICE .....	69

**TABLE OF CITATIONS**

<b><u>Cases</u></b>	<b><u>Page(s)</u></b>
<i>Allstate Ins. Co. v. Receivable Fin. Co.</i> , 501 F.3d 398 (5th Cir. 2007) .....	43
<i>Ameritas Variable Life Ins. Co. v. Roach</i> , 411 F.3d 1328 (11th Cir. 2005) .....	2
<i>Bd. of Regents of State Colleges v. Roth</i> , 408 U.S. 564 (1972).....	29
<i>Boddie v. Conn.</i> , 401 U.S. 371 (1971).....	30, 39
<i>CFTC v. Sidoti</i> , 178 F.3d 1132 (11th Cir. 1999) .....	42
<i>CFTC v. Tayeh</i> , 848 Fed. Appx. 827 (11th Cir. 2021).....	42
<i>Chudasama v. Mazda Motor Corp.</i> , 123 F. 3d 1353 (11th Cir. 1997) .....	63, 66
<i>Crawford &amp; Co. v. Apfel</i> , 235 F.3d 1298 (11th Cir. 2000) .....	2
<i>FTC v. Verity Int'l, Ltd.</i> , 443 F.3d 48 (2d Cir. 2006).....	42, 47
<i>FTC v. Vylah Tec LLC</i> , 378 F. Supp. 3d 1134 (M.D. Fla. 2019).....	42, 47
<i>Hirsch v. Arthur Andersen &amp; Co.</i> , 72 F.3d 1085 (2d Cir. 1995).....	35
<i>Honeycutt v. US</i> , 581 U.S. 443 (2017).....	62

*In re Huff*,  
 109 B.R. 506 (S.D. Fla. 1989) .....35

*In re Murchison*,  
 349 U.S. 133 (1955).....30

*Kern v. TXO Prod. Corp.*,  
 738 F.2d 968 (8th Cir. 1984) .....2

*Liberte Capital Grp. v. Capwill*,  
 421 F.3d 377 (6th Cir. 2005) .....2, 30

*Liu v. SEC*,  
 140 S. Ct. 1936 (2020).....40, 44, 45, 46

*Mathews v. Eldridge*,  
 424 U.S. 319 (1976).....30, 37, 38

*Milam v. Comm’r.*,  
 734 F. App’x 697 (11th Cir. 2018) .....2

*Morrissey v. Brewer*,  
 408 U.S. 471 (1972).....39

*Rubber Co. v. Goodyear*,  
 76 U.S. 788 (1870).....40

*SEC v. Aerokinetic Energy Corp.*,  
 No. 08–CV–1409, 2010 WL 5174509 (M.D. Fla. Dec. 15, 2010).....41

*SEC v. Aerokinetic Energy Corp.*,  
 444 F. App’x 382 (11th Cir. 2011).....41

*SEC v. BIH Corp.*,  
 No. 2:10-CV-577-FTM-29, 2014 WL 7057748  
 (M.D. Fla. Dec. 12, 2014).....41

*SEC v. Blackburn*,  
 15 F. 4th 676 (5th Cir. 2021) .....40

*SEC v. Blatt*,  
583 F. 2d 1325 (5th Cir. 1978) .....40

*SEC v. Calvo*,  
378 F. 3d 1211 (5th Cir. 2004) .....42, 51, 52

*SEC v. Elliot*,  
953 F.2d 1560 (11th Cir. 1992) .....30, 31, 33, 37

*SEC v. Elliot*,  
2012 WL 2161647 (S.D.N.Y. June 12, 2012) .....56

*SEC v. Huff*,  
758 F. Supp. 2d 1288 (S.D. Fla. 2011).....43

*SEC v. iShopnomarkup.com, Inc.*,  
126 F. Supp. 3d 318 (E.D.N.Y. 2015) .....56, 62

*SEC v. K.W. Brown & Co.*,  
555 F. Supp. 2d 1275 (S.D. Fla. 2007).....62

*SEC v. Kaleta*,  
No. 09-cv-3674, 2011 WL 6016827 (S.D. Tex. Dec. 2, 2011) .....35

*SEC v. Levin*,  
849 F.3d 995 (11th Cir. 2017) .....2

*SEC v. Monterosso*,  
756 F. 3d 1326 (11th Cir. 2014) .....2, 41

*SEC v. Pentagon Capital Mgmt.*,  
725 F.3d 279 (2d Cir.2013).....62

*SEC v. Revolutionary Concepts, Inc.*,  
No. 21-10984, 2022 WL 386085 (11th Cir. Feb. 9, 2022).....41, 42, 55

*SEC v. Shapiro*,  
No. 17-cv-24624, 2018 WL 7140669 (S.D. Fla. Dec. 27, 2018) .....55

*SEC v. Shapiro*,  
 No. 17-cv-24624, 2018 WL 7140359, (S.D. Fla. Dec. 27, 2018) .....55

*SEC v. Torchia*,  
 922 F.3d 1307 (11th Cir. 2019) .....31

*SEC v. Warde*,  
 151 F.3d 42 (2d Cir. 1998).....51

*SEC v. Warren*,  
 534 F.3d 1368 (11th Cir. 2008) .....2, 41

*SEC v. Watkins*,  
 No. 1:16-CV-3298-SCJ, 2019 WL 13026037 (N.D. Ga. July 5, 2019) .....62

*SEC v. Wealth Strategies Partners, LLP*,  
 No. 8:14-CV-2427-T-27TGW, 2019 WL 2504600  
 (M.D. Fla. May 17, 2019).....62

*SEC v. Wealth Strategy Partners, LLP*,  
 No. 8:14-CV-2427-T-27TGW, 2019 WL 2503206  
 (M.D. Fla. June 17, 2019).....62

*Tilghman v. Proctor*,  
 125 U.S. 136 (1888).....40

*Townsend v. Burke*,  
 334 U.S. 736 (1948).....36

*U.S. v. Bajakajian*,  
 524 U.S. 321 (1998).....42, 55

*U.S. Sec. & Exch. Comm'n v. Knight*,  
 694 F. App'x 853 (2d Cir. 2017).....56, 62

*United States v. Ritchie Special Credit Investments*,  
 620 F.3d 824 (8th Cir. 2010) .....35

*Windsor v. McVeigh*,  
 93 U.S. 274 (1876).....39

*Zacharias v. SEC*,  
 569 F.3d 458 (D.C. Cir. 2009).....42

<b><u>Rules</u></b>	<b><u>Page(s)</u></b>
11th Cir. R. 26.1-1 .....	C-1
11th Cir. R. 26.1-3(b) .....	C-3
11th Cir. R. 28-1 .....	i
Fed. R. App. P. 26.1 .....	C-3
Fed. R. App. P. 32(a)(5).....	68
Fed. R. App. P. 32(a)(6).....	68
Fed. R. App. P. 32(a)(7)(B) .....	68
Fed. R. App. P. 32(f).....	68
Fed. R. Civ. P. 54(b) .....	x

<b><u>Statutes</u></b>	<b><u>Page(s)</u></b>
15 U.S.C. § 77t(b) .....	x
15 U.S.C. § 77t(d) .....	x, 41
15 U.S.C. § 77t(d)(2) .....	41, 61, 62
15 U.S.C. § 77v(a) .....	x
15 U.S.C. § 78u(d) .....	x, 41
15 U.S.C. § 78u(d)(3)(A)(i) .....	54
15 U.S.C. § 78u(d)(3)(B) .....	41
15 U.S.C. § 78u(d)(3)(B)(i) .....	54

15 U.S.C. § 78u(d)(3)(B)(ii) .....55, 57, 58  
15 U.S.C. § 78u(d)(3)(B)(iii) .....55, 59  
15 U.S.C. § 78u(d)(5).....40  
28 U.S.C. § 1331 .....x  
28 U.S.C. § 2106 .....63

**Other Authorities**

U.S. Const. Amend. V.....30

## **JURISDICTIONAL STATEMENT**

The District Court had subject-matter jurisdiction pursuant to 28 U.S.C. § 1331, because this case arises under Sections 20(b), 20(d), and 22(a) of the Securities Act of 1934, 15 U.S.C. §§ 77t(b), 77t(d), and 77v(a) and Sections 21(d), 21(e), and Section 27 of the Exchange Act of 1934, 15 U.S.C. §§ 78u(d), 78u(e), and 78aa.

This Court has jurisdiction of this appeal with respect to the District Court's Amended Final Judgment As To Defendants Lisa McElhone And Joseph LaForte (ECF 1451) and the Order producing that Final Judgment (ECF 1450) pursuant to 28 U.S.C. § 1331 because the Order and Final Judgment presented a full adjudication of all liability and damages issues as to the Appellants, and the District Court's decision was properly certified as final pursuant to Fed. R. Civ. P. 54(b). This Court also has jurisdiction of this appeal with respect to the District Court's interlocutory Order Granting Motion To Expand Receivership Estate (ECF 436) pursuant to the Collateral Order Doctrine.<sup>1</sup>

The District Court's Order and Final Judgment were entered on November 22, 2022, and the Appellants timely filed their Notices of Appeal on January 20, 2023. (ECF 1491 and ECF 1494).

---

<sup>1</sup> The Appellants incorporate, by reference, their Response to this Court's Jurisdictional Questions (DE 22), which presented a more fulsome discussion of this Court's jurisdiction over the Final Judgment and Orders at issue. Appellants also refer the Court to the Appellee's Response to this Court's Jurisdictional Questions (DE 24), which presents potential alternate grounds for this Court's jurisdiction.

## **QUESTIONS PRESENTED AND STANDARD OF REVIEW**

### **I. Questions Presented**

1) Whether Appellants' due process rights were violated when the District Court entered an order expanding the Receivership over their Trust, their personal residences, and their assets without permitting Appellants to take discovery relating to the "commingling" allegations used to justify the expansion, or to respond to a flawed and error-ridden report prepared by the Receiver's consultant (which presented an inaccurate financial analysis that served as an alternate justification for the expansion), and without granting Appellants' request for an evidentiary hearing or oral argument pertaining to the proposed expansion of the Receivership.

2) Whether the District Court abused its discretion by finding the SEC met its burden of proof to provide a reasonable approximation of Appellants' ill-gotten gains, and by entering a disgorgement award which adopted an inaccurate revenue calculation and denied the Appellants deductions to which they were entitled.

3) Whether the District Court abused its discretion by imposing the maximum Tier 3 penalty against each of the Appellants for each outstanding promissory note issued by their companies without a showing that Appellants engaged in identical (or equivalent) wrongful conduct and without tying their

wrongful conduct to *any* of the outstanding notes, and then holding the Appellants jointly and severally liable for the amount of the combined penalties.

## II. Standard of Review

This Court reviews the amount of a monetary remedy under the securities laws – including disgorgement and penalty awards – for an abuse of discretion. *SEC v. Warren*, 534 F.3d 1368, 1369 (11th Cir. 2008) (per curiam); *see also SEC v. Levin*, 849 F.3d 995, 1001 (11th Cir. 2017) (We review for abuse of discretion a district court's calculation of disgorgement) (citing *SEC v. Monterosso*, 756 F. 3d 1326, 1337 (11th Cir. 2014)).

[A]n abuse of discretion “can occur in three principal ways: [1] when a relevant factor that should have been given significant weight is not considered; [2] when an irrelevant or improper factor is considered and given significant weight; and [3] when all proper factors, and no improper ones, are considered, but the court, in weighing those factors, commits a clear error of judgment.”

*Ameritas Variable Life Ins. Co. v. Roach*, 411 F.3d 1328, 1330 (11th Cir. 2005) (quoting *Kern v. TXO Prod. Corp.*, 738 F.2d 968, 970 (8th Cir. 1984)).

This Court’s review of the Order Granting Motion To Expand Receivership Estate, and whether that Order violated Appellants’ due process rights, is *de novo*. *See Milam v. Comm’r.*, 734 F. App’x 697, 699 (11th Cir. 2018) (Challenges to the constitutional sufficiency of a lower court’s procedures are reviewed *de novo*) (citing *Crawford & Co. v. Apfel*, 235 F.3d 1298, 1302 (11th Cir. 2000)); *see also Liberte Capital Grp. v. Capwill*, 421 F.3d 377, 382-83 (6th Cir. 2005).

## STATEMENT OF THE CASE

This appeal arises from an enforcement action the Securities and Exchange Commission (“SEC” or “Commission”) brought against the Appellants, Lisa McElhone and Joseph LaForte (“Appellants”), their businesses, including Complete Business Solutions Group, d/b/a Par Funding (“CBSG” or “Par”) and Full Spectrum Processing, Inc. (“FSP”), and various other defendants. At the outset of this case, Par was a thriving and profitable merchant cash advance (“MCA”) business. But Par’s operations were abruptly halted when the SEC commenced this action in July of 2020 and filed an emergency motion to place Par and FSP into Receivership.

The SEC’s Complaint focused on Par’s practice of issuing promissory notes to raise capital to fund MCA contracts, alleging that the promissory notes were unregistered securities and that the Appellants – as the actual or *de facto* principals of Par – made misrepresentations and omissions to investors<sup>2</sup> in connection with the promissory notes. Based on the SEC’s one-sided and misleading presentation of evidence, the District Court entered an emergency asset freeze order and appointed Ryan K. Stumphauzer as the Receiver – directing him to assume exclusive “custody, control and possession” of all “records, documents, and materials” belonging to Par

---

<sup>2</sup> The Appellants dispute the characterization of Par’s noteholders as investors. Notwithstanding, because the SEC and the district court have referred to the noteholders throughout these proceedings as investors, the Appellants will use that term in this brief.

and FSP. ECF 36 P. 3.

During six subsequent months of intense litigation, the Receiver successfully resisted Appellants' repeated demands for access to the business and financial records necessary for their defense. In late October 2020, the Receiver filed a motion to expand the Receivership to include virtually all personal assets of Appellants and the L.M.E. 2017 Family Trust (the "LME Trust") – of which Appellants were the sole trustees and beneficiaries. ECF 357. To support this inequitable expansion of the Receivership, the Receiver alleged – based on an incomplete analysis to which Appellants were not given a fair or adequate opportunity to respond – that LaForte and McElhone had purchased their homes and tens of millions of dollars in investment properties with commingled funds traced to the proceeds of the securities offerings. *Id.* at 2.

Because the Receiver had exclusive control of Par's books and records at that time – but had refused to provide them to Appellants in response to their discovery requests – the Appellants had no meaningful opportunity to rebut these allegations regarding the source of funds. To make matters worse, just three days before the expansion motion was ruled upon, the Receiver filed a report from its consultant, Bradley Sharp, which implied – through careful wording and incomplete analysis –

that Par was operating a Ponzi scheme.<sup>3</sup> ECF 26-1 (the “Sharp Report”). This unpled and demonstrably false notion provided an alternative justification for the expansion of the Receivership Estate – one which the District Court appeared to embrace at a status conference held on December 15, 2020, at which the Receiver was permitted to make an extensive and one-sided presentation. The very next day, the District Court granted the expansion of the Receivership *without* permitting discovery or a hearing on the Receiver’s allegations of commingling or the allegations presented in the Sharp report. ECF 436 (the “Expansion Order”).

Following the expansion of the Receivership, the Appellants continued to defend the case, but they faced a hostile Court which ruled against them at every opportunity. After the Court ruled that LaForte could not testify on his own behalf at his upcoming trial because he had invoked his 5<sup>th</sup> Amendment privilege during discovery, the Appellants elected to enter bifurcated consent judgments, whereby they conceded liability and accepted the allegations of the SEC’s Amended Complaint as true (for purposes of the consent judgment only) and agreed to litigate

---

<sup>3</sup> Throughout the course of this lawsuit, the SEC and the Receiver have periodically asserted (directly or implicitly) that Par was a Ponzi scheme – even though this was never actually pled, and the Appellants were ultimately able to produce an expert report which thoroughly debunked this false theory. *See* ECF 1330-20; *see also* 7.26.21 Tr. at P. 86 (Par’s former Controller and CPA testified that he did not believe the company was operating as a Ponzi scheme). Notwithstanding, the Court’s decisions have clearly been colored by the unpled and scurrilous Ponzi allegations throughout the course of this lawsuit.

the SEC's entitlement to disgorgement and penalties before the Court. ECF 1008 and 1010.

In its motion seeking damages, the SEC presented a one paragraph disgorgement calculation – asserting that Appellants should be ordered to disgorge the full amount of the proceeds raised from Par's noteholders less the amount repaid (hereafter, the "Net-Raise"), and less the amounts Par paid to two other defendants against whom the SEC also sought disgorgement. ECF 1252 P. 30. The SEC also asked the Court to impose a \$100 Million penalty against the Appellants. *Id.* at P. 36. In response to the SEC's motion – which presented no reasoning or analysis whatsoever, and evidenced a clear punitive intent – the Appellants presented a detailed brief demonstrating that the SEC had failed to meet its burden, and detailing the legitimate business expenses of Par and other equitable deductions which the District Court was required to deduct from the SEC's Net-Raise model of disgorgement (assuming it embraced that model at all). ECF 1329. Appellants also presented a detailed and reasoned penalties analysis, which included an examination of all available civil penalty awards imposed by the District Courts in the Eleventh Circuit since May of 1999 (91 cases total) for comparison purposes. ECF 1330-27.

After receiving the parties' submissions, the District Court conducted an evidentiary hearing during which the Court spoke on multiple occasions directly about the material defects with the SEC's brief. Indeed, Judge Ruiz stated: "**it would**

**almost be impossible for me to write an order that will withstand appellate review if I didn't make the SEC go back and write it over again the right way.”** (9.14.22 Tr. at P. 110 L. 21-23). But despite this observation, the Court *did not* make the SEC rewrite its brief, nor did it award the Appellants the full array of business deductions and offsets they were entitled to. Instead, the Court issued an Order Granting in Part Plaintiff's Amended Omnibus Motion for Final Judgment (the “Disgorgement Order”), which embraced the fiction that the SEC had “satisfied its burden to provide a reasonable approximation of the requested disgorgement” and then attempted to split-the-baby by granting the Appellants only *some* of the legitimate deductions to which they were entitled. ECF 1450, P. 13.

Amongst the more notable mistakes in the Disgorgement Order were: 1) the Court's acceptance of the SEC's “Net-Raise” analysis, which improperly focuses on the Investors' losses rather than the profits Appellants realized from the alleged wrongdoing; 2) deciding to use an inaccurate Net-Raise figure as the starting point for the disgorgement calculation; 3) failing to deduct the disgorgement sought or entered against other defendants who participated in offering Par's promissory notes from the Net-Raise calculation; 4) deciding to hold each Appellant liable for the maximum Tier 3 penalties notwithstanding the absence of evidence reflecting equivalent (let alone, identical) conduct, and to hold Appellants jointly and severally liable for the combined penalties; and 5) deciding to calculate Appellants' penalties

using an arbitrary and capricious method (which the SEC had not advocated for in its brief) which yielded a clearly excessive penalty – especially as to Ms. McElhone, whose liability was premised solely upon her ownership of Par.<sup>4</sup>

As a result of all of these errors, the Appellants are now subject to a final judgment which holds them jointly and severally liable for \$142,529,980 in disgorgement, \$43,700,000 in civil penalties and \$10,694,758.24 in pre-judgment interest – making their total obligation approximately \$197 Million, excluding post-judgment interest. ECF 1451 (the “Final Judgment”). To make matters worse, Appellants’ personal assets – which would otherwise have remained available to satisfy the Final Judgment – remain under the Receivership pursuant to the Expansion Order and – according to the SEC, the Receiver, and the Court – cannot be used to satisfy the Final Judgment! ECF 1531, 1538, 1539 and 1540.

This appeal challenges both the Expansion Order and the Disgorgement Order and Final Judgment on distinct and separate grounds. As Appellants will demonstrate, the District Court denied them a meaningful opportunity to defend their property rights by granting the Expansion Order without permitting discovery or a

---

<sup>4</sup> The Court’s first disgorgement order and final judgment (ECF 1432 and 1433) also overstated Appellants’ disgorgement obligation by \$20,554,206 due to an apparent mathematical error, which the Appellants had to correct by filing a motion to amend the Final Judgment (ECF 1444). While the Court acknowledged and corrected this discrepancy (ECF 1449), it is indicative of the Court’s mindset and approach in assessing disgorgement and penalties against the Appellants.

hearing on the Receiver’s allegations of “commingling” or the Sharp Report. Because the District Court’s procedures did not comport with due process, the Expansion Order should be reversed and the matter remanded with appropriate instructions.

Appellants will also demonstrate that the District Court’s findings in its Disgorgement Motion resulted in an excessive and legally unsupportable award of disgorgement and civil penalties, and that the Final Judgment must therefore be vacated and remanded with appropriate instructions.

Finally, Appellants request that, upon remand, this case be reassigned to a new district court judge because they respectfully submit that Judge Ruiz would have difficulty putting his previous views and findings aside, and that reassignment is appropriate to preserve the appearance of justice based on Judge Ruiz’s prior rulings and his comments in open court.

### **FACT STATEMENT**

#### **I. The Receivership And Expansion Order**

The SEC’s complaint (filed July 27, 2020) and subsequent Amended Complaint (filed August 10, 2020) focused on Par’s fundraising practices rather than its MCA operations. The SEC accused the Appellants and others of fraudulent “misrepresentations and omissions” connected to the “offer and sale of . . . [Par] promissory notes.” ECF 1 at ¶¶ 48, 50. The SEC also claimed that sales of the notes

violated the registration requirement of Section 5 of the Securities Act of 1933. *Id.* at ¶¶ 286-89; ECF 4 at P. 3-4; *see also* ECF 14 at P. 79 (alleging that defendants raised “\$482 million from about 1,200 investors nationwide”).<sup>5</sup> The SEC *did not* allege that the noteholders sustained losses related to their investment in the company or that Par was anything other than profitable. *See* 8/17/2020 Tr. at 46 (the Court acknowledges that Par’s “many” investors received “their monthly payouts and . . . principal returns” from the company).

The SEC paired its Complaint with an emergency motion to place all the corporate defendants, including Par, into receivership. ECF No. 4. The rationale that the SEC offered for seeking this draconian remedy was, if nothing else, straightforward. Relying on the Complaint’s allegations and an incomplete examination of Par’s bank accounts,<sup>6</sup> the SEC wrote that “the appointment of a Receiver is a well-established equitable remedy available to the Commission in civil enforcement proceedings . . . [and] particularly appropriate in cases such as this

---

<sup>5</sup> The SEC’s Complaint also alleged that Par’s MCA business involved making usurious loans, however, there were no causes of action based on these allegations. Furthermore, these allegations have been shown to be without merit by various courts (which have sustained the validity of Par’s MCA agreements) and by the actions of the Receiver (who has repeatedly successfully sought to enforce the MCA agreements, thereby vouching for their legitimacy).

<sup>6</sup> At the outset of the Receivership, the SEC’s counsel informed the district court that Par Funding’s bank accounts contained “less than three million dollars.” 8/4/2020 Tr. at P. 78. It soon became apparent that this was wrong as, a few weeks later, the Receiver estimated that Par had “somewhere between 20 to 25 million dollars” on hand at the Receivership’s inception. 9/8/2020 Tr. at P. 64-65.

where a corporation, through its management, has defrauded members of the investing public.” ECF 4 at P. 2-4.<sup>7</sup>

The District Court granted the motion on July 27 (the very day it was filed), before Appellants and their codefendants could submit a response to the SEC’s application.<sup>8</sup> ECF 36 at P. 2 (appointing Receiver and directing him to take control of Par Funding and other corporate defendants “[i]f the [c]ourt grants Plaintiff’s Emergency *Ex Parte* Motion for a Temporary Restraining Order”); ECF 42 (granting TRO). Within days, the Receiver had secured exclusive “custody, control, and possession of” all Par Funding’s business and financial records. ECF 36 at 3; *see* ECF 84 at P. 6 (reporting, as of August 4, 2020, that all Par Funding “employees [had been] barred from the business premises for the last week”).

Just over two weeks later, on August 13, 2020, the District Court entered an Amended Order Appointing Receiver. ECF 141. The Amended Order – which the SEC had proposed as a means to “clarify the Receiver’s powers and duties with

---

<sup>7</sup> In addition to the written submission quoted above, the District Court engaged in at least one *ex parte* discussion with the SEC regarding the receivership motion. *See* 7/27/2020 Tr. at P. 15 (district court agrees to “call [SEC counsel]” after conclusion of public hearing).

<sup>8</sup> Thanks to a docketing error, Appellants received an advance copy of the SEC’s “sealed” complaint on July 27, 2020. 7/27/2020 Tr. at P. 3-4. Thus alerted to the SEC’s request for “appointment of a Receiver” (ECF 1, ¶ 10), Appellants exhorted the District Court to deny “any request by Plaintiff for *ex parte* relief” and “schedule a hearing where Defendants can be heard in response to Plaintiff’s request.” ECF No. 19 at P. 4. That request was effectively denied a few hours later, when the court entered its receivership order.

respect to the entities already under the control of the Receiver” (ECF 105 at P. 1) – imposed a broad “[f]reeze” on the Appellants’ assets and granted the Receiver “exclusive . . . possession” of Receivership property, empowering him to “take all necessary and reasonable actions to cause the sale or lease of all real property of the Receivership Estates.” ECF 141 at P. 2, 13. It also directed the Receiver to “use reasonable efforts to determine the nature, location and value of all property interests of the Receivership Entities.” *Id.* at P. 3.

On October 30, 2020, the Receiver filed a motion to “Expand the Receivership Estate.” ECF 357. Citing the Amended Receivership Order’s “directive . . . ‘to determine the nature, location and value’” of the Receivership Entities’ property, the Receiver asserted that more than two dozen “additional entities and properties” – including the LME Trust and Appellants’ personal residences – “should be added to the Receivership Estate.” *Id.* at P. 1.

The Receiver’s position boiled down to a generalized assertion of “commingling.” Citing a trio of declarations from an SEC-retained accountant named Melissa Davis (“Davis Declarations”), he maintained that Par made payments to Appellants from bank accounts that held proceeds from the allegedly fraudulent sales of promissory notes. ECF 357 at P. 8-9. Any entity that received a payment from Par on Appellants’ behalf, the Receiver argued, was “funded with commingled investor proceeds” and properly included in the Receivership. *Id.* at P. 5.

In fact, the Davis Declarations offered little or no support for the Receiver's sweeping allegations. The first Declaration, dated July 23, 2020, identified 14 bank accounts belonging to Par and reported that the company had received a total of \$492,398,894 from the sale of promissory notes between 2015 and 2020. ECF 21-1 at ¶¶ 3(a), 10. It also identified transfers of \$11.3 million and \$14.3 million to Ms. McElhone and the LME Trust, respectively. *Id.* at ¶¶ 12, 16. The second Davis Declaration, dated August 4, 2020, provided further details concerning Par's bank accounts and identified \$84,643,174 in transfers to Appellant-controlled entities, Heritage Business Consulting and Eagle Six Consulting. ECF 177-50 at ¶ 4.

Only the final Davis Declaration, dated August 26, 2020, attempted to trace funds Par received from the sales of promissory notes. This narrative was unconvincing. At the outset of her Declaration, Davis observed that the \$492 million that Par had received from note-holders represented a modest fraction of the "\$1.6 billion" deposited into the company's accounts since 2015. ECF 290-8 at ¶ 5. Davis went on to examine two discreet instances in which Par had transferred money to the LME Trust or McElhone. Her findings were as follows:

- Between July 19 and September 20, 2018, LME Trust received \$10.5 million from Par accounts that contained \$1.6 million traceable to sales of promissory notes and *over \$13 million* from Par's profit-generating activities. *Id.* at ¶¶ 7-18.
- In September 2019, Ms. McElhone received \$4.3 million from Par accounts that contained approximately \$22 million traceable to sales of promissory

notes and *over \$14.2 million* from Par’s profit-generating activities. *Id.* at ¶¶ 19-24.

In both cases, then, the accounts in question held more than enough money from sources other than the sales of promissory notes to fund the payments to Appellants.

Undeterred by these facts, the Receiver’s motion treated every penny Appellants received from Par as if it had been traced to so-called “commingled proceeds from the fraud scheme.” ECF 357 at P. 11. On this reasoning, the Receiver declared that the LME Trust, along with the Appellants’ personal residences and “over nineteen (19) real estate entities that purchased [on Appellants’ behalf] twenty-six (26) income producing properties” should be “added to the Receivership Estate.” *Id.* at 11-20.

Appellants’ written opposition to the expansion motion pointed out the deficiencies in the Receiver’s reasoning. *See* ECF 401 at P. 13 (observing that proceeds from Par’s MCA business “exceeded [] deposits” from Par’s fundraising activities in the relevant accounts). Appellants could not, however, directly refute the Receiver’s allegations of commingling because, as Appellants’ papers explained, the Receiver had not yet permitted them access to “Par Funding’s books and records.” *Id.* at P. 13 fn.12.<sup>9</sup> Appellants urged the District Court to order “discovery and an evidentiary . . . hearing” before ruling on the expansion motion. *Id.* at P. 4.

---

<sup>9</sup> Months later, after the Expansion Order was entered, the Appellants finally obtained access to Par’s books and records and were able to have their own CPA

The commingling issue was effectively mooted on December 13, 2020, when the Receiver presented his “report . . . regarding the financial status of the Receivership Entities.” (*viz.* the Sharp Report, ECF 426 at P. 1). Filed on a Sunday in anticipation of a status conference scheduled two days later, the Sharp Report purported to set out “preliminary” findings and conclusions regarding Par’s finances. *Id.* at ¶ 5. In reality, the report was an ambitious piece of advocacy that implied – without actually asserting – that Par was, in fact, a Ponzi scheme.

The numbers presented in the Sharp Report were unremarkable. Looking only at Par’s books for “calendar years 2012 through 2019,” Sharp ventured “*preliminary* conclusions” about the business’s performance. *Id.* at ¶ 13. For example, comparing the amount that Par had advanced to merchants to the amount of its collections “through 2019,” the Report proclaimed that the company “generated only \$6.6 million in cash from MCA activity” and had sustained a “cash loss from operations of \$135.6 million.” *Id.* at ¶¶ 6, 9. Whether these figures provided a useful means of measuring the profitability of a company that had well over \$400 million in receivables and daily revenues of \$1.5 million in 2020, the Report did not say.

---

expert, Joel D. Glick, perform an exhaustive flow of funds analysis which required an examination of over 3.8 million booked transactions between 2012 and 2020. Glick concluded that “consulting fees were not paid with Investor Funds” and that payments to note holders came exclusively from monies paid by MCA borrowers. ECF 1330-16 P. 4; ECF 1330-17, at P. 71: L. 21-24, P. 72: L. 22 to P. 73: L. 6, and P. 100: L. 14-18.

The Report also noted that, as of the end of December 2019, Par had “only collected 86%” of funds advanced to ten of the largest merchants in its portfolio. *Id.* at ¶ 48. Treating the 86% figure as if it reflected the final outcome of all of Par’s transactions with all of its merchants, Sharp opined that Par “would not have been able to continue to provide payments to investors, or to continue to operate, without additional funds from investors.” *Id.* at ¶ 53. The Report failed to acknowledge that, in fact, Par had engaged in no fundraising activity after February 2020 and continued to collect an average of \$1.5 million per day from merchants, including those in the so-called top ten. *See* ECF 84 at P. 9-10.

Blindsided by the Sharp Report, Appellants and several codefendants moved on December 14 to postpone the status conference scheduled for the next day. ECF 430. Citing a concern for “fundamental fairness and due process,” the submission argued that “[d]efendants should be permitted to respond” to the Report “prior to its consideration by the [c]ourt and the discussion of its contents in open court.” *Id.* at 1. In a paperless order posted to the docket later that day, the court denied the defense’s request, reminding the parties that “the Receiver is an officer of the Court” and indicating that it would “not entertain oral argument regarding the disputed contents of the [Sharp Report].” ECF 431 (internal quotation marks and modifications omitted).

Consistent with the paperless order, there was no oral argument at the December 15 conference. Instead, the court engaged in a lengthy discussion with the Receiver and his counsel about the Sharp Report, which the court characterized as “perhaps” the “clearest picture . . . of the financial state of [Par]” to date – although the Report had only been filed two days earlier and spoke only to select financial issues that were by then almost a year old. 12/15/2020 Tr. at P. 13. According to the Court, that “picture” depicted something “akin to . . . a Ponzi scheme.” *Id.* at P. 14.

As the court stated:

It seems to me, based upon the report and the fact that some of the payouts or the funds that investors were receiving were essentially generated or the product of new money coming into these investments that we maybe have had a sea change in the true nature of this business and that it is less about factoring and due diligence on loans, *and more about taking from new investors to pay old investors.*

*Id.* at P. 14-15 (emphasis supplied).

The Receiver made no effort to dispel the Court’s misunderstanding of the Report. Instead, he made an impassioned presentation – lasting an uninterrupted 26 minutes – in which he directly accused the Appellants of deceit and other wrongdoing and stated that he would “stake [his] credibility” on the Sharp Report. *Id.* at P. 16-30. During this presentation, the Receiver initially asserted that Sharp had declined to explicitly characterize Par as a “Ponzi scheme” for clarity’s sake,

there being “no[] a single definition” for that term.<sup>10</sup> *Id.* at P. 16-17. Only later did the Receiver note, in passing, that the Sharp Report was only “an analysis of cash in and cash out, which is not the same as profit.” *Id.* at P. 19-20.

Heedless of this qualification, the Court expressed its frustration with what it characterized as the Appellants’ attempt to create “alternative realities” that conflicted with the “straight numbers” from the Receiver, who was “an extension of the Court.” *Id.* at P. 32. In the immediate wake of the Sharp Report, the court jumped to the conclusion that the Appellants’ arguments were “starting to fall apart.” *Id.* at P. 33. The court opined that:

[I]t doesn’t take an economics major or CPA to look at Mr. Sharp’s findings and figure out that at the very bottom, the model that we had here was not self-funding it just wasn’t, and the loans were not over-performing. I don’t even know if they can even say they were performing, period. *Id.*

Remarkably, the Appellants were neither invited – nor even permitted – to comment on the Report. To the contrary, the Court repeatedly forbade the defense attorneys from intruding upon its long “discussion” with the Receiver – and even placed Ms. McElhone’s counsel on “mute” to prevent “any [] interruptions.” *Id.* at P. 36-37, 40, 44, 55. When Appellants’ counsel finally were allowed to speak, it was

---

<sup>10</sup> Now, at the conclusion of the case, we know that the SEC was never able to allege – let alone prove – the existence of a Ponzi scheme, and the suggestion of a Ponzi scheme could only be sustained because the Receiver was permitted to present a one-sided and wholly inaccurate picture of Par’s finances, which the Appellants were given no opportunity to rebut until after the Expansion Order was entered.

only to address the Receiver's refusal to produce Par's books and records (which were the basis for the Sharp Report), and to implore the Court to give them an opportunity to test the Receiver's allegations and present their own expert report. *Id.* at P. 57-59, 60-62, 69-70 and 97-100. The District Court acknowledged that the Appellants needed access to the records sought in order to provide "any kind of merit-based response" to the Receiver's allegations, before returning to the Receiver and soliciting his view on whether the expansion would "protect investors" and "enable us to make a larger potential recovery for all investors." *Id.* at P. 71, 72, 80, 83. Satisfied with the Receiver's affirmative responses, the Court informed the parties that it would rule on the expansion "as soon as possible." *Id.* at P. 86.

Near the conclusion of the hearing, counsel for LME Trust ventured to point out that the defense had not yet been granted "access to the documents" necessary to respond to the Receiver's expansion motion. *Id.* at P. 97. Aside from the "due process" concerns implicated by the lack of discovery, counsel suggested that "since the receiver, and to some degree, the SEC has had an opportunity to weigh in" during the day's conference, "oral argument" on the expansion motion was appropriate. *Id.* at P. 99-100.

The court denied that application. Although it had earlier observed that the lack of discovery forced defendants to litigate with "one hand tied behind their back," the court explained that it "was trying to keep the train moving, making it fair

and not spending too much more time and money when the pleadings are very thorough.” *Id.* at P. 93, 101.

On the day following the status conference, the court granted the expansion motion. ECF 436. The Expansion Order did not specify the grounds on which the motion was granted, remarking only that the “Receiver has made a sufficient and proper showing in support of the relief requested” and noting “that tainted funds, which *could* be the subject of disgorgement, *may* be found in the entities and properties identified herein.” *Id.* at P. 2. (Emphasis supplied).

Upon entry of the Order, the Receiver assumed the management of Appellants’ commercial properties and took possession and control of Appellants’ three residences, requiring them to pay rent on their principal residence and carrying costs on all three properties as a condition of their being permitted to continue to reside in their principal residence.<sup>11</sup>

## **II. The Order On Disgorgement And Penalties And The Final Judgment**

Following the entry of the Expansion Order and the District Court’s order denying Mr. LaForte the right to testify at his trial, the Appellants decided – for tactical reasons – to enter a bifurcated settlement, whereby they consented to liability and allowed the Court to determine disgorgement and penalties.

---

<sup>11</sup> The other two properties – which Appellants would pay to maintain – were padlocked, and the Receiver prohibited the Appellants from entering those premises.

This agreement was memorialized in a Judgment of Permanent Injunction entered against Ms. McElhone and Mr. LaForte on November 21, 2021 (the “Consent Judgments”). ECF 1008 and 1010. The Consent Judgments provided that Appellants would “pay disgorgement of ill-gotten gains, prejudgment interest on disgorgement, and a civil penalty” in an amount to be determined by the Court “upon motion of the Commission.” *Id.* at 5. They also provided that the allegations of the Amended Complaint would be deemed true “solely for the purposes of such motion[,]” and that the Court would be permitted to determine the issues raised in the motion “on the basis of affidavits, declarations, excerpts of sworn deposition or investigative testimony, and documentary evidence, without regard to the standards for summary judgment contained in Rule 56(c) of the Federal Rules of Civil Procedure.” *Id.* The Consent Judgments also permitted the parties to take discovery, including from non-parties, in connection with the motion. *Id.*

Approximately five months after the Consent Judgments were entered, the SEC filed the first iteration of its motion for disgorgement and penalties. ECF 1214. This motion was just as light on analysis and just as deficient as the subsequent operative Disgorgement Motion. But, even more troubling, the first motion was replete with unfounded and conclusory allegations that Par had been operating as a Ponzi scheme – allegations that *were not* pled in the Amended Complaint and were not properly at issue in the case. Faced, for the first time, with these new and unpled

liability allegations (at a phase of the case where only damages were at issue), the Appellants filed a motion to strike the scurrilous Ponzi allegations or, alternatively, to be relieved from their Consent Judgments so they could contest these allegations at trial. ECF 1224.

After the motion to strike was fully briefed, the District Court conducted a hearing during which the Court acknowledged the Appellants' concerns and inquired why the SEC had waited until this juncture in the case to present Ponzi scheme allegations – observing that this issue had been a “third rail” no one wanted to touch, and that inserting the issue at this stage was “kind of lobbying [*sic*] a grenade into the disgorgement phase.” 5.19.22 Tr. at P. 27-28. Judge Ruiz acknowledged that these allegations were not raised in the pleadings (*id.* at P. 12), but stated that they had been “lurking in the ether” from the beginning of the case (*id.* at P. 7). Stressing that the case had been “a heavy lift for the Court” and that he was “trying to get it to some finish line” (*id.* at 30), the Court strongly suggested that the term “Ponzi scheme” should be stricken or excised from the SEC's motion, but the SEC should be permitted to argue that Par had paid old investors with new investor money in its motion. The Court later denied Appellants' motion to strike as moot on the grounds that the SEC had agreed to file an amended motion for disgorgement which would omit the term “Ponzi scheme.” ECF 1251.

A few days after this ruling, the SEC filed the Disgorgement Motion – which was materially the same as its predecessor except for the omission of the prohibited phrase. The motion included an 18-page summary of the Amended Complaint (ECF 1252, P. 3-21), but dedicated only one short paragraph to the disgorgement analysis. *Id.* at P. 30. The SEC asserted that the Appellants should be ordered to disgorge the amount Par raised from investors (allegedly \$550,325,596) minus the amount Par repaid in interest and principal (allegedly \$300,108,117) – citing as support a two-page Declaration by the Receiver which purported to vouch for these figures. ECF 1214-1. The SEC also stated that the Court should deduct the amounts Par paid to defendants Cole and Abbonizio (allegedly \$13,247,011 and \$10,498,581, respectively), but provided no support whatsoever for any of these figures.

Because the SEC relied solely upon the Receivers' Declaration to support its disgorgement figures, the Appellants subpoenaed the Receiver for documents and deposition testimony. ECF 1289-1. After the Receiver objected to the subpoena, the dispute was submitted to Magistrate Judge Reinhardt. As Appellants explained in a joint submission to the Magistrate, the Appellants sought this discovery because the figures contained in the Receiver's Declaration, which were the cornerstone of the SEC's disgorgement calculation, were in conflict with figures presented by the Receiver in his most recent quarterly report. ECF 1289 P. 4-5. This discrepancy was not inconsequential, as the most recent figures would result in \$3.8 Million less in

disgorgement (under the SEC’s Net-Raise analysis). At a hearing on this discovery dispute, the Receiver’s counsel represented to the Court that the most recent figures came from a more “in-depth” analysis which included a “reconciliation from bank account statements.” See ECF 1330-2, P. 11: L. 2-11 and P. 10: L. 10-15. Given these facts, the Appellants clearly should have been permitted to depose the Receiver to inquire why he used the figures presented in his Declaration when he knew that more accurate figures – which could have reduced the Appellants’ disgorgement obligation – existed. However, the Magistrate found that this discovery was not “proportional to the needs of the case” (*id.* P. 19) and entered an order quashing the Appellants’ subpoena. ECF 1292.

As a result of the Magistrate’s ruling, Appellants were denied the opportunity to conduct discovery regarding the SEC’s disgorgement calculation. Notwithstanding, the Appellants presented the Court with a detailed brief demonstrating that the SEC had failed to meet its burden to provide a reasonable approximation of the Appellants’ alleged unjust-gains in its Disgorgement Motion. ECF 1329. Appellants’ response brief presented a thorough analysis of Par’s legitimate business expenses (none of which had been addressed by the SEC) supported by ample record evidence, explained why the SEC’s impermissible Net-Raise computation (if adopted by the Court) should have been based on the more recent and more accurate figures rather than the figures contained in the Receiver’s

Declaration, and analyzed several other equitable deductions which the District Court should have applied in its disgorgement analysis. *Id.* at P. 14-27. Appellants also presented a detailed and reasoned penalties analysis, which included an examination of all available civil penalty awards imposed by the District Courts of this Circuit since May of 1999 (91 cases total) for comparison purposes. *Id.* at 29 to 49 and ECF 1330-27.

After receiving the parties' submissions, the District Court conducted an evidentiary hearing, during which it directly and repeatedly acknowledged that the SEC had not met its burden, and that the Disgorgement Motion was deficient:

Reasonable approximations and estimates, which is your burden, does not mean taking shortcuts. **It does not mean giving me a motion that is substandard.** It requires you to point to evidence in the record to support your calculations.

\* \* \*

I have to say, this motion, I think, had some glaring, glaring deficiencies in it, deficiencies that I have had a problem overcoming, and I'm getting a lot of gap filling today, some of which I think is well taken, some of which I really would have appreciated had it be [*sic*] formally or properly framed for me in the initial pleading... I am now being presented with a bunch of new points and evidentiary support that was never – I mean, I'm sorry – it was never in the SEC's motion. **I don't think objectively anyone can look at this SEC motion and think that it gave the Court what it needed to make a proper ruling.**

\* \* \*

I don't want to find myself rebooting and necessarily going all the way back to the beginning here after all this work. But at the same time, I have to say, **I have a pleading in front of me right now that I honestly find deficient.** I don't know any other way to put it. I do not believe that having a pleading like this, that is lacking record cites, that does not make use of an expert report fulsomely, and does not give me the opportunity to make sure that these numbers are supported is very, very

challenging for the Court. Because without that, without someone framing it, not only can I cannot [sic] get the defense position clarified, but **I can't really feel comfortable with numbers that I believe are falling within the parameters of existing case law.**

9/14/22 Tr., P. 45: L. 19-23; P. 81: L. 10 to P. 82: L. 3; P. 108 L. 17 to P. 109 L. 5.

Indeed, Judge Ruiz stated: **“it would almost be impossible for me to write an order that will withstand appellate review if I didn't make the SEC go back and write it over again the right way.”** *Id.* at P. 110 L. 21-23. Nevertheless, the Court ***did not*** make the SEC rewrite its brief, nor did it award the Appellants the full array of business deductions and offsets they were entitled to. Instead, the Court issued its Amended Order Granting in Part Plaintiff's Amended Omnibus Motion for Final Judgment (the “Disgorgement Order”), which embraced the fiction that the SEC had “satisfied its burden to provide a reasonable approximation of the requested disgorgement[,]” adopted the SEC's Net-Raise analysis (and inaccurate calculation of the Net-Raise), and denied the Appellants numerous deductions they had demonstrated entitlement to. ECF 1450, P. 13.<sup>12</sup>

Additionally, the District Court held that McElhone and LaForte should each be assessed the maximum Tier 3 penalty for each of Par's 115 outstanding promissory notes (230 Tier 3 penalties total), and that they should then be held

---

<sup>12</sup> The Court had to amend its first disgorgement order and final judgment (ECF 1432 and 1433) because it overstated Appellants' disgorgement obligation by about \$20 Million due a mathematical error by the Court.

jointly and severally liable for the combined penalty amount (\$43.7 Million). *Id.* at P. 42. Remarkably, the District Court came up with this analysis itself – since the SEC had simply asked the Court to impose a \$100 Million penalty without providing any reasoned calculation. Moreover, the Court invented entirely different methods to calculate penalties for the other defendants in this case – including Par’s CFO, Joseph Cole – which resulted in radically different penalties for the same alleged conduct. In Cole’s case, the Court assessed the maximum penalty (\$190K) for each of “the seven statutory violations” with which Cole was charged. *Id.* at P. 44.

As a result of the District Court’s clear legal errors in its calculation of both disgorgement and penalties, Appellants are now jointly and severally liable for a \$196,924,738.24 Final Judgment. ECF 1451.

### **SUMMARY OF ARGUMENT**

The Receiver, through its motion to expand the receivership estate, sought possession and control of virtually all of Appellants’ earthly possessions, including their homes. Given the scope of the relief sought in the motion, due process principles obliged the court to afford Appellants a meaningful opportunity to contest the Receiver’s allegation of commingling through discovery of relevant documents and, if necessary, an evidentiary hearing. To the extent the court granted the expansion motion on the basis that the alleged commingling had occurred, the failure to provide Appellants with an opportunity to conduct discovery on that claim

violated due process. The Sharp Report's *soto voce* suggestion that Par was a Ponzi scheme gave the Court the cover it needed to grant the Receiver's expansion motion. The court's refusal to permit Appellants to contest the Report – or even to voice a competing view of its conclusions – dispensed with concerns for accuracy and fairness that are at the root of due process's requirements in favor of expediency. Whatever the reasoning behind the Expansion Order, it was the product of gross deviations from all traditional notions of fair play and due process and cannot be permitted to stand.

Likewise, the District Court's calculation of Appellants' disgorgement and penalty obligations were marred by clear legal error and constituted an abuse of discretion. The Court's legal errors include: 1) erroneously holding that the SEC met its burden to provide a reasonable approximation of Appellants' unjust-gains; 2) using a demonstrably inaccurate Net-Raise figure as the starting point for its disgorgement calculation; 3) failing to deduct the disgorgement sought or entered against other defendants who participated in Par's note offering from the Net-Raise calculation; 4) calculating penalties using an arbitrary and capricious method (which the SEC had not advocated for) which yielded a clearly excessive penalty; and 5) holding the Appellants jointly and severally liable for a clearly excessive penalty without a shred of evidence demonstrating equivalent or identical conduct. To be clear, within 3 pages of the Disgorgement Order the Court somehow concluded that

Appellants' should each be assessed the maximum penalty for 115 violations and then assessed Par's CFO (Joseph Cole Barletta) the maximum penalty for the "seven statutory violations" assessed against him in the Amended Complaint. ECF 1432 P. 40-41, 44.

Appellants request that the District Court's Expansion Order, Disgorgement Order and Final Judgement be vacated and remanded with instructions. They also request that, upon remand, this matter be reassigned to a different district court judge.

### ARGUMENT

#### **I. The District Court Violated The Appellants' Due Process Rights When It Granted The Receiver's Expansion Motion Without First Permitting Discovery And An Evidentiary Hearing Or Oral Argument**

The District Court's Expansion Order stripped Appellants of possessory rights in their residences and deprived them of control over tens of millions of dollars in assets. Given the extent of the interests at stake, Appellants were entitled to elementary procedural protections including discovery of the documents underlying the Receiver's claims and an adversarial hearing on disputed issues of fact. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 571-72 (1972) (observing that "the property interests protected by procedural due process extend well beyond actual ownership of real estate, chattels, or money").

The requirements of due process constrain the “broad powers and wide discretion” of a district court in the administration of an equity receivership. *SEC v. Elliot*, 953 F.2d 1560, 1566 (11th Cir. 1992); U.S. Const. Amend. V (barring deprivations “of life, liberty, or property, without due process of law”). The requisite “process . . . varies according to the nature of the right and to the type of proceedings,” but the basic demand remains the same: “[d]ue process essentially requires that the procedures be fair.” *Elliot*, 953 F.2d at 1566 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976); *In re Murchison*, 349 U.S. 133, 136 (1955)).

Where protected property interests are at stake, considerations of fairness generally dictate that the defense be permitted to conduct discovery, “present evidence” establishing facts and “make arguments regarding those facts.” *Elliot*, 953 F.2d at 1567; *see Liberte Capital Grp. v. Capwill*, 421 F.3d 377, 383 (6th Cir. 2005) (observing that “a pre-deprivation hearing of some sort is generally required to satisfy the dictates of due process” with respect to property interests) (internal quotation marks omitted). “The fundamental requirement of due process is the opportunity to be heard at a meaningful time and in a meaningful manner.” *Eldridge*, 424 U.S. at 333 (internal quotation marks omitted); *Boddie v. Conn.*, 401 U.S. 371, 377 (1971) (reiterating that “due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful

opportunity to be heard”).

In evaluating the sufficiency of procedures employed in adjudicating claims against a receivership, this Court has asked whether claimants were “provided[ ] with necessary information, a meaningful opportunity to argue the facts and their claims and defenses, and an adjudication of their claims and defenses.” *SEC v. Torchia*, 922 F.3d 1307, 1319 (11th Cir. 2019). Where these elements were missing, the Court has concluded that the proceedings “d[id] not afford due process.” *Id.*

The same analysis should apply here, where the Receiver sought to acquire Appellants’ property rights through proceedings ancillary to an SEC enforcement action. As set out below, the procedure by which the district court adjudicated the Receiver’s expansion motion deprived Appellants of the “meaningful opportunity” that is the *sine qua non* of due process. *Elliot*, 953 F.2d at 1575. When reviewed *de novo* (or even for abuse of discretion) the lower court’s refusal to afford Appellants an opportunity to conduct discovery, present evidence and make arguments regarding disputed facts constitutes reversible error.

**A. Appellants Were Entitled To Discovery And An Evidentiary Hearing On The Receiver’s Allegations Of “Commingling”**

The Receiver sought expansion of his Receivership on the basis of “commingling.” ECF 357 at P. 4. The claim, in substance, was that the payments Appellants received as compensation from Par Funding were “derived substantially from the fraud” alleged in the SEC’s complaint. *Id.* at 5. The Receiver contended

that the Davis Declarations “proved” that “**\$99.3 million** dollars” of the over \$400 “million in investor funds... deposited into [Par Funding’s] fourteen different bank accounts” had been “distributed” to Appellants through their consulting companies. ECF 357 at P. 8-9 (emphasis original).

This was a blatant misrepresentation of Davis’s conclusions. Although Davis did identify over \$400 million in proceeds from the sales of promissory notes flowing into Par’s accounts, she also reported gross deposits to those accounts of over \$1.6 billion. ECF 290-8 at ¶ 5. As a result, it was anything but obvious that the disbursements Appellants received from Par included proceeds from the alleged fraud.

Attempting to plug this evidentiary gap, Davis’s August 24 declaration had endeavored to show that, in two instances, Appellants received payments from Par accounts that held proceeds from the sale of notes. The results of this analysis were ambiguous at best because, as discussed above, in each instance the accounts in question had also held funds from other sources, including Par’s MCA business, that were more than sufficient to cover the disbursements to Appellants.

While Appellants were able to point to the weaknesses of Davis’ analysis in their opposition papers, they lacked the information necessary to provide their own countervailing analysis. As their opposition papers explained, the defense “issued a Request for Production to the Receiver in order to obtain Par Funding’s books and

records” but had “yet to [receive] a single document” in response. ECF 401 at P. 13 fn.12. Without the necessary data, Appellants could not effectively rebut the Receiver’s claim of commingling. Instead, Appellants were consigned to a lame insistence that “the Receiver ha[d] failed to demonstrate whether any investor funds were used to purchase” the assets in question. *Id.* at 14. The Receiver, who continued to enjoy a monopoly on the data contained in Par’s books, confidently replied that the defense had “present[ed] absolutely no evidence to counter” the claims in his expansion motion. ECF 414 at P. 3. This assertion was, of course, unassailable so long as the Receiver was the only one with access to the evidence.

Given Ms. Davis’ inability to definitively trace the funds disbursed from the Par accounts to the note holders – together with her finding that the accounts received over one billion dollars of deposits that were *not* attributable to the activity that was the subject of the SEC’s complaint – Appellants were entitled to take discovery and present their findings at an evidentiary hearing. *Cf. Elliot*, 953 F.2d at 1570-71 (finding that summary procedure was sufficient where defendants were unable to point to “facts [that] might be disputed”). The court’s refusal to permit Appellants to make use of these procedures was reversible error. *See id.* at 1572 (lower court’s failure to permit appellant “to discover and present facts” supporting valid defense was reversible error).

**B. The District Court’s Refusal to Permit A Response To The Sharp Report Unfairly Prejudiced Appellants’ Opposition To The Expansion Motion**

By the time the District Court decided the expansion motion on December 16, 2020, the issue of commingling had been overshadowed by the far more inflammatory insinuations of the Sharp Report. Presenting an “analysis of [Par’s] cash sources and uses” that arbitrarily ended on December 31, 2019, the Report’s “preliminary conclusions” were incomplete, purely hypothetical, and without probative value. While the Report’s observation that, as of December 2019, Par had collected just 86% of the funds it advanced may have been accurate, it was hardly useful when one considered that Par’s collections continued into 2020. Only by ignoring that fact could Sharp conclude, “preliminar[ily],” that the company “would not have been able to continue to provide payments to investors, or to continue to operate, without additional funds from investors.” ECF 426-1 at ¶ 53.

By refusing the defense’s request for the time and discovery necessary to respond to the Report – and even precluding Appellants’ attorneys from commenting on the Report at the December 15 conference – the court willfully turned a blind eye to the Report’s shortcomings and proceeded on the false assumption that the Report provided a “clear[] picture[]” of a company that was “akin to a Ponzi scheme . . . . taking from new investors to pay old investors.” 12/15/2020 Tr. at P. 14-15.

The court's misapprehensions clearly colored its view of the expansion motion. A Ponzi scheme is, by definition, "insolvent from inception," every dollar it distributes is "presumptively tainted." *SEC v. Kaleta*, No. 09-cv-3674, 2011 WL 6016827, at \*4 (S.D. Tex. Dec. 2, 2011). Accepting Sharp's disingenuous insinuation that Par Funding was a Ponzi scheme, a factfinder would necessarily conclude that there was no need to trace the funds the company had disbursed to Appellants since every payment from the company was tainted. *See id.* Once the Court accepted the Sharp Report's distorted view of reality, granting the Receiver's expansion motion was inevitable.

Appellants might well have convinced the Court to abandon the notion that the Receiver had uncovered a Ponzi scheme, had they been permitted to speak against the Sharp Report at the December 15 conference. For instance, Appellants could have pointed out that Ponzi schemes typically engage in no "operation or revenue-producing activity other than the continual raising of new funds." *United States v. Ritchie Special Credit Investments*, 620 F.3d 824, 827 (8th Cir. 2010); *see also Hirsch v. Arthur Andersen & Co.*, 72 F.3d 1085, 1088 n.3 (2d Cir. 1995) (describing a Ponzi scheme as "a scheme whereby a corporation operates and continues to operate at a loss" while creating "the appearance of being profitable by obtaining new investors and using those investments to pay for the high premiums promised to earlier investors") (quoting *In re Huff*, 109 B.R. 506, 512 (S.D. Fla.

1989)). The Receiver’s own figures – which indicated that Par had already collected over \$1 billion from merchants and was, at the time the SEC commenced its suit, in the process of collecting over \$400 million in additional receivables at a rate of \$1.5 million every day (ECF 426-1 at ¶¶ 6-7) – debunked the notion that Par Funding was in the business of “taking from new investors to pay old investors.” 12/15/2020 Tr. at P. 15.

The district court apparently viewed the Sharp Report’s allegations as highly probative of the merits of the expansion motion. Thus, the court’s refusal even to permit Appellants to comment upon the Report before rendering a decision on the motion dispensed with the need for “fair play” that is a prerequisite to any “scrupulous and diligent search for truth.” *Townsend v. Burke*, 334 U.S. 736, 739 (1948).

### **C. The District Court’s Procedures Were Unequal To The Weight Of Appellants’ Interests**

Premised on an assertion that every penny Appellants received in compensation from Par was “tainted by the fraud scheme” alleged in the SEC’s complaint (ECF 357 at P. 19), the expansion motion proposed extending the Receiver’s reach beyond Par to Appellants’ personal interests and investments. The Receiver sought “possession and control” of the LaForte-McElhone residences and their contents. In the months following the Expansion Order, the Receiver extended his reach even further, gaining possession of the couple’s primary vehicles, amongst

other personalty. *See* ECF 517 at P. 2 (expanding the Receivership to Appellants’ SUVs).

The district court recognized the breadth of the expansion at the December 15 conference, commenting that it would be:

a very significant development in the case. If the Court goes ahead and expands the receiver, as requested, it will, I think, and I think defense lawyers recognize, dramatically shift the case in the sense of scope and breadth regarding what the receiver is going to be able to control. I am very much aware of that.

12/15/2020 Tr. at P. 78. Despite this “awareness,” the court denied Appellants’ request for discovery and oral argument on the basis of the supposed “thorough[ness of the parties’] briefing,” and a stated concern for “keep[ing] the train moving” at a minimal expenditure of “time and money.” *Id.* at P. 101.

This Court’s precedents, however, require a more thorough “balancing” of the interests at play. *Elliot*, 953 F.2d at 1566 (citing *Mathews v. Eldridge*, 424 U.S. 319, 334 (1955)). The District Court recognized the magnitude of Appellants’ “private interests,” but failed to accurately account for the “risk of erroneous deprivation, the probable value” of additional process and the costs that providing that process would entail. *Eldridge*, 424 U.S. at 335.

The District Court’s decision to grant the expansion motion before Appellants obtained discovery of Par’s books and financial records created an unacceptable risk of “erroneous deprivation.” *Id.* at 335. As discussed above, the import and veracity

of both the Receiver's assertion of "commingling" and the Sharp Report's analysis were dubious at best. Had Appellants been allowed access to Par's accounting data, Appellants could have debunked the commingling theory, tracing each disbursement they received to profits from the company's legitimate MCA business. The same data would have enabled Appellants to illustrate the flaws in the Sharp Report's methodology, demonstrating that the consultant's truncated analysis of "net cash" failed to provide visibility into the company's profitability. In other words, the discovery process would have permitted Appellants to meaningfully contest the proposition "that tainted funds, which could be the subject of disgorgement, [would] be found in the entities and properties" that were the subject of the expansion motion. ECF 436 at P. 2. There is, then, little room to doubt the "probable value" of additional process in this case. *Eldridge*, 424 U.S. at 335.

The costs of affording this process to Appellants would, moreover, have been negligible. On the day before it granted the expansion motion, the District Court effectively ended the Receiver's embargo on discovery, declaring that the Appellants had been forced to "litigat[e with] one hand tied behind their back . . . . for long enough" and ordering the parties to "exchange" information "in a way that lets everybody look at the veracity of the [Receiver's] numbers." 12/15/2020 Tr. at P. 93. Had this same pronouncement come in November, Appellants would have had the ammunition they needed to effectively oppose the Receiver's expansion motion.

No savings were achieved by depriving Appellants of this information until after the Court granted the draconian expansion.

By any reckoning, the cost of more fulsome fact-finding procedures was minute in comparison to the devastating burdens that the Receivership's expansion placed on Appellants. In the midst of what was sure to be a long and costly battle with the SEC, the Receiver sought to strip Mr. LaForte and Ms. McElhone of tens of millions of dollars in assets and *dispossess them of their homes*. With so much at stake, Appellants should not have been forced to litigate with "one hand tied behind their back[s]." *Id.*; see *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972) (observing that the availability and extent of "procedural protections [ ] depends on the extent to which an individual will be condemned to suffer grievous loss") (internal quotation marks omitted). The District Court's calculated refusal to permit Appellants to fight with both hands – through discovery and an evidentiary hearing – violated the most basic precept of our constitutional system: "(w)herever one is assailed in his person or his property, he may defend." *Boddie*, 401 U.S. at 377 (quoting *Windsor v. McVeigh*, 93 U.S. 274, 277 (1876)). It follows that the Expansion Order must be vacated.

## **II. The District Court's Calculation Of Disgorgement And Penalties Constituted An Abuse Of Discretion**

The District Court's calculation of Appellants' disgorgement and penalties represents an abuse of discretion because the Court made numerous legal and factual

errors which rendered the disgorgement award punitive, and the penalties arbitrary, capricious and excessive.

Disgorgement is an equitable remedy which must be limited to “the gain made upon any investment, when both the receipts and payment are taken into account. *See Liu v. SEC*, 140 S. Ct. 1936, 1946 (2020) (citing *Rubber Co. v. Goodyear*, 76 U.S. 788, 804 (1870)), 19 L. Ed. 566 (1869) *See SEC v. Blackburn*, 15 F. 4th 676, 682 (5th Cir. 2021) (to keep an award from becoming punitive, disgorgement “cannot exceed the defendants’ net profits and must be awarded for victims”) (citing *Liu*); *SEC v. Blatt*, 583 F. 2d 1325, 1335 (5th Cir. 1978) (“Disgorgement is remedial and not punitive. The Court’s power to order disgorgement extends only to the amount with interest by which the defendants profited from his wrongdoing. Any further sum would constitute a penalty assessment”). *Liu* recognizes that, absent a limited exception, “courts must deduct legitimate expenses before ordering disgorgement under § 78u(d)(5).” *See Liu*, 140 S. Ct. at 1950. The *Liu* Court also noted that “[a] rule to the contrary that makes no allowance for the cost and expense of conducting a business would be inconsistent with the ordinary principles and practice of courts of chancery.” *Id.* (citing *Tilghman v. Proctor*, 125 U.S. 136, 145, 8 S. Ct. 894, 899, 31 L. Ed. 664 (1888)) (internal quotations omitted).

Section 20(d) of the Securities Act and section 21(d)(3) of the Exchange Act authorize three tiers of monetary penalties for statutory violations:

The first-tier penalty may be imposed for any violation; a second-tier penalty may be imposed if the violation “involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement”; and a third-tier penalty may be imposed when the second-tier requirements are met and the “violation directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons[.]” *See Monterosso*, 756 F.3d at 1338 (*quoting* 15 U.S.C. §§ 77t(d)(2), 78u(d)(3)(B)).

The amount of a civil penalty is determined “in light of the facts and circumstances” of the case and subject to statutorily prescribed maximums. *See SEC v. BIH Corp.*, No. 2:10-CV-577-FTM-29, 2014 WL 7057748, at \*3 (M.D. Fla. Dec. 12, 2014) (*quoting* 15 U.S.C. § 77t(d); 15 U.S.C. § 78u(d)).

In evaluating the facts and circumstances of the case, the Court looks to factors such as: (1) the egregiousness of the violations at issue, (2) defendants' scienter, (3) the repeated nature of the violations, (4) defendants' failure to admit to their wrongdoing, (5) whether defendants' conduct created substantial losses or the risk of substantial losses to other persons, (6) defendants' lack of cooperation and honesty with authorities, if any, and (7) whether the penalty that would otherwise be appropriate should be reduced due to defendants' demonstrated current and future financial condition.

*Id.* (*quoting SEC v. Aerokinetic Energy Corp.*, No. 08–CV–1409, 2010 WL 5174509, at \*5 (M.D. Fla. Dec. 15, 2010) (quotation omitted), *aff'd*, 444 F. App'x 382 (11th Cir. 2011)).

Civil penalties, if imposed, are within the sound discretion of the district court. *See Warren*, 534 F.3d at 1369. However, a penalty is deemed excessive “if it is grossly disproportional to the gravity of a defendant's offense.” *SEC v.*

*Revolutionary Concepts, Inc.*, No. 21-10984, 2022 WL 386085, at \*11 (11th Cir. Feb. 9, 2022) (citing *U.S. v. Bajakajian*, 524 U.S. 321, 336-39 (1998)).

**A. The District Court Erroneously Held That The SEC Met Its Burden To Establish A Reasonable Approximation Of Appellants' Ill-Gotten Gains**

In order to obtain disgorgement, the law requires the SEC to carry its initial burden of proof by providing a reasonable approximation of the Appellants' ill-gotten gains. *See SEC v. Calvo*, 378 F. 3d 1211, 1217 (5th Cir. 2004) (citations omitted); *see also FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 68 (2d Cir. 2006) (“The two-step burden shifting framework for establishing the size of disgorgement relief requires the plaintiff to show that its calculations reasonably approximated the amount of the defendants’ unjust gains”) (citations omitted); *see also CFTC v. Sidoti*, 178 F.3d 1132, 1138 (11th Cir. 1999); *CFTC v. Tayeh*, 848 Fed. Appx. 827, 828 (11th Cir. 2021).

Although this standard does not require exactitude, it also does not mean that the SEC is free to put together *any* calculation, contend that it is reasonable, and then shift the burden to a defendant. *See FTC v. Vylah Tec LLC*, 378 F. Supp. 3d 1134, 1141 (M.D. Fla. 2019) (finding disgorgement calculation unreasonable when government failed to use the best records available, the calculation was a moving target, and non-party funds were included); *Zacharias v. SEC*, 569 F.3d 458, 473 (D.C. Cir. 2009) (Judge Williams dissenting) (finding SEC had not met its burden

to show its disgorgement figure was a reasonable approximation because it “did not attempt even a superficial showing of petitioner’s profits; instead it pointed simply to their proceeds from sales, after an arbitrary deduction of some costs but not others”).

Furthermore, the SEC must establish *some* causal connection between the ill-gotten gains and the charged violations of the securities’ laws to meet its burden. *See SEC v. Huff*, 758 F. Supp. 2d 1288, 1359 (S.D. Fla. 2011) (“disgorgement need only be a reasonable approximation of profits *causally connected* to the violation[.]”) (citations omitted) (emphasis supplied); *see also Allstate Ins. Co. v. Receivable Fin. Co.*, 501 F.3d 398, 413 (5th Cir. 2007).

Here, the SEC failed to provide a reasonable approximation of the profits Appellants received from the wrongful conduct alleged in the SEC’s Amended Complaint. The SEC merely took the Net-Raise (*i.e.*, 100% of the amount Par raised from investors from its inception in 2012 less the amount repaid) and then subtracted amounts that the SEC obtained in disgorgement from two Defendants, Cole and Abbonizio, while ignoring disgorgement sought or obtained from other parties.<sup>13</sup> The SEC’s analysis is severely flawed, as it seeks to hold Appellants jointly and

---

<sup>13</sup> For reasons that were never adequately explained in the SEC’s briefs or at oral argument, the SEC acknowledges that disgorgement obtained from Cole and Abbonizio must be deducted from the sum Par raised from investors, but asserts that recoveries the SEC has obtained or is seeking from other participants in the Par promissory note offerings are not deductible.

severally liable for every dollar Par ever raised from investors without any showing that these sums were causally connected to the alleged wrongful conduct. Furthermore, the SEC's disgorgement calculation was rife with errors, including using inaccurate figures to calculate the Net-Raise (resulting in an additional \$3.8 Million in disgorgement), refusing to acknowledge recoveries obtained from other participants in Par's business which ought to have been deducted, and failing to account for a single dollar of legitimate business expenses – as required by *Liu*. Indeed, the SEC's entire disgorgement analysis is less than 200 words long (including two footnotes, one of which terminates midsentence). ECF 1252 at P. 30.

At the hearing on the disgorgement motion, the district court repeatedly acknowledged the material defects with the SEC's brief. 9.14.22 Tr. P. 45: L. 19-23; P. 81: L. 10 to P. 82: L. 3; P. 108: L. 17 to P. 109: L. 5. Indeed, Judge Ruiz directly stated that **“it would almost be impossible for me to write an order that will withstand appellate review if I didn't make the SEC go back and write [its disgorgement brief] over again the right way.”** *Id.* at P. 110: L. 21-23. Notwithstanding his candid assessment in open court, Judge Ruiz did a complete about-face in his Disgorgement Order and embraced the fiction that the SEC had “satisfied its burden to provide a reasonable approximation of the requested

disgorgement.” ECF 1450 P. 13.<sup>14</sup> This conclusion simply cannot be reconciled with the Court’s honest assessment that the SEC’s brief suffered from “glaring deficiencies,” that no objective reader could conclude that the SEC’s brief gave the court “what it needed to make a proper ruling,” and that the SEC had failed to provide an analysis that would allow the court to feel comfortable that the disgorgement numbers fall “within the parameters of existing case law.” (*See* record cites, *supra*). Accordingly, the District Court’s finding that the SEC met its initial burden was nothing short of an abuse of discretion.

The fatal flaw with both the SEC’s disgorgement analysis – and with the modified version of that analysis adopted by the District Court – is that the focus was solely on the amount needed to make Par’s investors whole,<sup>15</sup> rather than on ill-gotten gains the Appellants received from the specific securities violations alleged by the SEC. *Liu* made clear that disgorged funds must be distributed to investors when feasible – but it *did not* hold that a disgorgement calculation may be based on

---

<sup>14</sup> The Court appears to contradict itself in a subsequent passage of the Disgorgement Order, where it finds Appellants “met their burden to show that the SEC’s disgorgement figure *is not reasonable* insofar as it does not deduct any legitimate business expenses.” *Id.* at P. 19. (Emphasis supplied).

<sup>15</sup> To be clear, these investor losses were all generated after the Receiver was appointed. Prior to that date, Par had never missed a payment to any of its noteholders, except for during a brief Covid related payment moratorium. When the Receiver was appointed, he stopped funding new MCA contracts (which would have generated revenue for the business), severely curtailed collections on existing MCA contracts, and ceased making payments to noteholders. Accordingly, the investor “losses” are not attributable to the Appellants.

the amount required to make investors whole rather than ill-gotten gains. *Liu*, 140 S. Ct. 1948-49. Instead, the Supreme Court affirmed that “[c]ourts may not enter disgorgement awards that exceed the gains made upon any business or investment, when both the receipts and payments are taken into account.” *Id.* at P. 1949-1950. The Court also found that a limited exception to this rule applied only when the entire profit of a business results from wrongdoing, and can only be used to deny “inequitable deductions” which would constitute wrongful gains under another name – such as deductions for the defendant’s personal services issued in furtherance of the wrongful conduct. *Id.* Here, the SEC made no attempt to demonstrate that the Net-Raise (i.e., the money Par raised from promissory notes less the amount paid back) inured to the Appellants as ill-gotten gains, or that such amounts were attributable to Appellants’ alleged wrongful conduct. Accordingly, the District Court’s decision to use the SEC’s Net-Raise calculation as the baseline for Appellants’ disgorgement does not comport with *Liu* and its progeny.

**B. The District Court Abused Its Discretion By Adopting The SEC’s Inaccurate Calculation Of The Net-Raise**

The District Court also abused its discretion when it adopted the SEC’s inaccurate calculation of the Net-Raise based on the principle that the risk of uncertainty falls on the wrongdoer.

The District Court was presented with competing calculations of the Net-Raise: the SEC’s figure of \$250,217,479, which was taken from a Declaration by the

Receiver that was based on an outdated (and admittedly incomplete) analysis performed by the SEC's expert, Melissa Davis; and Appellants' figure of \$246,400,000, which was based on a more recent and more complete analysis performed by the Receiver's consultant, Bradley Sharp of Development Specialists, Inc. ("DSI"), and adopted by the Receiver in his quarterly report. ECF 1289 P. 4-5. The court adopted the SEC's figure – which resulted in an additional \$3.8 Million in disgorgement for McElhone and LaForte – based on the legal presumption that the risk of uncertainty falls on the wrongdoer with respect to disgorgement. ECF 1450, P. 16. However, this presumption would only have applied had the SEC met its burden to present a reasonable approximation of ill-gotten gains and shifted the burden to the Appellants to rebut its calculation. *See FTC v. Verity Int'l, Ltd.*, 443 F.3d 48, 69 (2d Cir. 2006) (“presumption against the wrongdoer should not have been invoked without first establishing a reasonable approximation of unjust gain because this presumption applies only in the second stage of the burden-shifting framework.”). Because the SEC failed to meet its burden – for all the reasons discussed *supra* – the district court abused its discretion by applying the presumption against Appellants,

Furthermore, the presumption against the wrongdoer only applies when there is genuine uncertainty. *Id.* at P. 69-70 (“[T]he reasonableness of an approximation varies with the degree of precision possible”); *see Vylah Tec LLC*, 378 F. Supp. 3d

at 1141 (holding the FTC could not “turn a blind eye” to data that would have allowed it to “more precisely” calculate disgorgement). No genuine uncertainty was present in this case because the evidence clearly established that Appellants’ figure was accurate, and that the SEC’s figure was not.

Specifically, the representations of the Receiver’s counsel – which was admitted in evidence at the disgorgement hearing – established that the SEC’s Net-Raise calculation was based solely on Par’s QuickBooks records, while the Appellants’ figure was based on the same QuickBooks records after they were reconciled by the Receiver’s financial consultant (Bradley Sharp of DSI) to account for additional un-booked transactions contained in Par’s bank records. 9.14.22 Tr. at P. 17: L. 20 to P. 19: L. 20. Likewise, Appellants’ Response to the SEC’s Omnibus Motion cited to prior statements made by the Receiver’s counsel which also demonstrated that the \$246.4 Million Net-Raise calculation was more accurate. ECF 1329, P. 15-16 and ECF 1330-2, P. 11). Importantly, these statements by the Receiver’s counsel are the *sole* evidence explaining the discrepancy between the figures at issue – and this evidence credibly establishes that Appellants’ figure is the more accurate, and that the SEC’s is not.

Indeed, after considering the Receiver’s counsel’s prior representations to the Magistrate Judge and the testimony he presented at the evidentiary hearing, the Court correctly observed that “the number that [Appellants] have from DSI is *more*

*accurate and captures more business activity* than the number that the SEC's giving me.” 9.14.22 Tr. at P. 19: L. 23-25 (Emphasis supplied). The District Court also acknowledged during the disgorgement hearing that the SEC had failed to provide any analysis and support for its Net-Raise calculation<sup>16</sup> and directly stated that it would be “a complete abdication of my responsibility under the case law to just look at what the SEC’s given to me in a declaration and rubber stamp it.” *Id.* at P. 42: L. 15-17. But – inexplicably – the Court did exactly that, and rubberstamped the SEC’s inaccurate, incomplete, and inflated Net-Raise figure in its Disgorgement Order.

The Court attempted to justify this about-face by observing (for the first time in its Disgorgement Order) that the SEC’s Net-Raise calculation was based on the work of its expert, Ms. Davis, who “took two years to forensically analyze and reconcile Par Funding’s QuickBooks records, bank account records, and promissory note records when issuing her report.” ECF 1450 at P. 15. However, Ms. Davis’ report predates the DSI analysis and was created without the benefit of the adjustments and reconciliations performed by DSI. This is particularly important because Ms. Davis relied upon *prior* reconciliations to the QuickBooks records

---

<sup>16</sup> *See Id.* at P. 9: L. 21 to P. 13: L. 22 (inquiring why the SEC objected to “the use of more accurate records to determine disgorgement” and noting that the SEC never provided an “actual explanation” for the discrepancy); *see also* P. 105: L 15-24 (stating that the Net-Raise calculation “from the receiver declaration has not been identified, absent in a stray footnote here or there, adequately enough for the Court to sit down and conduct a true, thorough disgorgement analysis...”).

which were performed by DSI when she prepared her Report. (*See* Davis Report, ECF 843-1 at ¶ 21-25 and FN 22-23: reflecting that Ms. Davis performed her analysis using a copy of the QuickBooks that had been reconciled by the Receiver’s financial consultants – *i.e.*, Bradley Sharp of DSI – as of July 27, 2020). Given that Ms. Davis relied on DSI’s prior reconciliations in her report (thereby ratifying DSI’s methodology and work), the SEC should not have been allowed to cast doubt upon Sharp’s subsequent reconciliations simply because they yield a more favorable disgorgement number for the Appellants.<sup>17</sup> Furthermore, the SEC presented Sharp to the Court as a reliable witness in the trial of Michael Furman, and utilized his data, analysis and testimony in various contexts (including the Furman trial) throughout these proceedings. 9.14.22 Tr. at P. 16: L. 16 to P. 17: L. 5 (recognizing that the Receiver’s counsel had acknowledged in a hearing that Sharp’s analysis presented the “best snapshot of the financial picture of Par”).

---

<sup>17</sup> At the disgorgement hearing, the SEC’s counsel also sought to cast doubt on Sharp’s analysis by observing that he is not a CPA. 9.14.22 Tr. at P. 25: L. 3-17. This statement was misleading because Mr. Sharp’s staff included qualified accountants who conducted the relevant analysis. *See* Declaration of Bradley Sharp. ECF 482-2, ¶ 4 (“I have overseen my staff’s analyses of CBSG’s books and records and have reviewed their work. My staff includes experienced forensic accountants maintaining CPA, CFF and CFE certifications”). But even if this were not the case, the SEC’s critique is not credible given Ms. Davis’ reliance on Sharp’s prior reconciliations and analysis when performing her work.

Accordingly, the Appellants met their evidentiary burden to prove that their calculation of the Net-Raise was accurate, and the SEC's was not. *See SEC v. Warde*, 151 F.3d 42, 50 (2d Cir. 1998) (although the risk of uncertainty falls on the wrongdoer, "the wrongdoer is, of course, entitled to prove that the district court's measure is inaccurate") (cited with approval by *SEC v. Calvo*, 378 F. 3d 1211 (11th Cir 2004)). Thus, there is no genuine uncertainty that would warrant adoption of the SEC's inaccurate and inflated calculation of the Net-Raise. *See UNCERTAINTY*, Black's Law Dictionary (11th ed. 2019) (uncertainty is "the quality, state, or condition of being in some degree of *serious doubt*") (emphasis supplied).

Furthermore, even if the evidence did create a risk of uncertainty regarding which figure is accurate (it does not), it would be inequitable for the Court to adopt the SEC's figure under the facts of this case because – here – any potential risk of uncertainty was the result of the Appellants being denied a full and fair opportunity to prove that the SEC's figure is inaccurate. Specifically, during the discovery period permitted by the Court for the disgorgement proceedings, the Appellants issued a subpoena for deposition to the Receiver to address the discrepancy between the Net-Raise calculations presented in the Receiver's Declaration and Mr. Sharp's analysis. The Receiver moved to quash the subpoena, the Appellants moved to compel, and the dispute was heard by Magistrate Judge Reinhart on July 1, 2022. At the conclusion of that hearing, Judge Reinhart quashed the subpoena, holding that the

discovery sought regarding the discrepancy “was not proportional to the needs of the case.” ECF 1330-2, P. 19: L. 9 to P. 20 : L. 8.<sup>18</sup> Because Appellants were denied an opportunity to depose the Receiver, which would have allowed them to present additional proof that Sharp’s calculation of the Net-Raise is accurate (and that the SEC’s calculation is not), the instant matter is distinguishable from *Calvo* and other cases holding that defendants bear the risk of uncertainty.

Accordingly, the Court’s adoption of the SEC’s calculation of the Net-Raise was clear error which caused manifest injustice by erroneously assessing an additional \$3,817,479 in disgorgement against Appellants.

### **C. The District Court Abused Its Discretion By Refusing To Deduct Disgorgement Obtained From Other Defendants**

The District Court abused its discretion by determining – without basis or record support – that the disgorgement awards entered against *some* Defendants in this case *should* be deducted from Appellants’ disgorgement, while disgorgement

---

<sup>18</sup> In his ruling from the bench, Judge Reinhart also stated that the Appellants could retain an expert to perform an independent analysis regarding the discrepancy between the Receiver’s Declaration and the Sharp analysis. However, we know this *would not* have been permitted because the Court struck an expert report filed with Appellants’ Response to the Omnibus Motion on the grounds that it was untimely. ECF 1322. Judge Reinhart also suggested that the Receiver’s statements could be admitted as evidence. ECF 1330-2, P. 21: L. 8-18. The Appellants *did* present these statements as evidence, and the Receiver’s counsel provided additional testimony at the hearing which affirmed that the analysis performed by Sharp was more detailed and accurate than the analysis set forth in the Receiver’s Declaration and the Davis Report. But – for whatever reason – none of this was even mentioned in the District Court’s Disgorgement Order.

assessed against other defendants (Furman, Gissas, and Vagnozzi) and non-parties (certain sales agents who are defendants in a separate SEC action – Camarda, McArthur and A.G. Morgan) should not be deducted. ECF 1450, P. 17-18.

These six (6) parties were all participants in the promissory note offering at issue in this case and are accused by the SEC of making misrepresentations to investors and engaging in other wrongful conduct. The SEC contends that the disgorgement sums obtained or sought from these defendants were all deducted from the Net-Raise calculation which is the basis for the SEC's calculation of disgorgement against Appellants. But, once again, the SEC's analysis on this issue in its briefings to the Court was sorely lacking, as the District Court acknowledged at the disgorgement hearing. 9.14.22 Tr. at P. 39: L. 17 to P. 40: L. 21 (stating that the Court had "been grasping at straws for a month because the [SEC's briefings] are so light on evidentiary support" and that "other than just conclusory [*sic*] telling me what numbers I should take to the bank, there is no pointing or connecting to underlying evidence"). Furthermore, the Court acknowledged that the Appellants had not been given a fair opportunity to address the SEC's contention because it failed to provide any record support. *Id.* at P. 53 L. 7-11 ("the defendants should have known where these numbers were being drawn from, because they cannot respond in a vacuum, nor can I write in a vacuum"). Accordingly, the District Court made a clear legal error when it found that the profits made by these six parties –

which were derived from the same securities (promissory notes) the Appellants are being held responsible for – had already been deducted in the SEC’s calculation of the Net-Raise. ECF 1329 P. 15-16.

**D. The District Court Abused Its Discretion By Ordering Appellants To Pay Excessive Penalties, Jointly And Severally**

The Court abused its discretion by imposing excessive penalties against the Appellants using an arbitrary and capricious method of calculation which the SEC *did not* advocate for and which was not used in assessing penalties to the other defendants. The Court also abused its discretion by inexplicably holding the Appellants jointly and severally liable for the penalty amount.

Under the Exchange Act’s three-tier penalty scheme, courts may impose civil penalties only “upon a proper showing” by the SEC. *See* 15 U.S.C. § 78u(d)(3)(A)(i). The penalty amount “is determined by the court in light of the facts and circumstances.” *See* 15 U.S.C. § 78u(d)(3)(B)(i). The factfinder must make at least two inquiries. The first is how many violations occurred. *Id.* (penalties may be assessed “[f]or each violation”). The second is whether “the gross amount of pecuniary gain to [a] defendant as a result of the violation” exceeded the base penalty set by Exchange Act Section 21(d). Then, any upward departure from the base penalty to a tier two or tier three penalty requires additional findings. Tier two penalties require an additional determination that the violation “involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory

requirement.” See 15 U.S.C. § 78u(d)(3)(B)(ii). Tier three penalties require the same factual determinations necessary to establish tier two penalties *plus* a determination that the defendant’s conduct “directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons.” See 15 U.S.C. § 78u(d)(3)(B)(iii). A penalty is excessive “if it is grossly disproportional to the gravity of a defendant's offense.” *Revolutionary Concepts, Inc.*, WL 386085, at \*11 (citing *Bajakajian*, 524 U.S. at 336-39).

In its disgorgement motion, the SEC asserted that the Court should levy a \$100 Million penalty against Appellants, citing the *Woodbridge* case (a factually and procedurally inapposite case which involved a \$1.2 Billion scheme, and resulted in a \$100 Million penalty on consent) as support. ECF 1252 P. 39; *see also SEC v. Shapiro*, No. 17-cv-24624, 2018 WL 7140669 and 2018 WL 7140359 (S.D. Fla. Dec. 27, 2018). At the hearing on disgorgement and penalties, the Court flatly disagreed with the SEC’s use of *Woodbridge*, noting that the conduct of the Defendants in this case simply did *not rise* to that level:

It should come as no surprise that I respectfully disagree with the SEC. This is not *Woodbridge*. This is not 100 million civil penalty. It just, it’s not. It doesn’t make any sense. When you look at the equitable obligations of the court, that civil penalty to me just would not correspond with the conduct. 9.14.22 Tr. at P. 114: L. 1-8.<sup>19</sup>

---

<sup>19</sup> Notwithstanding the Court’s acknowledgment that the Appellants’ conduct did not come close to the level of the *Woodbridge* Ponzi scheme, the penalty the Court imposed against Appellants was almost exactly proportional. In *Woodbridge*, the defendants were assessed a \$100 Million penalty on a \$1.2 Billion scheme, making

Having declined the SEC's invitation to use *Woodbridge* as a benchmark, the District Court decided to calculate Appellants' civil penalties by treating each of Par's 115 outstanding promissory notes as a separate securities law violation and then assessing a separate maximum Tier 3 penalty against both McElhone and LaForte for each note (230 penalties total). This resulted in a \$21,850,000 penalty against both McElhone and LaForte (\$43,700,000 combined), which was excessive and unduly punitive. *See SEC v. Elliot*, 2012 WL 2161647, at \*11 (S.D.N.Y. June 12, 2012) (finding defendants' actions met the standard for 2nd or 3rd tier penalties, but declining to impose such penalties for each transaction because such an award would be "unduly penalizing"); *see also SEC v. iShopnomarkup.com, Inc.*, 126 F. Supp. 3d 318, 333 (E.D.N.Y. 2015), *aff'd sub nom. U.S. Sec. & Exch. Comm'n v. Knight*, 694 F. App'x 853 (2d Cir. 2017), as amended (June 7, 2017) (concluding it would be unduly penalizing to count each sale of an unregistered security to 350 different investors as a separate violation warranting a penalty, especially where the defendant was subject to a significant disgorgement award).

The District Court's method of calculation was flawed in several ways. First, because the SEC had not requested that penalties be calculated in this manner, the

---

the penalty about 8.3% of the funds raised from investor. Here, the Appellants were assessed a \$43.7 Million penalty against \$550 Million raised from investors, which is about 8% of the amount raised – notwithstanding that Par was not a Ponzi and the SEC never pleaded otherwise.

Appellants had no opportunity to respond to this calculation and explain why it is improper – and, indeed, impermissible.

Second, there was no showing that each promissory note resulted from the wrongful conduct of *either* McElhone or LaForte (let alone as to each of them on each and every note). The imposition of Tier 2 or Tier 3 penalties required the Court to find that Appellants committed violations which “involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement.” *See* 15 U.S.C. § 78u(d)(3)(B)(ii). Although the allegations of the Amended Complaint (which were accepted as true for purposes of the Disgorgement Motion only) established that the promissory notes were unregistered securities, neither the Amended Complaint nor the evidence demonstrated that the Appellants had *deliberately* disregarded the securities laws.

Instead, the evidence affirmatively established that the Appellants relied on qualified legal counsel, who drafted the form of promissory note and sales documents (offering memorandum). Furthermore, counsel issued several opinion letters concluding that the notes constituted debt instruments rather than securities. ECF 1329, P. 36-37, ECF 1330-24 and ECF 1330-25. Moreover, the record evidence also showed that certain offering memoranda were prepared (in whole or in part) by the sales agents (or their counsel). Accordingly, the evidence establishes that the issuance of the promissory notes themselves does not justify Tier 2 or Tier 3

penalties. As such, the penalties imposed by the Court could only stem from the alleged misrepresentations – and only upon a showing that such misrepresentations involved “fraud, deceit, [or] manipulation[.]” *See* 15 U.S.C. § 78u(d)(3)(B)(ii). But, again, the Court made no effort to tie any of the outstanding promissory notes (let alone all of them) to the alleged misrepresentations, such that a Tier 3 penalty could be entered for each note as to each Appellant.

The Court’s penalty assessment was particularly egregious with respect to McElhone. Based on the allegations of the Amended Complaint, the Court found – generally – that the Defendants had created a serious risk of loss to investors by making certain misrepresentations regarding Par’s default rate and regulatory history, and Mr. LaForte’s criminal record. ECF 1450 P. 34. The Court observed that the Amended Complaint “specifically ties” LaForte and two other Defendants to the alleged misrepresentations. *Id.* at FN 16. The same cannot truthfully be said about McElhone ***because the Amended Complaint does not allege that she made any misrepresentations whatsoever.***<sup>20</sup> Indeed, the SEC pointed only to McElhone’s

---

<sup>20</sup> The Amended Complaint contains no specific allegations of wrongdoing as to McElhone. Instead, it relies on general allegations that McElhone had ultimate decision making-authority for Par (as the President and CEO) and served as the public face of the company while her husband, LaForte, acted as the *de facto* head of Par. ECF 119. The Disgorgement Order discussed seven distinct categories of misrepresentations alleged in the Amended Complaint, and provided a detailed summary of the specific misrepresentations the various Defendants were alleged to have made. ECF 1450 P. 4-7. Notably, there are no allegations that McElhone made any misrepresentations whatsoever.

passive conduct as support for the requested penalty – asserting that she “authorized” marketing materials for distribution to investors, “approved” Par’s filings with the SEC, had “control” over Par’s bank accounts, and executed “some” of the promissory notes at issue. ECF 1252 P. 36-37.<sup>21</sup> On these facts, there was no basis for the District Court to find that McElhone committed violations involving “fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement” – as required to establish Tier 2 or Tier 3 penalties.

The Court also did not point to any evidence to establish that Appellants’ alleged violations created a “significant risk of substantial losses to other persons” – as required to justify Tier 3 penalties. *See* 15 U.S.C. § 78u(d)(3)(B)(iii). Instead, the Court noted that numerous investors remain unpaid – ignoring the fact that Par never missed a payment to investors prior to the Receivership, except for a brief payment moratorium during the peak of Covid lockdowns<sup>22</sup> – and then concluded that the “misrepresentations [alleged in the Amended Complaint] alone create a significant risk of substantial losses to investors.” ECF 1432 P. 34. Respectfully, the Court’s *ipso facto* reasoning does not establish a significant risk of substantial losses.

---

<sup>21</sup> Also, the Appellants established through record evidence that McElhone *did not* authorize the marketing materials, as alleged – so that attenuated conduct could not serve as a basis for the penalties against her. ECF 1329 P. 43.

<sup>22</sup> ECF 1329 P. 30-34.

For all of these reasons, the Court had no basis to assess Tier 3 penalties – let alone a Tier 3 penalty for each of Par’s 115 outstanding promissory notes, as the number of notes bears no connection to the Appellants’ alleged wrongful conduct. Indeed, the number of notes does not even reflect the number of ultimate investors.<sup>23</sup> Furthermore, the Court’s decision to hold the Appellants jointly and severally liable for their combined penalty amount effectively subjected both McElhone and LaForte to two maximum Tier 3 Penalties per note – *without any showing of wrongful conduct as to any of the notes*. By subjecting Appellants to joint and several liability, the Court effectively assessed a penalty of \$380,000 per violation – which makes the assessment illegal on its face. This outcome was not supported by the evidence or the law and constituted an abuse of the District Court’s discretion (especially since the Court sat in equity).

The arbitrary and capricious nature of the penalty award is also evidenced by the fact that the District Court employed different and inconsistent methods to determine penalties for the different defendants. While Appellants were held jointly and severally liable for 230 Tier 3 penalties (two per note), the Court decided to

---

<sup>23</sup> The outstanding notes represented money raised from 80 different creditors (*i.e.*, investors) controlled by 33 fund managers. ECF 1330-28. The Court assessed penalties based on its finding that Appellants’ conduct created a risk of loss to investors through their misrepresentations. Even accepting this premise, *arguendo*, the Court ought to have assessed a penalty for each fund manager or investor, rather than each note.

assess seven Tier 3 penalties against Par’s CFO, Joseph Cole Barletta (one for each cause of action alleged in the Amended Complaint), and only one Tier 3 penalty against Michael Furman (even though a jury found he had made misrepresentations to numerous investors and was liable for four separate securities violations). The District Court did not articulate any reasoned basis for its disparate treatment of the Appellants as compared to the other defendants, which resulted in radically different penalty amounts. Notably, the penalty against McElhone is 33 times greater than the penalty against Cole (Par’s CFO!) – even though the Court correctly observed that the Amended Complaint alleged Cole had made specific misrepresentations to investors,<sup>24</sup> but could point to no similar allegations against McElhone. Under these facts, the penalties against the Appellants – particularly Ms. McElhone – are an abuse of discretion.

Finally, and most egregiously, the Court also abused its discretion by holding McElhone and LaForte jointly and severally liable for a combined \$43.7 Million in civil penalties.<sup>25</sup> Several Courts have expressly held that the clear language of 15

---

<sup>24</sup> ECF 1450 P. 34, FN 16 and P. 42.

<sup>25</sup> The District Court’s Disgorgement Order expressly states that Appellants are held jointly and severally liable for this amount. ECF 1450 P. 41 and 47. The Final Judgment states that “[Appellants] are liable for civil penalties in the amount of \$21,850,000 each for a total of \$43,700,000.” Taken alone, the Final Judgment might be ambiguous, but read in combination with the Disgorgement Order, it is clear the Appellants are being held jointly and severally liable for the full \$43,700,000 in penalties.

U.S.C. § 77t(d)(2) does not permit a civil penalty to be imposed jointly and severally. *See SEC v. Pentagon Capital Mgmt.*, 725 F.3d 279, 287–88 (2d Cir.2013) (reversing district court’s decision to impose penalties jointly and severally as an error of law); *SEC v. iShopnomarkup.com, Inc.*, 126 F. Supp. 3d 318, 333 (E.D.N.Y. 2015), *aff’d sub nom. U.S. Sec. & Exch. Comm’n v. Knight*, 694 F. App’x 853 (2d Cir. 2017), *as amended* (June 7, 2017) (same); *Honeycutt v. US*, 581 U.S. 443, 444 (2017) (holding civil penalty under civil forfeiture statute cannot be joint and several based on similar statutory analysis).

While this Court has not expressly ruled that civil penalties under 15 U.S.C. § 77t(d)(2) cannot be joint and several, Courts in this Circuit have declined to impose joint and several liability based on the rationale espoused in *Pentagon Capital Mgmt.* *See SEC v. Watkins*, No. 1:16-CV-3298-SCJ, 2019 WL 13026037, at \*7–8 (N.D. Ga. July 5, 2019); *see also SEC v. K.W. Brown & Co.*, 555 F. Supp. 2d 1275, 1316 (S.D. Fla. 2007), *supplemented* (Jan. 4, 2008) (holding defendants jointly and severally liable for disgorgement, but imposing separate penalties); *SEC v. Wealth Strategies Partners, LLP*, No. 8:14-CV-2427-T-27TGW, 2019 WL 2504600, at \*7 (M.D. Fla. May 17, 2019), *report and recommendation adopted sub nom. SEC v. Wealth Strategy Partners, LLP*, No. 8:14-CV-2427-T-27TGW, 2019 WL 2503206 (M.D. Fla. June 17, 2019) (same).

Here, the District Court articulated no rationale for holding Appellants jointly and severally liable – and by doing so, it has effectively held each of the Appellants liable for the same conduct twice, rendering their penalties clearly excessive. Accordingly, this Court should find that the District Court committed legal error by holding the Appellants jointly and severally liable for their combined penalties.

**E. This Case Should Be Reassigned If It Is Remanded**

If the Court deems it appropriate to remand this case for further proceedings consistent with the Court’s opinion, and/or to reverse the Expansion Order and remand to the District Court, with appropriate instructions, the Appellants respectfully request that the case be reassigned to a new district court judge who can be fair and impartial. It is well established that the Court has the power to grant this relief pursuant to 28 U.S.C. § 2106. *See Chudasama v. Mazda Motor Corp.*, 123 F. 3d 1353, 1373 (11th Cir. 1997). This Court considers three factors when deciding whether to reassign a case on remand: “(1) whether the original judge would have difficulty putting his previous views and findings aside; (2) whether reassignment is appropriate to preserve the appearance of justice; (3) whether reassignment would entail waste and duplication out of proportion to the gains realized from reassignment.” *Id.*

Here, the record clearly establishes that the District Judge would have difficulty putting his previous views and findings aside if this Court disagrees with his

reasoning and remands the case, and that reassignment is needed to preserve the appearance of justice. The District Judge's comments in open Court make clear that he is eager to get to the end of this case, and is unwilling to do anything that would not advance his ultimate goal of making distributions to noteholders:

[W]e have a lot of investors that have been waiting for this day. We've all worked very diligently to get here. The Court is not interested in prolonging this case. We need to get to the last phase of this case, which is putting the Receiver in a position to begin the claims handling process so that we can make people whole.

\* \* \*

Listen, nobody wants to see the end of this litigation more than me. We've carried this for two years. I want to get to the end because the investors deserve it. I've done everything I can to marshal assets. My Receiver has been consumed with going after everything he can.

9.14.22 Tr., P. 108: L. 7-12; P. 114: L. 25 to P. 115: L. 4; *see also* 5.19.22 Tr. at P. 30.

Unfortunately, the Court's eagerness to make investors whole has come at the expense of the Appellants' due process rights, and fundamental principles of fairness. The plain proof of this is found in the Court's vehement criticism of the SEC's disgorgement brief in open Court, followed by his incongruous embrace of the SEC's arguments in his Disgorgement Order – which resulted in a \$197 Million Judgement against Appellants, and allowed the Court to get to the claims distribution phase it has been eagerly awaiting.

Furthermore, the record reflects the lower Court's bias against the Appellants, as the Court has routinely sided with "his receiver" and ruled in the Receiver's favor

without affording the Appellants an opportunity to be heard. Examples of this include his denial of the Appellants' request to be heard in connection with the initial appointment of the Receiver (ECF 19 P. 4 and ECF 36), the Sharp Report (ECF 430 and ECF 431) and the Expansion Order (as discussed in Section I. of this brief).<sup>26</sup>

The Court's unwillingness to hear the Appellants' arguments (and to afford due consideration of their fundamental rights) has become even more pronounced since the Final Judgment was entered. For example, the Receiver filed a motion to compel the Appellants to pay certain sums which they allegedly owed – on pain of eviction from their residence – at 6:56 p.m. on January 10, 2023. The motion was granted less than six hours later (at 12:31 a.m. on Jan. 11, 2023) without affording the Appellants any opportunity to file a response. ECF 1484 and 1486. Most recently, on May 16, 2023, the Appellants filed a thorough and reasoned motion to modify the District Court's injunction and asset freeze (which is currently set at \$482 Million, even though the Final Judgment is only \$197 Million). ECF 1565. Only a few hours later, the Court denied the Appellants' motion in a paperless Order,

---

<sup>26</sup> The Court's bias against the Appellants and partiality towards the Receiver was described in greater detail in a Motion for Recusal Appellants filed on June 23, 2021. ECF 630. Judge Ruiz denied the Motion to Recuse the very next day. ECF 631. Appellants also filed a Motion to Discharge the Receiver, which demonstrated that the Receiver had breached his duties by presenting inaccurate and misleading information regarding Par's finances to the Court. ECF 649. Judge Ruiz denied that motion as well. ECF 739. Appellants' Motion for Recusal and Motion to Discharge – and Judge Ruiz's denial of same – provide additional support for Appellants' request for reassignment to a new district court judge.

characterizing it as a “motion for reconsideration by another name” – which it assuredly was not. ECF 1566. For all of these reasons, it strongly appears that the District Judge would have difficulty putting aside his previous views and findings, and that reassignment is required to preserve the appearance of justice (and to make sure that justice is, in fact, done).

With respect to the third *Chudasama* factor, Appellants submit that their request to reassign this case would not entail waste and duplication out of proportion to the gains to be realized from reassignment. First, the gains to be realized from reassignment are enormous based on the District Judge’s manifest bias against the Appellants, and his entrenched views on this case. Accordingly, the risk of waste or duplication would have to be very great to outweigh the benefits of reassignment. Second, it does not appear that reassignment would entail significant waste or duplication – especially with respect to the order on disgorgement and penalties, since these issues were decided on written submissions to the Court and would therefore only require a review of the motions, exhibits and case law. Admittedly, this case involves complex factual and legal issues, but these issues will not be simplified by keeping the case with Judge Ruiz. Instead, his familiarity with this case will only exacerbate his existing biases.

For all of these reasons, the Appellants respectfully submit that a new Judge is needed to perform a fair and impartial analysis of the Appellants’ disgorgement

and penalties, and to afford them a fair hearing on the Receiver's motion to expand the Receivership.

### **CONCLUSION**

For the foregoing reasons, this Court should vacate the Expansion Order, the Receivership Order and the Final Judgment, remand this matter to the District Court with appropriate instructions, and reassign this matter to a different district court judge.

**CERTIFICATE OF COMPLIANCE**

This consolidated brief contains 17,186 words, excluding the parts of the document exempted by Fed. R. App. P. 32(f). The brief also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally-spaced typeface using Microsoft Office in a 14-point Times New Roman font. The brief exceeds the type-volume limit of Fed. R. App. P. 32(a)(7)(B), but is within the expanded 21,000 word limit requested in Appellants' Motion For Leave To File A Consolidated Principal Brief Which Exceeds The Page Or Word Limit, which was timely filed, but has not yet been ruled upon. In the event that Appellants' Motion is denied, they respectfully request the opportunity to amend and submit separate principal briefs which comply with the type-volume limit of Fed. R. App. P. 32(a)(7)(B).

Dated: May 30, 2023

Respectfully submitted,

KAPLAN ZEENA LLP  
*Attorneys for Appellant Lisa McElhone*  
2 South Biscayne Boulevard  
One Biscayne Tower  
Suite 3050  
Miami, Florida 33131  
Tel: (305) 530-0800

By: /s/ James M. Kaplan  
JAMES M. KAPLAN

KOPELOWITZ OSTROW  
FERGUSON WEISELBERG GILBERT  
*Attorneys for Appellant Joseph LaForte*  
One West Las Olas Boulevard  
Suite 500  
Fort Lauderdale, Florida 33301  
Tel: (954) 525-4100

By: /s/ David L. Ferguson  
DAVID L. FERGUSON

Florida Bar No. 921040  
James.Kaplan@kaplanzeena.com  
NOAH E. SNYDER  
Florida Bar No. 107415  
Noah.Snyder@kaplanzeena.com

Florida Bar No. 0981737  
Ferguson@kolawyers.com  
SETH D. HAIMOVITCH  
Florida Bar No. 85939  
Haimovitch@kolawyers.com

LAW OFFICES OF ALAN S. FUTERFAS  
*Attorney for Appellant Lisa McElhone*  
565 Fifth Avenue  
7<sup>th</sup> Floor  
New York, NY 10017  
Tel: (212) 684-8400

By: /s/ Alan S. Futerfas  
Asfuterfas@futerfaslaw.com  
*Admitted Pro Hac Vice*

### **CERTIFICATE OF SERVICE**

I certify that on May 30, 2023, I electronically filed the forgoing with the Clerk of Court for the United States Court of Appeals for the Eleventh Circuit by using the Court's CM/ECF system, which will send notice of such filing to all registered CM/ECF users.

/s/ James M. Kaplan  
JAMES M. KAPLAN