

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-CIV-81205-RAR

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

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

Defendants.

**DEFENDANTS' AMENDED JOINT REPLY IN SUPPORT OF MOTION
TO DISMISS PLAINTIFF'S AMENDED COMPLAINT**

Defendants Complete Business Solutions Group, Inc., d/b/a Par Funding (“Par Funding”), Lisa McElhone (“Ms. McElhone”), Joseph W. LaForte (“Mr. LaForte”), Joseph Cole Barleta (“Mr. Cole”), Perry S. Abbonizio (“Mr. Abbonizio”), Dean J. Vagnozzi (“Mr. Vagnozzi”), and Michael C. Furman (“Mr. Furman”) (collectively, “Defendants”) file this Reply in Support of their Joint Motion to Dismiss the Amended Complaint (“Amended Complaint or Am. Comp.”).¹

1. The Par Funding Notes issued During “Phase I” Are Not Securities

In its Response, the SEC argues Defendants cannot meet their burden of rebutting the presumption that the Par Funding promissory notes issued during “Phase I” were securities. The SEC claims, as a threshold matter, that Defendants are bound by Par Funding’s own characterization of the notes as securities. Alternately, the SEC also argues that Defendants have

¹ This Reply has been amended to exclude Relief Defendant The LME 2017 Family Trust (“Trust”) as a party joining in the Reply in light of the Court’s recent Order expanding the Receivership to include the Trust [DE 436]. However, it should be noted that the Trust joined in the Motion to Dismiss prior to the issuance of the Expansion Order [DE 363]. No other changes have been made to the Reply.

failed to show the notes fall into an exempt category of notes or otherwise pass the “family resemblance” test articulated by the Supreme Court in *Reves v Ernst & Young*. The SEC is wrong on both counts.

- a. Par Funding’s Form D is not relevant to whether the “Phase I” promissory notes are securities.

The SEC argues that Par Funding self-identified the promissory notes as securities by filing a Notice of Exempt Offering of Securities on Form D, and that Par Funding’s characterization of the notes should bind Defendants. *See* Response at 6–7. The SEC is mistaken. Defendants’ argument for dismissal focuses on the notes issued by Par Funding during “Phase I,” which the SEC separately defined in the Amended Complaint to include *only* the offerings made between August 2012 and December 2017. *See* Am. Compl. at ¶ 49. However, Par Funding filed the referenced Form D in February 2019 (and an amended Form D in April 2020), *see id.* at ¶¶ 235–36, which was *after* Phase I and *after* Par Funding is alleged to have transformed its offerings through the use of Agent Funds. Thus, the Form D has no bearing on the proper characterization of Phase I notes.

- b. Defendants have shown the “Phase I” promissory notes fall into exempt categories of notes.
 - i. Exempt Notes

The SEC first argues the notes are not short-term notes secured by a lien on a small business or some of its assets, or by an assignment of accounts receivable. *See* Response at 8–11. The SEC submits, in summary, that because each MCA merchant would grant Par Funding a security interest in the merchant’s assets and assign Par Funding its future accounts receivable, and because Par Funding would grant noteholders a security interest in Par Funding’s own assets and accounts receivable, each noteholder would obtain only a small, fractionalized interest in many loans. In

other words, according to the SEC, the notes fall outside the exempt categories because, “to the extent the notes were secured, they were secured by many small assignments of accounts receivable.” *Id.* at 10.

To support the distinction the SEC advances, the SEC relies upon and quotes from the court’s ruling in *SEC v. 1 Global Capital, LLC*, Case No. 18-CIV-61991, 2012 WL 1670799 (S.D. Fla. Feb. 8, 2019). However, the SEC may be unaware that in a subsequent, pending class action litigation brought by 1 Global’s investors, another federal court in the Southern District of Florida found collateral estoppel did not apply to the 1 Global ruling, considered the arguments anew, and disagreed that this part of the inquiry was as clear-cut as the 1 Global court had made it out to be. Specifically, while Bankruptcy Court Judge Robert A. Mark denied dismissal of the class action complaint and found the notes at issue in that case did not fall within an exempt category, he stated that “I don’t fully agree that the exception may be limited to notes that are secured by the assets of only a single business.” He reasoned, “I can see that you could have a commercial transaction where a business that’s loaning money needs a source of funding, and in exchange for the funding, offers specific security interests in [] the loans that that particular business is making.” *See Exhibit 1* (transcript of May 26, 2020 motion to dismiss hearing in *Foster v. Ruderman*, 18-01438-RAM (Bankr. S.D. Fla.)).

Judge Mark found the scenario he contemplated was not before the court in the case before him, in part, because the plaintiffs had alleged that 1 Global had total discretion as to how to use investor funds (i.e., the company was not required to use investor funds for the MCA component of its business, and thus at least a portion of the funds was not secured), and the rate of return on the notes at issue fluctuated based on 1 Global’s success in its overall operations.

That is not the case here: According to the Amended Complaint, the Phase 1 noteholders held short-term notes secured by an assignment of substantially all of Par Funding's assets (including its accounts receivable), and those noteholders were provided fixed rate returns in exchange for the funding they provided — funding that the noteholders understood Par Funding would use to advance MCA loans.

The SEC emphasizes that the Amended Complaint does not allege any contact between the noteholders and the MCA merchants, nor does the Amended Complaint allege that noteholders even understood which merchants would receive funding. Given that the “economic reality” of the transaction controls, however, these alleged circumstances should not bear on whether the notes fall within an exempt category; the “reality” is that noteholders obtained a lien and security interest in “substantially all” of Par Funding's assets and accounts receivable, including the merchant assets and accounts receivable that had been assigned to Par Funding. This is true regardless of how allegedly “small” or “fractionalized” those interests were, and regardless of the noteholders' level of interaction with merchants.

ii. The “Family Resemblance” Test

The SEC next argues that Par Funding's promissory notes do not meet any of the factors of the “family resemblance” test. As noted in the Motion, the Court is not required to apply the family resemblance test if it determines the notes fall within an exemption, which they do. *See, e.g., Lincoln v. Washington Mut. Bank, N.A.*, Case No. 07-CIV-60273, 2007 WL 9701069, *2 (S.D. Fla. Aug. 6, 2007) (“Since the note in contention is a mortgage note for a home there is no need to further discuss the family resemblance test.”). In any event, the SEC's application of the test is unreliable. As with the SEC's misplaced reliance on the Form D filed by Par Funding, the SEC at times ignores the relevant Phase I time period. *See, e.g.,* Response at 12–13 (citing the

Amended Complaint's allegations about amounts Par Funding had raised by 2019 to show why the second factor of the test allegedly supports a finding that the notes are not securities, even though Phase I extended only through 2017).

Moreover, the SEC fails to acknowledge "risk-reducing factors" and other countervailing considerations, including that the funds Par Funding received from noteholders were collateralized. *See Asset Protection Plans, Inc. v. Oppenheimer & Co., Inc.*, Case No. 11-CIV-00440, 2011 2533839, *5 (M.D. Fla. June 27, 2011). And while the SEC includes a lengthy string citation of instances in which Defendants referred to the notes as "investments," "casual semantics fail to govern over applicable law in distinguishing a loan from a security." *Id.* at *4. After all, "[i]n one sense every lender of money is an investor since he places his money at risk in anticipation of a profit in the form of interest." *Id.* at *3 (internal citation and quotation marks omitted).

2. The SEC's Complaint Is A Shotgun Pleading.

The SEC fails to heed the Eleventh Circuit's holding in *Wagner* that admonishes "shotgun pleadings [which] incorporate every antecedent allegation by reference into each subsequent claim for relief or affirmative defense." *Wagner v. First Horizon Pharm. Corp.*, 464 F.3d 1273, 1279 (11th Cir. 2006). Nor does the SEC address the point made in both *Wagner* and *Solow* that the factual allegations must be properly linked to the causes of actions to put the Defendants on notice of the claims against them. *Wagner*, 464 F.3d at 1278; *S.E.C. v. Solow*, No. 06-81041 CIV, 2007 WL 917269, at *3 (S.D. Fla. Mar. 23, 2007).

While the SEC argues in its Response that "[t]he Amended Complaint includes headings identifying sections of the pleading that relate to each of the misrepresentations and omissions..." bold headings do not relieve the SEC of its burden to put the defendants on notice as to what

allegation specifically against them gives rise to each cause of action. *See Dressler v. U.S. Dep't of Educ.*, No. 2:18-CV-311-FTM-99CM, 2019 WL 130348, at *3 (M.D. Fla. Jan. 8, 2019) (dismissing plaintiff's complaint as an impermissible shotgun pleading because "the allegations that follow each heading generally lump the defendants together, which fails to place each defendant on notice of what allegations specifically against them give rise to each cause of action"). Were the SEC's Complaint as clear as it suggests, it would not have had to break out the allegations relating to each defendant as it did in its Response to clarify which of them relate to which defendant. *Wagner* demands more than a few headings and a brief explanation in the SEC's Response referencing *some* of the allegations as to each Defendant. Leaving the Complaint as is will require the Defendants and this Court to sift through its Complaint to assemble the jigsaw puzzle of claims and allegations. The Defendants and the Court should not have to jump back and forth through 267 paragraphs and dozens of pages to determine what factual allegation supports what claim, and which factual allegation is attributable to what defendant. *See S.E.C. v. Levin*, No. 12-21917-CIV, 2013 WL 594736, at *9 (S.D. Fla. Feb. 14, 2013) (requiring the SEC to re-plead its complaint because the SEC failed to specify which misstatements and omissions were the basis of the fraud allegations in each respective count as to each defendant).

3. The SEC Has Failed to Establish That Defendants Violated the Antifraud Provisions of the Federal Securities Laws.

a. Alleged Misrepresentations

In a Section of its Amended Complaint entitled "Material Misrepresentations and Omissions in Connection with the Par Funding, ABFP, United Fidelis and Retirement Evolution Offerings," the SEC lays out the various misrepresentations it suggests violate the securities laws, each of which the Defendants addressed in their Motion to Dismiss. Rather than addressing these arguments, however, the SEC largely ignores or recasts the arguments raised in the Motion to

Dismiss. Failure to respond to arguments regarding particular claims in a motion to dismiss is a sufficient basis to dismiss such claims as abandoned or by default. *See Hooper v. City of Montgomery*, 482 F. Supp. 2d 1330, 1334 (M.D. Ala. 2007) (dismissing claims as abandoned where the plaintiff failed to respond to the defendant's arguments concerning the dismissal of those claims) (citing *Resolution Trust Corp. v. Dunmar Corp.*, 43 F.3d 587, 599 (11th Cir. 1995); *Hudson v. Norfolk S. Ry. Co.*, 209 F. Supp. 2d 1301, 1324 (N.D. Ga. 2001) (“When a party fails to respond to an argument or otherwise address a claim, the Court deems such argument or claim abandoned.”)).

*1. Par Funding’s Loan Practices*²

In paragraphs 154 - 184, the SEC alleges that Par Funding made material misrepresentations regarding its loan practices. Notably, the SEC acknowledges through its silence that its Complaint does not allege Ms. McElhone made or authorized any such statements, or that she knew such representations or written materials contained material misrepresentations, omissions, or were part of a deceptive scheme. The SEC is also conspicuously silent regarding the fact that the alleged statements constitute mere puffery and opinions “deemed immaterial by a broad spectrum of federal courts.” *City of Monroe Employees Retirement Sys. v. Bridgestone Corp.*, 399 F.3d 651, 671 (6th Cir. 2005). A reasonable investor would not attach significance to Par Funding’s decision not to inspect businesses with which it had a prior relationship or where the size of the deal would not warrant the expense of a physical inspection.

2. Loan Default Rates

² The Amended Complaint refers to these statements interchangeably as misrepresentations regarding “loan practices” (¶8) and “rigorous underwriting” (¶¶154-184). For simplicity, Defendants will identify them as statements regarding “loan practices.”

Rather than address its failure to properly allege this claim, the SEC argues that the Defendants simply cannot argue their position on a motion to dismiss. The SEC is wrong. The SEC must properly allege that the alleged misrepresentations regarding the alleged loan default rates were materially false, and it cannot simply make up its own version of the truth in doing so. The SEC does not allege that the default rate method used by Par Funding was materially misleading. Instead, it argues that an analysis it conjures up on its own, based on information that would have been publicly available to investors—lawsuits—yields a rate different than that used by Par Funding. The SEC does not allege, for example, whether or what percentage of the lawsuits it uses to calculate its version of the default rate were filed after Par Funding had already recovered its principal from the merchants. In short, alleging that Par Funding’s loan default rate was calculated “differently” than the SEC’s preferred method does not prove falsity or scienter. *Lloyd v. CVB Fin. Corp.*, No. CV-10-06256, 2012 WL 12883522, at *20-21, 26 (C.D. Cal. Jan 12, 2012) (dismissing complaint because plaintiffs did not allege adequate facts to show that defendants’ method of calculating loan loss reserves were false or misleading simply because they differed from the method used by plaintiffs.).

3. *Insurance on Merchant Fund Advances*

The SEC engages in a bit of word play to overcome the deficiency in this allegation. It alleges that a Par Funding brochure “claims to offer insurance . . . that protects Par Funding in case of a default or non-payment.” See Am. Comp. ¶ 204. Similarly, the SEC alleges that Messrs. LaForte and Abbonizo told investors that Par Funding had insurance to back up investor funds. *Id.*, ¶¶ 205-206. But the SEC does not allege—because it cannot—that Par Funding failed to obtain insurance to cover nonpayment by a small business. Instead, in an odd effort to allege falsity, the SEC alleges that “Par Funding *did not offer small businesses* insurance on the Loans, and thus

investor funds were not protected by insurance.” Am. Comp. at ¶ 207. But this does not make any of the alleged statements *false*. Having failed to allege that Par Funding did not obtain this insurance, or that anyone who allegedly made these statements knew when they made them that Par Funding’s insurance did not cover investor funds, the SEC’s theory fails.

4. Payments to Ms. McElhone and Mr. Cole

Here again, rather than address the insufficiency of this allegation, the SEC hopes the Court will punt this argument to a different procedural stage of the case. But the Defendants’ argument—and the SEC’s pleading deficiency—is not based on a dispute over facts. The SEC simply did not allege facts to suggest that the statement made in the Form D filings were false or made with scienter. Simply put, the SEC alleges that Mr. Cole and Ms. McElhone would not receive any of the gross proceeds of the securities offering, but fails to allege—because it cannot—that the payments they allegedly received represented funds deposited by investors rather than other funds generated by Par Funding’s legitimate merchant cash advance business. At minimum, the SEC’s conclusory allegations do not meet the requirements of Rule 9(b).

5. Mr. LaForte’s Criminal History

The SEC alleges that Mr. LaForte told investors in November 2019 that he had started Par Funding eight years prior and that he touted both its and his success in the industry. *See* Am. Compl. at ¶¶ 102-103. The Complaint does not allege that any of these statements are false. Instead, the SEC argues that Mr. LaForte’s statements were materially misleading because he failed to disclose convictions which the SEC acknowledges were at least 10 years old at the time of the alleged representations to investors. *Id.*, ¶ 18. The SEC’s own regulations make clear that convictions that are even five years or older need not be disclosed to the investing public. For example, Regulation S–K, which is promulgated by the SEC, requires disclosure of a prior

conviction by a control person only when it is within five years and material to an investment decision. 17 C.F.R. § 229.401(g). *See also Hoffman v. Estabrook & Co., Inc.*, 587 F.2d 509, 517-518 (1st Cir. 1978) (affirming as “correct” the district’s finding that “the omission from a memorandum of [the defendant’s] past criminal record was not material” because the investors were attracted to the defendant’s idea rather than the defendant’s character and integrity).

Moreover, this information was publicly available, and therefore, part of “the ‘total mix’ of information [already] available” to investors. *Basic Inc. v. Levinson*, 485 U.S. 224, 231–32; *Park Yield LLC v. Brown*, No. 18 Civ. 1947 (GBD) (SN), 2019 WL 6684127, at *8 (S.D.N.Y. December 6, 2019). *Park Yield LLC v. Brown*, No. 18 Civ. 1947 (GBD) (SN), 2019 WL 6684127, at *8 (S.D.N.Y. December 6, 2019).

In *Park Yield*, the court dismissed the plaintiff’s claim that the defendant, the controlling shareholder in a limited liability company in which plaintiff invested, materially misled the plaintiff by failing to disclose his prior criminal conviction to the plaintiff. *Id.* The court explained, “[a]s to [the defendant]’s alleged failure to inform plaintiff of his conviction, plaintiff does not demonstrate how any such failure to disclose publicly available information constitutes a material omission.” *Id.* Citing *In re Bank of Am. AIG Disclosure Sec. Litig.*, 980 F. Supp. 2d 564, 576 (S.D.N.Y. 2013), *aff’d*, 566 F. App’x 93 (2d Cir. 2014), the court explained, “[w]here allegedly undisclosed material information is in fact readily accessible in the public domain[,] a defendant may not be held liable for failing to disclose this information.” *Id.* Consequently, the court continued, “any alleged failure by [the defendant] to disclose his conviction was immaterial as a matter of law, and Plaintiff’s claim under Section 10(b) and Rule 10b-5 must be dismissed.”³ *Id.*

³ In order to overcome this obvious pleading deficiency, the SEC alleges that Mr. LaForte attempted to conceal his identity from investors and references an email address and business card in support of this claim. However, because there is no allegation that he ever used either in

As a consequence, the SEC's claim that Mr. LaForte acted with scienter in failing to disclose information readily available to the public is nonsensical. *See Hollinger v. Titan Capital Corp.*, 914 F.2d 1564 (9th Cir. 1990) (Broker dealer's failure to disclose to investors that registered representative had 11-year-old felony forgery conviction was not "reckless conduct" that could have satisfied scienter element in civil action under Securities Exchange Act § 10(b) and Rule 10b-5); *Cohen v. Telsey*, No. CIV 09-2033, 2009 WL 3747059, *13 (D.N.J. Nov. 2, 2009) (defendant, an attorney for the issuer, did not act with the requisite intent in omitting control person's conviction because by 2001 the conviction was more than 15 years old).

6. *Par Funding's Regulatory History*

Once again, the SEC ignores the deficiencies in its Complaint and simply reiterates allegations that fall well short of the mark to properly allege a materially misleading statement in violation of the antifraud statutes. Here, the SEC's theory is that statements touting Par Funding's success as a profitable cash advance company were materially misleading. *See Am. Compl.* at ¶ 227. Notably, however, *the SEC does not allege that Par Funding's cash advance business operations were not profitable*. Instead, it alleges that the statements are misleading because they omit that Par Funding "ha[d] twice been sanctioned for violating the securities laws." *Id.* In these cases, courts must consider whether the omitted conduct is sufficiently connected to the defendant's existing disclosures to be material. *Fries v. N. Oil & Gas, Inc.*, 285 F. Supp. 3d 706, 719 (S.D.N.Y. 2018).

connection with an interaction with an investor, much less in connection with the offer or sale of a security, this theory fails. More important still, the SEC's claim is also internally inconsistent in that the Complaint also alleges that Mr. LaForte posted videos and articles about himself on Par Funding's website bearing his own name and likeness. Reasonable inferences drawn from the SEC's own version of the events therefore undermine its theory that Mr. LaForte intended to conceal his identity.

In *Fries*, the plaintiff alleged that a public company made materially fraudulent representations and omissions in public filings with the SEC about one of its executives. *Id.* at 719. As the SEC has alleged here, the public company touted the executive's management expertise, but failed to disclose conduct which led the SEC to issue a cease-and-desist order against the executive concerning violations of the antifraud provisions of the securities laws. *Id.* at 712, 714 - 715. The court dismissed the claim, finding that the plaintiff failed to allege an actionable omission about the executive because: (1) the statements touting the executive's experience were not false; (2) none of the statements made about the executive's experience suggested that he was not engaged in the conduct that gave rise to the cease-and-desist order; and (3) the improper conduct was not a material source of the company's or the executive's success. *Id.* at 719 - 720.

For these same reasons, the court should dismiss the SEC 's claim that statements touting Par Funding's success as a profitable cash advance company were materially misleading by omission. First, the SEC did not allege that these statements were false. Second, the alleged statements did not suggest that Par Funding was no longer engaged in the conduct that gave rise to the prior securities violations. And finally, the SEC did not allege that the conduct that gave rise to the prior securities violations was a material source of the company's success (or that it even continued). Consequently, the alleged statements could not have been materially misleading and cannot form the basis of a violation of the securities laws.

b. Allegations Specific to Defendants

i. *Ms. McElhone*

The SEC's response regarding Ms. McElhone makes two things perfectly clear. First, it does not attribute a single alleged misrepresentation to her directly; it is now clear that she had no knowledge of the falsity of any such statement, did not disseminate or make any such statement to

an investor, and did not act with scienter with respect to any such statement. Second, the SEC is relying exclusively on her title with Par Funding as an improper basis to charge her in Count VIII with a violation of Section 20(a) of the Exchange Act. It is well established that “a plaintiff may not allege ‘controlling person’ status merely by reciting a corporate officer's title without alleging actual control and the nature of the controlling person's ‘culpable participation’ in the fraud.” *Ellison v. Am. Image Motor Co., Inc.*, 36 F. Supp. 2d 628, 642 (S.D.N.Y. 1999); *see, e.g., Craig v. First Am. Capital Res., Inc.*, 740 F. Supp. 530, 533, 537 (N.D. Ill. 1990). In *Craig*, the plaintiff alleged that the defendant was liable as a control person simply because the defendant was the President and director of the corporate defendant. *Id.* The district court rejected the plaintiff's argument. The court explained that to attach control person liability under Section 20(a), the plaintiff was required to allege more than just the fact that he was an officer of the corporate defendant. The plaintiff was required to allege that the defendant had “potential for control over the specific activity upon which the primary violation [of securities laws] is predicated.” *Id.* (citations omitted). Accordingly, the court granted the defendant's motion to dismiss the control liability claim against him.

Similarly, in *In re Galena Biopharma, Inc. Sec. Litig.*, 117 F. Supp. 3d 1145, 1201 (D. Or. 2015), the Court found that the simple allegation that the defendant was a control person because he was the corporate defendant's Chief Operating Officer and Executive Vice-President was insufficient to attach liability under Section 20(a). The court explained that the plaintiff failed to plead any other allegation that would tend to show that the defendant had the “requisite control over [the corporate defendant's] day-to-day operations.” *Id.* Thus, the court dismissed the plaintiff's control liability claim against said defendant. *Id.* For those same reasons, the Court should dismiss Count VIII as to Ms. McElhone.

ii. *Mr. Laforte*

The SEC's case against Mr. LaForte is largely built on the question of whether disclosure of his decade-old criminal history was necessary. It is worth repeating that the SEC is not alleging that Mr. LaForte told investors that he had no prior criminal history. In fact, the evidence will demonstrate that he did, in fact, tell investors and, as is the case for many other aspects of this matter, that he and Par Funding received advice from legal counsel on this issue.

For purposes of the SEC's Complaint, the issue is whether Mr. LaForte's alleged failure to disclose his criminal history to investors renders other statements he made touting his experience materially misleading by *omission*. As explained, *supra*, the sheer age of the convictions rendered them immaterial:

“The Federal Rules of Evidence *and the SEC's own internal policies* both suggest that the probative value of prior bad acts is diminished after ten years. Under the Federal Rules, evidence that a witness in a civil or criminal trial has been convicted of a felony must be admitted within ten years of the conviction; after ten years, the conviction is admissible only if its probative value, “supported by specific facts and circumstances, substantially outweighs its prejudicial effect.” Fed. R. Evid. 609(b)(1). Similarly, the SEC's own regulations on reporting for public companies require that directors and officers disclose legal proceedings “material to an evaluation of ... ability and integrity” only from the last ten years.”

See SEC v. Jensen, 835 F.3d 1100, 116-1117 (9th Cir. 2016) (emphasis supplied). Moreover, because the information the SEC alleges was publicly available to investors, its alleged omission could not have rendered statements made regarding Mr. LaForte's background materially misleading. Finally, Mr. LaForte could not have acted with scienter in allegedly omitting disclosure of his criminal history to some investors given that this information was both publicly

available and, *by virtue of the SEC's own internal policy*, of “diminished [value] after ten years.”
*Id.*⁴

iii. Mr. Cole

The SEC's internal policies and regulations that render Mr. LaForte's criminal background immaterial for purposes of public company disclosures by LaForte apply equally as to representations by Mr. Cole. Moreover, because Mr. LaForte's history is publicly available information, Mr. Cole could not have acted with scienter even if he knowingly omitted their disclosure to investors as alleged by the SEC. Finally, for the reasons stated in the Defendants' Motion to Dismiss and Section 3(a)(4), *supra*, the SEC has failed to adequately state a claim with respect to the Form D filings allegedly signed by Mr. Cole.

iv. Mr. Abbonizio

The SEC's Response confirms and underscores the complete insufficiency of the allegations that Abbonizio acted with the requisite scienter to sustain claims against him under Rule 10b-5 of the Exchange Act and Section 17(a)(2) of the Securities Act. With regard to Abbonizio's alleged omissions of LaForte's criminal background, the SEC refers to the allegations that Abbonizio was an owner of Par Funding, that Abbonizio claimed to have founded Par Funding with LaForte, and that Abbonizio introduced LaForte to potential investors. And similarly, with regard to Abbonizio's alleged misrepresentations about Par Funding's underwriting process and loan default rate, the SEC again refers to the vanilla allegations that Abbonizio was an owner,

⁴ This argument applies equally to the allegations made against Messrs. Abbonizio and Cole regarding Mr. LaForte's criminal history.

adding that Abbonizio claimed these were “critical” parts of the business that were necessary to its success. *See* Response at 29.

At bottom, the SEC’s argument is that, because Abbonizio is an alleged owner of Par Funding and a self-proclaimed co-founder, he therefore must have known or ought to have known the truth about these alleged misstatements and omissions. But even in the light most favorable to the SEC, this attempt to bootstrap the scienter element onto allegations relating to Abbonizio’s alleged role with the company are insufficient; there must be something more that specifically addresses Abbonizio’s alleged mental state. *See SEC v. Yorkville Advisors, LLC*, 305 F. Supp. 3d 486, 511–12 (S.D.N.Y. 2018) (“Mere allegations that a defendant knew or should have known of fraudulent conduct based solely on his or her corporate title or position are insufficient. . . . It is also insufficient to allege that a defendant ‘ought to have known’ of the fraud.”). Indeed, the Amended Complaint does not include any allegations that give rise to an inference that Abbonizio possessed *any* information contrary to what he relayed to potential investors. As such, the claims against Abbonizio must be dismissed.

v. *Mr. Furman*

Not surprisingly, of the SEC’s 40-page Response, there are only three short paragraphs devoted to Mr. Furman’s alleged misrepresentation about a New Jersey regulatory action against Par Funding. *See* Response at 33; Am. Compl. at ¶233. According to the Response (and the Amended Complaint), on June 16, 2019, Mr. Furman falsely told an undercover individual posing as an investor that the State of New Jersey had “retracted” its action against Par Funding and that New Jersey had said that the company was “good” and did not need to pay a fine or have any penalties.

As a threshold matter, the Response (like the Complaint) fails to square with the SEC's filings with this Court. On July 28, 2020, the SEC filed a transcript of an alleged recording of the conversation between the undercover posing as an investor and Mr. Furman about the State of New Jersey action. [See ECF No. 41-30]. While the SEC's Response (and Complaint) allege that the recording occurred on **June 16, 2019**, the declaration filed under penalty of perjury before this Court provides that the conversation at issue occurred on **March 5, 2020**. *Id.* at ¶4. Although courts must construe and accept as true the factual allegations in a complaint and inferences reasonably deductible therefrom, courts "need not accept . . . **facts which run counter to facts of which the court can take judicial notice . . .**" *Response Oncology, Inc. v. Metrahealth Insurance Co.*, 978 F.Supp. 1052, 1058 (S.D.Fla. 1997) (emphasis added) (citations omitted); *see also, Howard v. Kerzner Int'l Ltd.*, No. 12-22184-CIV-FAM, 2014 WL 714787, at *5 (S.D. Fla. Feb. 24, 2014) (Moreno, J.). Considering that the SEC's alleged facts in the Complaint "run counter to [facts in the SEC's filing] of which the court can take judicial notice" because it is in the record, the Court need not accept the factual claims as true when deciding the Motion to Dismiss. This alone is enough for this Court to dismiss the Complaint as to Mr. Furman.

Contrary to the Response, the Complaint also fails to sufficiently allege scienter as to Mr. Furman. The SEC's Response (like the Amended Complaint) lacks any specific allegations that Mr. Furman had the intent to deceive when he purportedly provided incorrect information to the undercover about the State of New Jersey action against Par Funding. He was neither a Par Funding employee nor trained to understand state regulatory actions. And the SEC does not allege that Mr. Furman had any specific duty to ensure that the information about New Jersey was accurate.

Moreover, the Response fails to answer *any* of the questions posed in the Defendants' Motion to Dismiss as to how Mr. Furman purportedly knew that *any* of his alleged representations were untrue. [See Mo. to Dismiss at pgs. 19 - 24]. The SEC ignores these questions because it cannot allege with any particularity that Mr. Furman acted with the intent to deceive (or that he acted recklessly or negligently). By ignoring Mr. Furman's challenges to the Complaint, the SEC concedes that the Complaint is deficient. See *GolTV, Inc. v. Fox Sports Latin Am. Ltd.*, 277 F. Supp. 3d 1301, 1311 (S.D. Fla. 2017) (Altonaga, J.) (treating argument ignored by plaintiff's brief in response to motion to dismiss as conceded) (citing *Hartford Steam Boiler Inspection & Ins. Co. v. Brickellhouse Condo. Ass'n, Inc.*, No. 16-CV-22236, 2016 WL 5661636, at *3 (S.D. Fla. Sept. 30, 2016) (Gayles, J.) ("[A] plaintiff who, in [its] responsive brief, fails to address [its] obligation to object to a point raised by the defendant implicitly concedes that point.") (citation omitted)). Because the SEC cannot sufficiently allege Mr. Furman's intent, the Complaint lumps Mr. Furman with other defendants in a textbook example of an impermissible "shotgun pleading." See Motion to Dismiss at 20-23. As a result, the Court should dismiss all counts alleged against Mr. Furman.

vi. Mr. Vagnozzi

The SEC's Response is most telling for what it does not say about Mr. Vagnozzi, and therefore concedes that dismissal is required. The SEC ignores Mr. Vagnozzi's arguments in the Motion that the Complaint fails to adequately allege scienter as to his alleged misrepresentations regarding Par Funding's default rate and underwriting practices. Motion at 21 - 22. The SEC also ignores Mr. Vagnozzi's arguments regarding the inadequacy of the Complaint's fraud allegations as to the April 2020 exchange offer. *Id.* at 21 - 23. The SEC ignores the rhetorical questions we raised in the Motion because it has no answer. As to Mr. Vagnozzi's dismissal argument that the Complaint fails to allege fraud with regard to the use of "Agent Funds," Motion at 23, the only

thing the SEC can say about that is a boilerplate statement that he "created the new structure" and "train[ed] sales agents." Response at 32.

None of the SEC's concessions is surprising. The Complaint utterly fails to plead any particularity of fraudulent conduct as to Mr. Vagnozzi regarding the Par Funding "business practices" allegations or Mr. Vagnozzi's alleged statements regarding the pros and cons of accepting an exchange offer at the beginning of the pandemic when Par Funding defaulted on its notes. And there is nothing inherently wrong about creating agent funds or engaging in alleged training, so these allegations also are insufficient to state a claim of fraud.

Instead, the SEC focuses mostly on Mr. Vagnozzi's allegedly not disclosing his own regulatory background. In doing so, the SEC first points, again, to statements about Par's business, track record, and successful investment history, without any showing as to how Mr. Vagnozzi knew any of this was allegedly false. Response at 30 - 31. The SEC makes much of him saying that Par Funding had never missed a payment, which of course was absolutely true. But all of these allegations are irrelevant to a claim of fraud with respect to regulatory proceedings. The two things have nothing to do with each other. The SEC similarly points to a statement by Mr. Vagnozzi that he has no criminal record, which is a true statement. *Id.* The best the SEC can point to is that Mr. Vagnozzi allegedly did not disclose his widely-publicized settlement with the Pennsylvania securities regulators based on an investigation they opened in February 2019 regarding Mr. Vagnozzi's conduct prior to the 2018 switch to Agent Funds. At a minimum, that fact does not support any claim of fraud for conduct before that date. More important, the SEC ignores the fact that its own evidence presented in the preliminary injunction hearing contradicts that allegation because Mr. Vagnozzi was recorded advising a prospective noteholder about that settlement with Pennsylvania. *See* [ECF No. 147 ¶ 30].

Finally, the SEC argues that it has stated a claim due to Mr. Vagnozzi's alleged failure to disclose facts about Par Funding's regulatory history. The Complaint has no particularized allegations showing that Mr. Vagnozzi was aware of Par Funding's state regulatory investigations before they were publicly announced. As to Mr. LaForte's criminal background, as we previously pointed out, that is immaterial as a matter of law. His conviction is not material, and the SEC baldly stating otherwise – in direct contravention of its own adopted regulations – does not sufficiently state a claim.

vii. The Trust

In keeping with its “sue first and sort out the facts later” strategy, the SEC merely recites the allegations of the Complaint as to the Trust without responding to the arguments raised in the Motion to Dismiss. Because the SEC is alleging that Par Funding funneled commingled funds into the Trust, the SEC must plead sufficient allegations with particularity to satisfy both components of the applicable two-part test. *See generally S.E.C. v. Founding Partners Capital Mgmt.*, 639 F. Supp. 2d 1291, 1294 (M.D. Fla. 2009) (finding that, “the Complaint fails to specifically identify factual contentions against [the company]” to demonstrate how the company qualified as a relief defendant); *accord Janvey v. Adams*, 588 F.3d 831 (5th Cir. 2009).

First, the SEC has alleged that the Trust owned Par Funding. *See Am. Compl.* at ¶36. The governing jurisprudence requires only an “ownership interest” to preclude an entity from being a proper relief defendant. *Janvey*, 588 F.3d at 834. Par Funding had a legitimate interest in distributions from Par Funding. The SEC did not allege that the transfer to the Trust was a gift. Second, the SEC has not alleged sufficient factual support that investor funds were diverted into the Trust. *Founding Partners Capital Mgmt.*, 639 F. Supp. 2d at 1295 (“such a sue-first-and-sort-out-the-facts-later-approach is [not] compatible with the Federal Rules or fundamental fairness).

The allegations of the Amended Complaint create a reasonable inference that distributions were made from Par Funding revenues, and not gross proceeds of the of the offering. If the SEC has evidence that investor proceeds were transferred to the Trust, Rule 9(b) requires that it say so in the Amended Complaint. Until then, the Trust is not properly named as a Relief Defendant and should not be subject to any future disgorgement order seeking to recover the Trust's assets.

CONCLUSION

For the reasons above, the SEC's claims against Defendants Complete Business Solutions Group, Inc., d/b/a Par Funding, Lisa McElhone, Joseph W. LaForte, Joseph Cole Barleta, Perry S. Abbonizio, Dean J. Vagnozzi, Michael C. Furman, and Relief Defendant The LME 2017 Family Trust should be dismissed.

Dated: December 23, 2020

Respectfully submitted,

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Page 1

1 UNITED STATES BANKRUPTCY COURT
 2 SOUTHERN DISTRICT OF FLORIDA
 3 MIAMI DIVISION
 4 IN RE: CASE NO.: 18-19121-RAM
 CHAPTER 11
 5 1 GLOBAL CAPITAL LLC,
 et al., (Jointly Administered)
 6 Debtors.
 7 SARAH FOSTER, individually / ADV. NO.: 18-1438-RAM
 and on behalf of all others
 8 similarly situated,
 9 Plaintiff,
 vs.
 10 CARL RUDERMAN,
 11 Defendant.
 12 _____/
 13
 14 ECF# 115, 132, 137
 15 May 26, 2020
 16 The above-entitled cause came on for hearing
 17 before the Honorable ROBERT A. MARK, one of the Judges in
 18 the UNITED STATES BANKRUPTCY COURT, in and for the
 19 SOUTHERN DISTRICT OF FLORIDA, via Zoom Video Conference,
 20 at 301 North Miami Avenue, Miami, Miami-Dade County,
 21 Florida on May 26, 2020, commencing at or about 1:30 p.m.,
 22 and the following proceedings were had:
 23
 24 Transcribed from a Digital Audio Recording by:
 Margaret Franzen, Court Reporter
 25

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1 APPEARANCES VIA ZOOM VIDEO CONFERENCE:
 2
 3 MELAND RUSSIN & BUDWICK, by
 MICHAEL S. BUDWICK, ESQUIRE
 and
 4 THE MOSKOWITZ LAW FIRM, by
 ADAM M. MOSKOWITZ, ESQUIRE
 On behalf of the Plaintiff
 5
 6 JONES LAW OFFICE, P.A. by
 JASON Z. JONES, ESQUIRE
 and
 8 MARCUS NEIMAN RASHBAUM & PINEIRO, by
 MICHAEL A. PINEIRO, ESQUIRE
 JASON L. MAYS, ESQUIRE
 On behalf of the Defendant
 9
 10 GREENBERG TRAURIG, by
 JOHN DODD, ESQUIRE
 General Counsel
 On behalf of the Liquidating Trustee
 11
 12
 13 GENOVESE JOBLOVE & BATTISTA, by
 GLENN D. MOSES, ESQUIRE
 On behalf of the Liquidating Trustee
 14
 15
 16 UNITED STATES ATTORNEY'S OFFICE, by
 JERROB T. DUFFY, ESQUIRE
 RAYCHELLE A. TASHER, ESQUIRE
 On behalf of the United States
 17
 18
 19 ALSO PRESENT VIA ZOOM VIDEO CONFERENCE:
 20
 21 JAMES CASSEL, Liquidating Trustee
 22
 23 CORINNE AFTIMOS, Law Clerk
 24
 25 JACKIE ANTILLON, Courtroom Deputy and
 ECRO - Electronic Court Reporting Operator
 JORDAN ZORNS, Judge Mark's Intern
 BRIANNA JOSEPH, Judge Mark's Intern

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1 THE COURT: Let's get started on our
 2 1 Global hearing. The -- you may need to unmute your
 3 microphones. I'm going to actually go in the order that I
 4 have folks listed. The only attorney I don't see is
 5 Michael Pineiro.
 6 Mr. Jones -- let me ask Jason Jones, is he
 7 the one that's going to be presenting the argument or do
 8 you know what's going on?
 9 MR. JONES: Yes, Your Honor. Mr. Mays is
 10 going to be presenting the argument on the motion to
 11 dismiss, and Mr. Pineiro will be handling the renewed
 12 motion to stay proceedings.
 13 THE COURT: Okay. Do you want to text him
 14 and find out why he's not on?
 15 MR. JONES: Sure, Your Honor. I'll do that
 16 right now.
 17 THE COURT: Okay. So let me call roll
 18 really in the order that it came -- came to me in the list
 19 from my calendar clerk. So when I call your name, if
 20 you could just announce your -- your full appearance.
 21 Mr. Duffy.
 22 MR. DUFFY: Your Honor, Jerrob Duffy for the
 23 United States, intervenor.
 24 THE COURT: Well, Mister -- Mister --
 25 Mr. Jones is on mute for the time being.

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1 Mr. Mays.
 2 MR. MAYS: Present, Your Honor, of Marcus
 3 Neiman Rashbaum & Pineiro, on behalf of Mr. Ruderman.
 4 THE COURT: Mr. Moses.
 5 MR. MOSES: Good afternoon, Your Honor.
 6 Glenn Moses, M-o-s-e-s, for the liquidating
 7 trustee.
 8 THE COURT: Mr. Dodd.
 9 MR. DODD: Good afternoon, Your Honor.
 10 John Dodd, D-o-d-d, general counsel to the
 11 liquidating trustee.
 12 THE COURT: Mr. Moskowitz.
 13 MR. MOSKOWITZ: Here, Your Honor. Thank
 14 you.
 15 THE COURT: Go ahead and announce your
 16 appearance.
 17 MR. MOSKOWITZ: Appearance on behalf of the
 18 plaintiffs, class action plaintiffs in this matter,
 19 Your Honor.
 20 THE COURT: And Mr. Budwick.
 21 MR. BUDWICK: I had to unmute myself, I
 22 apologize.
 23 Michael Budwick of Meland Russin & Budwick,
 24 along with co-counsel, Adam Moskowitz, on behalf of
 25 Ms. Foster.

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1 THE COURT: Okay, and Mr. Cassel.
 2 MR. CASSEL: I'm the liquidating trustee.
 3 THE COURT: Okay. So two -- two of the
 4 names -- some of the names you may see on your screen,
 5 Jackie Antillon is my courtroom deputy; Corinne Aftimos,
 6 my law clerk; Jordan Zorns and Brianna Josephs, summer
 7 interns.
 8 We have Jeffrey Neiman, and I'm not sure who
 9 that is. Mr. Neiman, do you want to announce who you are?
 10 MR. PINEIRO: Your Honor, this is
 11 Michael Pineiro. It's possible that initially I popped in
 12 on the Zoom meeting under my partner's account, but I
 13 changed the name.
 14 So it's Michael Pineiro and Jason Mays of
 15 Marcus Neiman Rashbaum & Pineiro, who are here on behalf
 16 of Mr. Ruderman, I apologize for that.
 17 THE COURT: Okay, and I didn't mean to scare
 18 or was -- we had a Mr. Neiman, but I don't see that name
 19 any longer.
 20 All right.
 21 MS. TASHER: And -- and Your Honor --
 22 THE COURT: Yes.
 23 MS. TASHER: -- this is -- this is -- this
 24 is Raychelle Tasher, Assistant United States Attorney, on
 25 behalf of the United States in this matter, intervenor.

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1 THE COURT: Okay, and that's R-a-y ---
 2 MS. TASHER: I'll be (inaudible).
 3 THE COURT: R-a-y-c-h-e-l-l, we have that
 4 listed in. I also believe we had a last minute, so to
 5 speak, request from Elizabeth Young.
 6 Are you on the line, as well? Okay, maybe
 7 not.
 8 So there's three matters on for today, a
 9 motion to intervene and for a 180 day stay by the
 10 United States; a motion to dismiss by the defendant,
 11 Mr. Ruderman; and a renewed motion to stay filed by
 12 Mr. Rudeman -- Ruderman.
 13 It would be my intention to take up the
 14 renewed motion to stay, which certainly in part is based
 15 on the Government's motion, but if the renewed motion to
 16 stay the entire proceeding is granted, then I believe that
 17 would resolve the Government's motion, as well.
 18 Just -- just some ground rules so we don't
 19 have too many attorneys, but let me -- let me understand
 20 who's going to argue what. So who -- who's going to argue
 21 the motion for stay, is that Mr. Pineiro or Mr. Mays?
 22 MR. PINEIRO: I will be arguing that,
 23 Your Honor.
 24 THE COURT: Okay, and who's going to argue
 25 on behalf of the plaintiffs?

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1 MR. BUDWICK: Your Honor, I will, and
 2 Mr. Moskowitz will then present the motion to dismiss, the
 3 response.
 4 THE COURT: Okay, and then Mr. Mays, I think
 5 it was said earlier, you're going to do the motion to
 6 dismiss?
 7 MR. MAYS: That's correct, Your Honor.
 8 THE COURT: Okay. All right. So I've read
 9 the papers on the -- on the renewed motion to stay.
 10 Let me -- let me -- let me start with
 11 Mr. Pineiro as to a couple of things. One was the
 12 argument in the response that if you need discovery, it
 13 should be asserted in your response to the summary
 14 judgment under Rule 56(d), and then the other point I'd
 15 like you to respond to would -- would be the request, the
 16 connection isn't directly clear, but the request that
 17 Mr. Ruderman turn over control of the artwork as a
 18 condition to the stay.
 19 So, Mr. Pineiro.
 20 MR. PINEIRO: Yes. Thank you, Your Honor.
 21 Michael Pineiro, again, for the record, on behalf of
 22 defendant, Carl Ruderman.
 23 Your Honor, our -- our motion -- our renewed
 24 motion to stay is essentially premised on the fact that
 25 the Government is seeking to stay just discovery. We were

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1 content to obtain the discovery that we were seeking in
 2 defending the case in summary judgment.
 3 When the Government intervened, at that
 4 point we were faced with a dilemma, which is basically
 5 accept their position, whereby discovery is stayed, we're
 6 not afforded any access to the discovery, and the
 7 plaintiff would maintain their action and try to prosecute
 8 and obtain a judgment.
 9 Now, as we've said in our papers, that's
 10 unprecedented. There's not one case that they've
 11 submitted or that we found that would support that type of
 12 procedure.
 13 Addressing more specifically the issues that
 14 you've raised, the plaintiffs simply misstate the law
 15 regarding Rule 56(d). As a -- as an initial matter,
 16 Judge, we're not in the middle of Rule 56(d) briefing.
 17 You -- you've abated that.
 18 So right now what we're weighing is,
 19 frankly, within your discretion the appropriate scope and
 20 tenor of a stay of this case, and whether it's appropriate
 21 to stay it sort of half baked, just discovery, or a full
 22 stay, which is consistent with what all other courts
 23 typically do in these scenarios, and frankly, it's
 24 consistent with what the Government typically requests in
 25 these scenarios where it seeks to intervene.

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1 So as an initial matter, I disagree with the
 2 plaintiff's position that somehow we needed to have
 3 submitted an affidavit. We would do that if there was
 4 Rule 56 briefing, but you specifically abated that.
 5 More importantly, they're actually
 6 completely incorrect under the law. They've submitted, in
 7 my view, incorrect law to you on that point. Under
 8 11th Circuit law it's well established that you don't need
 9 to submit an affidavit when you're seeking a continuance
 10 under Rule 56(d).
 11 The 11th Circuit is very clear on this. We
 12 cite a case in our -- in our papers, Your Honor, it's the
 13 Snook case, and it's an 11th Circuit case, and it says,
 14 and I'm quoting, "In this Circuit, a party opposing a
 15 motion for summary judgment need not file an affidavit
 16 pursuant to Rule 56 of the Federal Rules of Procedure in
 17 order to invoke the protection of that rule.
 18 This Court has concluded that the written
 19 representation by plaintiff's lawyer, an officer of this
 20 Court, is in the spirit of Rule 56 under the
 21 circumstances. Form is not to be exalted over fair
 22 procedures."
 23 There are dozens of cases on Westlaw where a
 24 Federal District -- where the Southern District of Florida
 25 District Court has applied that ruling. One example is

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1 the Sapiro vs. Cajova case (phonetic), that's 2013 Westlaw
 2 12106190, where Judge Williams, District Court Judge
 3 Williams, says the Courts of this circuit do not require
 4 an affidavit from a non-moving party opposing a summary
 5 judgment motion under Rule 56(d). A court may deny or
 6 defer a motion for summary judgment under Rule 56(d) so
 7 long as the non-moving party meets its burden of calling
 8 to the District Court's attention any outstanding
 9 discovery.
 10 Now, we weren't required to do that here,
 11 Judge, because again we're not in Rule 56 briefing, but to
 12 be very clear, our motion -- our response to the motion to
 13 stay discovery and our renewed motion, it's the same
 14 paper, points out the very -- it meets that burden.
 15 We very specifically point out the four
 16 depositions that we want to take. Two of those are of
 17 Mr. Heide -- all of those four individuals, Your Honor,
 18 indisputably have highly pertinent evidence regarding the
 19 motion for summary judgment filed by the plaintiffs. No
 20 one here disputes that. There was no dispute about that
 21 in the plaintiff's papers, and the Government doesn't
 22 dispute it.
 23 What's been ---
 24 THE COURT: You said -- hold on. You
 25 said -- you said four. I had -- I had written down in my

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1 notes three in terms of the parties that pled and what
 2 they said in their -- in their statements. Heidi, Atlas
 3 and Schwartz. Is the -- is the fourth also somebody who's
 4 pled guilty and I didn't see it --
 5 MR. PINEIRO: No.
 6 THE COURT: -- or it's a different person?
 7 MR. PINEIRO: No, Your Honor. The fourth
 8 person is Eric Alexander. We do reference him in our
 9 papers. He is the former CFO of 1 Global. To my
 10 knowledge, he has not pled guilty, but he was -- there's
 11 no substantive testimony from him in the SEC case.
 12 I thought we were reasonable here. We're
 13 not seeking to re-depose people who have testified, given
 14 depositions in the SEC case. The four individuals here,
 15 three of them have pled, and the fourth invoked the
 16 Fifth Amendment in the SEC case. So those are the four
 17 people we seek to depose, two of which, Your Honor, the
 18 plaintiffs exclusively rely on the -- on the factual
 19 proffer in their plea agreements in support of summary
 20 judgment.
 21 So if you look at Pages 3 and 4 of the
 22 plaintiff's motion for summary judgment, that's Docket
 23 Entry 127, one of the central issues in this case --
 24 actually, the central issue is was Mr. Ruderman involved,
 25 actually involved, or was he -- did he know of the sale of

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1 the 1 Global notes without a registration? That's the key
 2 factual issue, setting aside some of the legal
 3 circumstances here.
 4 On that issue on which they seek summary
 5 judgment, a 200 plus million dollar summary judgment, the
 6 only evidence cited by the plaintiff is the plea agreement
 7 of Mr. Atlas and Mr. Heide, and what they're suggesting to
 8 you is you take that as true, and that Mr. Ruderman not be
 9 able to depose those individuals.
 10 Again, there's -- there's simply no case law
 11 that permits that. I have not found one case where a
 12 defendant is not provided access to discovery, and that a
 13 court can move forward with summary judgment, and they
 14 haven't found a case either.
 15 Their papers, they filed a response to the
 16 Government's motion, and then a response to our renewed
 17 motion, and they haven't provided you with one case
 18 supporting what they're asking for.
 19 Conversely, I've cited to you a litany of
 20 cases where -- where the 11th Circuit is very clear, if a
 21 District Court proceeds to summary judgment and enters a
 22 summary judgment order, it's reversible in this very
 23 circumstance where you're -- where you're trying to deny
 24 discovery to the non-movant.
 25 I'm not going to belabor the point on that,

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1 our brief extensively addresses the issue and the only
 2 real rebuttal by the plaintiffs was this Rule 56(d)
 3 procedural rebuttal, which is invalid. Under the law it's
 4 completely incorrect.
 5 On the issue of -- and I'm -- I'm willing,
 6 Your Honor, to address any other ---
 7 THE COURT: That's fine. If you want to
 8 briefly comment on the artwork.
 9 I was, in part, just curious as to what the
 10 status was of the trustee's efforts to get the artwork and
 11 what Mr. Ruderman's current degree of control is, if it --
 12 if that's known or acknowledged, but go ahead.
 13 MR. PINEIRO: So, Your Honor, what I can
 14 tell you is the -- all of Ruderman's assets were frozen in
 15 the SEC case, and so my understanding of the art trust,
 16 and again, Mr. Ruderman is not the trustee or a
 17 beneficiary, so I am not an expert on the art trust.
 18 My understanding is that the art trust
 19 encompasses certain artwork and other personal property.
 20 My understanding is that when 1 Global was put into
 21 receivership or not 1 Global, I'm sorry, when it was --
 22 when it was -- when it was taken over by the -- by the
 23 debtor-in-possession, Greenberg Traurig, they basically, I
 24 think at that point, relocated a lot of the artwork that's
 25 subject to that trust. I believe it's in a storage

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1 facility now.
 2 Now, there may be other pieces of artwork
 3 encompassed by that trust in Mr. Ruderman's personal
 4 residence, which is for sale right now -- the residence is
 5 for sale, not the art, I don't know. I don't know about
 6 that.
 7 What I can tell you is the request here made
 8 by the plaintiff is confounding to me. I have never seen
 9 this done. Again, they are requesting that you enter a
 10 stay -- that -- that if you enter a stay, that you enter
 11 essentially a motion without any proper briefing -- you
 12 enter an order without any proper briefing requiring
 13 Mr. Ruderman to account for certain property and to turn
 14 it over.
 15 Now, I'm not a bankruptcy lawyer,
 16 Your Honor, but I do litigate in these courts, in the
 17 federal courts a lot, and what they're essentially asking
 18 for is a positive injunction without the benefit of
 19 actually filing a motion under the federal rules for that.
 20 I'm not sure the plaintiffs have standing to make that
 21 kind of an argument.
 22 I understand the trustee in the bankruptcy
 23 matter may have some standing on that, and I'm not sure
 24 who they would direct that to, whether it's to
 25 Mr. Ruderman or to Mr. Steven Schwartz, who at one point

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1 was the trustee of that trust, but that is a meritless
 2 request. It's procedurally improper in various ways and
 3 again, I don't believe that they have standing.
 4 I think if the Court were to even
 5 contemplate a ruling on that sort of ad hoc request, that
 6 it be done with appropriate briefing under the federal
 7 rules based on what they're seeking, which is an
 8 extraordinary remedy. They're asking for a positive
 9 injunction requiring Mr. Ruderman to take affirmative
 10 steps where he gathers property and turns it over.
 11 Again, I -- that didn't -- that didn't even
 12 happen in the SEC case, Your Honor, and again in the ---
 13 THE COURT: Well, we can -- we can leave it
 14 at that for now.
 15 Mr. Budwick.
 16 MR. BUDWICK: Thank you, Your Honor.
 17 Let -- let me address the points that
 18 Mr. Pineiro raised, and let me also maybe talk about what
 19 the stay would mean.
 20 It's difficult to understand what is exactly
 21 the length of the ultimate stay Mr. Ruderman would be
 22 seeking. He's seeking a stay temporarily of the adversary
 23 proceeding, but that's presumably until he's indicted.
 24 If he's indicted, he would then seek another
 25 stay. He would then seek a stay through trial, through

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1 sentencing, through the exhaustion of appeals. So the
 2 stay is not for a few months, the stay that's being
 3 requested likely is a multi-year stay, which he would
 4 retain control of this artwork.
 5 And just quickly in terms of the artwork,
 6 the statement just made was it was uncertain as to who
 7 owns the artwork in the house. I know who owns the
 8 furniture and the artwork in my house, and I believe
 9 Mr. Ruderman likely knows who owns the artwork in his
 10 house.
 11 And if it's his artwork, and he has the
 12 ability to dispose of it, then that's an issue of great
 13 concern, especially if he's going to be going to prison at
 14 some point in the near future, and artwork is one of the
 15 more easily laundered assets, and I'll come back to the
 16 artwork.
 17 Our view is Rule 56(d) provides exactly for
 18 this situation, and -- and to be very clear, we do not
 19 rely exclusively on Mr. Ruderman's invocation of the Fifth
 20 or the pleas that are stipulations with the U.S.A. under
 21 oath that were filed with -- publicly.
 22 If you look at the motion for summary
 23 judgment, which is ECF 128, at Page 5, we also cite to the
 24 declaration of Lyn Sohun, the Global chief compliance
 25 officer, and head of financial planning. She talks about

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1 how Ruderman gave all the directives at 1 Global and
 2 totally ran the company with an autocratic style of
 3 leadership.
 4 You also have an excerpt of Michael Latson,
 5 who is the 1 Global financial analyst who explained that
 6 while Ruderman was the chairman of 1 Global, he
 7 effectively acted also as the CEO.
 8 So there's a -- there's a mountain of
 9 evidence that Mr. Ruderman was the control person for this
 10 entity, and there's no evidence to the contrary, and under
 11 Rule 56(d), I think the approach Mr. Pineiro is taking is
 12 one that a criminal defendant would take. In -- in
 13 criminal court, a defendant can sort of just sit there and
 14 let the Government put on its case, and watch the case and
 15 proceed to trial, and that's fine in a criminal context.
 16 In the civil context it's different. Once
 17 the plaintiff comes forward with the burden of proving the
 18 evidence to prove his or her case, then it's up to the
 19 defendant to do something to avoid entry of summary
 20 judgment to show that there is a material issue of
 21 disputed fact.
 22 You have to cite to a witness, an affidavit,
 23 a transcript, a document, an e-mail, something. There has
 24 been nothing, and we have asked for the proffer that
 25 Mr. Pineiro indicated an attorney can provide.

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1 And let's assume that an attorney can
 2 provide the requisite proffer, I personally have asked
 3 Mr. Pineiro by e-mail multiple times, give me your
 4 proffer. Tell me if you could take a deposition, who is
 5 it that you would depose, and what you reasonably believe
 6 in good faith this person would say that would support the
 7 notion that summary judgment should not be entered? And
 8 instead the response is, we're entitled to test the
 9 evidence.
 10 That's not how Rule 56 works. They have to
 11 identify what is it that they would actually uncover
 12 during the course of discovery. So there can be a
 13 document, an e-mail, a contract, a letter, something, but
 14 they have yet to identify any of those things.
 15 So effectively what they're seeking is a
 16 multi-year stay where they have no defendants, have
 17 proffered no defendants -- proffered no defenses, have no
 18 affidavits, have not complied with Rule 56(d), and then
 19 are going to retain this artwork, which they claim they
 20 don't even know who owns, very vague statements,
 21 respectfully, from Mr. Pineiro as to what artwork is in
 22 the house, is it held by the trust, is it held by
 23 Mr. Ruderman, personally, what's the value of the artwork?
 24 We've been asking those questions actively,
 25 and we can't take a 2004 Exam, and neither can the

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1 trustee, because Mr. Ruderman claims that he can't sit for
 2 an exam because of Coronavirus and -- and other health
 3 issues, even though today examinations are taking place
 4 remotely through Zoom all the time.
 5 So we're being left in the dark while
 6 there's an indefinite stay, and that's simply not fair
 7 to the -- to the victims in this case.
 8 We think the appropriate measure is for
 9 Mr. Ruderman to file a response to the summary judgment
 10 motion, to set forth his basis under Rule 56(d), whether
 11 it's an affidavit of anyone on the planet who has personal
 12 knowledge that can show that there's a fact that shows
 13 that summary judgment should not be entered, or
 14 Mr. Pineiro can file under Rule 11 a written proffer that
 15 suggests that there is a fact that he seeks to uncover.
 16 And I'm not suggesting that Mr. Pineiro
 17 would violate Rule 11, it's the opposite, I know he would
 18 comply with it, and therefore, it would not be possible
 19 for him to provide that written proffer.
 20 And so we're entitled to summary judgment,
 21 the notion of this discovery is really just a side show,
 22 and we would ask the Court to reinstate the summary
 23 judgment briefing.
 24 If for any reason there is a stay, and we're
 25 concerned about how many years that stay would last, then

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1 certainly we believe that this Court has the jurisdiction
 2 and the discretion to impose reasonable conditions.
 3 And to say that there's artwork which he
 4 doesn't own in a house that he's selling or an apartment
 5 that he's selling, and that that can't be turned over to a
 6 trustee to put in a storage location, we think is -- is
 7 frivolous.
 8 There's no basis for him to retain that sort
 9 of asset, which can be easily laundered, when there is a
 10 stipulation with the Government that has been filed under
 11 penalty of perjury that states, from the former trustee,
 12 that this was a sham trust that was set up to deceive and
 13 defraud Mr. Ruderman's creditors.
 14 Thank you, Your Honor.
 15 THE COURT: So just some clarification
 16 factually on what you know about the artwork.
 17 Is there some artwork that the trustee has
 18 possession of, and Mr. Dodd or Mr. Moses I guess could
 19 jump in, and other artwork that would not be an asset of
 20 the estate, and you could only get if you get a judgment
 21 against Mr. Ruderman?
 22 MR. BUDWICK: I would like to defer to
 23 Mr. Dodd if I could, but this is my understanding from
 24 having spoken -- and I'm not sure if it was Mr. Dodd or
 25 one of his colleagues, is that there was some artwork that

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1 was in the physical premises of the corporation, and
 2 that's being held and maintained by the liquidating
 3 trustee, and that separate and apart from that, there is
 4 artwork in the residence of Mr. Ruderman, and that is
 5 either held by himself individually in his own name or
 6 it's held by the art trust, for which the former trustee
 7 has stated it was a sham.
 8 THE COURT: Mr. Dodd, anything to add on
 9 that point?
 10 MR. DODD: No, Mister -- Mr. Budwick's
 11 description is correct, other than to add that the trustee
 12 is maintaining the art that was at the 1 Global premises
 13 pursuant to both approval from the Bankruptcy Court and
 14 the District Court, but I think subject to further --
 15 further orders from both courts as to actually how to
 16 dispose of it.
 17 So it's more like just a custody arrangement
 18 right now, than any determination as to ownership.
 19 THE COURT: Okay. We're skipping around a
 20 little bit, but since we're talking about the artwork, and
 21 I know there was some discussion at the last hearing or
 22 the hearing in March on the discovery in the main case,
 23 the -- the order entered in the main case said it's
 24 without prejudice to the trustee seeking to depose
 25 Mr. Ruderman in a lawsuit or adversary proceeding he may

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1 initiate in the future.
 2 Remind me, Mr. Moses, I think it was you
 3 that -- was there some discussion of an adversary
 4 proceeding involving the artwork, is that one of the
 5 proceedings that we may have been referring to in that
 6 order?
 7 MR. MOSES: Thank you, Your Honor. I think
 8 that was Mr. Battista who was there, and I -- and I don't
 9 recall if there was a discussion particularly with respect
 10 to commencing an adversary vis-a-vis the artwork.
 11 Clearly we have a statute of limitations
 12 coming up on estate causes of actions, and that's in about
 13 60 days, and so we'll be doing what we need to do with
 14 respect to that, including with respect to Mr. Ruderman.
 15 THE COURT: Okay. Who was -- I wanted to
 16 ask the -- the -- the Government a question or two.
 17 Who -- who should I be directed to, would that be
 18 Mr. Duffy or ---
 19 MR. DUFFY: Your Honor, Jerrob Duffy for the
 20 United States.
 21 THE COURT: Okay. So as -- before I go back
 22 to Mr. Pineiro, as to the length of a stay, at least as it
 23 relates to the discovery that the Government was concerned
 24 about, walk me through what the sequence would be.
 25 Mr. Budwick is concerned that until there's

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1 a trial, if there's a trial and all appeals have been
 2 exhausted, the stay might be in place, but at what point
 3 in the proceedings, if there is a sooner point, would the
 4 Government no longer have objections to the depositions of
 5 some of your witnesses?
 6 MR. DUFFY: Your Honor, we -- we are mindful
 7 of the interests of the parties to this litigation. We
 8 asked for six months because we wanted to ask for what we
 9 thought was the least amount of time, at least initially,
 10 that we would, if you will, need to preserve our
 11 interests.
 12 But we would -- we would -- we would
 13 probably be looking to ask the Court to continue a stay
 14 perhaps up until the time of -- of a trial, if there were
 15 one. I don't want to, you know, say in this proceeding or
 16 otherwise, that we know precisely what's going to happen
 17 with respect to our criminal investigation. It's active,
 18 it's ongoing, it pertains to one or more individuals.
 19 As the Court has already heard, and as the
 20 filings show, there have been several individuals who have
 21 been charged publicly, and I can just reference -- I can
 22 just represent to the Court that it is active and ongoing.
 23 If the Court were concerned at some point
 24 that our process was not sufficiently expeditious to
 25 balance the interests, we could provide an ex parte report

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1 to the Court if requested, to provide the Court with
 2 specific information about the status of our
 3 investigation, but we -- we are prohibited from doing that
 4 publicly.
 5 So the answer to your question directly is
 6 perhaps up until the time of a trial, if there were one,
 7 but the awkward component of that question, Your Honor, is
 8 I can't say at this point exactly what the next steps will
 9 be in the criminal investigation.
 10 THE COURT: Okay, and I -- well, I assume
 11 the Government's concerns about deposing these witnesses
 12 would end if there was an indictment or information and
 13 plea; right?
 14 MR. DUFFY: All three of those things, if
 15 there were an indictment, information and plea with
 16 respect to Mr. Ruderman, Your Honor --
 17 THE COURT: Yes.
 18 MR. DUFFY: -- is that what you're referring
 19 to? If Mr. Ruder ---
 20 THE COURT: Or if it includes (inaudible.)
 21 MR. DUFFY: If Mr. Ruderman were to be
 22 charged in a criminal case, and if he were to accept
 23 responsibility in connection with that, and/or be
 24 adjudicated guilty, I do not see -- I don't see the
 25 interests that we have represented in our motion for stay

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1 as being the same.
 2 So it's a little bit hard for me to say
 3 exactly, but -- but so reading the tea leaves, Your Honor,
 4 if that were to take place, then I -- I would expect that
 5 our interests would -- we would no longer be asking for
 6 the type of stay we have asked.
 7 And I will say, just to address a related
 8 point that was raised, we asked for a stay of discovery in
 9 part because we are mindful that there are a variety of
 10 claims that this Court is attempting to adjudicate, and
 11 interests it is attempting to balance, and we were asking
 12 for the, if you will, most limited, the most limited
 13 intervention that we -- that we could.
 14 I -- I have in other matters asked for a
 15 stay of the entire proceedings. I have in other matters,
 16 civil and administrative, asked for only a stay of -- of
 17 certain specific discovery that was ongoing.
 18 So there are, from time to time, depending
 19 on the facts and circumstances, we, on behalf of the
 20 United States, in a situation like this where there might
 21 be a parallel criminal or administrative process at the
 22 same time, we might, you know, not always take the same,
 23 you know, course of action.
 24 But -- but here, Your Honor, we would be --
 25 if -- if -- if for some reason Mr. Ruderman were charged

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1 criminally and he were to accept responsibility, then that
 2 would -- that would probably change the interests that
 3 we've -- that we've advanced.
 4 THE COURT: And once it went to trial,
 5 presumably, the -- the prospect of an appeal wouldn't --
 6 wouldn't affect your concerns, I wouldn't -- I wouldn't
 7 suspect. If -- if you've already gotten the testimony,
 8 your concerns about inappropriate pretrial or
 9 pre-indictment discovery would be -- be over at that
 10 point.
 11 MR. DUFFY: That's right, Your Honor, or
 12 just depending on the circumstances. I mean, I would -- I
 13 would say, Your Honor, that during a criminal -- if there
 14 were a criminal charge -- a criminal case, any defendant,
 15 whether it be Mr. Ruderman or anybody else that was
 16 charged, would have certain discovery rights, criminal
 17 discovery rights. There are the ability to call
 18 witnesses, to obtain documents from third parties and so
 19 forth.
 20 It's just not as broad as in the civil or
 21 the bankruptcy process, and it's -- it's not typically --
 22 and the standard is different. It's essentially for
 23 trial, I mean, as opposed to reasonably calculated to lead
 24 to the discovery of admissible evidence, it was just the
 25 more broad civil standard.

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1 THE COURT: All right. I want to come back
 2 to Mr. Pineiro.
 3 The -- I -- I agree with you on the artwork.
 4 I don't find that to be an appropriate condition of -- of
 5 a stay, and -- and I agree with you as a matter of law
 6 that an affidavit isn't required under Rule 56 to present
 7 argument that you need more time for discovery, but why
 8 shouldn't I require at least some proffer that doesn't
 9 violate Mr. Ruderman's Fifth Amendment privilege as to
 10 what facts you believe would be uncovered through
 11 additional discovery that would create a genuine issue of
 12 fact as to whether he was a control person or if I'm not
 13 using the precise legal term, I think you know what I'm --
 14 I'm requesting.
 15 MR. PINEIRO: Your -- Your Honor, yeah,
 16 thank you.
 17 The -- the first thing that I would say is
 18 the first reason why that's not a proper burden being
 19 placed on Mr. Ruderman here is because of the
 20 circumstances here. We haven't been engaging in year-long
 21 discovery, we haven't taken 12 depositions, and I'm asking
 22 you to continue summary judgment because I need to
 23 take two more, it's the opposite.
 24 We haven't taken any depositions. The first
 25 moment that I attempted to set four -- four indisputably

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1 highly relevant witnesses for deposition, the Government
 2 intervened, and has sought to stay that. And so all of
 3 the case law says that when you don't afford adequate time
 4 for any discovery, any summary judgment order that you
 5 enter that's adverse to Mr. Ruderman is reversible.
 6 And, again, I mean, you can find a dozen
 7 cases on this point, Your Honor. In our brief, let me
 8 just turn to the page, at Page 11 and 12, we cite to
 9 multiple 11th Circuit decisions that would apply here,
 10 where summary judgment was entered before any access to
 11 discovery was taken -- was provided to the non-movant, and
 12 where there was pending discovery requests.
 13 So this isn't -- this isn't the typical
 14 circumstance where parties have been engaging in discovery
 15 for several months and somebody is asking for more time.
 16 I'm asking for Mr. Ruderman to be afforded his most basic
 17 due process right in a civil case, that's Rule 26
 18 discovery.
 19 Okay. Mister -- Mr. Budwick points out that
 20 this isn't a criminal case. I know that. I'm a civil
 21 litigator, that's generally all that I do, and I'm very
 22 well aware of the burdens of summary judgment, and what I
 23 say to that is, the 11th Circuit has made very clear
 24 multiple times, multiple cases, you cannot proceed to
 25 summary judgment.

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1 Moreover, Your Honor, the 11th Circuit has
 2 also said that where a movant, someone asking for summary
 3 judgment, attaches affidavits to the motion for summary
 4 judgment, the non-movant has to have the opportunity to
 5 depose those people if they seek to, and that's what we're
 6 doing here.
 7 In the Jones case, that's Jones vs. City of
 8 Columbus, that's a 1997 11th Circuit case, 120 F -- F.3d
 9 248, at Page 254, the 11th Circuit reversed a summary
 10 judgment where the plaintiff never had the opportunity to
 11 depose the individuals whose affidavits were offered in
 12 support of a motion for summary judgment.
 13 So what Mr. Budwick is attempting to do
 14 here, is essentially completely invert the Rule 56
 15 standard. He is seeking to -- he moved for summary
 16 judgment before I get any access to any discovery. He
 17 wants to prevent me from deposing people on whose factual
 18 proffers he's relying on, and then he's telling me, well,
 19 explain -- he's telling the Court, well, they have to
 20 explain to you what -- what these depositions might show.
 21 What I can tell you is I don't have to rely
 22 on a plea agreement. A plea agreement is a document
 23 drafted by a lawyer from the Department of Justice based
 24 on a factual proffer made by a defendant. That is not all
 25 of the relevant testimony, and there can certainly be

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1 conflicting testimony from those very witnesses, and what
 2 Mr. Budwick wants to do is in contravention of
 3 11th Circuit law, deny me the ability to take those
 4 depositions because he wants to move quickly to a
 5 judgment.
 6 I understand, Your Honor, I'm a plaintiff's
 7 lawyer in some cases, but expediency doesn't trump due
 8 process, the 11th Circuit has made that clear, and for
 9 that reason, while he argued, Mr. Budwick didn't cite to
 10 you one case supporting the order he's asking you to
 11 enter. Meanwhile, there's a -- there's a trove of cases
 12 supporting what it is that we're asking here.
 13 So -- so, Your Honor, with that, I think
 14 what they're asking you to do is -- is -- is contravene
 15 11th Circuit law. What they're asking for you -- asking
 16 you to do is not consistent with what District Courts do
 17 in this circumstance.
 18 We want to take these depositions and we
 19 have -- we have to have the ability to take these
 20 depositions, Your Honor, if we're being asked to defend a
 21 summary judgment motion or go to trial in a case where
 22 they're seeking rescissionary damages of over
 23 \$200 million.
 24 I have not in my 13 years as a -- as a
 25 lawyer, including the year when I clerked on the

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1 District Court, seen a case where the Court proceeded to
 2 summary judgment before the defendant had access to any
 3 discovery. It's unprecedented.
 4 THE COURT: Let's -- let's put it into
 5 context, though. This is not a defendant in a summary
 6 judgment motion that is unaware without discovery of facts
 7 that may -- or of testimony that may create genuine --
 8 genuine issues of fact.
 9 This is the -- the individual who, by many
 10 accounts, ran the company, who is disputing at this point
 11 that he was a culpable control person. He knows what role
 12 he played. If he thinks that somebody is going to
 13 testify, to provide information that showed him playing a
 14 lesser role, a legally insufficient role for culpability
 15 under the -- under the claims, why can't he proffer that
 16 without violating the Fifth Amendment?
 17 Why shouldn't he proffer that there is some
 18 plausible defense here factually, not just, well, the
 19 plaintiff needs to prove this. They're relying in part on
 20 guilty pleas where the -- to make some sort of analogy
 21 here, where, you know, Heide and -- and Atlas and Schwartz
 22 have said, yeah, Mr. Ruderman was driving the car that ran
 23 over all these investors. Well, Ruderman knows whether he
 24 was driving the car or not. I mean, why can't he proffer,
 25 no, I wasn't driving?

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1 Now, it's not -- under the securities law
 2 it's not quite that black and white, but -- but putting
 3 again more -- more on point, why can't, and why shouldn't
 4 I require some proffer that he believes through discovery
 5 he will show that there is a genuine issue of fact?
 6 Why does he need -- in other words, and then
 7 I'll -- I'll let you respond. Why does he need the
 8 testimony of these people to be able to assert at least by
 9 proffer that his role was insufficient to have him legally
 10 culpable as a control person?
 11 MR. PINEIRO: Your Honor, thank you for your
 12 questions.
 13 I -- I think your question is sort of
 14 harking back to the reason why we initially moved for a
 15 stay. Mr. Ruderman is severely prejudiced here because as
 16 confirmed by the Government, this case has -- is virtually
 17 identical or very similar, has extreme overlap with a
 18 criminal investigation into Mr. Ruderman.
 19 So I would be very hesitant to make any
 20 potential factual proffer that could be viewed as -- as
 21 coming from my client, given that he has a Fifth Amendment
 22 right, and given the circumstances that he's -- that he's
 23 faced with here, and that's why we filed the motion to
 24 stay in the first circumstance.
 25 We expressed to the Court the impossibility

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1 of Mr. Ruderman's situation. He cannot properly defend
 2 himself against these claims because he cannot testify on
 3 his behalf given the criminal investigation.
 4 Now, it's even worse. Now we're actually
 5 trying to get deposition testimony from the two
 6 individuals whose testimony pertain to whether he was a
 7 control person regarding these -- the offering of the
 8 notes, and we can't -- and it's being suggested that we
 9 shouldn't be able to take those either.
 10 And so on the issue of a factual proffer by
 11 Mr. Ruderman, we're in a very sensitive circumstance, and
 12 all the case law says is that the criminal proceedings and
 13 those interests sort of trump whatever is happening in
 14 a -- in a civil proceeding, no matter what Mr. Budwick
 15 might say.
 16 That's why, for example, in the In Re:
 17 Ahead case, I think that was a 1987 bankruptcy case, the
 18 Court -- you know, the Court basically in this very
 19 circumstance said the defendants seeking a stay will not
 20 be burdened for we are staying the civil proceeding, as
 21 well, and they will be afforded complete discovery at the
 22 time they must defend this proceeding.
 23 So, you know, in that case, the New York
 24 court said it would be a more efficient use of judicial
 25 time and resources to have the criminal case proceed

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1 first, for many of the issues here will be disposed of in
 2 that proceeding. Whereas, if we proceeded first here,
 3 much permanent information would probably be withheld, and
 4 that's the very problem I have here, Your Honor.
 5 That's -- that's -- that's the first point that I would
 6 raise.
 7 The second one that I would raise,
 8 Your Honor, is -- so the issue here is not just whether
 9 Mr. Ruderman is the control person. Nobody here disputes
 10 the standard.
 11 So under Section 15 of the Securities Act,
 12 Mr. Ruderman can be held liable as a control person for
 13 the sale or offering of securities without a registration
 14 statement unless he had no knowledge of or reasonable
 15 ground to believe in the existence of the facts by reason
 16 of which the liability of the control person is alleged to
 17 exist.
 18 That's Section -- that's 15 USC 77o, and the
 19 way that courts have interpreted that provision,
 20 Your Honor, is requiring proof that he was a culpable --
 21 culpable participant in the actual violations.
 22 So the -- the facts here -- the summary
 23 judgment really comes down to was Mr. Ruderman aware, was
 24 he involved in the actual decision making regarding the
 25 issuance of or the sale of the notes without a

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1 registration statement, and so what that -- what that
 2 really relates to then is these opinion letters.
 3 There were certain opinion letters that were
 4 provided by Mr. Atlas' law firm. Those opinion letters
 5 provided that the notes that were issued by 1 Global were
 6 not securities because they were short-term, nine-month
 7 notes, and basically what Mr. Heide and Mr. Atlas say in
 8 their factual proffers as cited by the plaintiffs is,
 9 those opinion letters were false. They were fraudulent.
 10 Mr. Ruderman knew that.
 11 Now, those opinion letters speak for
 12 themselves. They're certainly evidence that I could
 13 submit to the Court, and -- and our position is we're
 14 entitled to depose those two individuals to -- to
 15 understand the basis of why they're saying that. That's
 16 really what this comes down to, I -- I believe.
 17 And -- and let's be very clear, again, if
 18 you just reviewed Document 127, the motion for summary
 19 judgment, the only evidence that they submit on this point
 20 are those factual proffers, that's it, Mr. Heide's and
 21 Mr. Atlas' factual proffers.
 22 And so to answer your question about why I
 23 shouldn't have to make a proffer under Rule 56(f), again,
 24 the 11th Circuit says if there's affidavits or -- if
 25 there's affidavits, which basically these factual proffers

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1 are, they're one sided, lawyer-prepared documents that
 2 were sworn to by certain individuals, what the
 3 11th Circuit says is that in the -- when somebody submits
 4 those in support of summary judgment, you're entitled to
 5 depose those persons. You can't cut off and prevent
 6 discovery and enter a summary order.
 7 Again, Your Honor, there's a lot of
 8 litigation in this district. There's a lot of scenarios
 9 where you have parallel criminal and civil litigation.
 10 There's not one order that does what Mr. Budwick is
 11 suggesting that you do. There's not one, and that --
 12 that's because what they're seeking is extreme.
 13 And while it may be frustrating to
 14 Mr. Budwick, and others, it's the law. It's the law that
 15 a non-movant is entitled to properly defend summary
 16 judgment by deposing affiants.
 17 A contrary rule would make summary
 18 judgment -- it would -- it would basically destroy the
 19 summary judgment process for non-movants. You'd -- you'd
 20 be able to -- to basically attack people without affording
 21 them due process.
 22 And so I -- I think require -- requiring
 23 Mr. Ruderman to proffer what that discovery might show,
 24 it's not consistent with the law and it imposes a burden
 25 on a non-movant that doesn't exist, and there's no case

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1 law suggesting that that's -- that that's what's
 2 appropriate here.
 3 THE COURT: It's not a proffer of what he
 4 thinks the discovery might show. I mean, in theory he's
 5 thinking if -- if pressed, these witnesses would not --
 6 not make the same statements they made in their pleas, I
 7 don't know exactly, or that they would provide some
 8 supplemental information that may take him out of the
 9 control person.
 10 It is a little troublesome that you -- you
 11 haven't been able to even proffer that -- or I guess it
 12 would be in an answer if you file an answer, but it comes
 13 back to Mr. Ruderman knows, and you're -- I guess you're
 14 saying he can't provide even exculpatory, an exculpatory
 15 proffer because of the criminal investigation?
 16 How -- how would a proffer that he was not a
 17 control person jeopardize him in the criminal proceeding,
 18 unless his concern would be they would layer on perjury
 19 charges?
 20 MR. PINEIRO: That's not -- I don't know
 21 that's a concern, Your Honor. Frankly, I haven't closely
 22 evaluated whether there would be some type of waiver there
 23 on the Fifth Amendment issue, but I think it's the same
 24 concerns that are being raised by Mr. Duffy.
 25 So I'm being asked to proffer certain

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1 defenses to -- to what appear to be immanent criminal
 2 charges. Meanwhile, Mr. Duffy is suggesting that I
 3 shouldn't be able to depose any individuals who have
 4 information relevant to this case because somehow that
 5 might circumvent the criminal discovery rules.
 6 Okay. He hasn't identified any actual -- he
 7 hasn't identified any concrete reasons why this shouldn't
 8 move forward, other than hypotheticals, where if you read
 9 the motion -- if you read the motion, it's all
 10 speculation. The possibility of, you know, of
 11 obstruction, things like that.
 12 These motions are intended to preserve the
 13 Government -- the Government's somewhat tactical advantage
 14 in these criminal cases. I mean, there's no -- no real
 15 doubt about that, and we agree, though, we agree that the
 16 interest of -- we agree with the Government. The
 17 interests of justice command this stay, but it has to be a
 18 full stay and courts -- courts faced with these kind of
 19 motions almost always stay the entire case.
 20 You know, Mr. Budwick hasn't cited to any
 21 cases where -- in these parallel circumstances,
 22 Your Honor, where -- where courts entered orders
 23 consistent with what he's asking. It just -- it just
 24 doesn't happen.
 25 THE COURT: Mr. Budwick, I'll give you a few

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1 more minutes.
 2 MR. BUDWICK: I'd appreciate it.
 3 To -- to mirror the comment, I specialize in
 4 financial fraud, and I've served as special counsel in
 5 some of the largest Ponzi schemes in the country. I have
 6 never seen someone who has been accused of running a fraud
 7 in which he's defrauded thousands of people out of
 8 hundreds of millions of dollars keep artwork, keep his
 9 property, keep the civil litigation at bay, hold all his
 10 creditors at bay for years until he goes through trial.
 11 It didn't happen with Mr. Madoff, Mr. Petters,
 12 Mr. Stanford, Mister -- Mr. Rothstein, anybody.
 13 The relief that's being requested, the whole
 14 notion of he gets to sell his apartment, which is going to
 15 involve now moving all of that artwork, which Mr. Pineiro
 16 can't even represent today who owns, and whether it's
 17 insured.
 18 Based on the affidavit of Mister -- not the
 19 affidavit, but the plea of Mr. Schwartz, we have every
 20 reason to believe that this is art that belongs to the art
 21 trust nominally, but is truly owned and held in a sham
 22 trust and should be turned over eventually to the
 23 creditors.
 24 And so he's holding us at bay for an
 25 indefinite period of time, and in the meantime, assuming

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1 that a proffer would be adequate in lieu of an affidavit,
 2 there is still no proffer.
 3 The simple fact is, Mr. Pineiro's firm has
 4 been engaged for well over a year. There's an insurance
 5 policy for which they're paying -- getting paid their
 6 fees. There are public applications as to how much
 7 they're seeking. They've been paid well into the healthy
 8 six figures so far, and presumably the reason for this is
 9 to investigate and prepare for an eventual indictment.
 10 And so as they're going through their
 11 investigation, and as they're preparing for an eventual
 12 indictment, which they clearly expect, they must be in a
 13 position to identify one witness, one fact, something
 14 which they think will create a material issue of disputed
 15 fact in this case, and he simply isn't.
 16 Even when pressed by -- by Your Honor, he
 17 has not identified any particular proffer and that's why
 18 we want it in writing. Under Rule 56(d), the proffer
 19 would have to be in writing subject to Rule 11, and they
 20 failed to do that, then summary judgment would be granted.
 21 Mr. Ruderman can identify any information he
 22 wants or counsel has any information at his disposal based
 23 on his investigation over the last year and a half, and
 24 can capably file a proffer. There is nothing to proffer.
 25 There is no material disputed fact as to what

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1 Mr. Ruderman's role was at the company. He was the leader
 2 of the company. It's his subordinates who have pled
 3 guilty and who are pointing to him as being the leader,
 4 and he doesn't even need to be the leader. He just needs
 5 to at least be on equal par as his subordinates, but there
 6 is no issue of fact that that's the case, and there is no
 7 proffer, and there is no affidavit, and so essentially
 8 what they're getting is a free stay.
 9 They're getting a stay until at least trial,
 10 which would be at least a year away from today at the
 11 fastest, if not 18 months, if he's not indicted for a
 12 number of months, and in the meantime, he's selling his
 13 apartment, he's moving his assets. We know that he's got
 14 a sham trust that he's held assets in under the plea
 15 agreement, and he's likely going to be taking more steps
 16 to defraud his creditors.
 17 He's, I believe, about 80 years of age. If
 18 he gets any sort of criminal sentence or sentence, it's
 19 likely to be a life sentence. He has every incentive to
 20 dispose of his assets and secrete his assets, and we are
 21 being irreparably harmed, because when the day comes when
 22 we finally get our judgment, if we're in fact stayed,
 23 there will be nothing left for us to collect upon.
 24 And this art trust is likely -- putting
 25 aside the receivables in this case, in terms of litigation

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1 recoveries, I think it is clear, the largest litigation
 2 recovery that the victims will get in this case.
 3 THE COURT: What -- what -- this is -- this
 4 comes from the side, but it was a question I meant to ask
 5 I think at one of the prior hearings, it came -- came back
 6 to mind reading Judge Bloom's decision.
 7 The SEC wound up or looking at the docket,
 8 the SEC wound up with a consent judgment against
 9 Mr. Ruderman; correct?
 10 MR. BUDWICK: Yes, Your Honor, I believe
 11 \$49 million.
 12 THE COURT: So why -- why doesn't that
 13 judgment provide an ability to freeze or attach or execute
 14 on his assets?
 15 MR. BUDWICK: I don't know the details of
 16 that. I don't know if there was -- part of that was an
 17 agreement not to execute upon the additional artwork. I
 18 don't know what the details of that are, but there
 19 certainly is a \$49 million judgment.
 20 Unless he has more than \$49 million in
 21 assets, he shouldn't really be terribly concerned about
 22 the plaintiff getting a judgment.
 23 THE COURT: Does anybody ---
 24 MR. PINEIRO: I can answer that.
 25 THE COURT: Go ahead, Mr. Pineiro.

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1 MR. PINEIRO: Your Honor, we represented
 2 Mr. Ruderman in the SEC proceeding. So there is a
 3 \$49 million judgment. It's a no admit/no deny judgment.
 4 We have, as part of the resolution of that
 5 matter, the art trust was carved out in terms of
 6 collections. So there was an agreement with the SEC
 7 whereby the judge -- they could not seek to collect --
 8 they could not seek to execute the judgment against the
 9 art trust because it raised all types of issues, and to be
 10 clear, that -- those would be -- those are post-judgment
 11 proceedings.
 12 I mean, this -- this -- we're putting the
 13 cart, way, way before the horse. We're talking about
 14 collection on a judgment that Mr. Budwick doesn't have,
 15 against a trust for which Mr. Ruderman is not the trustee
 16 or a beneficiary.
 17 So he'd have to bring proceedings
 18 supplementary if he ever wanted to take his potential
 19 judgment and executed on that. He'd have to bring in --
 20 he'd have to implead Mr. Schwartz, or beneficiaries,
 21 et cetera. So I'm very confused about all this discussion
 22 when liability hasn't been determined in this case.
 23 The other thing that I would point out,
 24 Your Honor, is if the Court is not inclined to grant the
 25 full stay, then Mr. Ruderman's position is you should

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1 decline the stay, any stay whatsoever, and we've argued
 2 that.
 3 We've said if you don't want to stay the
 4 full case, then deny the Government's motion. Then allow
 5 us to take these depositions, we can brief summary
 6 judgment once we've taken the depositions, and we'll
 7 gladly then have a hearing on the summary judgment motion.
 8 THE COURT: Are you -- if the motion to
 9 dismiss is denied, and I agree to enter a stay or continue
 10 the abatement of summary judgment, are you arguing for a
 11 stay that would protect you from filing an answer, as
 12 well?
 13 MR. PINEIRO: No, Your Honor. I think that
 14 we can -- we can file an answer. Our primary concern is
 15 being required to defend an action at the -- at the
 16 Rule 56 stage or at trial without having had any
 17 discovery, but we can file an answer.
 18 And -- and -- and one other point I can
 19 make, Your Honor, is this is all within your discretion.
 20 So you can -- you can stay discovery, just toll, for
 21 example, or defer the dispositive -- the dispositive
 22 motion deadlines, and that's what courts have done where
 23 they don't enter full stays.
 24 What the District Courts have done is they
 25 said, well, I'm not going to prejudice either side where

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1 there's no discovery by requiring them to respond to
 2 dispositive motions or to file, so I'll just defer any
 3 adjudication on those motions until we have some type
 4 of -- until the case -- until the stay on discovery is
 5 lifted.
 6 So we would file a -- what we would suggest
 7 then is we would file our answer, and the Court can defer
 8 the motion for summary judgment and any other dispositive
 9 motion deadlines until we have further clarity from the
 10 Government.
 11 THE COURT: Okay, and discovery -- well,
 12 plaintiff doesn't believe they need more discovery, they
 13 filed a motion for summary judgment.
 14 Was somebody about to speak?
 15 MR. BUDWICK: Yes, Your Honor, if I may? I
 16 was simply going to highlight that if there was a
 17 negotiated carveout of the art trust as part of the
 18 consent \$49 million judgment, I think that highlights the
 19 need for us to move forward in our litigation.
 20 That means that the SEC's judgment will not
 21 be used to execute on the art trust, and we're happy to
 22 bring in any beneficiaries or alleged trustees of the sham
 23 trust, we just need Mr. Pineiro, we'd like if he could
 24 tell us who they are since we can't take 2004 discovery of
 25 Mr. Ruderman or depose him. But we're happy to -- to

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1 bring in those parties, but the fact that the SEC cannot
 2 proceed against that asset highlights the need for us to
 3 move forward with our litigation.
 4 And, again, there -- there needs to be
 5 respectfully some sort of proffer. Mister -- Mr. Ruderman
 6 knows, he knows what he can possibly proffer and
 7 Mr. Pineiro knows through his year and a half
 8 investigation, which has been well funded, what he can
 9 possibly proffer. There is no proffer and -- and there's
 10 resistance to a written proffer. We think that's telling.
 11 If it -- if Mr. Pineiro had a written
 12 proffer to offer, if his argument is under 11th Circuit
 13 law I can simply do an attorney proffer, our response is,
 14 fine, then do it, but he's not providing a written
 15 attorney proffer. He's providing no proffer whatsoever.
 16 And then Mr. Ruderman retains the artwork,
 17 and moves out of his apartment, and who knows what happens
 18 to the art, and the SEC is not going to proceed against
 19 the artwork. We are put in a -- on an -- untenable --
 20 untenable position based on this.
 21 We would ask that Mr. Ruderman comply with
 22 Rule 56(d), and I think Your Honor does have broad
 23 discretion to enter -- in connection with the stay to
 24 impose reasonable conditions, and there's been no argument
 25 that there's any prejudice whatsoever in turning over the

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1 artwork.
 2 We don't even know what apartment he's going
 3 to move to or where he's going to live, or if there's
 4 space for the artwork. So there's no prejudice to simply
 5 turning over the artwork and having it sit with the other
 6 art that was held at the corporation that the trustee is
 7 holding.
 8 THE COURT: Okay. At this point I'm going
 9 to grant the renewed motion to stay, Docket Entry 137. I
 10 was going to consider granting it until there was no
 11 longer an objection to Mr. Ruderman's right to depose
 12 Heide, Atlas and Schwartz, and I guess maybe
 13 Mr. Alexander, but I think at this point I want -- I'm
 14 going to go back and just abate the summary judgment
 15 and -- and grant the stay for a hundred eighty days, and
 16 let's -- let's see what the status is.
 17 In part I want to see what may play out in
 18 the main case in connection with the artwork. I think
 19 there was a decent argue -- a good argument for a proffer,
 20 but I'm also convinced by Mr. Pineiro that, number one,
 21 the -- under the general premise of defending a summary
 22 judgment, that a party has a right to depose witnesses
 23 whose affidavits or in this case, plea statements, were
 24 relied on, at least in significant part, in the summary
 25 judgment before granting summary judgment based in large

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1 part on that testimony.
 2 And as to the proffer, I was giving that
 3 more thought, and perhaps Mr. Budwick on rehearing, if you
 4 seek rehearing, I might consider, reconsider whether a
 5 proffer should be required, but for now I'm persuaded that
 6 any proffer of a defense in the context of this civil case
 7 may be problematic while the criminal investigation is
 8 going forward, and I'm accepting or adopting Mr. Pineiro's
 9 argument on the problem -- Fifth Amendment problem with
 10 providing a proffer.
 11 We'll do a short order on this, and again,
 12 Mr. Budwick, if you think there's -- if you can frame the
 13 issue of a -- of a proffer addressing both the general
 14 requirements under Rule 56 and the Fifth Amendment issues
 15 that are at play here, I may consider a motion for
 16 reconsideration.
 17 So let's turn to the -- well, and let me
 18 just confirm with the Government that that order renders
 19 it unnecessary at this point for you to intervene, other
 20 than without prejudice to seeking limited intervention to
 21 continue the stay if -- if -- if it's --
 22 MR. DUFFY: Correct, Your Honor.
 23 THE COURT: -- not otherwise extended?
 24 MR. DUFFY: That's correct, Your Honor.
 25 Yes, Your Honor. Thank you, Your Honor.

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1 THE COURT: Okay. All right. So that --
 2 that ---
 3 MR. BUDWICK: Your Honor -- Your Honor, if I
 4 may? I'm sorry to interrupt.
 5 THE COURT: Go ahead.
 6 MR. BUDWICK: Thank you for the ruling.
 7 I -- I just want to alert the Court that
 8 Mr. Moskowitz is going to handle the response on the
 9 motion to dismiss. I have another matter at
 10 three o'clock, if I can just ask the Court's indulgence
 11 that I may leave the Zoom call before three o'clock?
 12 THE COURT: I did have an attorney once
 13 that -- I know this will surprise all of you, who are very
 14 professional, walked out in the middle of a Bench ruling
 15 once I had announced I was ruling against her, so I won't
 16 consider that you're walking out because I ruled against
 17 you and --
 18 MR. BUDWICK: Never.
 19 THE COURT: -- we'll leave it to
 20 Mr. Moskowitz, who looks serious and ready to roll.
 21 Well, let's turn to the -- to the motion to
 22 dismiss. I've read a lot in connection with the motion to
 23 dismiss. Let -- let's take it in two pieces. The
 24 offensive collateral estoppel issue is interesting, and at
 25 first blush it seems that this may be a perfect case to

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1 apply it since it really is the -- essentially the
 2 identical argument on these MOIs, as they've been referred
 3 to, memoranda -- memoranda of indebtedness, are they
 4 securities?
 5 But then I was troubled, Mr. Moskowitz, by
 6 the fact that Judge Bloom did not strike an affirmative
 7 defense that raised the statutory exception for whether
 8 this is a security, and also the fact that the consent
 9 judgment itself did not admit liability.
 10 So under these circumstances, take a few
 11 minutes, maybe you can turn me around on -- on the
 12 collateral estoppel, but let's start there.
 13 MR. MOSKOWITZ: I'll -- I'll just take one
 14 minute, Your Honor. Thank you very much.
 15 The Christo decision in the 11th Circuit
 16 says that you're to -- to view whether it has a preclusive
 17 effect, whether it contains sufficient indicia of
 18 finality, and that's sort of the context that you use. So
 19 you're not just looking at the motion to dismiss order
 20 itself.
 21 In the context of what happened sooner, you
 22 have the order on the motion to dismiss, and then as
 23 Mr. Budwick said, immediately following that you have a
 24 \$49 million judgment that permanently enjoined
 25 Mr. Ruderman from ever selling unregistered securities

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1 again.
 2 So you put that in the context, you have the
 3 MOI ruling that the security -- that these are securities,
 4 and then you have Mr. Ruderman consenting to a \$49 million
 5 judgment and agreeing to permanently be enjoined from ever
 6 selling unregistered securities, in that context we
 7 believe that there is finality that the Christo decision
 8 would say is what you need to have this type of preclusive
 9 effect.
 10 THE COURT: Okay, and I believe it was going
 11 to be Mr. Mays.
 12 MR. MAYS: Your Honor, yes.
 13 For the record, Jason Mays from Marcus
 14 Neiman Rashbaum & Pineiro on behalf of Mr. Ruderman.
 15 Collateral estoppel applies when an issue is
 16 actually litigated and when the ruling on that issue was a
 17 necessary and critical part of the judgment. The issue of
 18 whether MOIs constitute securities was -- was not actually
 19 litigated within the meaning in the SEC proceeding.
 20 So to be actually litigated, the resolution
 21 of the issue, as Mr. Moskowitz pointed out, must have had
 22 sufficient indicia of finality.
 23 Motion to dismiss denials almost never carry
 24 that indicia of finality for the very reason that
 25 Your Honor pointed out, that the case proceeds after the

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1 denial, and as Judge Bloom declined to strike the
 2 affirmative defenses, it was in recognition of the fact
 3 that the issue had not yet been resolved.
 4 Mr. Ruderman and the SEC entered into the
 5 consent judgment in August 2019. The consent judgment by
 6 its very terms did not include findings of fact or
 7 conclusions of law, and Mr. Ruderman did not admit or deny
 8 the SEC's allegations.
 9 In the 11th Circuit, whether a consent
 10 judgment has collateral estoppel effect depends on the
 11 intent of the parties. Under these circumstances, it's
 12 clear that the parties did not intend for it to have
 13 collateral estoppel effect, and that Your Honor should
 14 consider the motion to dismiss independently.
 15 THE COURT: Are there any cases,
 16 Mr. Moskowitz, where ruling on a motion to dismiss was
 17 deemed sufficient for collateral estoppel or offensive
 18 collateral estoppel, in any event?
 19 MR. MOSKOWITZ: I don't cite to them,
 20 Your Honor, no.
 21 THE COURT: All right. Well, let's -- let's
 22 get onto the substance of it, and I think really where the
 23 Ruderman side has -- has come down, is looking more at
 24 the, I guess, short-term note exception, to the extent the
 25 notes are secured by business assets or accounts

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1 receivable.
 2 Is that a fair statement, Mr. Mays, that
 3 that's ---
 4 MR. MAYS: Your Honor, there -- there is two
 5 components to it, and -- and the first is that the MOIs
 6 fall under the judicial exemption to securities, those
 7 articulated by the Supreme Court in *Reves vs. Ernst &*
 8 *Young*, and then also they fall under the statutory
 9 carveout of the definition of securities under the
 10 Securities Act for short-term notes of nine months or
 11 less.
 12 In *Reves*, the Supreme Court specifically
 13 exempted one, short-term notes that were secured by the
 14 assets of a small business, and short-term notes secured
 15 by the assignment of accounts receivable, and the MOIs in
 16 this case, Your Honor, we submit fall squarely within both
 17 of those exemptions.
 18 They were secured by a lien on small
 19 business assets, and by the assignment of small business
 20 accounts receivable of 1 Global.
 21 THE COURT: But -- but there's -- but
 22 there's no cases that -- that -- that I saw, and I looked
 23 at, I think, the three or four cases that are on Page 12
 24 of the motion to dismiss, cases involving money being
 25 basically turned over with total control of the

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1 borrower/seller of the -- of the notes and -- and kind of
 2 unspecified fractional interests in unspecified loans that
 3 were going to be given in the form of these merchant
 4 credit agreements.
 5 It -- it -- and I'll -- I'll let you answer
 6 in a moment. It just seemed to me that even if that
 7 exception isn't limited to actual assets of the borrower
 8 being pledged, that it would require at least that there
 9 be some very specific collateral being -- being offered to
 10 the lender, the -- the noteholder, in connection with the
 11 loan to make it really a -- a commercial transaction
 12 rather than an investment.
 13 So are there any -- are there any cases like
 14 that? I mean, besides Judge Bloom's opinion itself, we --
 15 we also have Judge Middlebrooks' decision in the
 16 *Woodbridge Ponzi* scheme, *Honig vs. Kornfeld*, which had
 17 somewhat similar facts, so ---
 18 MR. MAYS: Your Honor, the MOIs in this case
 19 were unique instruments. They -- prior to the District
 20 Court's ruling, we could -- did not find any cases that
 21 sort of were sufficiently analogous.
 22 But 1 Global's merchant cash advances were
 23 loans to small businesses, in which those businesses
 24 pledged its assets, including its accounts receivable and
 25 its business to 1 Global as security for the loan.

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1 And then even though it's done in -- in two
 2 different transactions, 1 Global through the MOIs, then
 3 pledged those same -- security in those same assets and
 4 accounts receivable to the MOI noteholders in exchange
 5 for -- for -- those loans.
 6 So -- so under those circumstances, you
 7 know, we submit, Your Honor, that this -- this falls
 8 squarely within the exemptions that *Reves* contemplated
 9 because what was -- what was contemplated by the Supreme
 10 Court was the security aspect of it, and that's why we
 11 believe, Your Honor, that the District Court by
 12 emphasizing that it wasn't one specific business' assets
 13 or one specific accounts receivable, that was not what
 14 the -- what the Supreme Court required under *Reves*.
 15 THE COURT: Well, Judge Bloom went through
 16 the *Reves* factors, as did Judge Middlebrooks in -- in
 17 *Honig*. Where -- where did she go wrong? Where did the
 18 two of them go wrong?
 19 MR. MAYS: Well, Your Honor ---
 20 THE COURT: Well, I guess -- I guess *Honig*
 21 was -- was longer term, so some lawyer believed that they
 22 could create nine-month notes, and they wouldn't have the
 23 same problems, perhaps, as the *Wood -- Woodbridge* notes,
 24 but in any event, where did Judge Bloom go wrong?
 25 If I'm going to deny collateral estoppel and

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1 evaluate the merits of her decision, she goes through the
 2 four-factor test.
 3 MR. MAYS: Well, Your Honor, the four-factor
 4 test is a test that is the family resemblance test, and
 5 the family resemblance test under *Reves* seeks whether or
 6 not an instrument is -- actually resembles one of the
 7 exempt categories.
 8 And Judge Bloom actually acknowledged in her
 9 order, that if an instrument falls within one of these
 10 specifically enumerated categories, which are one, whether
 11 it's a short-term note that's secured by the assets of a
 12 small business; or two, whether it's a short-term note
 13 that's secured by the assignment of accounts receivable,
 14 you only get to the four factors for the family
 15 resemblance test if it does not fall squarely within one
 16 of those exemptions.
 17 And so what we submit to you, Your Honor, is
 18 that we don't -- there's no need to even turn to the -- to
 19 the family resemblance test and those four factors,
 20 because these MOIs fall squarely within.
 21 So where did the -- where did Judge Bloom go
 22 wrong in terms of the analysis? We submit, Your Honor,
 23 in -- in two ways, three if we get to the statutory
 24 carveout for -- for short-term notes.
 25 But with regard to the *Reves* exemptions

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1 there's two ways, and the first is, as I mentioned a
 2 moment ago, the Court emphasized that what's at issue here
 3 is MOIs that were not secured by any lien on a small
 4 business or some of its assets or by an assignment of
 5 accounts receivable, but instead were secured by many
 6 liens and multiple assignments of accounts receivable.
 7 But the District Court did not rely on any
 8 authority that that's a meaningful distinction, and we
 9 submit, Your Honor, that the number of businesses that
 10 secure a note is a distinction without a difference.
 11 It -- it doesn't really -- it doesn't bear itself on the
 12 extent of the note security.
 13 THE COURT: But you do -- but you -- but you
 14 acknowledge that there's no cases with these kinds of
 15 multiple assignments totally at the discretion of the,
 16 we'll call -- we'll call 1 Global -- let's just say --
 17 we'll just say 1 Global instead of trying to call them
 18 seller or borrower?
 19 MR. MAYS: Yes, Your Honor, instruments that
 20 are quite on all fours with the MOIs here, we did not find
 21 cases that -- that deal directly with this.
 22 But the second -- the second way that the
 23 District Court reasons that these instruments did not fall
 24 under the Reves exemptions, is as you alluded to just now,
 25 the fact that 1 Global had discretion to expand its

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1 business activities under the MOIs and were not required
 2 to use the MOI noteholder funds to fund the MCAs.
 3 And, you know, we submit, Your Honor,
 4 that's -- that's also another distinction that is not
 5 meaningful for purposes of determining whether the
 6 instruments fall under the Reves exemptions, and
 7 additionally, there are no allegations currently in the
 8 plaintiff's complaint that the MOI -- well, the basis --
 9 let me back up for just a moment.
 10 The basis for the Court articulating that
 11 was that -- was the assumption that because 1 Global had
 12 discretion under the MOIs, a portion of the funds that
 13 were -- were tendered by the noteholders were not
 14 necessarily secured.
 15 But, one, that's not necessarily the case
 16 and that's not a meaningful distinction, and in any event,
 17 the plaintiff's complaint does not allege that a portion
 18 of the noteholder funds under the MOIs were not secured.
 19 So -- so those were the two distinctions that the Court in
 20 our view erroneously relied upon.
 21 THE COURT: All right. Let me turn back to
 22 Mr. Moskowitz.
 23 MR. MOSKOWITZ: Your Honor, there's no
 24 contrary law that -- that the defendants can cite clearly
 25 because there is none.

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1 Judge Bloom hit it straight on all fours.
 2 It's an identical factual premise. We made -- they made
 3 the same argument, exactly the same, that they're not
 4 under the Reves test. Judge Bloom denied it and -- and
 5 found that the MOIs are not exempt from the registration
 6 as nine-month notes, and she went on that they are
 7 commercial in nature because they are really investments,
 8 and she went through the factual findings here, as
 9 Judge Middlebrooks did in the Woodbridge case.
 10 There's no distinction here between those
 11 two. The only difference between our case and
 12 Judge Bloom's case, is we actually cite to two sworn
 13 statements that they didn't cite to in the Judge Bloom
 14 case, the affidavit of Jan Atlas -- I mean, the proffer
 15 under oath of Jan Atlas and the proffer of Alan Heide.
 16 That was not done in Judge Bloom's case.
 17 So we had everything that was argued in
 18 Judge Bloom, where she goes very methodically through the
 19 Reves four-part test. There's no difference here, the
 20 findings are the same.
 21 What we have, which they didn't have, is we
 22 have the sworn statements Jan Atlas and Alan Heide, where
 23 he says not only did Mr. Ruderman know that these were
 24 securities, but he actually took aggressive measures to
 25 trick investors into thinking that they were not. That's

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1 a proffer that we have made.
 2 And again, this is the motion to dismiss
 3 stage, so these are allegations that we make, that he not
 4 only knew that they were securities, but he tricked the
 5 investors, who now we have a certified class of hundreds
 6 of thousands of investors that are all defending this
 7 motion, and that's why we filed the motion for summary
 8 judgment.
 9 We say, not only do we state that these are
 10 securities, but if you consider all the evidence, there's
 11 no genuine issue of material facts that they're
 12 securities, and we would respectfully ask that the motion,
 13 therefore, be denied.
 14 THE COURT: Is -- is there an issue just on
 15 the limited nine month or short-term distinction? Were
 16 some of the notes longer than nine months --
 17 MR. MOSKOWITZ: Your Honor ---
 18 THE COURT: -- is that relevant, or you're
 19 fine with saying, let's just -- let's just assume they're
 20 nine-month notes, that they're still not within the
 21 exception?
 22 MR. MOSKOWITZ: Right, and that's what
 23 Judge Bloom actually did. She said that these are not,
 24 quote, "commercial in nature, these are investments," and
 25 that's exactly what they were meant to be, and she did not

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1 find any clear cut issue on this point.
 2 She found here, the exemption for, quote,
 3 "any note which has a maturity at the time of issuance not
 4 exceeding nine months, excluding days of grace or any
 5 renewal therefore, only applies to notes that can be
 6 characterized as commercial in nature, but not to
 7 investments, and the MOIs were an investment because
 8 1 Global sought to profit from the success of the debtor
 9 apart from obtaining repayment of the note."
 10 There's no dispute about that. That's our
 11 allegations, so they're taken as true at this stage, but
 12 the evidence will show there's certainly no evidence or
 13 proffer or anything to the contrary, and that's why
 14 summary judgment will be proper on this point.
 15 But just for purposes of the motion to
 16 dismiss, if you take the allegations as true, clearly as
 17 Judge Bloom found, and as Judge Middlebrooks found in the
 18 Woodbridge case, there are no exceptions here for the
 19 nine-month notes under the Reves test.
 20 THE COURT: Where -- where -- what part of
 21 the opinion were you reading from about the commercial
 22 versus investment?
 23 MR. MOSKOWITZ: I was reading from my notes
 24 on her last part, but I don't have the citation exactly to
 25 where that was stated.

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1 THE COURT: No, I think that same premise
 2 comes out of comments in other cases, maybe even Reves.
 3 All right. Brief rebuttal.
 4 MR. MAYS: Your Honor, Mr. Moskowitz is
 5 addressing the standard under the statutory carveout of
 6 the Securities Act for the requirement for whether or not
 7 securities have to be registered, in which the
 8 Securities Act said that notes of a duration of nine
 9 months or less you do not have to -- do not meet the
 10 definition of security.
 11 He did not address the Reves factors, so --
 12 so his analysis was focusing on the portion of
 13 Judge Bloom's decision that addressed whether or not the
 14 MOIs fall under the statutory exemption.
 15 The Reves factors are -- are different, but
 16 additionally, plaintiff's complaint does not actually
 17 allege that the MOIs, noteholders, received funds from any
 18 other source other than the MCAs.
 19 At Paragraphs 20 and 21 of the complaint, it
 20 actually says quite the opposite. It alleges that the MOI
 21 noteholders' funds that they received in return, were
 22 based entirely on the success of the MCA portfolio that
 23 1 Global had assembled.
 24 So, Your Honor, I guess I'll leave it at
 25 that, but -- but, you know, we believe that collateral

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1 estoppel does not apply, and because the MOIs were not
 2 securities within the meaning of the Act, both because
 3 they fall under the Reves judicial exemptions and because
 4 they fall under the carveout under the Securities Act, we
 5 believe that the complaint against Mr. Ruderman should be
 6 dismissed.
 7 THE COURT: All right. I'm ready to proceed
 8 on this. I -- I've done a fair amount of reading, perhaps
 9 motivated partially by the rainy weekend, but in any
 10 event, I've reviewed the motion to dismiss, Docket Entry
 11 115; plaintiff's response, Number 128; defendant's reply,
 12 Number 136.
 13 I've read several cases, including
 14 Judge Bloom's decision, SEC vs. 1 Global and Ruderman, I
 15 don't know if ultimately there was an F.Supp cite, but I
 16 have the 2019 Westlaw 1670799, Southern District of
 17 Florida, February 7, 2019; the Judge Middlebrooks decision
 18 that we've been referring to, Honig, H-o-n-i-g, vs.
 19 Kornfeld, K-o-r-n-f-e-l-d, 339 F.Supp 1323, Southern
 20 District of Florida, 2018; the Reves decision that we've
 21 been talking about, the Supreme Court's decision, Reves,
 22 R-e-v-e-s, vs. Ernst & Young, 494 US 56, 110 Supreme Court
 23 945, 1990 decision; and several additional cases cited on
 24 the collateral estoppel issue and the securities issue.
 25 As I said, the offensive collateral estoppel

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1 issue had some appeal, but ultimately I conclude that it's
 2 not appropriate to apply here. The identical issue was
 3 fully briefed, argued and the subject of Judge Bloom's
 4 comprehensive opinion, but as I noted, Judge Bloom did not
 5 strike a remaining affirmative defense that the notes at
 6 issue here, these MOIs, memorandum -- memoranda of
 7 indebtedness, were statutorily exempt under 15 USC Section
 8 78c(a)(10), and moreover, the consent judgment admitted no
 9 liability.
 10 Now, of course we're not bound by a District
 11 Court decision in a court, District Court, where there's
 12 multiple judges. However, certainly a decision that's on
 13 the same facts and the same issues is -- is one that
 14 I'm -- I'm going to take a close look at, and in this --
 15 in this case, after taking -- undertaking an independent
 16 review, I agree with Judge Bloom's conclusions that the
 17 MOIs are securities.
 18 In the papers and in the cases, although not
 19 the focus of the argument today, we start with the
 20 presumption, because it's in the definition of securities,
 21 that every note is a security. Of course the cases say
 22 that presumption may be overcome if a defendant can show
 23 that the note falls within recognized exceptions,
 24 including some that are discussed, I think it was a prior
 25 2nd Circuit case that was, in large part, the reasoning

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1 was adopted by Justice Marshall in Reves, including notes
 2 for consumer financing, home mortgages, and short-term
 3 notes secured by a lien on a small business for its assets
 4 or short-term notes secured by accounts receivable.
 5 The Supreme Court's decision, as we've
 6 already discussed, also adopted a, quote, "family
 7 resemblance," closed quote, test for analyzing notes that
 8 may not fall squarely within any of the exceptions, but
 9 have similar qualities, and to apply this test, the Court
 10 in Reves listed four factors. Judge Bloom went through
 11 those in her opinion, Judge Middlebrooks did the same in
 12 Honig.
 13 And Honig arose, although the notes weren't
 14 of the same limited duration, arose from the Woodbridge
 15 Ponzi scheme, and had -- did have notes, that like the
 16 MOIs here, were marketed as low risk, high yield
 17 investments, were purportedly backed by loans to
 18 commercial borrowers, and were sold to a large number of
 19 investors around the country.
 20 So going through the analysis of the issues,
 21 as presented here and as presented to Judge Bloom, we do
 22 have to look first is this within the exception for
 23 short-term notes that are secured by the assets of a
 24 business, and the one area where I think I would depart or
 25 not rely in full, at least, on Judge Bloom's analysis, is

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1 that early on -- I'm trying to pinpoint the page from the
 2 copy I have. I believe it's at star 5 of the Westlaw
 3 opinion.
 4 She said, even if the MOIs were secured,
 5 they certainly were not secured by a lien on a small
 6 business or some of its assets, nor were they secured by
 7 an assignment of accounts receivable. Rather, funds
 8 tendered were used to fund numerous MCAs so that each
 9 noteholder obtained a small fractionalized interest in up
 10 to hundreds of MCAs. So she found that distinction to be
 11 meaningful.
 12 I would agree with Mr. Mays, there's no case
 13 law specifically to that effect and -- and I would -- I
 14 would -- I -- I can see that you could have a commercial
 15 transaction where a business that's loaning money needs a
 16 source of funding, and in exchange for the funding, offers
 17 specific security interests in -- in the loans that that
 18 particular business is making.
 19 But where this really falls short of fitting
 20 within the exception is that they -- this is not of a
 21 commercial nature, and we can -- we'll come back to that
 22 when we go through the Reves test.
 23 These -- these were investors that were
 24 lured by promises of high low risk returns, returns that
 25 were going to fluctuate, at least as alleged in the

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1 complaint, based on the success of 1 Global's operations.
 2 Money that was given to 1 Global to use at its total
 3 discretion. The fact that the only money that may have
 4 come back was -- was -- came back from the payments on the
 5 MCAs, does not mean that these were notes issued to people
 6 lending money in a commercial context based upon their
 7 receiving a security interest in a business or a small
 8 group of businesses' assets to fall within the exception.
 9 I'll come back to this a little bit more
 10 when we go through the factors. So while I don't fully
 11 agree that the exception may be limited to notes that are
 12 secured by the assets of only a single business, I do
 13 fully agree with Judge Bloom's conclusion that these
 14 notes, these MOIs, don't fall within the statutory
 15 exception.
 16 And when we turn to the -- to the four
 17 factors, and I didn't get much argument there from
 18 Mr. Mays, and I think the reason is that it would be hard
 19 to -- to make a strong argument that applying the four
 20 factors would lead to the conclusion that these notes bore
 21 a family resemblance to the -- to the kinds of commercial
 22 loans or consumer loans that had been deemed to be
 23 exceptions to the notes being securities.
 24 The first factor is the buyer's primary
 25 motivation, and here it was, again, the high single digit

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1 or low double digit rate of return that 1 Global offered,
 2 and as -- as Judge Bloom noted, and has already commented
 3 on, and I think it's a strong factor, the MOI stated that
 4 1 Global had sole discretion over how to conduct its
 5 business activities.
 6 And that really gets into some of the issues
 7 later, too, because these -- these things are all
 8 interrelated in some ways, and that is that people were
 9 lending money in the hopes that 1 Global's business would
 10 be successful and they would get a good rate of return,
 11 not lending money with the express expectation that
 12 particular assets of particular businesses were going to
 13 be -- provide adequate security, and that these were
 14 really just a commercial investment in a particular
 15 transaction by the issuer, in this case, 1 Global.
 16 The second factor requires that the Court
 17 determine whether there was common trading for speculation
 18 or investment. Like the notes in -- in the Woodbridge
 19 case, in -- in Honig, the -- the notes here were sold to
 20 more than 3400 investors in at least 25 states. I'm
 21 reading from Judge Bloom's opinion. Whether that specific
 22 fact is alleged, you certainly have allegations in the
 23 complaint about the over 200 and some odd million dollars
 24 worth of notes that were sold and the widespread investor
 25 class spread around the country.

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1 And it's important to note that in -- in
 2 this factor, the Supreme Court wasn't saying, when it said
 3 they were widely traded, they weren't -- they weren't
 4 saying that they had to be traded on an exchange, and I
 5 don't have the pin cite in Reves, but I did take note when
 6 I reread Reves this morning that trading on a public
 7 exchange is not a requirement to looking at that
 8 exception.

9 The third factor is the expectations of the
 10 investing public, whether these are looked at as
 11 securities on the basis of the investments or whether part
 12 of a commercial transaction, and that's why I said I think
 13 these are related, and this goes back to how these were
 14 marketed. They were marketed as high return investments,
 15 not as loans as part of commercial transactions.

16 And Judge -- Judge Bloom, in discussing the
 17 third factor, also cited to the Honig case at Page -- 339
 18 F.Supp at Page 1336, talking about the representations and
 19 the expectations of the investors in that case.

20 And the final factor is that the Court
 21 consider whether, if these are not regulated by the
 22 securities laws, that there's some other regulatory
 23 mechanism in place. And, in fact, I think when I looked
 24 at the cases, Mr. Mays, that -- that you cited in your
 25 motion to dismiss, one of them was a 9th Circuit case, the

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1 First Citizens Federal Savings & Loan Association vs. -- I
 2 can't read my own writing, I think it's Worthen -- Worthen
 3 Bank & Trust, 919 F.2d 510, 9th Circuit, 1990.

4 There -- there were a couple of issues
 5 there. Those were -- that was a loan participation
 6 agreement among sophisticated lending institutions, and
 7 the loan that was securing was by a commercial bank to a
 8 developer, and I think they -- they did in connection with
 9 this fourth factor also look at the fact that there's
 10 other regulations in place when you're dealing with
 11 lending institutions, and clearly that -- that's not the
 12 case here.

13 And I guess as long as I'm going through it,
 14 at least in that page of the notes I took, the -- the
 15 Pro -- Prochaska vs. Merrill Lynch case,
 16 P-r-o-c-h-a-s-k-a, vs. Merrill Lynch, 798 F.Supp 1427,
 17 District of Nebraska, 1992, found that the individual
 18 notes secured by assets of the borrowers were not
 19 securities.

20 There was, and this goes back to my
 21 distinction in the statutory exemption, there were
 22 specific -- there was specific security pledged. These
 23 were not, in that case, notes widely distributed and there
 24 was no deference in that case to -- as to how the borrower
 25 or issuer of the notes was using the money.

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1 The other case I looked at was Singer vs.
 2 Livoti, L-i-v-o-t-i, 741 F.Supp 1040, Southern District of
 3 New York, 1990, and those were notes secured by a
 4 mortgage. There was some discussion there because it was
 5 secured by a commercial mortgage, so it wasn't
 6 specifically within the exception, but in going through
 7 the Reves factor, the Court found that that was commercial
 8 in nature.

9 So, you know, going through the -- the
 10 decision as I just have, and both the -- whether they fit
 11 within the exception or they fit within resemblance under
 12 the Reves test, it's -- it's -- it's fine to go through
 13 the factors, it's fine to parse the cases, but I want to
 14 add some big picture comments here, and these come out of
 15 the cases. They weren't necessarily the focus of the
 16 arguments, but as the Supreme Court reaffirmed in -- in
 17 Reves, and I'm quoting now, "The fundamental purpose
 18 underlying the Securities Act -- Securities Act is to
 19 eliminate serious abuses in the largely unregulated
 20 securities market," and that's at 110 Supreme Court at
 21 949. I don't have pin cites for a couple other quotes,
 22 but it says to fulfill this purpose, quote, "Congress
 23 painted with a broad brush," closed quote, to, quote,
 24 "take account of the transaction under investigation."
 25 When you look at the big picture of the

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1 securities laws, you look at the nature of this
 2 transaction, the MOIs here are not short-term notes for
 3 commercial purposes.

4 These were aggressively widely marketed
 5 instruments -- investments, rather, of money to an
 6 enterprise with full control of the proceeds, investments
 7 where the return was going to fluctuate, not based on the
 8 specific -- a specific commercial transaction with one or
 9 a distinct group of borrowers, 1 Global, rather it was
 10 going to fluctuate with the results of 1 Global's success
 11 in its overall operations.

12 So at the end of the day, we go through all
 13 this analysis, there's cases arguably on both sides, but
 14 really at the end -- by the -- by the time I went through
 15 all this and read these cases, this one just isn't close.
 16 The notes here, the MOIs are securities under federal and
 17 Florida law, of course Florida law, it's been held the
 18 definition under federal law applies, so the motion to
 19 dismiss is -- is denied.

20 So, Mr. Moskowitz, either you or Mr. Budwick
 21 can submit an order just -- I'm not going to publish on
 22 this. Just incorporate the Court's findings and
 23 conclusions by -- by reference, deny the motion to
 24 dismiss.

25 How much time do you need to answer? I

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1 think the rules would normally give you just 14 days. I
 2 guess, Mr. Pineiro, I don't know if this is your question
 3 or Mr. Mays.
 4 MR. PINEIRO: Your Honor, I can answer that.
 5 If you don't mind giving us 21 days, that's fine.
 6 THE COURT: All right. So 21 days then to
 7 answer, and then we'll have the answer in place and the
 8 case will otherwise remain stayed. We'll see what
 9 develops in the -- in the main case, we'll see what
 10 develops in the criminal investigation.
 11 I suspect there -- there won't be any
 12 secrets once -- I suspect all parties will know if and
 13 when there's an indictment, and if an indictment, if
 14 there's a plea and so forth.
 15 But with the exception of the answer, and
 16 perhaps any motion for rehearing that Mr. Budwick may seek
 17 on obtaining a proffer, I don't think there's anything
 18 else really to address or anticipate, is there, in the
 19 case, in the adversary at this point, Mr. Budwick or
 20 Mr. Moskowitz?
 21 MR. BUDWICK: I -- I don't think so,
 22 Your Honor.
 23 MR. MOSKOWITZ: No, Your Honor.
 24 THE COURT: Okay. All right. So I'm going
 25 to do the order on the -- the stay, Mr. Moskowitz or

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1 Mr. Budwick will submit the order on the motion to
 2 dismiss.
 3 The order on the stay will -- will provide
 4 the protections that I talked about with respect to the
 5 Government. If for some reason the Government needs to
 6 seek an extension of the stay, they can intervene again
 7 for -- for that purpose, but otherwise, there won't -- you
 8 know, there won't be any order at this point granting
 9 intervention or specifically ruling on the -- on the
 10 Government's request.
 11 Okay. All right. Well, thank you all. I
 12 think the Zoom hearing was useful. My -- my summer
 13 interns, who we've been having participate or at least
 14 observe the Zoom hearings, listen to the telephone
 15 hearings, have had quite a range of complex issues in the
 16 last week since they started, I hope their heads are not
 17 exploding, but it's always good to have good cases with
 18 good lawyers to help expose our -- our interns to -- to
 19 the law, and this had a lot of law to it.
 20 So thank you all, and I'll recess the
 21 hearing. Thank you.
 22 MR. BUDWICK: Thank you, Your Honor.
 23 MR. PINEIRO: Thank you, Your Honor.
 24 MR. MOSKOWITZ: Thank you, Your Honor.
 25 (Thereupon, the hearing was concluded.)

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 2 CERTIFICATION
 3
 4 STATE OF FLORIDA :
 5 COUNTY OF MIAMI-DADE :
 6
 7 I, Margaret Franzen, Court Reporter and
 8 Notary Public in and for the State of Florida at Large, do
 9 hereby certify that the foregoing proceedings were
 10 transcribed by me from a digital recording held on the
 11 date and from the place as stated in the caption hereto on
 12 Page 1 to the best of my ability.
 13 WITNESS my hand this 15th day of December
 14 2020.
 15
 16
 17 _____
 18 MARGARET FRANZEN
 19 Court Reporter and Notary Public
 20 in and for the State of Florida at Large
 21 Commission #GG187411
 22 April 14, 2022
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