UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 0:18-cv-61991-BB-BLOOM

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

1 GLOBAL CAPITAL LLC, and
CARL RUDERMAN,

Defendants, and

1 WEST CAPITAL LLC,
BRIGHT SMILE FINANCING, LLC,
BRR BLOCK INC.,
DIGI SOUTH, LLC,
GANADOR ENTERPRISES, LLC,
MEDIA PAY LLC,
PAY NOW DIRECT LLC, and
RUDERMAN FAMILY TRUST,

Relief Defendants.
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PLAINTIFF'S RESPONSE TO DEFENDANT CARL RUDERMAN'S MOTION TO DISMISS THE AMENDED COMPLAINT

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I. Introduction

Having defrauded thousands of investors out of almost $300 million, Defendant Carl Ruderman now asks the Court to let him escape the consequences of his actions by dismissing the Amended Complaint ("Complaint" (DE 79)) against him based on a series of inaccurate and incomplete facts, incorrect legal standards, and infirm legal arguments. Ruderman's motion to dismiss (DE 103) erroneously claims the Court does not have subject matter jurisdiction to hear this case. Ruderman further claims incorrectly, based on nothing more than naked speculation, that the Supreme Court's decision in *Kokesh v. SEC*, 137 S. Ct. 1635 (2017), signaled to District Courts that they should find disgorgement is not a valid remedy in enforcement actions by the Securities and Exchange Commission. Neither argument has merit.

The Court should not dismiss the Complaint for lack of subject matter jurisdiction for two primary reasons. First, Ruderman's motion to dismiss cites the wrong standards for evaluating a claim of lack of subject matter jurisdiction. Such a motion is properly brought under Federal Rule of Civil Procedure 12(b)(1), not Rule 12(b)(6) as Ruderman states. The difference is far more than procedural. As explained in more detail below, under Rule 12(b)(1), where, as here, a federal statute determines both the Court's subject matter jurisdiction and the merits of the Commission's claims for relief, binding 11th Circuit precedent dictates the Court's proper course of action is to deny the motion to dismiss, allow the case to proceed on its merits, and determine both issues later in the case.

Second, the Commission's detailed, 34-page, 134-paragraph Complaint sets forth more than enough facts to show Ruderman and his company, 1 Global Capital, offered and sold securities under the federal securities laws. The investment was both a non-exempt note as well as an investment contract, both of which qualify as securities. Ruderman misstates the standards for evaluating whether a note is a security, and does not even bother to address the separate test for determining whether an investment qualifies as an investment contract. The investment 1 Global offered and sold to investors was a security: (a) because it was a note for longer than nine months; (b) under the family resemblance test for notes the Supreme Court set forth in *Reves v. Ernst & Young*, 494 U.S. 56, 63 (1990); and (c) an investment contract under the separate three-part test established in *SEC v. W.J. Howey Co.*, 328 U.S. 293, 298-99 (1946).

Finally, *Kokesh* did not eliminate disgorgement as a remedy in Commission enforcement actions. The sole issue before the Supreme Court was whether disgorgement was subject to a five-

year statute of limitations. Post-*Kokesh*, numerous courts have rejected challenges to the Commission's ability to seek disgorgement identical to Ruderman's arguments here.

II. Facts Of The Complaint

As set forth in Section III.A below, whether making a facial or factual challenge to subject matter jurisdiction, the facts of the Complaint must be resolved in the Commission's favor. Under a facial challenge, the Court must accept the facts of the Complaint as true, and cannot look beyond the four corners of the Complaint. *Morrison v. Amway Corp.*, 323 F.3d 920, 924 n.5 (11th Cir. 2003); *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). If, as Ruderman has done here,[1] the defendant makes a factual challenge by introducing facts outside the four corners of the complaint, the Commission may introduce additional facts, but any factual disputes must be resolved in the Commission's favor as they would be under Rule 56's summary judgment standard. *Morrison*, 323 F.3d at 925; *SEC v. LeCroy*, Case No. 09-cv-2238, 2010 WL 11565305 at *2 (N.D. Ala. Aug. 4, 2010). That severely restricts the District Court's discretion to weigh facts or dismiss based on lack of subject matter jurisdiction. *LeCroy*, 2010 WL 11565305 at *2. Accordingly, set forth immediately below are the relevant facts the Court must take as true for purposes of deciding this motion.

A. Introduction

From February 2014 until July 27, 2018, 1 Global, a private, South Florida firm, fraudulently raised more than $287 million from more than 3,400 investors in no fewer than 25 states to fund its business. [DE 79, ¶¶ 1-2]. The Company promised investors a high-return, low-risk investment in which 1 Global would use their money to make short-term cash advances called Merchant Cash Advances ("MCAs"). [*Id.*, ¶ 2]. In reality, the Company used substantial investor funds for other purposes, including paying operating expenses, non-MCA transactions, and misappropriating at least $28 million for Ruderman's benefit. [*Id.*, ¶ 3].

1 Global and its sales representatives also made numerous other material misrepresentations and omissions to investors, including: (1) deceptively claiming the Company would only use investor money to fund MCAs; (2) falsely representing the amount of investor money the Company would take; (3) sending monthly account statements that falsely represented investor portfolio balances, rates of return, and the amount of their cash 1 Global had in the bank

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to fund merchant loans; and (4) falsely representing the Company had an independent auditor that had endorsed certain aspects of the Company's business model. [*Id*., ¶ 4].

Largely as a result of Ruderman's misappropriation of investor funds, by no later than October 2017 1 Global had a shortage of investor funds approximating $23 million that should have been in the Company's bank accounts for merchant loans. This shortfall continued and increased, so that by June 30, 2018, 1 Global's records showed approximately $50 million in missing investor funds. [*Id*., ¶ 5]. Less than a month later, 1 Global and a sister company, Relief Defendant 1 West Capital LLC (which 1 Global used to make MCAs in California), filed for Chapter 11 bankruptcy protection, placing investors at risk of losing significant funds. [*Id*., ¶ 6].

B. 1 Global's Merchant Cash Advance Business

Ruderman founded 1 Global in 2013 and was a hands-on Chairman and CEO, overseeing all aspects of the Company's operations. [*Id*., ¶¶ 22-23]. Ruderman knew at all times how much 1 Global had raised from investors and received daily, weekly, and monthly reports on the status of MCA loans, fundraising from investors, MCA collection efforts, and company finances, and often criticized subordinates who did not get him exactly what he wanted. Ruderman signed 1 Global's agreements with third-party sales agents to allow them to offer and sell 1 Global's unregistered securities. Those agreements specified the sales agents' compensation and required 1 Global to approve all marketing materials and sales brochures the agents used. [*Id*., ¶ 23].

Ruderman also directed or approved all of the Company's major transactions, including the $50 million purchase of distressed credit card debt, which was not an allowed use of investor funds. He approved and monitored account statements 1 Global sent to investors each month, and knew they contained false statements about the value of investors' portfolios and rates of return. He ordered investor funds sent to himself and related companies, and told one employee who questioned those transactions it was his company and he could do what he wanted with investor money. [*Id*., ¶ 24]. Ruderman stated in emails that "I READ ALL THE REPORTS!" and "I'm personally on top of all operations from 8am thru 6:30pm everyday!" [*Id*., ¶ 25].

1 Global was in the business of funding MCAs - short-term loans to small and medium-sized businesses. [*Id*., ¶ 27]. In marketing materials used to solicit investors, 1 Global touted a comprehensive underwriting process and stressed that it only approved loans to one out of every ten merchants who applied. [*Id*., ¶ 28]. The MCAs were purportedly made against a business' future cash receivables, and merchants agreed to make daily payments via electronic (ACH)

debiting from their business operating bank accounts. [*Id*., ¶ 30].

1 Global's materials touted a consistently low default rate of 4%. [*Id*., ¶ 31]. In reality, the Company's MCA process was not so rigorous and its business functioned much differently. In contrast to its claim that its average loan amount was $68,000, 1 Global often made loans of hundreds of thousands or even millions of dollars. [*Id*., ¶ 32]. 1 Global had far more difficulty collecting from merchants than it disclosed. For example, 18% of the MCAs funded in 2016, and 15% of the MCAs funded in 2017, were the subject of collection lawsuits. [*Id*., ¶ 33].

The Company's website also told a far different story than the thorough underwriting process 1 Global touted to investors. The website stressed how simple and quick it was for merchants to obtain loans, noting that the MCAs were *unsecured* business cash advances. The website consistently promised merchants they could "have your money in as little as 24 hours." [*Id*., ¶ 34]. The website also promised merchants that "If you own a business and need cash fast, we're the company to call," going on to promise "We can provide the money you need without the hassles and hoops other financial institutions put you through . . . You do not have to come to us hat in hand with scads of paperwork proving your credit worthiness only to have your application denied. *We fund 90% of the businesses that apply without basing it on their credit scores* . . . We have the resources and the commitment to get you that unsecured advancement you need immediately." [Emphasis added, *Id*., ¶ 35].

Through April 2018, 1 Global and 1 West made about $348 million in cash advances involving approximately 4,000 MCAs. As of the same date, merchants had repaid approximately $241 million of that amount. As of April 2018, due to collectability issues and Ruderman's misappropriation of investor funds, 1 Global owed investors at least $272 million but only had $27.5 million in its bank accounts. 1 Global does not currently have enough funds to repay investors and filed for bankruptcy in July 2018. [*Id*., ¶ 36].

C. 1 Global's Solicitation Of Investor Funds

1. The Network Of Sales Agents

1 Global funded its MCA business and operations almost entirely with money from investors, whom the Company referred to alternately as "Lenders" or "Syndicate Partners." [*Id*., ¶ 37]. 1 Global found its investors through a network of sales agents consisting in large part of registered and unregistered investment advisers and barred brokers. The Company had dozens of sales agents to whom it paid an aggregate $9 million of commissions, which were based on the

amount of the investor funds they brought to 1 Global. [*Id*., ¶¶ 38-39].

Sales agents signed an Affiliate Agreement with 1 Global outlining their rights and responsibilities in, and compensation for, selling the 1 Global investment. Ruderman signed at least two of these Affiliate Agreements on behalf of the Company, allowing sales agents to market the 1 Global investment. 1 Global stressed that its minimum investment amount was $25,000, and that the investment opportunity was for a limited number of sophisticated investors. [*Id*., ¶ 40]. In reality, 1 Global placed no restrictions on who sales agents could solicit to invest in the Company, and frequently waived the $25,000 minimum investment requirement. 1 Global did not restrict who sales agents could offer the investments to, and accepted investments from anyone who wanted to invest, regardless of their net worth, income, or sophistication. [*Id*., ¶ 61].

1 Global received $287 million from 3,400 investors located in 25 states, with at least 100 investors located in Florida and four other states. More than one third of the money came from those who invested through IRAs. [*Id*., ¶ 42]. The funds 1 Global raised were commingled or pooled together into 1 Global's non-segregated bank accounts. [*Id*., ¶¶ 42 & 51].

2. 1 Global's Sales And Marketing Efforts

1 Global regularly provided sales materials to its agents to market the investment. Those materials included a list of Frequently Asked Questions ("FAQs"), a history of the Company, and a description of the MCA program and the investment process. Sales agents used the materials in soliciting clients. [*Id*., ¶ 43]. The marketing materials and FAQs touted 1 Global's alleged consistently high returns for investors and how 1 Global investors had *averaged* "high single digit" and "low double digit" annual returns. [*Id*., ¶ 44]. In January 2018, 1 Global changed its marketing materials to tell investors they would earn a guaranteed minimum of 3% a year, with the possibility of much higher returns. 1 Global also sent copies of investor monthly account statements to sales agents to show investors, which reflected returns ranging from 8% to 17% a year. [*Id*., ¶ 45]. Using this information, sales agents told investors 1 Global could earn them up to low double digit returns a year. Both the Company and sales agents stressed that 1 Global offered better returns than fixed instruments such as annuities, and was a safe, short-term alternative to more risky stock market investments. [*Id*., ¶ 47].

Many investors decided to send money on the basis of these purported high profits. For example, based on the promised high returns, one investor gave almost $1 million from a 401K retirement plan to 1 Global. Another investor invested $135,000 after his sales agent showed him

one of the sample client statements that reflected double digit annual returns. That same investor sent in another approximately $150,000 in the ensuing months based on receiving his own monthly account statements showing annual returns of at least 8%. Still another investor contributed approximately 20% of her net worth in two investments based on the promised high rates of return and the profits being shown on her monthly account statements. [*Id*., ¶ 48].

As part of an integrated offering, 1 Global offered and sold numerous notes that had a one-year term. At least one early version of the Company's marketing materials called the opportunity to put money into 1 Global an investment. The cover read "[p]utting cash to work for merchants while earning high returns on your investment." Many investors wrote the word "investment" in the memo line of their checks. At least one sales agent repeatedly told clients in emails that he was offering them an investment in 1 Global. [*Id*., ¶ 49].

3. The Memorandum Of Indebtedness

For the vast majority of the four-plus years 1 Global offered and sold its investment, it used an instrument entitled a Syndication Partner Agreement or Memorandum of Indebtedness (collectively "MOI") as the note or contract between the Company and investors. [*Id*., ¶ 50]. The MOI specifically stated that an investor was providing money to 1 Global so the Company could expand its business activities, which it termed the "Covered Activities." The only specific Covered Activity identified in the MOI was the MCAs. [*Id*., ¶ 51].

1 Global offered and sold notes that had either a nine-month or one-year term. The nine-month MOI automatically rolled over into a new nine-month term unless the investor expressly informed the Company in writing at least 30 days before the end of the nine months that he or she did not want to roll over. [*Id*., ¶ 52]. In fact, the overwhelming majority of investors allowed their investments to automatically roll over. One sales agent estimated at most eight of the hundreds of investors he solicited redeemed their investments after nine months. [*Id*., ¶ 54].

Even if an investor redeemed his or her investment after nine months, the note extended beyond nine months, because it took 1 Global several months to fully pay the investor. In addition, for the one-year notes, the investor had to wait the full year, then give 90 days' notice and wait for the unwinding period to expire before the investor got their investment back. [*Id*., ¶ 55]. The unwinding period was caused by the way 1 Global used investor money to fund MCAs. Rather than use investor funds on a single MCA or a small number of MCAs, the Company gave each investor a small, fractionalized interest in up to hundreds of MCAs.

Under this system, one MCA would be funded with dozens or even hundreds of investors' funds pooled together. [*Id.*, ¶ 56]. Using this process often resulted in the Company taking months to place all of an investor's funds into MCAs. Thus, if an investor elected to redeem his or her investment after nine months or one year, it could take months after that for the merchants who received the investor's money to fully repay the MCAs. Often the Company would not generate enough money from the MCAs to fully pay redeeming investors, forcing the Company to use new investor funds to pay off redeeming investors. [*Id.*, ¶ 57]. 1 Global eventually informed investors that an investor redeeming a nine-month note who had invested less than $250,000 would be fully repaid in 12 months, three months after the end of the nine-month term. For investments of greater than $250,000, the repayment would take six additional months, making the nine-month MOI a 15-month note. [*Id.*, ¶ 59].

Although 1 Global sent investors monthly account statements purporting to show each investor's account credited with the interest the investor had earned on MCA repayments, investors did not receive those payments right away. Rather, 1 Global simply commingled all those investor funds into its various bank accounts and frequently reinvested the investor money into new MCAs. This also allowed 1 Global to misappropriate investor funds. [*Id.*, ¶ 58].

Another key provision of the MOI provided that it was within 1 Global's sole discretion how to use investor money. Investors had no say in how 1 Global used their money and they could not and did not manage their MCA loan portfolios. It was solely up to 1 Global whether and when to use an investor's money to fund MCAs and which MCAs to fund. The success of the investment and whether investors profited was solely dependent on 1 Global's decisions on MCA funding and other uses of funds, as well as repayment and collection efforts. [*Id.*, ¶ 60].

D. Misrepresentations And Omissions To Investors

1. False Claims About Use Of Investor Funds

1 Global falsely represented to investors on its website, in its marketing materials, and in the MOIs that it would use their money to fund MCAs. 1 Global representatives also made these false statements to sales agents in meetings to pitch the MOI investment. [*Id.*, ¶ 63]. In reality, 1 Global used a substantial amount of investors' funds for other purposes. First, 1 Global used significant investor funds on the Company's operations - approximately $53 million in operating expenses through April 2018. Because investor funds were the sole source of 1 Global's money, the Company necessarily had to use investor funds to pay operating expenses. [*Id.*, ¶ 64].

However, the total investor funds available to 1 Global for operating expenses from the two ways it could collect money from investors was only $46.6 million. Thus, 1 Global spent $6.4 million more in investor funds on operating expenses than it told investors it would. [*Id.*, ¶ 65].

Ruderman also authorized 1 Global to spend another $50 million of investor money to purchase $60 million of bad credit card debt from an entity called Travis Portfolio. The $50 million represented about 16% of all investor funds 1 Global raised. [*Id.*, ¶ 66]. Buying the credit card debt was not an MCA, and thus not an allowed use of investor funds. Travis Portfolio was not using the money to fund specific business operations as 1 Global's marketing materials and website indicated MCAs were for. Furthermore, because the credit card debt was already considered bad debt, this was a very risky investment and the repayment time was far longer than the 4-to-12 months for MCAs that 1 Global advertised. In fact, Travis Portfolio collected the credit card debt so slowly that it could have taken that entity *four years* to repay 1 Global the entire amount. This slow repayment impacted investors' ability to make a profit and 1 Global's ability to fund its MCA business and repay investors. [*Id.*, ¶ 67]. Last, as described in more detail below, 1 Global, authorized and directed by Ruderman, misappropriated $28 million in investor funds to pay Ruderman personally as well as several related companies.

2. False Claims About Fees And Expenses 1 Global Could Take From Investors

1 Global disclosed one fee and one expense it could take from investors in the MOIs. The fee was a 13% fee on merchants' MCA repayments that 1 Global received. In total, 1 Global received $243.1 million of these repayments, so 1 Global could have taken $31.6 million in management fees from those repayments. [*Id.*, ¶ 72]. The one expense was the $15 million in fees it paid third parties to find merchants to enter into MCAs. Thus, the maximum amount of fees and expenses 1 Global could have taken from investors was $46.6 million. [*Id.*, ¶ 73]. However, Ruderman actually used $81 million in investor funds (not including the $50 million 1 Global spent on the Travis Portfolio deal). This consisted of $53 million in operating expenses, and at least $28 million in misappropriated funds sent to Ruderman and his related entities. Thus, the statements that 1 Global would take a 13% management fee and get reimbursed for only one expense from investor funds were false. [*Id.*, ¶ 74]. Ruderman knew 1 Global had used these excess investor funds because he authorized most, if not all, of the $28 million in misappropriated funds and closely monitored the Company's finances. [*Id.*, ¶ 75].

3. False Monthly Account Statements

1 Global provided every investor with a monthly account statement that showed all of the MCAs in which an investor's money was spent – frequently numbering into the hundreds of contracts. [*Id*., ¶ 76]. Early versions of the account statements added up the dollar amount in each MCA to reflect "total net current account receivables" – i.e., how much each investor could expect to receive in repayment from the outstanding MCAs. Below that figure, the account statement contained a total, called "cash not yet deployed," "cash to be deployed," or "cash for future receivables."

Regardless of the terminology, the latter total represented the amount of the investment that was purportedly sitting in 1 Global's bank accounts available for use. [*Id*., ¶ 77]. The early versions of the account statement added up the two totals to represent what the investor's portfolio was purportedly worth. Investors could see on these monthly statements how much their investment had allegedly increased in value, which directly correlated to the rate of return each investor was allegedly earning. In addition, on the first page of each statement, 1 Global expressly told investors the value of their portfolio, the increase in the valuation of their portfolio since they invested, and what rate of return their investment had earned. [*Id*., ¶ 78].

Ruderman received, reviewed, and approved the client statements before 1 Global sent them to investors. He also received a monthly report from the Company's financial analysts showing the total amounts from all investors loaned to merchants and the total cash allegedly available from investors in 1 Global's bank accounts. [*Id*., ¶ 79].

Starting no later than October 2017, the monthly account statements were false because they misrepresented the amount of "cash not yet deployed" available in 1 Global's bank accounts on investors' account statements. Due in large part to the Ruderman-authorized misappropriation and misuse of investor funds, the company's financial analysts discovered that the total of "cash not yet deployed" on all the account statements was approximately $23 million higher than the cash in 1 Global's bank accounts. [*Id*., ¶ 80]. Thus, every account statement showed a false amount of "cash not yet deployed." Because that amount was false, the total value of each investor's portfolio, the increase in the valuation since they had invested, and the rate of return each account statement showed for each investor were all overstated. [*Id*., ¶ 81].

When financial analysts brought this cash shortfall to Ruderman's attention, he falsely claimed they did not include all the Company's bank accounts, and his only action was to order

the "total net current account receivables" and "cash not yet deployed" lines removed from future account statements so investors could not easily tell how much of their investment remained in cash or how their total portfolio value was determined. [*Id*., ¶ 82]. The account statements Ruderman subsequently reviewed and approved continued to be false every month because the cash shortage continued every month. Despite knowing that the "cash not yet deployed" number was inaccurate, he continued to use that figure to overstate the total value of investors' portfolios, the increase in the valuation of investors' portfolios, and the investors' rates of return on all future monthly account statements. [*Id*., ¶ 83].

The cash shortfall not only continued, but increased. In November and December 2017, the shortfalls were around $25 million. Thus the rates of return, the value of the portfolio, and the increase in valuation of the portfolio since inception on each monthly account statement for November and December 2017 were overstated. [*Id*., ¶¶ 84-85]. This pattern continued through at least June 2018, when there was a $50 million shortfall. As a result, the rates of return and other financial metrics described above were false on each account statement. [*Id*., ¶ 86].

4. False Claims About Daszkal Bolton's Work

Investors' monthly account statements falsely claimed that "[o]ur independent audit firm, **Daszkal Bolton L.L.P.**, has endorsed and agrees with the rate of return formula." [Emphasis in original]. However, Daszkal Bolton never audited 1 Global's financial statements, and never endorsed or agreed with 1 Global's rate of return formula. [*Id*., ¶ 88]. Thus, every account statement containing the representation about Daszkal Bolton was false. [*Id*., ¶ 89]. In addition, numerous versions of 1 Global's FAQ's provided to sales agents and investors stated "[a]n external accounting firm validates [investor] loan balances quarterly." [*Id*., ¶ 90]. This statement was also false because neither Daszkal Bolton nor any other accounting firm ever validated the amounts listed on investor account statements. [*Id*., ¶ 91].

5. Misappropriation Of Investor Funds

Ruderman regularly instructed 1 Global accountants and other employees to transfer investor funds to benefit himself, his family, and other close acquaintances, either directly or through entities they owned. When one accountant repeatedly questioned these transfers as improper, Ruderman told the accountant 1 Global was his company and he could do what he wanted with its money. [*Id*., ¶ 93]. 1 Global at Ruderman's direction transferred nearly $22 million to companies he owned or a member of his family owned:

- Relief Defendant Bright Smile Financing, which loaned money to individuals to finance cosmetic dental procedures. 1 Global investors had no ownership interest in Bright Smile and there was no agreement documenting any secured or other interest in the $15.3 million in investor funds Ruderman had 1 Global send to Bright Smile. [*Id.,* ¶ 94].

- Relief Defendant Ganador Enterprises, a consumer loan service, which received $5.6 million in 1 Global investor funds. 1 Global investors had no documented ownership interest in Ganador and 1 Global received no consideration for the funds. [*Id.*, ¶ 95].

- Relief Defendant BRR Block, a company purportedly involved in block chain technology, incorporated by one of Ruderman's sons, which received $1 million in 1 Global investor funds for no consideration or services. [*Id.* ¶ 96].

Ruderman also had more than $4 million of 1 Global investor funds sent to Relief Defendant Ruderman Family Trust, of which his wife and children are beneficiaries. Ruderman had the Company pay the Trust nearly $1 million a year) in investor funds, purportedly to compensate him for his interest in entities that had almost nothing to do with 1 Global's business. The last of these payments occurred on July 26, 2018, one day before 1 Global filed for bankruptcy. The Trust provided no services or consideration for the money. [*Id*., ¶ 97]. 1 Global paid Ruderman's current wife a $116,000 annual salary, although she did not do any work for the Company. Ruderman also received a $240,000 annual salary. [*Id*., ¶ 98].

Ruderman's pilfering of investor funds did not stop there. He used significant amounts to fund a lavish lifestyle, including payments: (1) for a Mercedes Benz lease and a luxury family vacation to Greece; (2) to a housekeeper, a chef, and his ex-wife; (3) on personal credit cards; (4) for his son's auto insurance; (5) to a company where his wife's sister was listed as the manager; and (6) towards his mortgage and homeowner association dues. [*Id*., ¶¶ 17 & 99]. None of these payments were disclosed to investors, and this fleecing of investor funds directly inhibited 1 Global's ability to make MCA loans and placed investor funds at risk. [*Id*., ¶ 100].

III. Memorandum Of Law

A. Standards For Evaluating Subject Matter Jurisdiction

A motion challenging the Court's subject matter jurisdiction is brought under Rule 12(b)(1), not Rule 12(b)(6) as Ruderman has attempted to do. The standards for deciding the two types of motions are different. Thus, the standards Ruderman sets forth on Page 5 of his motion, and his attempt to introduce facts outside the four corners of the Complaint under the "documents central to the plaintiff's claim" theory (Motion to Dismiss at 3 n.2), are inapposite because they apply only to motions to dismiss for failure to state a claim under Rule 12(b)(6).

As discussed above, under a facial challenge to subject matter jurisdiction, the Court must accept the facts of the Complaint as true, and cannot look beyond the four corners of the Complaint. *Morrison*, 323 F.3d at 924 n.5; *Lawrence*, 919 F.2d at 1529. If the defendant makes a factual challenge by introducing facts outside the complaint, as Ruderman has done,[2] the Commission may introduce additional facts outside the complaint, but any factual disputes must be resolved in the Commission's favor as they would be under Rule 56's summary judgment standard. *Morrison*, 323 F.3d at 925; *LeCroy*, 2010 WL 11565305 at *2. Thus, under a facial challenge the Court may not consider the specific provisions of the MCA and the MOI that Ruderman has introduced. The Court may consider them if Ruderman is making a factual challenge, but not to contradict or draw inferences against the Commission's well-pleaded facts. *LeCroy*, 2010 WL 11565305 at *2.

There is a crucial limitation on the District Court's ability to dismiss a case for lack of subject matter jurisdiction: where, as here, the facts necessary to sustain jurisdiction also implicate the merits of a plaintiff's federal cause of action, the court should deny the motion to dismiss. *Morrison*, 323 F.3d at 925; *LeCroy*, 2017 WL 11565305 at *4 (A court may only examine jurisdictional challenges pursuant to Rule 12(b)(1) "if the facts necessary to sustain jurisdiction *do not implicate the merits of plaintiff's cause of action"*) (quoting *Morrison*) (emphasis in original). A subject matter jurisdiction challenge implicates the merits of a plaintiff's federal cause of action when "a statute provides the basis for both the subject matter jurisdiction of the federal court and the plaintiff's substantive claim for relief." *Morrison*, 323 F.3d at 926, quoting *Garcia v. Copenhaver, Bell & Assoc.*, 104 F.3d 1256, 1262 (11th Cir. 1997). Under those circumstances, "the Supreme Court has enunciated a strict standard for dismissals for lack of subject matter jurisdiction." *Williamson v. Tucker*, 645 F.2d 404, 415 (5th Cir. 1981).[3] Under that standard, a court should not dismiss a complaint for lack of subject matter jurisdiction unless the federal claim is *"immaterial"* or "*wholly insubstantial and frivolous*." *Meason v. Bank of Miami*, 652 F.2d 542, 546 (5th Cir. 1981) (emphasis added) (quoting *Bell v. Hood*, 327 U.S. 678, 682-83 (1946)). When a subject matter jurisdiction challenge also represents an attack on the plaintiff's entire cause of action, "the proper course of action for the district court . . . is to find that jurisdiction exists," deny

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[3] In *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 30, 1981.

the motion to dismiss, allow the case to proceed, and resolve it on the merits at a later stage. *Meason,* 652 F.2d at 546; *Williamson*, 645 F.2d at 415.

This case is one where federal statutes – Sections 5 and 17(a) of the Securities Act of 1933 ("Securities Act") and Section 10(b) of the Securities Exchange Act of 1934 ("Exchange Act") – provide both the basis for the Court's authority to hear the case (through requiring that the investment be a security), and the Commission's claims for relief (fraud in connection with the offer, purchase, or sale of securities and the unregistered offer and sale of securities). On at least three previous occasions, this Circuit has held the question of whether an investment is a security goes both to whether the Court has subject matter jurisdiction and to the merits of the cause of action. *SEC v. Mutual Benefits Corp.*, 408 F.3d 737, 742 (11th Cir. 2005); *Meason*, 652 F.2d at 547 ("this circuit has held that a question of whether certain transactions are securities within the meaning of the federal securities laws should not be determined on a motion to dismiss for lack of subject matter jurisdiction unless the complaint fails to meet the standards of *Bell v. Hood*"); *Williamson*, 645 F.2d at 416 ("the definition of the term 'security' in the context of a suit based on the federal securities laws may reach the merits of the case and thereby limit the court's discretion to dismiss for lack of subject matter jurisdiction"). *See also LeCroy*, 2017 WL 11565395 at *4 (denying motion to dismiss for lack of subject matter jurisdiction because the securities laws governed jurisdiction to hear the case and the Commission's claims for relief).

The *Williamson* and *Meason* courts both reversed district court decisions to dismiss securities claims for lack of subject matter jurisdiction on the grounds that the challenged investments were not securities. Under the holdings of those cases and the standards set forth above, this Court should, under binding 11th Circuit precedent, deny Ruderman's motion to dismiss for lack of subject matter jurisdiction. Furthermore, as we discuss in the next section, the facts of the Complaint, and the additional facts Ruderman and the Commission have introduced, demonstrate overwhelmingly that Ruderman and 1 Global offered and sold securities when they defrauded investors.

B. The MOIs Were Securities Under Reves

1. The MOIs Were Not Secured Loans To Businesses

Ruderman acknowledges that the MOIs he and 1 Global offered and sold to investors were

notes.[4] Ruderman further acknowledges that Securities Act Section 2(a)(1) and Exchange Act Section 3(a)(10) define the term security to include "any note."[5] Ruderman, however, fails to acknowledge a key premise of the securities laws – a note is *presumed* to be a security under Supreme Court precedent and it is up to him to rebut the presumption by demonstrating the MOIs were not securities. *Reves v. Ernst & Young*, 494 U.S. 56, 65 (1990); *SEC v. R.G. Reynolds Enterprises, Inc.*, 952 F.2d 1125, 1131-1133 (9th Cir. 1991).

Reves established the framework for determining whether a note is a security. Motion to Dismiss at 6-7; *Reves*, 494 U.S. at 60-69. Ruderman argues the MOIs were not securities because they fall under two categories of notes that *Reves* specifically identified as not being securities: short-term notes secured by a lien on a small business or some of its assets, and a short-term note secured by an assignment of account receivable. *Id.* at 65. Ruderman is wrong for two reasons. First, the facts of the Complaint and the additional facts Ruderman and the Commission have introduced, establish the MOIs were not loans to businesses, but investments in 1 Global's business that allowed 1 Global to make loans (MCAs) to small businesses. The MOIs stated 1 Global had discretion in how to use investor funds, and 1 Global in fact used significant portions of investor funds for purposes other than MCAs, in which investors had no interest.

Second, Ruderman incorrectly cites the standard the Court must use to evaluate whether the MOIs were securities. Under *Reves* and its progeny, the Court must look to the family-resemblance test set forth in *Reves* to determine whether the MOIs were securities. An examination of the MOIs shows they were securities under the family resemblance test.

Factually, Ruderman introduces matters outside the four corners of the Complaint and asks the Court to draw inferences from the facts in his favor in a failed attempt to show the MOIs were secured loans to businesses.[6] He introduces language from the MCAs, which were two-party agreements between 1 Global and merchants, purportedly showing 1 Global was making loans to merchants that were secured by the merchants' accounts receivable. *Id.* at 3-4. He then attempts to bootstrap the MOIs, which were separate two-party agreements between investors and 1 Global, onto the MCA language by quoting a provision of the MOIs in which 1 Global told investors they

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[4] Motion to Dismiss at 1.

[5] *Id.*, at 6.

[6] *Id.*, at 2-5.

had an interest in any MCAs listed in their account. *Id.* at 4. According to Ruderman this meant that "*in essence*, 1 Global noteholders were providing business loans that were brokered by 1 Global . . . ." *Id.* at 5 (emphasis added).

In making this argument, Ruderman ignores the economic realities of the MOI transaction, asks the Court to improperly draw inferences from the facts against the Commission, and ignores several other relevant facts directly contradicting the inference Ruderman asks the Court to draw. The facts Ruderman argues on Pages 3-4 of his motion show unequivocally that the MOIs and the MCAs were two separate transactions – the MCA between 1 Global and merchants, and the MOI between investors and 1 Global. Ruderman tries to gloss over this when he states that *in essence* 1 Global brokered loans between investors and merchants, but that only points up the fact that 1 Global investors gave their money to 1 Global, not directly to merchants. Several other facts demonstrate that the MOIs and the MCAs were separate transactions, and that the MOI was an unsecured note between investors and 1 Global only:[7]

- 1 Global did not have to use investors' money to make MCA loans. The MOIs gave Ruderman and 1 Global complete discretion over how to use investors' funds. Complaint, ¶ 60. Ruderman himself emphasized this in his Memorandum in Opposition to Preliminary Injunction: "Contrary to the SEC's *ex parte* submission, *the MOIs do not require that 1 Global use the loan funds only to fund MCAs*." DE 62 at 4 (emphasis added). This demonstrates the MOIs were an investment in *1 Global*, not in MCAs.

- Ruderman and 1 Global used significant portions of investor funds for purposes other than MCAs. Complaint, ¶¶ 64, 65, 67, 74, 75, and 93-100. This included:

    - $6.4 million in unauthorized expenses on 1 Global operations (*Id.*, ¶¶ 64-65);
    - $50 million to buy impaired, long-term credit card debt (*Id.*, ¶¶ 66-67); and
    - $28 million in misappropriated funds authorized by Ruderman to himself, family members, and related entities. *Id.*, ¶¶ 93-100. This included significant sums to Relief Defendants Bright Smile, Ganador Enterprises, BRR Block, and Ruderman Family Trust, as well as a variety of lavish personal expenses. *Id.*[8]

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[7] Ruderman further tries to blur the line between the MCAs and the MOIs when he claims the Commission did not allege the MOIs were unsecured loans. Motion to Dismiss at 7-8. However, he quotes provisions of the Complaint (¶¶ 34-35) alleging the *MCAs* were unsecured loans. *Id.* At this stage of the case the Court must accept those allegations as true or draw any inferences from them against Ruderman. Regardless of whether the MCAs were secured or unsecured loans, that language has no bearing on whether the MOIs were secured loans to businesses. The facts set forth in this section demonstrate they were not.

[8] Ruderman does not address these uses of investor funds in his Motion to Dismiss. Clearly 1 Global investors had no secured or other interest in these funds. *Id.* Using investor funds in this

- Not all of investor funds earmarked for MCAs were placed into MCAs. Investor money was left sitting in bank accounts, unloaned, as cash, which Ruderman and 1 Global misspent, leading to shortfalls in 1 Global's accounts that were supposed to contain investor money. Complaint, ¶¶ 76-86. These facts are further evidence that investors were giving money to 1 Global, not making commercial loans to businesses.

Finally, to the extent the Court is considering facts outside the four corners of the Complaint, the schedules of 1 Global's assets and liabilities, filed in the bankruptcy actions by the company's new, independent management, show investors had no secured interest in MCAs or any other asset of 1 Global (or its sister company 1 West). Those bankruptcy schedules list investors as *unsecured* creditors of the two companies. DE 64-18, pp. 23-24 of 643, DE 64-19, p. 13 of 37, and DE 64-18, pp. 25-579 of 643, in Case No. 18-19121-RBR. Thus, the undisputed *facts* show the MOIs were securities under the federal securities laws because they represented an unsecured investment in the businesses of 1 Global and 1 West.

2. The MOIs Were Securities Under The *Reves* Family Resemblance Test

(i) *Reves* Requires The Court To Examine The MOIs Under The Family Resemblance Test

Ruderman incorrectly claims the Court need not examine whether the MOIs were securities under *Reves'* family resemblance test because the notes purportedly fit into two of the categories of notes *Reves* identified as not being securities. Motion to Dismiss at 7. As set forth above, the MOIs do not fit into those categories. But even if there was some argument they did, *Reves* expressly requires courts to examine whether notes are securities under the family resemblance test. *Reves*, 494 U.S. at 64-67.

In *Reves*, after setting forth the types of notes it determined not to be securities, the Supreme Court went on to explain: "[m]ore guidance, though, is needed. It is impossible to make any meaningful inquiry into whether an instrument bears a 'resemblance' to one of the instruments identified by the Second Circuit without specifying what it is about *those* instruments that makes *them* non-securities." *Id.* at 65-66 (emphasis in original). The Supreme Court then enunciated the four-part test courts should use to evaluate whether a note bears a resemblance to one of the enumerated non-security notes, before concluding: "in determining whether an instrument denominated a 'note' is a 'security,' *courts are to apply the version of the 'family resemblance' test* that we have articulated here." *Id.* at 67 (emphasis added).

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way plainly shows investors were making an investment in 1 Global, not MCAs.

Thus, *Reves* itself states courts are to apply the family resemblance test, and most courts in this circuit have followed that dictate. *See, e.g., Honig v. Kornfeld*, Case No. 18-80019-CV, 2018 WL 4502174 at *5 (S.D. Fla. Aug. 20, 2018) (employing the family resemblance test to determine that a note was a security under Florida law and further stating that, in *Reves*, "the Supreme Court held that '[a] note is presumed to be a 'security' and that presumption may be rebutted *only* by a showing that the note bears a strong resemblance (in terms of the four factors we have identified) to one of the enumerated categories of instrument") (emphasis added); *SEC v. Levin*, Case No. 1:12-cv-21917, 2014 WL 11878357 at *9 (S.D. Fla. Oct. 6, 2014) ("The Supreme Court has adopted the 'family resemblance' test to determine if a note is a security"); *SEC v. Perez*, Case No. 10-21804-CIV, 2011 WL 13220451 at *3 (S.D. Fla. March 18, 2011) ("In *Reves*, the Supreme Court adopted a version of the Second Circuit's 'family resemblance' test for determining whether a note is a security"); *SEC v. Chemical Trust*, Case No. 00-8015-CIV, 2000 WL 33231600 at *8 (S.D. Fla. Dec. 19, 2000) (setting forth the family resemblance test to determine whether a note was a security and emphasizing the family resemblance test presumes a note is a security, and the defendant must rebut that presumption by showing a note bears a strong resemblance to the non-security notes set out in *Reves*).[9] The Court should therefore apply the family resemblance test.

(ii) The Family Resemblance Test

The family resemblance test examines: (1) the motivations of the buyer and seller; (2) the plan of distribution; (3) the reasonable expectations of the investing public; and (4) the existence of an alternate regulatory regime. *Reves,* 494 U.S. at 66-67. If a note fails the family resemblance test, it is deemed a security and subject to federal securities regulation. The first *Reves* factor examines the transaction "to assess the motivations that would prompt a reasonable seller and buyer to enter into it." *Id.* at 66. The inquiry is whether the motivations are to make an investment (suggesting a security) or commercial or consumer purposes (suggesting a non-security). *Pollack v. Laidlaw Holdings, Inc.*, 27 F.3d 808, 812 (2nd Cir. 1994) (mortgage participations were

[9] *But see Lincoln v. Washington Mut. Bank*, Case No. 07-60273-CIV, 2007 WL 9701069 at *2 (S.D. Fla. Aug. 6, 2007) (because the note in question was a mortgage note for a home, one of the non-security notes enumerated in *Reves*, there was no need to for the family resemblance test). Ruderman further lists three cases in which courts purportedly did not use the family resemblance test; however, only one of them actually did not use the test. *First Citizens Fed. Sav. and Loan Assoc. v. Worthen Bank and Trust Co.*, 919 F.2d 510, 515-516 (9th Cir. 1990). In light of *Reves'* express dictates, those two cases are simply wrong.

securities); *SEC v. Wallenbrock*, 313 F.3d 532, 538 (9th Cir. 2002) ("buyers seeking to make a significant profit provided Wallenbrock with cash for its business of buying accounts receivable").

Here the Complaint sets forth facts showing investors were motivated by the "high single digit" or "low double digit" rate of return that 1 Global offered. Complaint, ¶¶ 44-47. The Company's sales materials described 1 Global as an alternative to both fixed income investments offering lower rates of return as well as more risky stock market investments. *Id.*, ¶ 47. *Reves* recognized that if the buyer is primarily interested in the profit the note is expected to generate, it is likely to be a security. 494 U.S. at 66.

In addition, raising money "for the general use of a business enterprise or to finance substantial investments" is indicative of an investment motivation. *Reves*, 494 U.S. at 66; *Pollack*, 27 F.3d at 812-13. Here, investors did not loan money directly to merchants, a fact Ruderman acknowledges.[10] Rather, they invested their money with 1 Global, which in turn put some of it into fractionalized interests in hundreds of MCAs. Complaint, ¶ 56. The MOIs also expressly stated 1 Global had sole discretion over how to use investor funds. *Id*, ¶ 60. These facts are indicative of an investment, rather than a commercial loan, because investors were giving money to 1 Global to use the funds, not making a direct business loan themselves. *SEC v. Thompson*, 732 F.3d 1151, 1163-64 (10th Cir. 2013) (investors understood they were giving their money to Thompson to invest in Chinese projects and earn them money, not to make loans).

Last, the fact that 1 Global misspent and misappropriated a significant portion of investor funds for non-MCA purposes (i.e., the purchase of Travis Portfolio's distressed debt and sending money to Ruderman-related entities), showed 1 Global was raising funds for general business purposes. That also makes the MOI a security. *Wallenbrock*, 313 F.3d at 538.

The second factor is whether there is "common trading for speculation or investment," which is satisfied when the notes are "offered and sold to a broad segment of the public." *Reves*, 494 U.S. at 68. *See also Reynolds*, 952 F.2d at 1128 (notes sold to 148 investors in several states were offered to a broad segment of the investing public); *Wallenbrock*, 313 F.3d at 539 (notes were held by 1,000 investors in 25 states). Here, 1 Global sold its notes to more than 3,400 investors in at least 25 states, who collectively invested at least $287 million.[11] Such a widespread

[10] Motion to Dismiss at 5.

[11] Complaint, ¶¶ 1-2.

distribution to an extremely large number of holders is more typical of a securities offering than of a borrower/lender relationship. *Wright v. Downs*, 972 F.2d 350, 1992 WL 168104 at *3 (6th Cir. July 17, 1992) (notes sold to 200 investors constituted broad segment). 1 Global also put no limitations on who could purchase the notes, offering them to any member of the public that could come up with the required investment funds (often even waiving its required $25,000 minimum investment). Complaint, ¶¶ 40-41 & 61. *See Thompson*, 732 F.3d at 1165 (noting that seller "sought to expand its distribution to anyone interested who had $100,000 to invest . . . and made its instruments available to anyone willing to pay.").

The third factor is the "reasonable expectations of the investing public," which involves such traits as the return on the investment and the length and characteristics of the note. *Stoiber v. SEC*, 161 F.3d 745, 751 (D.C. Cir. 1998) ("Whether notes are reasonably perceived as securities generally turns on whether they are reasonably viewed by purchasers as investments."); *Wallenbrock*, 313 F.3d at 539 ("A reasonable investor sending funds to Wallenbrock for a guaranteed return of 20% and an automatic rollover every three months would expect that the funds were an investment"). This analysis is similar to the first *Reves* factor. 1 Global's investors invested because of the Company's promised high rates of return. Complaint, ¶ 48. 1 Global also advertised its investment as "an alternative to fixed income," "safe," and "[p]utting cash to work for merchants while earning high returns on your investment." *Id.*, ¶¶ 43-49. These facts would lead a reasonable investor to believe that the MOIs were investments and, in fact, investors stated they viewed these as passive investments generating safe returns.

The final factor is whether there are any alternative regulatory schemes or other risk-reducing factors indicating that the notes are not in fact securities. *Reves*, 494 U.S. at 69. An alternative regulatory regime would need to be quite comprehensive, such as FDIC or ERISA regulations, to keep the notes from "escap[ing] federal regulation entirely." *Id.* at 69. Here, there was no alternative regulatory regime. 1 Global's sales agents emphasized that factor to potential investors. One noted in a marketing brochure that the notes were not regulated by any other federal agency such as the FDIC, or any other regulatory scheme, such as insurance law.

No matter whether the 1 Global MOIs are weighed against each of the four *Reves* factors individually, or all four collectively, they are properly categorized as securities and thus subject to federal securities regulation.

C. The MOIs Were Not Exempt Nine-Month Notes

Ruderman also alleges the MOIs were not securities because they were nine-month notes. Motion to Dismiss at 8-11. Section 3(a)(3) of the Securities Act exempts from the *registration* requirements of Section 5 of the Securities Act "any note . . . which has a maturity at the time of issuance of not exceeding nine months . . ." Section 3(a)(10) of the Exchange Act has a similar definition. However, the nine-month exemption is inapplicable here for three reasons. First, Ruderman and 1 Global sold one-year notes as well as nine-month notes in one integrated offering.[12] Second, because of the automatic rollover provision in most of 1 Global's notes, they were not truly nine-month notes. Third, the exemption is only applicable to short-term, high-grade commercial notes, not investment notes such as the MOIs in this case.[13]

As to the second reason, the vast majority of the MOIs automatically and continuously rolled over into new nine-month terms unless the investor specifically opted out of the automatic renewal. *Id.*, ¶¶ 52-54. The rollover provision in reality transformed the note into a longer investment than nine months. *Wallenbrock*, 313 F.3d at 539 (the nine-month exemption did not apply to notes that had automatic renewal provisions and stating that "A reasonable investor sending funds to Wallenbrock for a guaranteed return of 20% and an automatic rollover every three months would expect that the funds were an investment"); *SEC Release No. 33-4412*, 1961 WL 61632 at *2 (Sept. 20, 1961) ("in light of [legislative] background, the staff of the Commission has interpreted Section 3(a)(3) to exclude as not satisfying the nine-month maturity standard, obligations . . . having provision for automatic 'roll over'").

Ruderman claims the language of the Securities and Exchange Acts specifically exempts rollover provisions from being counted towards the nine-month period. Motion to Dismiss at 8. However, he misquotes and grossly misrepresents the statutory language. The actual provisions states: "which has a maturity at the time of issuance of not exceeding nine months, exclusive of

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[12] Complaint, ¶ 49.

[13] Ruderman acknowledges that this nine-month argument, if persuasive (which it should not be), would only apply to dismiss Counts 1 and 5-10 of the Complaint. That is because the Securities Act contains a provision specifically making the nine-month exemption inapplicable to fraud claims brought under Securities Act Section 17 (Counts 2-4). *See* Securities Act Section 17(c); *SEC v. Better Life Club of America*, 203 F.3d 54, 1999 WL 236885 at *3 (D.C. Cir. March 24, 1999) (unpublished) ("The exemption in § 3(a)(3) excepts the short-term instruments it covers solely from the registration requirements of the 1933 Act. The same instruments are not exempted from the 1933 Act's antifraud provisions").

days of grace, *or any renewal thereof the maturity of which is likewise limited*." Securities Act Section 3(a)(3), Exchange Act Section 3(a)(10) (emphasis added). Clearly these provisions do not include rollover periods in the nine-month computation. Rather they only state that if a note renews the renewal period also must be limited to nine months. Thus, as *Wallenbrock* reasoned, a note that *automatically* renews until an investor opts out is not a nine-month note.

As to the third reason, numerous courts have held that the nine-month provision of Section 3(a)(3) "applies only to commercial paper . . . 'short-term, high quality instruments issued to fund current operations and sold only to highly sophisticated investors.'" *Wallenbrock*, 313 F.3d at 541. *See also Bellah v. First Nat'l Bank of Hereford, Tex.*, 495 F.2d 1109, 1112 (5th Cir. 1974); *Holloway v. Peat, Marwick, Mitchell & Co.*, 900 F.2d 1485, 1489 (10th Cir. 1990) (the "exception for short-term notes is limited to prime quality negotiable commercial paper of a type not ordinarily purchased by the general public"); *R.G. Reynolds*, 952 F.2d at 1132:

> While the short-term note exceptions are not explicitly limited to short-term commercial paper, the literal words of the statutes are not dispositive. In defining the coverage of the Securities Acts, Congress in each case prefaced the definitions with the phrase "unless the context otherwise requires." Furthermore, the Supreme Court has emphasized that in interpreting the Securities Acts "we are not bound by legal formalisms, but instead take account of the economics of the transaction under investigation."

Ruderman acknowledges the nine-month exemption does not apply to a note that is an investment. But he fails to mention that courts use the *Reves* family resemblance test to determine whether a note is more like an investment or commercial paper. *Wallenbrock,* 313 F.3d at 541; *Reynolds*, 932 F.2d at 1132. Under *Reves*, the family resemblance test shows that not only is the MOI a security, it is an investment not subject to the nine-month exemption under Section 3(a)(3) of the Securities Act or Section 3(a)(10) of the Exchange Act.

Bellah, the binding Fifth Circuit case, is not to the contrary as Ruderman argues. In that case, one individual loaned $200,000 directly to a bank so the bank could cover its debts. As the Fifth Circuit held, it was an ordinary, one-on-one commercial loan. *Bellah*, 495 F.2d at 1113. That is drastically different than the situation here, where as described in detail throughout this response, thousands of investors gave 1 Global money to spend on a variety of transactions with the intent of making a profit from 1 Global's investments with third parties. The facts of the two cases could not be more different. The nine-month exemption simply does not apply to the MOIs as they were for investment purposes and for longer than nine months.

D. The MOIs Were Also Investment Contracts

The MOIs also qualify as securities because they are investment contracts. Section 2(a)(1) of the Securities Act and Section 3(a)(10) of the Exchange Act define "security" to include, among other things, "investment contracts." Although the term "investment contract" is not defined in these statutes, the Supreme Court has defined the term to mean: (1) an investment of money; (2) in a common enterprise; (3) with the expectation of profits to come solely from the efforts of others. *SEC v. W. J. Howey Co.*, 328 U.S. 293, 298-99 (1946).

Here, the MOIs satisfy all three elements of the *Howey* test. First, money was invested. Complaint, ¶¶ 1-2 & 37-60. The second element, a common enterprise, is satisfied by the existence of either horizontal commonality (a pooling of investor funds and interests) or vertical commonality (the fortunes of the investor are linked with those of the promoter). The Eleventh Circuit requires only a showing of "broad vertical commonality." *SEC v. Unique Financial Concepts*, 196 F.3d 1195, 1199-1200 (11th Cir. 1999). Here, a common enterprise existed under both horizontal and vertical commonality. Horizontal commonality was met because 1 Global pooled all investor funds into non-segregated bank accounts and placed dozens and sometimes even hundreds of investors into the same MCA. Complaint, ¶¶ 56, 58, & 60. Broad vertical commonality existed because the investors were entirely dependent for their profits on 1 Global's efforts to find successful MCAs. *Id.*, ¶¶ 56-60.

The final element of the *Howey* test requires that the investors' returns be derived solely from the entrepreneurial or managerial efforts of others. *Howey,* 328 U.S. at 298. The Eleventh Circuit traditionally looks at "the amount of control that investors retain[ed over their investment] under their written agreements," as well as the actual ability of the investors to manage their investments, in determining whether the investment meets the third prong of the *Howey* test. *Unique Financial Concepts*, 196 F.3d at 1201. Here, 1 Global and Ruderman had exclusive control over how investors' funds were used. Complaint, ¶¶ 56-60. The MOI expressly stated that it was within 1 Global's sole discretion of how to use investor funds. *Id.* 1 Global determined whether and when the money would be invested in MCAs and which MCAs an investor's money would be used for. *Id.* Moreover, investors were entirely dependent on 1 Global's collection efforts to ensure enough money was collected from all MCAs to make the investor profitable. In short, investors had no role in the MCA process. Therefore, this element of the *Howey* test is met.

Because these investments satisfy the elements of an investment contract, they are securities.[14]

E. Kokesh Did Not Eliminate Disgorgement As A Remedy

In *Kokesh*, 137 S. Ct. at 1635, the Supreme Court held the Commission's claims for disgorgement are governed by the five-year statute of limitations in 28 U.S.C. § 2462. The applicability of Section 2462 to disgorgement was the only issue before the Court. *Kokesh*, 137 S. Ct. at 1642 n.3. Despite acknowledging this ("*Kokesh* did not explicitly invalidate SEC disgorgement because that issue was not before the Court"),[15] Ruderman cites a different part of the same footnote he claims "strongly hinted" that disgorgement is no longer a remedy the Commission can obtain: "Nothing in this opinion should be interpreted as an opinion on whether courts possess authority to order disgorgement in SEC enforcement proceedings or on whether courts have properly applied disgorgement principles in this context." *Id.*

Ruderman speculates that this dicta "perhaps invit[ed] lower courts to extend its reasoning and assess whether district courts have the authority to order disgorgement."[16] As support for this claim, Ruderman cites a purported "well-respected" legal scholar hypothesizing what the Supreme Court *might* have meant, two questions from Justices at *Kokesh's* oral argument, and further conjecture from now-Justice Kavanaugh when he sat on the D.C. Circuit as to what that footnote might have meant. *Id.* at 16. From this flimsy foundation, Ruderman asks this Court to rule – contrary to decades of binding precedent that he acknowledges *Kokesh* did not overrule – that the federal courts no longer have the authority to order disgorgement against securities law violators such as himself who pilfer millions of dollars of investor funds.

The fact is that controlling precedent in this Circuit holds that courts have broad equity powers in Commission enforcement actions to prevent unjust enrichment by ordering securities

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[14] Ruderman's argument that *Howey* is inapplicable here is infirm. Motion to Dismiss at 8-9 n.4. The Supreme Court in *Reves* adopted the family resemblance test and rejected the *Howey* test as applicable to notes, but it nowhere said that an investment instrument could not be analyzed in the alternative to determine whether it is a security. Indeed, the Eleventh Circuit has said that is exactly what can happen. *Financial Security Assurance v. Stephens, Inc.*, 500 F.3d 1276, 1285 (11th Cir. 2007) ("The Supreme Court has articulated three tests to determine whether an instrument is a security that is protected under the federal securities laws by means of being an 'investment contract,' 'stock,' *or* 'note'") (emphasis added).

[15] Motion to Dismiss at 16.

[16] *Id*.

law violators to disgorge their ill-gotten gains. *SEC v. Monterosso*, 756 F.3d 1326, 1337 (11th Cir. 2014). Nothing in *Kokesh* overruled that precedent, and the naked speculation of one judge and one legal writer mean nothing in the wake of well-established fiat that the Supreme Court does not overrule precedent or lower court rulings by implication. *Evans v. Secretary, Florida Department of Corrections*, 699 F.3d 1249, 1263 (11th Cir. 2012) ("the Supreme Court has told us many times that 'if a precedent of the Court has direct application in a case, yet appears to rest on reasons rejected in some other line of decisions, the Court of Appeals should follow the case which directly controls'") (internal citations omitted); *Powell v. Barrett*, 541 F.3d 1298, 1302 (11th Cir. 2008) ("The Plaintiff's position is consistent with the Supreme Court's repeated admonitions that we should not assume that it has, by implication, overruled a prior decision specifically on point with later, more generalized language").[17]

Ruderman is not the first defendant to make this argument. Yet *every* court to address it since *Kokesh* has held that nothing in the Supreme Court's opinion eliminated the Commission's ability to seek disgorgement or the courts' ability to order it. *SEC v. Revolutions Medical Corp.*, Case No. 12-cv-3298, 2018 WL 2057357 at *3 (N.D. Ga. March 16, 2018) ("because the Eleventh Circuit has expressly recognized disgorgement as a proper remedy in SEC enforcement actions, the Court declines to find that *Kokesh* has undermined that authority"); *SEC v. Brooks*, Case No. 07-61526-CIV-ALTONAGA, 2017 WL 3315137 at *8 (S.D. Fla. Aug. 3, 2017) ("*Kokesh* is about statutes of limitations, and its holding is embedded in this context").[18] The Court in *FTC v. J. William Enterprises*, 283 F. Supp. 3d 1259, 1262 (M.D. Fla. 2017), squarely rejected the exact argument Ruderman makes:

> The Defendants argue that discussion during oral argument and what has been called an "ominous footnote" in *Kokesh* suggest that the Supreme Court had doubts about courts' authority to order disgorgement in agency enforcement actions where disgorgement is not a statutorily-conferred remedy . . . there was no such finding in *Kokesh*; the Supreme Court

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[17] *See also In re Horizon Healthcare Servs., Inc. Data Breach Litig.,* 846 F.3d 625, 638 (3rd Cir. 2017) ("we do not assume that the Supreme Court has altered the law unless it says so"); *United States v. Wood*, Case No. 3-15-CR-14, 2016 WL 8131240 at *4 (E.D. Ky. Oct. 3, 2016) ("The Supreme Court 'does not discard longstanding precedent' *sub silentio;* rather, 'if the Court . . . were intent on overriding [the case in question], it surely would have said so directly, rather than act in such an ambiguous manner'") (internal citations omitted).

[18] In *Brooks*, the defendant made many of the same arguments Ruderman makes here about the scope of *Kokesh,* all of which Judge Altonaga rejected in holding *Kokesh* did not abolish the Commission's ability to seek disgorgement. This Court should also reject these arguments.

> specifically declined to address whether courts possessed authority to order disgorgement in SEC enforcement proceedings . . . the Supreme Court's deliberate avoidance of this different, if potentially analogous, issue provides no basis for this Court to disregard decades of precedent.[19]

Circuit and district courts elsewhere have also rejected arguments that *Kokesh* eliminated the Commission's ability to seek disgorgement. *SEC v. Liu*, Case No. 17-55849, 2018 WL 5308171 at *3 (9th Cir. Oct. 25, 2018) (unpublished) (*Kokesh* "expressly refused to reach the issue" of whether disgorgement remains an authorized remedy); *SEC v. Present*, Case No. 14-cv-14692, 2018 WL 1701972 at *2 (D. Mass. March 20, 2018) ("*Kokesh*'s holding on the scope of Section 2462 does not undermine First Circuit precedent supporting a court's equitable power to prevent unjust enrichment by ordering disgorgement"); *SEC v. Chen*, Case No. 17-cv-6929, Slip Op. at 6 (C.D. Cal. March 23, 2018) (attached as Exhibit A) ("This court concludes that the Supreme Court's explicit statement that it was not opining on the authority of courts to order disgorgement, or whether they have done so correctly, does not overturn binding Ninth Circuit precedent authorizing disgorgement"); *SEC v. Team Resources, Inc.,* Case No. 15-cv-01045, Slip Op. at 3-4 (N.D. Tex. June 4, 2018) (attached as Exhibit B) (rejecting defendants' "contention that *Kokesh* impairs [the Court's] authority to order disgorgement in securities enforcement proceedings").[20]

Thus, the unanimous holdings of courts post-*Kokesh* is that regardless of whether disgorgement is considered a penalty for statute of limitations purposes, *Kokesh* did not eliminate disgorgement as a remedy in Commission enforcement proceedings. Ruderman has not cited a contrary holding. Accordingly, the Court should not dismiss any portion of the Commission's Complaint on these grounds.

IV. Conclusion

Based on the above, the Court should deny Ruderman's motion to dismiss in its entirety.

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[19] *Id*., at 1262.

[20] *See also SEC v. Arcturus Corp.*, Case No. 3:13-CV-4861, 2018 WL 1701998 at *2 (N.D. Tex. Jan. 10, 2018) (disagreeing with defendants that *Kokesh* called into question the courts' authority to award disgorgement in Commission enforcement proceedings); *SEC v. Jammin Java Corp.*, Case No. 2:15-CV-08921, 2017 WL 4286180 at *3-4 (C.D. Ca. Sept. 14, 2017) (collecting cases holding *Kokesh* did not eliminate the disgorgement remedy).

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on November 16, 2018, the foregoing document was filed electronically with the Clerk of Court using CM/ECF system and served via CM/ECF.

/s/ *Christopher Martin*
Christopher Martin

SERVICE LIST

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