STATE OF MINNESOTA
COUNTY OF HENNEPIN

DISTRICT COURT
FOURTH JUDICIAL DISTRICT
CIVIL DIVISION

Carebourn Capital, L.P.,

Plaintiff,

v.

DarkPulse, Inc., Standard Registrar & Transfer Company, Inc.,

Defendants,

DarkPulse, Inc.,

Third-Party Plaintiff,

v.

Chip A. Rice,

Third-Party Defendant.

ORDER ON DARKPULSE, INC.'S MOTION FOR SUMMARY JUDGMENT

Court File No.: 27-CV-21-1173

More Capital, LLC,

Plaintiff,

v.

DarkPulse, Inc. and Standard Registrar Transfer Company, Inc.,

Defendants,

DarkPulse, Inc.,

Third-Party Plaintiff,

v.

Court File No.: 27-CV-21-1173

Michael J. Wruck,

Third-Party Defendant.

This matter came on before the Court on January 27, 2023, on DarkPulse, Inc.'s, motion for partial summary judgment.

Lee Hutton III, Esq., appeared as counsel for Carebourn Capital, L.P. ("Carebourn").

Eric Benzenberg, Esq., Marjori Santelli, Esq., Jacques Lerner, Esq., and Jordan Weber, Esq., appeared as counsel for DarkPulse, Inc. ("DarkPulse").

DISCUSSION

1. **Procedural Background.** Carebourn initiated this action on January 29, 2021, alleging that DarkPulse defaulted on its financing agreements ("Agreements") with Carebourn and improperly transferred shares of its stock that should have been held for Carebourn.

2. The Amended Verified Complaint added Standard Register as a Defendant and asserts claims for Declaratory Judgment—Count I (Against All Parties), Breach of Contract—Count II (Against DarkPulse Only), Breach of Contract—Count III (Against Standard Register Only), Attorney's Fees—Count IV (Against All Parties), Unjust Enrichment—Count V (Against DarkPulse Only), Quantum Meruit—Count VI (Against DarkPulse Only), Account Stated—Count VII (Against All Parties), and Civil Conspiracy—Count VIII (Against All Parties).

3. On October 12, 2021, the Court granted Standard Register's Motion to Dismiss for lack of personal jurisdiction. Order, Dec. 6, 2021. The Court reaffirmed Standard Register's dismissal on Carebourn's Motion for Reconsideration in an Order dated February 15, 2022.

4. The Court issued a second Order dated February 15, 2022, denying Carebourn's Motion for Summary Judgment. The Court held that summary judgment was premature at that stage because DarkPulse had been diligent in seeking discovery, and Carebourn had not been forthcoming. Additionally, the limited factual record indicated that there were issues of material fact that would preclude Carebourn from prevailing on its motion.

5. In the instant summary judgment motion, DarkPulse seeks a declaratory judgment that (1) Carebourn is an unregistered securities dealer in violation of the Exchange Act, 15 U.S.C. § 78o(a); (2) the Agreements between Carebourn and DarkPulse are unlawful, unenforceable, void, and subject to recission under the Exchange Act, 15

U.S.C. § 78cc; (3) the DarkPulse has no further legal or equitable obligations under the Agreements; (4) grant summary judgment to DarkPulse on Counts I, II, IV, V, and VI; and (5) grant summary judgment to DarkPulse on its first, third, fourth and fifth affirmative defenses.[1]

6. **Facts.** Based on the parties' statements of material facts in support of and in opposition to DarkPulse's Motion, along with the evidence in the record, the following facts are not genuinely in dispute.

7. Carebourn is a Delaware limited partnership founded by Chip Rice in 2009. (Benzenberg Aff. Ex. 14, at 46.) Its principal place of business is at 8700 Black Oaks Lane N, Maple Grove, Minnesota 55311. (*Id.*) Carebourn's managing partner is Carebourn Partners, an entity owned in part by Chip Rice. (*Id.*) Chip Rice's son, Logan Rice, provides consulting services to Carebourn. (Benzenberg Aff. Ex. 15, at 11.) Since 2011, Carebourn's business model has focused exclusively on convertible debt agreements. (Benzenberg Aff. Ex. 14, at 25.)

8. Carebourn describes its activities as "actually [making] an investment in the company." (*Id.* at 19.) Carebourn invests its own money and does not handle anyone else's money. (*Id.* at 16.) Carebourn has never registered with the SEC as a securities dealer. (*Id.* at 52.)

9. Business Model. Since 2011, Carebourn's business model has focused exclusively on providing loans to target companies ("issuers") in exchange for convertible debt agreements. (*Id.* at 25.) The agreements were offered on a mostly take-it-or-leave-it basis, and thus issuers had little room for negotiation. (*Id.* at 31, 42.) Each agreement allowed Carebourn to purchase the debt at a discount. (*Id.* at 30–40.) Additionally, when Carebourn sought to convert the debt into issuer stock, it did so at a discount below the market value of the stock. At any given time, Carebourn was only allowed to convert 4.99% of the issuer's stock to avoid ownership reporting requirements. (Benzenberg Aff. Ex. 14, 37–38.) Carebourn never sought repayment of the loan in cash and fully expected to receive the target's stock as payment. (*Id.* at 35.)

10. In order to find potential customers, Carebourn cold-called targets, examined the OTC markets, engaged contacts in Chip Rice's network, and attended financial shows in Las Vegas, San Diego, San Francisco, and New York City. (*Id.* at 26.) For at least a brief period, Carebourn engaged an individual named Mike Wruck to assist with research. Linrick Industries, Chip Rice's wife's company, also conducted some research. (*Id.* at 28.) Carebourn conducted some due diligence on the target companies, including checking the

[1] Lack of standing, Carebourn cannot lawfully engage in securities transactions, Carebourn cannot lawfully exercise any of its rights under the Agreements, and Carebourn is barred from obtaining relief sought in the Complaint as a result of unclean hands, *in pari delicto*, waiver, release, satisfaction, and/or estoppel, respectively.

EDGAR website to ensure the target was current on its filings with the SEC. (Benzenberg Aff. Ex. 15, at 47.)

11. Chip Rice described the general process of converting the debentures as follows:

> [W]e would wait six months, you know, under Rule 144. So long as the company is qualified, current, we would take and submit a conversion. Get an attorney opinion. Submit the conversion with the opinion to the TA, send it to the brokerage firm, fill out the brokerage firm request of information on the note and wait for their approval or disapproval. That was the process."

(Benzenberg Aff. Ex. 14, at 33.)

12. The point of Carebourn's model was to obtain the stocks at a significant discount and then sell the stock at market value. (*Id.* at 56.) It would then make distributions to its shareholders. (*Id.*) It made no other investments. It was a "mandate" to not get involved in any issuer. (*Id.*) Carebourn never took part in any organizational control, investor relations, consulting services, marketing, or advertising services, or hiring of professionals, or any substantive business decisions. (*Id.*)

13. Carebourn's and DarkPulse's Agreements. Carebourn and DarkPulse executed two contracts on two separate occasions: a Convertible Promissory Note ("Note") and a Securities Purchase Agreement ("SPA") (Compl. 1; Benzenberg Decl. Exs. 1–4, Feb. 24, 2021.) On July 17, 2018, DarkPulse entered into the July 17 Note and SPA, whereby Carebourn agreed to loan $165,000 to DarkPulse, with an expected repayment of $189,750. (Compl. 1; Benzenberg Decl. Exs. 1–2.) The July 17 Note imposed a twelve percent interest rate and an original issue discount of $24,750. (Benzenberg Decl. Ex. 1, at 1.) The July 17 Note also gave Carebourn the right to convert any or all of the outstanding debt owed into DarkPulse securities at a 40 percent discount to DarkPulse's average trading price of the lowest three days during the twenty-day period preceding a conversion. (*Id.* ¶ 1.1–1.2.)

14. On July 24, 2018, DarkPulse entered into a second, similar agreement with Carebourn, whereby Carebourn provided DarkPulse with an additional $75,000. (*Id.* Exs. 3–4.) Similar to the July 17 agreements, the July 24 Note imposed a 12 percent interest rate and 40 percent conversion discount, but the issue discount in this subsequent agreement was $36,000. (*Id.* Ex. 3, at 1–3.)

15. **Summary Judgment Standard.** Summary judgment is appropriately granted when there are no genuine issues of material fact, and a party is entitled to judgment as a matter of law. Minn. R. Civ. P. 56.03. In determining a summary judgment motion, the Court must view evidence in the light most favorable to the party opposing the motion. See *Gradjelick v. Hance*, 646 N.W.2d 225, 231 (Minn. 2002). Summary judgment is

"inappropriate when reasonable persons might draw different conclusions from the evidence presented." *DLH, Inc. v. Russ*, 566 N.W.2d 60, 69 (Minn. 1997) (citing *Illinois Farmers Ins. Co. v. Tapemark Co*., 273 N.W.2d 630, 634 (Minn. 1978)). On a motion for summary judgment, the district court's function "is not to decide issues of fact, but solely to determine whether genuine factual issues exist." *Id.* (citing *Nord v. Herreid*, 305 N.W.2d 337, 339 (Minn. 1981)). "[T]he court must not weigh the evidence on a motion for summary judgment." *Id.* (citing *Murphy v. Country House, Inc*., 240 N.W.2d 507, 512 (Minn. 1976); *Fairview Hosp. & Health Care Servs. v. St. Paul Fire & Marine Ins. Co.*, 535 N.W.2d 337, 341 (Minn. 1995)). Mere denials, general assertions, and speculation are insufficient to raise an issue of material fact. *Gutbrod v. Cnty. of Hennepin*, 529 N.W.2d 720, 723 (Minn. Ct. App. 1995).

16. Carebourn argues that summary judgment is improper because there are issues of material fact relating to whether Carebourn is a "dealer." (Pl.'s Opp. Mem. 20). However, it is well settled that statutory interpretation is a question of law. *Bingham's Trust v. CIR*, 325 U.S. 365, 370 (1945). When no genuine issue of material fact exists in applying the factual record to the statutory definition, summary judgment is appropriate. *See SEC v. Keener*, 580 F. Supp. 3d 1272 (S.D. Fla. 2022) (holding defendant was a dealer under the Exchange Act on summary judgment motion) (hereinafter *Keener II*); *SEC v. Almagarby*, 479 F. Supp. 3d 1266 (S.D. Fla. 2020) (granting SEC summary judgment on claim that defendant was a dealer, based on undisputed factual record, and rejecting defendant's trader exception defense). This dispute centers on whether Carebourn's actions fit the definition of "dealer" under the Exchange Act. In its brief, Carebourn does not point to any evidence that a material factual dispute exists regarding whether it acted as a dealer. Rather, it examines at length what constitutes a genuine issue of material fact, then summarily concludes that there is one regarding Carebourn's status. (Pl.'s Opp. Mem. 18–19.). Because Carebourn does not point to factual issues beyond making general denials that it is dealer, summary judgment is proper.

17. **Definition of "Dealer" Under the Exchange Act.** Section 15(a)(1) of the Exchange Act makes it unlawful for anyone who is a dealer to use the mails or interstate commerce to engage in or attempt to induce the purchase or sale of securities unless the dealer is registered with the SEC. *See* 15 U.S.C. § 78o(a)(1). The Exchange Act defines "dealer" as "any person[2] engaged in the business of buying and selling securities . . . for such person's own account through a broker or otherwise." 15 U.S.C. § 78c(a)(5)(A). Explicitly excluded from this definition is any person who buys or sells securities "for such person's own account, either individually or in a fiduciary capacity, but *not as a part of a regular business*."

18. As the Eleventh Circuit Court of Appeals has found, the central distinction between these activities is whether the entity is engaged "in the business of" buying and

[2] *See* 15 U.S.C. § 78c(a)(9) (defining "person" as "a natural person, company, government or political subdivision, agency of instrumentality of a government").

selling securities." *SEC v. Big Apple Consulting USA, Inc.*, 783 F.3d 786, 809 (11th Cir. 2015).[3][4] That circuit has defined business as a "commercial enterprise carried on *for profit*, a particular occupation of employment habitually engaged in for *livelihood* or *gain*." *Id.* Additionally, courts have looked at the volume of activity to determine whether a person is a dealer:

> While evidence of merely *some* profits from buying and selling securities may alone be inconclusive proof, the defendants' *entire* business model was predicated on the purchase and sale of securities. Big Apple and its subsidiaries depended on acquiring client stock and selling that stock to support operations and earn a profit.

Id. 809–10 (11th Cir. 2015) (citation omitted, emphasis original). Regular participation in securities transactions is the "primary indicia of being 'engaged in the business.'" *SEC v. Kenton Capital, Ltd.*, 69 F. Supp. 2d 1, 12–13 (D.D.C. 1998).

19. Additionally, the SEC has promulgated a series of question to help persons determine whether they are acting as a dealer. *See Guide to Broker-Dealer Registration*, U.S. Securities and Exchange Commission, https://www.sec.gov/about/reports-publications/investor-publications/guide-broker-dealer-registration#II (last modified Dec. 12, 2016). The relevant portion reads:

- Do you advertise or otherwise let others know that you are in the business of buying and selling securities?
- Do you do business with the public (either retail or institutional)?
- Do you make a market in, or quote prices for both purchases and sales of, one or more securities?

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[3] Carebourn argues that the *Big Apple* decision is inapplicable in the instant case because the court was applying the definition of dealer from the Securities Act, not the Exchange Act. However, prior courts have found that the definition of dealer in both Acts are similar and have used *Big Apple*'s reasoning when determining if someone is a "dealer" under the Exchange Act. *See, e.g.*, *Keener II*, 580 F. Supp. 3d at 1282 n.3 (S.D. Fla. 2022); *SEC v. Carebourn Capital, L.P.*, No. 21-cv-2114 (KMM/JFD), 2022 WL 1639515 at *3 n.4 (D. Minn. 2022).

[4] Eighth Circuit caselaw defining "dealer" under the Exchange Act is sparse, but existing cases are consistent with the Eleventh Circuit's requirement that a person must be involved in buying and selling securities as a business, not just as a sometime investor. *See SEC v. Ridenour*, 913 F.2d 515, 517 (8th Cir. 1990) ("We agree with the government that Ridenour's level of activity during this period made him more than an active investor.").

- Do you participate in a "selling group" or otherwise underwrite securities?

- Do you provide services to investors, such as handling money and securities, extending credit, or giving investment advice?

- Do you write derivatives contracts that are securities?

A "yes" answer to any of these questions indicates that you may need to register as a dealer.

Id. at ¶ II(B). These factors are not controlling and do not have the force of law, but rather may be used by courts to help determine whether an entity is a dealer. *See Almagarby*, 479 F. Supp. 3d. at 1273 ("The factors listed are merely examples of activity or actions that might render one a dealer. There is nothing . . . that implies that the listed factors are an exclusive or exhaustive checklist that creates a burden of proof . . . ."); *SEC v. River N. Equity LLC*, 415 F. Supp. 2d 853, 858 (N.D. Ill. 2019) (noting the factors are not "a checklist through which a court must march to resolve a dispositive motion").

20. **Carebourn Is a Dealer Under the Exchange Act**. To support its motion for summary judgment, DarkPulse alleges in its motion that Carebourn is an unregistered securities dealer.

21. Carebourn's Regular Participation and Volume of Activity. DarkPulse first points to the percentage of profits, regular participation, and the volume of activity Carebourn engaged in to show that Carebourn is "in the business of" buying and selling securities. (Def.'s Mem. 5–9.) A high volume of buying and selling securities is one indication that a person is acting as a dealer. *See, e.g., SEC v. Ridenour*, 913 F.2d 515, 517 (8th Cir. 1990) (finding defendant acted as a dealer by engaging in over 100 transactions over two-year period); *Almagarby*, 479 F. Supp. 3d. at 1272 ("[T]he sheer volume of the number of deals and the large sums of profit Defendants generated—no fewer than 962 sales of shares and more than $2.8 million in proceeds—gives credence to the proposition that Defendants were engaged in the 'business' of buying and selling securities.").

22. Carebourn's level of participation is significant. There is no dispute that Carebourn purchased convertible notes from issuers at a discount, and then around six months later converted the note into stock, which it then sold on the market for a profit. (Benzenberg Aff. Ex. 14, at 33.) The record shows that Carebourn purchased at least 105 convertible notes from 35 issuers. (Benzenberg Aff. Ex. 16.) Carebourn acquired 21.6 billion shares of newly issued common stock that was then sold on the market, resulting in $28.2 million in sales proceeds. (*Id.*)

23. While evidence of some profits from buying and selling securities may not be conclusive, Carebourn admits that that is its *entire* business model. (*See* Benzenberg

Aff. Ex. 14, at 35 ("[W]e never looked at it as they owed us money. They owed us the right to convert more stock. In general, we were looking at converting shares in kind for repayment, not money."); *Id.* at 52 (affirming that Carebourn's entire business was acquiring and selling shares of issuers for its own accounts); *Id.* at 56 ("[T]he point of the whole model was to make money by doing a convertible debt and giving distributions to our shareholders on a quarterly basis . . . . That is what we did. That's all we did and no other assets. No other purchases. No other investments . . . . We made it a mandate to not be involved in any issuer, and we never bought any stock.")). This level of volume and the fact that the activity comprised the whole of Carebourn's business model strongly weighs in favor of finding that Carebourn acted as a dealer.

24. Carebourn Held Itself out to the Public. Additionally, DarkPulse points out that Carebourn held itself out to the public as willing to purchase convertible notes and sell securities. Such actions are consistent with dealer activity. *See Guide to Broker-Dealer Registration*, U.S. Securities and Exchange Commission at ¶ II(B). The record shows that Carebourn networked extensively to find potential issuers, including by cold-calling, and traveling to financial conferences.[5] Carebourn also maintained a website that advertised convertible and secured debentures to "small to medium sized businesses" which were unable to secure traditional funding.[6] (Benzenberg Aff. Ex. 13, at 1–2.) This activity supports a finding that Carebourn is a dealer.

25. Carebourn Engaged in Underwriting Activity. DarkPulse also argues that Carebourn engages in underwriting activity, which would further support the assertion that Carebourn is acting as a dealer. The Exchange act defines "underwriter" as "any person who has purchased from an issuer with a view to, or sells for an issuer in connection with, the distribution of any security . . . ." 15 U.S.C. § 78c(a)(20). Clearly, Carebourn's business model of purchasing convertible debentures at a discount from issuers with the intent of later selling the securities fits into this definition. Other courts have also found that such activity supports finding that the entity is a dealer. *See Keener II*, 580 F. Supp. 3d at 1287–88 ("As further evidence that [d]efendant meets the statutory 'dealer' definition, [d]efendant acquired newly issued stock directly from issuers at a discount . . . and then resold the stock into the public market."); *SEC v. River North Equity LLC*, 415 F. Supp. 3d 853, 859 (N.D. Ill. 2019) (finding that defendant's practice of acquiring newly issued stock

[5] As Chip Rice explained, "we had a large network of people that were CEOS in public companies, that knew people . . . . And we just networked ourselves into all kinds of different things . . . . Then we started going to shows in Las Vegas. We went to financial shows and we went to San Diego. We went to San Francisco. We went to New York. We went to Florida . . . . We did a lot of one-on-ones where you go to the show and you signed up and you met the company one a one-on-one on the table . . . ." (Benzenberg Aff. Ex. 14, at 26.)

[6] *See also id.* at 30 ("[W]e pay a guy 200 bucks to monitor our email website thing every month. Yes, it is in existence . . . .").

and turning a profit by quickly reselling was the type of underwriting activity that the SEC has found to be characteristic of a dealer). Evidence of its underwriting activity thus supports finding that Carebourn is a dealer.

26. Carebourn's Attempts at Differentiation Are Unpersuasive. First, Carebourn argues that it is not a dealer because it does not provide "dealer services" to customers. (Pl.'s Opp. Mem. 24–25.) It claims that "the plain language of the 'dealer' definition requires it to show that Carebourn was providing 'dealer services,' [sic] as 'part of a regular business'" and even goes so far as to say that "[t]his court must fear the burden to redefine the dealer definition without Congressional [sic] authority." (*Id.* at 28–29.) To support its argument, Carebourn cites to an unpublished bankruptcy court decision approving a settlement agreement and a 1965 decision from the Southern District of California that was not interpreting the definition of "dealer" in the Exchange Act, but rather the Internal Revenue Code. (*Id.* (citing *In re Scripsamerica, Inc.*, 634 B.R. 863, 871 (D. Del. 2021); *Mirro-Dynamics Corp. v. United States*, 247 F. Supp. 214, 217 (S.D. Cal. 1965))). Carebourn also cites to the 8th Circuit decision in *Ackerberg v. Johnson*, but the referenced section focuses on whether the party met the definition of underwriter, only briefly stating that the company's chairman was "clearly" not an issuer or dealer. 892 F.2d 1328, 1335 (8th Cir. 1989).

27. In fact, there is no language in 15 U.S.C. § 78c(a)(5) mandating provision of dealer services in order to be a dealer. Rather, the statute merely requires that the person be "engaged in the business of buying and selling securities." Additionally, none of the cited decisions hold precedential value here. Indeed, several courts have rejected similar arguments. *See Almagarby*, 479 F. Supp. 3d at 1272–73 (granting SEC summary judgment and rejecting defendant's claim it was a only trader when its business model was based on purchasing aged debt from issuers' bondholders and obtaining conversion agreements at deep discounts, then selling them on the market for profit); *River North*, 415 F. Supp. 3d at 858 (denying motion to dismiss SEC claim that defendant was a dealer when it purchased discounted stock from issuers and turned profit not from waiting for market price to rise but from quickly reselling at marked-up price); *SEC v. Keener*, 2020 WL 4736205, at *9 (S.D. Fla. Aug. 14, 2020) (denying motion to dismiss by defendant arguing it was a trader and noting it was plausible that defendant had held itself out as willing to buy convertible notes as a regular part of its business which it frequently converted into stock at a deeply discounted price); *SEC v. Fife*, 2021 WL 5998525, at *5 (N.D. Ill. Dec. 20, 2021) (cataloguing decisions permitting SEC enforcement actions to proceed and also rejecting argument that "dealer" must buy and sell the same securities in the same condition) ; *SEC v. GPL Ventures LLC*, Case No. 21 Civ. 6814 (AKH), 2022 WL 158885, at *5 (S.D.N.Y. Jan. 18, 2022) (rejecting argument by defendants that since they had no customers and provided no services, they could not be dealers).

28. Carebourn further attempts to support its argument by citing to a 1934 senate hearing discussing what would become the definition of dealer in the Exchange Act. There,

the senators noted their concern that the proposed definition would include people such as a "retired man" who is "simply investing his own money" and not just those "engaging in a business of buying and selling securities" (Hutton Aff. Ex. D., at 6581.) This merely clarifies that the congressmen did not intend to include lay individuals making personal investments with those who engaged in the markets as a business. It does not create a requirement that a person must provide dealer services to others to be a dealer under the Exchange Act.

29. Carebourn also urges the Court to define the phrase "buying and selling" in 15 U.S.C. § 78c(a)(5)(A) as buying and selling "the *same* type of security, in the *same* condition, around the *same* time. (Pl.'s Opp. Mem. 21 (emphasis in original).) Carebourn argues that this is how Congress would have understood the phrase at the time the Exchange Act was passed. (*Id.*, citing *Wis. Cent. Ltd. v. United States*, 138 S. Ct. 2067, 2070 (2018) (determining whether stock options qualified as "money renumeration" under Railroad Retirement Tax Act by examining how Congress used term at time Act was passed).) However, Carebourn supports this assertion by citing to several decisions interpreting *state* laws that existed prior to the current federal securities regime.[7] This sheds no light on how members of Congress would have understood the term and has been rejected by other courts. *See SEC v. Fife*, No. 20-cv-5227, 2021 WL 5998525, at *5 (N.D. Ill. Dec. 20, 2021) (cataloguing decisions permitting SEC enforcement actions to proceed and also rejecting argument that "dealer" must buy and sell the same securities in the same condition); *SEC v. Carebourn Capital, L.P*, 21-cv-2114 (KMM/JFD), 2022 WL 1639515, at *6 (D. Minn. 2022). This argument is therefore unpersuasive.

30. Lastly, Carebourn argued at the hearing that it is not a dealer because it does not provide dealer services to "customers" in the regular course of business. (*See also* Pl.'s Opp. Mem. 24–25.) This argument again ignores the plain text of the statute. The definition of dealer explicitly includes a person that buys and sells securities *for the person's own account*. 15 U.S.C. § 78c(a)(5)(A). There is no requirement that a dealer must provide services for others. *Cf.* 15 U.S.C. § 78c(a)(4)(A) (defining broker as "any person engaged in the business of effecting transactions in securities *for the account of others*.") (emphasis added). Adopting Carebourn's definition would add text to the statute that is simply not there.

31. **The Securities Contract Between Carebourn and DarkPulse Is Void Because of Carebourn's Status as an Unregistered Dealer.** DarkPulse next asks the

[7] *State v. Yearby*, 82 N.C. 561 (N.C. 1880) (determining whether meat sellers met definition of dealer in state tax law); *Public Printing*, 12 Pa. D. 790 (Att'y Gen. Op. 1903)(determining whether paper manufacturer was a dealer under Pennsylvania act*); State v. San Patricio Canning Co.*, 17 S.W.2d 160 (Tex. Civ. App. 1929) (determining whether shrimp canner was a dealer under the state licensing and tax laws); *Kansas City v. Butt*, 88 Mo. App. 237 (Mo. 1901) (determining whether defendant selling ice constituted a dealer under Kansas City ordinance).

court to void the contract between it and Carebourn due to Carebourn's status as an unregistered dealer. Section 29(b) of the Exchange Act voids any contract made in violation of the act, with certain exceptions not at issue here. 15 U.S.C. § 78cc(b). To void the contract, the party must show (1) the contract involved a prohibited transaction; (2) the party is in contractual privity with the opposing party; and (3) the party is in the class of persons that the securities acts were designed to protect. *Regional Properties, Inc. v. Financial and Real Estate Consulting Co.*, 678 F.2d 552, 559 (5th Cir. 1982). Because this Court has determined that Carebourn acted as an unregistered dealer in violation of the Exchange Act, the first element is satisfied. There is also no doubt that the parties were in privity of contract. (*See* Benzenberg Affidavit, Exs. 1–4.) Lastly, this Court has already determined that DarkPulse is within the class of persons that the Act was designed to protect because it is an issuer transacting with an unregistered dealer. February 16, 2022, Order, ¶ 10, Index No. 233.

32. Carebourn argues that DarkPulse is not an "unwilling innocent party." (Pl.'s Opp. Mem. 39.) It is true that Section 29(b) does not nullify a contract *per se*. *Mills v. Electric Auto-Lite Co.*, 396 U.S. 375, 386–87 (1970). Rather, it precludes the party that violated the Exchange Act from enforcing the contract while allowing the "unwilling innocent" party that did not violate the act to render it void. *Id.* at 387. However, the Court fails to see how this would be beneficial to Carebourn, as it is the party guilty of violating the statute.

33. Carebourn also argues that the agreement can be voided "[o]nly if an agreement cannot be performed without violating the securities laws" and because, technically, DarkPulse could have repaid Carebourn in cash, it could have been performed without violating securities law. (Pl.'s Opp. Mem. 39–40.) To support this contention, Carebourn cites to a Third Circuit decision, *Berckeley Inv. Group, Ltd. v. Colkitt*, 455 F.3d 195 (2006), which also dealt with convertible debentures. However, in that case, the appellant was attempting to use Section 29(b) to invalidate the appellee's subsequent sale of appellant's stock after the parties had entered into a convertible debenture agreement. *Berckeley*, 455 F.3d at 205. The Third Circuit found that Section 29(b) was not available to rescind the appellee's sale of the stock because the sale was completely independent of the agreement between the two parties. *Id.* at 206. It did not hold as Carebourn suggests, that because the agreement technically allowed repayment in cash, Section 29(b) recission was unavailable. This argument also completely ignores the fact that the parties had no expectation the loan would be repaid in cash. (*See* Benzenberg Aff. Ex. 14, at 35; *Id.* at 42 ("Well, the Securities Purchase Agreement goes along with the fact that we are doing a purchase of securities.").)

34. Lastly, Carebourn claims that this Court would be preempting the "***executive authority*** that the Congress has vested in the SEC" if it found that the contracts between DarkPulse and Carebourn are illegal. (Pl.'s Opp. Mem. 37) (emphasis in original).

Carebourn cites to no case law, nor can the Court find any, that states that only the SEC[8] may seek to rescind contracts under Section 29(b). If anything, extant case law undermines this assertion. See *Regional Properties Inc. v. Financial and Real Estate Consulting Co.*, 678 F.2d 552, 558 (5th Cir. 1982) (holding a private cause of action under Section 29(b) exists in the Fifth Circuit); *Mills*, 396 U.S. at 388 ("The interests of the victim are sufficiently protected by giving him the right to rescind . . . ."). Additionally, there is nothing in the statutory language implying that only the SEC may rescind such contracts. The Court is therefore unpersuaded by this argument.

35. **DarkPulse Is Entitled to Summary Judgment on Carebourn's Unjust Enrichment and Quantum Meruit Claims.** DarkPulse seeks summary judgment on Carebourn's unjust enrichment and quantum meruit claims in its Amended Complaint. Count V of Carebourn's Amended Complaint states that DarkPulse was unjustly enriched by receiving a promissory note worth $500,000 and that Carebourn is entitled to judgment against DarkPulse for the remaining balance, plus interest. (Am. Compl. ¶ 59–62.) An unjust enrichment claim requires proof that (1) a party received something of value; (2) that the recipient was not entitled to the thing of value; and (3) it would be unjust under the circumstances for the recipient to retain the benefit. *Schumacher v. Schumacher*, 627 N.W.2d 725, 729 (Minn. Ct. App. 2001). The term "unjust" could mean illegal, unlawful, or it would be morally wrong for one party to enrich itself at the expense of another. *See First Nat'l Bank of St. Paul v. Ramier*, 311 N.W.2d 502, 504 (Minn. 1981); *Schumacher*, 627 N.W.2d at 729. In Count VI, the quantum meruit claim, Carebourn asserts that it provided money to DarkPulse and had a reasonable expectation of repayment plus interest, and it would be unjust for DarkPulse to retain the funds. Quantum meruit is restitution for the value of a benefit conferred in the absence of a contract under a theory of unjust enrichment. *Faricy Law Firm, P.A. v. API, Inc. Asbestos Settlement Trust*, 912 N.W.2d 652, 657–58 (Minn. 2018) (citation omitted).

36. The parties do not dispute that DarkPulse received something of value from Carebourn. Carebourn argues that it would be unjust for DarkPulse to retain the funds because it "is not an innocent party" and alleges that DarkPulse frequently "accept[s] money and then claim[s] it is toxic." (Pl.'s Opp. Mem. 35.) However, a generalized assertion that Darkpulse is not an innocent party because it has engaged in multiple potentially similar transactions does not create a genuine issue of whether it is an innocent party in this transaction. *See City of Maple Grove v. Marketline Const. Cap., LLC*, 802 N.W.2d 809, 818 (Minn. Ct. App. 2011) ("Vague assertions that Maple Grove committed some type of fraud or negligent misrepresentation are insufficient to establish a prima facie

[8] The SEC is suing Carebourn and Chip Rice for acting as unregistered securities dealers in the District of Minnesota in a separate action. That action is still pending. *SEC Sues Minnesota-Based Firm and Its Managing Partner for Acting as an Unregistered Securities Dealer*, U.S. Securities and Exchange Commission (Sept. 27, 2021), https://www.sec.gov/litigation/litreleases/2021/lr25223.htm.

claim of unjust enrichment that would survive summary judgment."). Additionally, the Minnesota Supreme Court has held that, generally, no rights can be enforced when a contract is illegal, even if the defendant received something under the contract. *Fox Film Corp. v. Muller*, 255 N.W. 845, 848 (Minn. 1934); *Ylijarvi v. Brockphaler*, 213 Minn. 385, 319 (1942) ("[T]he mere fact that a part performance has been beneficial is not enough to render the party benefited liable to pay for the advantage."); *First Nat'l Bank of St. Paul v. Ramier*, 311 N.W.2d 502, 504 (Minn. 1981) ("[U]njust enrichment claims do not lie simply because one party benefits from the efforts or obligations of others . . . ."). Lastly, it would undermine the policy of Section 29(b)—protecting persons from a contract involving a prohibited transaction—by allowing an unregistered dealer to essentially enforce the contract through restitution. *See* Restatement (Third) of Restitution § 32(2) (Am. Law. Inst. 2011) ("Restitution will also be allowed . . . if the allowance of restitution will not defeat or frustrate the policy of the underlying prohibition."). Because of this, Carebourn is not entitled to equitable relief.

37. **Carebourn's Claims for Attorney's Fees and Equitable Relief Fail as a Matter of Law.** Lastly, this Court turns to DarkPulse's argument that Carebourn's claim for attorney's fees fails as a matter of law. The parties agreed that DarkPulse would pay Carebourn all costs, fees, and expense in connection with "any litigation, contest, dispute, suit or any other action" to enforce the agreement. (Benzenberg Aff. Ex. 1, at 19.) As explained above, Section 29(b) makes the offending contract voidable "as regards the rights of any person . . . in violation of any such provision, rule, or regulation." Because the Court has found that the securities contracts are void as to Carebourn, it no longer has the contractual right to attorney's fees.

IT IS SO ORDERED:

1. DarkPulse's motion for summary judgment seeking a declaratory judgment that Carebourn is an unregistered dealer is **GRANTED**.

2. DarkPulse's motion for summary judgment seeking a declaratory judgment that the Agreements are void is **GRANTED**.

3. DarkPulse's motion for summary judgment seeking a declaratory judgment that it has no further legal or equitable obligations under the Agreements is **GRANTED**.

4. DarkPulse's motion for summary judgment on Counts I, II, IV, V, and VI of the Amended Complaint is **GRANTED**.

5. Because the Agreements are void, the Court finds it unnecessary to rule on DarkPulse's affirmative defenses.

Dated: April 21, 2023

BY THE COURT:

Patrick D. Robben
Judge of District Court