

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

CASE NO. 12-CV-80-CEJ

SECURITIES AND EXCHANGE COMMISSION,)
)
Plaintiff,)
v.)
)
BURTON DOUGLAS MORRISS,)
ACARTHA GROUP, LLC,)
MIC VII, LLC,)
ACARTHA TECHNOLOGY PARTNERS, LP, and)
GRYPHON INVESTMENTS III, LLC,)
)
Defendants, and)
)
MORRISS HOLDINGS, LLC,)
)
Relief Defendant.)
_____)

**PLAINTIFF’S MOTION FOR ORDER
TO SHOW CAUSE WHY RELIEF DEFENDANT SHOULD NOT
BE HELD IN CONTEMPT FOR FAILING TO PROVIDE SWORN ACCOUNTING**

Pursuant to Rules 26 and 37 of the Federal Rules of Civil Procedure, and this Court’s inherent authority to enforce its orders, Plaintiff Securities and Exchange Commission moves this Court for an order to show cause why Relief Defendant Morriss Holdings, LLC should not be held in contempt of this Court for failing to provide the sworn accounting the Court ordered on both January 17, 2012 and again on January 27, 2012. After significant delay, Morriss Holdings has produced an unsworn and incomplete “Trial Balance Worksheet for 2011,” which fails to comport with the Court’s orders.

FACTUAL AND PROCEDURAL BACKGROUND

The Commission filed this action against Defendant Burton Douglas Morriss, four other defendants, and Morriss Holdings as Relief Defendant on January 17, 2012, alleging among

other things that Morriss defrauded investors in the four defendant companies by transferring more than \$9 million in investor funds to himself and Morriss Holdings. (D.E. 1). The Commission's Complaint alleges Morriss Holdings received a significant portion of the funds Morriss misappropriated. (*Id.*). On the same day, the Commission filed *ex parte* motions seeking asset freezes over all defendants but Morriss and over Morriss Holdings, and to appoint a Receiver over the four defendant companies. (D.E. 3 & 6). After reviewing the Commission's pleadings and exhibits, the Court granted both motions. *See, e.g.*, Asset Freeze Order and Other Emergency Relief (D.E. 17).

In its January 17, 2012 Asset Freeze Order, the Court ordered Morriss Holdings to provide a sworn accounting of (1) all funds, whether in the form of compensation, commissions, loans, income, and other benefits Morriss received from Morriss Holdings; (2) all assets, fund or other properties held by Morriss Holdings; (3) all accounts, including but not limited to bank accounts, savings accounts, securities accounts, and deposits of any kind in which Morriss Holdings has either an interest or over which it has the power or right to exercise control; (4) all funds received from investors; (5) all compensation and other benefits it paid to Morriss; and (6) all assets, funds or other properties held in its name or for its indirect beneficial interest. (*Id.* at 5). The Court ordered Morriss Holdings to produce the sworn accounting within seven days. Morriss Holdings failed to do so.

After a hearing on whether the Court should continue the asset freeze, on January 27, 2012, the Court issued a second Asset Freeze Order and Other Emergency Relief. (D.E. 59). In the Order, the Court ruled that "Morriss Holdings shall make the sworn accountings described in D.E. 17 within 14 days of the entry of this Order if [it] has not already provided [it]." (*Id.* at 3). On February 7, 2012, Morriss Holdings' filed its motion requesting additional time until

February 28, 2012 to provide the sworn accounting. (D.E. 64). The Commission consented to the motion, and the Court granted it. (D.E. 69). Meanwhile, at Morriss Holdings' request, on February 10, 2012, the Commission provided it with early discovery to aid its ability to provide the accounting. February 10, 2012 Letter from the Commission to Morriss Holdings' counsel, David Corwin, attached as Exhibit A.

On February 28, 2012, Morriss Holdings finally filed its response to the Asset Freeze Orders. (D.E. 82). In its response, Morriss Holdings advised it could not provide a sworn accounting and attached an unsworn document entitled "Trial Balance Worksheet for 2011." (*Id.* at Ex. B). The worksheet includes, among other things, entries for what appear to be three bank accounts and a number of accounts receivable, accounts payable, and notes payable. It does not include the information the Court ordered. Specifically, it does not purport to include: (1) all funds Morriss Holdings provided to Morriss; (2) all assets held by Morriss Holdings; (3) all bank, savings, and securities accounts; (4) funds it received from investors; or (5) real estate or other property held by Morriss Holdings. (*Id.*). Morriss Holdings claimed that it could not provide a sworn accounting because Morriss, who asserted his Fifth Amendment privileged against self-incrimination when responding to the same Orders, was its only agent, and it was not in a position to force Morriss to provide the sworn accounting for Morriss Holdings. (*Id.* at 2).

On March 26, 2012, Commission counsel and Morriss Holdings' counsel conducted a telephone conference to discuss Morriss Holdings' objections to the Commission's first request for the production of documents and its attempt at an accounting. April 2, 2012 Letter to Morriss Holdings' counsel, David Corwin, attached as Exhibit B. During the conference, Morriss Holdings advised it would not submit a sworn accounting at that time. Subsequently, Commission counsel requested more detailed information about certain Trial Balance Worksheet

entries, but Morriss Holdings refused to provide such documentation. April 2, 2012 Letter from Corwin to the Commission, attached as Exhibit C. To date, Morriss Holdings has failed to provide any discovery.

Pursuant to Local Rule 37-3.04, Counsel for the Commission certifies that he and counsel for Morriss Holdings have conferred orally in a good-faith effort to resolve the issues this motion raises, but have been unable to resolve them. *See* Exs. B & C.

ARGUMENT

Morriss Holdings has failed to comply with the Court's order requiring a sworn accounting of its assets. This is the case even though Morriss Holdings received the benefit of multiple extensions of time and early discovery. As a result, the Commission requests that the Court issue an order to show cause why Morriss Holdings should not be held in contempt of Court.

As an initial matter, this Court has the inherent authority to enforce its orders through institution of civil contempt proceedings. *In re Smith*, 212 F. App'x 577, 578 (8th Cir. 2006) (citations omitted); *Jake's, Ltd. Inc. v. City of Coates*, 356 F.3d 896, 901 (8th Cir. 2004); *Greater St. Louis Const. Laborers Welfare Fund v. Hance Excavating, LLC*, 4:07-CV-16 CAS, 2008 WL 544718, at *1-2 (E.D. Mo. Feb. 26, 2008) (citations omitted); *Kennedy v. Ala. State Bd. of Edu.*, 78 F. Supp. 2d 1246, 1257 (M.D. Ala. 2000). Failure to comply fully with an order to provide an accounting is a valid basis for a finding of contempt. *SEC v. Current Fin. Servs., Inc.*, 798 F. Supp. 802, 808 (D.D.C. 1992); *Greater St. Louis Const. Laborers Welfare Fund*, 2008 WL 544718, at *2.

Morriss Holdings has failed to comply with the Court's Asset Freeze Orders. Its purported accounting is woefully insufficient. Most importantly, the Trial Balance Worksheet

for 2011 is not a sworn statement. (D.E. 82 at Ex. B). As a result, the Court has no assurances the document includes a complete or accurate list of Morriss Holdings' assets. Second, the Trial Balance Worksheet fails to include the information the Court requested. It does not include information such as bank account numbers for all of Morriss Holdings' checking accounts. Nor does it include any securities brokerage accounts or real estate holdings over which Morriss Holdings maintains control. Likewise, the accounting does not detail the source of funds in its possession or all the funds Morriss Holdings provided Morriss. It also fails to provide any information for 2012. Indeed, Morriss Holdings admits the Trial Balance Worksheet fails to comport with the Court's Orders. (D.E. 82 at 2-3).

The Trial Balance Worksheet's insufficiencies render it useless. A sworn accounting detailing all of Morriss Holdings' assets is crucial to ensure compliance with the Court's Asset Freeze Order and necessary to document Morriss Holdings assets, so the Commission can better determine funds subject to disgorgement. The 2011 Trial Balance Worksheet does not satisfy those needs because it does not purport to be a complete and accurate description of all of Morriss Holdings' assets. Indeed, there may be other assets, including securities, real estate, and trust accounts, which are not included in the trial balance.

Morriss Holdings contends that because Morriss, who has invoked his Fifth Amendment privilege against self-incrimination, is its designated agent and sole employee, it does not have any agents or employees who could swear to an accounting. (D.E. 82 at 2). Morriss Holdings' claim lacks merit. First, Morriss Holdings has no Fifth Amendment privilege against self-incrimination, nor can it "utilize" Morriss' personal privilege against self-incrimination. *SEC v. Brown*, 06-1213 (PAM/JSM), 2007 WL 4192000, at *2 (D. Minn. Jul. 16, 2007) (citing *Belis v. United States*, 417 U.S. 85, 90 (1974)). As a limited liability company, Morriss Holdings cannot

hide behind Morriss' personal privilege against self-incrimination, nor can Morriss assert his personal privilege to avoid producing information on the company's behalf. *Id.* (noting that an individual defendant under criminal investigation cannot assert Fifth Amendment privilege for production of documents on behalf of a company for which he is the owner and sole shareholder). Morriss cannot avoid producing records of an entity for which are in his possession in a representative capacity, even though those records might incriminate him personally. *Id.* See also *Braswell v. United States*, 487 U.S. 99, 109-11 (1988) (holding that because a "custodian of corporate or entity records holds those documents in a representative rather than a personal capacity," the custodian cannot claim a personal Fifth Amendment privilege against the production of corporate records). The fact that Morriss is the sole agent of the company is of no consequence – he cannot claim any Fifth Amendment privilege in the production of corporate records. Indeed, in *Amato v. United States*, 450 F.3d 46, 52-53 (1st Cir. 2006), the First Circuit held that a corporation's sole shareholder, director, officer, and employee could not claim any Fifth Amendment privilege in responding to an administrative subpoena for corporate records because, among other things, when choosing to incorporate, the owner accepted both the benefits and responsibilities that come with incorporation. *Id.* (citations and quotation omitted).

Second, as Morriss Holdings explains in its response, it is owned by the Barbara Burton Morriss Revocable Trust – not Morriss. The trust has had ample time – more than two months – to appoint another agent to compile and produce the Court-ordered sworn accounting. Morriss Holdings provides no explanation why the trust has failed to do so.

Because Morriss Holdings has refused to comply with the Court's Order requiring it to provide a sworn accounting, the Commission requests the Court to issue an order to show cause

why Morriss Holdings should not be held in contempt of Court. Alternatively, the Court should preclude Morriss Holdings from offering any evidence regarding the amount of funds it received at trial or any future disgorgement hearing.

CONCLUSION

For the forgoing reasons, the Commission respectfully requests the Court issue an order to show cause why Morriss Holdings should not be held in contempt of Court for failing to Comply with the Court's January 17 & 27, 2012 Orders.

Respectfully submitted,

April 10, 2012

By: s/ Adam L. Schwartz
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CERTIFICATE OF SERVICE

I hereby certify that on April 10, 2012, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to the following:

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Counsel for Relief Defendant Morriss Holdings, LLC

s/Adam L. Schwartz

Adam L. Schwartz



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February 10, 2012

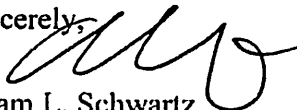
VIA Overnight Delivery

David S. Corwin, Esq.
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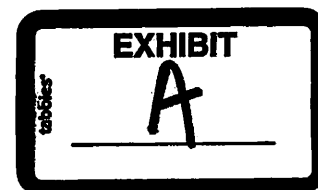
Re: SEC v. Morriss, et al., Case No. 4:12-cv-80-CEJ (E.D. Mo.)

Dear Messrs. Corwin, Sher and Ms. Little:

Pursuant to your request, enclosed are five discs that include transcripts of all investigative testimony taken during the Commission's investigation as well as all documents produced to the Commission by Burton Douglas Morriss, Bates labeled BDM 0000009-0000001 through 0000009-000892, and UHY Advisors Bates labeled P-UHY 0000001 through 0010107 and UHY0000001 through 00107667. If the disc requires a password, it is Sec_FL-03707\$. As previously discussed, the production of these documents serves as partial satisfaction of the Commission's discovery obligations pursuant to Fed. R. Civ. P. 26(a).

Sincerely,

Adam L. Schwartz
Senior Trial Counsel

Enclosures





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April 2, 2012

Via U.S. Mail and E-Mail

David S. Corwin, Esq.
Sher Corwin, LLC
190 Carondelet Plaza, Suite 1100
Clayton, MO 63105
E-Mail: dcorwin@shercorwin.com

**RE: SEC v. Burton Douglas Morriss, et al.
Case No.: 12-CV-80-CEJ (E.D. Mo.)**

Dear Mr. Corwin:

I am writing to request the underlying documents and other, detailed information regarding certain entries in Morriss Holdings LLC's 2011 trial balance. Per our March 26, 2012 discussion, Morriss Holdings agreed to provide, upon the Commission's request, underlying documents and detailed information regarding specific trial balance entries. The Commission requests such documentation for the following entries:

1. Account 000-1170-002; Description: A/R – BDM; Pages 5-6
2. Account 000-1170-003; Description: A/R – BBMT – BDMCRE PIC; Page 6
3. Account 000-1170-011; Description: A/R – BDM 2000 IT; Page 7
4. Account 000-1170-012; Description: A/R – BDMIT; Page 7
5. Account 000-1170-018; Description: A/R BDM Household; Page 8
6. Account 000-1170-021; Description: A/R – Employees; Page 8
7. Account 000-1170-022; Description: A/R – Employees – JSW; Page 8
8. Account 000-1170-023; Description: A/R – Employees – DRB; Page 8
9. Account 000-1170-044; Description: A/R – MIC VII, LLC; Page 9
10. Account 000-1170-100; Description: A/R – Gryphon Holdings; Page 11
11. Account 000-1170-120; Description: A/R – Gryphon Investments; Page 11
12. Account 000-1170-121; Description: A/R – Gryphon Investments II; Page 11
13. Account 000-1170-122; Description: A/R – Gryphon Investments IIb; Page 11
14. Account 000-1170-130; Description: A/R – Gryphon Management Company; Page 11
15. Account 000-1170-500; Description: A/R – Acartha Partners; Page 13

The commission requests that Morriss Holdings produce the requested underlying documents and additional information on or before **April 9, 2012**. The Commission reiterates its previous position that Morriss Holdings' production of its trial balance is insufficient and fails to comply with the Court's

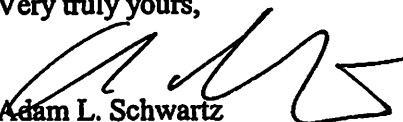


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Asset Freeze Order requiring Morriss Holdings to produce a sworn accounting. In addition, the Commission reserves the right to request additional information as it deems necessary.

If you have any questions, please do not hesitate to contact me at (305) 982-6390.

Very truly yours,



Adam L. Schwartz
Senior Trial Counsel



David S. Corwin

dcorwin@shercorwin.com

April 2, 2012

Via US Mail and E-mail

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**Re: SEC v. Burton Douglas Morriss, et al.
Case No. 12-CV-80-CEJ (E.D. Mo.)**

Dear Mr. Schwartz:

I am in receipt of yours of April 2, 2012. I take issue with the premise of your letter, generally, and specifically your statement that in our March 26, 2012 discussion I promised "on behalf of Morriss Holdings to provide, upon the commissions requests underlying documents and detailed information regarding specific trial balance entries." In fact, in our conversation I did just the opposite. I detailed the structure for you of Morriss Holdings and informed you that there was no one person at this time that was in a position to assist us in the production of documents or accounting records. I further informed you I believed Morriss Holdings was in the process of designating somebody and hoped that person would be identified quickly.

At no time in our conversation did I promise to provide you any additional information based upon the trial balance that I sent to you. Providing the trial balance to you was a gesture of good faith on my part on behalf of Morriss Holdings for the purpose of confirming for you that Morriss Holdings does not have any money at this time. As such, we will not be responding to your request as detailed in your April 2nd letter for the reasons we have stated.

Should you have any questions please feel free to give me a call.

Very truly yours,



David S. Corwin

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