

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 TO COMPEL PRODUCTION
OF DOCUMENTS FROM DEFENDANT BURTON DOUGLAS MORRISS**

Plaintiff Securities and Exchange Commission, Pursuant to Rule 37(a) of the Federal Rules of Civil Procedure, moves the Court to compel Defendant Burton Douglas Morriss to comply with his discovery obligations and produce responses to the Commission’s January 19, 2012 First Request for Production of Documents. After multiple extensions of time, on February 27, 2012, Morriss served his Response to the Commission’s request. In his Response, Morriss raised a number of erroneous objections, but agreed to produce documents responsive to certain portions of the Commission’s request. During a March 23, 2012 telephone conference, the Commission agreed to alter certain requests, and in return, Morriss agreed to produce documents responsive to those modified requests. To date, however, Morriss has yet to produce one single document.

Morriss' failure to produce documents has hampered the Commission's discovery, preventing it from setting and preparing for depositions. Consequently, the Commission asks this Court to order Morriss' prompt and complete response to the Commission's First Request for Production of Documents by a date certain so that fact discovery can be completed in a timely manner.

I. FACTUAL AND PROCEDURAL BACKGROUND

The Commission filed this action against Morriss, the private equity funds and their management companies Morriss controlled (collectively, the "Investment Entities"), and Morriss Holdings as Relief Defendant on January 17, 2012. The Complaint alleged, among other things, that Morriss defrauded investors in the Investment Entities by transferring more than \$9 million in investor funds to himself and Morriss Holdings. (D.E. 1). Morriss disguised these transfers as loans or accounts receivables from the Investment Entities without the knowledge or consent of investors. (*Id.*, ¶ 1) The Commission's Complaint also alleges Morriss Holdings received a significant portion of the funds Morriss misappropriated. (*Id.*, ¶ 24). On the same day it filed the Complaint, the Commission also filed *ex parte* motions seeking asset freezes over all defendants but Morriss and over Morriss Holdings, and to appoint a Receiver over the Investment Entities. (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 Order, the Court ruled "[i]mmediely upon the entry of this Order . . . the parties shall be entitled to serve interrogatories, requests for the production of documents, and requests for admissions. The parties shall respond to such discovery requests within two days of service." (*Id.* at 6). Pursuant to the Court's Order, on January 19, 2012, the Commission

served its First Request for the Production of Documents From Defendant Burton Douglas Morriss via overnight mail to Morriss personally and his attorney at that time. Copy of First Request for Documents, attached as Exhibit A. The Commission's request asked Morriss to produce 19 types of documents including, among other things, communications he had with the Investment Entities, Morriss Holdings, and investors as well as his personal financial records. On January 24, 2012, Morriss filed his first motion to request an additional two weeks to respond to the Commission's document request. (D.E. 45). The Commission consented, and the Court granted the motion and reset Morriss' response deadline to February 7, 2012. (D.E. 49).

On February 1, 2012, the Commission held a telephone conference with counsel for both Morriss and Morriss Holdings regarding its outstanding document requests. During the conference, the Commission consented to Morriss' second request for an additional 20 days to respond to the Commission's First Request for Production of Documents (D.E. 65), and Morriss' counsel advised it would begin producing documents on a rolling basis to the Commission as soon as possible. Feb. 1, 2012 e-mail, attached as Exhibit B. The Court granted Morriss' second motion for additional time, and reset Morriss' response date to February 28, 2012. (D.E. 69). Contrary to his promise, Morriss failed to produce any documents, let alone on a rolling basis.

On February 27, 2012, Morriss served the Commission via U.S. Mail, his Response to Plaintiff's First Request for Production of Documents. Morriss' February 27, 2012 Response, attached as Exhibit C. Morriss' Response included 12 general objections and specific objections to each of the Commission's 19 requests. Morriss also agreed in his Response, subject to certain limitations and objections, to produce documents responsive to Commission requests 1, 2, 5, 6, 7, 8, 13, 14, 15, and 18. *Id.* On March 23, 2012, the Commission and Morriss' counsel conducted a telephone conference in attempt to resolve Morriss' objections. During the

conference, the Commission agreed to revise certain document requests and to investigate whether the Receiver possessed certain documents responsive to the Commission's request. Morriss agreed to produce documents responsive to the Commission's modified requests. On March 28, 2012, the Commission sent a letter to Morriss' counsel in which it detailed its responses to Morriss' general and specific objections, modified certain requests, and demanded production of documents by April 6, 2012. Mar. 28, 2012 Ltr., attached as Exhibit D. On April 12, 2012, Commission counsel and Morriss' counsel again discussed the Commission's discovery request; unfortunately, the parties were unable to resolve this issue. To date, Morriss has failed to produce a single document.

Pursuant to Local Rule 37-3.04(A), counsel for the Commission certifies that he and counsel for Morriss have conferred orally in a good-faith effort to resolve the issues this motion raises, but have been unable to resolve them.¹ See Ex. D.

II. LEGAL STANDARD

Rule 26(b)(1) of the Federal Rules of Civil Procedure provides for liberal discovery. *St. Paul Reins. Co., Ltd. v. Commercial Fin. Corp.*, 198 F.R.D. 508, 512 (N.D. Iowa 2000) (citations omitted). In part, it provides that:

Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if information sought appears reasonably calculated to lead to the discovery of admissible evidence.

¹ The telephone conference on March 23, 2012, occurred at 2 p.m., EDT, and included undersigned counsel, on behalf of the Commission, and Catherine Hanaway, Esq., and Matthew Bartle, Esq., on behalf of Defendant Morriss.

Fed. R. Civ. P. 26(b)(1). Courts have interpreted Rule 26 to provide for liberal discovery. *St. Paul Reins. Co.*, 198 F.R.D. at 511 (citing cases). *See also Liberty Mut. Fire Ins. Co. v. Centimark Corp.*, 08CV230-DJS, 2009 WL 539927, at *1 (E.D. Mo. Mar. 4, 2009) (holding that Rules 26(b) and 34 provide for broad discovery) (citations omitted). “Thus, as long as the parties request information or documents relevant to the claims at issue in the case, and such requests are tendered in good faith and are not unduly burdensome, discovery shall proceed.” *St. Paul Reins. Co.*, 198 F.R.D. at 511 (citing *M. Berenson Co., Inc. v. Faneuil Hall Marketplace, Inc.*, 103 F.R.D. 635, 637 (D. Mass. 1984)). *See also Liberty Mut. Fire Ins.*, 2009 WL 539927, at *1 (holding that requesting party need only make a “threshold showing of relevance” under Rule 26(b)).

The party resisting production bears the burden of establishing lack of relevance or undue burden. *St. Paul Reins. Co.*, 198 F.R.D. at 511 (citations omitted). The objecting party “must demonstrate to the court ‘that the requested documents either do not come within the broad scope of relevance defined pursuant to Fed.R.Civ.P. 26(b)(1) or else are of such marginal relevance that the potential harm occasioned by discovery would outweigh the ordinary presumption in favor of broad disclosure.’” *Id.* (quoting *Burke v. New York City Police Dep’t*, 115 F.R.D. 220, 224 (S.D.N.Y.1987)).

Use of “boilerplate” objections such as: “the requested documents are neither relevant to the subject matter of this action nor reasonably calculated to lead to discovery of admissible evidence,” “the request is overbroad,” and “the request is oppressive, burdensome, and harassing,” are insufficient and “are textbook examples of what federal courts have routinely deemed to be improper objections.” *Id.* at 512. Instead, the party resisting discovery must show specifically how each request is overly broad, oppressive, irrelevant or unduly burdensome. *Id.*

(citing *Redland Soccer Club v. Dep't of Army*, 55 F.3d 827, 856 (3d Cir. 1995); *McLeod, Alexander, Powel & Appfel, P.C. v. Quarles*, 894 F.2d 1482, 1485 (5th Cir. 1990); *Paulsen v. Case Corp.*, 168 F.R.D. 285, 289 (C.D. Cal. 1996); *Burns v. Imagine Films Entert., Inc.*, 164 F.R.D. 589, 592-93 (W.D.N.Y. 1996). Indeed, “[g]eneral objections are not useful to the court ruling on a discovery motion. Nor does a general objection fulfill [a party’s] burden to explain its objections.” *Chubb Integrated Sys. Ltd v. Nat’l Bank of Wash.*, 103 F.R.D. 52, 58 (D.D.C. 1984). As discussed in detail below, Morriss’ generalized, boilerplate objections are insufficient.

III. MORRISS’ GENERAL OBJECTIONS

In his Response, Morriss raised twelve general objections. As discussed above, general objections are insufficient as a matter of law; Morriss must state a specific objection to each item the Commission requested. *Creighton St. Joseph Regional Healthcare, LLC v. Lakeland Eng’g Equip. Co.*, 8:07CV113, 2007 WL 4052064, at *3 (D. Neb. Nov. 13, 2007) (holding that general objections not related to specific requests were insufficient and ordering defendant to produce requested documents and pay attorney’s fees) (citing Fed. R. Civ. P. 34(b)). Consequently, the Court should overrule Morriss’ general objections as insufficient as a matter of law.² *Id.* The Commission, however, addresses two of Morriss’ general objections here because they relate to a number of Morriss’ specific objections, which are discussed below.

A. Morriss Cannot Claim Any Act Of Production Privilege

In General Objection D, Morriss stated he “objects to Plaintiff’s requests to the extent that the act of production and Fifth Amendment privileges apply.” Ex. C at 2.

As an initial matter, there is no Fifth Amendment privilege regarding the contents of the documents the Commission requests. *In re Grand Jury Subpoena Dated July 6, 2005*, 256 F.

² The Commission addressed each of Morriss’ general objections in its March 28, 2012 letter to Morriss’ counsel. *See* Ex. D. The Commission incorporates by reference its responses here.

App'x 379, 381 (2d Cir. 2007). However, the Fifth Amendment's protections in certain limited circumstances may be implicated by the very act of producing the documents or records. *United States v. Teeple*, 286 F.3d 1047, 1049 (8th Cir. 2002) (citations omitted). This aspect of the Fifth Amendment privilege against self-incrimination is commonly referred to as the "act of production privilege." *Id.*

The act of production privilege is limited to two situations: "first if the existence and location of the [requested] papers are unknown to the government and, second, where production would implicitly authenticate the documents" *In re Grand Jury Subpoena*, 256 F. App'x at 381 (internal quotations and citation omitted). In contrast, the privilege does not apply to situations where "the existence, possession, and authenticity of the documents are a 'foregone conclusion' and the [producing defendant] adds little or nothing to the sum total of the Government's information by his act of producing the documents." *Teeple*, 286 F.3d at 1050 (internal quotations and citation omitted). In other words, "where the government already possesses the knowledge that would otherwise be communicated, the question is not of testimony but of surrender." *Id.* (internal quotations and citation omitted). For example, in *Teeple*, the Eighth Circuit held that the production of business documents pursuant to an IRS administrative summons did not implicate the act of production privilege because the individual's possession of the requested documents was a "forgone conclusion" based upon the individual's previous testimony in which he admitted to possession of such documents. *Id.* at 1051.

As in *Teeple*, Morriss' possession of the requested documents is a "foregone conclusion," based upon Morriss' previous investigative testimony and incomplete productions made pursuant to the Commission's administrative subpoenas as well as statements of his attorneys. In other words, Morriss' production of the requested documents would not implicate any privilege

against self-incrimination because the Commission already knows he possess the requested documents due to his previous investigative testimony, his partial, incomplete responses to an investigative subpoena, and the statements of his counsel.

On October 27, 2012, the Commission issued an investigative subpoena requesting that Morriss provide sworn testimony and produce documents. Oct. 27, 2011 Subpoena, attached as Ex. E. The requested documents included communications Morriss had regarding the use of investor funds as well as bank and financial information. *Id.* Morriss began to produce a small portion of certain communications he had with the Investment Entities, Morriss Holdings and investors, but failed to produce all relevant records. In testimony, Morriss admitted that he had not produced all of the requested documents. Nov. 30, 2011 Testimony Tr. at 11:9-2, attached as Ex. F. Consequently, Morriss' previous statements and partial production have placed the Commission on notice of his possession of the requested documents.

Similarly, in November 30, 2011 and January 4, 2012 sworn investigative testimony, Morriss admitted he had received funds from the Acartha Group and other Investment Entities, he used the funds he received for personal expenditures, and he had communications regarding these transfers. Ex. F at 158- 173, 212:16-22; Jan. 4, 2012 Testimony Tr. at 280-281, attached as Ex. G.

Moreover, during Morriss' testimony, his counsel admitted Morriss possessed communications related to the allegations alleged in the Complaint, agreed to produce the documents, including e-mail communications, but failed to do so. Ex. G at 372, 394. Even more recently, Morriss' counsel admitted to possessing 19 images of computer hard drives that may contain documents responsive to the Commissions requests. Mar. 29, 2012 E-mail, attached as Ex. H. Consequently, Morriss cannot claim any act of production privilege because his

possession of the requested documents is a “foregone conclusion,” and therefore his act of producing them is not a question of “testimony but of surrender.” *Teepie*, 286 F.3d at 1050.³

B. Morriss Cannot Limit Production To “Personal” Documents

In General Objection H, Morriss stated he “will produce responsive documents only to the extent that such documents are his personal documents. Defendant objects to any definition to the extent it seeks the documents of any entity over which Defendant Morriss currently has no control.” Ex. C at 2. The Commission’s request is not limited to Morriss’ *personal* documents, but rather all documents in Morriss’ possession, custody, or control.

Whether Morriss no longer maintains control over an entity is of no consequence. Pursuant to Fed. R. Civ. P. 34(a)(1), Morriss must produce any documents in his possession, custody, or control whether *personal* or not. *Huggins v. Fed. Express Corp.*, 250 F.R.D. 404, 408 (E.D. Mo. 2008) (“Control is defined broadly as the ability to obtain upon demand documents in the possession of another. The party to whom the discovery is directed need not have legal ownership or actual physical possession, but rather a practical ability to obtain the documents.”) (citation and internal quotations omitted); *In re Hallmark Capital Corp.*, 534 F. Supp. 2d 981, 981 (D. Minn. 2008) (same).

A party need not have actual possession of documents to be required to produce them under Fed. R. Civ. P. 34. *In re Domestic Air Transp. Antitrust Litig.*, 142 F.R.D. 354, 356 (N.D. Ga. 1992) (“A party need not have actual possession of the documents to be deemed in control of them. The test is whether the party has a legal right to control them.”) (internal citations omitted). Courts have defined “control” as the legal right to obtain documents upon demand.

³ Nor would the production of the requested documents “implicitly authenticate” them. The Commission may authenticate the requested documents in a number of alternative methods, including obtaining testimony from the sender or recipient of communications with Morriss or through the documents own distinctive characteristics. *See* Fed. R. Evid. 901(b)(1) & (b)(4).

Searock v. Stripling, 736 F.2d 650 (11th Cir. 1984). “Production may be ordered when a party has the legal right to obtain papers, even though he has no copy, and regardless of whether a paper is beyond the jurisdiction of the court.” *Buckley v. Vidal*, 50 F.R.D. 271, 274 (S.D.N.Y. 1970). In other words, the responding party cannot furnish only that information within his immediate knowledge or possession; he is under an affirmative duty to seek all information reasonably available to him. *Weaver v. Gross*, 107 F.R.D. 715, 717 (D.D.C. 1985) (declaring that “a party cannot take a purposefully restricted approach to discovery by furnishing only that information within his immediate knowledge or possession” and further adding that “a party has a duty to seek that information reasonably available to him from his employees, agents, or others subject to his control.”).

Contrary to the law, Morriss’ responded to the Commission’s requests for documents reflecting or relating to communications he had with the Investment Entities and investors (Requests 1 & 2), by stating he would only provide “documents responsive to [each] request that are *personal in nature* and not under the custody and control of the Receiver” Ex. C at specific objections 1 & 2 (emphasis added). As discussed above, Morriss must produce all documents in his possession, custody, and control. Pursuant to Fed. R. Civ. P. 34, he may not unilaterally limit his production to communications that were only “personal” in nature. *Id.* See also, *Huggins*, 250 F.R.D. at 408.

IV. MORRISS’ SPECIFIC OBJECTIONS

The majority of Morriss’ specific objections consist of the boilerplate language “Morriss objects to this request because it is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.” Ex. C at specific objections 3-4, 9, 13, 14, 16, & 19. Morriss failed to provide any explanation as to why each of the specific requests was

overbroad, burdensome, and would not lead to the discovery of admissible evidence. Quite the contrary, the Commission's requests relate directly to the heart of the Complaint's allegations – namely, whether Morriss defrauded investors and misappropriated their funds for his personal use. As discussed in Section II above, such boilerplate objections, are insufficient as a matter of law, and should not be considered by the Court. *St. Paul Reins. Co.*, 198 F.R.D. at 511 (citations omitted).

Moreover, in his Response, Morriss agreed to produce certain documents responsive to the Commission's specific requests. Ex. C at specific objections 1-6, 8, 13-14, & 18. Morriss, however, has failed to produce a single document in response to the Commission's now three-month-old First Request for the Production of Documents.

In addition to the forgoing, the Commission replies to Morriss' Responses as follows:

Request No. 1: All documents reflecting or relating to communications you had with the Investment Entities, including, but not limited to letters, emails, voicemails, contracts, and promissory notes.

Defendant's Response: Before Plaintiff successfully petitioned the Court for the appointment of a Receiver, Defendant produced documents responsive to this request. Now, however, documents responsive to this request are in the custody and control of the Receiver. If during Defendant's on-going investigation, he discovers any documents responsive to this Request that are personal in nature and not under the custody and control of the Receiver, he will produce them subject to the objections listed above.

Commission's Reply: The Commission objects because, as discussed in Section III(B) above, Morriss must produce all documents in his custody, control, or possession, not just those of a *personal* nature. That being said, Morriss need not produce documents that are solely in the possession of the Receiver. Moreover, because Morriss' previous document productions during the Commission's investigation were incomplete, the Commission requests Morriss to identify which documents in his previous production satisfy this request.

Moreover, during the March 23, 2012 telephone conference, Morriss' counsel agreed to provide a list of all computer hard drives counsel had imaged, which Morriss believes are also in the possession of the Receiver. The Commission agreed that if the same hard drive images are also in the Receiver's possession, it would obtain them through its outstanding discovery request from the Receiver. Upon receipt of the list of 19 hard drive images in Morriss' possession (*see* Ex. H), the Commission consulted with the Receiver, and learned she did not possess the images. Instead, the Receiver, in agreement with Morriss and Morriss Holdings, had a third-party vendor image twelve of the hard drives in Morriss' possession, and hold them in escrow. According to the Receiver, the images may only be obtained by the consent of all parties or through Court order. Apr. 6, 2012 Ltr., attached as Exhibit I. As the nineteen drives are in Morriss' possession, the Commission's request should include responsive documents on the hard drives.

Request No. 2: All documents reflecting or relating to communications you had with the Investment Entities' existing and potential investors, including, but not limited to, offering materials, letters, emails, and voicemails.

Defendant's Response: Before Plaintiff successfully petitioned the Court for the appointment of a Receiver, Defendant produced documents responsive to this request. Now, however, documents responsive to this request are in the custody and control of the Receiver. If during Defendant's on-going investigation, he discovers any documents responsive to this Request that are personal in nature and not under the custody and control of the Receiver, he will produce them subject to the objections listed above.

Commission's Reply: The Commission reasserts its objection to Morriss' response to request number one.

Request No. 3: All documents reflecting or relating to communications you had with Morriss Holdings, including, but not limited to, letters, emails, and voicemails.

Defendant's Response: Defendant objects to this Request because a request for "all documents reflecting or relating to communication" between Defendant and a company over a six-year period without any subject matter restriction is overbroad, unduly burdensome, and not reasonably calculated to lead to the discovery or admissible evidence. Furthermore, Defendant has already produced documents responsive to this request. Defendant asserts the act of production privilege in response. Subject to and without waiving the objections listed above, Defendant is

willing to work with Plaintiff to narrow this request so that Defendant can conduct a meaningful search for responsive documents that are not subject to the privilege.

Commission's Reply: The Commission objects because Morriss' communications with Relief Defendant Morriss Holdings, LLC is highly relevant given the allegations Morriss misappropriated investor funds through Morriss Holdings. These communications will likely demonstrate, among other things, Morriss Holdings received investor funds at Morriss' direction, used investor funds for Morriss' personal benefit, and was controlled by Morriss. Consequently, the Commission has made a "threshold showing of relevance" as required under Fed. R. Civ. P. 26(b). *Liberty Mutual Fire Ins.*, 2009 WL 539927, at *1. That being said, the Commission agreed to limit its initial request, reserving the right to request additional documents at a later date, to communications between Morriss and Morriss Holdings relating to Acartha Group, MIC VII, ATP, Gryphon Investments, and Morriss Holdings' assets. As to Morriss' assertion of the act of production privilege, the Commission reasserts its objection in Section III(A), above. Last, the Commission requests Morriss to provide a list of all documents it produced pursuant to investigative subpoena that is responsive to this request.

Request No. 4: All documents reflecting or relating to any email account(s) you have used.

Defendant's Response: Defendant objects to this Request because it is so dramatically overbroad that it would sweep in documents that do not have even scant relevance to Plaintiff's Complaint. The request is also unduly burdensome. Defendant asserts the act of production privilege in response. Subject to and without waiving the objections listed above, Defendant is willing to work with Plaintiff to narrow this request so that he will be able to produce any emails that are not privileged and are reasonably related to this case.

Commission's Reply: The Commission objects because documents reflecting or relating to the email accounts Morriss used is highly relevant because their production would lead to the discovery of relevant, admissible evidence. Based upon Morriss' testimony, the Commission has reason to believe Morriss heavily utilized email in making misrepresentations to investors. The

Commission requests documents showing all email addresses Morriss utilized in the past six years, which relate to and reflect communications regarding the Investment Entities and Morriss Holdings.

Request No. 5: All documents reflecting or relating to any bank account(s) you have used.

Defendant's Response: Defendant has already produced documents responsive to this request. Subject to and without waiving the general objections listed above, Defendant will produce the portions of any monthly account statement he is able to locate that reflect a deposit of funds from or payments to any of the other Defendants or one of the Investment Entities. To the extent that Plaintiff's request seeks more than monthly account statements or portions of the monthly account statements beyond what is described above, Defendant objects to the request as being repetitive, burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Commission's Reply: The Commission objects to Morriss' limitation to produce "portions of any monthly account statement he is able to locate that reflect a deposit of funds from or payments to any of the other Defendants" The Commission requests all monthly bank statements for all accounts Morriss used, which are in his possession, custody, or control. Morriss fails to explain how such production is repetitive, burdensome, or not reasonably calculated to lead to the discovery of admissible evidence. Quite the contrary, Morriss' bank records, which are admissible business records, will demonstrate Morriss' misappropriation and use of investor funds. These records are particularly necessary because Morriss has refused to provide a sworn accounting of his assets as ordered by the Court. (D.E. 80). Without the requested documents, the Commission will be unable to ascertain what Morriss did with the money he misappropriated. The Commission has advised Morriss of the bank records in its possession (Ex. D at 5), and he need not produce those statements.

Request No. 6: All documents reflecting or relating to any money transfers you received from the Investment Entities. Include, without limitation, all documents concerning communications with the Investment Entities, bank records, promissory notes, and any other documentation related to such transfers.

Defendant's Response: Defendant objects to this request because it is unduly compound. Defendant further asserts the following in response to each sub-request:

- Defendant objects to all portions of this request that make reference to the terms “money transfers” or “transfers” and asserts the act of production privilege in response.
- Subject to and without waiving any of the objections listed above, Defendant will produce any document not covered by the privilege, related to compensation he received and documentation relating to loans made to Defendant by any of the Investment Entities.
- Defendant objects to the request for communication with the investment entities because it is duplicative of request number 1 and interposes his response to request number 1.
- Defendant objects to the request for “bank records” because it is duplicative of request number 5 and interposes his response to request number 5.

Commission’s Reply: The Commission objects because Morriss fails to provide any basis for his objection to the terms “money transfers” or “transfers.” Moreover, the requested documents are particularly necessary because Morriss has refused to provide a sworn accounting of his assets as ordered by the Court. (D.E. 80). In order to address Morriss’ concerns, the Commission modified its request to include all financial transactions between Morriss and the Investment Entities. These transactions include, but are not limited to, loans, compensation, salary, or any other payment. Ex. D at 5. To date, however, Morriss has failed to produce any documents responsive to this modified request. As to Morriss’ assertion of the act of production privilege, the Commission reasserts its objection in Section III(A), above.

Request No. 7: All documents reflecting or relating to money transferred to you from Morriss Holdings.

Defendant’s Response: Defendant objects to the use of the term “transfers” and asserts the act of production privilege in response. Subject to and without waving any of the objections listed above, Defendant will produce any documents related to compensation he received and documentation relating to loans made to Defendant by Morriss Holdings that are privileged.

Commission’s Reply: The Commission objects because Morriss fails to provide any basis for his objection to the terms “transfers.” As stated in the previous reply to Morriss’ objection to request six, the Commission has subsequently modified its request to include “all financial

transactions between Morriss and Morriss Holdings. These transactions include, but are not limited to, loans, compensation, salary, or any other payment.” Ex. D at 5. Moreover, the requested documents are particularly necessary because Morriss has refused to provide a sworn accounting of his assets as ordered by the Court. (D.E. 80). To date, Morriss has failed to produce any documents responsive to this modified request. As to Morriss’ assertion of the act of production privilege, the Commission reasserts its objection in Section III(A), above.

Request No. 8: All documents reflecting or relating to Morriss Holdings using funds for your benefit.

Defendant’s Response: Defendant objects to the use of the phrase “using funds for your benefit” and asserts the act of production privilege in response. Subject to and without waiving any of the objections listed above, Defendant will produce any documents related to compensation he received and documentation related to loans made to Defendant by Morriss Holdings, that are not privileged

Commission’s Reply: Pursuant to its March 23, 2012 telephone conference with Morriss’ counsel, the Commission modified its request to include “documents reflecting or relating to any financial transactions, including, but not limited to loans, wire transfers, or purchases of items or property by Morriss Holdings that Morriss utilized. It also requests any pay stubs, invoices, account ledgers, checks, or any other document detailing any services Morriss provided to Morriss Holdings.” Ex. D at 6. To date, however, Morriss has failed to produce any documents responsive to this modified request. As to Morriss’ assertion of the act of production privilege, the Commission reasserts its objection in Section III(A), above.

Request No. 9: All documents reflecting or relating to your employees and/or agents, including but not limited to employment contracts, agency agreements, and/or pay stubs.

Defendant’s Response: Defendant Morriss objects to this request because it is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

Commission's Reply: Morriss' boilerplate objection is insufficient as a matter of law. That being said, however, the Commission withdraws this request, but reserves the right to renew it at a later date.

Request No. 10: Monthly statements for all bank accounts you control, are in your name, and/or have any beneficial interest in including, without limitation, offshore accounts.

Defendant's Response: Defendant objects to this request because it completely duplicates request number 5 and interposes his response to request number 5.

Commission's Reply: The Commission reiterates its reply to Morriss' objection to request number 5.

Request No. 11: Monthly statements for all bank accounts in your name.

Defendant's Response: Defendant objects to this request because it completely duplicates request number 5 and interposes his response to request number 5.

Commission's Reply: The Commission reiterates its reply to Morriss' objection to request number 5.

Request No. 12: All documents reflecting or relating to your use of the Investment Entities' investor funds.

Defendant's Response: Defendant objects to this request because it is blatantly conclusory and argumentative. Defendant asserts the "act or [sic] production" and Fifth Amendment privileges.

Commission's Reply: During the March 23, 2012 telephone conference, the Commission advised Morriss it would modify its request to include "all documents reflecting or relating to funds Morriss received from the Investment Entities." Ex. D at 6. The modification should cure Morriss' concern that the request is argumentative and conclusory. To date, however, Morriss has failed to produce any documents responsive to this modified request. As to Morriss' assertion of the act of production privilege, the Commission reiterates its objection in Section III(A) above.

Request No. 13: All documents reflecting or relating to your ownership interest in any limited liability companies and/or limited partnerships.

Defendant's Response: Defendant objects to this request because it is overbroad and not reasonably calculated to lead to the discovery of admissible evidence. Defendant asserts the act of production privilege in response. Subject to and without waiving the objections listed above, Defendant will produce any articles or organization, operating agreements, or partnership agreements of any limited partnership or limited liability company in which he has an ownership interest and that he is able to locate.

Commission's Reply: The Commission objects because documents reflecting or relating to Morriss' ownership interest in limited liability companies and/or partnerships will provide relevant, admissible information demonstrating Morriss' role in the Investment Entities as well as lead to additional evidence regarding Morriss' involvement or activities with other companies. The Commission also objects to Morriss' statement that he will provide only those documents which he is "able to locate," because as discussed in Section III(B) above, Morriss' production obligation includes documents not only in his physical possession, but also documents he has practical ability to obtain. *Huggins*, 250 F.R.D. at 408. To date, Morriss has failed to produce any documents responsive to this modified request. As to Morriss' assertion of the act of production privilege, the Commission reasserts its objection in Section III(A), above.

Request No. 14: All documents reflecting or relating to the enrollment in and the monthly statements for all securities brokerage accounts you control, are in your name, and/or which you have any beneficial interest.

Defendant's Response: Subject to and without waiving the general objections listed above, Defendant will produce the portions of any monthly account statement he is able to locate that reflect a deposit of funds from or payments to any of these other Defendants or one of the Investment Entities. To the extent that Plaintiff's request seeks more than monthly account statements or portions of the monthly account statements beyond what is described above, Defendant objects to the request being repetitive, burdensome, and not reasonably calculated to lead to the discovery of admissible evidence.

Commission's Reply: The Commission objects to Morriss' limitation to producing documents reflecting "only deposit of funds or payments to any of the other Defendants or one of the Investment Entities." The request was for statements for *all* securities brokerage accounts in

Morriss' control or in which he has any beneficial interest. Such documents are relevant to the Commission's misappropriation claims and the issue of disgorgement. The requested documents will also provide evidence as to Morriss' financial condition during the period of the alleged fraud, which will demonstrate Morriss' motive and intent. Given the fact that Morriss has refused to provide a sworn accounting of his assets as ordered by the Court (D.E. 80), the requested documents are necessary to determine what Morriss has done with the funds he misappropriated. The Commission also objects to Morriss' statement that he will provide only those documents which he is "able to locate," because as discussed in Section III(B) above, Morriss' production obligation includes documents not only in his physical possession, but also documents he has practical ability to obtain. *Huggins*, 250 F.R.D. at 408.

Request No. 15: All documents reflecting or relating to any payments and/or disbursements you made and/or authorized from any of your bank or securities brokerage accounts.

Defendant's Response: Defendant objects to this request because it is a duplicate of requests, 5, 14, and others. Defendant interposes his responses to requests 5 and 14.

Commission's Reply: As this response is duplicative of his responses to requests 5 and 14, the Commission reasserts its replies to requests 5 and 14.

Request No. 16: All documents reflecting or relating to any of your real estate ownership interests and/or investments.

Defendant's Response: Defendant Morriss objects to this request because it is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

Commission's Reply: Morriss' objection is mere boilerplate and fails to include "specific explanations or factual support as to how [this] discovery request is improper," as required. *Liberty Mut. Fire Ins.*, 2009 WL 539927, at *1. Contrary to his objection, Morriss' real estate holdings, investments, and leases are relevant to the Commission's misappropriation

allegations. Indeed, the Complaint includes allegations that Morriss used investor funds for personal expenditures, including loans and mortgages. (*See, e.g.*, D.E. 1, ¶ 29). Moreover, the requested documents are necessary to determine the full extent of Morriss' assets given his refusal to provide a sworn accounting. Morriss' financial satiation is relevant to his motive, intent, and the Commission's request for disgorgement.

Request No. 17: All documents reflecting or relating to any real estate leases in your name.

Defendant's Response: Defendant Morriss objects to this request because it is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

Commission's Reply: As this response is duplicative of his responses to request 16, the Commission reasserts its reply to request 16.

Request No. 18: All documents reflecting or relating to any services that you provided to the Investment Entities and/or Morriss Holdings.

Defendant's Response: Defendant asserts the act of production privilege in response. Defendant will produce any responsive documents that he is able to locate, that are not privileged.

Commission's Reply: The Commission reasserts its objection to Morriss' claim of the act of production privilege in Section III(A), above. Indeed, in previous sworn testimony Morriss described in detail that Morriss Holdings was his family company and that he was its agent. As a result, Morriss' possession of such documents is a "foregone conclusion." *Teepie*, 286 F.3d at 1050.

Request No. 19: All documents reflecting or relating to your assets and liabilities as well as monthly income and expenses.

Defendant's Response: Defendant asserts the act of production privilege in response. Defendant Morriss objects to this request because it is overbroad, unduly burdensome and not reasonably calculated to lead to the discovery of admissible evidence.

Commission's Reply: With respect to Morriss' assertion of the act of production privilege, the Commission reasserts its objection in Section III(A), above. Moreover, Morriss'

boilerplate objections are insufficient. The information requested is necessary to determine the full extent of Morriss' assets given his refusal to provide a sworn accounting. Morriss' financial satiation is relevant to his motive, intent, and the Commission's request for disgorgement.

CONCLUSION

For the forgoing reasons, the Commission respectfully requests the Court grant the Commission's Motion to Compel and overrule Morriss' objections and require him to produce, by a date certain, all documents responsive to the Commission's First Request for the Production of Documents.

Respectfully submitted,

April 18, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on April 18, 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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