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 REPLY TO RELIEF DEFENDANT MORRISS HOLDINGS' MEMORANDUM IN OPPOSITION TO PLAINTIFF'S MOTION FOR ORDER TO SHOW CAUSE WHY RELIEF DEFENDANT SHOULD NOT BE HELD IN CONTEMPT FOR FAILING TO PROVIDE A SWORN ACCOUNTING

I. INTRODUCTION

The issue before the Court is simple – on two occasions, January 17 and 27, 2012, the Court ordered Relief Defendant Morriss Holdings, LLC to provide a sworn accounting and it has not complied with the Court's Orders. In fact, in its Response, Morriss Holdings admits its failure to comply with the Court's orders. Instead, it claims it is impossible for it to comply and provide a sworn accounting. In making this claim, however, Morriss Holdings fails to advise the Court of, let alone meet, the exacting standard required to demonstrate the "factual impossibility" defense against an order of civil contempt. Instead, it improperly attempts to avail itself of Defendant Burton Douglas Morriss' Fifth Amendment privilege against self-

incrimination. It also makes unsubstantiated and unverified assertions of its lack of resources, both personnel-wise and financial, to compile a sworn accounting, which are legally insufficient. Last, Morriss Holdings argues that the sworn accounting is unnecessary given the availability of civil discovery. Morriss Holdings cannot now claim *after* failing to comply with the Court's orders that the orders themselves are unnecessary. Nor can it claim that civil discovery should cure its failure to produce a sworn accounting, given its repeated failures to comply with *any* of the Commission's discovery requests.

The Court should reject Morriss Holdings' impermissible and unsubstantiated excuses for its failure to comply with the Court's Orders and hold it in contempt of Court.

II. ARGUMENT

A. Morriss Holdings Has Failed To Meet Its Burden To Demonstrate Compliance With Court Order Is "Impossible"

As an initial matter, Morriss Holdings' 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). To establish contempt the Commission must demonstrate: (1) valid orders of the Court existed, (2) Morriss Holdings had knowledge of the Court's orders, which required it to act, and (3) Morriss Holdings disobeyed these orders. *SEC v. Bankers Alliance Corp.*, 881 F. Supp. 673, 678 (D.D.C. 1995) (citations omitted). In its Response, Morriss Holdings concedes all three elements. Specifically, Morriss Holdings admits (1) the Court issued two valid orders on January 17 and 27, 2012, requiring Morriss Holdings to provide a sworn accounting of its assets, (2) Morriss Holdings knew of the two orders, and (3) it has not complied with the Court's orders and failed to produce a sworn accounting. (D.E. 143 at 2).

As a result, the Commission has met its *prima facie* burden to demonstrate Morriss Holdings' is in contempt of Court, and the burden now shifts to Morriss Holdings to provide a

legally viable defense for failure to comply with the Court's orders. *Parker v. Scrap Metal Processors, Inc.*, 468 F. 3d 733, 740 (11th Cir. 2006) (noting once plaintiff provides evidence of civil contempt, burden shifts to defendant); *Bankers Alliance*, 881 F. Supp. at 683 (holding defendants in civil contempt for failing to provide sworn accounting).

In its defense, Morriss Holdings argues it has "found it impossible to comply with this Court's order [sic] to provide a sworn accounting." (D.E. 143 at 5). While impossibility of performance constitutes a defense to a charge of contempt, Morriss Holdings "must demonstrate [its] inability to comply categorically and in detail." *Bankers Alliance*, 881 F. Supp. at 679. The burden of production when raising this defense "'may be difficult to meet.'" *SEC v. Oxford Capital Sec., Inc.*, 794 F. Supp. 104, 107 (S.D.N.Y. 1992) (quoting *Badgley v. Santacroce*, 800 F. 2d 33, 36 (2d Cir. 1987)). Moreover, the "burden of production is not satisfied by a mere assertion of inability." *Parker*, 468 F.3d at 740 (citation omitted).

Morriss Holdings has failed to meet its burden to demonstrate impossibility. Its Response includes only a "mere assertion of inability," and fails to include any declarations or other verified documentation from Morriss, its counsel, or the sole member of Morriss Holdings, the Barbara Burton Morriss Revocable Trust ("BBMRT") to prove its actual inability to provide a sworn accounting. *Id.* Although Morriss Holdings' mere assertions of inability as a matter of law fail, the Commission addresses each in turn.

First, Morriss Holdings contends it cannot provide a sworn accounting because its sole agent, Morriss, has availed himself of his Fifth Amendment privilege against self-incrimination. As a result, the company claims the Court cannot compel him to provide the company's sworn accounting. (D.E. 143 at 5). Morriss Holdings, however, may not hide behind Morriss' personal

privilege against self-incrimination.[1] *SEC v. Brown*, 06-1213 (PAM/JSM), 2007 WL 4192000, at *2 (D.Minn. Jul. 16, 2007) (citations omitted).

Indeed, Courts have squarely rejected the argument Morriss Holdings advances. *Oxford Capital*, 794 F. Supp. at 107-108. *See also United States v. Kordel*, 397 U.S. 1, 8 (1970) (holding corporation cannot avoid responding to interrogatories based on an individual's assertion of his Fifth Amendment privilege). In *Oxford Capital*, 794 F. Supp. at 107-108, two defendant corporations refused to comply with the court's order requiring them to provide a sworn accounting on the grounds that the corporate officers invoked their personal privileges against self-incrimination. The court rejected the defendants' claims and held them in civil contempt explaining that the Supreme Court's holding in *Braswell v. United States*, 417 U.S. 85, 117-118 (1988), "requires that the signing of the accountings on behalf of [the corporate defendants] not to be used against the corporate officers as individuals. Accordingly, [the corporate defendants] must comply fully with the terms of the Order and cannot hide behind the Fifth Amendment privilege of their officers." *Id.* at 108.

Likewise, here Morriss Holdings may not hide behind Morriss' Fifth Amendment privilege because his signing of the sworn accounting could not be used against Morriss personally. *Id.* A corporate representative, either Morriss or someone else, therefore must comply with the Court's orders and swear to an accounting of the corporation's assets. *Id.* Consequently, the fact that Morriss has availed himself of his personal privilege against self-

[1] The case law on which Morriss Holdings relies, *Curcia v. United States*, 354 U.S. 118, 123-24 (1957) and *SEC v. Simpson*, H88-212, 1988 U.S. Dist. LEXIS 18382, at *4 (N.D. Ind. Oct. 21, 1988), does not support its claim. Those cases involved a subpoena and court order compelling *individual* defendants to provide sworn testimony and an accounting. In contrast, the Court in this matter ordered Morriss Holdings, a corporation, to provide a sworn accounting.

incrimination does not make it impossible for Morriss Holdings to provide a sworn accounting.[2] *Id.*

Second, Morriss Holdings alleges it is impossible to provide a sworn accounting because it has no employee or agent sufficiently familiar with its finances to swear to an accounting. (D.E. 143 at 3 and 7). Morriss Holdings' unverified claim is not sufficient to demonstrate impossibility. As a matter of law, "a corporation must answer a complaint and provide discovery, and if necessary it must appoint an agent to do so who could finish the information without fear of self-incrimination." *SEC v. Leach*, 156 F. Supp. 2d 491, 498 (E.D. Pa. 2001) (denying defendant corporation's request for a protective order from answering complaint). If Morriss Holdings does not currently have an employee to provide a sworn accounting, it is legally obligated to appoint someone else to do so. *Id.* ("If one person within the corporation is unable to answer the complaint, the corporation must appoint someone else to do so.") (citing *Kordel*, 397 U.S. at 8). Indeed, "[e]ven the corporation's attorney can serve as an agent," if Morriss Holdings or the BBMRT does not wish to have Morriss swear to the accounting or retain another agent to do so. *Id.* (citing *United States v. 42 Jars*, 162 F. Supp. 944 (D. N.J. 1958, *aff'd* 264 F.2d 666 (3d Cir. 1959)).

Third, Morriss Holdings claims it lacks the funds to hire an employee to compile and swear to the Court-mandated accounting. (D.E. 143 at 3 and 7). This unverified and unsubstantiated self-serving claim is insufficient as a matter of law. *SEC v. Showalter*, 227 F.

[2] Even if the Court were to hold that Morriss Holdings can avail itself of Morriss' personal privilege, the Court should still grant the alternative relief the Commission requests and bar Morriss Holdings from offering any evidence regarding the amount of funds it received at any future trial or hearing. Morriss Holdings cannot use the Fifth Amendment privilege against self-incrimination as both a sword and shield -- it is black-letter law that a witness may not testify voluntarily about a subject and then invoke the Fifth Amendment to certain questions about the details. *Rogers v. United States*, 340 U.S. 367, 373 (1951); *United States v. Rylander*, 460 U.S. 752, 758 (1983); *Mitchell v. United States*, 526 U.S. 314, 321-22 (1999).

Supp. 2d 110, 122-23 (D.D.C. 2002) (holding in civil contempt proceeding that sworn accounting necessary to determine whether defendant has no money to pay ordered disgorgement). Moreover, Morriss Holdings' claim the asset freeze has prevented it from providing the Court-ordered sworn accounting similarly lacks merit. Morriss Holdings has retained counsel despite the asset freeze. It has failed to explain why it could not also hire an accountant or an agent to provide a sworn accounting. Similarly, it also fails to explain why the BBMRT, the sole member of Morriss Holdings, could not provide a sworn accounting or provide the funds necessary to do so.[3]

Consequently, Morriss Holdings has failed to meet its burden to demonstrate its inability to provide a sworn accounting.

B. Morriss Holdings' Remaining Arguments Fail

In addition to making bare assertions that it is impossible for it to comply with the Court's orders to provide a sworn accounting, Morriss Holdings also contends a sworn accounting is unnecessary because the Commission could obtain the information through civil discovery. (D.E. 143 at 7-8). Before even turning to the validity of its argument, whether a court order is necessary is not a defense for failing to comply with it. Morriss Holdings' argument does not excuse its refusal to comply with the Court's orders. Regardless, its argument lacks merit.

Civil discovery is not a sufficient substitute to a sworn accounting because Morriss Holdings has failed to comply with *any* of the Commission's multiple discovery requests. Morriss Holdings failed to produce any witness to testify at the Fed. R. Civ. P. 30(b)(6)

[3] Morriss Holdings' suggestion that investor funds be used to complete Morriss Holdings' sworn accounting would lead to a perverse result that runs contrary to the Court-ordered asset freeze – *i.e.* the use of victim-investor funds for the benefit of the very company that received the majority of money Morriss stole.

deposition the Commission noticed for January 24, 2012. (D.E. 42). Moreover, as detailed in the Commission's Motion to Compel the Production of Documents from Morriss Holdings (D.E. 147), Morriss Holdings has failed to produce a single document in response to the Commission's January 19, 2012 document request. It also advised that it would not produce any documents until it appoints a new agent.

Morriss Holdings cannot have it both ways – it cannot refuse to comply with the Court's orders to provide a sworn accounting on the basis that the Commission can obtain the same information through discovery and at the same time refuse to meet its discovery obligations. Moreover, the fact that the Commission has subpoenaed the account records for the few known accounts in Morriss Holdings' name does not obviate the need for a sworn accounting. The Commission does not know where Morriss Holdings keeps all of its assets. It does not know if Morriss Holdings maintains other bank accounts, offshore bank accounts, brokerage accounts, or has any real estate holdings. Consequently, the Court mandated sworn accounting is necessary to ensure compliance with the Court's Asset Freeze Order and necessary to document all of Morriss Holdings' assets, so the Commission can determine the funds subject to disgorgement.

Last, the Commission's requested relief – holding Morriss Holdings in contempt of Court or alternatively precluding it from providing evidence of its finances at trial or in disgorgement proceedings – is proper. The requested sanctions are consistent with the Rules of Civil Procedure and the sanctions other courts have ordered in similar situations. *See, e.g.*, Fed. R. Civ. P. 37; *Reily v. Natwest Markets Group, Inc.*, 181 F.3d 253, 268 (2d Cir. 1999) (holding that preclusion of evidence is proper sanction for failure to comply with discovery rules); *Oxford Capital Sec.*, 794 F. Supp. at 109 n.4 (holding that sanctions requiring the appointment of a special master to perform an accounting at defendant's request, transfer of funds from defendant

to court's registry, and the imposition of a daily fine for failure to cooperate with special master were proper); *Bankers Alliance Corp*., 881 F. Supp. at 684 (imposing increasing fines of $25,000, $50,000, and $75,000 per day in five-day increments until defendant corporation provided a sworn accounting).

III. CONCLUSION

For the foregoing 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 and 27, 2012 Orders. 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.

Respectfully submitted,

May 3, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 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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