UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,	)	
	)	
Plaintiff,	)	
v.	)	**CASE NO. 4:12-CV-00080-CEJ**
	)	
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.	)	
	)	

RESPONSE OF DEFENDANT BURTON DOUGLAS MORRISS TO PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS

INTRODUCTION

Defendant Burton Douglas Morriss has agreed to turn over immediately to the Securities & Exchange Commission ("SEC") all forensic copies of all servers and drives in his possession that contain documents responsive to the SEC's far-reaching discovery requests. Also, Defendant Morriss has agreed to make available for the SEC's immediate review approximately 280 banker's boxes of documents that contain documents responsive to the SEC's discovery requests. All of the documents that Mr. Morriss has offered to turn over to the SEC are in the form, pursuant to Rule 34(b)(2)(E), "as they are kept in the usual course of business." In return, Mr. Morriss asked that the SEC enter into a claw-back agreement, as is common in cases like this involving massive amounts of documentation, that would preserve Mr. Morriss's ability to

assert privilege objections in the event the production contains privileged documents. Upon making this offer and believing that he was going well beyond what he was required to do under the law, Mr. Morriss asked the SEC to withdraw its Motion to Compel (Doc. # 128). The SEC refused. The SEC's Motion to Compel should be denied because it is moot. With a court-ordered claw-back or the SEC's agreement to a claw-back, Mr. Morriss stands ready to produce all sources of documents in his possession that contain documents responsive to the SEC's discovery requests.

BACKGROUND

The SEC's eight-count, 21-page Complaint (Doc. # 1), the 1,100 pages of exhibits attached thereto, and the SEC's 41-page Ex Parte Emergency Motion For Asset Freeze Order and Other Relief And Memorandum Of Law In Support (Doc. # 6) span a period of seven years. Their allegations make reference to five different corporate entities, an unspecified number of special purposes vehicles and scores of complicated business transactions. The SEC has also propounded "carpet bomb" document requests. The SEC's requests define Defendant Morriss to include a whole host of different people and "any entity or company of which he is a principal, director or officer, or otherwise controls," effectively expanding the requests well beyond the five corporate entities referenced in the Complaint. When Mr. Morriss objected to the sweeping breadth of these requests, the SEC stood its ground in the Motion to Compel (Doc. # 128) and insisted that it needed everything it had requested. Now, strangely, when Mr. Morriss has agreed to turn over all of the boxes of documents and all of the of the digital images that contain material responsive to the SEC's massive document request, the SEC has refused to withdraw its Motion to Compel. Instead, the SEC seeks to require Mr. Morriss, an individual who is in bankruptcy and who no longer has the assistance of employees, to parse through reams of

material to try to find a subset that may or may not comport with the SEC's idea of relevance. The SEC's recipe includes draining Mr. Morriss's limited defense resources and unending discovery disputes over the adequacy and speed of Mr. Morriss's response.

By offering to provide the store of documents that contain the material the SEC insists it needs, Mr. Morriss has fully satisfied his obligations under Rule 34. Mr. Morriss does not propose, as the SEC insinuates in its May 18 letter (attached hereto as Exhibit 2), to dump jumbled documents. To the contrary, Mr. Morriss's defense team has already spent at least 15 full days winnowing the hard copies down to eliminate boxes that are outside the date range of the Complaint and do not have any relevance to the issues raised in the Complaint. *See* accompanying Affidavit of Matthew Bartle ¶¶ 3-4. Also, the documents Mr. Morriss proposed to give to the SEC are in the form they appeared in the normal course of business. *Id.*[1]

The SEC cannot sue someone, demand they produce a mountain of documents, and then complain that there are too many documents and force their adversary to spend limited resources trying to sort through the pile of documents. Responsive documents are so interspersed throughout the materials Mr. Morriss proposes to provide that pulling out subsets would expose Mr. Morriss to the allegation that he had not provided enough documents, or alternatively that he had provided too many documents. The SEC has already made clear that its idea of relevancy is far broader than Mr. Morriss's and therefore its insistence that Mr. Morriss should be forced to conduct a relevance review is puzzling. This is not Mr. Morriss's lawsuit and these are not Mr. Morriss's discovery requests. The SEC has no right, under the law, to force Mr. Morriss to spend dwindling insurance proceeds groping about trying to satisfy the whims of the SEC when

[1] The documents have been boxed accordingly to the corporate entity or source of the document so as to be responsive to the SEC's Request for Production and to eliminate those documents which in no way relate to this litigation. The individual file folders containing documents have not been disturbed, and the documents will be produced as they, otherwise, appeared in the normal course of business. *Id.* ¶ 4.

Mr. Morriss has agreed to provide all potentially relevant documents as they were maintained in the normal course of business.

It is important to view these discovery issues in the context of not only this litigation but against the backdrop of Mr. Morriss's bankruptcy proceedings as well. On January 9, 2012, Mr. Morriss filed for Chapter 11 bankruptcy in this district. (It was converted to a Chapter 7 proceeding on February 13, 2012.) On January 17, the SEC filed the present action against Mr. Morriss and others, and two days later, on January 19, the SEC propounded its First Request for the Production of Documents against Mr. Morriss, seeking production of documents within two (2) days of service. The following day, on January 20, Mr. Morriss retained his present counsel in this case. Given that Mr. Morriss had just retained counsel, and given the large volume of documents involved, Defendant sought and was granted additional time to respond to the document requests. Doc. ## 65, 69.

Counsel contacted an outside vendor in order to commence the enormous task of responding to the SEC's requests. Bartle Aff. ¶ 3. (As discussed further below, the SEC's requests were extremely broad and encompassed basically every aspect of the defendants' investment businesses.) Defense counsel engaged a vendor on Mr. Morriss's behalf to make forensic copies of all servers and drives that contained material relating to the issues raised in the SEC's Complaint. By this time, the SEC's Receiver had already conducted her own extensive imaging of computer drives. Mr. Morriss's vendor advised that the images he made amounted to approximately 1 terabyte of data. *Id.*[2] Mr. Morriss also identified approximately 90 bankers'

[2] A terabyte comprises a massive amount of data. *See, e.g., Hagemeyer North America, Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594, 601 (E.D. Wis. 2004) ("To illustrate, a CD–ROM's storage capacity is 650 megabytes, the equivalent of 325,000 typewritten pages; computer networks create backup data measured in terabytes – 1,000,000 megabytes - which is the equivalent of 500 billion typewritten pages. Manual for Complex Litigation (Fourth) § 11.446 (2004).").

boxes worth of hard-copy documents that contained responsive materials. Back in early February, while discussing the need for more time to respond to the SEC's discovery requests, counsel for Mr. Morriss explained to the SEC that there was a terabyte of data at issue and a large number of hard copy documents.

In the meantime, Mr. Morriss's counsel continued to represent him without having received any retainer or other payment for their services. The SEC has been well aware since January that Mr. Morriss's ability to work with the immense amount of documentation at issue in this case was being hindered by the fact that he had no money to pay vendors or attorneys to work with the documents. Mr. Morriss made a claim for the advancement of defense costs under a Federal Insurance Company directors and officers insurance policy, and on February 13 Federal advised that it was willing to advance defense costs as provided under the policy. However, both the SEC and Receiver objected on the grounds that this would violate the Court's asset freeze order. On February 16, defense counsel therefore filed a motion with this Court seeking an order that the insurer's advancement of defense costs would not violate the Court's asset freeze order. Doc. # 72.

While this motion was pending, Mr. Morriss did not have any money to pay a data vendor to do anything with the 1 terabyte of data to render it capable of being searched. This Court granted Mr. Morriss's motion for defense costs on May 8, 2012. Doc. # 160. Nonetheless, in recognition of the finite nature of the insurance resources available for Mr. Morriss's defense (the policy is a "wasting" policy and there are multiple pending claims against the policy limit), Mr. Morriss's counsel has continued to negotiate with the Plaintiff regarding how to most appropriately respond to its discovery requests.[3] Shortly after this Court granted

[3] By this point it had become clear to Mr. Morriss and defense counsel that the insurance policy at issue was the only available source of funding for Mr. Morriss's defense.

Mr. Morriss access to insurance proceeds, his counsel reached out to the SEC about discovery in general and its Motion to Compel in particular.

Most recently, on May 18 defense counsel proposed to Plaintiff that given the huge volume of electronic data and physical documents already gathered, Mr. Morriss would be willing to provide access to the entirety of the electronic and paper data in his possession and control.[4] In exchange, Mr. Morriss asked for the SEC's consent to a claw-back agreement (*i.e.*, an agreement that production would not constitute a waiver of any privileged documents). As counsel for Mr. Morriss explained, "[e]ven if Mr. Morriss and Morriss Holdings, LLC had the resources to review this enormous store of data (and they most certainly do not) to assess documents for privilege and responsiveness, it would take a small army of reviewers months and months to go through it. That is simply not practical." Ex. 1 at p.2 (Hanaway letter to SEC dated 5/18/12). Alternatively, counsel proposed the option of an agreed-upon set of searches on the electronic databases. Counsel additionally asked for more time to respond to the SEC's motion while these alternatives were explored. The SEC responded by rejecting the offer of full access to the materials, though it did not respond to counsel's alternative offer of performing searches. Ex. 2 (SEC letter dated 5/18/12).

ARGUMENT

Rule 34(b)(2)(E) of the Federal Rules of Civil Procedure defines an acceptable presentation of documents by a party in response to document requests:

[4] One terabyte of data is equal to 1000 gigabytes. The amount of time it would take to conduct a review of this information for relevance and privilege would be overwhelming for any litigant, much less one in bankruptcy with limited funds available for defense costs. *See* David Degnan, *Accounting for the Costs of Electronic Discovery*, 12 Minn. J.L. Sci. & Tech. 151, 151 (Winter 2011) ("Experts estimate that conducting an electronic discovery (e-discovery) event may cost upwards of $30,000 per gigabyte."); *id.* at 169 ("In short, the cost range to review 100 gigabytes of information is between $7000 and $284,375 ….").

> (E) Producing the Documents or Electronically Stored Information. Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:
>
> (i) A party must produce documents as they are kept in the usual course of business or must organize and label them to correspond to the categories in the request;
>
> (ii) If a request does not specify a form for producing electronically stored information, a party must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and
>
> (iii) A party need not produce the same electronically stored information in more than one form.

Mr. Morriss's offer fulfills his obligations under Rule 34. Mr. Morriss has made a digital image of 19 hard drives and servers. This information is in exactly the form it was kept in the normal course of business. Also, the hard copy documents at issue are either in the very box in which they were maintained in the normal course of business, or have been moved from file cabinets, in the file folders in which they were stored, directly into boxes in the same order in which they were maintained in the normal course of business. This is not a dump of disorganized documents. Because Mr. Morriss has proposed to make the documents available in substantially the same form in which they appeared in the normal course of business, he is fully compliant with Rule 34 and the SEC is not entitled to make him categorize the documents further.

After having mounted a spirited effort to deprive Mr. Morriss of access to insurance proceeds for his defense, the SEC now seeks to force him to spend the limited insurance proceeds to winnow out a subset of documents that the SEC will later no doubt claim are inadequate. The SEC lost in its effort to deprive Mr. Morriss of the funds to defend himself, but now appears to seek the effective equivalent: forcing him to spend scarce resources and time on a massive document review project that will plunge the parties into incessant, on-going discovery disputes. The SEC complains bitterly in its Motion to Compel about not having access to a

mountain of documents it says it must have and must have quickly. Yet, most and perhaps nearly all of the documents it wants Mr. Morriss to produce are in the possession of the Receiver. The SEC has not, to Mr. Morriss's knowledge, made any effort at all to obtain these documents from the Receiver. Instead, the SEC insists on obtaining the documents from Mr. Morriss and insists that he spend limited resources trying to divide the documents between those that he believes are responsive to the SEC's requests and those that he thinks are not. Even if Mr. Morriss had the deep pockets of the SEC, he could not possibly conduct a full responsiveness and privilege review of 1 terabyte of data and approximately 90 bankers boxes of documents in a reasonable time frame. It would take an army of reviewers months and months.

Mr. Morriss's offer to the SEC is eminently reasonable. Indeed, in one way or another, the parties must work this out given the impossibility of a page-by-page review of such a massive amount of data. Mr. Morriss has had a team of reviewers go through all of the file cabinets and boxes of hard copy documents that might possibly contain documents relevant to the issues raised in the SEC's Complaint. The review team has separated out files bearing labels that suggested the files contained documents that were clearly not relevant to the Complaint and/or were outside of the time frame specified in the Complaint. Thus, Mr. Morriss believes that approximately 90 boxes of documents contain documents responsive to the SEC's very broad discovery requests. Mr. Morriss has not conducted a page-by-page relevance or privilege review of these documents. Mr. Morriss has agreed to allow the SEC to conduct a physical review of these documents so that it can determine what documents it wants to copy. Alternatively, if the SEC wants all of these documents copied, it is welcome to do that.

Mr. Morriss's offer as to the 1 terabyte of computer data is also reasonable. Mr. Morriss has agreed to give all of this data to the SEC so that the SEC can search it as it sees fit. The SEC

most certainly cannot claim to lack resources to handle a large volume of documents. The newspapers are full of reports of SEC cases far larger in scale than this one. Furthermore, the SEC most certainly has the ability to render the data searchable. It must know that a data store of this size must be searched because it is far too large for an eyes-on page by page review, even for a litigant of its behemoth size. Now that Mr. Morriss has access to insurance proceeds, he has retained a vendor to de-duplicate the dataset and to render it word-searchable. Mr. Morriss has offered to work with the SEC to search the database with SEC-defined search parameters. This apparently did not satisfy the SEC. The SEC is intent on making Mr. Morriss go through the documents.

As the courts have recognized, under Rule 34(b), parties have the option to "produce documents as they are kept in the usual course of business or [to] organize and label them to correspond to the categories in the request." Fed. R. Civ. P. 34(b)(2)(E). Thus, in one case, a court explained that "under Rule 34, it is up to the producing party to decide how it will produce its records, provided that the records have not been maintained in bad faith. *See Kozlowski v. Sears, Roebuck & Co.*, 73 F.R.D. 73, 76 (D. Mass. 1976) ("To allow a defendant whose business generates massive records to frustrate discovery by creating an inadequate filing system, and then claiming undue burden, would defeat the purposes of the discovery rules."). The party complies with the rule if it affords opposing sides equal access to the information sought. *See* 8A Wright & Miller [] § 2213 at 429–31." *Rowlin v. Alabama Dept. of Public Safety*, 200 F.R.D. 459, 462 (M.D. Ala. 2001). The court in *Rowlin* therefore held that where it would entail "equal efforts" by either party to obtain the requested documents, the defendant satisfied his discovery obligations by making the documents available to the plaintiff: "Defendants maintain their records in a reasonable manner, albeit one that would entail equal efforts by both parties to

obtain the requested documents. Plaintiff has the financial resources to photocopy the documents he deems relevant. Defendants shall make available to Plaintiff's counsel their personnel files since May 1, 1998, as they are customarily kept. Plaintiff's counsel—and counsel alone—may review the documents and photocopy their records of choice, dated after April 30, 1998." *Id.* (footnotes omitted).

Similarly, in *Renda Marine, Inc. v. United States*, 58 Fed. Cl. 57 (Fed. Cl. 2003), a party filed a motion to compel after receiving 38,000 pages of documents as they were kept in the usual course of business. The movant argued that the responding party was obligated to organize and label the responsive documents. The responding party claimed that it would be unduly burdensome for it to do so, and that the rules allowed it to produce the documents as kept in the usual course of its business. The court explained:

> It appears that the pivotal consideration in deciding discovery challenges under Rule 34(b), … where a large number of documents have been produced based on an "as they are kept in the usual course of business" election is whether the filing system for the produced documents "is so disorganized that it is unreasonable for the [party to whom the documents have been produced] to make [its] own review." Here, defendant has made no allegation that plaintiff's filing system is "so disorganized" that defendant is unable to review the documents. Rather, the gravamen of defendant's complaint is that the large volume of produced documents (more than 38,000 pages of records by plaintiff's own estimate) is burdensome. It is the view of the court, based on its review of the authorities and the facts presented here, that defendant's objection to the production of requested documents based on the volume alone is insufficient to trigger relief from the court.

Id. at 64 (citations omitted). The court therefore denied the motion to compel.

The SEC should not be allowed to force Mr. Morriss to do more than it is willing to do itself. Mr. Morriss can satisfy his discovery obligations by providing the information he has offered the SEC. In a similar case, a plaintiff filed a motion to compel, claiming that the defendant "has a duty to segregate the material requested from non-responsive documents." *Hagemeyer North America, Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594, 596 (E.D.

Wis. 2004). After the case was filed, the defendant filed for bankruptcy and so the proceedings were stayed. During the stay, the bankruptcy trustee allowed the plaintiff "unfettered access to [defendant] Gateway's records and documents, which were kept at the time in two storage facilities[.]" *Id.* After Gateway emerged from bankruptcy, the plaintiff served it with another set of document requests, to which Gateway responded that "all responsive documents had already been produced in these proceedings." In its motion to compel, the plaintiff claimed "that the documents in the storage facility were not kept in the ordinary course of business but were buried amongst large amounts of non-responsive documents." *Id.*

The court rejected the plaintiff's arguments, explaining:

> A party responding to a document request under Rule 34 has a choice of producing the documents "as they are kept in the usual course of business" or of "organiz[ing] and label[ing] them to correspond with the categories in the request." Fed.R.Civ.P. 34(b). When producing documents, the responding party cannot attempt to hide a needle in a haystack by mingling responsive documents with large numbers of nonresponsive documents. However, according to the plain language of Rule 34, a responding party has no duty to organize and label the documents if it has produced them as they are kept in the usual course of business.
>
> The documents in the Phoenix storage facility have not been moved since the trustee placed them there in June 1998. All other materials that were in the trustee's control have been placed in an office in Phoenix. The materials are kept in the usual course of business and are kept in clearly labeled boxes. No attempt has been made to hide responsive documents among nonresponsive documents. Although there is a dispute concerning the organization of the documents at the storage facility, the photographs attached to Gordon's Declaration sufficiently demonstrate that Hagemeyer's charges that the facility is a "document dump" are unfounded. Additionally, Hagemeyer has refused Rudolph's bona fide attempts to resolve the dispute by granting French access to the storage facility.

Id. at 438. The court concluded that "Gateway has discharged its duty to produce the documents as they are kept in the usual course of business," and denied the plaintiff's motion.

In another relevant case, a defendant responded to a discovery request by providing compact discs containing over 200,000 emails. *Zakre v. Norddeutsche Landesbank*

Girozentrale, 2004 WL 764895 (S.D.N.Y. Apr. 9, 2004). The defendant, however, had not reviewed the emails for responsiveness to the plaintiff's specific document requests. The plaintiff moved to compel the defendant to review the discs for responsive documents. The court denied the motion, holding that the defendant had satisfied Rule 34, which states that "'[a] party who produces documents shall produce them as they are kept in the usual course of business or shall organize them and label them to correspond with the categories in the request.'" *Id.* at *1 (quoting Fed. R. Civ. P. 34(b)). The court held that the defendant "has produced the documents in as close a form as possible as they are kept in the usual course of business [and] [b]ecause the emails are also text-searchable, [defendant] is not further obligated to organize and label them to correspond with [plaintiff's] requests." *Id.*

In another case of note, the defendant – like Mr. Morriss – produced "everything that could possibly be responsive to the [plaintiffs'] discovery demands," yet the plaintiffs argued that they that they were entitled to a "'meaningful and detailed document index.'" *In re Lorazepam & Clorazepate Antitrust Litigation*, 300 F. Supp. 2d 43, 46 (D.D.C. 2004). As the court observed, the production "generated what appears to be a mountain of information," including data in electronic form. *Id.* In response to the plaintiffs' motion to compel, the defendant argued that "the [plaintiffs] have to do their own work and look diligently at what they have been provided and that [defendant] has no further obligation now that [defendant] has provided everything that could possibly be responsive to the [plaintiffs'] discovery demands." *Id.* The plaintiffs argued that "an unindexed, document 'dump' does not meet [defendant's] obligation to match documents with discovery requests as specifically as possible." *Id.* at 46-47. The court held that if the CD-ROMs at issue could be rendered searchable, then the defendant's obligation was met:

> [A]s I understand the situation, the [plaintiffs] are protesting that the information on them is not readable. But, if it can be made readable and, more importantly, searchable by the [plaintiffs], there is no need for an index of them. To the contrary, the [plaintiffs] can then search the documents on their own, regardless of any index produced by [defendant]. The glory of electronic information is not merely that it saves space but that it permits the computer to search for words or "strings" of text in seconds. The [plaintiffs] can, for example, look for the White Paper they insist exists by searching for the word "white" within a certain number of words from the word "paper," thus replicating for themselves the search done several years ago by a computer forensic scientist. In this sense, the presence of the information on the CD–ROM's is an opportunity for the [plaintiffs] rather than a problem.

Id. at 47. The court directed the plaintiffs to consult with a computer forensics company to determine whether the CDs could be made searchable. The court added that if the cost was high, it will address whether the cost should be shared by the parties. (None of the parties in that case, however, were in bankruptcy, as here.) *Cf.* Handbk. Fed. Civ. Disc. & Disclosure § 9:4 (3d ed.) ("In complex cases, such as antitrust or consumer lending litigation, the amount of relevant documents can be overwhelming. In such cases, responding parties are faced with a dilemma: sort through thousands of documents to find those that are responsive to the requests for production or allow the requesting party to inspect all such documents.").

The SEC's document requests are extraordinarily broad. The requests, in effect, seek every piece of paper and every byte of electronic data involving Mr. Morriss's business and financial dealings for a period of more than seven years. They seek, among other things, "[a]ll documents reflecting or relating to" Mr. Morriss's communications with the Investment Entities, existing and potential investors, and Morriss Holdings; "[a]ll documents reflecting or relating to" any email, bank and securities accounts Morriss has used, fund transfers and use, employees, and real estate and other corporate interests. *See* Doc. # 128-1. These requests are, on their face, overbroad and combined with the SEC's insistence that Mr. Morriss go through the data-store in search of what the SEC might deem relevant imposes an undue burden on Mr. Morriss.

As the federal courts have noted, "[u]ndue burden can be found when a [request] is facially overbroad." *Williams v. City of Dallas*, 178 F.R.D. 103, 109 (N.D. Tex. 1998). *See id.* at 110 (requests for attorneys for reporter and television station to produce "any and all documents relating" to two professional football players, and a female acquaintance of one the players, were overbroad on their face, and would be modified to require only production of documents relating to false allegations of rape and assault by female acquaintance). The discovery sought by the SEC, even if modified as the parties have discussed in their efforts to resolve these issues, will impose an undue burden and expense upon the Defendant. This case presents the unusual situation where the party from whom discovery is sought is actually in bankruptcy. Normally this does not occur given the automatic stay of the Bankruptcy Code. But here, because the SEC's enforcement action is not subject to the automatic stay, Morriss must defend himself with the limited resources available through coverage under a single insurance policy. Because of this limitation, Mr. Morriss – who has already had a third-party vendor prepare forensic copies of all servers and drives which might contain relevant information – has offered to allow the SEC access to this electronic data. As counsel for Mr. Morriss has explained, it would take months of review – and substantial sums of money – for defense counsel to complete a review of the electronic and paper data for documents responsive to the SEC's requests.

Moreover, the burden on Mr. Morriss in this case is greater given the overbroad nature of the discovery requests. Indeed, many courts include the "specificity of the requests" as a factor in determining whether the discovery presents an "undue burden" on a party. As one court has explained, "[t]he less specific the requesting party's discovery demands, the more appropriate it is to shift the costs of production to that party. … Where a party multiplies litigation costs by

seeking expansive rather than targeted discovery, that party should bear the expense." *Rowe Entertainment, Inc. v. William Morris Agency, Inc*., 205 F.R.D. 421, 429 (S.D.N.Y. 2002) (citation omitted). *See also Medtronic Sofamor Danek, Inc. v. Michelson*, 229 F.R.D. 550, 553 (W.D. Tenn. 2003) (factors for determining whether discovery imposes undue burden include "the specificity of the discovery requests").

CONCLUSION

Defendant Morriss respectfully requests that this Court deny the SEC's Motion to Compel and either order the parties to enter into a claw-back agreement or enter an order allowing for a claw-back of privileged documents that might later be found in the materials Defendant Morriss produces to the SEC.

Respectfully submitted this 21st day of May, 2012.

ASHCROFT HANAWAY, LLC
By: /s/ Catherine L. Hanaway ___
Catherine L. Hanaway, # 41208MO
222 S. Central Avenue, Suite 110
St. Louis, MO 63105
Phone: (314) 863-7001
Fax: (314) 863-7008
chanaway@ashcroftlawfirm.com

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 2012, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following:

Stephen B. Higgins
Brian A. Lamping
Thompson Coburn, LLP
One US Bank Plaza
St. Louis, MO 63101
314-552-6000
314-552-7000 (fax)
Counsel for the Receiver

Kathleen E. Kraft
Thompson Coburn, LLP
1909 K Street NW
Washington, DC 20006
202-585-6922
202-508-1035 (fax)
Counsel for the Receiver

Brian T. James
Robert K. Levenson
Adam L. Schwartz
Securities and Exchange Commission
801 Brickell Avenue, Suite 1800
Miami, FL 33131
305-982-6300
305-536-4146 (fax)
Counsel for the Plaintiff

David S. Corwin
Vicki L. Little
Sher Corwin LLC
190 Carondelet Plaza, Suite 1100
St. Louis, Missouri 63105
314-721-5200
314-721-5201 (fax)
Counsel for Defendant Morriss Holdings, LLC

/s/ Catherine L. Hanaway _____
Catherine L. Hanaway, # 41208MO
Attorney for Defendant Burton Douglas Morriss

ASHCROFT HANAWAY

May 18, 2012

Via US Mail and Email
Adam Schwartz
Senior Trial Counsel
Securities and Exchange Commission
Miami Regional Office
Suite 1800
801 Brickell Avenue
Miami, FL 33131

Re: *SEC v. Burton Douglas Morriss, et al*
Case No: 4:12-CV-80-CEJ (E.D. Mo.)
Proposal regarding Document Production

Dear Adam,

This letter will follow-up on the conversation you had yesterday with Matt Bartle regarding our proposal for document production. I understand that you and Matt agreed that you would consider the proposal and get back to him with an answer. We thought that it would be helpful to memorialize our proposal in this letter.

As you know, in January, we engaged a vendor to make forensic copies of all servers and drives of which we are aware that might contain documents relevant to the issues raised in the SEC's Complaint. At this time, we propose to turn over all of these images to the SEC to satisfy the Request for Production of Documents served by the SEC. In addition, we would also immediately make available all of the hard copy documents that we have been able to locate for your physical inspection or copying.

The hard copy and digital documents that we would be turning over to the SEC would include all documents in our possession or in the possession of Morriss Holdings, LLC that might possibly be responsive to your document requests. I have spoken with David Corwin who, on behalf of Morriss Holdings, LLC, joins us in making this proposal to you.

We would be providing you with a very comprehensive response to your document requests, but have not yet had the opportunity to do a privilege review of the documents. Therefore, we would ask the SEC to enter into a "claw-back agreement" in which the government would agree not to claim waiver if Mr. Morriss or Morriss Holdings, LLC later wished to dispute whether a particular document was privileged. Furthermore, in return, we would ask the SEC to withdraw its motions to compel related to both Mr. Morriss and Morriss Holdings, LLC.

The SEC's discovery requests to Doug Morriss and Morriss Holdings, LLC are extremely broad. Although we have objected to their breadth, the SEC's Motion to Compel argues that the

EXHIBIT 1

SEC needs all of the documents it has requested. The parties obviously have vastly different ideas about what is and what is not relevant. Our proposal would resolve this disagreement and will save the Court and the parties from spending scarce resources parsing through these issues. The SEC would not be left to rely on us to determine what is and is not responsive to the SEC's requests.

The SEC understandably wants quick access to the documents. Given the current status of the documents, our proposal is the only way practical way to give it that quick access. Our vendor reports that there is approximately 1 terabyte of imaged data. Although there are no doubt operating files and duplicates in that count, this is an enormous amount of data. Also, we believe that there are more than 200 bankers boxes of documents. Documents potentially responsive to the SEC's requests will be interspersed throughout these materials. Even if Mr. Morriss and Morriss Holdings, LLC had the resources to review this enormous store of data (and they most certainly do not) to assess documents for privilege and responsiveness, it would take a small army of reviewers months and months to go through it. That is simply not practical.

I know that you and Matt discussed the possibility of conducting searches on the database as an alternative to our turning over all of the images. We are open to that being part of our agreement.

Please let me know your response as soon as possible. If you are interested in coming to some agreement, we will send you a draft claw-back agreement for your review. We would ask that you allow us more time in which to respond to the SEC's motion to compel while we work out an agreement.

Sincerely,

Catherine L. Hanaway

Catherine L. Hanaway

CLH/amd

cc: David Corwin
Matt Bartle

UNITED STATES
SECURITIES AND EXCHANGE COMMISSION
MIAMI REGIONAL OFFICE
SUITE 1800
801 BRICKELL AVENUE
MIAMI, FLORIDA 33131
Direct Telephone: (305) 982-6390
E-mail: schwartza@sec.gov

May 18, 2012

Via Email and U.S. Mail

Catherine Hanaway, Esq.
Ashcroft Hanaway
222 South Central Avenue, Suite 110
St. Louis, MO 63105
E-Mail: chanaway@aschroftlawfirm.com

Matthew V. Bartle, Esq.
Graves Bartle Marcus & Garrett, LLC
1100 Main St. Suite 2700
Kansas City, MO 64105

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

Dear Ms. Hanaway & Mr. Bartle:

I am writing this letter to respond to your letter dated May 18, 2012, follow-up on our telephone call on the same date, and confirm the Commission's position to your proposal to satisfy Mr. Morriss' discovery obligations. To clarify, Mr. Morriss proposes to satisfy his discovery obligations by providing images of all servers and computer hard drives in his possession and access to all paper documents without any prior review for privilege or responsiveness. Mr. Morriss also requests the Commission enter into a "claw-back" agreement, in which the Commission would agree not to claim waiver if Mr. Morriss inadvertently produces privileged documents. The Commission has no objection entering into a "claw-back" arrangement with respect to privileged documents that Mr. Morriss inadvertently produces to the Commission. It does, however, object to the proposed production of any and all electronic data and paper in Morriss' possession.

Federal Rule of Civil Procedure 34 prohibits "simply dumping large quantities of unrequested materials onto the discovering party along with the items actually sought." 8A Charles Alan Wright, Arthur R. Miller, and Richard L. Marcus, *Federal Practice & Procedure*, § 2213 (2008). Providing the Commission all electronic information and all paper documents (approximately 200 bankers boxes) in Mr. Morriss' possession without conducting any high-level review for relevancy, would severely prejudice and place an undue burden upon the Commission and its ability to conduct meaningful discovery. The Commission notes its discovery request has been pending for more than four months, ample time for Mr. Morriss to satisfactorily conduct a high-level review of documents in his possession.

EXHIBIT 2

That being said, in order to streamline the discovery process, the Commission agrees to limit Request Nos. 1-4 to include:

- All email (whether in hard copy or in MS Outlook, Lotus Notes, or other email data form), in your possession for the following custodians: Burton Douglas Morriss, Dixon Brown, John Wehrle, Wynne Morriss, Ameet Patel, Brian Zeibarth, and Christian Leedy;

- All emails sent or received by Burton Douglas Morriss, Dixon Brown, John Wehrle, Wynne Morriss, Ameet Patel, Brian Zeibarth, and Christian Leedy from third-party email servers such as MailStreet, Global Relay, Gmail, or Hotmail; and

- All external correspondence files for the above-mentioned custodians.

We believe that these limitations will serve both parties' interest in moving the discovery process along, without overburdening either side.

The Commission's remaining requests are specific in nature and should be responded to in-kind. In particular, the Commission's requests for documents reflecting or relating to: Mr. Morriss' monthly bank account, brokerage, and asset and liability accounting statements (Request Nos. 5, 10-11, 14-15, 19); Mr. Morriss' real estate and lease holdings (Request Nos. 16-17); money Mr. Morriss received from the Investment Entities and Morriss Holdings, LLC (Request Nos. 6-9, 12, 18); and Mr. Morriss' ownership interests in other companies or partnerships (Request No. 13); are discrete in nature.

In your letter, you also advise Morriss Holdings joins in your document production proposal. The Commission has no problem in entering into a similar "claw-back" agreement, with Morriss Holdings. The Commission, however, does take issue with Morriss Holdings' proposal to the extent that it runs contrary to the agreement the parties reached on May 3, 2012, which was described to the Court in Morriss Holdings' and the Commission's court filings (D.E. 162 & 163). If Morriss Holdings wishes to alter its agreement with the Commission to produce certain documents, we would request that it advise us as soon as possible, so that we can discuss the issue and advise the Court as necessary.

We understand the discovery process in this matter will require the ongoing cooperation between the parties, and are open to discuss any additional solutions you propose. We hope that we can resolve these issues in a fair and efficient manner. 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

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI
EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION,	)	
	)	
Plaintiff,	)	
v.	)	**CASE NO. 4:12-CV-00080-CEJ**
	)	
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.	)	
	)	

AFFIDAVIT OF MATTHEW BARTLE

STATE OF MISSOURI)
) ss:
COUNTY OF JACKSON)

I, Matthew Bartle, of lawful age, being duly sworn under oath and under penalty of perjury, state as follows:

1. I am an attorney practicing with the law firm of Graves Bartle Marcus & Garrett, LLC. I am one of the attorneys that is representing Burton Douglas Morriss in the matter captioned above.

2. I have been responsible for overseeing the accumulation of documents pertaining to the issues raised in the Complaint in this matter.

3. Defendant Morriss retained Ispirian Computer Forensics ("Ispirian") to make a forensic image of the hard drives and computer servers that might contain documents pertaining to the issues raised in the Complaint in this matter. Isperian collected these images on January 30, 31 and February 2 and has kept them in its possession since that date. Ispirian reports that there is approximately one terabyte of data in the images it collected. Some portion of this data includes duplicates and operating files. I am in the process of having a vendor de-duplicate and render this data searchable. In its current form it cannot be reliably searched. It is my understanding that the images made by Ispirian are an exact picture of how the documents were maintained in the normal course of business.

4. With the assistance of others, I have been assembling all of the hard copy documents that we have been able to locate that might pertain to the issues raised in the Complaint. In total, we believe there are approximately 280 boxes of documents. By reading the labels on boxes and the labels on the folders in the boxes, we are in the process of separating material that does not pertain to issues raised in the Complaint or is clearly beyond the time frame of the Complaint. We estimate that there are approximately 90 boxes of documents that contain material pertaining to the issues raised in the Complaint. We have endeavored throughout this process to maintain each folder containing hard copy documents as it was maintained in the normal course of business.

FURTHER AFFIANT SAYETH NOT

Matthew Bartle

SWORN TO AND SUBSCRIBED before me, a Notary Public, on the 21st day of May, 2012.

(seal)

NICHOLE BOYD
Notary Public-Notary Seal
STATE OF MISSOURI
Commission for Jackson County
My Commission Expires: March 8, 2013
ID. #09759308

Notary Public, State of Missouri

My commission expires: 3/8/2013

Nichole Boyd
Notary's Printed Name