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 DEFENDANT BURTON DOUGLAS MORRISS' AND RELIEF DEFENDANT MORRISS HOLDINGS, LLCS' SUPPLEMENTAL RESPONSES TO PLAINTIFF'S MOTION TO COMPEL PRODUCTION OF DOCUMENTS (D.E. 182 & 185)

I. INTRODUCTION

Despite the actions described in Defendant Burton Douglas Morriss' Supplemental Response (D.E. 182), Morriss and Relief Defendant Morriss Holdings, LLC, have not fully responded under Fed. R. Civ. P. 34 to the Commission's five-month-old document requests. The majority of the Commission's requests remain outstanding.

In contrast to the Defendants' description of their response to the Commission's document requests, their purported efforts are tantamount to providing no discovery at all. Specifically, the Defendants have not: (1) conducted a diligent search for the documents sought

in the Commission's document request; (2) produced all requested financial records in their custody and control, as required by Rule 26(b)(1); and (3) produced documents as they are kept in the usual course of business or organized and labeled them to correspond to the Commission's requests as required by Rule 34(b)(2)(E)(i). The result is the Defendants' actions have severely hampered the Commission's ability to conduct meaningful discovery by improperly forcing us to attempt to scour millions of documents to locate those responsive to our discrete document requests.

In reality, this is what the Defendants have done to respond to the Commission's document requests:

- Put 90 unlabeled boxes in a conference room without any index or indication as to which documents were responsive to our discrete requests. The boxes contained a hodgepodge of documents, some of which literally contained a "dump" of random papers in no particular order.

- Provided us a list of 6,787 computer file directories for more than 19 computer hard drives containing millions of documents and asked us which documents we wanted. The file directories included meaningless names such as "exchange server\04813HD\ExchangeServer\DiskImage\ D\8e9ac9bafcebb122f0c6744d2eb398\1025."

- Requested *we* compile a number of search terms to run over more than 19 imaged computer hard drives.

- Produced all emails sent and received from seven custodians comprising approximately 280,000 emails.[1]

This is the exact type of "document dump" Rule 34 prohibits because it renders the ability of the requesting party to conduct any meaningful discovery useless. To avoid this very situation, Rule 34 obligates the Defendants to conduct a comprehensive search to locate the

[1] As discussed in the Commission's Reply to Morriss' Response (D.E. 175 at 11), the Commission, in an effort to resolve the present discovery dispute, offered to modify Requests 1 through 4 to include all email and external correspondence files of Morriss and six other individuals. On July 23, 2012, Morriss' counsel advised the email production does not include Morriss' personal email accounts. These email accounts should also be produced.

documents the Commission requests. The rule makes perfect sense here because, as the possessor of the documents and the sole employee of Morriss Holdings (*see* D.E. 82 at 2), Morriss is in a much better position to efficiently create a search protocol and locate the documents requested. The Defendants, however, have shirked their responsibilities to conduct a thorough search and produce documents in a useable manner. Indeed, the Defendants' proposed "document dump" production is akin to no production at all because it would take years for the Commission to conduct the same meaningful search that the Defendants could in a fraction of the time.

At the same time, the Defendants have refused to provide a complete set of financial statements for all of their brokerage and bank accounts. The Commission has asked the Defendants for statements for all of their bank and brokerage statements. The Commission is not aware of the entire universe of the Defendants' financial accounts, but the Defendants certainly are. Yet, the Defendants have only agreed to produce financial statements in their physical possession. Most importantly, they have refused to obtain statements for accounts in their custody and control, but not in their physical possession. As a result, the Commission may never learn of bank and brokerage accounts, which may prove vital to its case. Rule 26(b) specifically prohibits such behavior.

The Commission respectfully requests the Court order the Defendants to comply with their discovery obligations, so that the Commission can conduct meaningful discovery in an efficient manner. The Defendants have unnecessarily held up discovery for nearly five months, they should not be permitted to do so any longer.

II. ARGUMENT

First, the Defendants have failed to conduct diligent searches for responsive electronic documents as required by Rule 34, and have instead demanded the Commission to direct and conduct its own searches for responsive information.[2] Pursuant to Rule 34, a responding party "must conduct a diligent search [for responsive documents], which involves developing a reasonably comprehensive search strategy. Such a strategy might, for example, include identifying key employees and reviewing any of their files that are likely to be relevant to the claims in the litigation." *Treppel v. Biovail Corp.*, 233 F.R.D. 363, 374 (S.D.N.Y. 2006) (citing *General Electric Corp. v. Lear Corp.*, 215 F.R.D. 637, 640 (D. Kan. 2003); *McPeek v. Ashcroft*, 202 F.R.D. 31, 32-33 (D.D.C. 2001)). A party may not relieve itself of its discovery obligation to search through documents and produce only those responsive to requests by dumping both responsive and "numerous other unrelated, nonresponsive materials." *Rothman v. Emory Univ.*, 123 F.3d 446, 455 (7th Cir. 1997).

The Defendants have refused to conduct a diligent search for responsive electronic documents or develop any comprehensive search strategy. Instead, the Defendants merely wish to provide the Commission with gigabytes of data to search and review. (D.E. 182 at ¶ 5). Lacking any understanding of the Defendants' electronic filing systems, Commission cannot reasonably review such a massive amount of data. In contrast, the Defendants used the computer system and created or received the documents which the Commission now requests, meaning the Defendants can easily locate the documents the Commission requests. Just as importantly, they are obligated under Rule 34 to do so.

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[2] Likewise, as described below, the Defendants did not conduct a reasonable search of the paper documents in their possession. Indeed, the 90 boxes which they permitted the Commission to inspect were, for the most part, unlabeled, lacked any coherent order, and included a mix of non-responsive and responsive documents. Moreover, a number of boxes included documents well outside of the requested date range.

As previously explained in the Commission's Reply to Morriss' initial Response to the Motion to Compel, the Defendants' proposal is not permitted under Rule 34, which 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); *see also Wagner v. Dryvit Sys. Inc.*, 208 F.R.D. 606, 610-11 (D. Neb. 2001) ("producing large amounts of documents in no apparent order does not comply with a party's obligation under Rule 34"); *CFTC v. American Derivatives Corp.*, 2007 WL 1020838, at *5 (N.D. Ga. Mar. 30, 2007) (same) (citing *Williams v. Taser Int'l, Inc.*, 2006 WL 1835437, at *7 (N.D. Ga. Jun. 30, 2006)); *Residential Constructors, LLC v. ACE Prop. & Cas. Ins. Co.*, 2006 WL 1582122, at *2 (D. Nev. Jun. 5, 2006) (noting that production of over 40 boxes worth of unindexed material violated Rule 34).

The Defendants have also refused to develop *any* logical process to locate responsive documents, and have instead demanded the Commission develop its own search terms and review a list of 6,787 electronic folder directories to determine where responsive documents reside. (*Id.* at ¶¶ 5-7). Without any understanding or experience with the Defendants' electronic files or computer system, and in order to obtain *any* discovery at this point, the Commission has submitted a number of search terms and requests for electronic files to Defendants. (*Id.*). The Commission's recent attempt to obtain even a modicum of discovery, however, does not relieve the Defendants of their duty to conduct a comprehensive search for documents responsive to the Commission's requests.

Indeed, due to their superior knowledge of the documents in their possession, how they are stored and organized on their computer systems, and how best to locate responsive documents, the Defendants are required under Rule 34 to develop a comprehensive search

strategy to respond to the Commission's requests. *Biovail*, 233 F.R.D. at 374 (requiring producing party to develop and carry out a comprehensive search strategy and presenting it to requesting party for review); *McPeek*, 202 F.R.D. at 32-33 (noting that producing party conducting a search is aided by a knowledge of the organization of documents); *General Electric Corp.*, 215 F.R.D. at 640 (same). As the custodian and primary user of the computer systems at issue (both his own and Morriss Holdings'), Morriss is in a much better position than the Commission to locate responsive documents. He should know the location of the electronic files which contain his and his employees' email files and external correspondence as well as his and Morriss Holdings' bank and brokerage records.

To force the Commission to locate responsive documents within a terabyte[3] of data, when Morriss likely knows the location of the documents the Commission seeks, would be unduly burdensome upon the Commission. For example, without any knowledge of Morriss' and Morriss Holdings' computer systems, the Defendants asked the Commission to select from a list of 6,787 computer file directories, which directory files they should produce. (D.E. 182 at ¶ 7). Each file directory may contain hundreds if not thousands of documents. Morriss, who has an intimate knowledge of this system, would be much better suited to locate the file directories likely to contain responsive information. The same holds true for electronic search terms and criteria. Morriss, with his intimate knowledge of the universe of documents and the computer system is in a much better position to develop accurate and successful search terms to locate responsive documents. Even though the Defendants are in a much better position to develop search terms and criteria, they have asked the Commission to do their job. In short, it would be less costly, burdensome, and time consuming for Morriss to develop and execute a

[3] A terabyte is the equivalent of 500 billion typewritten pages. *Hagemeyer North America, Inc. v. Gateway Data Sciences Corp.*, 222 F.R.D. 594, 601 (E.D. Wis. 2004) (citation omitted).

comprehensive search of his own records. It would also prevent the non-disclosure of responsive documents to the Commission's requests.

Second, the Defendants have refused to produce requested financial records in their custody and control. In particular, they have refused to obtain financial records not already in their physical possession. As the Commission does not know the universe of financial accounts under the Defendants control, the only way it can obtain financial records for these unknown accounts is through the Defendants. Their refusal to do so violates Rule 26(b)(1), which requires the Defendants to produce all documents in their custody or control – even if they are not in their physical possession. *Huggins v. Fed. Express Corp.*, 250 F.R.D. 404, 408 (E.D. Mo. 2008). Therefore, the Defendants must obtain copies of their accounting, brokerage, and offshore account statements which are not in their physical possession because they maintain control over those accounts. *See id.* These records may be particularly critical to prove the Complaint's allegations that Morriss misappropriated millions of investor funds from the private equity funds he controlled to himself and Morriss Holdings. Their refusal to obtain financial records not in their physical possession will severely prejudice the Commission, given the fact it is not aware of every domestic and offshore bank and brokerage account that are in the Defendants' name or exist for their benefit. The Court should not allow the Defendants to conceal such important records.

Third, the Defendants' production does not comply with Rule 34(b)(2)(E)(i). Rule 34 requires a producing party to "produce documents as they are kept in the usual course of business" or "organize and label them to correspond to the categories in the request." Fed. R. Civ. P. 34(b)(2)(E)(i). "[T]o the extent the producing party elects to produce responsive documents as they are kept in the ordinary course of business, it must either direct the

[requesting] party *to the specific location or locations* within its files where documents responsive to each of their requests may be found, or *provide a key or index to assist the responding party in locating* the responsive documents." *American Derivatives Corp.*, 2007 WL 1020838, at *5 (citation omitted) (emphasis added). The Defendants have failed to do either with respect to their paper and electronic productions. Instead, the Defendants have indicated they will only dump a sea of documents on the Commission, the practical result of which is to drown the Commission and its attempts to conduct reasonable and efficient discovery.

On June 12, 2012, the Commission reviewed at Morriss' counsels' office approximately 90 boxes which were apparently located in his home and office. The boxes purportedly included documents from both Morriss and Morriss Holdings. (D.E. 182 at ¶ 3). While certain boxes included labels such as "Morriss Holdings," the majority had no labels or any other indication as to what materials were inside. Instead, the boxes were numbered in accordance with an organizational system, which Morriss has declined to share with the Commission. July 2, 2012 letter, attached as Exhibit A. Many of the boxes lacked any organizational order and included a jumble of documents relating to different entities and accounts. Counsel for Morriss Holdings informed Commission counsel that certain documents relating to Morriss Holdings were in the process of being scanned and unavailable for review. During the review, Morriss' counsel declined to provide any document index. After a Commission's subsequent request, however, on July 6, 2012 Morriss provided a partial index of the boxes it permitted the Commission to inspect. July 6, 2012 letter and example of produced indexes, attached as Exhibit B. The indexes, however, fail to indicate where the documents were located and the documents' custodians. The Commission also requested Morriss Holdings to produce the documents which were unavailable on June 12, 2012. Morriss' counsel produced approximately 738 documents in PDF format. Similarly, as discussed above, the

Defendants proposed "data dump" electronic production includes hundreds of thousands, if not millions, of non-responsive documents interspersed with responsive ones.

The Defendants' production does not comport with Rule 34. Defendants may not use the guise of producing documents in the usual course of business to "absolve itself of [their] responsibility" to conduct a thorough search for responsive documents. *Kozolowiski v. Sears, Roebuck & Company*, 73 F.R.D. 73, 76-77 (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." *Id.* Indeed, courts have repeatedly ordered producing parties to provide an index or table of contents of the material provided in situations where the location of responsive documents are not readily apparent from the manner of production. *See Residential Constructors*, 2006 WL 1582122, at *2 (ordering producing party to provide index of 41 boxes, which were produced in the ordinary course of business); *American Derivatives Corp.*, 2007 WL 1020838, at *5 (ordering defendants to "either direct Plaintiff to the specific location or locations within its files where documents responsive to each of their requests may be found, or provide a key or index to assist Plaintiff in locating the responsive documents"); *Wagner*, 298 F.R.D. at 613 (ordering producing party to provide counsel with an index system useful in locating records or providing all responsive documents organized and labeled to correspond with the categories in the requests). The Defendants' failure to do so has deprived the Commission of its ability to locate responsive documents. In addition, without providing information such as the documents' location and its custodian, the Commission cannot discern the proper witness to authenticate each document. Consequently, the Defendants must conduct a thorough search of their paper and electronic

documents to locate responsive documents or indicate the location of responsive material through a complete index of documents in its possession as required by Rule 34.

III. CONCLUSION

Consequently, the Commission respectfully requests the Court grant its Motions to Compel and require Morriss and Morriss Holdings to comply with the strictures of Rule 34 by (1) conducting a diligent search for the documents requested in the Commission's document request; (2) produce all requested financial records in their custody or control regardless of which they are in their physical possession; and (3) produce documents in a manner consistent with Rule 34(b)(2)(E)(i), which includes directing the Commission to responsive documents and providing detailed indexes, which include the documents' original location and custodian.

Respectfully submitted,

July 24, 2012

By: s/ Adam L. Schwartz__

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CERTIFICATE OF SERVICE

I hereby certify that on July 24, 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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