

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.)
_____)

AMENDED JOINT SCHEDULING AND DISCOVERY REPORT

Pursuant to the Federal Rules of Civil Procedure 16 and 26(f), and Local Rule 16-5.03, the undersigned parties submit this Amended Joint Scheduling and Discovery Report:¹

A. Scheduling And Discovery Meeting

Plaintiff Securities and Exchange Commission, Defendant Burton Douglas Morriss, Relief Defendant Morriss Holdings, LLC, and Claire Schenk, Receiver for Defendants Acartha Group, LLC, MIC VII, LLC, Acartha Technology Partners, LP (“ATP”), Gryphon Investments III, LLC, participated in a scheduling and discovery conference by telephone on March 22, 2012. Present were:

¹ The parties’ initial Joint Scheduling and Discovery Report (D.E. 106) incorrectly states the Commission’s position as to the preliminary estimate of time required for trial. (*Id.* at 5). This Amended Report includes the Commission’s current estimation that trial in this matter should take no longer than five (5) to ten (10) days if tried before a jury.

- Senior Trial Attorney Adam L. Schwartz, Esq., and Paralegal Specialist Victoria Jacqmein for Plaintiff Securities and Exchange Commission;
- Stephen B. Higgs, Esq. and Brian A. Lamping, Esq, counsel for the Receiver;
- Catherine Hanaway, Esq., counsel for Defendant Burton Douglas Morriss; and
- David S. Corwin, Esq., and Ann Corrigan, Esq., counsel for Relief Defendant Morriss Holdings, LLC.

Case Management Track

The parties could not agree upon which track the case should proceed. Pursuant to E.D. Mo. Local Rule 16-5.01, the Commission requests that the Court assign this matter to Track 2 -- the standard case management track because the Commission anticipates the case will be concluded within 18 months. Defendant Morriss and Relief Defendant Morriss Holdings request the Court assign this matter to Track 3 – the complex case management track because the Defendant and Relief Defendant believe the case will not be concluded within 18 months, but rather 24 months.

B. Disclosures

1. Likelihood of Settlement

Although it is unknown whether settlement is likely, the parties have discussed – and will continue to discuss – the likelihood of settlement. Any and all offers of settlement made by Defendants must be submitted for consideration and approval by the five-member Commission in Washington, D.C.

2. Likelihood of Appearance of Additional Parties

The appearance of additional parties is not anticipated at this time.

3. Proposed Time Limits

The parties could not agree as to which track this case should be assigned. Accordingly, the parties submit alternative proposed time limits:

May 15, 2012/
February 15, 2013

Joinder of additional parties and amended pleadings. This deadline does not apply to claims raised by the Receiver against additional parties pursuant to the Court's Order Appointing Receiver.

December 15, 2012/
February 15, 2013 (Morriss)/

March 15, 2013 (Morriss Holdings) Parties shall exchange expert witness summaries and reports as required by Federal Rule of Civil Procedure 26.

January 25, 2013/
April 16, 2013

Parties shall exchange expert rebuttal witness summaries and reports as required by Federal Rule of Civil Procedure 26.

March 29, 2013/
July 16, 2013

All factual discovery, including expert discovery, must be completed. All discovery must be commenced in time to be completed before this date.

April 29, 2013/
August 20, 2013

All summary judgment and other pretrial motions, and memorandums of law, (except for motions *in limine*) must be filed.

May 29, 2013/
September 20, 2013

Responses to summary judgment and other pretrial motions must be filed.

June 3, 2013/
October 4, 2013

Replies relating to summary judgment and other pretrial motions must be filed.

June 28, 2013/
November 14, 2013

All other motions, including motions *in limine*, must be filed.

July 12, 2013/
December 1, 2013

Joint pretrial stipulation must be filed.

July 26, 2013/

December 13, 2013 Proposed jury instructions and/or proposed findings of fact and conclusions of law must be filed.

August 15, 2013/
January 20, 2014 Pretrial conference/trial to commence.

Defendant Morriss wishes to include the following: Defendant Morriss is in personal bankruptcy. His ability to respond to discovery requests is thus diminished greatly. However, Defendant Morriss has moved this Court to allow him access to proceeds of an insurance policy in which he is a named insured. This issue is fully briefed and is now before the Court.

The Commission objects to Morriss' inclusion of this information in this report because it is irrelevant to scheduling. Lack of funds is not an excuse to avoid discovery obligations. *Tech. Chem. Co. v. IG-LO Prod. Corp.*, 812 F.2d 222, 224 (5th Cir. 1987); *Herstgaard v. Cherryden, LLC*, No. 1:07CV02-MP/AK, 2009 WL 2191862, at *3 (N.D. Fla. Jul. 22, 2009).

Relief Defendant Morriss Holdings wishes to include the following: Morris Holdings has filed a Motion to Dismiss or in the Alternative Motion for More Definite Statement on February 28, 2012, which the Court has not yet ruled upon. In the even the Court grants the Plaintiff Securities and Exchange Commission leave to amend its Complaint, Morriss Holdings requests that these time limits may be adjusted so that Defendant Morriss Holdings has adequate time to properly respond to any amended complaint and any outstanding discovery served on it by the Securities and Exchange Commission and to further prepare its own discovery in response to the clarified claims contained in the amended complaint.

The Commission objects to Morriss Holdings' request. The Commission's Complaint "give[s] [Morriss Holdings] fair notice of what the . . . claim is and the grounds on which it rests." *McMillian v. AMC Mortgage Servs., Inc.*, 560 F. Supp. 2d 1210, 1212 (S.D. Ala. 2008) (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)). Morriss Holdings is a relief defendant and

is not alleged to have committed any wrongdoing, but rather received ill-gotten funds. Consequently, its request would unnecessarily delay the progress of this case.

4. Proposals for the Formulation and Simplification of Issues

The parties have agreed to work together in good faith to simplify the issues for trial, including stipulating to certain facts and to the authenticity of certain documents. Further, if appropriate, the parties agree to file motions for summary judgment in order to resolve and simplify any disputed issues of law.

5. Necessity or Desirability of Amendments to the Pleadings

At this point, the parties do not know whether any of the pleadings will need to be amended.

6. Possibility of Obtaining Admissions of Fact and of Documents

The parties agree to work together in good faith to reach stipulations regarding uncontested facts and the authenticity of documents to expedite the trial of this matter.

7. Avoidance of Unnecessary Proof and Cumulative Evidence

At this juncture, the parties do not have any specific suggestions to the Court for the avoidance of unnecessary proof and cumulative evidence, but will endeavor to streamline the litigation.

8. Suggestions On the Advisability of Referring Matters to a Magistrate Judge

The parties agree to have discovery matters referred to a Magistrate Judge. At this point, the parties have not agreed on referring other matters to a Magistrate Judge or master, but we agree to discuss referring other matters to a Magistrate Judge or master as the case progresses.

9. Preliminary Estimate of the Time Required for Trial

The Commission currently estimates that the trial in this matter should take no longer than five (5) to ten (10) days if tried before a jury. Morriss and Morriss Holdings currently estimate that the trial in this matter should take no longer than 21 to 28 days if tried before a jury.

10. Requested Dates for Conferences Before Trial, Final Pretrial and Trial

The parties are not requesting any specific dates, but will leave the setting of all such dates to the Court's sound discretion.

11. Other Information That Would Be Helpful to the Court

The parties have not identified any matters that would be helpful to the Court.

C. Discovery Plan Report

Pursuant to Federal Rule of Civil Procedure 26(f), the parties developed the following discovery plan:

- (a) The parties shall exchange initial disclosures required by Federal Rule of Civil Procedure 26(a)(1), and E.D. Mo. Local Rule 3.02(A) by April 26, 2012.²

² Defendant Morriss wishes to include the following: Defendant Morriss is in personal bankruptcy. His ability to respond to discovery requests is thus diminished greatly. However, Defendant Morriss has moved this Court to allow him access to proceeds of an insurance policy in which he is a named insured. This issue is fully briefed and is now before the Court.

The Commission objects to Morriss' inclusion of this information in this report because it is irrelevant to scheduling. Lack of funds is not an excuse to avoid discovery obligations. *Tech. Chem. Co. v. IG-LO Prod. Corp.*, 812 F.2d 222, 224 (5th Cir. 1987); *Herstgaard v. Cherryden, LLC*, No. 1:07CV02-MP/AK, 2009 WL 2191862, at *3 (N.D. Fla. Jul. 22, 2009).

Relief Defendant Morriss Holdings wishes to include the following: Morris Holdings has filed a Motion to Dismiss or in the Alternative Motion for More Definite Statement on February 28, 2012, which the Court has not yet ruled upon. In the even the Court grants the Plaintiff Securities and Exchange Commission leave to amend its Complaint, Morriss Holdings requests that these time limits may be adjusted so that Defendant Morriss Holdings has adequate time to properly respond to any amended complaint and any outstanding discovery served on it by the Securities and Exchange Commission and to further prepare its own discovery in response to the clarified claims contained in the amended complaint.

The Commission objects to Morriss Holdings' request. The Commission's Complaint "give[s] [Morriss Holdings] fair notice of what the . . . claim is and the grounds on which it rests." *McMillian v. AMC Mortgage Servs., Inc.*, 560 F. Supp. 2d 1210, 1212 (S.D. Ala. 2008) (quoting *Erickson v. Pardus*, 551 U.S. 89, 93 (2007)). Morriss Holdings is a relief defendant and is not alleged to have committed any wrongdoing, but rather received ill-gotten funds. Consequently, its request would unnecessarily delay the progress of this case.

- (b) The Commission will likely seek discovery from, among others, the Defendants; the former and current officers and employees of Acartha Group, MIC VII, ATP, and Gryphon Investments; investors; accountants; auditors; banks; experts; and any other person or entity who may have relevant knowledge of the claims or defenses pertaining to this matter.

Defendant Morriss and Relief Defendant Morriss Holdings will likely seek discovery from, among others, the Commission; the Defendants; the former and current officers and employees of Acartha Group, MIC VII, ATP, and Gryphon Investments; investors; accountants; auditors; banks; experts; and any other person or entity who may have relevant knowledge of the claims or defenses pertaining to this matter.

The parties do not believe that they should conduct discovery in phases or be limited to particular issues.

- (c) Whenever feasible, the parties will produce all electronically stored information in date-stamped, OCR text, or pdf format. Alternatively, if unable to produce electronically stored information in such a manner, the parties will produce the information in the currently stored format.
- (d) The parties have agreed that if any party inadvertently produces electronically stored information, or other documents, that the producing party claims after production are privileged, they will notify the opposing party or parties within a reasonable time of learning that an inadvertent production had occurred. Further, all parties who received such information shall promptly return, sequester or destroy it, and must take reasonable steps to retrieve the information from third-parties, including expert witnesses. The parties, however, reserve their right to claim that the information

disclosed was not privileged or that the privilege was waived. The parties are requesting that the Court include their agreement in the Court's Scheduling Order.

- (e) At this time, the parties do not foresee any need for a variance from the rules pertaining to discovery, including any variance from the limit of ten (10) depositions per side provided by Fed.R.Civ.P. 30(a)(2)(A) and twenty-five (25) written interrogatories per side provided by Fed. R. Civ. P. 33(a)(1); however, if circumstances change, the parties will request leave of Court to conduct additional depositions and/or interrogatories.

March 28, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on March 28, 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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