

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’ RESPONSE
TO PLAINTIFF’S MOTION TO COMPEL PRODUCTION OF DOCUMENTS**

I. INTRODUCTION

Relief Defendant Morriss Holdings, LLC, has had nearly four months to produce documents responsive to the Commission’s First Request for Production of Documents, but has failed to provide a single document. During this time, in a good faith effort to move this matter forward, the Commission agreed to extensions of time and limited the scope of certain of its requests. The Commission’s efforts were to no avail. Now, for the first time, Morriss Holdings states it will produce certain documents responsive to the Commission’s request. In doing so, however, Morriss Holdings mischaracterizes the parties’ agreement to limit certain requests, refuses to provide certain documents which it is legally obligated to provide under Federal Rule 34, and makes no mention of its requirement to produce a privilege log.

Last, Morriss Holdings' request for an additional thirty days to produce documents is unreasonable due Morriss Holdings' considerable delay. Indeed, the Commission advised Morriss Holdings back in its March 26, 2012 letter, it would agree to nearly all of the limitations discussed in its Response, but Morriss Holdings failed to produce a single document. Consequently, the Commission respectfully requests the Court grant its Motion to Compel and require Morriss Holdings to produce documents responsive to the Commission's First Request for Documents by no later than May 22, 2012.

II. ARGUMENT

A. Morriss Holdings Mischaracterizes Certain Agreements to Limit Requests

In its Response, Morriss Holdings advises the Court the Commission agreed to certain limitations to its document requests during a May 3, 2012 telephone conference. Morriss Holdings, however, mischaracterizes the agreed-upon limitations for requests 6, 8, and 14. The Commission addresses each below.

1. Request No. 6

In Request No. 6, the Commission asks for “[a]ll documents reflecting or relating to your funds used for the benefit of Burton Douglas Morriss.” (D.E. 147, Ex. A). Morriss Holdings claims the Commission agreed to limit the request to “pay stubs, invoices, account ledgers, checks or documents detailing any services Doug Morriss provided to Morriss Holdings.” (D.E. 162 at 3). Morriss Holdings is incorrect. During the telephone conference, the Commission reiterated its previous March 26, 2012 clarification that the request included (1) “any financial transactions be it loans, wire transfers, or purchases of items or property by Morriss Holdings which Morriss utilized,” and (2) “any pay stubs, invoices, account ledgers, checks, or any other document detailing any services Morriss provided to Morriss Holdings.” (D.E. 147 at 12 and Ex.

C). Morriss Holdings advised the Commission it would agree to provide the first portion of the request, but requested that the Commission provide a separate, second document request for “any pay stubs, invoices, account ledgers, checks, or any other document detailing any services Morriss provided to Morriss Holdings.” Pursuant to that agreement, on May 7, 2012, the Commission served Morriss Holdings with its Second Request for Production of Documents, which includes that request. Second Request for Production of Documents, attached as Ex. A.

Moreover, the requested documents are extremely relevant because they relate directly to the Complaint’s allegations that “Morriss used the funds he transferred from the Investment Entities to himself and Morriss Holdings for personal expenditures, including alimony payments, interest payments for personal loans, and expensive vacations, including a hunting trip to Africa.” (D.E. 1, ¶ 29).

2. Request No. 8

In Request No. 8, the Commission asks for “Monthly statements for all bank accounts you control, are in your name, and/or have any beneficial interest in including, without limitation, *offshore accounts*.” (D.E. 147, Ex. A) (emphasis added). In its Response, Morriss Holdings claims “the Commission agreed to the limitation of this request to include only monthly statements from domestic bank accounts it controls, has in its name or has a beneficial interest in.” (D.E. 162 at 3-4). Morriss Holdings is incorrect.

The Commission requests both domestic and offshore accounts Morriss Holdings controls, has in its name, or for which it has a beneficial interest. Both domestic and offshore bank account records are highly relevant because they will show, as alleged in the Commission’s Complaint, Morriss Holdings’ received significant portions of the money Defendant Burton Douglas Morriss stole from investors. Moreover, the requested documents are particularly necessary because

Morriss Holdings has failed to provide a sworn accounting of its assets as ordered by the Court. (D.E. 82).

In addition, the Commission reiterates its objection to Morriss Holdings' limitation that it will only provide account statements in its "possession." As discussed in the Commission's Motion to Compel, 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. *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). Morriss Holdings has a legal right to its own bank records. Consequently, it must obtain whatever records are not in its physical possession, from the banking institutions for which it maintains accounts it controls, has in its name, or for which it has a beneficial interest.

3. Requests No. 14

In Request No. 14, the Commission asks for "[a]ll documents reflecting or relating to any of your real estate ownership interests and investments." (D.E. 147, Ex. A). In its Response, Morriss Holdings states the parties agreed to limit the request to "a listing of real estate that Morriss Holdings owns." (D.E. 162 at 5). Morriss Holdings is incorrect. The Commission requests more than just a list of owned real estate, but documents demonstrating its ownership, including, but not limited to, deeds, sales contracts, loan or mortgage documentation, and HUD-1 forms. These documents are relevant because they will show when and how Morriss Holdings

purchased real estate, which may have been purchased for Defendant Burton Douglas Morriss' benefit or be subject to potential disgorgement.

B. Morriss Holdings Must Produce All Documents In Its Possession, Custody, or Control

Throughout its Response, Morriss Holdings improperly limits its production of documents to those “in its possession.” (D.E. 162, at 2-6 and 7). As explained in the Motion to Compel and our response regarding Request No. 8, pursuant to Fed. R. Civ. P. 34(a)(1), Morriss Holdings must produce any documents in his possession, custody, or control whether they are in its physical possession 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).

Morriss Holdings claims that it should not be required to comply with the Rules of Civil Procedure because it may require outside expertise or cost money. It also claims that requiring it to obtain documents not in its physical possession would be overly burdensome because Morriss Holdings lacks employees and its only agent is Morriss, who is subject to a criminal investigation.

Morriss Holdings' arguments lack merit. First, Morriss Holdings fails to explain how obtaining any of the requested documents would require anything more than a letter or telephone call. Quite the contrary, to obtain bank and brokerage account records not in its physical possession, Morriss Holdings would merely have to request the documents from the banks and brokerage firms it utilizes. Second, lack of funds is 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).

Third, the fact that its sole agent, Morriss, is subject to a criminal investigation does not relieve Morriss Holdings of its discovery obligations. Morriss Holdings may not hide behind Morriss' personal privilege against self-incrimination. *SEC v. Brown*, 06-1213 (PAM/JSM), 2007 WL 4192000, at *2 (D.Minn. Jul. 16, 2007) (citations omitted). Nor can Morriss assert his personal privilege to avoid producing information on the company's behalf. *Id.* (noting that an individual defendant under criminal investigation cannot assert Fifth Amendment privilege for production of documents on behalf of a company for which he is the owner and sole shareholder). Morriss cannot avoid producing records of an entity for which are in his possession in a representative capacity, even though those records might incriminate him personally. *Id.* See also *Braswell v. United States*, 487 U.S. 99, 109-11 (1988) (holding that because a "custodian of corporate or entity records holds those documents in a representative rather than a personal capacity," the custodian cannot claim a personal Fifth Amendment privilege against the production of corporate records); *Amato v. United States*, 450 F.3d 46, 52-53 (1st Cir. 2006) (holding sole shareholder of corporation could not claim Fifth Amendment privilege in response to subpoena for corporate records). Consequently, Morriss Holdings must produce all documents in its possession, custody, or control.

C. Morriss Holdings Must Provide A Privilege Log

In its Response, Morriss Holdings advises it continues to object to the production of documents protected by the attorney-client privilege and the work-product doctrine. Federal Rule of Civil Procedure 26(b)(5)(A)(ii), requires a party withholding otherwise discoverable information on the basis of privilege to "describe the nature of the documents, communications,

or tangible things not produced or disclosed” and do so “to enable other parties to assess the claim.” Consequently, pursuant to Rule 26(b)(5)(A), Morriss Holdings must produce a privilege log to identify any documents for which it claims privilege.

D. Morriss Holdings Should Not Receive An Additional 30 Days to Produce

To date, Morriss Holdings has failed to produce a single document. Regardless of that fact, Morriss Holdings now requests an additional thirty days – four months and 15 days after the original due date – to produce the documents the Commission originally requested on January 19, 2012. In doing so, Morriss Holdings fails to demonstrate any cause, let alone good cause, as to why it needs the additional time, nor can it. Indeed, it cannot claim the Commission agreed to limit the scope its requests only after the May 3, 2012 conference. In its March 26, 2012 letter, the Commission originally proposed limitations to the scope of its requests, which Morriss Holdings discusses in its Response. (D.E. 147, Ex. C). Consequently, Morriss Holdings had ample time to produce documents subject to the stated scope limitations, but instead chose not to produce a single document. Moreover, Morriss Holdings also fails to provide any explanation as to why it failed to produce documents responsive to requests for which it raised no objections – *i.e.* Commission requests 4-5, 7, 9, and 11.

Morriss Holdings’ unjustified and unexplained delay in producing *any* documents responsive to the Commission’s request has unreasonably prejudiced the Commission and has delayed this case. Without the requested documents, the Commission has been unable to set and prepare for depositions. Consequently, the Commission respectfully requests the Court to order Morriss Holdings to provide the requested documents by no later than May 22, 2012.

III. CONCLUSION

For the forgoing reasons, the Commission respectfully requests the Court grant the Commission's Motion to Compel and overrule Morriss Holdings' objections and require it to produce, by May 22, 2012, all documents responsive to the Commission's First Request for the Production of Documents.

Respectfully submitted,

May 11, 2012

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CERTIFICATE OF SERVICE

I hereby certify that on May 11, 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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EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

CASE NO.: 12-CV-80-CEJ

SECURITIES AND EXCHANGE COMMISSION,)
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Plaintiff,)
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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 SECOND REQUEST FOR PRODUCTION
OF DOCUMENTS FROM RELIEF DEFENDANT MORRISS HOLDINGS, LLC**

Pursuant to Rules 26 and 34 of the Federal Rules of Civil Procedure, Plaintiff Securities and Exchange Commission requests that Relief Defendant Morriss Holdings, LLC, produce the following documents in its possession, custody or control at the Miami Regional Office of the Commission, 801 Brickell Avenue, Suite 1800, Miami, Florida 33131. Pursuant to the Court’s Order, all documents shall be produced within thirty (30) days of service of this request.

DEFINITIONS AND INSTRUCTIONS

1. Unless otherwise specified, the applicable time period for these requests is January 1, 2005 through the present.
2. “Person” means a natural person, firm, partnership, corporation, proprietorship, joint venture or any other organization or entity.

3. “You” or “Your” refers to Morriss Holdings, its agents, servants, employees, representatives, contractors, attorneys, investigators, and anyone acting on its behalf or pursuant to its direction, and any entity or company of which it is a principal, director or officer, or otherwise controls.

4. “Investment Entities” means Acartha Group, LLC; Acartha Technology Partners, LP; MIC VII, LLC; and Gryphon Investments III, LLC, including any of their subsidiaries, affiliates, predecessors, successors, and any of their officers, directors, principals, consultants, representatives, agents, employees, attorneys, or any other person acting on their behalf.

5. “Documents” includes all writings and graphic matter of any kind, including, but not limited to, the original, all interim drafts, and each copy containing interlineations, deletions, marginal notes, or which is otherwise non-conforming and which shall include, but not be limited to, any file, financial statement or report, note, bank statement, canceled checks, analysis, deposit slip, credit and debit memoranda, telex, bill (including telephone and credit card), correspondence, prospectus, script, transcript, offering materials, e-mails, ledger sheet, receipt, transcript, photograph, sketch, chart, graph, diagram, diary, telephone log, appointment calendar, telegram, telecopy, fax, diary, mailgram, accounting work paper, report, computer printout, filing with any state or federal agency, inter- or intra-office communication, minutes of meetings, invoices, and any tangible items of readable or visual material, whether printed, typed, handwritten, microfilmed, or recorded on tape, computer hard drive or disk or other means of recording or data entry. The term “documents” also includes voice recordings, film, tapes, and other compilations from which information can be obtained.

7. A document “relating to”, “regarding”, “reflecting”, “underlying” or “supporting” a given subject matter means any document or communication that constitutes, contains,

embodies, comprises, reflects, identifies, describes, analyzes, or in any way relates to that subject, including, but not limited to, documents concerning the presentation of the documents.

8. This request calls for all documents in your possession, custody or control, regardless of where such documents are located.

9 These requests are intended to be continuing in nature so as to require the addition of supplemental information under the terms and conditions set forth in Federal Rule of Civil Procedure 26(e).

10. Morriss Holdings may comply with the request by providing legible copies of the responsive documents. Morriss Holdings may provide copies in an electronic format if consented to by the Commission prior to its response. The Commission retains the right to inspect the originals of the documents produced prior to the trial of this cause.

11. If you object to any request or any part thereof on the basis of any claimed privilege, create a privilege log that identifies the privilege claimed, the statement or communication for which such privilege is claimed, and provide the following information with respect to each such statement, communication or document:

- (a) date;
- (b) names of persons present;
- (c) subject matter;
- (d) location or custodian; and
- (e) the basis on which the privilege is claimed.

DOCUMENTS REQUESTED

1. All documents reflecting or relating to services provided by Burton Douglas Morriss to You and payments made by You to Burton Douglas Morriss for such services, including, but not limited to, pay stubs, invoices, account ledgers, wire transfers, or checks.
2. All documents reflecting or relating to tangible and intangible property You own, including, but not limited to appraisals, sales receipts, and inventory lists.
3. All documents reflecting or relating to emails and attachments sent from and received by Investment Entities' employees and officers, including, but not limited to Burton Douglas Morriss, Ameet Patel, Wynne Morriss, and Dixon Brown, which are maintained on Your MailStreet (a division of Apptix, Inc.) subscribed email accounts. These documents should include, but not be limited to, emails with corresponding attachments, to and from all custodians using the domain "@acarthagroup.com."
4. All documents reflecting or relating to the business operations of the Investment Entities, which are maintained on your servers.
5. "Certain accounting and financial records of Morriss Holdings," as described in Your May 3, 2012 Rule 26(a)(1) initial disclosures.
6. "Documents regarding the finances and relationships between and among Morriss Holdings, Burton D. Morriss, other Morriss entities, and the Investment Entities," as described in Your May 3, 2012 Rule 26(a)(1) initial disclosures.
7. "Documents regarding the bank accounts of Morriss Holdings, Burton D. Morriss, other Morriss entities and the Investment Entities," as described in Your May 3, 2012 Rule 26(a)(1) initial disclosures.

8. "Disclosure documents provided to investors in the Investment Entities," as described in Your May 3, 2012 Rule 26(a)(1) initial disclosures.

9. "Emails between and among Morriss Holdings, Burton D. Morriss, other Morriss entities, the Investment Entities, investors, and/or witnesses identified above," as described in Your May 3, 2012 Rule 26(a)(1) initial disclosures.

10. "Correspondence between and among Morriss Holdings, Burton D. Morriss, other Morriss entities, the Investment Entities, investors, and/or witnesses indentified above," as described in Your May 3, 2012 Rule 26(a)(1) initial disclosures.

11. "Documents reflecting or relating to loans to/from Morriss Holdings to the Investment Entities and any collateral for any such loans," as described in Your May 3, 2012 Rule 26(a)(1) initial disclosures.

12. "Documents reflecting or relating to loans to/from Morriss Holdings and Burton D. Morriss, other Morriss entities, and/or related trust entities and any collateral for any such loans," as described in Your May 3, 2012 Rule 26(a)(1) initial disclosures.

Respectfully submitted,

May 7, 2012

By:



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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was served by email and overnight mail on this 7th day of May 2012 on the following:

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