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IN THE UNITED STATES DISTRICT COURT
DISTRICT OF UTAH, CENTRAL DIVISION

SECURITIES AND EXCHANGE COMMISSION

Plaintiff,

v.

MERRILL SCOTT & ASSOCIATES, LTD.,
MERRILL SCOTT & ASSOCIATES, INC.,
PHOENIX OVERSEAS ADVISERS, LTD.,
GIBRALTAR PERMANENTE ASSURANCE, LTD.,
PATRICK M. BRODY,
DAVID E. ROSS II, and
MICHAEL G. LICOPANTIS

Defendants,

Civil No. 2:02CV 0039C

**MEMORANDUM IN
SUPPORT OF
MOTION FOR
CONTEMPT AGAINST
DAVID E. ROSS II**

The Plaintiff, Securities and Exchange Commission (“Commission”), by and through its counsel of record, hereby submit this Memorandum for Contempt in Support of the Motion for Contempt Against David E. Ross II (“Ross”).

INTRODUCTION

Ross has engaged, and may be continuing to engage in, an evasion and violation of this Court’s duly issued Order which prohibits him from transferring or depleting or causing the transfer or depletion of any funds or property of the Merrill Scott and Associates, Ltd. and affiliated entities.

Within months of this Court’s Order freezing the assets of the Merrill Scott organization and the

appointment of a Receiver to marshal and conserve the assets of Merrill Scott, Ross transferred and directed the transfer of over \$544,049 from accounts that were established by the Merrill Scott organization. The Court's Order froze these accounts and the existence of these accounts should have been disclosed to the Receiver. Although the Commission has managed to secure some of the funds wrongfully secreted and dissipated by Ross, some funds have been further concealed from the Commission and the Receiver. These transfers violate the Court's asset freeze Order and the Stipulated Order Appointing a Receiver.

FACTS

BACKGROUND

On January 15, 2002, this Court issued an Order (the "TRO Order") freezing the assets of Merrill Scott and Associates, Ltd., and affiliated entities. That TRO Order provided:

A. Defendants MSA, MSAI, Phoenix, Gibraltar and Brody, and their officers, directors, subsidiaries, affiliates, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them who receive actual notice of this order by personal service or otherwise, and each of them, hold and retain within their control, and otherwise prevent any disposition, transfer, pledge, encumbrance, assignment, dissipation, concealment, or other disposal whatsoever of any of their funds or other assets or things of value presently held by them, under their control or over which they exercise actual or apparent investment or other authority, in whatever form such assets may presently exist and wherever located; and

B. That any financial institution or other person or entity located within the territorial jurisdiction of the United States courts and holding any funds or other assets in the name of, for the benefit of, or under the control of MSA, MSAI, Phoenix, Gibraltar, or Brody officers, directors, subsidiaries, affiliates, agents, servants, employees, attorneys-in-fact, and those persons in active concert or participation with them, and each of them, shall hold and retain within their control and prohibit the withdrawal, removal or transfer or other disposal of any such funds or other assets.

Thereafter, on January 23, 2002 this Court issued a Stipulated Order Appointing Receiver (“Receiver Order”), which supplemented the TRO Order by appointing a Receiver, David K. Broadbent to marshal the assets of the Merrill Scott organization for ultimate distribution to victims in this case. On January 22, 2002, Ross consented to an Order of Preliminary Injunction (“Preliminary Injunction”).

Ross was on notice of all these Orders. On January 15, 2002, counsel for the Commission telecopied a copy of the TRO Order to Defendant Ross. Defendant Ross was personally served with a copy of the TRO on January 15, 2002. Ross stipulated to both the entry of a preliminary injunction and the appointment of the Receiver. Further, Ross’ counsel also stipulated to the entry of these orders. Ross is clearly familiar with the terms and requirements of those orders.

Ross is an attorney licensed to practice in Utah, Kansas and Illinois. He held positions of significant responsibility within the Merrill Scott organization, including acting as general counsel, officer, director, manager and trustee of various Merrill Scott entities and affiliates. For example, Ross was the managing director of two Merrill Scott subsidiaries, Estate Planning Institute, and a Managing Director of Gibraltar Permanente Assurance, Ltd.

At the Receiver’s request, Ross has provided the Receiver with selective information. Despite blanket requests for documents and information, Ross has not disclosed all of Merrill’s Scott’s assets to the Receiver. As set forth in the Receiver’s Declaration filed herewith, Ross is assisting in the transfer of funds to third parties that are the property of Merrill Scott and subject to the control of the Receiver.

Since his appointment in January 2002 and in accordance with his duties under the Stipulated Order, the Receiver has been locating accounts established by the Merrill Scott organization. The Receiver recently discovered the Grand Slam and Evergreen accounts, both of which were established by Ross in his capacity as an officer of the Merrill Scott organization.

ROSS' KNOWN TRANSACTIONS IN VIOLATION OF THE ORDER

A. Evergreen Management Services, Ltd.

On June 11, 1999, Ross established an account in the name of Evergreen Management Services, Ltd. ("Evergreen") with Wall Street Financial Group, Inc. ("Wall Street"), a broker-dealer registered with the Commission. Evergreen is a Bahamian international business corporation for which Brody and Ross were acting as directors and corporate president and secretary, respectively. This Bahamian international business corporation was established on behalf of Shelton Powers, a Merrill Scott customer and sales representative. In September 1999, Shelton Powers was removed as the "beneficial owner" of Evergreen, and his daughter, Michelle Powers became the "beneficial owner."

The initial directors of Evergreen were Merrill Scott & Associates, Ltd., Global Management Limited and The Estate Planning Institute (Bahamas) Ltd. In his addition to his position with The Estate Planning Institute, Ross is the corporate secretary and a director of Global Management, Ltd. Subsequently, Ross directed a series of corporate maneuvers to remove these funds from the Receiver's control. Those transactions are set forth in graphic form on Exhibit "A."

The Receiver's declaration details the series of deliberate acts taken by Ross to transfer the contents of the Wall Street account offshore. At the time of the TRO, the Evergreen account had a

balance of \$455,421.37. On January 21, 2003, a Bahamian agent for Evergreen, Bertha M. Cooper-Rousseau, instructed Wall Street to “transfer the entire cash balance on account for Evergreen” to Evergreen’s account with Barclays Bank in the Bahamas. On January 31, 2003, \$389,884.01 was wired from the Wall Street account to Evergreen’s Barclays account in the Bahamas.

Ross clearly directed this transfer. To authorize and facilitate the liquidation of the account, Ross sent Evergreen’s representative, Amy Bennage (“Bennage”) several communications. For example, on October 7, 2002, Ross sent Bennage the following email:

Dear Ms. Bennage:

Sorry for the delay in sending you the appropriate papers, including the W8BEN, wire instructions and corporate directions. Evergreen Management is having its annual meeting this week and new directors are being appointed and they in turn with [sic] elect new officers. They will be providing you copies of the minutes and resolution of the authorized officer to remit directions to your attention. The Trust that originally sent the funds to your company maintains the account for Evergreen Management and will be receiving the proceeds.

Should you have any question, please feel free to contact me.

Sincerely yours, David Ross

Further, on December 22, 2002, Ross sent Bennage another email that stated:

“You will be contacted by the Nassau, Bahamas attorney for Evergreen Management Services, Ltd. Her name is Bertha M. Cooper-Rousseau of the law firm Cooper & Rousseau. She will provide the proper wire instructions. Her telephone number is 242-325-3693. FAX 242-325-3688.

If you need anything further, please do not hesitate to contact me at 866-302-2252 or FAX 435-615-7225 and email address: dadkawika@aol.com.

Sincerely,
David E. Ross II

Finally, on January 21, 2003, Ross sent Bennage a letter on his “attorney” letterhead that reads as

follows:

Dear Ms. Bennage:

As you recall and your records will reflect that the undersigned previously served as an officer and director of the companies that served as officers and directors of Evergreen Management Services, Ltd., a Bahamian International Business Corporation (the "Company"). I am aware of the fact that the companies that previously did serve as the officers and directors and that I had been an officer and director of [sic] were effectively removed as officers and directors of the Company in 2002. I am further aware of the fact that the new sole Director and President of the Company is Finchley Limited, Nassau Bahamas.

Please note that Bahamas attorney Bertha M. Cooper-Rousseau represents the Company should be able to assist and provide you with information as to the new sole officer and director.

If you have any questions, please feel free to contact me. You can reach me at 801-712-8784, FAX 435-615-7225 or email: dadkawika@aol.com. My address is 1912 Sidewinder Drive, Suite 209, Park City, UT 81060.

The letter is signed by Ross as "David E. Ross II, Attorney at Law". On the same date as Ross' letter, Cooper-Rousseau sent Wall Street the instruction to transfer the remaining balance of Evergreen's Wall Street account to Barclays Bank in the Bahamas. As of the date of this Motion, the disposition of these funds is unknown.

2. Grand Slam Park, LLC

As set forth in the Receiver's Declaration, filed herewith, on January 3, 2001, Ross established two accounts with MML Investor Services, Inc., ("MML"), a broker-dealer registered with the Commission, in the name of Grand Slam Park, LLC ("Grand Slam"). One of those accounts was established at MML, and the second account was established through MML with an entity named SEI Private Trust Company ("SEI Private Trust"). Ross was designated as the

Managing Director of Grand Slam in an Operating Agreement dated September 1, 2000, and was given sole transactional and signatory authority in Grand Slam's MML account. On April 5, 2002, less than three months after the issuance of this Court's TRO and Ross' Preliminary Injunction, Ross sent a letter to MML instructing the broker to "liquidate all assets from the Grand Slam Park, LLC account . . . and wire the proceeds into the SEI account of Gehrig and Margaret White Charitable Foundation"

In accordance with Ross' instructions Grand Slam's MML account was liquidated, and on April 17, 2002, funds totaling at \$88,628.47 were wired to an account with First Union National Bank on behalf of S.E.I. Private Trust. As detailed in the Receiver's declaration, Ross ordered that the second Grand Slam account maintained by SEI be looted and transferred into the SEI Private Trust account. On April 15, 2002, \$59,413.47 was transferred into that account. The total value of the account maintained at SEI Private Trust, as of April 30, 2002 was \$147,095.36. Several withdrawals were made between April 30, 2002 and the present. For example, approximately \$40,000 was withdrawn on June 19, 2003. The account presently holds \$70,433.32. SEI Private Trust is acting as trustee for the Gehrig and Margaret White Charitable Foundation, and has been notified that those funds are frozen pursuant to this Court's Order.

ARGUMENT

ROSS IS IN CONTEMPT OF THIS COURT'S ORDERS

This Court has the inherent authority to enforce compliance with its lawful orders through the process of civil contempt. Shillitani v. United States, 384 U.S. 364, 370 (1966). These powers are "governed not only by rule or statutes but by the control necessarily vested in courts

to manage their own affairs so as to achieve the orderly and expeditious disposition of cases.” Chambers v. NASCO, Inc., 501 U.S. 32, 43 (1991) (quoting Link v. Wabash R.R. Co., 370 U.S. 626, 631 (1962)). “Civil contempt proceedings may yield a conditional jail term or fine.” Hutto v. Finley, 437 U.S. 678, 690 (1973); Shillitani, 384 U.S. at 370. See generally International Union v. Bagwell, 512 U.S. 821, 826-30 (1994).

Moreover, contempt sanctions may be imposed “to coerce the defendant into compliance with the court’s order, and to compensate.” United States v. United Mine Workers, 330 U.S. 258, 303 (1947). Where the court’s purpose is to make the defendant comply with its orders, “[i]t must then consider the character and magnitude of the harm threatened by the continued contumacy, and the probable effectiveness of any suggested sanction in bringing about the result.” Id. at 304. See also SEC v. Credit Bancorp, Ltd., et al., 2000 LEXIS 9755 (SDNY 2000).

In the Tenth Circuit, “[t]o prevail in a civil contempt proceeding, the plaintiff has the burden of proving, by clear and convincing evidence, [cite omitted] that a valid court order existed, that the defendant had knowledge of the order, and that the defendant disobeyed the order.” Reliance Insurance Co. v. Mast Construction Company, et al. 159 F.3d 1311, 1315 (10th Cir. 1998), citing Roe v. Operation Rescue, 54 F.3d 133, 137 (3rd Cir. 1995). “Civil contempt may be used ‘to compensate the contemnor’s adversary for injuries resulting from the contemnor’s noncompliance’ with a court order. O’Connor v. Midwest Pipe Fabrications, Inc., 972 F.2d 1204, 1211 (10th Cir. 1992).” Reliance at 1318. Furthermore, “[i]n a civil contempt proceeding, once a plaintiff has

established the elements of contempt by clear and convincing evidence, it need only prove damages by a preponderance of the evidence.” Id.

Ross’ failure to comply with this Court’s Orders clearly meets the standard for civil contempt. This Court issued valid orders freezing the assets of the Merrill Scott organization and Brody in January 2002 and appointing a receiver to marshal them for distribution. The Court’s Orders, as they apply to Ross, are clear and unambiguous. Ross had knowledge of the TRO and Stipulated Order and has violated the asset freeze numerous times since January 2002. Furthermore, Ross is an attorney and understands fully the meaning and direction of the TRO, Stipulated Order and Preliminary Injunction. Ross never sought leave of this Court for authority to transfer assets frozen by this Court, and the majority of the assets transferred may be lost to this Court’s jurisdiction. There is no exception in the Court’s orders for any transactions by Ross. Ross has willfully violated this Court’s Orders and has depleted significant assets that would otherwise be available to defrauded investors.

Ross is a member of three State bars and has held himself out as an expert in offshore entities and asset protection. His status as an attorney and his position and responsibilities within the Merrill Scott organization warrant the levy of severe sanctions for his contumacious conduct.

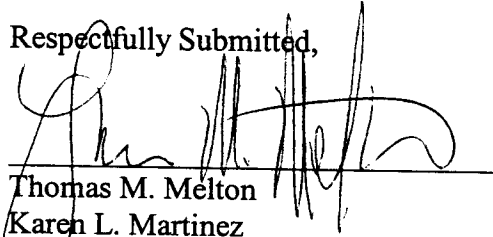
RELIEF REQUESTED

Ross’ contempt of this Court’s Orders is plain and warrants immediate sanction. The Commission respectfully requests that the Court enter an Order (a) finding David Ross in contempt of this Court’s previously issued Orders; (b) ordering Ross to repay the monies transferred from the Evergreen account; (c) requiring Ross to provide the Receiver and counsel for the Commission

with a sworn accounting of all accounts over which he now has, or has ever had, control, beneficial or otherwise, or signatory authority, related in any way, directly or indirectly, to Merrill Scott, or any subsidiary, affiliate, related company or person. The accounting should be filed and delivered to the Receiver and counsel for the Commission within ten business days.

Dated: July ¹⁰ 6, 2003

Respectfully Submitted,



Thomas M. Melton

Karen L. Martinez

William B. McKean

ATTORNEYS FOR PLAINTIFF
SECURITIES AND EXCHANGE
COMMISSION

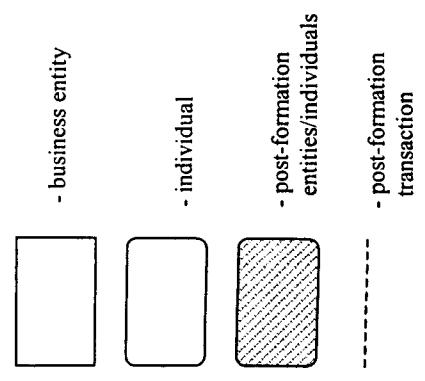
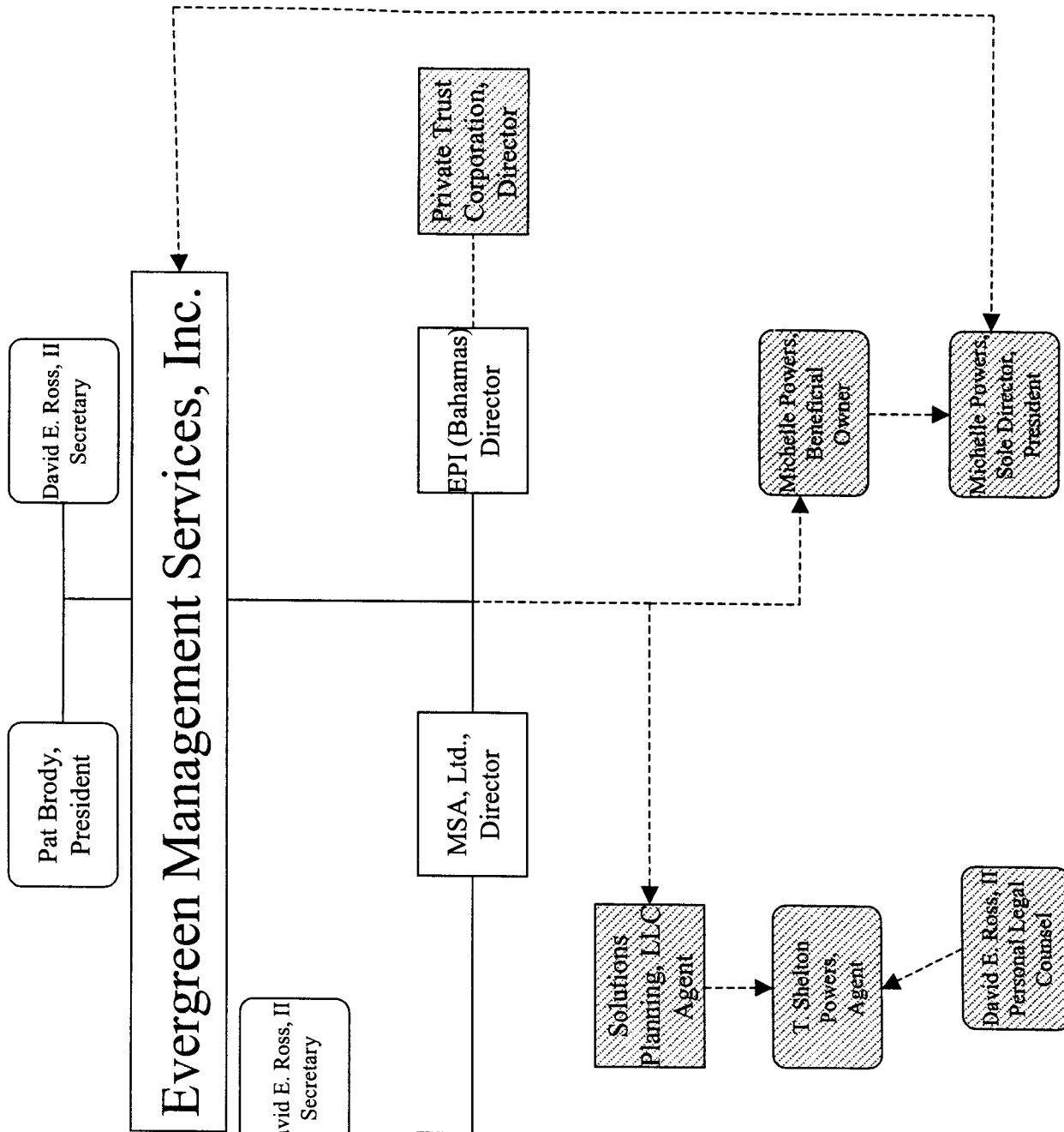


Exhibit A