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UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF UTAH  
CENTRAL DIVISION

SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

v.

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

Defendants.

CIVIL NO: 2 :02 CV 0039 C

**SECOND SUPPLEMENTAL BRIEF  
CONCERNING CIVIL CONTEMPT  
AGAINST DAVID E. ROSS, II**

Judge Tena Campbell

Pursuant to the Court's request for additional briefing regarding actual notice given to David E. Ross ("Ross") of the terms of the extended TRO (Dkt #17) and the terms of the January 23, 2002 Order Appointing Receiver (Dkt #15), the Securities and Exchange Commission ("Commission") respectfully submits this Second Supplemental Brief Concerning Civil Contempt. The record is replete with clear and convincing evidence that demonstrates that David Ross had actual notice of both Orders.

**I. ROSS HAD ACTUAL NOTICE OF THE COURT'S TEMPORARY  
RESTRAINING ORDER, ORDER OF ASSET FREEZE, PROHIBITING  
DESTRUCTION OF DOCUMENTS AND OTHER RELIEF DATED JANUARY 15, 2002**

There is no dispute that Ross received actual notice of the Temporary Restraining Order, Order of Asset Freeze, Prohibiting Destruction of Documents and Other Relief (“TRO”). Ross was served personally with a copy of this action, including the TRO on January 15, 2002. A true and correct copy of the Summons in a Civil Action (Dkt #11), reflecting that service is attached as Exhibit “A.” Additionally, Ross was given a copy of the TRO the next day by his co-defendant, Patrick Brody, as part of a notice prepared by counsel to Merrill Scott & Associates, Ltd. (“MSA”). That notice was delivered to all individuals by MSA’s outside counsel, Russell C. Skousen. Attached as Exhibit “B” is a true and correct Affidavit of Russell C. Skousen. He testified through his Affidavit that, “it appeared evident to me that all employees, officers and directors of MSA and the MSA affiliates were aware of the TRO and its contents, we quickly determined to circulate a memo and a copy of the TRO to all persons in the MSA offices. . . . We accomplished such distribution by handing the memo to individuals present at the time and by placing the memo on chairs and desks in unoccupied offices.” Skousen Affidavit, ¶ 13. Ross was on notice of the TRO.

**II. ROSS STIPULATED TO THE ENTRY OF A PRELIMINARY INJUNCTION**

Immediately after the entry of the TRO, Ross immediately obtained counsel. Ross , through his counsel, negotiated for a expedited briefing schedule on the entry of a preliminary injunction. On January 18, 2002, three days after the entry of the TRO, counsel for the Commission, negotiated a shortened briefing schedule with the Ross’ counsel. That briefing schedule was incorporated into an Order Setting Briefing Schedule for Preliminary Injunction Hearing dated January 18, 2002. A copy of that Order Setting Briefing Schedule was transmitted

to Ross' counsel on January 18, 2002. A true and correct copy of the Order Setting Briefing Schedule and the telecopy record reflecting service to Ross' counsel is attached as Exhibit "E."

After negotiations between counsel for Ross and Commission counsel regarding the form of a Stipulation and Order, Ross consented to the entry of a preliminary injunction on January 22, 2002. A true and correct copy of the Consent of David E. Ross II to the Entry of Order of Preliminary Injunction is attached hereto as Exhibit "C." An Order of Preliminary Injunction was entered against David Ross II on January 23, 2002. A true and correct copy of the Preliminary Injunction is attached as Exhibit "D." There is no dispute that Ross was informed of the terms of this Order.

### **III. ROSS WAS GIVEN ACTUAL NOTICE OF THE STIPULATED ORDER APPOINTING RECEIVER**

Ross was given actual notice of the Stipulated Order Appointing a Receiver. The Commission moved on January 15, 2002, for, among other things, the appointment of a Receiver of MSA and other related entities. The Court reserved a ruling on that Motion at the hearing on January 15, 2002, and the Commission continued seek the appointment of a receiver for those entities. On January 23, 2002, Commission counsel and counsel for Patrick M. Brody and certain of the MSA entities stipulated for the appointment of a receiver for those entities and an extension of the TRO (including the asset freeze) "until a trial upon the merits in this action, or such time as any party, upon notice, shall move for a modification of that Order (the TRO) and that Order shall remain in full force and effect until such time as it is modified." A true and correct copy of that Stipulation is attached hereto as Exhibit "F."

Pursuant to that Stipulation, and after a hearing on the issues of the asset freeze and the appointment of a receiver, the Court entered a Stipulated Order Appointing Receiver. That Order is dated January 23, 2002. A true and correct copy of that Order is attached hereto as

Exhibit “G.” A copy of that Order was immediately served upon Ross’ counsel, Max Wheeler, on January 23, 2002, by the administrative assistant for the Commission, Barbara Zamora-Tueller. Ms. Zamora-Tueller telecopied a copy of the Order to all counsel, including Mr. Wheeler. Affidavit of Barbara Zamora-Tueller dated January 8, 2004, ¶ 3, attached as Exhibit “H.” Ms. Zamora-Tueller’s Declaration attaches a copy of the Commission’s telefacsimile log reflecting that service. Thus, Ross was given actual notice of the Order through his counsel the date that it was entered.

Ross admits that he was given actual notice of the Receiver and his authority. In his Proposed Findings of Fact and Conclusions of Law, “Mr. Ross concedes, however, that he learned of the appointment of the Receiver.” (p. 3) Further, his testimony in this proceeding provides evidence of his admission that he was actually aware of the terms of the Order appointing the Receiver. In his examination on October 2, 2003, Mr. Wheeler asked Mr. Ross about his notice of the Stipulated Order Appointing Receiver:

Q: (by Mr. Wheeler) And you don’t dispute that you were aware of the Order?

A: (by Ross) I was aware of the Order.

Q: (by Mr. Wheeler) And why was it that you agreed to assist Dr. Powers in taking his money out of that account?

A: (by Ross) Well, initially I didn’t because at that point in time I thought that Evergreen was an operative company with a receiver who would have stepped into the shoes of Merrill Scott and been in charge of that entity.

Transcript of October 2, 2003, p. 37, lines 6-14 (attached hereto as Exhibit “I”).

Ross further acknowledged his awareness of the Stipulated Order Appointing Receiver in response to a direct inquiry from the Court:

Q: THE COURT: So you are saying that it was your understanding that before I ordered that all the assets be frozen, these were no longer Merrill Scott assets, or at the time I ordered it they were Merrill Scott assets?

A: (Ross) Well, I don't know the date that the charter lapsed. Had it lapsed before, then I don't think the Court did have jurisdiction or the Receiver. If it happened after the charter being revoked by the Bahamian Government at the time that the order was entered, then I think the Receiver would have had some interest because they would have been the directors of the corporation.

Transcript of Proceedings, October 2, 2003, p. 42, lines 13-24, attached as Exhibit "J." These admissions, together with the claims that he has cooperated fully with the receiver (as set forth in his Proposed Findings of Fact and Conclusions of Law) are clear and convincing evidence that he was given actual notice of the Stipulated Order Appointing Receiver.

Ross's course of conduct and correspondence after the entry of the Stipulated Order Appointing Receiver also provides clear and convincing evidence that he was given actual notice of this Order. On January 29, 2002, Ross sent a letter to MSA "clients" notifying those clients of the appointment of a receiver. He informed the clients that, "[p]lease be advised that the United States District Court for the Northern (sic) District of Utah has appointed a Receiver for Merrill Scott & Associates ("MSA"). . . .The Receiver in order to facilitate assisting MSA clientele needs certain information; e.g., names and jurisdiction of client entities or entities whereby the specific client may have a beneficial interest." He continued, "[w]e believe that it is in your interest to provide this information to the Receiver and therefore recommend that you consent." Letter dated January 29, 2002, a true and correct copy is attached as Exhibit "K."

Ross' actual knowledge of the terms of the Stipulated Order appointing Receiver is also demonstrated in a letter that he delivered to the resident Bahamian counsel for some MSA entities. In a letter dated January 30, 2002, Ross instructs Gavin Cassar as follows:

Please be advised that a Mr. David K. Broadbent has been appointed Receiver for Merrill Scott & Associates and its affiliated companies. He steps into the same position formally (sic) held by those persons controlling (sic) Merrill Scott & Associates, Ltd., and other related companies formed in the Bahamas. Therefore you should follow his direction the same as you would have for any former officers of Merrill Scott & Associates, Ltd., its management company and other related companies.

True and correct copy of letter dated January 30, 2002, attached hereto as Exhibit "L." The Receiver and Rodney Reed were copied on this letter. This evidence demonstrates that Ross was aware of the scope and terms of the Stipulated Order Appointing Receiver.

There is additional documentary evidence proving Ross' actual knowledge of the Stipulated Order Appointing Receiver. In a letter dated January 29, 2002, to David K. Broadbent, Ross attaches a list of "domestic bank accounts that my name was on for Merrill Scott client related entities and three Merrill Scott related entity accounts (the two Legacy and the Coyote Run accounts) and a Gibraltar Permanente account." Ross provided that information in order to comply with the terms of the Stipulated Order Appointing Receiver. A true and correct copy of the letter is attached as Exhibit "M."

This evidence overwhelmingly supports the Commission's burden of proof that there is clear and convincing evidence that Ross had actual notice of the Stipulated Order Appointing the Receiver. He was given notice of the Stipulated Order Appointing Receiver through counsel. He admitted that he was aware of the Stipulated Order Appointing Receiver in his testimony before, and pleadings filed with, this Court. His course of conduct, as evidenced by his own letters directly after the entry of the Stipulated Order appointing Receiver is clear and convincing evidence that he was given actual notice of the nature and scope of the receivership.

**IV. ROSS WAS GIVEN ACTUAL NOTICE OF THE STIPULATION EXTENDING THE TEMPORARY RESTRAINING ORDER, ASSET FREEZE, PROHIBITING DESTRUCTION OF DOCUMENTS AND OTHER RELIEF**

Ross was given actual notice of the Stipulation Extending the Temporary Restraining Order, Asset Freeze and other relief. As set forth above, the Stipulated Order Appointing Receiver was delivered to Ross' counsel, Max Wheeler, on January 23, 2002. The Stipulated Order Appointing Receiver specifically states:

WHEREAS the Commission and defendants Patrick M. Brody ("Brody"), Merrill Scott & Associates, Ltd., Merrill Scott & Associates, Inc., and Phoenix Overseas Advisers, Ltd., (collectively, "Merrill Scott") have stipulated to an extension of the Temporary Restraining Order, Asset Freeze and Prohibiting Destruction of Documents and Other Relief.

Therefore, David Ross received actual notice, through counsel, of the extension of the asset freeze.

Ross now argues that he was unaware that the freeze of MSA's assets was extended. He contends that since he did not stipulate to an extension of the asset freeze, it expired as to him. This argument is without merit. David Ross' personal assets were never frozen by Order of this Court. The asset freeze extended to MSA's assets, and the assets of its related entities. MSA's counsel stipulated to both an extension of the asset freeze and to the appointment of a Receiver. This stipulation bound all officers directors, subsidiaries, affiliates, agents, employees, attorneys-in-fact, and those persons in active concert or participation with MSA and its affiliated entities from transferring any assets of MSA or its affiliated entities. Ross was an officer, director, agent, employee, attorney-in-fact of MSA and many of its affiliated entities. He was bound by the terms of the asset freeze in the same manner as every other person acting in active concert or participation with MSA or its affiliated entities.

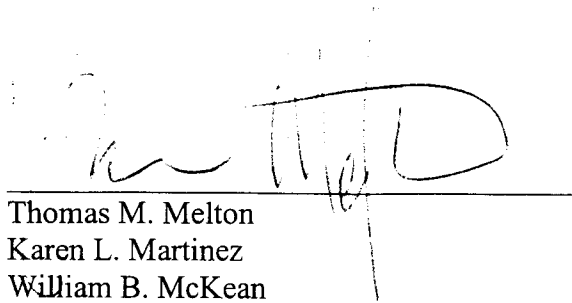
Ross, through his counsel, received actual notice of the extension of the asset freeze. There is clear, convincing and undisputed evidence that the Stipulated Order Appointing

Receiver was delivered to his counsel on the day it was executed. There is substantial clear and convincing evidence that Ross acted with full knowledge of the Order.

### CONCLUSION

This Court should find that there is clear and convincing evidence that Mr. Ross, either personally, or through his attorney, received actual notice of the Stipulated Order Appointing Receiver and the Stipulation extending the Temporary Restraining Order.

Respectfully submitted this 7th day of May, 2004.

A handwritten signature in black ink, appearing to read 'T. Melton', is written over a horizontal line. The signature is stylized and cursive.

Thomas M. Melton

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William B. McKean

Attorneys for Plaintiff

SECURITIES AND EXCHANGE COMMISSION

CERTIFICATE OF SERVICE

I hereby certify that on this 7<sup>th</sup> day of May, 2004, I caused to be sent via first class U.S.

Mail, postage prepaid, a true and correct copy of the Second Supplemental Brief Concerning Civil

Contempt Against David E. Ross, II:

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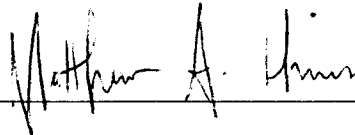
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