

MAX D. WHEELER (A3439)  
RICHARD A. VAN WAGONER (A4690)  
SNOW, CHRISTENSEN & MARTINEAU  
10 Exchange Place, Eleventh Floor  
Post Office Box 45000  
Salt Lake City, Utah 84145-5000  
Telephone: (801) 521-9000  
  
Attorneys for Defendant David E. Ross, II

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

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SECURITIES AND EXCHANGE  
COMMISSION,

Plaintiff,

vs .

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 LICOPANTIS,

Defendants.

**SUPPLEMENTAL MEMORANDUM  
CONCERNING SEC'S MOTION FOR  
CONTEMPT AND MR. ROSS' LACK  
OF NOTICE OF APPLICABLE COURT  
ORDERS**

Civil No. 2:02CV-0039C

Judge Tena Campbell

Magistrate Judge Nuffer

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**I. INTRODUCTION**

The Court asked the parties to provide further briefing in connection with the issue of whether Mr. Ross was on notice of the Order Extending the TRO (Docket No. 17) and the Stipulated Order Appointing Receiver (Docket No. 15). For the reasons set forth below, the SEC

cannot establish, by clear and convincing evidence, that Mr. Ross received Rule 65(d) notice of the extension of the TRO, because he did not,<sup>1</sup> and the TRO otherwise did not apply to Mr. Ross. Mr. Wheeler did receive by facsimile a copy of the Stipulated Order Appointing the Receiver on January 23, 2002, but the Stipulation was not included.

## **II. ARGUMENT**

### **A. MR. ROSS RECEIVED NO RULE 65(a) NOTICE OF THE CHANGED OSC HEARING, EVEN IF THE OSC HEARING HAD RELATED TO HIM.**

Exhibit A, attached hereto, is a copy of the TRO, which the Court signed on January 14, 2002, and which was entered on the Court Docket January 15, 2002. At page 9 of Exhibit A, the Court set January 25, 2002 at 1:30 p.m. as the date and time that each defendant was ordered to appear and show cause why the Court should not enter an Order of Preliminary Injunction and other relief until a final adjudication on the merits could take place (“OSC Hearing). The SEC has previously argued in these contempt proceedings that Mr. Ross was given notice of the OSC Hearing and chose not to attend, so he should be on at least constructive notice of or otherwise held accountable for what took place at the OSC Hearing. Yet, no one, including the SEC, appeared at the appointed time for the OSC Hearing.

In its Motion for Order Setting Briefing Schedule for Preliminary Injunction Hearing, court Docket No. 10, attached hereto as Exhibit B, Footnote 1 at page 1 reveals the following: “The Court’s Order originally established 1:30 p.m. as the hearing date. The Court has advised counsel for the Commission that it had re-set the matter for 3:15 p.m. Counsel for the

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<sup>1</sup>*Reliance Insurance Co. v. Mast Construction Co.*, 159 F.3d 1311, 1315 (10th Cir. 1998).

Commission has undertaken to inform all of the parties of this time change.” There is no Certificate of Service or any notation or indication in the record or the Court Docket that Mr. Ross received this Motion or any notice of the time change for the OSC Hearing. On January 18, 2002, the Court signed the Order Setting Briefing Schedule for Preliminary Injunction Hearing. See Exhibit C hereto, Court Docket No. 9. The Certificate of Service shows that the SEC was the only party served with Exhibit C, and further includes the following notation: “No appearances entered for dfts.” There is no notation or indication in the record or the Court Docket that Mr. Ross received Exhibit C or notice thereof. If called to testify, Mr. Ross would state he received no notice of Exhibit C or the change in the schedule for the OSC Hearing.

In the interim, the SEC and Mr. Ross entered into an agreement whereby Mr. Ross consented to the entry of an Order of Preliminary Injunction solely as to Mr. Ross (“Ross Consent”). See Exhibit D hereto. Mr. Ross and his attorney signed the Ross Consent on January 22, 2002. *Id.* The Order of Preliminary Injunction as to David E. Ross II (“Ross PI Order”) was prepared by the SEC and, along with the executed Ross Consent, was submitted by the SEC to the Court for signature. No hearing was held in connection with the Ross PI Order, and because it was consented to, no hearing was necessary. The Court signed the Ross PI Order on January 23, 2002, Docket No. 16. See Exhibit D. Mr. Ross naturally would conclude that the OSC as to him had been resolved by the Ross Consent and the entry of the Ross PI Order. It had.

On the same day the Court entered the Ross PI Order, January 23, 2002, and *not* at the designated time for the OSC Hearing of January 25, 2002 at 3:15 p.m. (even though Mr. Ross had no Rule 65(a) notice even of the time change from the original setting at 1:30 p.m. on the

25<sup>th</sup>), the SEC and counsel for Merrill Scott and Phoenix Overseas Management, Ltd., appeared before the Court. There is nothing in the record to show that Mr. Ross was given notice of this hearing, and if called to testify, Mr. Ross would state that he received no notice of the hearing through any source or means. Indeed, the SEC had no incentive to notify Mr. Ross because it had already stipulated with him for the entry of the Ross PI Order. Presumably, the SEC gave Mr. Ross no notice of this hearing because it, too, deemed his involvement to be irrelevant, having already obtained the Ross Consent and the Ross PI Order. It was at this January 23, 2002 hearing that Court entered the Stipulated Order Appointing the Receiver and the attending parties entered the Stipulation extending the TRO as to them.

In her January 8, 2004 Declaration, Barbara Zamora-Tueller, an employee of the SEC, declared that on January 23, 2002, she sent to Max Wheeler and others via facsimile the “Stipulated Order Appointing Receiver,” Docket No. 15. Without waiving the attorney-client privilege, counsel informs the Court that the faxed version of that Order appears in counsel’s pleadings file. Ms. Zamora-Tueller did *not* declare that she had faxed the Stipulation extending the TRO, Docket No. 17, to Mr. Wheeler. The Stipulation, Docket No. 17, does not appear in counsel’s pleadings file—except recently as an attachment to memoranda relating to the SEC’s contempt motion. While Mr. Ross has stipulated that he learned the Court had appointed a Receiver, his own Affidavit of November 24, 2003 provides that he first saw the Stipulated Order Appointing the Receiver during the latter part of October 2003 while reviewing the Court’s file at the Clerk’s Office, at which time he also first learned of the Stipulation extending the TRO.

To the extent, therefore, that the SEC contends Mr. Ross received notice of and had the opportunity to appear at hearings and chose not to, and that he should be on at least constructive notice of or otherwise held accountable for what took place at the OSC Hearing, he did not have notice. Moreover, the SEC's conduct vis-a-vis Mr. Ross was entirely inconsistent with the SEC's post hoc position that Mr. Ross was bound by the terms of the TRO.

**B. THE PERTINENT ORDERS WERE NOT, NOR COULD THEY HAVE BEEN, EXTENDED AS TO MR. ROSS.**

1. MR. ROSS DID NOT CONSENT TO EXTENSION OF THE PERTINENT ORDERS.

In addition to the fact that Mr. Ross did not receive Rule 65(a) notice that the OSC Hearing had been rescheduled from January 25, 2002 to two days earlier, he did not consent to the extension of the TRO as to him or anyone else. The stipulation was among Mr. Melton for the SEC, Mr. Mackey for Patrick M. Brody, and Mr. Nielson for Merrill Scott & Associates, Ltd., Merrill Scott & Associates, Inc., Phoenix Overseas Advisers, Ltd., and Gibraltar Permanente Assurance, Ltd. See Docket No. 17, at 2. There was no reason for the SEC to seek to include Mr. Ross in the Stipulation because it had already obtained the Ross Consent and the Ross PI Order.<sup>2</sup> Moreover, Rule 65(b) provides that the TRO “shall expire by its terms within such time after entry, not to exceed 10 days, as the court fixes, unless within the time so fixed the order, for good cause shown, is extended for a like period or *unless the party against whom the order is directed consents that it may be extended for a longer period.*” (Emphasis supplied.)

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<sup>2</sup>Ross concedes, however, that he or his counsel informed the SEC it could represent to the Court that he agreed that a Receiver should be appointed.

The TRO was not extended by the Court for “a like period” for “good cause shown,” but rather the parties to the Stipulation agreed it would remain in effect “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 and that the Order shall remain in full force and effect until such time as it is modified . . . .” Docket No. 17, at 2. If the SEC contends now that the TRO was meant to be extended as to Mr. Ross, it certainly did not provide notice to him and obtain his consent. So he would not have been, and in fact was not, on notice that the TRO had been extended, and he certainly was not on notice of what the SEC now contends, that it had been extended as to him.

2. NO ONE ON MR. ROSS’ BEHALF CONSENTED TO THE EXTENSION OF THE TRO AS TO HIM, AND MR. ROSS WAS NOT ON NOTICE THAT THE TRO WAS EXTENDED AS TO HIM, (BECAUSE IT WAS NOT).

a. Mr. Ross Had His Own Attorney, So He Was Not On Notice That Mr. Nielson Could Somehow Bind Him.

To the extent the SEC seeks to tie Mr. Ross into the TRO by asserting that he was represented at the January 23, 2002 hearing by counsel for Merrill Scott entities (Mr. Nielson)<sup>3</sup> because Mr. Ross was an officer, director, employee or agent of Merrill Scott entities as of the January 23, 2002 hearing, the SEC is wrong. Mr. Ross was represented by his own counsel, Mr. Wheeler, beginning no later than January 22, 2002, when he and his attorney signed the Ross Consent, and the SEC knew it. The SEC and Mr. Wheeler had already negotiated the Ross Consent and the Ross PI Order when the January 23, 2002 hearing took place. It is wholly

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<sup>3</sup>Parenthetically, Mr. Nielson was Mr. Brody’s divorce attorney at this period of time and was appointed by Mr. Brody to represent the Brody entities.

unreasonable for the SEC to contend, therefore, that some attorney other than Mr. Wheeler, who had no authority (express, apparent or otherwise), could bind Mr. Ross to a stipulation to extend the TRO as to him, and that Mr. Ross would be on notice of that.

Parenthetically, at the last hearing, the Court advised counsel that Mr. Wheeler first appeared on the Court's Certificate of Service in February 2002.

- b. At The Time The Pertinent Orders Were Entered, Mr. Ross Was Not A Current Officer, Director, Employee, Or Agent Of Merrill Scott, So He Was Not On Any Sort Of Notice That The TRO Had Been Extended As To Him (It Was Not).

To the extent the SEC has contended and may further contend that Mr. Nielson was representing Mr. Ross at the January 23, 2002 hearing because Mr. Ross was an officer, director, employee or agent of Merrill Scott, the predicate is wrong. Mr. Ross previously testified that he was not an officer or director of any Merrill Scott entities as of January 15, 2002. See Exhibit E hereto. The public record, attached as Exhibit F, also establishes that at the time the TRO was extended, the only officer and director of Merrill Scott was Pat Brody. In addition, the first page of the Stipulated Order Appointing the Receiver states that "most of the employees . . . of Merrill Scott have left the employ of Merrill Scott." Docket No. 15, Exhibit G, hereto. That was true with respect to Mr. Ross prior to the time the TRO was extended. Hence, Mr. Ross could not have been on notice that the TRO somehow had been extended as to him.

- c. Mr. Ross Had Already Entered The Ross Consent, Agreeing To Entry Of The Ross PI Order, Which Incorporated All Portions Of The TRO The SEC Deemed Relevant To Mr. Ross.

The SEC took the opportunity to incorporate those portions of the TRO it wanted for inclusion in the Ross PI Order. So for the SEC now to assert that the TRO as a whole was extended to Mr. Ross is clearly an after-the-fact contention, and it is improper for notice to be attributed to him. An analysis of the TRO reveals that the TRO is clear in identifying which portions of that Order are directed at which persons and entities:

1. Paragraph I is directed at all named defendants, and those defendants are ordered not to violate Section 17(a) of the Securities Act of 1933 [15 U.S.C. § 77q(a)]. *This Paragraph became Paragraph I of the Ross PI Order.*
2. Paragraph II is directed at all named defendants, and orders them not to violate Section 10(b) of the Securities Exchange Act of 1934 [15 U.S.C. § 78j(b)] and Rule 10b-5 thereunder [17 C.F.R. 240.10b-5]. *This Paragraph became Paragraph II of the Ross PI Order.*
3. Paragraphs III is directed at Defendants MSA, MSAI and Brody, and orders those defendants from operating as a broker in violation of Section 15(a) of the Securities Exchange Act of 1934 [15 U.S.C. § 78o(a)]. *This Paragraph was not included in the Ross PI Order.*
4. Paragraph IV is directed at Defendants MSAI, Phoenix and Brody, and orders them not to violate Sections 206(1) and (2) of the Advisers Act [15

U.S.C. §§ 80b-6(1) and (2)]. *This Paragraph contains the same proscription as Paragraph V, below.*

5. Paragraph V is directed at Defendant Ross, and orders him not to violate Sections 206(1) and (2) of the Advisers Act [15 U.S.C. §§ 80b-6(1) and (2)]. *This Paragraph became Paragraph III in the Ross PI Order.*
6. Paragraph VI is directed at Defendants MSA, MSAI, Phoenix, Gibraltar, and Brody, and orders them, among other things, not to dissipate any assets and for financial institutions holding certain assets to freeze those assets. *This Paragraph was not included in the Ross PI Order.*
7. Paragraph VII is directed at Defendants MSA, MSAI, Phoenix, Gibraltar and Brody, and orders a sworn accounting of certain assets. *This Paragraph was not included in the Ross PI Order.*
8. Paragraph VIII is directed at all defendants, and restrains them from “destroying, mutilating, concealing, altering, or disposing of any document referring or relating in any manner to any transactions described in the Commission’s complaint in this action . . . .” *This Paragraph became Paragraph IV of the Ross PI Order.*
9. Paragraph IX sets the date and time for the OSC, January 25, 2002, at 1:30 p.m. *This Paragraph was not included in the Ross PI Order.*
10. Paragraph X provides that service of the TRO could be made in a variety of possible ways. *This Paragraph was not included in the Ross PI Order.*

It appears that the SEC relies upon ¶¶ 6 and 7 of the extended TRO in its contempt motion. Even if Mr. Ross had been put on Rule 65(d) notice that the TRO had been extended, and even if he would have been put on notice that the SEC intended the extension to apply to him (which is wholly unreasonable to assume, given that the SEC chose which portions of the TRO it incorporated into the Ross PI Order—the same provisions that were directed at Mr. Ross in the TRO), ¶¶ 6 and 7 were not directed at him. Moreover, he was not an officer, director, employee or agent of a named defendant at the time the TRO was entered, nor at the time it was extended.

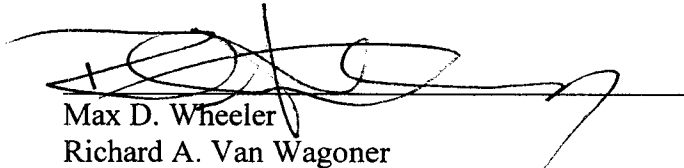
### **III. CONCLUSION**

As a result of the position the SEC has taken, Mr. Ross' Fifth Amendment due process rights are now in jeopardy. Rule 65(a), (b) and (d). The SEC had no reason or incentive to give Mr. Ross the notice it now asserts Mr. Ross must have had because (1) it had already obtained the Ross Consent and the Ross PI Order by the time it obtained the other Defendants' consent to extending the TRO as to them; (2) the portions of the TRO that were directed at Mr. Ross had already been incorporated by the SEC in the Ross PI Order; and (3) the extension of the TRO was intended to bind those persons and entities as to whom the SEC had not obtained a Preliminary Injunction. The extension of the TRO served as a form of Preliminary Injunction as to those persons and entities. In effect, Mr. Ross had no notice of an extended TRO that was not directed at him. As to him, the Ross PI Order was in place, and the TRO had expired. Mr. Ross was not an officer, director, employee or agent of any of the named defendants at the time the TRO was extended. He had his own counsel, and no other attorney had authority to bind Mr. Ross to the extension of the TRO.

This Court should deny the SEC's contempt motion.

DATED this 7 day of May, 2004.

SNOW, CHRISTENSEN & MARTINEAU



Max D. Wheeler  
Richard A. Van Wagoner  
Attorneys for Defendant David E. Ross II

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## CERTIFICATE OF SERVICE

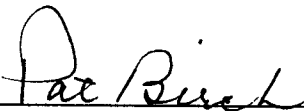
The undersigned hereby certifies that she caused a true and correct copy of the foregoing: **SUPPLEMENTAL MEMORANDUM CONCERNING SEC'S MOTION FOR CONTEMPT AND MR. ROSS' LACK OF NOTICE OF APPLICABLE COURT ORDERS**, to be served by U. S. mail, First Class, postage prepaid, this 7<sup>th</sup> day of May, 2004, on the following:

Thomas M. Melton  
Karen L. Martinez  
William B. McKean  
SECURITIES & EXCHANGE COMMISSION  
50 South Main Street, Suite 500  
Salt Lake City, UT 84144-0402

David K. Broadbent  
HOLLAND & HART  
60 East South Temple, Suite 2000  
Salt Lake City, UT 84111

Francis Joseph Nielson  
ARNOVITZ SMITH & NIELSON  
44 West 300 South, Suite 1108 S  
Salt Lake City, Utah 84101

Randall K. Mackey  
Russell Skousen  
MACKEY PRICE & WILLIAMS  
57 West 200 South, Suite 350  
Salt Lake City, Utah 84101

  
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