Elizabeth M. Streit, Lead Trial Attorney
Jennifer S. Diamond, Trial Attorney
Rosemary Hollinger, Regional Counsel
Commodity Futures Trading Commission
525 West Monroe Street, Suite 1100
Chicago, Illinois 60661
312-596-0537
ES-2235
JD-5642
RH-6870

Paul Blaine
Assistant United States Attorney
for the District of New Jersey
Camden Federal Building & U.S. Courthouse
401 Market Street, 4th Floor
Camden, New Jersey 08101
856-757-5412
PB-5422

In The United States District Court
For The District Of New Jersey
Camden Vicinage

Commodity Futures Trading Commission, Plaintiff, vs. Equity Financial Group LLC, Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., Magnum Capital Investments, Ltd., Vincent J. Firth, Robert W. Shimer, Coyt E. Murray, and J. Vernon Abernethy, Defendants.	Hon. Robert B. Kugler District Court Judge Hon. Ann Marie Donio Magistrate **Civil Action No: 04-1512 (RBK)** **Motion in Limine to Deem Untimely Objections by Defendants Firth and Shimer in the Pretrial Order Waived**

Plaintiff, Commodity Futures Trading Commission, through its attorneys, hereby moves in limine for an Order deeming objections made by Defendants Firth and Shimer in the Pretrial Order against Plaintiff's deposition excerpts presented as testimony at trial waived because they are untimely. Specifically, Defendants Firth and Shimer made objections relating to foundation, hearsay, "incomplete," not best evidence, characterization, speculation, non-responsive answer to question, leading question, facts not in evidence, vagueness, confusing, witness not qualified to answer, as well as an objection to "tone" that could have been cured at the time of the deposition. For the reasons set forth below, Plaintiff is asking that those objections be deemed waived as they are untimely.

I. Federal Rule of Civil Procedure 32(a) Allows Deposition Excerpts to Presented For Admission At Trial

The decision to admit deposition testimony is at this Court's discretion. *Reeg v. Shaughnessy*, 570 F.2d 309, 316 (10th Cir. 1978) (*citing, Sims Consolidated, Ltd. v. Irrigation and Power Equipment, Inc.*, 518 F.2d 413 (10th Cir. 1975), *cert. denied*, 423 U.S. 913 (1975), *see also, Oostendorp v. Khanna,* 937 F.2d 1177, 1179 (7th Cir. 1991) *cert. denied*, 502 U.S. 1064 (1992). Plaintiff has submitted deposition testimony pursuant to Federal Rule of Civil Procedure 32(a) as part of the Joint Pretrial Order and will move to have the excerpts admitted at trial. Pursuant to Federal Rule of Civil Procedure 32(a), deposition testimony may be used at trial in certain circumstances, so long as the party for whom it will be used against had reasonable notice of the deposition. One of those circumstances occurs when the witness is at a greater distance than 100 miles from the place of trial or hearing. FED. R. CIV. PRO. 32(a)(3)(B). At issue are Plaintiff's submitted deposition excerpts from Elaine Teague ("Teague") of Portland, Oregon, Nicholas Stevenson ("Stevenson") of Wilton, Connecticut, Robert Collis ("Collis") of Gastonia, NC, and Susan Lee ("Lee") of Washington, DC, a partner of Arnold & Porter. It is uncontested

that the four aforementioned witnesses are more than 100 miles from the courthouse and provide testimony relevant to this case.

A. Notices of Depositions Were Reasonable

During the course of discovery, approximately twenty different individuals were deposed. With the consent of the parties, four of the individuals were deposed over multiple days. All parties noticed up depositions, and no one served written objections to the notices. All Defendants had reasonable notice of these depositions. Pursuant to Federal Rule of Civil Procedure 32(d)(1), objections to errors or irregularities in the notice of depositions "...are waived unless written objection is promptly served upon the party giving the notice." FED. R. CIV. PRO. 32(d)(1). "Reasonableness" is not defined by the rules and is determined based on the circumstances while allowing for some flexibility. *U.S. v. Hart*, 772 F.2d 287, 286 (6th Cir. 1985). (Despite the importance of the deposition and time limitation, two to three hours notice of a deposition was not reasonable.)

Defendants Firth and Shimer received reasonable notice of the depositions in this case. Specifically, Shimer sent Teague's notice of deposition via priority U.S. mail 21 days before the deposition, Plaintiff sent notice of Arnold & Porter's deposition by U.S. mail more than thirty days prior to the scheduled testimony, notice of Collis' telephonic deposition by email 14 days prior to the scheduled testimony, and notice of Stevenson's telephonic deposition was sent by email and U.S. Mail twelve days before the scheduled deposition.[1] (Ex. 2, Notice of Depos.).

[1] Shimer was put on notice of the deposition of Arnold and Porter by at least December 1, 2005 when he sent an email waiving the attorney client privilege "with respect to [Plaintiff's] proposal to subpoena the deposition of any employee or partner of Arnold & Porter in the matter of CFTC v. Equity Financial Group, *et al.*" (Ex. 1).

Notably, Shimer attended the first day of Teague's deposition on December 21, 2005.[2] Shimer, as well as attorneys for Plaintiff, appeared by telephone for Stevenson's deposition. Shimer did not attend Lee's deposition. While unrepresented, Shimer appeared sporadically at depositions, appearing at nine different depositions across the United States.[3] Firth did not attend any depositions except his own, and failed to participate by telephone.[4]

B. Defendants Firth and Shimer's Objections to Deposition Transcripts Submitted for Trial Should be Deemed Waived

Defendants Firth and Shimer made objections to Plaintiff's submitted deposition transcripts in the Pretrial Order that could have been cured at the time of the deposition. Specifically, Defendants Firth and Shimer made objections relating to foundation, hearsay, "incomplete," not best evidence, characterization, speculation, non-responsive answer to question, leading question, facts not in evidence, vagueness, confusing, witness not qualified to answer, as well as an objection to "tone" that could have been cured at the time of the deposition.

---

[2] Shimer noticed the deposition of Elaine Teague for December 21, 2005. Shimer asked questions for the entire first day and the witness was not cross examined by any other party. Discussions regarding the continuation of Teague's deposition were held off the record after the video had run out of tape. (Ex. 3, Teague Dep. p. 286 l. 14-15, p. 288 l. 23-24, p. 289). Shimer agreed to the specific dates for continuance of the deposition, and explained that he would not be attending additional dates of the deposition. Shimer stated that the depositions could continue without him. (Ex. 4, Teague Dep. pp. 297 l. 16- p. 298 l. 9). This is supported by the email sent by Teague's attorney to Shimer and others on December 22, 2005, the day after the first session of the deposition, confirming the continuation of Teague's deposition to January 12 and 13, 2006. (Ex. 5).

[3] Shimer is a licensed attorney and includes that fact in his letter head on his correspondence. Moreover, Shimer held himself out to the investors in this case as an attorney. As an attorney licensed to practice before the Supreme Court of the United States, Shimer should have knowledge of the Federal Rules of Civil Procedure, specifically Rule 32 governing the use of depositions.

[4] Firth, while not an attorney, has relied on Shimer throughout this matter. Most recently, Firth did not produce a joint pretrial order or objections to any of Plaintiff's proposed witnesses or exhibits. Instead, Shimer's cover letter stated that he was submitting documents on behalf of himself and Firth.

Since these objections could have been cured at the time of the depositions, Firth and Shimer's objections in the Pretrial Order are untimely and should be deemed waived.

Generally, objections as to the competency, relevancy, or materiality of the deposition testimony are not waived if a party failed to assert those objections during the taking of the testimony. FED. R. CIV. PRO. 32(d)(3)(A). However, objections that could have been cured during the taking of a deposition are deemed waived if not raised at the time of the deposition. *Bahamas Agr. Industries Ltd. v. Riley Stoker Corp*, 526 F.2d 1174, 1180-81 (6th Cir. 1975); *Jordan v. Medley,* 711 F.2d 211, 218 (D.C.Cir. 1983). Specifically, objections as to the form of the question are waived since they could have been cured at the time the deposition was taken. FED. R. CIV. PRO. 32(d)(3)(B) ("Errors and irregularities occurring at the oral examination … in the form of the questions or answers,…and errors of any kind which might be obviated, removed, or cured if promptly presented, are waived unless seasonable objection thereto is made at the taking of the deposition"); *see also, Oberlin v. Marlin American Corp.*, 596 F.2d 1322, 1328 (7th Cir. 1979) (Failure to object to leading questions at the time of the deposition is waived at the time of trial because the form of the question could have been cured); *In re WPMK, Inc.* 42 B.R. 157, 159 (Bkrtcy. 1984) (When not raised during the deposition, objections as to use of facts not in evidence, leading questions, foundation, compound question, and answers calling for speculation were deemed waived when presented at time of trial). Objections as to foundation are also deemed waived if not made at the time of deposition. *Jordan,* 711 F.2d at 218; *In re WPMK, Inc.* 42 B.R. at 159; *SEC v. Merrill Scott & Assoc., LTD*, 2007 WL 1519068, *2 (D. Utah 2007) (Where defendant failed to attend any depositions, objections as to foundation were deemed waived when not made during the time of the deposition) (Attached hereto as Attach. A.).

The purpose of Federal Rule 32(d) is to allow depositions to have some use at trial. The Sixth Circuit explained:

> It is important that objections be made during the process of taking the deposition, so that the deposition retains some use at the time of trial; otherwise counsel would be encouraged to wait until trial before making any objections, with the hope that the testimony, although relevant, would be excluded altogether because of the manner in which it was elicited.

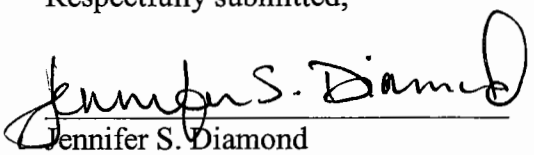
Bahamas Agr. Industries Ltd., 526 F.2d at 1181. Defendants Firth and Shimer raise several objections to Plaintiff's submitted deposition excerpts that could have been cured if made at the time the deposition was taken. (*See* Joint Pretrial Order filed on June 5, 2007 and Amendment to Joint Pretrial Order filed on July 23, 2007). Specifically, Defendants Firth and Shimer raise objections relating to foundation, hearsay, "incomplete," not best evidence, characterization, speculation, non-responsive answer to question, leading question, facts not in evidence, as well as an objection to the "tone" of the deposition. Whether or not these are valid objections, they should be deemed waived because Firth and Shimer failed to make them at the time of the deposition. Firth's failure to participate in the discovery process and Shimer's sporadic involvement in the discovery process should not now allow them to make objections that could have been alleviated at the time depositions were taking place.

II. CONCLUSION

As explained above, deponents Teague, Lee, and Stevenson all reside more than 100 miles from this Court and provided relevant, admissible testimony in depositions taken during the discovery process. For the reasons stated above, Plaintiff respectfully requests that this Court deem objections in the Pretrial Order made by Defendants Firth and Shimer that could have been cured during the time the deposition was taking place waived because of their failure to object in a timely manner.

Date: July 30, 2007

Respectfully submitted,



Jennifer S. Diamond
Trial Attorney
(312) 596-0549
Elizabeth Streit
Lead Trial Attorney
Rosemary Hollinger
Regional Counsel
Commodity Futures Trading Commission
525 West Monroe Street, Suite 1100
Chicago, Illinois 60661

ATTORNEYS FOR PLAINTIFF

H

S.E.C. v. Merrill Scott & Associates, Ltd., D.Utah,2007.
Only the Westlaw citation is currently available.
United States District Court,D. Utah,Central Division.
SECURITIES & 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.
No. 2:02-CV-39-TC.

May 21, 2007.

Thomas M Melton, Cheryl M. Mori, Karen L. Martinez, William B. Mckean, Securities And Exchange Commission, Salt Lake City, UT, for Plaintiff.
Brent E. Johnson, James L. Barnett, Holland & Hart, Reha Kamas Deal, Utah Attorney General's Office, Jeffrey R. Olsen, Randall A Mackey, Gifford W Price, Gregory N. Jones, Russell C. Skousen, Mackey Price Thompson & Ostler, Rodney G. Snow, Jennifer A. James, Clyde Snow Sessions & Swenson, Salt Lake City, UT, for Defendants.

ORDER AND MEMORANDUM DECISION
TENA CAMPBELL, Chief Judge.
***1** Plaintiff Securities & Exchange Commission (SEC) seeks summary judgment against individual defendant Patrick M. Brody in this civil securities fraud action. Mr. Brody is the only remaining defendant in this five-year-old case.

As demonstrated below, the undisputed facts prove that Mr. Brody violated the anti-fraud provisions and broker registration requirements of the federal securities laws. Accordingly, the SEC is entitled to judgment as a matter of law, and the court GRANTS SEC's Motion for Summary Judgment Against Defendant Patrick M. Brody.

The SEC seeks permanent injunctive relief against future violations of the federal securities laws, disgorgement of Mr. Brody's ill-gotten gains, prejudgment interest on those gains, and a civil monetary penalty. Because the court finds liability on the part of Mr. Brody, the court hereby enters the requested permanent injunction against Mr. Brody and orders Mr. Brody to pay $16,622.163 .11 in disgorgement and pre-judgment interest. The court defers ruling on SEC's request for a civil monetary penalty until further briefing and a hearing are completed.

I. FACTUAL AND PROCEDURAL BACKGROUND

The factual and procedural background is set forth at length in the written submissions of the parties. The court will repeat only those facts necessary to explain its decision.

The facts are undisputed,[FN1] not because of any stipulation between the parties but because the court strikes the evidence (that is, sworn discovery responses) that Mr. Brody submitted in an attempt to controvert facts set forth in SEC's Motion.[FN2] The reasons for striking Mr. Brody's evidence are discussed below in the section addressing Mr. Brody's last minute attempt to waive his Fifth Amendment privilege against self-incrimination, which he asserted in 2003.

FN1. All facts are taken from the undisputed facts in the record and the ninety-four exhibits submitted by the SEC (that is, Exhibits 1-93 and Gil Miller's Expert Report).

FN2. Because the statement of facts set forth by the SEC in its Motion were not controverted with any admissible evidence, the facts set forth in the Motion are deemed admitted. See Local Rule DUCivR 56-1(c) (" All material facts of record meeting the requirements of Fed.R.Civ.P. 56 that are set forth with particularity in the statement of the movant will be deemed admitted for the purpose of summary judgment, unless specifically controverted by the statement of the opposing party identifying material facts of record meeting the requirements of Fed.R.Civ.P. 56.").

Attach. A

But before the court sets forth the facts, it must address Mr. Brody's evidentiary objections.

A. Mr. Brody's Evidentiary Objections

Mr. Brody makes specific objections in response to specific evidence and statements of fact in the SEC's memorandum. This section addresses those objections.

But he also makes a very broad objection in his opposition memorandum, in which he states that the ninety-three exhibits provided by the SEC " are, for the most part, improperly before the court and this defendant moves that [with narrow exceptions identified by Mr. Brody] they be stricken because they lack foundation, are not based on personal knowledge, do not affirmatively show the affiant or the deponent is competent to testify as to the matters stated therein, and because the documents are not authenticated ..., lack foundation, or are privileged so as to make them inadmissible in evidence." (Brody's Opp'n Mem. at 14 n. 28.) The court will not consider such a blanket objection.

1. Best Evidence

Mr. Brody contends that the SEC fails to meet the best evidence requirements of the Federal Rules of Evidence because SEC did not produce written agreements between the investors and Merrill Scott & Associates, Ltd. (MSAL). (*See* Brody Opp'n Mem. at 2 n. 25.) As SEC notes, Mr. Brody's objection misses the mark. Rule 1002 of the Federal Rules of Evidence requires a party to provide an original writing to prove the writing's contents. But, in this case, the SEC is not attempting to prove the contents of the written contracts between MSAL and investors. Rather, MSAL and Mr. Brody made oral promises to investors, and the best evidence of those verbal representations is the investors' testimony about what Mr. Brody and MSAL said to them.[FN3]

> FN3. To some extent, the same can be said for the SEC's Paragraph 89, in which SEC relies on investor testimony that financial statements were unprofessional and inaccurate at best. But even if the court were to disregard the evidence based on Mr. Brody's best evidence objection, the SEC's evidentiary case would still be complete.

2. Hearsay

***2** Mr. Brody further contends that MSAL employee and investor testimony regarding MSAL's and Mr. Brody's oral representations about the use and control of investor funds is inadmissible hearsay. (*Id.*) Mr. Brody is incorrect. Admissions by party-opponents are admissible, even if they are not based on personal knowledge. Fed.R.Evid. 801(d)(2); Grace *United Methodist Church v. City of Cheyenne*, 451 F.3d 643, 665-67 (10th Cir.2006).

3. Foundation

Mr. Brody objects to certain deposition testimony that, he contends, is inadmissible because it lacks foundation. (*See, e.g.*, Brody's Opp'n Mem. at pp. 14 n. 28, jj-mm, pp-tt.) Rule 32 of the Federal Rules of Civil Procedure provides that:

Objections to the competency of a witness or to the competency, relevancy, or materiality of testimony are not waived by failure to make them before or during the taking of the deposition, *unless the ground of the objection is one which might have been obviated or removed if presented at that time.*

Fed.R.Civ.P. 32(d)(3)(A) (emphasis added). Foundation is one type of objection that could have been " obviated or removed" if Mr. Brody had attended any of the depositions. *See, e.g., Jordan Medley*, 711 F.2d 211, 218 (D.C.Cir.1983) (" What the exception [in Rule 32(d)(3)(A)] obviously envisions is a situation in which a timely objection (*e.g.*, on the ground of failure to lay an adequate foundation) could have enabled the problem to be remedied so that the same *testimony* could be received in accordance with law.") (internal citation omitted; emphasis in original). But Mr. Brody did not attend any depositions and so he did not make the objection at the appropriate time. Even assuming there was a problem with foundation, Mr. Brody has waived the objection.

4. Miscellaneous Evidentiary Objections

Mr. Brody makes other types of evidentiary objections in his response. For example, he objects to the admissibility of e-mails cited in paragraphs 75-78 of the SEC's supporting memorandum. He also objects to evidence cited in paragraph 79, which he asserts are " hearsay legal conclusions" presented by deponent O.E. (Bud) Stoner, III. But even if the court were to disregard this evidence, the record is replete with other evidence to support the SEC's overall case

against Mr. Brody.

5. Expert Report

Mr. Brody challenges certain aspects of Gil A. Miller's May 2006 Expert Report (setting forth results and opinions derived from a forensic accounting). (*See, e.g.,* Brody Opp'n Mem. at p. ee (stating in conclusory fashion that " plaintiff and its expert CPA [are] taking an incomplete fact and misrepresenting it."); *id.* at p. xx (" The expert accounting report of Gil A. Miller, CPA, was not prepared to a summary judgment standard and was not prepared by gathering all available accounting evidence, organizing it in the manner most favorable to Mr. Brody, and then drawing all reasonable inference in the light most favorable to Mr. Brody."); *id.* at pp. zz, aaaddd (same); *id.* at p. zz (" Mr. Miller is without any expertise to review depositions and weigh witness credibility and his report should be stricken in that regard, especially as to the highly dubious witnesses."); *id.* at pp. ddd, 2 n. 26 (same); *id.* at pp. 14 n. 28, 15 (requesting court to strike all of the Miller Report except " those portions of the expert witness report ... that constitute actual accounting").

***3** Mr. Brody did not file a Motion in Limine under *Daubert v. Merrill Dow Pharm., Inc.,* 509 U.S. 579 (1993), or Federal Rule of Evidence 702. He did not participate in expert discovery. He did not file an opposing expert report. Instead, he offers unqualified, conclusory criticism by himself and his attorney. This is not sufficient to challenge the admissibility of Mr. Miller's report, and the court disregards his objections. (*See also* SEC's Reply Mem. (Docket # 936) at 98-101 (setting forth proper analysis as to why Mr. Miller's report should be considered by the court in analyzing the motion for summary judgment).)

Having ruled on Mr. Brody's objections, the court now sets forth the facts from the record.

B. *SEC's Enforcement Action*

In January 2002, the SEC brought this enforcement action against four corporate entities, as well as some principals of those entities (for example, Mr. Brody). Those corporate entities-collectively referred to as " Merrill Scott" -are Merrill Scott & Associates, Ltd. (MSAL), Merrill Scott & Associates, Inc. (MSAI), Phoenix Overseas Advisers, Ltd. (" Phoenix"), and Gibraltar Permanente Assurance, Ltd. (" Gibraltar").

In its complaint, SEC alleged that MSAL and its affiliated entities (MSAI, Phoenix, and Gibraltar), and certain of their principals, had misappropriated investor funds and were actively operating a Ponzi scheme [FN4] (that is, they were using money obtained from new clients to pay obligations owing to other clients). A short time after the SEC filed its complaint, the court entered an order enjoining the defendants, freezing the assets of the Merrill Scott, and appointing David K. Broadbent as the receiver.FN5

> FN4. " The term ' ponzi scheme' refers to an investment scheme whereby returns to investors are financed, not though the success of an underlying business venture, but from the principal sums of newly attracted investors." *In re Primeline Sec. Corp.,* 295 F.3d 1100, 1104 n. 2 (10th Cir.2002) (citing *Hill v. Kinzler,* 275 F.3d 924, 926 (10th Cir.2001)).
>
> FN5. (*See* Jan. 14, 2002 Order (Docket # 8) (granting temporary restraining order and freezing assets); Jan. 23, 2002 Order (Docket # 15) (appointing temporary receiver); Jan. 23, 2002 Stipulation (Docket # 17) (extending restraining order, asset freeze, and appointment of receiver until resolution of case on merits).)

The court recently issued a Partial Consent Judgment and Permanent Injunction against Merrill Scott. (*See* May 2, 2007 Order at 3 (Docket # 970).) Judgment has also been entered against Mr. Brody's individual co-defendants-Mr. Licopantis and Mr. Ross.[FN6] Mr. Brody is the only remaining defendant.

> FN6. (*See* Aug. 15, 2006 Final Judgment as to Defendant David E. Ross, II (Docket # 728); Dec. 22, 2006 Final Judgment as to Defendant Michael G. Licopantis (Docket # 875).)

As for Mr. Brody, the SEC specifically contends that at least since 1998, Mr. Brody misappropriated investor funds and securities by way of misrepresentations made to investors. SEC says that instead of holding investor funds in trust for investors' benefit, Mr. Brody used those funds to pay for his extravagant lifestyle, to pay operating expenses and obligations of MSAL (through which

Mr. Brody conducted his scheme), and to make investments in high risk start-up companies. He also used client funds to pay MSAL's obligations to other investors who demanded their promised profits or a return of their funds. In other words, Mr. Brody used MSAL to operate a Ponzi scheme.

1. The Merrill Scott Entities

Corporate formalities were not observed among Merrill Scott entities, which included not only the named corporate defendants but other entities such as Estate Planning Institute, Ltd. (EPI) (purportedly a Bahamian law firm). Funds moved freely from one entity to another and funds placed in separate entities were frequently commingled. Nevertheless, the following describes the purported roles of the defendant entities.

a. *MSAL and its Master Financial Plan (MFP) Product*

***4** MSAL was a Bahamian company that claimed to be a leading firm in the business of providing tax reduction and asset protection through the establishment of offshore entities and accounts. It described itself and its affiliated entities as " advisors to the affluent." FN7

FN7. (MSAL Brochure (attached as Ex. 14 to SEC's Mem. Supp. Mot. Summ. J.) at 2.)

MSAL offered a product known as a Master Financial Plan (MFP). One of the functions of the MFP was to provide a means by which the investor could invest cash and securities offshore, usually in the Bahamas or another Caribbean nation, and receive purported tax-free gains from the investment activity. The MFP established the framework through which the MSAL investor invested and protected cash and assets, avoided payment of taxes, and repatriated funds. The basic structure of the MFP involved the transfer of an investor's income or assets into offshore entities established on behalf of the investor but controlled by MSAL. These funds and assets were then used to purchase investments and other products offered by MSAL and its affiliates.

MSAL advertised its services in publications such as *The Robb Report, Fortune, Forbes, Money Magazine, Barrons,* and *The Wall Street Journal.* MSAL also retained financial advisers who solicited investors either through personal contracts or by referrals. Numerous clients were attracted by promises of decreased tax liability and services designed to shelter assets.

MSAL made money through fees for initial development of a client's MFP (clients paid between $15,000 and $50,000 for an MFP), sale of investment contracts, creation of offshore entities, and transactions and maintenance associated with implementation of MFPs. But, ultimately, MSAL operated as a Ponzi scheme. (*See* SEC's Mem. Supp. Mot. Summ. J. at p. 26, ¶¶ 137-141.)

b. *Merrill Scott & Associates, Inc. (MSAI)*

MSAI was a corporation based in Salt Lake City, Utah. Its function was to provide office space and staff to run the MSAL organization. MSAI also served as the office through which MSAL solicited investors.

c. *Phoenix Overseas Advisers, Ltd.*

Phoenix was a Bahamian entity that acted as an investment adviser and a mutual fund company for MSAL investors. Mr. Brody's co-defendant Michael Licopantis was officially listed as General Manager of Phoenix, which managed the mutual funds sold to MSAL investors. Phoenix also maintained brokerage accounts into which it placed investors' securities and funds, including numerous accounts with TD Waterhouse Canada Inc. (" TD Evergreen"), a Canadian brokerage. The MSAL accounts at TD Evergreen were later consolidated into a single account.

d. *Gibraltar Permanente Assurance, Ltd.*

Gibraltar was an entity organized under the laws of Dominica, a Caribbean island. Mr. Licopantis was officially listed as General Manager of Gibraltar. Gibraltar ostensibly acted as an issuer of many of the investment products sold to MSAL investors, such as loss of income (LOI) insurance policies and foreign variable annuities. Gibraltar also controlled the funds of MSAL investors that were to be repatriated to those individuals from accounts located in the Bahamas.

2. Patrick M. Brody's Involvement

***5** Mr. Brody was a Salt Lake City-based promoter for MSAL. But he was not registered with the SEC as

a broker or affiliated with a registered securities dealer.

Although he was officially listed as the Managing Director of MSAL, he also controlled the operations of other entities affiliated or associated with MSAL, including MSAI, Phoenix, and Gibraltar. Mr. Brody was intimately familiar with the operations of MSAL and the affiliated entities, and he exercised free reign over client cash and assets. He was intimately familiar with MSAL finances because the accounting staff provided Mr. Brody with daily reports regarding account balances.

a. *Misrepresentations*

Mr. Brody personally solicited wealthy clients, but he misrepresented to these investors that their assets would be safe if invested with MSAL, that the money would be invested according to their wishes as laid out in the MFP created for that client, that their assets would be held in segregated accounts (client funds were commingled in various accounts) and that they were guaranteed a specific rate of return on investments made with MSAL. The details of those misrepresentations are laid out in the SEC's briefs, but the following provides a good summary.

First, Mr. Brody failed to inform the investors that their money would be used to pay for his personal expenses. For example, from September 1999 to June 2000, Mr. Brody took approximately $261,378.00 from clients to pay his credit card bills. He transferred $659,000.00 from various corporations established for the benefit of his clients to Alex Jones, Ltd., a company established for his own personal benefit. He made similar transfers in the amount of $1,246,061.42 to Web Services Ltd., another shell corporation established for Mr. Brody's personal benefit. He used misappropriated funds to furnish a home, purchase art, take extravagant vacations, lease expensive cars, pay for a housekeeper, and pay for a personal masseuse/nurse.

Second, Mr. Brody failed to inform the investors that their money would be used to pay the operating expenses and obligations of MSAL (at his direction). According to MSAL's financial statements, it had been operating at a loss for several years. Mr. Brody used client funds to cover operating expenses. He would often take client funds to pay MSAL's payroll. He would also margin securities maintained on behalf of MSAL clients and use those proceeds to pay the company's obligations. To keep his actions hidden from clients, Mr. Brody instructed MSAL employees to conceal those payments from clients.

Third, Mr. Brody failed to inform the investors that their money would be used to make unauthorized investments in high-risk start-up companies (at his direction). Mr. Brody was the sole decisionmaker in determining which prospects to invest in and how much to invest. He used investor funds to purchase speculative securities, but those purchases were not authorized by the clients. At times, the investors were not even denominated the owners of the newly purchased securities. Mr. Brody purchased these high-risk stocks in a failed attempt to raise revenue to meet investor demands for the return of their money.

***6** Fourth, Mr. Brody failed to inform the investors that their money would be used to fund a Ponzi scheme (at his direction). During 2001, many clients demanded the return of their money. In order to accommodate these demands, Mr. Brody decided to use newly invested client funds to pay more recent obligations because MSAL did not have the money to return funds to clients. According to former MSAL Chief Financial Officer S. Drew Roberts, " had Merrill Scott always transacted client funds in accordance with each client's MFP, Merrill Scott should not have encountered an inability to meet client obligations." (SEC's Mem. Supp. at 17, ¶ 73.) But because Brody had misappropriated client funds to pay for his personal expenses or for the operations of MSAL, the obligations on those client MFPs had to be met with money coming in from new clients or the ongoing sale of MSAL investment products. When MSAL did provide statements to clients, the accounting information was either false or inaccurate.

b. *In Connection With the Purchase or Sale of Securities*

All of Mr. Brody's activities were in connection with the purchase or sale of securities. For example, as part of the MFP, Mr. Brody offered clients the opportunity to invest in the Phoenix family of mutual funds. Also as part of the MFP, he promised investors a specific return on their investments, he recommended specific stock purchases to clients, and he bought and sold securities on a client's behalf. He told some investors to place their funds in securities accounts with TD Evergreen (but, unbeknownst to investors, their securities were placed in commingled accounts at TD Evergreen). And MSAL offered

investment advice to its clients through its asset management program.

c. *With Full Knowledge and Intent*

Mr. Brody acted with the necessary scienter. He controlled all aspects of MSAL and its affiliates. He developed the MFPs, recommended strategies, and met with clients. He exercised free reign over MSAL's accounts and directed the transfer of investor funds to pay MSAL's operating expenses and his personal expenses. He received daily reports regarding MSAL account balances and daily information from TD Evergreen regarding the margin limits of those securities accounts. He devised the scheme to make payments from new client funds to meet MSA's obligations to older clients. Even though he acknowledged (not publicly) at one point that $9 million was missing and owed to clients, he told clients who requested their money back that the funds were safe and refunds forthcoming (this despite knowing the MSAL was insolvent). And the personal nature of various payments to or on behalf of Brody, who controlled the accounts, were concealed in Merrill Scott's books and records.

d. *Investor Losses Caused By Brody*

The accounting of Merrill Scott's books shows that investor losses caused by Brody amount to $13,140,000.00. This is set forth at length in the forensic accounting report of expert witness Gil A. Miller. (*See* May 1, 2006 Expert Report & Disclosure of Gil A. Miller (Docket # 658); SEC's Mem. Supp. at pp. 25-26, ¶¶ 131-136 .)

C. Discovery and Mr. Brody's Exercise of his Fifth Amendment Privilege Against Self-Incrimination

***7** After the SEC filed its complaint in January 2002, and after the injunction, appointment of receiver, and asset-freeze went into effect, Mr. Brody and his attorney met with SEC and Department of Justice attorneys in the fall of 2002 to discuss a potential plea agreement to anticipated criminal charges against Mr. Brody. The SEC did not have the opportunity to examine Mr. Brody during that meeting, nor did Brody discuss the substance of his defense at that time. No other meetings were held with Mr. Brody, and no criminal charges were filed.[FN8]

FN8. The record does not reflect why no criminal charges were filed, and the court will not speculate regarding the reasons why.

Meanwhile, discovery in the civil enforcement action began, but Mr. Brody did not participate until December 2003. By December 12, 2003, almost two years after the complaint was filed, Mr. Brody had not even answered the SEC's complaint. The SEC moved for entry of default judgment, but because Mr. Brody answered the complaint approximately three weeks later (he denied the allegations), no default judgment was entered.

Then, on December 15, 2003, the SEC deposed Mr. Brody. Mr. Brody (who was represented by counsel) asserted his Fifth Amendment privilege against self-incrimination to all substantive questions regarding Merrill Scott and its affiliated entities and regarding all allegations in the Complaint. Mr. Brody's invocation of the privilege was very broad. (*See* Dep. of Patrick Brody, attached as Ex. 82 to SEC's Mem. Supp. Mot. Summ. J. (Docket # 678); SEC's Mem. Supp. Mot. Summ. J. at pp. 21-22, ¶¶ 101-113; SEC's Reply Mem. in Supp. Mot. Summ. J. (Docket # 936) at pp. 2-78, 80-82.)

Following Mr. Brody's fruitless deposition, the SEC, from February 2004 to December 2005 (when fact discovery ended), took fifty-two depositions of individuals, including investors, former Merrill Scott employees, independent contractors, and other third parties. (Plus SEC had participated in more than twenty depositions before Mr. Brody's deposition).

On August 11, 2004, the SEC filed its first motion for summary judgment against Mr. Brody.[FN9] Mr. Brody filed an opposition memorandum in November 2004, but he did not submit an affidavit or declaration or in any other way testify as to the facts for which he had previously asserted his Fifth Amendment privilege against self-incrimination. Then, months later and only a few days before the March 18, 2005 hearing, Mr. Brody filed an affidavit in opposition to the motion. The Commission moved to strike Mr. Brody's affidavit for the same reasons that it now seeks to strike Mr. Brody's sworn discovery responses. The court denied the SEC's motion for summary judgment during the March 2005 hearing, but not for reasons related to Mr. Brody's affidavit. Accordingly, SEC's motion to strike the affidavit was moot, although the court did not expressly deny it as such.[FN10] Still, Mr. Brody had notice of SEC's

position on his attempt to waive his Fifth Amendment privilege right before the court considered a motion for summary judgment.

> FN9. The motion currently being considered by the court is the SEC's second motion for summary judgment against Mr. Brody.
>
> FN10. Instead, the motion to strike was " terminated" on the electronic docket by court personnel because it was moot.

After the court denied the SEC's initial motion for summary judgment, SEC conducted more discovery, including dozens of depositions. Many of the witnesses reside outside the District of Utah. According to the SEC, it has taken over seventy depositions in the United States and Canada since discovery began.

***8** On November 28, 2005, SEC served Mr. Brody with interrogatories and requests for admissions. The fact discovery deadline was January 1, 2006. Mr. Brody did not respond to or participate in any discovery during the three years of discovery. Instead, around the time the SEC served Mr. Brody with its discovery request, Mr. Brody engaged the SEC in settlement discussions and, consequently, sought an extension of time to respond to the discovery request. SEC agreed to the extension.

In the meantime, the SEC filed its second motion for summary judgment against Mr. Brody (the one currently before the court) a few days before the motion filing deadline of June 2, 2006. Because of settlement discussions, the SEC also granted extensions to Mr. Brody to file his opposition brief.

After continual delays from Mr. Brody in the settlement negotiations, SEC requested (and received) a status conference from the court. During the November 13, 2006 status conference, the court ordered Mr. Brody to either deposit the settlement funds requirement by the SEC into his counsel's trust account (as had been discussed and tentatively agreed to during settlement negotiations) or respond to the second motion for summary judgment by December 13, 2006.

After Mr. Brody was compelled to act, he did respond to a portion of the SEC's discovery responses on December 9, 2006. Still, despite the court's order, Mr. Brody requested (and received) two more extensions of time to respond to the SEC's summary judgment motion.

In the interim, Mr. Brody found time to file numerous other motions, including a motion for sanctions, a motion for summary judgment dismissal based on lack of subject matter jurisdiction, a motion to stay disbursements by the Receiver, and motion for certification of an issue to the Utah Supreme Court. The court summarily denied all of these motions because they lacked merit.

Finally, on February 9, 2007, Mr. Brody filed his opposition to the motion for summary judgment and served SEC with his response to the remainder of the SEC's discovery responses. Attached to his opposition memorandum was his sworn response to the SEC's discovery responses, upon which he relies to defeat the SEC's current motion. Mr. Brody's submissions came less than a month before the March 8, 2007 hearing on SEC's summary judgment motion. SEC filed a reply brief before the hearing, contending, among other things, that Mr. Brody was not entitled to submit testimonial evidence at this stage in the proceeding after asserting his privilege only to waive it at the " eleventh hour," with resulting prejudice to the SEC.

On March 8, 2007, the court heard argument on the SEC's Motion for Summary Judgment. During the hearing, the court requested supplemental briefs on the issues relating to waiver of the Fifth Amendment privilege against self-incrimination. Having received the supplemental briefs, and having reviewed the relevant pleadings and case law, the court now sets forth its decision.

II. ANALYSIS

***9** In its Motion for Summary Judgment, the SEC contends that Mr. Brody violated the antifraud provisions and the broker registration requirements of the federal securities laws.[FN11]

> FN11. Despite Mr. Brody's contentions, this court has subject matter jurisdiction. (*See* May 2, 2007 Order (Docket # 971) (denying Mr. Brody's summary judgment motion challenging the court's subject matter jurisdiction).)

Federal Rule of Civil Procedure 56 permits the entry of summary judgment " if the pleadings, depositions,

answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law.' " Fed.R.Civ.P. 56(c); *see Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250-51 (1986); *Adler v. Wal-Mart Stores, Inc.*, 144 F.3d 664, 670 (10th Cir.1998). The court must " examine the factual record and reasonable inferences therefrom in the light most favorable to the party opposing summary judgment." *Applied Genetics Int'l, Inc. v. First Affiliated Sec., Inc.*, 912 F.2d 1238, 1241 (10th Cir.1990). " The mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient [to overcome a motion for summary judgment]; there must be evidence on which the jury could reasonably find for the plaintiff." *Liberty Lobby*, 477 U.S. at 252; *see also Anderson v. Coors Brewing Co.*, 181 F.3d 1171, 1175 (10th Cir.1999) (" A mere scintilla of evidence supporting the nonmoving party's theory does not create a genuine issue of material fact.").

Before the court discusses the merits of SEC's claims, the court must address the threshold issue regarding Mr. Brody's last minute waiver of his Fifth Amendment privilege against self-incrimination.

A. *The Fifth Amendment Privilege Issue*

In February 2007, Mr. Brody submitted sworn discovery responses (specifically, responses to SEC's Interrogatory No. 1 and Interrogatory No. 6) as evidence to support his opposition to the SEC's summary judgment motion. By submitting what essentially amounts to an affidavit, he waived the Fifth Amendment privilege that he asserted during his 2003 deposition. In his discovery response, he denies many of the allegations that SEC now seeks to prove in its motion. And he cites to the discovery response as evidence that controverts the voluminous evidence cited by the SEC in its motion. His discovery response is the only evidence he submits (although he does occasionally cite to SEC exhibits in his opposition).

The SEC argues that the court must strike Mr. Brody's discovery response. Specifically, SEC contends that Mr. Brody's " last minute attempt to testify on his own behalf would prejudice the Commission and is nothing more than the legal gamesmanship that has characterized Brody's belated defense." (SEC's Supp. Mem. Regarding Fifth Am. Privilege (Docket # 948) at 2.)

1. Mr. Brody's Motion to Strike

After SEC filed its supplemental memorandum regarding the Fifth Amendment privilege issue, Mr. Brody moved to strike two aspects of SEC's memorandum. First, he moves the court to strike " Point II" of the memorandum (which argues in the alternative that Mr. Brody's discovery responses, even if not stricken, are insufficient to controvert the SEC's undisputed facts) on the ground that it exceeds the scope of the issue the court asked the parties to brief. Second, he moves the court to strike " all commentary in that memorandum purporting to set forth the course and the contents of settlement discussions on the grounds that it exceeds the scope of the Fifth Amendment issue" the court asked the parties to brief.

***10** Regarding his request to strike " Point II," that issue is moot because the court is striking Mr. Brody's discovery response and does not consider SEC's alternative argument. As for the " commentary" set forth in the SEC's supplemental memorandum, that information is very pertinent to the Fifth Amendment privilege waiver issue, as will become apparent during the discussion below about factors the court should consider when determining whether to strike the discovery response. For these reasons, the court denies Mr. Brody's Motion to Strike.

2. Merits of SEC's Request to Strike the Discovery Response

A party may assert the privilege against self-incrimination during civil as well as criminal proceedings. But during civil proceedings, " because the privilege may be initially invoked and later waived at a time when an adverse party can no longer secure the benefits of discovery, the potential for exploitation is apparent." *SEC v. Graystone Nash, Inc.*, 25 F.3d 187, 190 (3d Cir.1994).

Certainly the court may not punish Mr. Brody for invoking his privilege during his deposition. The civil procedures recognize the need for exercise of the privilege and " provide no basis for inflicting sanctions when there is a valid invocation of the Fifth Amendment." *Id.* at 191. It would be improper to impose a complete bar on presenting any evidence, or to grant summary judgment solely in response to a

valid invocation of the privilege.

But a limitation on sanctions does not immunize the party invoking the privilege from adverse consequences in the civil litigation setting. For instance, according to the United States Supreme Court, it is permissible to draw " adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them." *Baxter v. Palmagiano*, 425 U.S. 308, 318 (1976). The Supreme Court has also noted that " the fact that a litigant may be forced to choose ' between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination.' " *United States v. Certain Real Property and Premises Known as 4003-4005 5th Ave., Brooklyn, NY*, 55 F.3d 78, 83 n. 3 (2d Cir.1995) (quoting *Williams v. Florida*, 399 U.S. 78, 83-84 (1970)). " In a civil trial, a party's invocation of the privilege may be proper, but it does not take place in a vacuum; the rights of the other litigant are entitled to consideration as well." *Graystone Nash, Inc.*, 25 F.3d at 191. Consideration of the other litigant's rights continues even when the party invoking the privilege attempts to waive it later in the proceedings, as in Mr. Brody's case. " The Fifth Amendment privilege cannot be invoked to oppose discovery and then tossed aside to support a party's assertions." *SEC v. Zimmerman*, 854 F.Supp. 896, 899 (N.D.Ga.1993) (distinguishing situation where party invoking privilege is a defendant in both civil and criminal cases and is forced to choose between waiver of the testimonial privilege in the criminal case and automatic entry of an adverse judgment in a civil case).

***11** To determine whether Mr. Brody's discovery response should be stricken, the court should examine how and when the privilege was invoked, how and when it was waived, the nature of the proceeding, and any resulting prejudice to the opposing party. *4003-4005 5th Ave.*, 55 F.3d at 84-86. Further, the court must " carefully balance the interests of the party claiming protection against self-incrimination and the adversary's entitlement to equitable treatment. Because the privilege is constitutionally based, the detriment to the party asserting it should be no more than is necessary to prevent unfair and unnecessary prejudice to the other side." *Graystone Nash, Inc.*, 25 F.3d at 192.

Nothing in the record indicates that Mr. Brody improperly invoked the privilege in December 2003 when he was deposed.[FN12] And SEC does not argue otherwise.

> FN12. Although the court notes that he invoked his privilege only after he narrowly avoided a default judgment by answering the complaint nearly two years after it had been filed.

But the timing and context within which Mr. Brody waived his privilege is troubling. Mr. Brody did not submit his sworn " testimony" until approximately one year after the period for fact discovery had concluded. More importantly, he waived the privilege after the SEC had moved for summary judgment, and, consequently, had an opportunity to tailor his response to the motion.[FN13] Moreover, he only waived the privilege after the court compelled him to either deposit settlement money or respond to the summary judgment motion. Faced with this " eleventh hour" waiver, particularly in light of the many delays arguably attributable to Mr. Brody, the court believes that striking the discovery response is an appropriate measure. Other courts have done the same in similar circumstances. *See, e.g., SEC v. Hirshberg*, 173 F.3d 846, Case Nos. 97-6171 & 97-6259, 1999 WL 163992 (2d Cir.1999) (table decision) (precluding evidence of defendant who waived Fifth Amendment privilege after SEC filed summary judgment motion, finding that it would be prejudicial to SEC to allow defendant, who waited four years to respond to the motion, to tailor his affidavit to create an issue of fact for trial); *4003-4005 5th Ave.*, 55 F.3d at 85 (noting that if litigant's waiver of privilege comes at " eleventh hour" and " appears to be part of a manipulative, ' cat-and-mouse' approach to the litigation, a trial court may be fully entitled ... to bar a litigant from testifying later about matters previously hidden from discovery through an invocation of the privilege"); *In re Edmond*, 934 F.2d 1304, 1308 (4th Cir.1991) (" By selectively asserting his Fifth Amendment privilege, [the defendant] attempted to insure that his unquestioned, unverified affidavit would be the only version [of his testimony]. But the Fifth Amendment privilege cannot be invoked as a shield to oppose depositions while discarding it for the limited purpose of making statements to support a summary judgment motion."); *United States v. Parcels of Land*, 903 F.2d 36, 43-44 (1st Cir.1990) (affirming order striking affidavit opposing government's summary judgment motion when witness " shielded his account of the ' facts' from scrutiny by invoking

the Fifth Amendment at his deposition."); *SEC v. Softpoint, Inc.*, 958 F.Supp. 846, 857 (S.D.N.Y.1997) (noting that defendant's waiver of privilege three months after SEC moved for summary judgment was " convenient" and that defendant " simply may not invoke his privilege against self-incrimination to impede the government's discovery efforts and then seek to waive the privilege when faced with the consequences of his refusal to testify."); *SEC v. Grossman,* 887 F.Supp. at 660 (precluding evidence at summary judgment stage on the issues for which the defendants had " declined to provide discovery for several years" under the guise of the Fifth Amendment privilege against self-incrimination); *SEC v. Zimmerman,* 854 F.Supp. 896, 899 (N.D.Ga.1993) (" The Fifth Amendment privilege cannot be invoked to oppose discovery and then tossed aside to support a party's assertions.").

> FN13. Mr. Brody's offer to submit to a deposition now is not sufficient to remedy the problems created by his " eleventh hour" waiver. (*See* Tr. of Mar. 8, 2007 Hearing at 60-61, 64 (SEC's counsel requested that if Mr. Brody were allowed to testify at a deposition, discovery be " completely reopened so that we can then go back to our witnesses and talk about what Mr. Brody said they said."). *See also Parcels of Land,* 903 F.2d 36, 45 (1st Cir.1990) (rejecting civil forfeiture defendant's contention that district court erred when it failed to consider defendant's " last-minute agreement to answer deposition questions," noting that the motivation for the defendant's " change of heart" " seems to have been [defendant's] realization that the court was not going to consider his affidavit in light of his refusal to answer deposition questions.... [The defendant's] last-minute backpedaling on his longstanding refusal to be deposed is not enough to save his properties.")

***12** As SEC notes in its supplemental brief, cases where a court declined to preclude the testimony are distinguishable. For instance, one court denied preclusion when the defendant was pro se at the time he invoked his Fifth Amendment privilege and did not fully understand the consequences. See *Graystone Nash, Inc.*, 25 F.3d at 192-93. Here, Mr. Brody was represented by counsel during his deposition, and has been represented by counsel throughout the litigation. No doubt his counsel fully informed him of the ramifications of invoking the privilege. Also, in *Graystone Nash,* the court noted that the SEC's summary judgment motion was the first indication to the pro se defendants that invocation of the privilege could prevent them from offering evidence in their defense. *Id.* at 193. Again, Mr. Brody (perhaps uniquely in this case) had actual notice that the issue would arise this time because it arose when the SEC filed its initial motion for summary judgment in 2004. He cannot now argue that he had no indication, either through advice from counsel or from the actual unfolding of events in this case, that he may not be able to present last-minute testimony to oppose a motion for summary judgment. And during all that time, there was no indication from Mr. Brody that he would waive the privilege he asserted in 2003.

As for the nature of the proceeding, Mr. Brody does not face the dilemma that a defendant in parallel civil and criminal proceedings faces. For example, SEC has the burden of proof here, unlike in civil forfeiture proceedings that typically track a criminal prosecution. In civil forfeiture proceedings, courts may be less inclined to strike evidence proffered at the last-minute. *See, e.g., 4003-4005 5th Ave.*, 55 F.3d at 83 (" The tension between self-incrimination concerns and the desire to testify may be especially acute for a claimant in a civil forfeiture proceeding."). Here, Mr. Brody is not being forced to waive his privilege in order to meet an affirmative burden, because SEC retains the burden of proof in this enforcement action. *See, e.g., Graystone Nash, Inc.*, 25 F.3d at 190 (noting that SEC must still prove its case when defendant invokes the Fifth Amendment). And, as the Supreme Court noted many years ago, forcing a litigant to choose " between complete silence and presenting a defense has never been thought an invasion of the privilege against compelled self-incrimination." *Williams v. Florida,* 399 U.S. 78, 83-84 (1970). Regardless, Mr. Brody is not precluded from remaining silent and, at the same time, testing the government's proof and offering evidence (other than his last-minute testimony) to rebut such proof.

Finally, acceptance of Mr. Brody's waiver would cause substantial prejudice to the SEC. This case has been pending for over five years. SEC has taken over seventy depositions throughout the United States and Canada. Mr. Brody did not attend a single deposition that the SEC noticed (other than his own). The SEC no doubt incurred significant costs and expenses in

connection with that discovery. Indeed, arguably the SEC took more depositions as a result of Mr. Brody's refusal to testify in 2003. But SEC took many of the depositions without the benefit of Mr. Brody's version of events. While the SEC developed its own case, it did not have the opportunity to rebut Mr. Brody's newly presented case. It certainly would be prejudicial to the SEC to allow Mr. Brody to testify at trial without first being deposed. And it would be prejudicial to require SEC to rely on discovery that was developed without the benefit of knowing Mr. Brody's assertions. So the court would have to re-open discovery, at least for Mr. Brody's deposition. But SEC has requested that the court open *all* discovery so that SEC can test Mr. Brody's assertions about what other witnesses allegedly did or said. To allow SEC the opportunity to rebut Mr. Brody's case through additional discovery would not only open a Pandora's box but would result in substantial additional costs and delay. But otherwise, without that additional discovery, at trial the SEC would in some instances have to rely on transcripts of depositions where they lacked the ability to test Mr. Brody's recent assertions.[FN14] This is so because many of the witnesses reside outside the District of Utah and so are outside the subpoena power of the court.

FN14. The SEC, in its supplemental brief, specifically lays out examples of assertions that SEC would not be able to explore with other witnesses. (*See* SEC's Supp. Mem. Re: Fifth Am. Privilege at 22-23.)

***13** Mr. Brody waited over three years from the date of his deposition to waive the Fifth Amendment privilege and attempt to offer evidence in his defense. Before filing his opposition to the SEC's summary judgment motion, Mr. Brody never indicated that he intended to waive the privilege. Indeed, he never sought assistance from this court to accommodate any Fifth Amendment concerns he might have. *See Softpoint,* 958 F.Supp. at 856 (precluding last-minute testimony from defendant and noting that defendant, despite ample time and opportunity to do so, failed to seek the court's assistance in accommodating his Fifth Amendment concerns). As a result of his behavior, SEC has been prejudiced. Given case law precedent and the facts of this case, the court rejects Mr. Brody's attempt to waive his privilege in this context, and, consequently, strikes Mr. Brody's discovery response.[FN15]

FN15. SEC also urges the court to draw an adverse inference based on Mr. Brody's Fifth Amendment broad privilege assertion, arguing that " Brody's silence and failure to contest these assertions is evidence of his acquiescence to the fact that he was conscious of his fraudulent activities and of his active involvement in the scheme to defraud MSA investors." (SEC's Mem. Supp. Mot. Summ. J. at 49-50.) The court is allowed to draw such an inference. *Baxter v. Palmigiano,* 425 U.S. 308 (1976). But given the overwhelming and uncontroverted evidence in the record, the court need not do so here.

B. SEC's Claims of Securities Laws Violations

The SEC contends that Mr. Brody violated the anti-fraud provisions of the Securities Act of 1933, the Securities Exchange Act of 1934, Rule 10b-5, and the Investment Advisers Act of 1940. It also contends that he violated the broker registration requirements under the Securities Exchange Act of 1934. The court will address each in turn.

1. Mr. Brody violated the anti-fraud provisions of Section 17(a) of the Securities Act of 1933, and Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5.

To prove that Mr. Brody violated Sections 17(a) of the Securities Act of 1933 (" Securities Act") and 10(b) of the Securities Exchange Act of 1934 (" Exchange Act"), the SEC must establish that (1) in connection with the offer and sale of securities; (2) Mr. Brody engaged in a scheme to defraud when he made untrue statements, omitted material facts, and engaged in transactions, practices or courses of business that operated as a fraud or deceit upon the investor; (3) Mr. Brody's misrepresentations or omissions were material, such that a reasonable investor would consider the misrepresented or omitted facts to be important in making an investment decision; and (4) Mr. Brody acted with the requisite scienter, in that he intended to deceive, manipulate or defraud investors, and acted recklessly. 15 U.S.C. §§ 77j(b) and 77q(a); *TSC Indus., Inc. v. Northway, Inc.,* 426 U.S. 438, 449 (1976); *Basic Inc. v. Levinson,* 485 U.S. 224, 231-32 (1988); *Aaron v. SEC,* 446 U.S. 680, 701 (1980); *Ernst & Ernst v. Hochfelder,* 425 U.S. 185, 193 (1976); *Edward J.*

Mawod & Co. v. SEC, 591 F.2d 588, 595-97 (10th Cir.1979) (defining scienter as reckless conduct). The SEC must also show that Mr. Brody used the means and instrumentalities of interstate commerce in connection with the fraud. 15 U.S.C. §§ 77q(a), 78j(b); 17 C.F.R. § 240.10b-5. SEC must prove these elements by a preponderance of evidence. *Herman & MacLean v. Huddleston,* 459 U.S. 375, 387 (1983).

a. *Means and Instrumentalities of Interstate Commerce*

***14** The jurisdictional requirements of Section 17(a) of the Securities Act and Section 10(b) of the Exchange Act (and Rule 10b-5) are satisfied by the use of the mails or telephone in connection with the fraud. The fraud or misrepresentation itself need not have been communicated over the telephone or through the mail, as long as the defendant's use of the telephone or mail " furthered the fraudulent scheme." *Aquionics Acceptance Corp. v. Kollar,* 503 F.2d 1225, 1228 (6th Cir.1974). Here, there is ample evidence in the record that this jurisdictional requirement is met. For example, Mr. Brody made misrepresentations to investors over the telephone, used the mail to transmit correspondence with investors, and wired money between accounts both in the United States and off-shore.

b. *In connection with the offer and sale of securities*

Mr. Brody's actions to defraud were done " in connection with the offer and sale of securities." First, Mr. Brody was dealing with " securities." The term " security" is defined as an " investment contract." 15 U.S.C. §§ 77b(a)(1), 78c(a)(10). The United States Supreme Court has defined an " investment contract" as (1) " an investment of money" ; (2) " in a common enterprise" ; and (3) with a reasonable expectation of profits to be derived " solely from the efforts of others." *SEC v. W.J. Howey Co.,* 328 U.S. 293, 301 (1946); *United Hous. Found., Inc. v. Forman,* 421 U.S. 837, 852 (1976). Mr. Brody's foreign investment schemes were " investment contracts" as defined under *Howey.*

First, there was an investment of money. Mr. Brody's clients each invested money or securities with MSAL in order to obtain promised tax advantages, asset protection or profits. Each client paid a fee to obtain an MFP, which outlined the framework and strategies that MSAL would follow in order to help the client achieve his desired objectives. The basic structure of most MFPs involved transfer of a client's income and/or assets into various offshore entities established on the client's behalf. So when the MFP was finalized, the client transferred the money he was investing to MSAL. This money was then used to purchase various MSAL products such as Loss of Income insurance policies (LOIs), Equity Management Mortgages (EMMs), and Foreign Variable Annuities (FVAs).

Second, the investors' assets were commingled in a common enterprise. Once MSAL received money from its clients, it would transfer it into various bank accounts where it would be commingled with other investors' money. These bank accounts were in the names of various Merrill Scott entities. Also, if a client transferred stock to MSAL as part of his investment, those securities were mixed with other clients' stocks. Mr. Brody controlled these accounts.

Third, the clients had a reasonable expectation of profits to be derived solely from the efforts of others. Mr. Brody and Merrill Scott representatives told investors they would receive a return on their investments in the form of tax liability benefits, asset protection and management, and income from investments made by Merrill Scott entities on the client's behalf.

***15** Mr. Brody made misrepresentations " in connection with" the purchase or sale of securities. The " in connection with" requirement should be broadly and flexibly construed to effectuate the remedial purpose of the federal securities laws. *SEC v. Zandford,* 535 U.S. 813, 819, 822 (2002) (" It is enough that the scheme to defraud and the sale of securities coincide."). The " in connection with" requirement is satisfied when someone uses a device " that would cause reasonable investors to rely thereon, and, in connection therewith, so relying, cause them to purchase or sell a corporation's securities." *SEC v. Texas Gulf Sulphur Co.,* 401 F.2d 833, 860 (2d Cir.1968).

Here, Mr. Brody's " device" was Merrill Scott promotional and sales literature, including the MFP. There was a direct and intended link between the MFP and the purchase and sale of securities by MSAL clients. Based on the court's review of the record, SEC has established the " in connection with the offer and sale of securities" requirement.

c. *Scheme to Defraud through Misrepresentations*

Mr. Brody's misrepresentations and omissions were actively used to defraud investors out of at least $13 million, and this constitutes a scheme to defraud. Clients were told that their money would be safe, segregated, and handled in accordance with the strategies outlined in their MFPs. Mr. Brody failed to inform his investors that their money would be used to pay for such things as Mr. Brody's own personal expenses, the operating expenses and obligations of MSAL, unauthorized investments in high-risk start-up companies, and the funding of a massive Ponzi scheme. He further misled investors when he failed to disclose that their money would be commingled with funds from other investors and that their stocks would be margined with the proceeds being used to fund the operating expenses of MSAL.

d. *Material Misrepresentations or Omissions*

The misrepresentations and omissions presented in the record and summarized above were material, in that there was a substantial likelihood that a reasonable investor would consider the misrepresented or omitted facts to be important in making an investment decision. *See* *TSC Indus., Inc. v. Northway, Inc.*, 426 U.S. 438, 449 (1976); *Basic Inc. v. Levinson*, 485 U.S. 224, 231-32 (1988). The testimony of a segment of the investors shows that the facts such as rate of return, the purported tax benefits, asset protection, and segregated accounts were important to them in making their decision to invest their money through MSAL. Many said they would not have invested their money with MSAL if they had known that Mr. Brody would handle their money the way he did. And some who learned what was actually being done with their money asked for their investments to be unwound and refunded.

e. *Scienter*

Mr. Brody acted with scienter when he made misrepresentations and omissions that caused clients to invest in Merrill Scott. Scienter is defined as " a mental state embracing intent to deceive, manipulate, or defraud." *Aaron v. SEC*, 446 U.S. 680, 686 n. 5 (1980) (citing *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194 n. 12 (1976)). Scienter has also been defined as recklessness. *Edward J. Mawod & Co.*, 591 F.2d at 595-97; *Hackbart v. Holmes*, 675 F.2d 1114, 1117 (10th Cir.1982) (ruling that threshold mental state for specific " intent to deceive" is " recklessness" and noting that all circuits facing the issue have held the same). Recklessness is " conduct which falls far short of the standard of ordinary care and which carries a danger of misleading purchasers such that [the defendants] knew or must have known of its propensity to mislead." *C.E. Carlson, Inc. v. SEC*, 859 F.2d 1429, 1435 (10th Cir.1988).

***16** Mr. Brody knew that investor funds were not being used as represented. Despite this knowledge, Mr. Brody continued to tell clients that their money would be invested according to the MFPs. He participated in presentations made to clients and so was well aware that clients expected their money to be invested according to the representations made by MSAL. He specifically told investors their funds were safe. Yet he took much of that money for his own personal use. Mr. Brody developed and authored many MFPs and worked with attorneys and financial advisers to plan others. He knew the type of investment strategies that were being presented to clients, but he ignored the plan once the client's money was received.

Mr. Brody knew that MSAL operated at a loss. He received daily cash status reports from MSAL staff. He knew that client money was being used to meet the company's payroll and operating expenses. He had access to MSAL's accounts, and he frequently exercised his control by transferring funds.

In short, the court finds that Mr. Brody acted with the requisite scienter.

f. *Conclusion*

SEC has established, by a preponderance of evidence, all of the elements required to prove that Mr. Brody violated the anti-fraud provisions of Section 17(a) of the Securities Act of 1933, and Section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 thereunder. Accordingly, it is entitled to summary judgment on those claims.

2. Mr. Brody violated Sections 206(1) and (2) of the Investment Advisers Act of 1940.

Section 206 of the Investment Advisers Act prohibits investment advisers from employing devices, schemes or artifices to defraud, or engaging in any transaction, practice, or course of business that operates as a fraud or deceit on clients or prospective clients. 15 U.S.C. §§ 80b-6(1) & (2). To establish that Mr. Brody violated Section 206(1) of the

Investment Advisers Act, the SEC mush prove that (1) Mr. Brody was an investment adviser; (2) Mr. Brody utilized the mails or instrumentalities of interstate commerce to employ a device, scheme or artifice; (3) the device, scheme or artifice violated Mr. Brody's fiduciary duty to his clients in that he made false and misleading statements to his clients; and (4) Mr. Brody acted with scienter. *Id.; Morris v. Wachovia Sec., Inc.*, 277 F.Supp.2d 622, 644 (E.D.Va.2003). The same elements apply for Section 206(2), except that no scienter is required. All that need be shown is that the investment adviser failed to disclose a material fact. *Morris*, 277 F.Supp.2d at 644.

Concerning the first element, SEC has established that Mr. Brody acted as an investment adviser. An investment adviser is " any person, who for compensation, engages in the business of advising others, either directly or through publications or writings, as to the value of securities, or who for compensation and a part of a regular business, issues or promulgates analyses or reports concerning securities." 15 U.S.C. § 80b-2(a)(11).

***17** Mr. Brody frequently advised clients as to the value of securities, recommended investments, and encouraged clients to invest in an MSAL-controlled mutual fund. He either wrote or helped to write most of the MFPs prepared for clients. These MFPs contained numerous recommendations regarding various investment products. He promoted investment in various start-up companies and used investor money to purchase stock in many of the companies he was promoting. Mr. Brody made investment decisions for Phoenix and Gibraltar, both of which held client money. His conduct falls within the definition of an investment adviser.

As for the remaining elements, which mirror the elements of a violation of Section 10(b) discussed above, the SEC has established them as well.

Accordingly, SEC is entitled to summary judgment on this claim.

3. Mr. Brody violated the broker registration requirements under Section 15(a) of the Securities Exchange Act of 1934.

Section 15(a)(1) of the Exchange Act prohibits a broker or dealer from making use of the mails or any means or instrumentality of interstate commerce to effect or attempt to induce transactions in securities unless registered with the SEC in accordance with Section 15(b). 15 U.S.C. § 78o(a)(1). Scienter is not required to prove a violation of Section 15(a). *See, e.g., SEC v. Martino*, 255 F.Supp.2d 268, 283 (S.D.N.Y.2003); *SEC v. National Exec. Planners, Ltd.*, 503 F.Supp. 1066, 1073 (M.D.N.C.1980). So the SEC need only establish that Mr. Brody acted as a broker or dealer in offering and selling Merrill Scott investment products and that he failed to register with the SEC under Section 15(b) of the Exchange Act.

A " broker" is any person engaged in the business of effecting transactions in securities for the account of others." 15 U.S.C. § 78c(a)(4)(A). The evidence demonstrates that Mr. Brody acted as a broker. The elements of interstate commerce and " inducing transactions in securities" have been established, as discussed above in previous sections. And it is undisputed that Mr. Brody was not registered with the SEC. Accordingly, the court finds that Mr. Brody violated Section 15(a)(1) of the Exchange Act, and the SEC is entitled to summary judgment on that claim.

C. The Remedy

Now that the court has found Mr. Brody liable of the acts alleged by the SEC, it must fashion a remedy. SEC seeks a permanent injunction against future violations of the federal security laws, disgorgement and prejudgment interest on that amount, and a civil monetary penalty.

1. Permanent Injunction

The court is authorized to grant permanent injunctions against future violations of the securities laws, particularly in cases such as this, where liability is based on " systematic wrongdoing" accompanied by a high " degree of the defendant's culpability and continued protestations of innocence." *See, e.g., SEC v. First Jersey Sec., Inc.*, 101 F.3d 1450, 1477 (2d Cir.1996). Having reviewed the totality of the circumstances presented in the record, the court finds that the SEC has shown a substantial likelihood of future violations by Mr. Brody. Accordingly, Mr. Brody is permanently enjoined from violating Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a); 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; Sections 206(1) and (2) of the Investment Advisers Act of 1940, 15

U.S.C. §§ 80b-6(1) and (2); and Section 15(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(a).

2. Disgorgement and Prejudgment Interest

***18** The court may also order the equitable remedy of disgorgement of ill-gotten gains in SEC enforcement actions, along with prejudgment interest on those gains, to prevent unjust enrichment. *E.g., First Jersey Sec., Inc.*, 101 F.3d at 1474. " The amount of disgorgement ordered ' need only be a reasonable approximation of profits causally connected to the violation,' [and] ' any risk of uncertainty [in calculating disgorgement] should fall on the wrongdoer whose illegal conduct created that uncertainty.' " *Id.* at 1475 (internal citations omitted).

According to the undisputed calculations of SEC's expert, Mr. Brody caused investors to lose $13,140,000.00. The basis for this amount is set forth at length in the forensic accounting report of expert witness Gil A. Miller. (*See* May 1, 2006 Expert Report & Disclosure of Gil A. Miller (Docket # 658); SEC's Mem. Supp. at pp. 25-26, ¶¶ 131-136.)

Further, the SEC calculates the prejudgment interest to total $3,482,163.11. (*See* Dec. of Matthew A. Himes ¶ 3 and accompanying Prejudgement Interest Report, attached as Ex. 93 to SEC's Mem. Supp. Mot. Summ. J.) The court finds that this is an appropriate calculation, because the interest rate was based on IRS published rates on tax underpayments for individuals. *See First Jersey Sec., Inc.*, 101 F.3d at 1476 (" courts have approved the use of the IRS underpayment rate in connection with disgorgement").

Equity supports the court's holding that Mr. Brody must pay $16,622,163.11, which consists of disgorgement fees ($13,140,000.00) plus prejudgment interest ($3,482,163.11).

3. Civil Monetary Penalty

The court will determine whether to impose a civil monetary penalty upon motion by the SEC, along with full briefing of the issue and a hearing.

ORDER

For the foregoing reasons, the court ORDERS as follows:

1. Mr. Brody's sworn discovery responses (*see* Attachment 1 to Mr. Brody's opposition memorandum (Docket # 925)) are STRICKEN from the record.

2. SEC's Motion for Summary Judgment Against Defendant Patrick M. Brody (Docket # 677) is GRANTED.

3. Mr. Brody's Motion to Strike portions of SEC's supplemental memorandum regarding the Fifth Amendment privilege (Docket # 953) is DENIED.

4. Mr. Brody's Objection to February 21, 2007 Order of United States Magistrate Judge (Docket # 942) is MOOT, and the court will not consider it.

5. It is hereby ORDERED that Mr. Brody is permanently enjoined from violating Section 17(a) of the Securities Act of 1933, 15 U.S.C. § 77q(a); 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; Sections 206(1) and (2) of the Investment Advisers Act of 1940, 15 U .S.C. §§ 80b-6(1) and (2); and Section 15(a) of the Securities Exchange Act of 1934, 15 U.S.C. § 78o(a).

6. It is further ORDERED that Mr. Brody shall pay $16,622,163.11 as disgorgement fees and prejudgment interest.

D.Utah,2007.
S.E.C. v. Merrill Scott & Associates, Ltd.,
Slip Copy, 2007 WL 1519068 (D.Utah), Fed. Sec. L. Rep. P 94,336

END OF DOCUMENT

EXHIBIT

1

Streit, Elizabeth M.

From: Robert Shimer [shimer@enter.net]
Sent: Thursday, December 01, 2005 4:50 AM
To: Streit, Elizabeth M.
Cc: Robert_Litt@aporter.com
Subject: Reply Re: Arnold & Porter Deposition

Ms Streit,

Per our telephone conversation of today, please be advised that I waive any attorney client privilege that may exist between myself and the law firm of Arnold & Porter. This waiver is made per your request with resepct to your proposal to subpoena the deposition of any employee or partner of Arnold & Porter in the matter of CFTC v Equity Financial Group, LLC, *et al.*

Sincerely,

Robert W. Shimer

----- Original Message -----
From: Streit, Elizabeth M.
To: Robert Shimer
Sent: Thursday, December 01, 2005 12:38 PM
Subject: Arnold & Porter Deposition

Mr. Litt's email address is:

Robert_Litt@aporter.com

If you would copy him on your email waiving the attorney client privilege as to the CFTC, that would be much appreciated.

Elizabeth M. Streit
Senior Trial Attorney
Commodity Futures Trading Commission
525 W. Monroe St.
Suite 1100
Chicago, Illinois 60661
(312) 596-0537
(312) 596-0714 (facsimile)
estreit@cftc.gov

EXHIBIT

2

Robert W. Shimer. Esq., *Pro Se*
1225. W. Leesport Rd
Leesport, PA 19533
Voice: (610) 926-4278
Fax: (610) 926.8828

UNITED STATES DISTRICT COURT
DISTRICT OF NEW JERSEY

COMMODITY FUTURES TRADING COMMISSION	:
Plaintiff,	:CIVIL ACTION NO. 1:04CV-01512-RBK-AMD
vs.	:
EQUITY FINANCIAL GROUP, LLC VINCENT J. FIRTH, ROBERT W. SHIMER J.VERNON ABERNETHY, COYT E. MURRAY, TECH TRADERS, INC., TECH TRADERS, LTD., MAGNUM INVESTMENTS, and MAGNUM CAPITAL INVESTMENTS	:
Defendants	:
	:NOTICE OF DEPOSITION

TO: Elaine Teague
c/o Thomas L. Hutchinson, Esq.
Bullivant, Houser, Bailey, PC
888 S.W. Fifth Avenue, Suite 300
Portland, OR 97204

PLEASE TAKE NOTICE that in accordance with the Federal Rules of Civil Procedure, testimony will be taken by deposition upon oral examination before a person authorized by the laws of the State of Oregon to administer oaths on Wednesday, December 21, 2005, at 10:00

11/29

EXHIBIT
tabbies
2

o'clock a.m. at the offices of Beovich, Walter & Friend, 1001 S.W. 5th Avenue, Suite 1200, Portland, OR 97204 with respect to all matters relevant to the subject matter involved in this action, at which time and place the testimony of the following person will be taken:

Elaine Teague, a partner in the CPA firm of Puttman & Teague, LLP

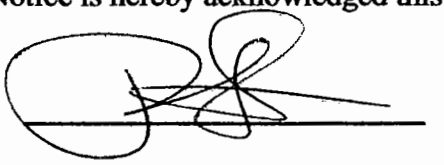
TAKE FURTHER NOTICE that it is requested that said deponent produce at the aforesaid time and place all documents within her possession, custody or control or within the possession, custody and control of the CPA firm of Puttman & Teague, LLP which concern, touch upon or relate to the subject matter of this action or as to the deponents designated, the matters as to which they will testify.

More particularly, deponent is requested to produce for inspection and copying the documents listed on Schedule A attached hereto.

By: 

Dated: November 29, 2005

Service of a copy of the foregoing Notice is hereby acknowledged this 29th day of November, 2005.



SCHEDULE A

1. All documents which concern, touch upon, reflect or relate to telephone conversations by and between Elaine Teague and Vernon J. Abernethy during the months of July, 2001 and August, 2001.

2. All telephone records of Puttman & Teague, LLP which document telephone calls from Elaine Teague and/or the firm of Puttman & Teague, LLP to J. Vernon Abernethy, CPA during the months of July and August, 2001.

3. All written correspondence including e-mail initiated by Elaine Teague to Defendant Robert W. Shimer for the time period of March, 2001 through and including April, 2004.

4. All written correspondence including e-mail initiated by Elaine Teague to Defendant J. Vernon Abernethy and all written correspondence including e-mail received by Elaine Teague from Defendant J. Vernon Abernethy during all calendar months from the month of July, 2001 through and including the month of March, 2004.

Issued by the

UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

Commodity Futures Trading Commission

V.

Equity Financial Group, LLC, et. al

SUBPOENA IN A CIVIL CASE

Case Number:[1] 1:04CV-01512-RBK-AMD
(CURRENTLY PENDING IN THE DISTRICT OF NEW JERSEY)

TO: Elaine Teague
c/o Thomas L. Hutchinson
Bullivant, Houser, Bailey, PC
888 S.W. Fifth Avenue, Suite 300, Portland, OR 97204

☐ YOU ARE COMMANDED to appear in the United States District court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM
	DATE AND TIME

☑ YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
Bovich, Walter & Friend, 1001 S.W. Fifth Ave., Suite 1200 Portland, OR 97204	DECEMBER 21, 2005 10:00 AM

☑ YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

See Attachment A

PLACE	DATE AND TIME

☐ YOU ARE COMMANDED to permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

ISSUING OFFICER'S SIGNATURE AND TITLE (INDICATE IF ATTORNEY FOR PLAINTIFF OR DEFENDANT)	DATE
	NOV 25 2005

ISSUING OFFICER'S NAME, ADDRESS AND PHONE NUMBER

Office of the Clerk
740 U. S. Courthouse
1000 S.W. Third Avenue
Portland, Oregon 97204-2902

(See Rule 45, Federal Rules of Civil Procedure, Parts C & D on next page)

[1] If action is pending in district other than district of issuance, state district under case number.

COPY

AFFIDAVIT OF SERVICE

UNITED STATES DISTRICT COURT
District of Oregon

Case Number: 1:04CV-01512-RBK-AMD

Plaintiff:
COMMODITY FUTURES TRADING COMMISSION

vs.

Defendant:
EQUITY FINANCIAL GROUP LLC, ET AL

Received by Free Lance Investigations, LLC to be served on **ELAINE TEAGUE C/O THOMAS L HUTCHINSON, BULLIVANT, HOUSER, BAILEY, P.C. , 888 SW FIFTH AVENUE, SUITE 300, PORTLAND, OREGON 97204.**

I, Rodger Baughman, being duly sworn, depose and say that on the **2nd day of December, 2005** at **12:30 pm, I:**

(SUBSTITUTED SERVICE) by leaving a true copy of the **SUBPOENA IN A CIVIL CASE** at the above referenced address in care of HEATHER GRAMSON, ASSISTANT TO MR. HUTCHINSON. I am a competent person over 18 years of age and a resident of the State of Oregon. I am not a party to nor an officer, director or employee of, nor attorney for any party. I hereby declare under penalty of perjury under the laws of this State that the foregoing is true and correct.

Additional Information pertaining to this Service:
Mr. Hutchinson approved and requested this arrangement.

OFFICIAL SEAL
BARBARA A BAUGHMAN
NOTARY PUBLIC-OREGON
COMMISSION NO. 376032
MY COMMISSION EXPIRES JAN. 18, 2008

Rodger E. Baughman

Rodger Baughman
Process Server

Free Lance Investigations, LLC
P.O. Box 1948
Hillsboro, OR 97123
(503) 547-8444

Our Job Serial Number: 2005003697

Subscribed and Sworn to before me on the 5th day of December, 2005 by the affiant who is personally known to me.

Barbara A Baughman

NOTARY PUBLIC
My Commission Expires: 1-18-08

ORIGINAL

PROOF OF SERVICE

DATE PLACE

SERVED

SERVED ON (PRINT NAME) MANNER OF SERVICE

SERVED BY (PRINT NAME) TITLE

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on _____
DATE

_____
SIGNATURE OF SERVER

_____
ADDRESS OF SERVER

Rule 45, Federal Rules of Civil Procedure, Parts C & D:

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and reasonable attorney's fee.

(2) (A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things, or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(B) Subject to paragraph (d) (2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection has been made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to comply production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3) (A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance,

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c) (3) (B) (iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, or commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena, or, if the party in who behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the mmmdemanding party to contest the claim.

SCHEDULE A

1. All documents which concern, touch upon, reflect or relate to telephone conversations by and between Elaine Teague and Vernon J. Abernethy during the months of July, 2001 and August, 2001.

2. All telephone records of Puttman & Teague, LLP which document telephone calls from Elaine Teague and/or the firm of Puttman & Teague, LLP to J. Vernon Abernethy, CPA during the months of July and August, 2001.

3. All written correspondence including e-mail initiated by Elaine Teague to Defendant Robert W. Shimer for the time period of March, 2001 through and including April, 2004.

4. All written correspondence including e-mail initiated by Elaine Teague to Defendant J. Vernon Abernethy and all written correspondence including e-mail received by Elaine Teague from Defendant J. Vernon Abernethy during all calendar months from the month of July, 2001 through and including the month of March, 2004.

CERTIFICATE OF SERVICE

The undersigned does hereby certify that on December 6, 2005 he caused a true and correct copy of the foregoing Subpoena and its Attachment A and attached Affidavit of Service to be sent by Priority Mail to the following.

Elizabeth M. Streit, Esq.
Commodity Futures Trading Commission
525 West Monroe St., Suite 1100
Chicago, Illinois 60661

Stephen T. Bobo, Esq. (Receiver)
Bina Sanghavi, Esq.
Raven Moore, Esq.
Sachnoff & Weaver, Ltd.
10 South Wacker Drive, Suite 4000
Chicago, Illinois 60606-7507

On behalf of Equity Financial Group, LLC
Samuel F. Abernethy, Esq.
Menaker and Herrmann
10 E. 40th St., 43rd Floor
New York, NY 10016-0301

Defendant Vincent J. Firth, pro se
Vincent J. Firth
3 Aster Court
Medford, New Jersey 08055

AUSA Paul Blaine, Esq
Camden Federal Building
401 Market Street, 4th Floor
Camden, NJ 08101

On behalf Coyt E. Murray, Tech Traders, Inc. Ltd.,, Magnum Investments, Ltd., & Magnum Capital Investments, Ltd.
Cirino M. Bruno, Esq.
Martin H. Kaplan, Esq.
Melvyn J. Falis, Esq.
Gusrae, Kaplan, Bruno & Nusbaum, PLLC
120 Wall Street
New York, New York 10005

Defendant J. Vernon Abernethy, pro se
Mr. Jack Vernon Abernethy
413 Chester Street
Gastonia, NC 28052

ROBERT W. SHIMER, *pro se*

Elizabeth M. Streit, Lead Trial Attorney
Scott R. Williamson, Deputy Regional Counsel
Rosemary Hollinger, Regional Counsel
Commodity Futures Trading Commission
525 West Monroe Street, Suite 1100
Chicago, Illinois 60661
312-596-0537
ES-2235
SW-9752
RH-6870

Paul Blaine
Assistant United States Attorney
for the District of New Jersey
Camden Federal Building & U.S. Courthouse
401 Market Street, 4th Floor
Camden, NJ 08101
856-757-5412
PB-5422

In The United States District Court
For The District Of New Jersey

Commodity Futures Trading Commission, Plaintiff, vs. Equity Financial Group LLC, Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., Magnum Capital Investments, Ltd., Vincent J. Firth, Robert W. Shimer, Coyt E. Murray, and J. Vernon Abernethy, Defendants.	Civil Action No: 04 CV 1512 (RBK/AMD) Judge Robert B. Kugler Magistrate Judge Ann Marie Donio **Notice of Deposition Pursuant to Fed. R. Civ. P. 30**

PLEASE TAKE NOTICE, that pursuant to Rule 30 of the Federal Rules of Civil Procedure, the undersigned will take the deposition of **Arnold & Porter, LLP, on January 23, 2006 to commence at 9:00 a.m.** by stenographic means before a notary public or other officer authorized by law to administer oath(s), at **Commodity Futures Trading Commission, Three Lafayette Centre, 1155 21st Street, N.W, Room 6002, Washington, D.C. 20581.**

12/15

Date: December 15, 2005

Respectfully submitted,

Elizabeth M. Streit
Lead Trial Attorney
A.R.D.C. No. 06188119
Commodity Futures Trading Commission
525 West Monroe Street, Suite 1100
Chicago, Illinois 60661
(312) 596-0537 (Streit)
(312) 596-0714 (facsimile)

CERTIFICATE OF SERVICE

The undersigned, Venice Bickham, a non-attorney, does hereby certify that on December 15, 2005 she caused a true and correct copy of the foregoing Notice of Deposition for Arnold & Porter, LLP, to be served upon the following persons via first class mail:

On behalf of Coyt E. Murray, Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., and Magnum Capital Investments, Ltd.
Melvyn J. Falis
Martin H. Kaplan
Gusrae, Kaplan, Bruno & Nusbaum, PLLC
120 Wall Street
New York, NY 10005
mkaplan@gkblaw.com
mfalis@gkblaw.com

Defendant J. Vernon Abernethy, pro se
J. Vernon Abernethy
413 Chester St.
Gastonia, NC 28052

Receiver
Stephen T. Bobo
Sachnoff & Weaver, Ltd.
10 S. Wacker Drive, 40th Floor
Chicago, IL 60606-7484
sbobo@sachnoff.com

Bina Sanghavi
Sachnoff & Weaver, Ltd.
10 S. Wacker Drive, 40th Floor
Chicago, IL 60606-7484

On behalf of Equity Financial Group,
Samuel Abernethy
Paul Hellegers
Menaker and Hermann
10 E. 40th St., 43rd Floor
New York, NY 10014
SFA@mhjur.com

Defendant Robert W. Shimer, pro se
Robert W. Shimer
1225 West Leesport Rd
Leesport, Pennsylvania 19533
shimer@enter.net

Defendant Vincent J. Firth, pro se
Vincent J. Firth
3 Aster Court
Medford, NJ 08055
triadcapital@comcast.net

Venice Bickham

Venice Bickham,Paralegal

From: Bickham, Venice M.
Sent: Tuesday, January 17, 2006 10:01 AM
To: McCormack, Joy; Streit, Elizabeth M.
Subject: FW: Notice of Telephonic Deposition
Attachments: collis nod 01-12-06.pdf

per your request

Venice M. Bickham
Paralegal Specialist
(312) 596-0554 phone
(312) 596-0714 fax

From: Bickham, Venice M.
Sent: Thursday, January 12, 2006 3:23 PM
To: 'mkaplan@gkblaw.com'; 'mfalis@gkblaw.com'; 'jvaberethy@msn.com'; 'sbobo@sachnoff.com'; 'bsangha@sachnoff.com'; 'Samuel Abernethy'; 'shimer@enter.net'; 'triadcapital@comcast.net'
Cc: Bickham, Venice M.
Subject: Notice of Telephonic Deposition

Good Afternoon,

Attached is the Notice of Telephonic Deposition of Robert Collis. If you should have any questions regarding this matter, please call Joy McCormack at 312/ 596-0527.

Venice M. Bickham
Paralegal Specialist
(312) 596-0554 phone
(312) 596-0714 fax

Elizabeth M. Streit, Lead Trial Attorney
Scott R. Williamson, Deputy Regional Counsel
Rosemary Hollinger, Regional Counsel
Commodity Futures Trading Commission
525 West Monroe Street, Suite 1100
Chicago, Illinois 60661
312-596-0537
ES-2235
SW-9752
RH-6870

Paul Blaine
Assistant United States Attorney
for the District of New Jersey
Camden Federal Building & U.S. Courthouse
401 Market Street, 4th Floor
Camden, NJ 08101
856-757-5412
PB-5422

In The United States District Court
For The District Of New Jersey

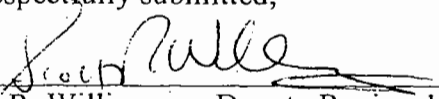
Commodity Futures Trading Commission, Plaintiff, vs. Equity Financial Group LLC, Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., Magnum Capital Investments, Ltd., Vincent J. Firth, Robert W. Shimer, Coyt E. Murray, and J. Vernon Abernethy, Defendants.	Civil Action No: 04 CV 1512 (RBK/AMD) Judge Robert B. Kugler Magistrate Judge Ann Marie Donio **Notice of Telephonic Deposition Pursuant to Fed. R. Civ. P. 30**

PLEASE TAKE NOTICE, that pursuant to Rule 30 of the Federal Rules of Civil Procedure, the undersigned will take the **telephonic** deposition of **Robert Collis on January 25, 2006 to commence at 9:00 a.m.** CST by stenographic means before a notary public or other officer authorized by law to administer oath(s).

Any party who intends to participate must provide notice to Plaintiff no later than **January 19, 2006 via email at jmccormack@cftc.gov**. By further email, Plaintiff shall provide a telephone number for participation in this deposition.

Date: **January 12, 2006**

Respectfully submitted,



Scott R. Williamson, Deputy Regional Counsel
Commodity Futures Trading Commission
525 West Monroe Street, Suite 1100
Chicago, Illinois 60661
(312) 596-0700 (phone)
(312) 596-0714 (facsimile)

CERTIFICATE OF SERVICE

The undersigned non-attorney, Venice Bickham, does hereby certify that on **January 12, 2006** she caused a true and correct copy of the foregoing Notice of Telephonic Deposition for Robert Collis to be served upon the following persons via email and regular U.S. Mail as indicated

On behalf of Coyt E. Murray, Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., and Magnum Capital Investments, Ltd.
Melvyn J. Falis
Martin H. Kaplan
Gusrae, Kaplan, Bruno & Nusbaum, PLLC
120 Wall Street
New York, NY 10005
mkaplan@gkblaw.com
mfalis@gkblaw.com

Defendant J. Vernon Abernethy, pro se
J. Vernon Abernethy
413 Chester St.
Gastonia, NC 28052
jvabernethy@msn.com

Receiver
Stephen T. Bobo
Sachnoff & Weaver, Ltd.
10 S. Wacker Drive, 40th Floor
Chicago, IL 60606-7484
sbobo@sachnoff.com

Bina Sanghavi
Sachnoff & Weaver, Ltd.
10 S. Wacker Drive, 40th Floor
Chicago, IL 60606-7484
bsanghavi@sachnoff.com

On behalf of Equity Financial Group,
Samuel Abernethy
Paul Hellegers
Menaker and Hermann
10 E. 40th St., 43rd Floor
New York, NY 10014
SFA@mhjur.com

Defendant Robert W. Shimer, pro se
Robert W. Shimer
1225 West Leesport Rd
Leesport, Pennsylvania 19533
shimer@enter.net
U.S. Mail

Defendant Vincent J. Firth, pro se
Vincent J. Firth
3 Aster Court
Medford, NJ 08055
triadcapital@comcast.net
U.S. Mail

Venice Bickham, Paralegal Specialist

Elizabeth M. Streit, Lead Trial Attorney
Scott R. Williamson, Deputy Regional Counsel
Rosemary Hollinger, Regional Counsel
Commodity Futures Trading Commission
525 West Monroe Street, Suite 1100
Chicago, Illinois 60661
312-596-0537
ES-2235
SW-9752
RH-6870

Paul Blaine
Assistant United States Attorney
for the District of New Jersey
Camden Federal Building & U.S. Courthouse
401 Market Street, 4th Floor
Camden, NJ 08101
856-757-5412
PB-5422

In The United States District Court
For The District Of New Jersey

Commodity Futures Trading Commission, Plaintiff, vs. Equity Financial Group LLC, Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., Magnum Capital Investments, Ltd., Vincent J. Firth, Robert W. Shimer, Coyt E. Murray, and J. Vernon Abernethy, Defendants.	Civil Action No: 04 CV 1512 (RBK/AMD) Judge Robert B. Kugler Magistrate Judge Ann Marie Donio **Notice of Telephonic Deposition Pursuant to Fed. R. Civ. P. 30**

PLEASE TAKE NOTICE, that pursuant to Rule 30 of the Federal Rules of Civil Procedure, the undersigned will take the **telephonic** deposition of **Nicholas Stevenson on February 28, 2006 to commence at 1:00 p.m.** CST by stenographic means before a notary public or other officer authorized by law to administer oath(s).

Any party who intends to participate must provide notice to Plaintiff no later than **February 24, 2006 via email at jmccormack@cftc.gov**. By further email, Plaintiff shall provide a telephone number for participation in this deposition.

Date: **February 17, 2006**

Respectfully submitted,

Elizabeth M Streit

Elizabeth M. Streit, Lead Trial Attorney
Commodity Futures Trading Commission
525 West Monroe Street, Suite 1100
Chicago, Illinois 60661
(312) 596-0700 (phone)
(312) 596-0714 (facsimile)

CERTIFICATE OF SERVICE

The undersigned non-attorney, Venice Bickham, does hereby certify that on **February 17, 2006** she caused a true and correct copy of the foregoing **Notice of Telephonic Deposition of Nicholas Stevenson** to be served upon the following persons as indicated via email and regular U.S. Mail:

On behalf of Coyt E. Murray, Tech Traders, Inc., Tech Traders, Ltd., Magnum Investments, Ltd., and Magnum Capital Investments, Ltd.
Melvyn J. Falis
Martin H. Kaplan
Gusrae, Kaplan, Bruno & Nusbaum, PLLC
120 Wall Street
New York, NY 10005
mkaplan@gkblaw.com
mfalis@gkblaw.com

Defendant J. Vernon Abernethy, pro se
J. Vernon Abernethy
100 Glenway St.
No. K.
Belmont, NC 28012
jvabernethy@msn.com

Receiver
Stephen T. Bobo
Sachnoff & Weaver, Ltd.
10 S. Wacker Drive, 40th Floor
Chicago, IL 60606-7484
sbobo@sachnoff.com

Bina Sanghavi
Sachnoff & Weaver, Ltd.
10 S. Wacker Drive, 40th Floor
Chicago, IL 60606-7484
bsanghavi@sachnoff.com

On behalf of Equity Financial Group,
Samuel Abernethy
Paul Hellegers
Menaker and Hermann
10 E. 40th St., 43rd Floor
New York, NY 10014
SFA@mhjur.com

Defendant Robert W. Shimer, pro se
Robert W. Shimer
1225 West Leesport Rd
Leesport, Pennsylvania 19533
rshimer@enter.net
U.S. Mail

Defendant Vincent J. Firth, pro se
Vincent J. Firth
3 Aster Court
Medford, NJ 08055
triadcapital@comcast.net
U.S. Mail

Venice Bickham

Venice Bickham, Paralegal Specialist

Issued by the

United States District Court

FOR THE
SOUTHERN DISTRICT OF NEW YORK

COMMODITY FUTURES TRADING COMMISSION

Plaintiff,

VS

EQUITY FINANCIAL GROUP, LLC
VINCENT J. FIRTH, ROBERT W. SHIMER,
J. VERNON ABERNETHY, COYT E. MURRAY,
TECH TRADERS, INC., TECH TRADERS, LTD.,
MAGNUM INVESTMENTS, and
MAGNUM CAPITAL INVESTMENTS, LTD

JUDGE ROBERT B. KUGLER

CASE NUMBER:
1:04CV-01512-RBK-AMD
(Currently pending in the District of New Jersey)

Defendants.

TO: Mr. Nicholas Stevenson
One Liberty Plaza
New York, NY 10006

YOU ARE COMMANDED to appear in the United States District Court at the place, date, and time specified below to testify in the above case.

PLACE OF TESTIMONY	COURTROOM:
	DATE AND TIME:

YOU ARE COMMANDED to appear at the place, date, and time specified below to testify at the taking of a deposition in the above case.

PLACE OF DEPOSITION	DATE AND TIME
COMMODITY FUTURES TRADING COMMISSION **140 Broadway** **19th Floor, Room 1906** **New York, NY 10005**	**February 28, 2006 at 2:00 P.M. (EST)**

YOU ARE COMMANDED to produce and permit inspection and copying of the following documents or objects at the place, date, and time specified below (list documents or objects):

PLACE	DATE AND TIME

YOU ARE COMMANDED to produce and permit inspection of the following premises at the date and time specified below.

PREMISES	DATE AND TIME

Any organization not a party to this suit that is subpoenaed for the taking of a deposition shall designate one or more officers, directors, or managing agents, or other persons who consent to testify on its behalf, and may set forth, for each person designated, the matters on which the person will testify. Federal Rules of Civil Procedure, 30(b)(6).

Issuing Officer Signature and Title (Indicate if attorney for Plaintiff or Defendant)

Date: **2/17/06**

Attorney for Plaintiff Elizabeth Mstreit

Issuing Officer's Name, Address, and Phone Number
Elizabeth Streit, Lead Trial Attorney
Commodity Futures Trading Commission
525 West Monroe Street, Suite 1100
Chicago, IL 60661
(312) 596-0537

(See Rule 45, Federal Rules of Civil Procedure Parts C & D on Reverse)

AO 88 (Rev. 1/94) Subpoena in a Civil Case

PROOF OF SERVICE

SERVED: **NICHOLAS STEVENSON** DATE: **2/17/06** PLACE: **One Liberty Plaza**
New York, NY 10006

SERVED ON (PRINT NAME): **NICHOLAS STEVENSON** MANNER OF SERVICE: **VIA ELECTRONIC MAIL**
NSTEVENSON6@HOTMAIL.COM

TITLE: **LEAD TRIAL ATTORNEY**

DECLARATION OF SERVER

I declare under penalty of perjury under the laws of the United States of America that the foregoing information contained in the Proof of Service is true and correct.

Executed on **February 17, 2006**
DATE

Elizabeth Mstreit
SIGNATURE OF SERVER

CFTC
525 West Monroe Street, Suite 1100
Chicago, IL 60661

(c) PROTECTION OF PERSONS SUBJECT TO SUBPOENAS.

(1) A party or an attorney responsible for the issuance and service of a subpoena shall take reasonable steps to avoid imposing undue burden or expense on a person subject to that subpoena. The court on behalf of which the subpoena was issued shall enforce this duty and impose upon the party or attorney in breach of this duty an appropriate sanction which may include, but is not limited to, lost earnings and a reasonable attorney's fee.

(2)(A) A person commanded to produce and permit inspection and copying of designated books, papers, documents or tangible things or inspection of premises need not appear in person at the place of production or inspection unless commanded to appear for deposition, hearing or trial.

(2)(B) Subject to paragraph (d)(2) of this rule, a person commanded to produce and permit inspection and copying may, within 14 days after service of the subpoena or before the time specified for compliance if such time is less than 14 days after service, serve upon the party or attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials or of the premises. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials or inspect the premises except pursuant to an order of the court by which the subpoena was issued. If objection is made, the party serving the subpoena may, upon notice to the person commanded to produce, move at any time for an order to compel the production. Such an order to compel production shall protect any person who is not a party or an officer of a party from significant expense resulting from the inspection and copying commanded.

(3)(A) On timely motion, the court by which a subpoena was issued shall quash or modify the subpoena if it

(i) fails to allow reasonable time for compliance;

(ii) requires a person who is not a party or an officer of a party to travel to a place more than 100 miles from the place where that person resides, is employed or regularly transacts business in person, except that, subject to the provisions of clause (c)(3)(B)(iii) of this rule, such a person may in order to attend trial be commanded to travel from any such place within the state in which the trial is held, or

(iii) requires disclosure of privileged or other protected matter and no exception or waiver applies, or

(iv) subjects a person to undue burden.

(B) If a subpoena

(i) requires disclosure of a trade secret or other confidential research, development, of commercial information, or

(ii) requires disclosure of an unretained expert's opinion or information not describing specific events or occurrences in dispute and resulting from the expert's study made not at the request of any party, or

(iii) requires a person who is not a party or an officer of a party to incur substantial expense to travel more than 100 miles to attend trial, the court may, to protect a person subject to or affected by the subpoena, quash or modify the subpoena or, if the party in whose behalf the subpoena is issued shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship and assures that the person to whom the subpoena is addressed will be reasonably compensated, the court may order appearance or production only upon specified conditions.

(d) DUTIES IN RESPONDING TO SUBPOENA.

(1) A person responding to a subpoena to produce documents shall produce them as they are kept in the usual course of business or shall organize and label them to correspond with the categories in the demand.

(2) When information subject to a subpoena is withheld on a claim that it is privileged or subject to protection as trial preparation materials, the claim shall be made expressly and shall be supported by a description of the nature of the documents, communications, or things not produced that is sufficient to enable the demanding party to contest the claim.

McCormack, Joy

From: Bickham, Venice M.

Sent: Friday, February 17, 2006 12:07 PM

To: mkaplan@gkblaw.com; mfalis@gkblaw.com; jvabernethy@msn.com; sbobo@sachnoff.com; bsangha@sachnoff.com; Samuel Abernethy; rshimer@enter.net; Vincent Firth

Cc: Streit, Elizabeth M.; McCormack, Joy; vbickham@ameritech.net

Subject: Notice of Depositon

Attachments: notice of dep - nicholas stevenson.pdf

Good Afternoon,

Attached is the Notice of Deposition of Nicholas Stevenson. If you should have any questions regarding the Notice, please call Elizabeth Streit at (312) 596-0700.

Venice M. Bickham
Paralegal Specialist
(312) 596-0554 phone
(312) 596-0714 fax

EXHIBIT

3

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

vs. Civil Action No.

EQUITY FINANCIAL GROUP, LLC, 1:04CV-01512-RBK-AMD
VINCENT J. FIRTH, ROBERT W.
SHIMER, J. VERNON ABERNETHY,
COYT E. MURRAY, TECH TRADERS,
INC., TECH TRADERS, LTD.,
MAGNUM INVESTMENT, and MAGNUM
CAPITAL INVESTMENTS,

Defendants.

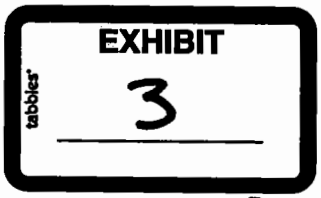
DEPOSITION OF ELAINE TEAGUE

December 21, 2005

Portland, Oregon

VOLUME I

* * *



BE IT REMEMBERED that the deposition of ELAINE TEAGUE was taken pursuant to the Federal Rules of Civil Procedure, before Pamela Beeson Frazier, Certified Shorthand Reporter for Oregon, California, and Washington, and a Registered Professional Reporter, on Wednesday, the 21st day of December, 2005, in the court reporting offices of Beovich, Walter & Friend, 1001 S.W. Fifth Avenue, 12th Floor, Portland, Oregon, commencing at the hour of 10:20 a.m.

APPEARANCES

BULLIVANT HOUSER BAILEY

By: Mr. Thomas L. Hutchinson, appearing on behalf of Elaine Teague and Puttman & Teague;

MR. ROBERT W. SHIMER, appearing pro se;

SACHNOFF & WEAVER

By: Ms. Bina Sanghavi, appearing on behalf of the Equity Receiver and Steven T. Bobo;

verified each month to Shasta Capital and New Century?

MR. HUTCHINSON: That's really the same question phrased in a different way.

I mean, you can answer it, Elaine.

THE WITNESS: If you're asking me if that impaired my independence because I knew you and you were a friend?

BY MR. SHIMER:

Q. Yes.

A. No, I don't believe that it did.

Q. Okay.

A. I have clients who are friends now.

THE VIDEO TECHNICIAN: Counsel, two minutes' worth of tape.

MR. SHIMER: Okay.

MR. HUTCHINSON: I think -- when we change we're done, because I think everybody is getting tired.

BY MR. SHIMER:

Q. Did you have occasion to call Mr. Abernethy in April of 2004 shortly after the current legal action was filed against defendants Firth and Shimer, but not against Mr. Abernethy or Mr. Coyt Murray?

To the best of your recollection, what did Vernon Abernethy tell you when you told him about the possibility of losses at Tech Traders?

A. He said to me that he didn't see any losses.

Q. Were you shocked to learn there might be losses at Tech Traders instead of the profitable rates of return that Vernon Abernethy was consistently reporting and providing to you and your firm for the benefit of your client, Shasta?

A. Of course I was.

Q. Do you believe -- this is my last question.

Do you believe the limited role of your CPA firm was adequately disclosed to Shasta's members in both the private placement memorandum and the subscription documents that each member of Shasta signed?

MR. HUTCHINSON: I'm going to object. It calls for a legal opinion.

THE WITNESS: Yeah, it does.

THE VIDEO TECHNICIAN: I'm out of tape.

MR. HUTCHINSON: Are we done?

MR. SHIMER: Actually, I had one more quick question here, and that's the last one, and I think she might want to answer it.

THE VIDEO TECHNICIAN: Well, we can try and run. I don't know how much the lead will go --

MR. HUTCHINSON: Go.

BY THE WITNESS:

Q. Okay. My last quick question is, Ms. Teague, did you and your firm do everything that was required of you and your firm as you understood your responsibility to be to your client, Shasta?

A. Yes. As far as I believed my responsibility to be -- yes, we did. We did what we thought we should do.

MR. SHIMER: Thank you.

THE VIDEO TECHNICIAN: Off the record at 6:09.

(Deposition recessed at 6:09 p.m.)

CERTIFICATE

I, Pamela Beeson Frazier, Certified Shorthand Reporter for Oregon, California, and Washington, and a Registered Professional Reporter, do hereby certify that ELAINE TEAGUE personally appeared before me at the time and place set forth herein; that at said time and place I reported in stenotype all testimony adduced and other oral proceedings had in the foregoing matter; that thereafter my notes were transcribed using computer-aided transcription under my direction; and the foregoing transcript constitutes a full, true and accurate record of such testimony adduced and oral proceedings had and of the whole thereof.

Witness my hand and stamp at Portland, Oregon, this 4th day of January, 2006.

_____

PAMELA BEESON FRAZIER

CSR No. 90-0061

EXHIBIT

4

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF NEW JERSEY

COMMODITY FUTURES TRADING
COMMISSION,

Plaintiff,

vs. Civil Action No.

EQUITY FINANCIAL GROUP, LLC, 1:04CV-01512-RBK-AMD
VINCENT J. FIRTH, ROBERT W.
SHIMER, J. VERNON ABERNETHY,
COYT E. MURRAY, TECH TRADERS,
INC., TECH TRADERS, LTD.,
MAGNUM INVESTMENT, and MAGNUM
CAPITAL INVESTMENTS,

Defendants.

DEPOSITION OF ELAINE TEAGUE

January 12, 2006

Portland, Oregon

Volume II - Pages 291 to 463

* * *

BE IT REMEMBERED that the continuation of the deposition of ELAINE TEAGUE was taken pursuant to the Federal Rules of Civil Procedure, before Pamela Beeson Frazier, Certified Shorthand Reporter for Oregon, California, and Washington, and a Registered Professional Reporter, on Thursday, the 12th day of January, 2006, in the court reporting offices of Beovich, Walter & Friend, 1001 S.W. Fifth Avenue, 12th Floor, Portland, Oregon, commencing at the hour of 1:17 p.m.

APPEARANCES

BULLIVANT HOUSER BAILEY
By: Mr. Thomas L. Hutchinson, appearing on behalf of Elaine Teague and Puttman & Teague;

SACHNOFF & WEAVER
By: Ms. Bina Sanghavi, appearing on behalf of the Equity Receiver and Steven T. Bobo;

COMMODITY FUTURES TRADING COMMISSION
By: Ms. Elizabeth M. Streit, Supervisory Trial Attorney, Division of Enforcement.

ALSO PRESENT

Bobby Behn, I-View Video

Joy McCormack, appearing by telephone

* * *

THE VIDEO TECHNICIAN: We're on the record at 1:17 p.m.

ELAINE TEAGUE,

called as a witness, being previously sworn, is further examined and testifies as follows:

EXAMINATION

BY MS. STREIT:

Q. Ms. Teague, you understand you are still under oath?

A. Yes.

Q. First, I would like to go over some of your testimony from last time when Mr. Shimer was questioning you.

But in terms of Mr. Shimer, perhaps we should put on the record, at the end of our session last time Mr. Shimer indicated that he would not be attending the continuation of Ms. Teague's deposition. We discussed the timing of that deposition at that time. We said it would be the 12th and 13th of January and that's what today is, the 12th of January.

Mr. Shimer said he would be out of the country and that he was okay with us going ahead

and finishing the deposition in his absence.

Does anybody else want to put their recollection of that on the record?

MR. HUTCHINSON: That's my recollection, as well. And my understanding is that Mr. Shimer agreed to waive his appearance at this deposition.

MS. SANGHAVI: That's my recollection as well.

BY MS. STREIT:

Q. Ms. Teague, last time when Mr. Shimer was questioning you he asked you some questions about a job you held when you worked for somebody named Monty Guild.

A. Right.

Q. Do you recall that testimony?

A. Yes, yes, I do.

Q. And could you tell me what that, what company you worked for that involved Mr. Guild?

A. Yes. Mr. Guild is the president and owner of Guild Investment Management.

Q. And what kind of work did you do there?

A. I was his executive secretary.

Q. And what did that entail?

EXHIBIT

5

McCormack, Joy

From: Streit, Elizabeth M.
Sent: Thursday, December 22, 2005 5:23 PM
To: Hutchinson, Tom; McCormack, Joy; 'shimer@enter.net'
Subject: RE: Deposition of Elaine Teague

I am planning on those dates. Let's start at 1 p.m. on the 12th and continue at 9 a.m. on the 13th. I thought we were doing it at the court reporter's office again though.

Elizabeth M. Streit
Senior Trial Attorney
Commodity Futures Trading Commission
525 W. Monroe St.
Suite 1100
Chicago, Illinois 60661
(312) 596-0537
(312) 596-0714 (facsimile)
estreit@cftc.gov

-----Original Message-----
From: Hutchinson, Tom [mailto:Tom.Hutchinson@bullivant.com]
Sent: Thursday, December 22, 2005 2:32 PM
To: Streit, Elizabeth M.; McCormack, Joy; 'shimer@enter.net'
Subject: Deposition of Elaine Teague

This will confirm our availability for the continuation of Elaine Teague's deposition on January 12 and January 13, 2006, at our offices.
Thank you.

Heather Gramson
Assistant to Thomas L. Hutchinson
Bullivant|Houser|Bailey PC
888 S.W. Fifth Avenue, Suite 300
Portland, OR 97204
mailto:Heather.Gramson@bullivant.com
direct dial: 503.499.4683 - fax: 503.295.0915
http://www.bullivant.com
Seattle . Vancouver . Portland . Sacramento . San Francisco . Las Vegas

CERTIFICATE OF SERVICE

The undersigned non-attorney, Anne Smith, does hereby certify that on July 30, 2007 she caused a true and correct copy of the foregoing **Motion in Limine to Deem Untimely Objections by Defendants Firth and Shimer in the Pretrial Order Waived** to be served upon the following persons via first class mail:

On behalf of Equity Financial Group,
Samuel Abernethy
Menaker and Hermann
10 E. 40th St., 43rd Floor
New York, NY 10014
SFA@mhjur.com

Defendant Robert W. Shimer, pro se
Robert W. Shimer
1225 West Leesport Rd
Leesport, Pennsylvania 19533
rwshimer@enter.net

Defendant Vincent J. Firth, pro se
Vincent J. Firth
3 Aster Court
Medford, NJ 08055
triadcapital@comcast.net

Anne Smith
Anne Smith, Secretary