

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 07-22570-CIV-MARTINEZ/BROWN

SECURITIES AND EXCHANGE COMMISSION)
)
Plaintiff,)
v.)
)
U.S. PENSION TRUST CORP.)
U.S. COLLEGE TRUST CORP.)
ILIANA MACEIRAS,)
LEONARDO MACEIRAS, JR.,)
NILDO VERDEJA,)
)
Defendants.)

**DEFENDANTS’ RESPONSE IN OPPOSITION TO PLAINTIFF’S
APPLICATION FOR AN ORDER TO SHOW CAUSE WHY DEFENDANTS
U.S. PENSION TRUST, U.S. COLLEGE TRUST, ILIANA MACEIRAS,
LEONARDO MACEIRAS, AND NILDO VERDEJA SHOULD NOT BE HELD IN
CONTEMPT OF THE COURT’S MARCH 12, 2009 ORDER AND FOR SANCTIONS**

Defendants U.S. Pension Trust Corp. and U.S. College Trust Corp. (collectively, the “Companies”) and Iliana Maceiras, Leonardo Maceiras, Jr., and Nildo Verdeja (collectively, the “Individual Defendants”) (altogether, “Defendants”) hereby respond to Plaintiff Securities and Exchange Commission’s (the “Commission”) Application for an Order to Show Cause Why Defendants U.S. Pension Trust, U.S. College Trust, Iliana Maceiras, Leonardo Maceiras, and Nildo Verdeja Should Not Be Held in Contempt of the Court’s March 12, 2009 [*sic*]¹ Order and for Sanctions [D.E. 122] (hereinafter, “Motion”). The Commission’s Motion should be denied for the following reasons:

¹ The Court’s Order Re: Motions to Compel and Further Discovery is dated March 11, 2009.

1. The Commission has ignored the Court's Order dated March 11, 2009, which provided that "Plaintiff may file a supplemental motion – only addressed to the prior motions – with regard to any outstanding discovery issues that remain, by Tuesday, March 31, 2009." *See* Order Re: Motions to Compel and Further Discovery dated March 11, 2009 [D.E. 114] ("Order") at ¶ 8. The Court permitted the additional briefing at the Commission's behest, on the heels of its eleventh hour motion to continue the trial. The Commission claimed that additional discovery was needed—although it had filed a motion for summary judgment *on July 25, 2008*. In response, this Court entered its Order, which, among other things, allowed for supplemental briefing. Rather than follow the Court's instructions, the Commission filed its Motion seeking an Order to Show Cause and severe sanctions against Defendants and their counsel.² In an effort to remain on track for the April 8, 2009 hearing set by the Court, Defendants are responding to the Motion in accordance with the abbreviated schedule.
2. The Motion is without merit and should be summarily denied. Defendants have fully complied with the Order. To that end, on March 23, 2009, Defendants made a supplemental production of over 7,200 pages of documents and provided detailed supplemental answers to the Commission's request for production that addressed each of the categories of documents produced, by Bates range, and satisfied Defendants' obligations under the Order.

² Although not stated until the page 15 of its Motion, the Commission also appears to be seeking an order to show cause and monetary sanctions against counsel for the Defendants. *See* Motion at 15-16.

3. Defendants have also complied with the Court's requirement that they produce all electronic discovery, including the "Application Extender Data Base," in a useable format. *See* Order at ¶ 1. Although it protested mightily before this Court about the state of Defendants' production, the Commission has rejected the Defendants' arrangements without ever attempting to access this database.
4. Defendants have further complied with the Court's requirement that they produce documents in their "care, custody and/or control," including all relevant documents set forth in ¶ 3 of the Order. *Id.* at ¶¶ 2-3. The Court previously recognized that the parties should have an opportunity to present legal argument as to whether the independent agents and regional directors of the Companies are, as a matter of law, under Defendants' control. Despite this Court's prior ruling on this point, in its Motion, the Commission takes the position that Defendants and their counsel should be held in contempt and subject to monetary sanctions **prior** to any final determination being made by the Court as to this legitimate dispute.
5. While the Commission never raised the interrogatory answers with the Court at the hearing held before Magistrate Judge Stephen T. Brown on March 10, 2009, applicable law states that it is duplicative and a waste of resources to require interrogatory answers after depositions have occurred. Here, the Commission has deposed each of the Individual Defendants and has had ample opportunity to question those individuals—and did in fact question them—regarding the matters set forth in the interrogatories. Thus, this argument is a red herring.
6. The Commission's request for an order to show cause and for severe monetary sanctions are unsupported by the facts of this case or applicable law. Indeed, the

very cases relied upon by the Commission demonstrate that such sanctions are inappropriate given the state of the record and Defendants' full compliance with the Order. The Motion should be denied.

I. THE COMMISSION HAS DISREGARDED THE COURT'S ORDER WHILE FALSELY ACCUSING DEFENDANTS AND THEIR COUNSEL OF VIOLATING THAT VERY ORDER

On March 10, 2009, Magistrate Judge Brown conducted a hearing where he heard, at length, from counsel for the parties. The following day, the Court issued an order *granting in part and denying in part* the Commission's motions to compel. *See* Order at 1. The Order sets forth a series of additional deadlines, culminating in a "subsequent hearing for the day of April 8, 2009 (commencing at 10:00 A.M.) . . . if needed." *Id.* at ¶ 7. This Order does not appear to contemplate or endorse the Commission's decision to forego supplementing their motions to compel and to skip directly to a penalty phase. Rather, it provides that the Commission shall "file a supplemental motion – only addressed to the prior motions – with regard to any outstanding discovery issues that remain, by Tuesday, March 31, 2009." *Id.* at ¶ 8. This attempt to circumvent the Court's Order is improper, especially in light of the fact that Defendants made a supplemental production of over 7,200 pages of documents, as set forth in subsection II., below, and have fully complied with the Court's Order.

In addition to the explicit language of the Order, the transcript of the hearing dated March 10, 2009 clearly establishes that the Court was not making a final ruling on the motions to compel at that time or in the subsequent Order, but, rather, was giving the parties an opportunity to resolve the issues directly. To the extent that they could not do so, this Court determined that another hearing would be held. The Court concluded the March 10, 2009 hearing by stating that it is

setting another hearing, okay, and I am going to require, and I will tell you right now that hearing is going to be Wednesday, April the 8th. If you have got a conflict, you better change it. Okay. I am going to set it to commence at 10:00

a.m. I am going to hope that we are through by lunchtime. I am not going to bet on it, but I am going to hope. **I am going to give each side requirements as to what they are going to have to do before that hearing.**

March 10, 2009 Hearing Transcript at 52:15-24 (emphasis added). A true and correct copy of the transcript is attached hereto as Exhibit 1. As set forth in subsection II., below, Defendants have abided by the requirements set forth in the Order. *See also* Defendants' Notice of Compliance With Paragraph 4 of Order Re: Motions to Compel and Further Discovery dated March 23, 2009 [D.E. 119]. The Commission has failed to provide any evidence of Defendants' failure to comply, much less any evidence that they willfully failed to produce materials ordered by this Court. The Motion is devoid of the evidence necessary to sustain the burden on a motion for sanctions; accordingly, the Motion should be denied.

II. DEFENDANTS' SUPPLEMENTAL PRODUCTION OF MORE THAN 7,200 PAGES OF DOCUMENTS ON MARCH 23, 2009 FULLY COMPLIES WITH THE COURT'S ORDER

Upon receiving the Court's Order on March 12, 2009, the date on which the Order was docketed and served on the parties via CM/ECF notification, Defendants worked diligently to supplement their prior production. In so doing, they addressed each of the requirements set forth in the Order and also responded to each of the categories of documents that the Commission claimed it needed during the previous conferral, which occurred on March 6, 2009. This March 6, 2009 conferral lasted for over two-and-a-half hours, during which time the Commission described the documents it believed needed to be produced. The supplemental production made by Defendants on March 23, 2009 addressed every request made by the Commission during the March 6, 2009 conferral.

Specifically, the supplemental production included the following categories of documents:

- All payroll records from 2003 to 2008. *See* Bates Nos. USPT-SUPP-000001 – 2071.³
- All website statistics that Defendants could locate. *See* USPT-SUPP-002072 – 106 and www.usptweblink.com/reports.asp, a publicly-available website where the information is stored in its native format.⁴
- Each version of the trust agreement used by the Companies. *See* USPT-SUPP-002107 – 222.
- The account statement used by U.S. Pension Trust from 1995 until October 1997, *see* USPT-SUPP-002223, the only time period missing from the prior production. After the supplemental production, the Commission brought to Defendants' attention the omission of account statements used by U.S. College Trust. Defendants immediately rectified this inadvertent omission by providing those account statements on March 27, 2009. *See* March 27, 2009 letter to Scott A. Masel, Esq. and Amie Riggle Berlin, Esq., attached as Exhibit B to the Commission's Motion, at ¶ 2. *See also* USPT-SUPP-007250-53.
- Each of the versions of the investor certificates used by the Companies since their inception. *See* USPT-SUPP-002224 – 26.
- Tax returns for U.S. College Trust for 1997 to 2003 and 2005 to present. *See* Bates Nos. USPT-SUPP-002227 – 379.⁵
- Tax returns for U.S. Pension Trust for 1995 to present. *See* Bates Nos. USPT-SUPP-002380 – 703.
- Tax returns for Iliana Maceiras for 1998 to 2000. Tax returns for the period after the year 2000 were previously produced. *See* Bates Nos. USPT-SUPP-002704 – 16.
- Tax returns for Leonardo Maceiras, Jr. for 1995 and 1997 to 2000. Tax returns for the period after the year 2000 were previously produced. *See* USPT-SUPP-002747 – 70.

³ A letter requesting payroll records from 1995-2002 was sent to the third-party payroll vendor. *See* Defendants' Supplemental Answers to Plaintiff's First Request for Production of Documents ("Supplemental Answers to Request for Production"), attached hereto as Exhibit 2, at Exhibit A.

⁴ An inquiry was made of the web host for additional statistics and other website-related information but the web host informed Defendants that it does not keep any such information. *See* Exhibit 2, Supplemental Answers to Request for Production at Exhibit D.

⁵ All missing tax returns have been requested from Paul A. Garcia, C.P.A. Despite these requests, Mr. Garcia has informed Defendants that he cannot produce these documents until after tax season ends on April 15, 2009. *See* Exhibit 2, Supplemental Answers to Request for Production at Exhibit C.

- Tax returns for Nildo Verdeja for 1997 to 1999. Tax returns for the period after the year 1999 were previously produced. *See* Bates Nos. USPT-SUPP-002717 – 46.
- The share register for U.S. Pen Insurance Company. *See* Bates No. USPT-SUPP-002771.
- U.S. Pension Trust financial statements for 1999 through 2002, 2004, and 2006 through present. *See* Bates No. USPT-SUPP-002772 – 805.⁶
- U.S. College Trust financial statements from its inception in late 1997 through 2002 and 2004 through present. *See* Bates No. USPT-SUPP-002806 – 859.
- General ledgers for U.S. Pension Trust for the year 2006 and U.S. College Trust for the years 1998 through 2001, 2002, 2004 and 2006. *See* Bates No. USPT-SUPP-002860 – 3080.⁷
- All documents pertaining to the Mainstay Group, Michael McDonald & Associates, and CORIS. *See* Bates No. USPT-SUPP-003081 – 131.
- Bank statements for U.S. Pension Trust from 2001 through 2008. *See* Bates No. USPT-SUPP-003132 – 6489.⁸
- Bank statements for U.S. College Trust from 1999-2000 and 2002 through 2008. *See* Bates No. USPT-SUPP-006490 – 7249.

After this supplemental production was made, however, the Commission sent counsel for Defendants approximately 52 objections that it claims were not addressed by the supplemental production. *See* Motion, at Exhibit A. It appears that after initially narrowing the remaining discovery issues, the Commission elected to broaden the scope of its requests so as to keep the discovery dispute alive, for whatever reason. Now, in its Motion, the Commission states that it “only raises in this pleading the matters we deem absolutely critical to this case. This reflects a

⁶ All missing financial statements have been requested from Mr. Garcia. *See* footnote 5, *infra*.

⁷ All missing general ledgers have been requested from Mr. Garcia. *See* footnote 5, *infra*.

⁸ A letter requesting missing bank statements was sent to Wachovia Bank. *See* Exhibit 2, Supplemental Answers to Request for Production at Exhibit B. Additional letters have been sent to several banks on March 30, 2009. Copies of those letters were attached to a letter sent to Mr. Masel and Ms. Riggle Berlin on March 30, 2009. A complete copy of the letter sent to the Commission, with attached bank letters, is attached hereto as Exhibit 3.

significant narrowing of the issues.” Motion at 3. Defendants are being whipsawed between the 52 objections made on March 25, 2009 and what the Commission now purports to be a narrower list of “critical” issues in the Motion filed on March 31, 2009. These amorphous demands have made it impossible to ever reach final resolution of these discovery issues despite the fact that the Defendants have made every effort in providing a complete supplemental production.

Moreover, after Defendants served their supplemental production, the Commission contacted Andres Garcia, an employee for the copy service used by Defendants to Bates label and produce the supplemental production to the Commission. The Commission appears to believe that Defendants intentionally told the copy service, Speed Print, not to staple or clip the documents being produced to them. Even though Mr. Garcia told Ms. Berlin that he was not given those instructions by the Defendants, he was told that he could either sign a declaration *prepared by the Commission* that states that the Defendants told him not to staple or clip the documents or he would be subpoenaed to appear at the April 8, 2009 hearing. Mr. Garcia would not swear to a declaration that misrepresented the conversations between him and Defendants and, therefore, a subpoena was served on Mr. Garcia on April 2, 2009. A copy of the *unsigned* declaration prepared by the Commission for Mr. Garcia’s signature is attached hereto as Exhibit 3. The supplemental production was produced with Bates labels and the Supplemental Answers to the Request for Production outlines the Bates range for each type of responsive document. The omission of staples was necessitated by the tight deadline to get the supplemental production to the Commission on the deadline set forth in the Order and was not gamesmanship. Defendants would like nothing more than to get past this discovery dispute once and for all.

III. DEFENDANTS HAVE MADE THE “APPLICATION EXTENDER DATA BASE” AVAILABLE TO THE COMMISSION IN A USEABLE FORMAT, THEREBY COMPLYING WITH PARAGRAPH ONE OF THE ORDER

The Court ordered Defendants to produce the “Application Extender Data Base,” which is also referred to by Defendants as the “scanned document server,” in a “useable format.” *See* Order at ¶ 1. In full compliance with the Order, Defendants arranged, at their considerable expense, to have George Bushak at United Business Products install software and assist its setup so that the Commission would have full and complete access to the scanned document server. United Business Products is the third-party vendor that installed software for the Companies so that they could access the scanned document server. Therefore, by arranging to have Mr. Bushak set up access to the scanned document server for the Commission and then asking the Commission to work directly with him, Defendants fully complied with the Order and provided the Commission the materials it claimed it desperately needed to prepare its case. Ironically, had Defendants not arranged for direct contact between the Commission and United Business Products, counsel for the Commission would likely complain that Defendants did not provide the Commission with a direct contact with the party doing the installation. As the saying goes, no good deed goes unpunished.

Despite their efforts to comply with the Order in a very tight time period, the Commission claims that Defendants and their counsel have intentionally violated the Court’s Order by having United Business Products provide remote access. The Commission further claims, although they were never a party to any conversation between Defendants and United Business Products, that Defendants only asked Mr. Bushak to provide remote access to the Commission. This is simply incorrect and there is no evidence in the record of this unsupported allegation.

On the contrary, Mr. Bushak discussed the various types of software offered by United Business Products that would provide **full, useable access** to the scanned document server. One of those options was to provide the “Application Xtender Server,” which would provide the Commission with all of the tools, search screens, access, and capabilities as are available to Defendants. This would require Mr. Bushak to set up a username and password for the Commission, install certain files to permit the new access point to the scanned document server, and assist the Commission’s information technology staff with installing certain files to make sure that the program is fully functional.

The second option for providing access to the scanned document server is to purchase a \$13,500 software suite that provides the exact same tools, search screens, access, and capabilities as the previous option. As the full software suite would not provide any additional function and would be unduly burdensome in its expense, Defendants made arrangements to have the Application Xtender Server set up so that the Commission would have access to the scanned document server in a “useable format.”

Rather than test the Application Xtender Server, the Commission simply rejected this offer and filed the subject Motion. The Commission has refused to make a good faith effort to even test the Application Xtender Server. If it had, it would have decidedly learned that it provides complete access to the scanned document server and to all of the information it claims it so desperately needed.

Finally, with respect to the Commission’s claim that Defendants would be able to track the documents it accessed in the scanned document server, this claim is likewise incorrect. Mr. Bushak told the information technology employee at the Commission that this function was available and could have been installed, but that it was not and, hence, Defendants have no such

capability. *See* Declaration of George Bushak, attached hereto as Exhibit 3, at ¶¶ 4-5.

Moreover, counsel for Defendants, as officers of the Court, previously assured counsel for the Commission that neither they nor their clients would ever attempt to install or use such a feature. The Commission's claims are therefore insufficient to sustain its burden on the instant motion, which should be denied.

IV. DEFENDANTS COMPLIED WITH THE COURT'S REQUIREMENT THAT THEY PRODUCE DOCUMENTS IN THEIR CARE, CUSTODY, AND CONTROL; HOWEVER A LEGITIMATE DISPUTE EXISTS AS TO WHETHER THE INDEPENDENT AGENTS AND REGIONAL DIRECTORS ARE UNDER DEFENDANTS' CONTROL

- A. *Defendants have addressed each of the categories set forth in ¶ 3 of the Court's Order and have produced all responsive documents in their possession, custody, and control.*

In the Order, the Court identifies four specific categories of documents that needed to be produced, to the extent that they had not been produced already. In their Supplemental Answers to the Request for Production, Defendants addressed each of these categories.

In regards to the travel service documents, the Commission makes several incorrect claims. First, the Commission states that Defendants produced “*one* travel service document.” Motion at 4 (emphasis in original). As evident from the actual production, *see* Bates Nos. USPT-SUPP-003107 – 131, attached hereto as Exhibit 6, Defendants produced their entire file for CORIS, the travel service, as it is kept in the usual course of business. This production includes the contract between CORIS and the Companies and *the very same travel service documents* that the Commission claims in its Motion were not produced. *See* Motion at 4. The only additional document produced by the Commission as evidence of the allegedly intentional withholding of “additional travel documents” is a one-page cover letter sent to plan participants by Ms. Maceiras. Defendants did not keep a copy of this letter in the file for the travel service

and, as a result, could not have produced it. Notably, even the Commission recognizes that correspondence such as this between plan participants and the Companies is contained in the scanned document server, addressed in subsection III., *infra*. See Motion at 4. Therefore, while the Commission alleges that “extensive evidence exists that the defendants have additional travel documents,” it cannot identify any documents that were not produced. *Id.* At the previous hearing, the Court found that “plaintiff’s argument that defendants ‘must have it’ was not persuasive. . . .” (Order at ¶ 5), and it is no more persuasive today.

In regards to documents involving the Mainstay Group, Defendants reiterated in their Supplemental Answers to the Request for Production that they previously produced all documents in their possession, custody, or control. See Exhibit 2, at 6. Without basis, the Commission claims that Defendants had an obligation to contact the Mainstay Group to demand documents from this third-party consultant. Conspicuously absent is any claim by the Commission that the Mainstay Group is under Defendants’ control, let alone does the Commission meet its burden of establishing such control. See *Burton Mech. Contractors, Inc. v. Foreman*, 148 F.R.D. 230, 236 (N.D. Ind. 1992) (“ ‘A party seeking production of documents bears the burden of establishing the opposing party’s control over those documents.’” (citations omitted)). Indeed, the Mainstay Group is not under Defendants’ control for the reasons set forth in subsection IV.b., below.

The Commission has been aware of the Mainstay Group since May 7, 2008, at the latest, and does not explain why it did not subpoena the Mainstay Group at that time, even though discovery was still open. See Defendant U.S. Pension Trust Corp.’s Amended Answers to Plaintiff’s First Set of Interrogatories at 10 [D.E. 32, Exhibit 4]; Defendants’ Amended Answers to Plaintiff’s First Request for Production at 9 [D.E. 31, Exhibit 4]. Defendants do not control

this third party provider and simply cannot be the scapegoat for the Commission's failure to conduct what it claims is necessary discovery.

The Commission further argues that it did not receive access to all sales agent files, including the paper files kept at the Companies that predate those kept in the scanned document server. Motion at 5. The Commission acknowledges that Defendants have invited the Commission to the Companies' office to examine these documents as they are kept in the usual course of business. *Id.* In its Motion, the Commission creates the false impression that Defendants refused this offer until now. Defendants invited the Commission to the Companies' office on June 17-18, 2008, and permitted the inspection of paper files. While the Commission claims that it was only shown plan participant files, the Commission was offered access to *all* files. This miscommunication was brought to Defendants' attention for the first time in the Commission's letter dated March 25, 2009, where the Commission asserted 52 newfound objections, attached as Exhibit A to the Motion. Defendants made arrangements for the inspection of all paper files of plan participants in June 2008 and would have immediately arranged an inspection of agent files had they known that those files were still being sought by the Commission. It remains willing to do so now.

In short, Defendants fully complied with each of the categories set forth in paragraph 3 of the Order and the Commission's claim that a finding of contempt and severe sanctions are warranted should be rejected.

B. *The Court recognized at the March 10, 2009 hearing that the parties should have the opportunity to brief the issue of whether the independent agents and regional directors are under the Companies' control. The facts and applicable law support Defendants' position that there is no such control for purposes of discovery.*

At the hearing on March 10, 2009, the Court stated that the parties would need to address at a future time the issue of whether Defendants actually had "control" over the independent sales agents and regional directors for purposes of discovery. In its Motion, the Commission cites two cases for the proposition that control means that the party served with the discovery request has a legal right to obtain documents upon demand. *See* Motion at 6 (citing *Searock v. Stripling*, 736 F.2d 650 (11th Cir. 1984) and *In re Domestic Air Transp. Antitrust Litig.*, 142 F.R.D. 354, 356 (N.D. Ga. 1992)). However, in *Searock*, one of those cases relied upon by the Commission, the Eleventh Circuit held that the appellant's assertion, in a deposition, that he

had "control" over the documents does not conclusively decide this issue. . . . [H]is testimony on this point was merely a statement that because he lived in Alabama where the repair work was done he would write letters to the repair shops and attempt to obtain the documents. . . . In short, it does not appear from this record that Stripling asserted "control" over the documents in the sense required for production under Rule 34.

Searock, 736 F.2d at 654. In *Chaveriat v. Williams Pipe Line Co.*, 11 F.3d 1420 (7th Cir. 1993), the Seventh Circuit held that "the fact that a party could obtain a document if it tried hard enough and maybe if it didn't try hard at all does not mean that the documents is in its possession, custody, or control; in fact it means the opposite." *Id.* at 1427.

In *Searock*, the Eleventh Circuit further held that "although the district court found that these documents were essential to Allied Marine's defense of counterclaim, ***the record in this case does not reflect that Allied Marine took any attempt to secure these crucial documents itself. Clearly, Allied Marine had the ability to subpoena these documents . . . however, the record does not reflect any such attempt*** by Allied Marine." *Id.* (emphasis added) (holding that

the district court's dismissal of counterclaim as discovery sanction was an abuse of discretion). *See also Chaveriat*, 11 F.3d at 1426-27 (“[I]f the defendant had wanted pertinent documents in the custody or control of any of those entities it had only to issue a subpoena duces tecum. . . . It did not do so.”). Likewise, the Commission made no attempts to subpoena documents from the independent agents or regional directors, or any of the third-party vendors, that the Commission now claims are essential to their claims.

The only other case upon which the Commission relies is *In re Domestic Air Transp. Antitrust Litig.*, 142 F.R.D. 354, where the court held that a party was required to produce documents kept by *employees and ex-employees* of the company. *Id.* at 357. Even though the Commission has previously argued that these independent agents and regional directors are employees of the Companies, despite any evidence supporting such a claim, the Commission has since contacted these individuals *directly*, which would constitute impermissible contact with a party represented by counsel under the Commission's own unsupported theory. *See* Motion at Exhibit M (Declaration of Alfredo Tognetti). Therefore, the Commission's actions belie its argument that the independent agents and regional directors are subject to the Companies' control.

V. THE COMMISSION'S CLAIM THAT THE RESPONSES TO THE INTERROGATORIES ARE INSUFFICIENT IS UNFOUNDED WHERE, AS HERE, THE COMMISSION HAS SINCE DEPOSED EACH OF THE INDIVIDUAL DEFENDANTS AT LENGTH

After the date on which the interrogatories were served on U.S. Pension Trust Corp., the Commission deposed each of the Individual Defendants, each of whom are principals of U.S. Pension Trust. To the extent that the Commission felt that any interrogatory responses given by the U.S. Pension Trust were insufficient, it had the opportunity—and did in fact—question the Individual Defendants at great length regarding the matters set forth in those interrogatories.

“Written interrogatories are most valuable as a device to compel admissions and the disclosure of major factual matters not concerned with details; the deposition is the best device suited to compel disclosure of detailed information.” *Richlin v. Sigma Design West, Ltd.*, 88 F.R.D. 634, 638 (E.D. Cal. 1980). “ ‘[W]here interrogatories served subsequent to deposition are demonstrated by the objector to be substantially duplicative of material already discovered, the court should carefully scrutinize the two successive procedures in order to determine whether there has been an abuse of the discovery procedure and oppression within the meaning of Rule 30(b). . . .’ ” *Id.* at 638 (quoting *Schotthofer v. Hagstrom Constr. Co.*, 23 F.R.D. 666 (S.D. Ill. 1958)). *Richlin* is directly on point. Although the interrogatories were served prior to the depositions, the depositions have since occurred, providing the Commission with an opportunity to seek the sort of detail that they claim is absent from the interrogatory answers.

Other courts have likewise held that depositions are more suitable for the level of detail to which the Commission claims it is entitled. “ ‘It should also be borne in mind that extensive examination of the adverse party by interrogatories is cumbersome and likely to prove inefficient, as compared with the now available method of taking his deposition.’ ” *Colorado Milling & Elevator Co. v. American Cyanamid Co.*, 11 F.R.D. 580, 581 (W.D. Mo. 1951) (quoting *Coca Cola Co. v. Dixi-Cola Labs.*, 30 F. Supp. 275, 278 (D. Md. 1939)). In *Colorado Milling*, the court further stated that “ ‘[i]t was never intended that a party should by interrogatories compel the adverse party to submit every item of evidence he expects to produce on the trial of the case. Nor is a party expected in answer to interrogatories to state his opinions on matters of law or fact.’ ” *Id.* at 582 (quoting *U.S. v. General Motors Corp.*, 2 F.R.D. 528, 532 (N.D. Ill. 1942)). A review of the Commission’s interrogatories makes clear that the detail sought therein is better elicited in a deposition. As noted above, the Commission has already

deposed all material witnesses. Tellingly, the Commission has not filed a motion to compel or otherwise suggested that the witnesses were not compliant or forthcoming in their depositions.

The cases cited by the Commission merely stand for the generic proposition that different methods of discovery are not exclusive and that a party may take depositions *and* interrogatories. *See* Motion at 11. Defendants agree and they have certainly provided responsive information in both arenas here. However, the above authority makes evident that a deposition is the appropriate forum for detailed discovery. Courts have clearly held that interrogatories are not suited to this sort of discovery, especially where depositions are subsequently taken. Although rapt with innuendo, the Motion falls flat when it comes to actual evidence. Nor has the Commission shown how it has been prejudiced because it received some of the more detailed information through deposition rather than by interrogatory answer.

VI. THE CASES RELIED ON BY THE COMMISSION FIRMLY ESTABLISH THAT AN ORDER TO SHOW CAUSE SHOULD NOT BE ISSUED AND THAT NO SANCTIONS SHOULD BE LEVIED AGAINST DEFENDANTS OR THEIR COUNSEL

The Commission cites to cases standing for the general proposition that courts have the power to hold parties in contempt for failure to comply with their orders. Not only have Defendants already shown that they complied with the Court's Order, but the very cases relied upon by the Commission shed light on the type of egregious conduct which is typically subject to the Court's contempt powers and severe sanctions.

In *Sec. & Exchange Comm'n v. Bilzerian*, 112 F. Supp. 12 (D.D.C. 2000), the court held a defendant in contempt for failing to comply with the court's \$62 million disgorgement judgment. *Id.* at 17. *See also Shillitani v. U.S.*, 384 U.S. 364 (1996) (finding of contempt against a witness who refused to answer questions in front of a grand jury on two occasions); *U.S. v. City of Miami*, 195 F.3d 1292 (11th Cir. 1999) (City of Miami held in contempt for violations of

consent decrees that prohibited police officer promotions based on race); *In re Jove Eng'g, Inc.*, 92 F.3d 1539 (11th Cir. 1996) (holding IRS in civil contempt for violating automatic stay after Chapter 11 filing). Here, the Commission fails to establish that Defendants violated a discovery order, let alone a multi-million dollar disgorgement order, as in *Bilzerian*.

In the cases involving a violation of a discovery order, the violations are continuing, repetitive, and in contravention of multiple court orders. In *Beilue v. Int'l Brotherhood of Teamsters, Local No. 492*, 13 Fed. Appx. 810, 812 (10th Cir. 2001), for example, the court sanctioned a defendant for failing to respond to three separate motions for sanctions. Moreover, the defendant continued its blatant disregard for the court's orders even after being fined for attorney's fees, with the court noting that "it was at this point" that the defendant's behavior was an "utter, flagrant disrespect of this Court and of the rights of this Plaintiff." *Id.*

The two cases upon which the Commission relies for its claim of escalating monetary penalties involve the sort of egregious conduct that one might expect to be the subject of such sanctions. In *Sec. & Exchange Comm'n v. Bankers Alliance Corp.*, Civ. A. No. 95-0428 (PLF), 1995 WL 590665 (D.D.C. May 5, 1995), the defendants were ordered to pay daily fines of \$25,000 to \$100,000 per day for failure to repatriate almost \$4 million worth of funds, as required by a preliminary injunction. *Id.* at *1. Likewise, in *Citronelle-Mobile Gathering, Inc. v. Watkins*, 943 F.2d 1297 (11th Cir. 1991), the court held a party in civil contempt for violation of a temporary restraining order by wrongfully converting funds in investments, interfering with the appointment of a receiver, and wrongfully converting proceeds from a sale of an aircraft. *Id.* at 1300-01.

In the present action, the Commission cannot even establish the violation of a single order, let alone the sort of pattern of violative behavior that would result in such severe sanctions

as striking Defendants' answer and affirmative defenses, entry of a default judgment, escalating monetary sanctions, and payment of the Commissions' costs and fees.

VII. CONCLUSION

Defendants have not only complied with the Court's Order but have made significant additional efforts to resolve the outstanding discovery disputes so that this case can proceed to trial. The Motion is unsupported by facts and law and should be denied in its entirety.

Furthermore, the pending motions to compel should be denied and the Court should grant

Defendants such other and further relief as it deems appropriate.

Dated: April 3, 2009

Respectfully submitted,

s/Ryan Roman _____

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CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2009, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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