IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

v.

JOHN P. MILLER,

Defendant.

CIVIL ACTION NO.

1:04-CV-01655

ORDER and OPINION

This case is presently before the Court on defendant's Motion to Exclude Plaintiff's Bloomberg Exhibits [150] and plaintiff's Motion to Withdraw Alana R. Black as Attorney [184]. The Court has reviewed the record and the arguments of the parties, and it hereby **DENIES** defendant's Motion to Exclude Plaintiff's Bloomberg Exhibits [150] and **GRANTS** plaintiff's Motion to Withdraw Alana R. Black as Attorney [184].

On January 5, 2010, the Court issued an Order **GRANTING in part** and **DENYING in part** defendant's Motion for Reassignment and New Trial [161], based on its oral ruling at an October 8, 2009 conference. (*See* Jan. 5, 2010 Order [181].) This Order will further elaborate on the reasoning behind that oral ruling.

BACKGROUND

Plaintiff Securities and Exchange Commission ("SEC" or

"plaintiff") brought a civil action charging John P. Miller ("Miller" or "defendant") with five counts of federal securities fraud. (*See* Compl. [1].)

Following pretrial litigation and the denial, in part by the Court of defendant's Motion for Summary Judgment [52], the case was ready to be calendared for trial. On April 16, 2008, counsel for both parties submitted a letter ("Joint Letter") to this Court jointly requesting that this Court appoint Magistrate Judge Alan J. Baverman to preside over the trial. (*See* Joint Letter [67-1].) The parties also stated that "[s]hould the Court decline to appoint Magistrate Judge Baverman to preside over the trial, the[y] respectfully request that the Court set a status conference to discuss scheduling." (*Id.*)

The Court issued an order granting this request.[1] (Apr. 17, 2008 Order [67].) Approval by the Court, however, was conditioned on the parties' submission of a signed "Consent to Proceed Before Magistrate Judge" form, which form was attached. (*Id.*) The Consent Form provides that "the parties in this case consent to have a United States magistrate judge conduct any and all proceedings in this case, including the trial, order the entry of a final judgment, and conduct all post-judgment proceedings." (*Id.* at [67-2]).

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[1] The Order stated that "[p]er the counsels' letter dated April 16, 2008 [], they consent to trial before [Judge Baverman]. Accordingly, the Court grants this request and directs the Clerk of Court to assign this action to [Judge Baverman] for all further proceedings." (Apr. 17, 2008 Order [67].)

After this Court issued the April 17, 2008 Order [67], the parties submitted a signed consent form. ([69].) As later discovered by Judge Baverman, defendant had added the following language to the bottom of the Consent Form: "Defendant reserves the right to request or move for reassignment of the above-captioned case back to the Honorable Julie E. Carnes for the remedies determination that shall take place after a verdict is rendered and/or judgment is entered." (*Id.*)

Upon noticing this unusual disclaimer, Judge Baverman convened a pretrial conference on June 3, 2008, at which he asked defense counsel to submit legal support for this reservation of rights. ([71].) Defense counsel thereafter sent a letter that expressly withdrew the additional language and submitted a newly-executed Consent Form, writing:

> Upon further consideration, counsel for the Defendant hereby withdraws the "reservation of rights" to move for reassignment for a potential remedies determination and thus consents unconditionally to your Honor presiding over the trial in the above-referenced case. Both parties, in accordance with the provisions of 28 U.S.C. § 636© and FED. R. CIV. P. 73, have now provided explicit, clear[,] and unambiguous consent to the jurisdiction of a United States Magistrate Judge "to conduct any or all proceedings in this case including a jury or nonjury trial, and to order the entry of a final judgment."

(Ex. A to Opp'n [163].)[2] A revised Consent Form, without the

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[2] The parties have never disagreed that a jury trial should be conducted on the question of liability and that, upon a finding for plaintiff SEC, a judge would be required to determine the remedies to be imposed. It is worth noting and emphasizing, however, that the defendant had initially requested that a magistrate judge handle the

reservation language, was then submitted and this Court entered a revised order assigning the case to Judge Baverman. ([74].)

The case was tried from August 25, 2008 to September 5, 2008 before Judge Baverman, and, finding that Miller had violated securities law on all counts charged in the Complaint, the jury returned a verdict for the plaintiff SEC. ([139].)

Following briefing, Judge Baverman held a hearing on the civil penalties to be imposed. ([149].) At the close of the parties' presentations, he made preliminary findings. (*See generally* Tr. [154].)

On December 23, 2008, defendant filed a Motion to Exclude Plaintiff's Bloomberg Exhibits [150], in which he sought to exclude three exhibits ("the Bloomberg Exhibits") that plaintiff had sought to introduce at the December 10, 2008 remedies hearing regarding the calculation of damages. (*See* Mot. to Exclude [150].) Plaintiff filed an opposition brief on January 7, 2009 (*see* Opp'n [151]), and the matter was submitted to Judge Baverman on January 27, 2009.

On February 11, 2009, Judge Baverman entered an Order recusing himself from any further proceedings because his nephew had just been

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liability phase, but that the undersigned determine any remedies upon a plaintiff's verdict. Defendant's original wish has been granted. Yet, inexplicably, defendant now contends that the very arrangement that he first advocated should entitle him to a new trial on liability. (*See generally* Mot. for Reassignment and New Trial [161].)

named an equity partner at defense counsel's law firm.[3] (Order of Recusal [152]; Status Conference [153].) The case was then reassigned to a new magistrate judge, Magistrate Judge Susan Cole, to preside over the remedies portion of the proceedings. (*Id.*) Defendant thereafter filed a Motion for Reassignment and New Trial

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[3] 28 U.S.C. § 455 states that a judge must disqualify himself if "[h]e or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person [i]s acting as a lawyer in the proceeding." 28 U.S.C. § 455(b)(5)(ii).

Plaintiff notes that having been informed at the December 8, 2008 hearing of the relief Judge Baverman was considering, and because defendant was attempting to close a business deal that could have resulted in his becoming a director of a publicly traded company, defendant may have had incentive to "drag out the proceedings in an attempt to manufacture grounds for a motion for new trial." (Opp'n [163] at 6 n.2.) However, plaintiff stated that it was "not questioning" defense counsel's "assurances" of "surprise" that Judge Baverman's relative worked at the same firm. (*Id.*)

Defense counsel vigorously disputes plaintiff's suspicions, stating that such attacks were "entirely baseless and extremely inappropriate." (Reply [165] at 2 n.1.] Defendant's attorneys stated that they did not know about the relationship of their new partner to Judge Baverman until the recusal hearing, and that

> [a]lthough flattering, it is utterly incomprehensible that Miller's counsel had the foresight or knowledge, over a year ago, to request a Magistrate that would ultimately be forced to recuse himself based on the fact that the Magistrate's wife's niece's husband, who works in a law firm with approximately 900 attorneys, was elected to be an equity partner of that law firm.

(*Id.*) The Court accepts defense counsel's representation that the odd course of events in this case was not planned by defendant. Nonetheless, it is the Court's firm impression that defendant has viewed an indefinite delay of these proceedings as a positive outcome, as any delay of resolution means a delay in imposing penalties. Certainly, the peculiar events here have insured delay.

[161] on May 28, 2009, which has since been fully briefed. (Mot. for Reassignment and New Trial [161].) In that motion, defendant sought reassignment of the case from Judge Cole to the undersigned. He further sought a new trial on liability.

In its conference on October 8, 2009, the Court orally granted defendant's request for reassignment to the undersigned and denied defendant's request for a new trial. (*See* Tr. [178] at 4:24-25.) The Court then issued a written Order on January 5, 2010 confirming the above. (*See* Jan. 5, 2010 Order [181].)

DISCUSSION

I. MOTION FOR REASSIGNMENT AND NEW TRIAL

A. Reassignment to the Undersigned

As noted, the Court has previously granted defendant's motion for reassignment. The Court now explains its reasoning. Defendant had argued that the case should be reassigned to this Court because, as set out in the Joint Letter [67-1], both parties consented only to Magistrate Judge Baverman's assignment and did not consent to assignment to any other judge. (Mot. for Reassignment and New Trial [161] at 2; Tr. [178] at 20:21-25; 21:1-5, 18; 22:10-11.) Plaintiff disagreed and responded that based on the language in the Consent Form, the parties only consented to "a United States magistrate judge," not Judge Baverman, and therefore any magistrate judge could preside. (*See* Order Granting Consent [74], emphasis added; *see also* Tr. [178] at 21:23-25; 22:17-22.)

In his Motion for Reassignment [161], defendant relied on only one case--*Brownlee v. King*, No. 98-3815, 1998 WL 898830 (6th Cir. Dec. 16, 1998)--which case is not pertinent to these facts.[4] (*See generally* Mot. for Reassignment and New Trial [161].) In his Reply [165], however, defendant cited additional, more apt authority. (*See* Reply [165] at 7-11.) *See, e.g., Hester v. Graham, Bright & Smith, P.C.*, 289 F. App'x 35, 39-40 (5th Cir. 2008) (in finding that the parties had consented to having any magistrate judge preside, the court relied only on specific text of consent, which did not refer to a particular magistrate judge); *Eastwood Auto Body & Garage, Inc. v. City of Waterbury*, No. 97-9278, 1998 WL 487017, at *2 (2d Cir. June 11, 1998) (consent preceded designation of a specific magistrate judge). *See also Kalan v. City of St. Francis*, 274 F.3d 1150, 1152 (7th Cir. 2001) ("a consent that specifies a particular magistrate judge by name [does not] constitute[] consent to a different magistrate judge"); *Mendes Junior Int'l Co. v. M/V Sokai Maru*, 978

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[4] In *Brownlee*, the court ruled that the parties had to consent again in order to proceed before a second magistrate judge after the first magistrate judge had recused himself. *Brownlee*, 1998 WL 898830, at *1. Plaintiff has rightly noted, however, that *Brownlee* is inapposite because the case turned on the district court's local rule, which expressly provided that the parties had ten days to provide further consent to the jurisdiction of the newly assigned magistrate judge or else the case would be delivered back to the district court. There is no such local rule in the Northern District of Georgia. (Opp'n [163] at 10.) *See Brownlee*, 1998 WL 898830, at *1; *see also* N.D. Ohio R. 73.1. The Court also notes that defendant wrongly cited this case as *Wyatt v. Brownlee*. (Mot. for Reassignment and New Trial [161] at 3-4.) The plaintiff's name was Wyatt C. Brownlee, but the case is styled *Brownlee v. King*.

F.2d 920, 922 (5th Cir. 1992) (consent to a specific, named magistrate did not constitute consent to a different magistrate judge as "consent to proceed before a magistrate [must] be explicit" and cannot only be inferred) (citation and internal quotation marks omitted); *Paddington Partners v. Bouchard*, 950 F. Supp. 87, 89-90 (S.D.N.Y. 1996) (when a magistrate judge to whom the parties have specifically consented "retires or otherwise becomes unavailable[,]" the consent should be deemed withdrawn).

The above cases stand for the proposition that where a party has consented to proceeding before a specific magistrate judge, the subsequent recusal or unavailability of that magistrate judge renders void the initial consent to proceed before a magistrate judge, at least insofar as any future proceedings are concerned. Instead, the party must consent again before a second magistrate judge will be allowed to preside.

Plaintiff is correct, however, that the Consent Form [67-2] ultimately submitted by the parties did not specify a particular magistrate judge, but instead indicated consent to the assignment, generally, of a magistrate judge. That important fact means that the above cases favoring defendant's position are distinguishable. Accordingly, as the Consent Form did not specify a magistrate judge, the Court assumes that a decision to reassign the case to another magistrate judge would be sustained. That technicality notwithstanding, both parties had earlier signed a Joint Letter [67-

1] requesting Judge Baverman, and the Court deems it prudent to honor the intent set out in that letter.

For the above reasons, the Court therefore formally reaffirms its earlier oral grant of defendant's request for reassignment from the second magistrate judge to whom the case was assigned, Judge Cole, to the undersigned.

B. Motion for New Trial

In his Motion for Reassignment and New Trial [161], defendant also requested an entirely new jury trial on the liability phase, as a result of Judge Baverman's recusal after the conclusion of that trial. Defendant, however, provided only one paragraph, with no cited case law in support of his argument that he deserved a new trial pursuant to FED. R. CIV. P. 59(a)(1)(A).

Under Rule 59, a court may grant a motion for a new trial "for any reason for which a new trial has heretofore been granted in an action at law in federal court." FED. R. CIV. P. 59(a)(1)(A). While the use of the word "any reason" might give the impression that a trial judge may freely grant a motion for a new trial, in fact, appellate review of a decision to grant a new trial is quite "stringent." *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984). This is so because the grant of a new trial potentially conflicts with the deference that should be paid to the jury's determination of questions of fact. *Id; Narcisse v. Ill. Cent. Gulf R.R. Co.*, 620 F.2d 544, 546 (5th Cir. 1980)(the Seventh Amendment

requires appropriate deference to a jury verdict and "facts once found by a jury in the context of a civil trial are not to be reweighed and a new trial granted lightly.") *Narcisse*, 620 F.2d at 546 (5th Cir. 1980)(citation omitted).[5]

Accordingly, the range of circumstances under which the grant of a new trial may be sustained is relatively narrow. Traditional reasons for granting a new trial include juror misconduct,[6] erroneous evidentiary rulings that have caused substantial prejudice or injustice to the affected party,[7] or a jury verdict that is against the great weight of the evidence.[8] None of the above occurred in this case.

As none of the above factors are present here, defendant is able to muster only the following argument: "[T]he federal securities laws give the Court substantial discretion in terms of the penalties, if any, to be imposed for the alleged violations," and only a "judge that presided over the trial" can "assess the credibility of the

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[5] Decisions of the former Fifth Circuit filed prior to October 1, 1981 constitute binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Ala.*, 661 F.2d 1206, 1207 (11th Cir. 1981) (*en banc*).

[6] *Jackson v. State of Ala. State Tenure Comm'n*, 405 F.3d 1276, 1288 (11th Cir. 2005).

[7] *Peat, Inc. v. Vanguard Research, Inc.*, 378 F.3d 1154, 1162 (11th Cir. 2004).

[8] *Hewitt v. B.F. Goodrich Co.*, 732 F.2d 1554, 1556 (11th Cir. 1984); *Narcisse v. Ill. Cent. Gulf R.R. Co.*, 620 F.2d 544, 546-48 (5th Cir. 1980).

witnesses." (Mot. for Reassignment and New Trial [161] at 4.)

Defendant's argument is unpersuasive. His assertion that a judge for the penalty phase cannot properly impose remedies without first weighing, through live observation, the credibility of witnesses runs counter to the principle that a judge should defer to a jury's findings of fact. While the undersigned will carefully study the trial record and make judgments on the appropriate remedy based on that review, this exercise does not require an assessment of the credibility of particular witnesses, as the jury has already performed that task.

Moreover, defendant's position is not supported by law. The operative rule governing how a proceeding should be handled if the initial judge is unable to see the case to its conclusion is Federal Rule of Civil Procedure 63. This rule provides:

> *If a judge conducting a hearing or trial is unable to proceed, any other judge may proceed upon certifying familiarity with the record and determining that the case may be completed without prejudice to the parties*. In a hearing or nonjury trial, the successor judge must, at a party's request, recall any witness whose testimony is material and disputed and who is available to testify again without undue burden....

Id. (emphasis added).

With regard to a bench trial in which the presiding judge leaves the case before its final resolution, the second sentence of the rule indicates that the successor judge must, at a party's request, recall any witness whose material testimony is disputed. The first sentence, which the Court interprets as referring to a jury trial,

does not, however, impose this requirement. That sentence does not require that the successor judge recall witnesses, but instead indicates that a successor judge may proceed upon certification of his familiarity with the record and a determination that the case may be completed without prejudice to the parties.

This case was a jury trial and the jury returned a verdict. The task remaining for a judge is the imposition of remedies in the case, both financial and injunctive. That task can be competently and fairly completed by a successor judge who has attaining familiarity with the trial transcript and the pertinent briefing. The undersigned will fulfill that duty before imposition of remedies.

Defendant's cited case authority in his Reply [165] does not alter this interpretation of Rule 63 or persuade the Court that a new trial must be ordered merely because Judge Baverman recused prior to entry of judgment. *See* Reply [165] at 11-12. Defendant cites *Zand v. Comm'r*, 143 F.3d 1393, 1400 (11th Cir. 1998) and *Emerson Elec. Co. v. Gen. Elec. Co.*, 846 F.2d 1324, 1325-26 (11th Cir. 1988). In *Emerson*, the presiding judge over a civil bench trial recused after concluding the trial, but before he had issued findings of fact and conclusion of law. The Eleventh Circuit held that the successor judge should have retried the case, absent consent from both parties that the successor judge could simply review the transcript prior to issuing a ruling.

Emerson is clearly distinguishable from the present case, in

which a jury has heard the case and returned a verdict. *Zand* is likewise inapposite because it also involved a bench trial.[9]

Should the obvious distinctions between this case and the cited cases not be apparent, the Eleventh Circuit has explicitly noted the distinction between a bench trial and a jury trial when applying Rule 63. In *Jackson v. State of Ala. State Tenure Comm'n*, 405 F.3d 1276 (11th Cir. 2005),[10] the appellate court rejected a losing party's argument that a successor judge in a civil jury trial was unable to issue a post-trial Rule 50 judgment as a matter of law without first retrying the case. The Eleventh Circuit specifically distinguished *Emerson* and *Zand* as involving bench trials, whereas *Jackson* involved a jury trial:

> Rule 63 treats bench trials and jury trials differently. The rule gives the parties the right to insist that a witness be recalled in a bench trial....The rule does not give that right where a jury trial is involved. What we have her is a jury trial, not a bench trial.

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[9] Further, even though the losing party in *Zand* had sought a retrial, the Eleventh Circuit rejected his argument noting that he had essentially consented to a ruling by a successor judge made only on the record.

[10] Plaintiff cited this case in its Surreply [166]. While a surreply brief is not authorized by the Federal Rules of Civil Procedure or the Local Rules of this Court, a court "may in its discretion permit the filing of a surreply . . . where a valid reason for such additional briefing exists, such as where the movant raises new arguments in its reply brief." *Fedrick v. Mercedes-Benz USA, LLC*, 366 F. Supp. 2d 1190, 1197 (N.D. Ga. 2005). Here, the defendant had offered new case law in his Reply [165], and it was necessary for the plaintiff to file a surreply that cited a later case that called into question the applicability of the cases cited by the defendant in his Reply.

Id. at 1287. Accordingly, where a jury trial is involved, the successor judge must merely certify that he is familiar with the record and determine that the proceedings in the case can be completed without prejudice to the parties. *Id.* As the successor judge in Jackson had done just that, "Rule 63 required no more." *Id.*

Likewise, in this case, the Court concludes that defendant is not entitled to a new jury trial on liability. The Court views this case as analogous to a criminal trial in which the presiding judge has recused or is unavailable after a jury verdict of guilty, but before sentence has been imposed. In that scenario, which has occurred from time to time in this district when a presiding judge has died or been elevated to an appellate court, the Court is aware of no requirement, or even suggestion, that the criminal defendant was entitled to a new jury trial on the question of guilt. Instead, the successor judge is simply expected to review the trial record and impose sentence.

Moreover, as noted *supra*, defendant cannot, nor does he try to, explain the inconsistency between his current position and the reservation he initially attempted to impose on the first Consent Form [67-2], in which he explicitly sought to have Judge Baverman try the liability phase of the trial, but return the case to the undersigned to determine the remedies, upon a jury finding for the plaintiff. There is no way to reconcile defendant's earlier request for this Court to handle the remedies phase with his current

position, and the Court agrees with plaintiff that defendant cannot have it both ways. Indeed, defendant waited almost four months after Judge Baverman recused himself to file this motion. (*See* Order of Recusal [152], issued Feb. 11, 2009; Mot. for Reassignment and New Trial [161], filed May 28, 2009.)

Finally, after the Court indicated at the October 2009 conference that it would not conduct a new trial, defense counsel said that he "understood [the] ruling," and the most important issue to defendant was not a new trial, but an opportunity for the Court to hear him testify at a remedies hearing. (Tr. [178] at 5:8-18.)

For all the above reasons, the Court therefore formally reaffirms its earlier denial of defendant's request for new trial.

II. Motion to Exclude [150]

With regard to the remedies hearing, defendant filed a Motion to Exclude [150] on December 23, 2008. Plaintiff filed an Opposition [151]; defendant did not file a reply brief.

In its September 23, 2009 Order [167], the Court denied defendant's Motion to Exclude [150] without prejudice, pending a determination whether the case would be proceeding before this Court or Judge Cole. Thereafter, the parties briefly discussed these issues at the October 8, 2009 conference. (*See generally* Tr. [178].) Because the case is proceeding before this Court, the Court will now reconsider this motion.

A. Background

During the December 8, 2008 hearing ("Remedies Hearing") before Judge Baverman, plaintiff proffered Exhibits 427, 428, and 436 (the "Bloomberg Exhibits") in support of its petition for the imposition of civil monetary penalties. These three exhibits consist of computer screen prints of summaries of market price and trading volume of Master Graphics stock from the Bloomberg Terminal, which is a computer system that provides access to financial market data, during the relevant time period.[11]

Plaintiff also sought to have David Elzinger ("Elzinger"), an SEC staff accountant, testify to explain an additional document: a summary spreadsheet that Elzinger had prepared and annotated with information printed from the Bloomberg Terminal showing historical stock data, in order to give the Court a sense of the volume of shares traded over the relevant time period. (Tr. [154] at 34:14-15, 24-25; 35:1-4; 36:2-11.)

Defendant objected to all of the exhibits, arguing that the information had not been introduced in plaintiff's earlier briefs and was being presented for the first time. (*Id.* at 37:10-25; 38:1.)

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[11] Specifically, Exhibit 427 is a one-page printout showing a chart for the stock price from January 4, 1999 to April 28, 2000. (Tr. [154] at 42:18-20.) Exhibit 28 is an eight-page printout showing the closing price on each trading day for the same time period, as well as the volume for each time period. (*Id.* at 42:23-25; 43:1.) Exhibit 436 is a two-page printout showing certain closing prices and figures. (*Id.* at 43:5-6.) Exhibit 436 was also attached to an earlier brief, so it had been previously provided to defense counsel. (*Id.* at 43:1-5.)

Defendant objected specifically to the spreadsheet, stating that it was a summary and did not fit within the requirements of FED. R. EVID. 1006.[12] (*Id.* at 38:2-15.) Defendant also objected to Elzinger's testimony because his testimony had never been disclosed in discovery, and defense counsel had no opportunity to examine him. (*Id.* at 34:16-20; 35:22-24.)

Judge Baverman excluded the summary spreadsheet and did not allow Elzinger to testify. (*Id.* at 42:2-5.) However, he preliminarily admitted the Bloomberg Exhibits, conditioned on defendant's opportunity to confirm that the Bloomberg Exhibits were, in fact, accurate printouts from the Bloomberg Terminal. (Opp'n [151] at 2.) Defendant has not disputed their accuracy.

B. Discussion

In reviewing the Bloomberg Exhibits, defendant seemingly found no problem with the accuracy of the documents, as he has never articulated any concerns. In the Motion to Exclude [150], however, defendant had asserted two other objections to the Bloomberg Exhibits: (1) that plaintiff failed to demonstrate how they would be

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[12] FED. R. EVID. 1006 provides that:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at [a] reasonable time and place. The court may order that they be produced in court.

FED. R. EVID. 1006.

helpful to the Court in determining the issue of substantial losses and (2) that the exhibits lack proper foundation.

1. Substantial Losses

Defendant argues that plaintiff failed to present any evidence regarding substantial losses or risk thereof[13] in either its brief [144] or its reply brief [148] regarding remedies, but instead waited until the December 10, 2008 hearing on penalties to attempt to make this showing. Defendant therefore contends that plaintiff failed to demonstrate how the proffered exhibits would be helpful to the Court in determining the issue of substantial losses. (Mot. to Exclude [150] at 2.)

As discussed at the Remedies Hearing before Judge Baverman, however, these exhibits are relevant to the issue of whether Miller's violations caused substantial losses or significant risk of substantial losses. To understand how widespread investors losses were, it is helpful to know the volume of shares traded during the relevant time period and the market value of those shares. (*See, e.g.*, Opp'n [151] at 6-7.) Additionally, even before these exhibits

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[13] Defendant requests that the Court find that plaintiff has failed to present evidence of "substantial losses" or risk thereof sufficient to support the imposition of third-tier civil monetary penalties under 15 U.S.C. § 78u(d)(3)(B)(iii)(bb). These "third tier" penalties may be imposed only where a defendant's violation involves fraud or deceit and the violation resulted in substantial losses or created a significant risk of substantial losses to other persons. 15 U.S.C. § 78u(d)(3)(B)(iii)(bb). (Mot. to Exclude [150] at 3.) The Court reserves further discussion of civil penalties until after the remedies hearing.

were offered, there was already evidence in the record from which to conclude that Miller's violations resulted in substantial losses or created a significant risk of substantial losses because of the size of the company and its trading volume, as well as the role of accounting fraud in the Company's demise. (*See, e.g., id.* at 5, 6.)

Therefore, the Court determines that these documents are helpful to the Court in assessing remedies.

2. Foundation

Second, defendant argues that the exhibits lack proper foundation. (Mot. to Exclude [150] at 2.)

Plaintiff argues that the Bloomberg Exhibits should be admitted under an exception to the hearsay rule found in Rule 803(17) of the Federal Rules of Evidence for "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." FED. R. EVID. 803(17). Defendant concedes the admissibility under that exception, particularly as defense counsel attached a similar exhibit to one of the earlier pleadings. (*See* Ex. U to Mot. for Partial Summ. J. [25], a printout of share prices and volume from one of Bloomberg Exhibits' competitors, IDD Information Services.)

Defendant argues that the Bloomberg Exhibits lack proper foundation because even if they fall within the above exception to the hearsay rule, plaintiff has failed to authenticate them pursuant to Rule 901(a), which requires that a party offering evidence must authenticate it through "evidence sufficient to support a finding that the matter in question is what the proponent claims." FED. R. EVID. 901(a). (Mot. to Exclude [150] at 3.) The Court rejects this argument as a lack of notice and any lingering questions by defendant about authenticity were cured by Judge Baverman's grant of ample time for defense counsel to check any accuracy issues related to the Bloomberg Exhibits. As noted, defendant has never contended that the figures are inaccurate.

Further, defendant explicitly waived any potential objections to the relevance and foundation of the Bloomberg Exhibits at the Remedies Hearing. When plaintiff introduced the Bloomberg Exhibits, defense counsel admitted that he had no objection other than the notice issue:

> THE COURT: Are you telling me that if they just admitted or sought to admit the Bloomberg [Exhibits], you wouldn't have an objection?
>
> [DEFENSE COUNSEL]: Your Honor, I would still object because I think I should have been given notice of what they're intending to do before this hearing, but in terms of the evidentiary issue, I don't think I have a valid objection to the Bloomberg data itself.[14]

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[14] Defense counsel also stated, "I'm not accusing the SEC of dishonesty here, but the fact is I don't know that this was downloaded properly, I don't know that this isn't a double count of

(Tr. [154] at 40:24-25; 41:1-3.)

The Court concludes that plaintiff laid a proper foundation for these documents. Therefore, the Court confirms Judge Baverman's earlier preliminary admission and will consider the Bloomberg Exhibits.

CONCLUSION

For the above reasons, the Court **DENIES** defendant's Motion to Exclude Plaintiff's Bloomberg Exhibits [150]; **GRANTS** defendant's Motion for Reassignment and **DENIES** his Motion for New Trial [161]; and **GRANTS** plaintiff's Motion to Withdraw Alana R. Black as Attorney [184].[15]

The Court schedules a proceeding to determine remedies for **FRIDAY, SEPTEMBER 10, 2010 at 10:00 A.M., in COURTROOM 2107.**

By the time of the proceeding, the Court will have completed its reading of the transcripts of the trial and earlier remedies hearing. Therefore, there will be no second hearing on remedies. The Court will allow defendant to allocute or testify. Any remarks by defendant should be concise, as the Court will have read his previous testimony. No other witnesses will be allowed to testify or speak at

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the buys and the sells on both sides like Yahoo does and so I just can't at this stage in a hearing agree to this document." (Tr. [154] at 41:4-8.)

[15] Nevertheless, the Court would welcome the appearance of Ms. Black, who is now an Assistant United States Attorney, at its upcoming proceeding to impose remedies, as she is quite knowledgeable about the facts of this case.

the proceeding, absent prior approval by the Court.

The Court has previously allowed the parties, as they requested, to submit briefs prior to the upcoming remedies hearing. Both parties have done so. *See* Def.'s Mem. Advising Court Materials to Focus on upon Review of Trial Proceedings [179]; Pl.'s Mem. to Assist Court in Review of Record [180]. Accordingly, the Court assumes that no new memoranda will be submitted. If either party seeks to submit further memoranda, the party must obtain permission in advance and the document must be submitted by Friday, September 3, 2010.

SO ORDERED, this 18 day of August, 2010.

Julie Carnes

JULIE E. CARNES
CHIEF U.S. DISTRICT JUDGE