Exhibit P

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, vs. JOHN M. FIFE, et al., Defendants.	)	Docket No. 20 C 5227
	)	
	)	Chicago, Illinois
	)	March 15, 2023
	)	11:00 o'clock a.m.

TRANSCRIPT OF TELEPHONIC PROCEEDINGS - MOTION HEARING
BEFORE THE HONORABLE MAGISTRATE JUDGE HEATHER McSHAIN

APPEARANCES:

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THE CLERK: 20 C 5227, Securities and Exchange Commission vs. Fife, et al. For motion hearing.

THE COURT: Good morning, counsel. Please state your appearance for the record, beginning with plaintiff's counsel.

MR. PHILLIPS (Via Telephone): Good morning, this is Eric Phillips on behalf of the SEC.

THE COURT: Is anyone else on the line on behalf of the SEC?

MS. GUARDI (Via Telephone): Hi, you have Ariella Guardi on behalf of the SEC, as well.

THE COURT: Great.

Thank you both for calling in.

And for defendants, please?

MR. GOLDSMITH (Via Telephone): Yes, your Honor, this is Barry Goldsmith on behalf of the defendants.

MR. RICHMAN (Via Telephone): Good morning, your Honor, this is Brian Richman from Gibson Dunn, also on behalf of the defendants.

THE COURT: Does anyone else on behalf of defendants want to make an appearance?

(No response.)

THE COURT: Great.

Okay. So, I am prepared to rule on the record today with respect to the three discovery motions that are fully briefed. And I am going to proceed one motion at a time.

There are a couple of instances where I have questions or need clarification. And I will address each of those in turn.

Please note, also, we do have a court reporter on the line. I request that everyone please make an effort. I know it is difficult over the phone without the benefit of seeing one another, but I ask that everyone please make an effort not to interrupt or speak over one another.

And I also ask the attorneys to please identify yourself by name before you speak.

So, there are, as I mentioned, three motions that are pending, that fall within the referral, that I plan to address today.

The first is plaintiff SEC brings a motion to compel, at Document Entry 49; the memorandum in support is at Docket 50; and, defendants' opposition is at Docket Entry 58; and, an amended motion for a protective order to quash the depositions of a current and former SEC employee; and, SEC's 30(b)(6) representative at Docket 71.

Defendants' opposition and response is at Docket 67.

And, then, the third motion bought by defendants is a motion to compel, which appears at Docket Entry 42.

SEC's opposition response is at Docket Entry 66.

Phillips' Declaration in support of opposition to the motion to compel is at Docket Entry 57.

And the Court also notes the defendants filed a Notice of Supplemental Authority in support of their pending discovery motions, attaching Bittner vs. United States. And that filing appears at Docket Entry 84.

So, prior to today's ruling, the Court has reviewed and its ruling today assumes familiarity with the Complaint and the District Judge's Order entered on December 20th, 2021, at Docket Entry 31, that denied defendants' motion to dismiss plaintiff's complaint, as well as all of their briefing associated with it.

There are three discovery motions that I am addressing today to include the Notice of Supplemental Authority.

And, in summary, the complaint alleges violations of Section 15(a)(1) of the Securities Exchange Act of 1934.

Plaintiffs allege that defendants generated profit by purchasing convertible notes from microcap or penny stock issuers at discounted prices, converting those notes to newly-issued shares of stock, and reselling that stock to investors at market price, in unregistered transactions. And Plaintiffs claim this conduct demonstrates that defendants used the means or instrumentalities of interstate commerce to buy and sell securities as part of their regular business without registering as dealers with the SEC, as the Exchange Act requires.

The primary dispute in this case is whether the SEC

has plausibly alleged that defendant is a dealer within the meaning of the Exchange Act.

So, I want to start with the plaintiff SEC's motion for a protective order. Defendants have subpoenaed for a deposition third-party Jeffrey Riedler, who is a former SEC employee; Bonnie Gauch, a current SEC employee; and, then, the SEC's 30(b)(6) representative.

I am going to pause now. I want the attorneys to know I am very familiar with the briefing and the materials that I have already identified. But to the extent that either side wants to make any further argument or points on the record before, I am going to give you an opportunity. And, again, I am going to do this motion by motion.

So, given that the first motion I am addressing is the SEC's motion, I am going to give defendants an opportunity -- I am sorry, I am going to give the SEC an opportunity -- to make any additional points or arguments that SEC wants to put on the record.

I will, then, give defendants a chance to respond.

So, let me start with SEC counsel.

MR. PHILLIPS (Via Telephone): Your Honor, this is Eric Phillips on behalf of the SEC.

We don't need to make any additional points beyond the briefing, but we are happy to answer any questions the Court may have.

THE COURT: Thank you, Mr. Phillips.

How about from the defense side?

Mr. Goldsmith, Mr. Richman, anything you would like to say or emphasize with respect to opposition to the motion?

MR. RICHMAN (Via Telephone): Thank you, your Honor.

This is Brian Richman from Gibson Dunn.

I am happy to answer any questions your Honor has.

The only point I would emphasize here is that our Notice of 30(b)(6) Deposition and those subpoenas are seeking factual information from the Commission that we believe is relevant to our claims.

And, here, it would be, I think, an extraordinary order to, essentially, foreclose all depositions in this matter; to block all 30(b)(6) topics; and, to quash all of the defense's subpoenas.

THE COURT: Thank you, Mr. Richman.

Mr. Phillips, Ms. Guardi, anything you want to say in reply? Again, it is your motion. So, you get the last word. Anything further?

MR. PHILLIPS (Via Telephone): Your Honor, this is Eric Phillips, again, on behalf of the SEC.

The only thing I will say is that -- and, again, this is -- our points have been made in the briefing, is that a lot of the information that the defendants seek through the 30(b)(6) notice and through the request to depose these two

individuals, are internal SEC deliberations or SEC individual staff members' spin on the guidance that the SEC has publicly issued. But the defendants have not demonstrated that any of those issues are relevant or proportional to the needs of the case.

The SEC's internal deliberations or what some staff member thinks is not relevant to any of the affirmative defenses that they have raised, such as fair notice.

The courts have held that those affirmative defenses, like fair notice or equal protection, those are all analyzed objectively based on what a hypothetical, reasonable person would have gleaned from the statute and whatever sort of public guidance that the SEC issued, to the extent that somebody would think that informs the analysis of a reasonable expectation of a member of the public. That is all objective. And it is all out there.

So, what somebody said internally or what somebody would think about these issues isn't relevant or proportional to the needs of the case.

And, I think, as some of the other cases have held, when they are asking for additional information about the SEC's position on these issues through a 30(b)(6) request, what they are really doing is asking for a deposition of opposing counsel.

We have already answered written discovery on these

issues. And, so, to ask for now a 30(b)(6), it is our position, as other cases have held, that would be asking for our -- the lawyers' for the SEC -- our analysis of these issues.

THE COURT: Thank you, Mr. Phillips.

So, I am going to go ahead and put my ruling on the record. And let me just start with the standards that the Court is applying today.

And I am not going to repeat these with respect, as applicable, to the additional two motions that I am addressing today.

So, let me just begin with the general standard that applies to all motions -- all discovery motions -- before the Court, and for the proposition that the district courts have extremely broad discretion to control discovery.

With respect to the protective order, Rule 26 permits a court to limit discovery; and, a court, upon a showing of good cause, may enter a protective order limiting discovery to protect any party to a lawsuit from annoyance, embarrassment, undue burden or expense.

Protective orders may address matters relating to a deposition; and, a court may order that a deposition be terminated or may limit its scope and manner. District courts have substantial latitude to fashion protective orders.

To determine whether a party has shown good cause, the

district court must balance the parties' interests, taking into account the importance of disclosure to the non-movant and the potential harm to the party seeking the protective order.

Furthermore, a court may limit discovery pursuant to Rule 26(b)(2)(c) if it determines that the requested information may be obtained from a more convenient or less burdensome source, the requesting party has had ample opportunity to obtain the information, or the information sought is cumulative or duplicative of other discovery.

I am not citing case law or the applicable federal rules here. It is not necessary given that these are well-accepted standards.

I am going to start first with Jeffrey Reidler, the former SEC employee who worked for the SEC between 1979 and 2015. And Reidler served as an assistant director in Corporate Finance -- I am sorry, in Corporate Finance's, or Corp Fin's -- Office of Health Care and Insurance for his last 18 to 20 years with the SEC.

Plaintiff argues that a protective order is warranted because Reidler was not involved with this case. Reidler's declaration states that until he was subpoenaed, he did not know about this case or defendants.

Plaintiff adds that Reidler was not involved in enforcement except for Corp Fin's enforcement referrals from time to time; and, further, plaintiff contends that even if

Reidler's involvement with referrals were relevant, his deposition testimony on this topic would implicate internal SEC deliberations that are protected by the deliberate process privilege.

Defendants respond that Reidler was involved in Corp Fin's screening of many transactional filings, including registration statements for the issuance of convertible debt filed under the Securities Exchange Act.

Defendants argue Reidler's involvement in screening demonstrates that he has relevant knowledge about plaintiff's theory that defendants qualified as dealers and should have registered with the SEC when they bought convertible notes that they, then, converted and resold as stock in the market.

Plaintiff replies that Reidler does not recall any screening process involving convertible debt or having worked on this specific screening process at the SEC; and, even if he recall working on this screening process, plaintiff argues Reidler's testimony about the SEC's internal processes or internal staff points of view are irrelevant.

The Court finds that there is good cause to grant plaintiff's motion for a protective order to bar defendants' noticed deposition of Jeffrey Reidler because the proposed deposition topics are irrelevant and Mr. Reidler is unlikely to possess relevant information related to the parties' claims.

First, the likelihood that Reidler has any relevant

information regarding the claims in this suit is extremely low.

Reidler has not worked for the SEC going on eight years; he has never heard of the defendants or this case; he never worked on broker or dealer registration issues; he does not recall any specific issue to register convertible debt securities or the disposition of any screening process for any particular filings of convertible debt securities; and, as plaintiff pointed out, he does not recall a special screening process for any particular filing of convertible debt securities or special screening criteria related to the registration of convertible debt securities.

Even if Reidler recalled reviewing these registration statements for issuing convertible debt and referred entities to enforcement, his recommendations were not authoritative agency actions.

And I am relying on the Board of Trade vs. SEC. The case cite is 883, F.2d 525, at Pages 529-30, 7th Circuit 1989.

And, further, the internal reactions, analyses and deliberations of individuals examiners are not relevant, whether consistent with the SEC's final and public positions in the lawsuit or not.

For that proposition, I am relying on SEC vs. SBB Research Group, LLC, No. 19 C 6473, it is 2022 Westlaw, 2982424, at Page *12. That is a Northern District of Illinois July 28, 2022, case.

And it is citing to SEC vs. Nacchio, which is a District of Colorado case from 2009.

Thus, the screening processes that Reidler conducted and his reactions when reviewing registration statements for issuing convertible debt, in the Court's opinion, are just not relevant.

So, the Court grants the SEC's motion with respect to Reidler.

Turning next to Bonnie Gauch, who is a current SEC employee, Gauch has worked for the SEC for over twenty years. She has served as coordinator of the Division of Trading and Markets' Office of Interpretation and Guidance since 2012. Her division regulates major securities market participants, including broker-dealers; and, her office responds to questions from industry professionals about the Exchange Act provisions administered by the Division. As coordinator, she is responsible for responding to, or referring to other divisions, questions received by the pubic.

Plaintiff argues a protective order should bar Gauch's testimony because Gauch has minimal involvement in this case. Plaintiff points out that Gauch did not know the SEC filed this case and did not know the defendants until SEC's Enforcement Division contacted Gauch about defendants' written discovery requests.

Plaintiffs add that while Gauch is aware the SEC has

charged others with acting as unregistered securities dealers, Gauch has never been deposed in her capacity as an SEC employee. Like Reidler, plaintiff argues Gauch's testimony would also implicate SEC's privileged, internal deliberations.

Defendants respond that as part of Gauch's position, she responds to public inquiries about dealer registration, inquiries that are encouraged in the SEC's Guide to Broker-Dealer Registration.

Defendants intend to ask Gauch about what certain phrases mean in the Guide and the advice the SEC provided or refused to provide inquiring members of the public.

Further, defendants argue Gauch can discuss what the SEC tells people seeking advice and whether they need to register as a dealer.

Defendants contend that this testimony will establish what market participants would know and, thus, what a reasonable person in defendants' position would know.

Defendants also respond that Gauch's communications with third parties are not privileged.

The Court grants in part and denies in part plaintiff's motion for a protective order to bar the deposition of Ms. Gauch.

To the extent the defendants seek to depose Gauch to ask about the meaning of certain phrases in the SEC's Guide to Broker-Dealer Registration, plaintiff's motion for a protective

order is granted as this topic is not relevant to the parties' claim.

Ms. Gauch's personal interpretation regarding the meaning of phrases that are contested in this suit is not relevant. The Court agrees with plaintiff that the personal opinion held by an individual SEC staff member is not relevant where there is no indication that her opinion regarding the meaning of these phrases in SEC Guidance documents is attributable to the SEC itself or was ever communicated to anyone outside the SEC.

For that, the Court is relying on SBB Research Group, LLC, at Page *12.

However, to the extent defendants seek to depose Ms. Gauch to ask about communications made by the SEC's Office of Interpretation and Guidance in response to questions stemming from the dealer registration requirements set forth in the Guide, plaintiff's motion is denied.

The Court finds this deposition topic relevant to the defendants' fair notice defense, as it bears on the market's understanding of broker-dealer registration; and, given Ms. Gauch's role as coordinator of the Office of Interpretation and Guidance, she is likely to possess relevant information on this topic.

For that, the Court relies on SEC vs. Keener, 580 F. Supp. 3d, 1272. That is a Southern District of Florida case

from 2021.

The Court does not find these communications protected under the deliberative process privilege as the privilege is waived when a communications occur in the agency's dealings with members of the public.

For that, the Court relies on Howard v. City of Chicago, No. 03 Civil 8481, 2006 Westlaw 2331096, at Page *8, Northern District of Illinois, August 10, 2006.

Finally, plaintiff has not carried its burden in establishing that Ms. Gauch's compliance with the deposition would be burdensome.

So, with respect to Gauch, again, the motion is granted in part and denied in part.

As to the SEC's 30(b)(6) representative, defendants seek to depose an SEC 30(b)(6) representative on twenty-one topics that fall generally into three categories: The first, plaintiff's discovery efforts; the second, plaintiff's contentions about defendants' conduct and plaintiff's underlying basis for those contentions; and, three, the SEC's guidance, policies, procedures and charging decisions.

Plaintiff argues a protective order is warranted to bar defendants taking a 30(b)(6) deposition on all twenty-one topics.

With respect to the first category, plaintiff's discovery efforts, defendants first proposed deposition topic

is the steps taken to preserve, collect, search, review and produce potentially relevant information in discovery; or, in other words, this case law discusses discovery on discovery.

Plaintiff contends this topic is irrelevant to the parties' claims and defenses and necessarily seeks privileged work product.

Defendants assert this information is relevant because plaintiff's discovery compliance has reasonably been drawn into question. Defendants explain that plaintiff: 1, falsely represented the SEC could not broadly search employee accounts; 2, objected that producing documents would be burdensome when plaintiff already collected the requested documents months ago; 3, produced documents created with irrelevant search terms for a different case; and, 4, conducted searches without restricting the search to relevant personnel, narrowing search terms or removing duplicates.

The Court finds that defendants have not provided a factual basis for permitting discovery about discovery. Discovery about discovery is permitted only when one party's discovery compliance has reasonably been drawn into question and that suspicion is grounded in an adequate factual basis.

The Court relies for that proposition on Gross v. Chapman, Case No. 19 C 2743, 2020 Westlaw 4336062, at Page *2 and *4, Northern District of Illinois, July 28, 2020.

Defendants' cite in support In Re: Caesars

Entertainment Operating Company, Inc., where the court permitted limited discovery about discovery because the non-requesting party gave inconsistent statements under oath, that a litigation hold was never imposed.

And that is at *13 -- I am sorry, at Page *13 in the Caesars Entertainment Co. Operating case.

Here, the plaintiff's counsel admission that he was mistaken on the SEC's e-mail searching capabilities is hardly like the inconsistent statement demonstrated in the In Re Caesars case. Plaintiff's counsel's statements were not given under oath, but during meet and confer discussions.

Further, a party's admitted mistake about its searching capabilities does not raise concerns over whether the party preserved or destroyed discoverable information, like the possibility that a party failed to impeach a litigation hold.

Finally, the Court fails to the see how defendants' remaining grounds to permit discovery on discovery demonstrates that plaintiff's discovery productions have been deficient or that plaintiff has additional responsive materials that exist and are being withheld.

For that, the Court relies on Orillaneda vs. French Culinary Institute, No. 07-3206, 2011 Westlaw 437536t, at Page *5-9, Southern District of New York, September 19, 2011, which denied discovery on discovery where counsel failed to identify

specific deficiencies in the opposing counsel's motion production.

The Court also relies on Gross v. Chapman, at Page *2 -- at Pages *2-3 -- which denied discovery on discovery based on party's mere speculation that additional discovery exists.

Turning to the next topic, Plaintiff's Contentions About Defendants' Conduct and Plaintiff's Underlying Basis For Those Contentions.

The defendants seek information related to this subject in Topics 2-6, 10, 13 and 20-21. Specifically, these topics relate to whether defendants: Solicited investors, faced risk in connection with their convertible debt transactions, engaged in activities described on SEC forms and in the SEC's Guide to Broker-Dealer Registration, as well as which regulatory obligations for searches did defendants avoid.

Finally, defendants seek testimony related to disgorgement, such as identifying victims and making distributions.

Plaintiff does not appear to dispute that these topics are relevant, but argues the SEC already addressed these topics substantively in responding to defendants' written discovery requests and briefing on defendants' motion to dismiss.

Plaintiff adds this testimony on these topics would also implicate privileged work product of SEC's attorneys litigating the case.

The defendants assert in response that for Topics 2-5 plaintiff's written responses are inadequate because while plaintiff stated it was aware of evidence that CVP was a broker or dealer making inter-dealer markets in corporate securities over the counter, plaintiff failed to identify the name of the inter-dealer market and only identified one transaction that CVP executed with a firm that is not a dealer.

Defendants also contend plaintiff's written responses on Topic 6 and Topics 12-15 raise follow-up questions, such as inconsistencies and contradictions between these responses and official statements from the SEC.

Lastly, regarding Topics 20-21, defendants argue plaintiff must designate a witness to discuss remedies -- specifically, disgorgement -- as it is plaintiff's burden to show that the SEC will return a defendant's gains to wronged investors, and that there is a causal link between the alleged illegal activity and the amount sought to be disgorged.

Defendants point out that Judge Dow held, when addressing the motion to dismiss, that while defendants' disgorgement argument was premature at the motion to dismiss stage, defendants can seek additional factual development to assess whether the SEC's claim can make it past summary judgment.

The Court finds that the topics related to plaintiff's allegations of defendants' conduct do not satisfy Rule 26. The

Court agrees with plaintiff that plaintiff has substantively addressed these topics in responding to defendants' written discovery requests.

Specifically, defendants discussed the deposition topics, often at length, as follows: Topics 2 and 4. I am referring to the file at Docket 56-23, at Pages 16-18.

Topics 5 and 6, Docket Entries 42-10, Pages 3-7.

Topic 10, Docket Entry 42-6, Pages 5-8.

Topic 13, Docket Entry 27, at Pages 27-32.

Topics 20 and 21, Docket Entry 56-23, at Pages 22-23.

In light of Plaintiff's written discovery responses, additional discovery regarding these topics would be duplicative and of low probative value in moving this litigation.

Finally, defendants offer no support for their proposition that the SEC must designate a witness to talk about disgorgement. On that point, the Court agrees with plaintiff, that this topic would implicate privileged attorney work product. The Court finds this topic would be an inappropriate attempt to depose opposing counsel and to delve into the mental impressions, legal theories and opinions of SEC attorneys because to address this topic would inevitable involve disclosure of the SEC's attorneys' legal and factual theories and their opinions as to the significance of documents and credibility of witnesses.

For that proposition, the Court is relying on SEC vs. Buntrock, No. 02 C 2180, 2004 Westlaw, 1470278, at Page *1, Northern District of Illinois, June 29, 2004.

In that case, the court upheld a protective order to from prevent a Rule 30(b)(6) deposition where noticed topics included the alleged ill-gotten gains retained by defendants as a result of the alleged fraudulent accounting practices.

Turning next to SEC's guidance, policies, procedures and charging decisions, defendants seek information related to these subjects in Topics 7-9, 11-12, and 14-19. Specifically, these topics relate to the SEC's screening processes, policies and procedures for reporting violations, and the SEC's interpretation of terms in the SEC's broker-dealer guide.

Defendants also intend to ask whether specific entities and types of businesses qualify as dealers and how these entities or businesses were regulated between 2003 and 2017.

Finally, defendants seek testimony related to the SEC's new proposed rule.

Plaintiff contends these topics are unrelated to defendants and defendants' conduct and, as such, are not relevant or proportional to this case.

Specifically, as to Topics 8 and 9, which ask the SEC to discuss the dealer status of two unrelated entities, plaintiff argues this discussion is prohibited under the SEC's

rules and regulations; and, to the extent an SEC staff member has a preliminary view about whether to charge an entity with acting as an unregistered dealer, that would be protected by the deliberative process privilege.

As to Topic 19, which asks the SEC about its regulation of firms or individuals who provided financing to microcap companies during that 15-year period between 2003 and 2017, the plaintiff argues this topic is overly broad and would implicate internal privileged information covered, again, by the deliberative process privilege.

Defendants respond, as to Topics 7 to 9, that the testimony related to SEC's theory is relevant because these allegations could be used to describe every hedge fund, investment company and family office; that is, firms that are unregistered as dealers.

Defendants argue the Supreme Court cautioned courts to be skeptical of agency assertions that imply an entire industry has violated federal law, citing to Christopher v. SmithKline Beecham Corp, and this topic would investigate whether this caution applies to SEC's theory in this case.

Defendants dispute plaintiff's argument that the proposed testimony would implicate SEC's preliminary views on charging entities, responding that the topic requests only for public information and is focused on the facts.

Regarding Topics 19 and 11, defendants argue the

topics regarding the SEC's historical regulation of convertible-note lending, Topic 19, and the SEC's screening process to review disclosures concerning these loans, Topic 11, are relevant because this information would undermine the SEC's theory, that convertible-note lending is new, when the SEC has closely scrutinized and viewed convertible-note lenders for non-dealer related matters for years, and demonstrates that the Court should be skeptical of the SEC's claim to regulatory power where SEC failed to assert that power for years when it was aware of the claimed unlawful conduct.

Related to Topics 16-17, defendants contend that these topics seek information to establish the existence of certain SEC policies and procedures and are relevant, because plaintiff may argue that while officials closely regulated the convertible-lending market for decades, sufficient information might not have traveled throughout the agency.

To rebut this assertion, defendants seek to establish that personnel in the SEC's Division of Corporate Finance and Division of Enforcement are required to report potential legal violations, Topic 16; and, that enforcement staff begin each investigation by checking the registration status of this subject, Topic 17.

Defendants dispute plaintiff's claim that these topics were already addressed when plaintiff's written responses said enforcement staff sometimes check registration status, when

defendants have reason to believe it is done in every -- or, at least, nearly every -- case.

Finally, as to Topic 18, which concerns SEC's pending dealer rule, defendants argue this information is relevant because it confirms the breath of the SEC's new legal theory and establishes defendants' equal-protection defense.

Specifically, defendants claim the SEC cannot give the world's largest hedge fund a year to register as dealers, while simultaneously charging defendants. Defendants point out that plaintiff's written responses on this topic have been, in the defendants' estimation, non-responsive.

The Court finds that these topics related to the SEC guidance documents, policies, procedures and charging decisions do not satisfy Rule 26's relevance and pro proportionality requirements it follows.

The Court agrees with plaintiff that defendants' deposition Topics 7-9, 11-12, 14-15 and 18 are irrelevant because they probe into personal opinions of SEC employees and, in all likelihood, the internal discussions among those employees.

Topics 11-12 and 14-17 solicit information regarding the SEC's interpretation of terms in the broker-dealer guide and a new proposed rule, screening processes, reasons for publishing guidance documents, and procedures for reporting and investigating violations.

As explained earlier in granting a protective order to bar Mr. Reidler's deposition, the internal reactions, analyses and deliberations of individual examiners are not relevant, whether consistent with the SEC's final and public positions in the lawsuit or not.

And, again, the Court is relying on SBB Research Group, LLC, at Page *12.

Thus, information on screening processes and procedures, which fall under analyses the SEC undertakes, is irrelevant.

Further, an SEC employee's personal interpretation of the terms in the dealer-broker guide, reasons they believe the SEC publishes guidance documents, or operation of a rule yet to go into effect do not bear on the claims at issue in this case.

With respect to Topics 7-9 which seek information on whether certain entities or businesses engage in conduct that could prompt the SEC to bring an enforcement action against them, in other words, the SEC's deliberations in deciding to charge individuals engaged in similar conduct as defendants.

This topic would require the deponent to speculate whether the named entities or categories of businesses engaged or are engaging in conduct allegedly violative of the Securities Exchange Act.

Like Topics 11-12 and 14-7, an SEC employee's personal

speculation is not a reflection of the agency or necessarily consistent with the SEC's final and public position on the issue and, thus, is not relevant.

Again, the Court is relying on SBB Research Group, LLC, at Page *12.

The Court also agrees with plaintiff that defendants' deposition Topic 19, which concerns the SEC's regulation of firms or individuals who provided financing to microcap companies and received shares at discount from 2003 to 2017, is overly broad, burdensome and the potential benefit to resolving parties' claims is highly speculative.

It would take an extremely long time for the SEC to review every regulatory action taken against these firms or individuals over a 14-year period.

The Court is relying on SEC v. SBB Research Group, LLC., at Page *12, at Note 1.

And, further, whether plaintiff's regulation of these firms or individuals would be of any ultimate use to defendants is completely speculative, as these cases are highly fact specific.

So, the Court finds that there is good cause to grant plaintiff's motion for a protective order to bar defendants' noticed deposition of a 30(b)(6) representative on the proposed deposition topic.

So, the motion is granted with respect to the 30(b)(6)

deposition.

Okay. I want to turn next to Defendants' Motion to Compel, which is at Docket Entry 42; the opposition response is at Docket Entry 56; and, the Phillips' Declaration in support of the opposition response is at Docket 57.

Defendants' motion to compel moves for an order to compel plaintiff to produce documents responsive to defendants' requests for documents: Nos. 19-22, 25-38, 41, 44-47, 54-58, and answers to interrogatories Nos. 1 and 5.

The motion also requests the Court deem request for admission, RFA No. 89, is admitted.

This is the defendants' motion. So, I will start with defense counsel.

Again, I have familiarity and I spent a lot of time with the briefing, but is there anything further that the defendants want to put on the record in support of the motion?

MR. RICHMAN (Via Telephone): Thank you, your Honor.

This is Brian Richman, from Gibson Dunn, for the defense.

I will add that, just for the record, on a number of our requests, the defendant is seeking information that we think will show that no one in our industry, no convertible-note lender in the history of the United States, has ever registered as a securities dealer; and, that the SEC, itself, has closely regulated this industry, including CVP

specifically, for years and has never said anything.

In our view, under Supreme Court precedent, that fact is relevant both to the statutory and to our fair notice defense.

In Christopher vs. SmithKline, for example, the Court, quoting the Seventh Circuit, stated that, "A reading of a statute is less plausible if it implies that in entire industry has been operating in violation of federal law for a long time without the principal regulator noticing;" and, second, the court stated that, "A longstanding industry practice, coupled with a very lengthy period of conspicuous inaction on the part of the regulator, creates the acute potential for unfair surprise."

A number of CVP's requests seek to show that the Supreme Court's caution, both for the statutory point and for the fair notice point, apply here.

RFP's 27, 54-57 and Interrogatory No. 1, for example, is seeking a narrow category of information; specifically, just the identity of certain convertible-note lenders the SEC has interacted with.

That will allow CVP to demonstrate that none of them have ever been registered as securities dealers.

RFP 41, then, seeks documents about the special screening process the Commission created in 2007, specifically to review filings of convertible-note deals.

Given the Commission's current theory that convertible-note lenders are dealers, the plausible -- the existence of that screening process is hard to understand.

CVP also seeks documents that show not only the Commission's close regulation of convertible-note lending generally, but the Commission's regulation of CVP specifically.

Throughout this case, the Commission has tried to deny that it does not know what convertible lending is and that CVP is engaged in it.

In its response to our motion to dismiss, the SEC said that it was not on notice of CVP's trading activity; and in response to our motion to compel, the SEC continued that argument.

It is status Docket 56 at Page 6, that with regard to letters the SEC had written to issuers about CVP, the Commission said that CVP, "has not alleged that the companies have any relationship to the defendants."

Those documents have zero relevance to this case. The Commission's assertion is just false.

Here is a direct quote from one of the letters we asked for additional documents about. This is at Docket 56, 10, at Page CHI 73. And this is from the SEC.

It says, "Please reconcile the balance of the St. George notes -- " St. George is one of the defendants here -- "of the St. George notes of 2.095 million, shown on Page F16,

with your disclosure on Page F13, that the new convertible notes were for 2.4 million before discount."

This type of information gets directly to the plausibility of the SEC's theory and fits squarely within Supreme Court precedent as it will show both that the SEC has known exactly what this industry is and that it has taken no action for many years.

And we are happy to address any additional questions your Honor might have.

THE COURT: Thank you, Mr. Richman.

Mr. Phillips and Ms. Guardi, anything you would like to say in opposition?

MR. PHILLIPS (Via Telephone): Your Honor, this is Eric Phillips for the SEC.

I think we have already addressed the points in the briefing. So, we don't have anything additional to add at this time.

THE COURT: Okay. Thank you.

Let me start, then -- before putting my ruling on the record, let me just start -- with the applicable standard on a motion to compel.

In ruling on a motion to compel, the discovery standard set forth in Rule 26(b) applies. And Rule 26 governs the scope of civil discovery and allows parties to obtain discovery regarding any matter that is: 1, non-privileged; 2,

relevant to any party's claim or defense; and, 3, proportional to the needs of the case.

At the same time, discovery must be proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information; the parties' resources; the importance of the discovery in resolving the issues; and, whether the burden or expense of the proposed discovery outweighs its likely benefit.

The party requesting discovery bears the initial burden to establish its relevancy. If the discovery appears relevant, the party objecting to the discovery request bears the burden of showing why that request is proper.

Again, these are well-established standards and I am not going to put case citations or rule citations on the record.

I am going to start with the Requests For Documents and the Answers to Interrogatory Regarding CVP's Defenses.

So, that is RFD Nos. 19-22, 27-31, 38, 41, 44-47, 54-58 and on Interrogatory No. 1.

Defendants' requests include -- and I am breaking this down -- documents related to public statements by former and current SEC Commissioners and shares; but, specifically, RFD Nos. 19-22.

Defendants argue these documents will establish that

the SEC's own Commissioners did not embrace the legal theory that the agency now presses and pursues against defendants.

Defendants further contend that these communications can be valuable impeachment and rebuttal evidence.

Plaintiff responds that these RFDs seek documents relating to public statements by certain current or former SEC officials, yet defendants have failed to supply any of the statements to the Court. The statements are on the SEC's website, but the Court would still need to determine what portion cited by defendants have to do with this case.

With respect to this category, the Court finds the requested information irrelevant to defendants' defense under either theory of relevance defendants propose.

First, whether an individual commissioner or commissioners embraced the position the SEC decided to adopt in bringing this suit is irrelevant, as discussed already by the Court in its early rulings today in granting plaintiff's motion for a protective order to bar Reidler's deposition testimony.

To underscore this point, plaintiff points out that decisions, like whether to charge individuals with acting as an unregistered dealer, is conducted through a vote of the SEC's commissioners, not through unilateral acts of individual commissioners.

Second, the Court finds defendants' argument that this information is relevant as rebuttal or impeachment evidence

underdeveloped in the briefing.

Defendants cite Ripple Labs in support where the court found internal documents related to a speech given by former SEC Director Hinman relevant to impeach witnesses at trial, where the defendants argued Hinman could potentially testify.

And that is at Page *2 of the Ripple Labs case.

Here, defendants ask for internal documents for speeches by former Commissioners Elad Roisman and Luis Aguilar, Chair Gary Gensler, and former Chair Mary Jo White.

Unlike in Ripple Labs, defendants do not argue or indicate that any, let alone all, of these listed persons may testify. And the Court finds that Ripple Labs is distinguishable from the instant case and concludes internal speech documents are not otherwise directly relevant to any claims or defenses in this case. So, as to Requests 19-22, the motion is denied.

So, turning to internal SEC documents, for this I am to going lump together RFD Nos. 27, 31, 41, 54-47. So, documents related to the SEC's 2021 proposed rule regarding the Rule 144 Holding Period and Form Filing. So, RFD No. 27.

Defendants explain that the proposed rule purports to have studied the convertible lending industry and compiled a list of transactions. And defendants argue that information about the convertible-note market more broadly is contained in the SEC's study of the convertible lending industry will reveal

whether other convertible-note lenders have even registered as dealers.

Plaintiff responds that defendants have failed to provide basic facts that the Court needs to resolve the motion as this request centers around an SEC publication that defendants have not supplied the Court with a copy of.

With respect to RFD No. 31, the communications between the SEC and FINRA about market adjustable convertible securities, the defendants argue that these communications will establish that no one in the market, including SEC personnel, was aware of the SEC's current theory and that SEC is using this theory as a pretext to target a single disfavored industry.

Plaintiff's argument -- plaintiff's argue that this document is not publicly available, meaning defendants never could have seen it, and it is, thus, irrelevant. Plaintiff explains that defendants can make their arguments objectively without needing this information.

With respect to RFD No. 1, which seeks documents with information about the SEC's screening process for disclosures regarding convertible notes, defendants argue this information will establish that if the Commission's own personnel did not believe for years that convertible-note lenders were dealers, an ordinary person would not know that, either.

Plaintiff responds that this RFD seeks documents

relating to public statement by certain current or former SEC officials, yet defendants have failed, again, to supply any of these statements to the Court.

These statements are on the SEC's website, but the Court would still need to determine what portion cited by defendants have to do with this case.

Turning to RFD Nos. 45-57 and Interrogatory No. 1, these seek documents the SEC used to identify and conclude four companies were holders of convertible notes, as stated in the SEC publications, and for the SEC to identify every person the SEC believes or suspects engages in similar alleged dealer activities as defendants.

Defendants argue these documents will establish that no convertible-note lenders ever registered as a dealer. Defendants explain a proposed rule purports to have compiled a list of transactions, including non-dealer related enforcement actions concerning convertible notes.

The requested information, defendants contend, would allow defendants to identify the convertible-note lenders in these enforcement actions for which the lender is not identified in the SEC filing, check the registration status of the identified entities and show that no one in the industry has ever registered as a defendant.

Plaintiff responds the SEC identified public actions where SEC alleged the defendants had this business model.

Non-public information, such as pending enforcement investigations, where the SEC staff believes or suspects that someone has this business model is irrelevant, and SEC rules and regulations prohibit SEC staff from sharing this type of non-public information absent a court order; plus, in the context of SEC enforcement investigations, this material is work product.

The Court observes that plaintiff objects to these categories of requests generally as being protected under the deliberative process privilege. And for the government to demonstrate the prima facie existence of the privilege, three things must happen: 1, the department head with control over the matter must make a formal claim of privilege, after personal consideration of the problem; 2, the responsible official must demonstrate, typically by affidavit, precise and certain reasons for preserving the confidentiality of the documents in question; and, 3, the official must specifically identify and describe the documents.

And that is SBB Research Group, LLC, at Page *2.

Here, the SEC has not provided a declaration or a privilege log asserting the privilege. Notwithstanding these requirements, courts have gone on to resolve privilege disputes without a privilege log where the categories of documents subject to the privilege is clear enough.

And I am relying on FDIC v. Crow Horwath, LLC., No. 17

CV 04384, 2018 Westlaw 3105987, at *6, Northern District of Illinois, June 25, 2018.

Here, at least two categories of requests, the internal analyses and deliberations involved in agency decisions of whether to take enforcement action or sue, and documents reflecting deliberations while policy was formulated, constitute the kinds of materials the courts have held are protected from disclosure. U.S. v. Farley, 11 F.3d 1385, at Page 1389, 7th Circuit 1993, and NLRB v. Sears, Roebuck & Company, 421 U.S. 132, at Page 150, 1975.

This leads the Court to conclude that there is good cause to grant plaintiff leave to file a supplemental filing on the record to include a declaration or affidavit or privilege log to address whether the deliberative process privilege applies to the sought materials.

And the Court will also give defendants leave to submit a reply to whatever the SEC ends up filing.

So, the Court is going to reserve ruling with respect to RFD Nos. 27, 31, 41, 54-57, to allow this to be further briefed.

I am going to ask, for instance, you to submit the supplemental filing two weeks from today -- so, by March 29th -- and to file anything additional addressing or substantiating deliberative process.

And, then, I will give two weeks for the defense to

respond, to April 12th.

To the extent that more time is needed, just file a motion and I will be flexible with respect to the timing of these supplements.

I am hopeful that two weeks will be sufficient time, so that we get this aspect of the motion wrapped up.

Turning to communications between the SEC and the three private attorneys or their firms about market adjustable convertible securities -- so, it is RFD Nos. 28-30 -- defendants argue that these communications will establish that no one in market, including the SEC's personnel, was aware of the SEC's current theory and that SEC is using this theory as a pretext to target a single disfavored industry.

Plaintiff states it already produced responsive communications between the attorneys litigating this action and the first two lawyers and firm, but did not have any responsive communications with the last lawyer that is listed.

The Court finds defendants' request Nos. 28-30 are moot in light of plaintiff's representation that it has already searched and produced the requested documents.

The defendants provide no reason for the Court to suspect that plaintiff is withholding responsive information related to this request. So, Request Nos. 28-30 are denied as moot.

Turning to communications or documents related to

communications between the SEC and third-parties about holders of convertible-notes being characterized as dealers -- so, RFD No. 38 -- defendants argue that plaintiff agreed to respond to RFD No. 38, but has failed to produce the documents and its response is facially inadequate.

Defendants explain that plaintiff agreed to produce documents stored in a non-legacy database maintained by Trading and Markets' Office of Interpretation and Guidance, but this is not responsive to defendants' request for documents concerning a telephone call between private lawyers and certain SEC staff to discuss the change in the Commission's interpretation of the word "dealer" or a request for communications between the Division of Examinations and specific broker-dealers who have served defendants.

Plaintiff responds that the SEC has produced all responsive documents. Plaintiff states it has produced documents previously produced in the Keener case; that is, communications from January 1, 2013, through July, 2021, regarding dealer-related questions to, or responses from, the SEC's Division of Trading and Markets. Plaintiff points out that defendants have already obtained certain responsive documents through a FOIA request.

The Court finds that defendants' request No. 38 is moot in light of plaintiff's representation that it produced documents previously ordered in Keener.

Well, in Keener, the court granted defendant's request for documents in that already identified time period, January 1, 2013, to July 27, 2021, reflecting questions received by the Office of Interpretation and Guidance concerning the section of the guide on, "Who is a Dealer," and all documents reflecting responses provided by the office.

Thus, the Court finds the information requested in defendants' request No. 38, specific communications between the office and certain members of the public, is encompassed in materials that plaintiff has already produced.

So, the request, No. 38, is denied at moot.

Turning to RFD for Requests Nos. 44-47, these seek communications between the SEC Division of Corporate Finance and public companies regarding the Division's review of the company's public filings, Schedule 13Gs and related documents defendants filed with the SEC, and documents related to the Division of Corporation Finance's review of those filings referencing any defendant.

Defendants argue this information will establish that the SEC has known about convertible-note lending for years and never mentioned the dealer at issue; and, that the SEC has known about CVP's business for years and never mentioned the dealer issue.

Plaintiff contends the request for communications seeks internal documents concerning the SEC's review of certain

public companies' filing, information plaintiff argues is irrelevant because these communications took place between eight and eleven years ago and defendants have not alleged the companies have any relationship to defendants.

Plaintiff adds this information is publicly available.

As to the request for Schedule 13Gs, plaintiff state all Schedule 13Gs filed by defendants are publicly available through the SEC's Electronic Data Gathering, Analysis, and Retrieval, or the EDGAR system.

In addition, plaintiff argues these internal documents are protected from disclosure by the deliberative process privilege.

Considering the parties' equal access to the requested documents and the relative burdens of locating and collecting this information, the Court finds it unduly burdensome and not proportional to the needs of the case to require the plaintiff to produce filings and communications that are publicly available.

The fact that requested documents are publicly available is not necessarily a valid reason in and of itself for a party not to produce discoverable information as issues of burden and proportionality must be considered in each particular case.

For that, the Court is relying on County of Cook v. Bank of America Corp., 2019 Westlaw 6309925, at Page *3,

Northern District of Illinois, November 25, 2019.

Here, plaintiff's objection is accompanied by a specific factual showing of undue burden. Plaintiff states that the SEC performed sample searches using possible search parameters for responsive documents to the RFD, and these searches produced over four million e-mails that SEC would have to review for responsiveness and privilege issues.

Thus, under the circumstances presented, the Court finds that the requested filings and communications can be obtained from other sources that is more convenient, less burdensome or less expenses because defendants can access this information on the SEC's website.

So, with respect to Request Nos. 44-47, the notion is denied.

Turning to RFD No. 58, the comment file of an SEC proposed rulemaking about publication of the SEC's guidance documents.

Defendants argue that this file likely contains scores of letters to establish that market participants rely on the SEC's interpretative, no-action and exemptive correspondence in assessing the application of securities laws.

Defendants argue that it is relevant because for decades the SEC's guidance showed that defendants and other convertible-note lenders are not dealers and CVP reasonably relied on that guidance.

Plaintiff responds that defendants have failed to provide basic facts that the Court needs to resolve the motion, as this request centers around an SEC publication that defendants have not supplied the Court with a copy of.

Plaintiff adds this document is not publicly available, meaning defendants never could have seen it and is, thus, irrelevant.

Finally, plaintiff states the SEC cannot search for ESI prior to 2002, such as the ESI for the documents from 1987 sought in defendants' request.

The publication, which, as plaintiff notes, defendants did not provide to the Court, appears at Plaintiff's Exhibit 21, refers to a final rule published in the Federal Register from 1988, titled, "Expedited Publication of Interpretative, No Action and Certain Exemption Letters."

The Court concludes the burden and expense of the proposed discovery outweighs its marginal benefit.

First, the Court finds the benefit of defendants receiving this information is minimal because it is possible for the defendants to establish market participant reliance on the SEC's correspondence without requiring plaintiff to produce the requested comment file.

The Federal Register listing explicitly states, "Members of the public interested in federal securities laws rely substantially on this correspondence; and, in many

instances, the staff's no-action positions and interpretative views are the most comprehensive secondary source on the application of these laws."

The Court fails to see how the comment letters themselves would provide any added benefit to proving market reliance when the excerpt discussing the SEC rule explicitly acknowledges this.

Second, the burden of producing the comment file is significant and would require the SEC to expand its searching capabilities, as plaintiff stated it cannot search for ESI prior to 2002.

So, Request No. 58 is denied.

Turning to RFD Nos. 34-37 and RFA No. 89, these are Requests For Documents and Deemed Admission Regarding CVP's Structural Constitutional Defenses.

RFD Nos. 34-37, defendants seek information to support their defense that the SEC lacked authority to file this enforcement action, as the Commissioners who authorized it were unconstitutionally insulated from presidential control.

Relatedly, defendants also seek SEC's communications with the Securities Investor Protection Corporation's -- or SIPC -- President and documents concerning her level of responsibility, in support of defendants' claim that SIPC's, a government entity, leadership was not appointed in conformity with the Appointments Clause.

Plaintiff responds that Judge Dow rejected defendants' legal theory. Plaintiff argues that Judge Dow ruled that even if defendants were right that SIPC's president must be appointed in accordance with the Appointment Clause, that would be no defense against the SEC's claim.

Further, plaintiff contends that SEC has not sought any relief related to SIPC and does not seek to compel defendants to join SIPC.

Finally, plaintiff argues that if defendants believe SIPC's president was not properly appointed, they may object to SIPC membership by filing a suit against SIPC.

With respect to RFA No. 89, defendants argue that RFA No. 89 asks plaintiff -- which asks plaintiff to admit that SIPC's president was not appointed pursuant to the Appointments Clause, should be deemed admitted.

Defendants explain that plaintiff's claim that it does not know how SIPC's president was appointed is unreasonable, given that SIPC's bylaws, which provide the method for the president's appointment, are a matter of federal law, filed with and subject to approval by the Commission under the Securities Protection Act of 1970.

Plaintiff responds that after reasonable inquiry, it lacked information to admit or deny the RFA; and, that while plaintiff does have access to SIPC's bylaws, the RFA does not ask about SPIC's bylaws, but how SIPC's president was actually

appointed. That, plaintiff contends, the SEC does not know.

As previously stated, this Court has reviewed the district court's order denying the defendants' motion to dismiss, where the district court discusses these Constitutional arguments purported by defendants.

The Court agrees the district court judge flatly rejected the defendants' argument that the SEC lacked authority to file this enforcement action, stating, if defendants are right, "then the SEC and several other multimember commissions and agencies would be rendered toothless, and that this result would misread the Supreme Court's decision."

For this reason, defendants' RFD Nos. 34 and 35, which requests information related to this rejected defense, are irrelevant to the claims and defenses the district court ruled could proceed to trial.

So, with respect to RFD Nos. 34 and 35, the motion is denied.

Turning to defendants' appointments defense, the district court judge did not outright reject this defense and stated, "If, at a later stage of the case, the Court determines that one or more of the defendant entities is indeed a dealer and, thus, defendants would be required to join the SIPC, defendants may renew this constitutional argument."

Thus, the Court finds that discovery requests relating to defendants' appointment defense are relevant. However, the

Court concludes that RFD Nos. 36 and 37, that request all documents concerning the president of SIPC and all communications with the president, is overly broad and the burden or expense of the requested information outweighs its likely benefit.

The Court, based on the record before it, suspects it would take a very long time to cull and review all communications and documents related to this position; and, at this stage of the case, defendants have not articulated any benefit from requiring plaintiff to produce this volume of information.

So, Request RFD Nos. 36 and 37 are denied.

Regarding defendants' request for admission, it appears defendants ask the Court to ignore the objections put forth by the SEC and, instead, deem the request admitted. The Court declines to do that here.

Here, plaintiff's response to defendants' RFA No. 89 appears at Defendants' Exhibit F, states that the SEC objects that the request is unduly burdensome, calls for irrelevant issues and is not proportional to the needs of the case.

Under Federal Rule of Civil Procedure 36(a)(6), a requesting party may move to determine the sufficiency of an answer or objection. Here, defendants skip that step and presume that the SEC's objections have been deemed insufficient by the Court. That is not the case.

Requests to admit are proper when they are used to establish facts or the application of law to facts, but not to establish legal conclusions.

Here, this request, as plaintiff points out, is not designed for that purpose, but for the SEC to admit or deny a legal conclusion that the SIPC president was not properly appointed pursuant to the Appointments Clause.

The Court finds nothing improper about the SEC's objection or response that would warrant deeming this request admitted at this time. So, defendants' request to deem RFA No. 89 admitted is also denied.

Turning to RFD Nos. 25-26 and Interrogatory No. 5 -- so, these are requests for documents and answers to interrogatories regarding allegations in the SEC's complaint -- defendants seek this information supporting plaintiff's claim that selling newly-issued shares or earning a spread are common attributes of a securities dealer.

Defendants argue that plaintiff must produce the documents that support that assertion.

As to Interrogatory 5, defendants request plaintiff's response as to what an SEC and FINRA inspector would do at a convertible-note lender, such as defendants, which has no customers in response to plaintiff's complaint that defendants, by failing to register as a dealer, avoided inspection by the SEC and FINRA, to ensure that it complied with securities laws.

Defendants contend plaintiff's response is deficient and should respond specifically as to what the inspector would do with a convertible-note lender.

Plaintiff responds that regarding the RFDs, the SEC already provided a detailed interrogatory answer that addresses these RFDs, and cites to publicly-available materials responsive to the RFDs.

As to Interrogatory 5, plaintiff responds the SEC did not refuse to answer, as defendants claim, but provided a detailed description regarding the SEC's processes; and, further, because each examination necessarily differs based on individual facts and circumstances, the SEC cannot provide any more specificity.

I need to pause here to make a further inquiry. And this is addressed to plaintiff's counsel. So, to the SEC.

The plaintiff's response to both of the requests indicate that the SEC agrees to produce documents responsive, if any; and, that it would do so as long as -- sorry.

It says that it would do so; but, then, I don't have an update on that. So, I would like to confirm whether SEC provided responsive documents to RFD Nos. 25 and 26, as it stated it would in their written discovery responses.

And just so you know what I am looking at for this, it is Docket Entry 42-6, at Pages 12-14.

Mr. Phillips? Ms. Guardi?

(Brief pause.)

MR. PHILLIPS (Via Telephone): I am sorry, your Honor. I am just going to -- if you give me a moment, I will pull it up.

THE COURT: Yes.

MR. PHILLIPS (Via Telephone): This is our response to RFDs 25 and 26, correct?

THE COURT: Yes.

And I am looking at Docket 42-6, at Pages 12-14, with respect to SEC's position that it would produce documents responsive, if any, and cites, in its response to Interrogatories 6 and 7 in the defendants' first set of interrogatories, and that are not publicly available.

(Brief pause.)

MR. PHILLIPS (Via Telephone): Right.

So, I think the answer is that we haven't cited to anything that is not publicly available. So, the only things that we have cited to are information that is publicly available.

So, we haven't produced anything additional because we haven't cited to anything that was not publicly available.

THE COURT: Okay.

From defense counsel's standpoint, Mr. Goldsmith, Mr. Richman, is there anything further you want to say with respect to that representation made in the briefing and what

Mr. Phillips just stated?

MR. RICHMAN (Via Telephone): Yes, your Honor. Thank you.

This is Brian Richman from Gibson Dunn.

I would just say that for RFP 25 and 26, the defense has received zero documents, which is, I think, consistent with what Mr. Phillips said. But that does not excuse the SEC from producing information.

The SEC alleged in its complaint that selling large quantities of shares or selling some newly-issued shares was indicative of being a dealer. Our contention is that is false.

If the SEC has got information that it is actually true, whether it is internal or external, they need to produce it.

THE COURT: Mr. Phillips, Ms. Guardi, anything else you want to say?

MR. PHILLIPS (Via Telephone): No, your Honor.

Well, yes. I think that what Mr. Richman just said and how the request is framed, I think it is overly broad and unduly burdensome to ask us to search for every document that conceivably would be responsive to this issue, whether internal or external.

We have responded to these discovery requests, asking them for materials that support these allegations. So, we have

cited to authorities -- both the SEC's authorities and case law -- that support the notion that these issues are relevant in that, where they, for example, profited for a markup, between a difference at which they converted and they sold in the stock, that that is a factor that courts take into account.

We have cited all of this authority.

So, we think that we have satisfied the request and that doing it -- in doing some sort of search -- as to every single material that the SEC might have, from whatever timeframe it asks for, is not relevant and proportional to the needs of the case.

MR. RICHMAN (Via Telephone): Your Honor, this is Brian Richman.

Can I add one thing to that, please?

THE COURT: Sure.

MR. RICHMAN (Via Telephone): Thank you.

The SEC here has, with its guidance documents, just been playing a game.

So, when the SEC initially issued its guidance documents, it referred to industry terms of art.

So, for example, a new issue. The Commission guidance said, "New issue." And a new issue is a defined term under the securities laws that refers to particular types of initial public offerings.

Those words have magically changed in the Commission's

litigation filings and they have now become newly-issued shares.

So, the Commission is deviating from what itself has said publicly. And I think as part of our fair notice defense we get to explore what the historical guidance was and what the Commission thought it was.

The Commission cannot just change the words in its own guidance documents and, then, avoid all questions about it.

THE COURT: But doesn't this come back, again, to this -- I am going to call this -- sort of disconnect between both sides, between the publicly-released information versus the internal deliberations of the SEC?

And the fact that Mr. Phillips has referenced that there aren't -- there is nothing else to produce that is publicly available, how does this not get into, again, privilege issues?

MR. RICHMAN (Via Telephone): Yes. But the SEC is going to come into court and they are going to say, "We should have known that we were required to register under the Commission's theory because the trading involved newly-issued shares."

And we are going to point to the Commission documents and say, "But they used the words 'new issue.' They used a defined term."

And in order to respond to the SEC, to say the SEC at

the time even they knew what the words "new issue" meant.

That is going to be a dispute. It is going to be what did a reasonable person at the time, how would they have read those words?

And how the SEC's own personnel read those words we think is evidence to how a reasonable person read them.

It would be difficult for the Commission to come into court and say, "Hey, a reasonable person would have read this particular phrase this way," is at the exact same time the Commission's internal documents say the exact opposite.

THE COURT: Again, I am just failing to see the distinction.

And I understand the defense and the argument that you are making. I just don't -- I continue to have -- now, I am going to identify this as a disconnect, as far as what the defendants should have known, as what is in the public sector, what is publicly available.

Again, I am not understanding the relevancy in how you are not getting into privilege issues with respect to SEC's internal document.

MR. RICHMAN (Via Telephone): Right, your Honor.

I think the question, in terms of fair notice, is how would a reasonable person in the public have understood the Commission guidance or understood the Commission or understood the statute.

And I think evidence that is relevant to that is how did people at the time understand it.

So, how did the Commission's own personnel understand the term? That is evidence to whether a reasonable person would have done it.

So, if there were a product liability case, for example, and the plaintiff said the defendant should reasonably have installed a certain safety measure, it would be relevant to point out, if the plaintiff at that time had installed such a safety measure. But it gets to the objective reasonableness of whether someone would have done it.

So, when the Commission is making claims here and is trying to refute CVP's fair notice defense, saying that a reasonable person would have known in 2017 or 2016 or 2015 our theory, we think it is evidence of objective reasonableness of CVP's position that the Commission, itself, did not know that.

THE COURT: Okay.

Thank you for the additional arguments from both sides.

So, regarding RFD Nos. 25 and 26 --

(Brief pause.)

THE COURT: I am sorry, my computer just froze. So, give me one moment. I apologize. My screen just went blank. Hold on.

(Brief pause.)

THE COURT: Okay. I am back. Sorry about that.

Okay. Regarding RFD Nos. 25 and 26, the Court is denying the motion as to both of these requests for the reason that was just demonstrated in the back and forth that I just had with defense counsel.

The SEC has provided all of the -- or has searched and has not located publicly-available documents.

The Court does not see the relevance of the non-public documents and, also, credit the SEC's position with respect to the burden of searching; and, also, that it is not proportional to the needs here.

So, for those reasons, RFD Nos. 25 and 26, the motion is denied.

Regarding defendants' Interrogatory 5, the Court concludes that the plaintiff must amend its response to identify any securities laws, regulations, FINRA rules, policies or the like, that plaintiff referenced in answering the interrogatories.

So, the Court recognizes that plaintiff did describe in detail the inspection process across multiple pages, and that this process will likely vary based on individual facts and circumstances.

However, plaintiff does not include any citations to indicate that the process described reflects agency policy or law. And the Court is unpersuaded that including these

citations would be unduly burdensome, as the Court would imagine plaintiff referenced these sources when crafting its response.

So, with respect to Interrogatory No. 5, the motion is granted.

Turning to Request for -- this is RFD No. 32, Request -- for Communications between SEC and inquiring members of the public regarding dealer-related questions, defendants argue the SEC's communications with third-parties about the dealer registration issue will establish that no one in the market, including the SEC's personnel, was aware of the SEC's current theory, and that the SEC is using this theory as a pretext to target a single disfavored industry.

Plaintiff responds defendants have public and, thus, equal access to communications between the SEC and inquiring members of the public. Plaintiff explains the SEC's website contains responsive, publicly-available information, including links to the SEC's Division of Trading and Markets' no-action, exemptive and interpretive letters from January 1, 2002, to present.

Many letter categories relate to broker-dealer registration. And Plaintiff adds that the SEC already produced communications between January 1, 2013, through July, 2021, that the SEC could obtain using search terms from two databases.

The defendants replay that plaintiff is withholding communications because defendants have in their possession relevant communications that SEC should have produced, but did not, referring to the SEC's lawyers' communications with private plaintiffs' lawyers about convertible-note cases mentioned on podcasts and communication with an in-house lawyer for a broker-dealer who reached out for compliance guidance.

And I am referring to Exhibits L and M for that, in summarizing defendants' response.

So, considering plaintiff's representation that plaintiff already produced the requested communications and, alternately, that these communications are available publicly on the SEC's website, the Court finds defendants' request, as related to RFD No. 32, as moot.

The Court is unpersuaded by defendants' alleged proof that plaintiff is withholding documents.

First, defendants provide no indication that the information discussed during the podcasts, where private plaintiffs' lawyers brag about collaborations with the SEC on convertible-note cases, is verifiable, accurate or involving similar facts to the instant case.

Second, the attached e-mail chain between in-house counsel for Alpine and the SEC's Division of Trading and Markets, does not suggest plaintiff is withholding its responses to public -- and, again, this is on public --

inquiries.

The Division responded to in-house counsel that the Commission staff generally cannot comment on enforcement actions other than to provide information already made public by the Commission, and suggested in-house counsel send a no-action letter.

And I am referring to Exhibit L at Page 2.

When the in-house lawyer pressed the Division for a specific response, the Division reiterated it could not add any gloss to the Commission's order.

That is at Exhibit M, at Page 2.

This e-mail chain does not suggest to the Court that in-house counsel for Alpine received any insight given the SEC's policy not to comment on enforcement actions and the SEC's suggestion to submit a no-action letter, which are published on the SEC's public website.

So, for this reason -- for these reasons -- the Court denies the motion as to Request No. 32.

Turning to RFD 33, which is a request for prior versions of SEC's Guide to Broker-Dealer Registration, defendants argue that prior versions of this guide will show how SEC guided market participants in assessing who may need to register as a dealer.

The plaintiff responds that the plaintiff already produced prior versions of the Guide. Plaintiff explains that

the SEC already collected and produced these documents in a 2021 case, SEC vs. Keener, which I referenced earlier in the rulings, and re-produced those to the defendants in this case.

And that is coming from Mr. Phillips' declaration at Docket Entry 57, Pages 2-3.

In light of plaintiff's representation that plaintiff already produced prior versions of the Guide, the Court finds defendants' request, as related to Request No. 33, moot. Defendants provide no reason for the Court to suspect that plaintiff is withholding responsive information related to this request.

And, with that, I am done with that second motion.

Finally, I am going to turn to plaintiff's motion to compel.

MR. RICHMAN (Via Telephone): Your Honor, I apologize to interrupt.

This is Brian Richman.

I wanted to ask if I could raise one thing.

I think there was one factual misunderstanding that I think the Commission would agree with on us.

THE COURT: Go ahead.

MR. RICHMAN (Via Telephone): So, this concerns Request for Production 28-30. This is the Commission's communications with third-party lawyers about this case.

I believe the Court held that the requests were moot

in light of the Commission's assertion that it has produced the documents.

I would just clarify on that, the Commission's position is that it produced only the documents of communications with a single SEC lawyer, Mr. Phillips.

The Commission has told us that it is withholding the communications with those other private plaintiffs' lawyers with all other Commission personnel.

We have received about -- I think it was -- maybe 10 to 12 of such e-mails.

And the SEC's declaration of their IT professional, at Docket 56-20, actually confirms that there are a substantial number of additional e-mails.

So, for example, the Basile Law Firm, there are 261. For Barry Bergetsky, there are 19. And, for Brenda Hamilton, there is 113.

And, I think, the SEC would confirm they have not produced those, other than the ten or so e-mails that Mr. Phillips has personally.

THE COURT: Can you give me a minute to catch up? Because I am going back into my notes and I am trying to find this in the briefing. So, just stand by.

MR. RICHMAN (Via Telephone): Sure.

(Brief pause.)

THE COURT: Mr. Richman, can I just ask you to repeat,

and could you give me what you are looking at with respect to those numbers that you just cited?

MR. RICHMAN (Via Telephone): Yes, your Honor.

So, I -- referring to Document Request 28-30, and those are addressed in our brief, the motion to compel, which --

THE COURT: Right.

MR. RICHMAN (Via Telephone): -- is Docket 42, at Pages 8-9.

And, then, discussed --

THE COURT: I am sorry. I specifically mention numbers that you cited with respect to the lawyers.

MR. RICHMAN (Via Telephone): Got it.

THE COURT: Yes, sorry.

MR. RICHMAN (Via Telephone): Yes, your Honor.

Docket 56-20.

And, then, it is Page ID 1140, Paragraphs 5, 6 and 7.

(Brief pause.)

THE COURT: Mr. Richman, so, I have those paragraphs in front of me. And the defense's point is they were only -- documents -- responsive documents -- were only produced for which lawyers?

MR. RICHMAN (Via Telephone): So, the SEC produced only documents between Mr. Phillips, the SEC attorney --

THE COURT: Right.

MR. RICHMAN (Via Telephone): -- and these external third-parties.

The Commission has withheld all communications between other Commission lawyers and these third-parties.

So, we have received, it is about ten e-mails between Mr. Phillips and these third-party plaintiffs' lawyers.

So, based on the SEC's numbers here, it looks like there would be around 280 such e-mails the Commission is withholding.

THE COURT: Okay.

And, now, I understand your point. Okay.

Can I hear from SEC on this. Mr. Phillips? Ms. Guardi.

MR. PHILLIPS (Via Telephone): Yes, your Honor.

Your Honor, it is Eric Phillips from the SEC.

What Mr. Richman said is, basically, right. We view these requests -- and I think the Court has already held -- that they are irrelevant, our communications with these individuals lawyers. They have no relevance to the case.

But, in an effort to compromise, we said, "We will agree to produce any communications between the litigation team litigating this case and these attorneys."

And since I was the only one on the litigation team who had any responsive communications with some of the lawyers, we produced those.

So -- and, in searching for documents potentially responsive to these requests to respond to the motion to compel, we searched for these names across the entire SEC system and came up with a certain number of hits, which we haven't searched for and produced, because we think that these communications, with, presumably, with these other people who are not involved in this case -- other SEC staff members -- presumably would not have anything to do with this case.

Again, we haven't searched them except to identify the number of hits that were generated. But, presumably, they relate to other matters.

We do know that some other attorneys involved in other cases have had some communications with some of these lawyers. But we just view them as not at all relevant or proportional.

And I think the Court has already ruled that previously during this hearing.

MR. RICHMAN (Via Telephone): Your Honor, this is Brian Richman, again.

The small sample of e-mails the SEC produced were literally about this case. They were e-mailing with the Commission counsel about this case.

And they were also referencing their conversations with other SEC attorneys about the Commission's broader enforcement initiative against convertible-note lenders.

THE COURT: But, again, if I am following what

Mr. Phillips just said, the unproduced e-mails are communications with these other attorneys, not public. And, again, not related to the instant case, correct, Mr. Phillips?

MR. PHILLIPS (Via Telephone): As I said, as to the latter -- as to the first point, that is right.

As to the latter point, that they don't have anything to do with this case, I am presuming that to be the case, because I don't think these other lawyers have anything to do with this case, or the other staff members who have communicated with these individuals.

But we haven't looked at them. We have just generated a number of hits. So, I can't say for certain, without looking at them, that they don't bear on this case. I am presuming that because there is not a finite number of people who have been involved in this case. And I don't have any reason to believe that there are any other people involved in the case, other than me, who has had communications with these lawyers.

THE COURT: Am I right, then, that there is -- so, out of these three paragraphs, then, it is a total of 261, from Paragraph 5; 19 e-mails, then, from Paragraph 6; and, 113 e-mails from Paragraph 7. So, it is a total of 393 e-mails.

But the SEC has not reviewed those e-mails to see if they do have anything -- they have any relation to the instant case?

You are sure that it is not pubic -- these are not

public; but, your point is that -- or, I think, what you are saying, Mr. Phillips, is that they were not reviewed -- you are making an assumption based on the individuals who are on these e-mails, that they don't have any bearing on this case. But no one has reviewed the 393 e-mails?

MR. PHILLIPS (Via Telephone): Correct.

And I don't know that there are actually 393 e-mails. This is a number of hits that were generated by searching for these lawyers' e-mail addresses. And, so, those are the number of hits that come up.

But, no, we have not reviewed them.

THE COURT: Okay.

With respect to the Court's ruling -- and I appreciate, Mr. Richman, noting this. And the Court needs to clarify it.

So, with respect to Request Nos. 28-30, the Court is denying it as to anything that doesn't have to do with the instant case, because given what Mr. Phillips said, none of these are public.

But I am ordering the SEC to review the hits here, given that it seems to be a reasonable number; and, to the extent that any of these hits result in communications between, you know, these individuals relating to the instant case, then the SEC is to produce those additional communications.

But I am denying the request to the extent that it is

not dealing with the instant case.

And, again, taking the SEC's point that none of these are public.

So, obviously, if these were public, given all that we have talked about on the record today, this would be a different analysis, in the Court's estimation.

But that is the clarification.

MR. PHILLIPS (Via Telephone): Your Honor, this is --

THE COURT: Yes, go ahead.

MR. PHILLIPS (Via Telephone): I am sorry.

This is Eric Phillips, again.

Can I make one suggestion, in light of your Court's ruling and Mr. Richman's concerns: That instead of actually pulling and reviewing all of those hundreds of communications at the outset, that the parties agree on some search terms to determine whether they have anything to do with this case; like, we could enter the party's names?

And, I think, that our IT Department can do that.

So, we would search for Fife. We would search for Chicago Venture Partners.

We can agree on those search terms, but I think that would be a much more efficient way to get what Mr. Richman is asking for and what the Court has said that we should be producing.

Is that acceptable to the Court?

THE COURT: Mr. Richman, what are your thoughts?

MR. RICHMAN (Via Telephone): Your Honor, thank you.

I have two responses on that -- or two things to add.

First, when it comes to the relevance, I would respectfully request that documents concerning the SEC's broader enforcement initiative against convertible-note lenders be included, as that would include this case.

So, perhaps, you know, there might be e-mails talking about, say, the Keener case individually.

And I understand that would be outside of your Honor's ruling.

But I would request that to the extent the SEC's counsel are talking more broadly about going after the convertible-note industry, that it be clarified that would include this case against CVP.

And as for Mr. Phillips' suggestion, in terms of negotiating search terms, this is something that the defense has been requesting from the SEC for months. It is something we requested throughout all of this time.

And I will just note that, I think, at this point, the SEC, even putting in this affidavit where it describes its search hits, is improper, as we had asked the SEC to run these searches.

Mr. Phillips, the SEC's counsel, told us on numerous occasions that the SEC was unable to search employee e-mail

accounts without downloading them one by one; they were unable to conduct these searches.

We told the SEC on multiple occasions we did not believe that was true, concerning the SEC is subject to the Freedom of Information Act, which would seemingly require the SEC to broadly search employee e-mail accounts.

We, then, served the SEC with a document request very narrowly tailored, asking the Commission for documents sufficient to identify the Commission's ability to search employee e-mails.

The Commission flatly refused to respond to that request on the ground that counsel's personal representations were sufficient, that the Commission was unable to do that.

We operated under that assumption for six months through meet and confers. The defense drafted and served third-party subpoenas on these individuals, on the assumption the SEC could not even identify who they were talking to, besides Mr. Phillips personally.

We, then, briefed our motion. And, then, after it was briefed is when we found out for the first time that the SEC actually has this ability.

THE COURT: Notwithstanding the defendants' frustration, Mr. Richman, your two requests are denied. I am not expanding the scope for all of the reasons that I have already cited with respect to the Court's other rulings.

And I am not interested in setting up another discovery motion because you all cannot agree about search terms.

So, notwithstanding the efficiently point that Mr. Phillips has raised, I am ordering the SEC to look at the 393 hits that are referenced in the Phillips' declaration -- or in the Phillips' -- sorry, in the Phillips -- declaration in those three paragraphs.

If they have anything to do with the instant case, the SEC is to produce those. Otherwise, the motion is denied with respect to requests -- to the two requests.

So, that is the Court's ruling -- or modified ruling.

Okay. I want to turn to the third motion, plaintiff's motion to compel, at Docket Entry 49.

Plaintiff's motion to compel moves for an order to compel defendants to produce documents responsive to plaintiff's requests for documents, or RFD Nos. 2, 4, 7, 8, 12, 18 and 30, and answers to Requests For Admission No. 1, and every other odd-numbered RFA through 209.

And I have already applied the applicable standard to this motion, but I do -- or I have already stated on the record the applicable standard.

It is plaintiff's motion. So, I will hear first from SEC, to the extent that there is anything further that SEC wants to state on the record.

Again, the Court has familiarity with all of the briefing.

I will, then, give defense a chance to respond.

So, starting with the SEC, Mr. Phillips, Ms. Guardi, is there anything to say in further support of plaintiff's motion to compel?

MR. PHILLIPS (Via Telephone): Eric Phillips on behalf of the SEC.

Again, we don't have anything additional at this time.

THE COURT: Mr. Richman, Mr. Goldsmith, anything that the defense would like to say, you know, further to the briefing?

MR. GOLDSMITH (Via Telephone): Yes. Thank you, your Honor.

This is Barry Goldsmith speaking.

And I know we have been going for some time, but I wanted to raise a few points and emphasize a few points.

The requests here would require defendants to produce, I will just divide this briefly between the requests for e-mails -- additional e-mails -- and the requests to admit.

The e-mail requests would require us to produce e-mails from January of 2015 to the present, with every third-party that defendants have dealt with regarding convertible loan transactions, as well as the internal documents relating to those kinds of transactions involving the firm's principal.

That would be about 135,000 e-mails -- additional e-mails -- and attachments spanning a million pages.

As we have pointed out in the briefs, we have produced during the investigation, which went on for some three years, 450,000 pages of e-mails and attachments, similar to what was requested.

Obviously, we don't need to produce those, again.

But in terms of what is proportionate to the needs of the case, we believe that the request is not only unduly burdensome and not proportionate to the needs of the case, but wholly unnecessary.

I just wanted to stress that the facts that the SEC is hoping to prove from these e-mails are facts that the defendants don't contest.

The defendants have said that they need these e-mails to demonstrate the volume and frequency of defendants' purchase and sales of securities; and, that defendants' principal was regularly involved in these transactions.

We don't dispute the volume. In fact, we have offered to stipulate to, you know, whether it is a precise number or a generalization, to avoid this kind of discovery.

We have also produced -- and, I think, it is very important here -- the actual transaction documents with our brokers, that would allow the SEC to calculate or determine the extent, frequency and nature of each and every transaction that

we have entered into.

And, again, the SEC's position in this case -- just directing you to Exhibit 53 or 58-3 in the docket on the motion to dismiss -- the SEC's position on these issues, and they have stated this, is that a convertible debt buyer that regularly buys and sells securities -- and they use the term in more than a few isolated transactions -- needs to register as a dealer.

So, again, in terms of what is proportionate to the needs of the case, or even necessary here, we don't believe these e-mails even are necessary under the Commission's theory.

We have offered to stipulate. We don't dispute the fact that we have entered into these kinds of transactions.

We have asked the SEC, "Are there additional facts that you would like us to stipulate to, that would be drawn from these e-mails?" We have asked them.

They have not come up with anything.

So, again, to go through a very, very time-consuming and burdensome process producing these e-mails, I am not sure what the SEC would actually do with them or whether they would even read them. But we don't think they are necessary, given the prior production -- the transaction documents that have been produced -- and our willingness, again, to stipulate to the frequency at which these transactions were entered into.

The second part of the SEC's motion to compel relates to their odd-numbers requests for admission. And I think what

is important here is the SEC has pointed out, "Well, we have addressed and responded to the eve-number requests."

The even-numbered requests, essentially, parroted back the statute and asked us to admit that we violated the statute.

And, obviously, this whole case is about the interpretation of the '34 Act and what the dealer provisions means under that statute. And we have responded and denied those.

The requests that they are asking us to admit here, it is really over 100 variations of the same request: That between the years 2015 and 2021, whether our principal business, as measured by profits, proceeds or employee hours worked, was buying convertible notes and selling convertible shares.

What is at issue here and, I think, again, important to emphasize, is that defendants -- and there a number of entities here -- but, essentially, it is a family office. It is not a public company. It is not an, you know, entity that files financial reports. It is a family office.

And the scope of business activities of that family office goes far beyond convertible notes. Certainly, it was one aspect of their business, but the defendants managed a number of operating companies in the healthcare field. They have invested in oil and gas services investments. They own oil royalty interests. They make real estate investments.

They trade common and preferred stocks. They buy and sell warrants.

So, you know, in order to determine, you know, what is the principal business, as measured by employees' hours worked or even profits, is not something that this entity -- that these entities -- do or keep. And, you know, that is just something that would require an expert to come in and make that analysis.

The cases that the SEC cites in their brief are very specific cases where there is a particular fact that they are asking a party to admit to. These are not specific facts. This would require someone to come in and do a complete analysis of the business.

So, that is why we have objected to those requests and not responded.

So, again, I think these are important facts to consider.

THE COURT: On the requests to admit point -- and I understand the portion of the argument dealing or where the defendants are alleging that expert testimony or expert analysis is necessary, but the case law talks about a reasonable inquiry being made. And the answers don't address that.

And from what -- something you just said makes me think that the answer is that it can't be done because of the

nature of the business.

But what is the response to, that a reasonable inquiry needs to be made and that the response needs to establish that?

MR. GOLDSMITH (Via Telephone): Certainly, your Honor. We can make a reasonable inquiry.

Again, you know, in terms of breaking down the business of the entities here -- and, as you can see, there are a number of defendants and a number of different entities -- you know, the business that they engage -- the businesses that they engage -- in are quite diverse, involve a number of different types of investments, that are not tracked, you know, based on employee hours.

Again, being a family office and one that is sort of insular here, engaging in many different activities, you know, we certainly can ask the principles. But none of these criteria are tracked on a regular basis.

So, for example, they ask, you know, employees' hours worked or gross proceeds or net profits.

Again, there are a number of operating companies that are run out of these same offices. They buy and sell preferred stock. They trade in just debt -- in non-convertible promissory notes. So, the ability to quantify the way the SEC is asking us to do is just something that is not easily done.

It is not, you know, can we make an inquiry and find out whether defendant was at work on a particular day or

engaged in a transaction with a particular issuer. Those are things, obviously, that are reasonably discernible. But what they are asking us here just isn't.

And, you know, we certainly can answer specific questions. And we have. We have produced in discovery, you know, 400 -- almost half -- over half a million pages during the investigation; and, in the litigation, I think, another 30,000 pages of documents.

So, we are certainly willing to answer specific questions. But the notion that -- and it is not really defined here -- you know, "What does a principal business mean? Is it a majority of your revenues? Is it a plurality? Is it a specific percentage?" The answers to these questions are just not reasonably obtainable. And that is why we objected and could not answer these.

I suppose you could have forensic accountants come in and go back to 2015 and try to analyze the business and come up with numbers. But, again, that is not something that we have. And if we did have it, we would certainly, you know, produce it.

THE COURT: I want to go back just to a question about the e-mails. And, then, I will go back to the SEC and see if they want to reply to any of this.

But going back to e-mails and the points that were just made in the argument, in terms of one of the factors that

the SEC has to establish is about -- well, with respect to a factor in what is going to be ultimately the Court's remedies' analysis -- is the recurrent nature of the defendants' misconduct.

And, so, I understand the points that you made with respect to stipulations and, also, that there has already been a lot produced that goes to this. But I am not so sure that a stipulation is sufficient with respect to, you know, the remedies' analysis here.

And, so, how is a stipulation going to satisfy that?

MR. GOLDSMITH (Via Telephone): We can certainly stipulate; but, in terms of the recurrent nature, we have provided the SEC with the transaction documents, all of its convertible lending activity.

You know, again, I mean, it is not something that we are doing, you know, actively now. But, in the course of discovery in this litigation, we provided the actual transaction documents.

So, the SEC can determine, you know, are we still engaging in the transactions that they find problematic.

Now, their theory, you know, as I mentioned, you know, in connection with the motion to dismiss, they have said that, you know, only a few -- more than a few -- isolated would be sufficient.

But in terms of what are we doing today and how

frequently and whatever, they have the transaction documents. So, I don't know what they are going to do with, you know, e-mails with the borrowers or the contra-party -- the third-parties -- that we have engaged in securities transactions with.

We have given them the transaction documents. So, they can determine are we still engaged in this activity and how recently and in what magnitude.

So, again, the e-mails, I think, not only are, you know, 130,000 e-mails, a million pages disproportionate to the needs of the case, it is unnecessary, you know, if they have the actual transaction documents.

They have all of our brokerage statements. So, they can see what the securities transactions are. But, again, you know, what the e-mails show.

Now, they says, "Well, if you go to an industry conference, you are a dealer."

Well, we can tell them or stipulate, you know, that on occasion we have gone to industry conferences.

So, again, I think the e-mails, it is sort of a red herring. You know, are they going to show the jury a transaction document, you know, where -- you know, a letter agreement between third parties?

The other thing is, you know, they are asking for internal e-mails from the principal of -- defendants'

principal. Those are going to have to be reviewed for privilege. You know, there are certainly lawyers involved.

So, again, I think it is just totally disproportionate to what they need. They have the transaction documents.

In terms of the frequency which we engage in these transactions or have over the years, we have offered to stipulate to that.

We have also said, "What facts do you think these e-mails will show or are you asking for the e-mails?"

We have asked them to tell us what facts and we can, you know, stipulate.

I think the real issues in this case are the legal issues. It is what is meant by a dealer under the '34 Act.

THE COURT: I mean, along with the -- along with the -- disproportionate argument with respect to the volume and what is required, I just want to be clear that what you are saying is these e-mails are duplicative of information already produced?

MR. GOLDSMITH (Via Telephone): Yes.

I mean, largely, duplicative.

In terms of the basis that the SEC has articulated as to why it needs these e-mails is to demonstrate the volume and frequency of our purchase and sales of convertible notes.

The volume and frequency, they have the actual transaction documents. We produced those.

We have produced the brokerage statements. You know, have we, over the years, engaged in convertible note transactions more than a few times or, you know, from time to time, or in whatever volume they think is necessary here.

But, again, their own theory of the case is if you are doing this at more than a few isolated transactions, that somehow makes you a dealer. They have said that in the motion to dismiss.

So, again, you know, we would agree that it is more than a few isolated. And we can try to agree on a quantification.

But, again, I don't see the need for these e-mails, particularly given where we are now; the fact that during the investigation, which went on for three years, we have produced 450,000 pages.

They asked for a sampling, which is reasonable, at the time.

We gave them e-mails relating to, I believe, it was 65 different transactions. They have had those. They have had those for a long period of time.

But what we have brought up to date are the actual transactions.

So, again, you know, a million pages, 130,000 additional e-mails, after we have already produced 450,000 in the investigation, again, just does not seem to be necessary or

proportionate. In fact, I would argue, would be wholly unnecessary here.

THE COURT: I would like to hear from the SEC.

You are free to make -- and, Mr. Phillips, Ms. Guardi, you are free to address -- any of the points that were just addressed by Mr. Goldsmith.

I do have two specific questions for SEC. But let me just open it up, as far as any specific points you want to address. And, then, I will ask my two questions.

MR. PHILLIPS (Via Telephone): Thank you, your Honor.

Eric Phillips, again, on behalf of the SEC.

Just a couple of points in response to what Mr. Goldsmith said.

He said that we are asking for these e-mails solely to establish volume and frequency of the transactions. That is not true. Volume and frequency is an important issue in the dealer analysis, to be sure.

And it is possible, we may argue, that just looking at the volume and frequency of the transactions is enough to establish liability. But we don't know what Judge Maldonado will determine is relevant or not -- whether that is sufficient -- or whether there are other factors to be considered.

Certainly, other courts have said -- including Judge Durkin in this district -- this there are potentially other factors to be considered, like solicitation; to what extent did

the defendants solicit issuers to engage in transactions; to what extent did they participate in these conferences, use finders.

The e-mails are relevant to all of those things. Judge Maldonado may find they are relevant.

If the case goes to a jury, a jury may find that they are relevant.

So, it is not just volume and frequency that these e-mails may be relevant to. They may be relevant to that issue, but they may be relevant to other factors that a trier of fact may find to be relevant.

On the issue of -- and I am also responding to what Mr. Goldsmith said with respect to Mr. Fife and counsel -- communications with counsel -- we are not interested in communications with counsel involving Mr. Fife. So, we could exclude those from the scope of the e-mails that they need to produce. So, we can resolve that issue.

On the -- on the -- requests to admit responses, I think, respectfully, that the defendants are just trying to avoid answering these requests to admit.

The idea that they -- even though it is a very small admit, that they --- can't possibly answer whether their principal business involves -- is convertible-debt transactions or not, just is not credible. They don't need an expert to determine that.

We have given them some objective measures, so that we have tried, in an effort to avoid disputes over how to measure principal business.

But the bottom line is they can and they should answer whether their principal business involved these transactions or whether their principal business involves oil and gas or these other industries. They know that. It is a small business. They know their business and they can answer these questions. They are just using that, too.

MR. GOLDSMITH (Via Telephone): Your Honor, if I could briefly address the SEC's comments?

This is Mr. Goldsmith.

THE COURT: I need to -- I need to -- take a break. And I also want the court reporter to have a break. And, so, what I would like to do is just hit the pause button and come back at 1:15 central time.

Let me just confirm that the court reporter is available for us to reconvene. And, I think, we can have the motion wrapped up.

Is the court reporter available if we take a break until 1:15 and, then, reconvene?

And, again, it could be longer than 15 minutes to get this last motion knocked up.

THE COURT REPORTER: Yes, Judge, I am available.

THE COURT: Okay. Wonderful.

So, I need everyone to just take a breather. Dial back in, please, at 1:15.

This will give our court reporter a break and I also just need to get more water. And we will -- everyone take a break and we will -- come back at 1:15.

Okay. Thanks, everyone.

MR. GOLDSMITH (Via Telephone): Thank you.

(Brief recess.)

THE CLERK: Recalling Case No. 20 C 5227, Securities and Exchange Commission v. Fife, et al. For continued motion hearing.

THE COURT: So, we are back of the record.

I think -- I don't know if it was Mr. Goldsmith or Mr. Richman who had wanted to make a response to a point that Mr. Phillips had just raised.

Do I have that right, that it was the defense --

MR. GOLDSMITH (Via Telephone): Yes.

THE COURT: -- who had wanted to make a point right before we broke?

MR. GOLDSMITH (Via Telephone): Yes, your Honor.

It is Barry Goldsmith. I will be brief --

THE COURT: Okay.

MR. GOLDSMITH (Via Telephone): -- just to respond to Mr. Phillips.

You know, what he has represented to the Court today

is something different than what he said in his brief. I just wanted to point it out because it is important.

He said a little while ago that the justification for the e-mails is that we don't know what Judge Maldonado will find relevant in the case; and, therefore, you know, we need what amounts to, you know, 130,000 e-mails and a million pages of documents.

I don't think that is consistent with the justification he raised in his papers in Docket Entry 50, Page 11, where he said, "The SEC may use defendants' e-mails to show, among other things, that defendants bought and sold securities on a near constant basis; and, that Fife was regularly involved in these activities."

And, again, our point is that we have produced the transaction documents that would show the activity. And that is probably -- I mean, it is -- the best evidence.

And the brokerage statements. So, they have all of those.

They have two accountants who appeared at the 30(b)(6) deposition. They have a very large staff of people who could certainly analyze trading records.

I think that is one thing the SEC, I know from my tenure there, did very, very well.

So, again, the justification and proportionality here, I think, is way out of proportion. And the need for, really,

more additional e-mails here has not been shown.

The other point, in terms of the requests to admit and the requests that we conclude, that, you know, by employee hours or revenues or, you know, any objective measure here -- and the SEC doesn't define what those are -- you know, is it 51 percent? Is it 75 percent?

While it is a family office and, you know, that connotes, you know, perhaps three people sitting at a desk, you know, this office did operate and does operate a number of operating companies, as well as making a whole host of different investments. So, it is not a small operation.

Chicago Venture Partners operates a company called Typenex Medical, that has about 95 employees. They do a number of healthcare services, blood donor recipient matching, COVID-19, vein therapy.

A company that is a defendant, Tonaquint, operates Miller Fabrication, the construction and fabrication of a number of vessels for pressurized storage. They have 85 employees in that operating company.

So, again, to be able to quantify by some standard that is not clearly defined, whether it is a principal business or not, I think is something that -- is something that -- would require a lot of analysis.

The other point, if you look at the statutes at issue here, the term "principal business" is not even used in the

statutes. So, again, I am not sure what the relevance or importance is there, as well.

So, I just wanted to raise those issues. I appreciate the opportunity.

THE COURT: Mr. Goldsmith, you know, looking at the defense briefing and, also, I know you have reiterated the points here -- and, just so you know, I am talking about the e-mails right now, but you have reiterated the points -- about what has been produced, along with the investigation e-mails -- the e-mails produced during the investigation -- but the CVP has produced the transaction documents, the trading records and other financial information relating to all its convertible debt transactions from 2018 to the present.

But the two rationales or bases that the SEC cite are not only about the trading volume or the recurrent nature of it, but, also, this issue of Fife -- whether Fife was regularly involved, and view the documents that CVP already produced -- again, the transaction documents and the others specified in your briefing. Does that go to that point about -- that Fife was or was not regularly involved?

MR. GOLDSMITH (Via Telephone): There is no dispute, your Honor.

I mean -- I mean -- Mr. Fife was regularly involved in the businesses of these defendants.

When we talk about a family office, you know, he is --

I guess you can define him as a principal or the principal. But there is no dispute.

And in the, you know, 450,000 e-mails that have been produced, I have not gone through them, obviously -- all of them or many of them or most of them -- but it is clear that he was. There is no dispute here.

And, in fact, what we have offered and it is in the pleadings and it is in letters we sent, we said, "Tell us what facts you would like to establish through these e-mails?"

And we think that, you know, if the SEC is reasonable here, we could agree.

And if one of those facts is that Mr. Fife was regularly involved in these transactions at issue -- again, convertible loans to microcap or small cap companies here -- you know, we can agree to that. We don't need to review another million pages of e-mails.

The SEC has been investigating this or did investigate it for three years. They have taken his testimony in the investigation. You know, there is not a dispute.

So, again, if you are looking at, you know, proportionality and need, there is just no need here. And we regret we have to burden the Court here with, you know, disputes over discovery. But if there are facts here that Mr. Fife was regularly involved in the business, you know, we can admit that.

So, that is a point here, that, again, I think, if the basis is that there may be something in these e-mails that Judge Maldonado will find relevant to some point and, therefore, we need it, I mean, that is not even a fishing expedition. That is, you know, the hope that perhaps there is something in these e-mails that the judge will later find relevant.

But the theory that the SEC has articulated here is very clear, that if you engage in more than a few or a handful these kinds of transactions, you are a dealer. And, you know, we will litigate over that.

But, again, there is no real need here to produce these e-mails. Everything is memorialized in the actual transaction documents, which the SEC has.

And they have, also, again, did a sampling of 65 issuers. All of those documents were produced in the investigation. And they have those, as well, which clearly, you know, if they won't accept our stipulation, you know, show different people's involvement in the transactions that they view as requiring you to now register as a securities dealer.

THE COURT: Thank you.

Mr. Phillips, Ms. Guardi, is there anything else that you want to say in response to the points made by the defense?

MR. PHILLIPS (Via Telephone): This is Eric Phillips.

Your Honor, I think this has all been addressed by the

briefing, but we are happy to answer any additional questions the Court may have.

THE COURT: Okay.

Then I am going to jump to the two questions that I said that I was going to raise. And I am going to start with the e-mails.

I have found it persuasive and I am having a hard time understanding why the e-mails are not duplicative. And, I mean, this is going to the proportionality piece of it. But given the volume that has been produced, given, you know, this is a 2020 case, at some point we just have to say enough.

And the proportionality argument here is pretty persuasive. And I don't understand -- I just need the SEC to articulate what don't you already have, that is going to be in these e-mails?

MR. PHILLIPS (Via Telephone): So, in the investigation, as we have discussed, we asked for a sampling, and they produced e-mails pertaining to about 65 transactions through 2018.

We are currently discussing how many transactions that they have through the relevant time period; but, according to the defendants, it is 190 transactions through 2022.

So, we have nothing on about two-thirds of those transactions. We also have nothing beyond 2018.

So, it is not --

THE COURT: But I guess -- and I am sorry to rudely interrupt you, but don't you have the transaction documents, the trading records and the financial information regarding all of the convertible debt transactions to present?

So, when you say, "We don't have any information on those," I guess I just don't understand what information don't you have?

MR. PHILLIPS (Via Telephone): Well, if I said we don't have any information, I misspoke. We do have that information, but it doesn't capture all of the factors that we may need to prove either at summary judgment or at trial.

For example, solicitation. Did they -- to what extent did the defendants -- solicit issuers?

Yes, we have some e-mails that we have attached in our presentation to the Court that establish that, as to some of the issuers for some of the time period. But that doesn't speak -- we don't have it as to most of the issuers that they have transacted with. We don't have it for many years. And, so, that is not cumulative because we have zero of those e-mails for a substantial portion of the conduct at issue.

Whether they used finders. That is something that the courts have found is relevant. Judge Maldonado may find it is relevant. She may not. But we don't know yet. The jury may find it is relevant.

Again, we have nothing as to a majority of the

issuers. And it is a substantial number of years. So, it is not cumulative, where we have zero evidence. The transaction documents don't establish that. All of these other documents they produced during the litigation don't speak to those issues. They only speak to the volume and frequency of the transactions, to some degree.

So, it is not cumulative where we have nothing as to a majority of the transactions they engaged in and as to a substantial time period in which they transacted.

THE COURT: Okay.

Thank you for that.

Turning to the requests to admit, in terms of principal business, I mean, why -- this goes to Mr. Goldsmith's point; but, in terms of what the SEC means by that, why is it -- and I don't find it unreasonable that the defense is saying it is vague; so, why -- is it not defined?

MR. PHILLIPS (Via Telephone): We think that "principal business" is a common-sense term.

We would be happy to define it either in a formal amendment of the discovery requests or a meet and confer. I don't think it is something that, frankly, needs definition. It is the majority. But if they needed us to assign a percentage, we are happy to do that.

I think the basic issue is that courts, like the Big Apple court in the 11th Circuit, some of these Southern

District of Florida cases that have resolved these cases in favor of the SEC on summary judgment, have said it is relevant that the majority of the defendants' business, most of it, whatever term they used, was devoted to these transactions. So, that is what we are trying to get at.

So, I think that they know that that is the thrust of these. And if they need us to define those terms, we are happy to do that.

We don't think it is necessary. We think it is a common-sense understanding of what that term means, but we are happy to work with them formally or informally if they needed some sort of clarification.

MR. GOLDSMITH (Via Telephone): Your Honor, if I may briefly respond to that?

THE COURT: Sure.

MR. GOLDSMITH (Via Telephone): I guess two points.

One, the word "principal business" is nowhere in the statute.

Two, the Big Apple case involved the Securities Act of 1933, not the Securities Exchange Act of 1934.

And, you know, I have always been puzzled why they are fixated on principal business because, you know, the question is whether somebody is engaging in dealer activity. It is not whether it is the main business or the only business.

I mean, for example, I will use -- pick on -- Amazon,

since everyone seems to be picking on Amazon these days.

If Amazon decides to go into the prescription drug mail order business, and assuming that is regulated by the FDA, and it accounts for, you know, .1 percent of its revenues or employees or by some measure, if it is, you know, regulated by the FDA, it doesn't matter if it is a small proportion of their business. It is -- you are regulated by the FDA.

And if somebody is a securities -- a commodities -- firm, yet they have a broker-dealer operation that is a small part of their business, they need to register that business.

So, again, I don't see the relevance here, but, you know, the nature of the defendants' businesses, given the wide scope of activity, using the term "principal," and even if it was defined as 51 percent of the profits, that is not something that is easily readily obtainable by defendants.

You know, they don't keep their records that way. It is not a public company. People wear multiple hats and do multiple things. They don't track employee hours.

So, I don't think this is even relevant to anything, to begin with.

If you are a dealer and it is three percent of your business and it requires registration, then you need to register.

So, again, you know, if this was something that we had financial records on, you know, we could answer it and we could

argue the relevance later. But I don't even think this is relevant to the inquiry.

We have no public customers. We are not making markets. We are not a dealer. And that's -- you know, again, this case is going to rise and fall on how one interprets the language of the '34 Act, not the '33 Act, certainly.

And, you know, whether it is 5 percent, 51 percent, you know, or 80 percent, it is not -- it really is not -- going to make a difference.

And under the SEC's theory and as articulated in the opposition to the motion to dismiss, you know, if it is more than a few isolated transactions buying and selling securities, are you required to register.

So, you know, to have to answer these, we have certainly, you know, approached this in good faith. But these are not answers that are readily obtainable, nor are they really relevant, I think, to the inquiry here.

THE COURT: This is SEC's motion. So, Mr. Phillips, Ms. Guardi, I will give you the last word. Is there anything further you want to say?

MR. PHILLIPS (Via Telephone): No, your Honor. Thank you.

THE COURT: Okay.

Thank you for the additional argument.

So, let me is place my ruling on the record now.

So, with respect to plaintiff's motion to compel, I am going to start with the e-mail request. So, this refers to RFD Nos. 2, 4, 7, 8, 12, 18 and 30.

And plaintiff requests the e-mails regarding defendants' convertible debt transactions, including responsive external e-mails between defendants and third-parties and internal e-mails involving defendant Fife personally.

During the SEC's pre-litigation investigation, defendants produced e-mails showing that defendants bought and sold large volumes of securities through these transactions, directly solicited microcap issuers with whom defendants potentially could engage in potential convertible note transactions, and used third-party brokers to identify and transact with microcap issuers.

The plaintiff argues that these e-mails are relevant to proving that defendants are dealers under the Exchange Act. And plaintiff explains that the Exchange Act defines dealer as any person engaged in the business of buying and selling securities for such person's own account except for a person who buys or sells securities not as part of a regular business.

And plaintiff argues the requested pre-investigation e-mails show defendants' conducted a regular business of buying and selling securities for their own accounts.

Plaintiff contends that their requests are also proportional because plaintiff cannot obtain these facts

through other means, such as RFAs or stipulations, given defendants' refusal to admit to various facts in the case, in responding to plaintiff's RFAs; and, 2, defendants have not produced e-mails from 2018 to present and the e-mails defendants have produced are from less than half of the microcap issuers defendants worked with on convertible note transactions.

Plaintiff adds that e-mails from 2018 to present, from all issuers involved, are critical because a factor in the Court's remedies analysis is the "recurrent" nature of defendants' misconduct.

Defendants respond that plaintiff does not need additional documents to prove a set of facts that nobody disputes. Defendants add that plaintiff already has the facts underlying plaintiff's argument that defendants bought and sold securities on an near-constant basis and that the firm's principal was regularly involved with these activities.

Defendants argue that plaintiff's attempt to establish that the e-mails are relevant merely copies and pastes the Exchange Act and does not identify how the e-mails are relevant to the facts in the case.

Defendants contend the requests are also disproportionate because plaintiff already has all of CVP's primary source transaction documents and, thus, already knows the volume of defendants' trading activity.

During the SEC's pre-litigation investigation, defendants allege that CVP's search form produced every e-mail and attachment associated with those transactions with 65 public companies that SEC selected with whom CVP had executed a convertible note transaction. So, this was a sampling.

Further, defendants do not dispute the scope of CVP's trading volume, facts that plaintiff seek to establish through the additional e-mail review.

For this reason, defendant contends plaintiff failed to explain what benefit additional discovery would yield.

Defendants assert that searching for these e-mails would require over 1,000 attorney hours and involve more than one million pages of documents, based on a sample search through the e-mails of CVP's principal and the external e-mails of two more custodians that returned 135,784 e-mails and attachments.

And, finally, defendants argue that a less burdensome means of securing this information is possible, given the defendants' offer to admit or stipulate to certain specific facts.

The bottom line is that the Court is denying the plaintiff's motion with respect to the e-mails. The plaintiff credits the -- I am sorry, the Court credits the -- plaintiff's argument with respect to the relevancy. However, on the proportionality, the Court disagrees with the plaintiff and

does credit the defendants' arguments here, as also demonstrated not only through the briefing, but through the argument that we just heard on the record.

The defendants have already produced a large volume of e-mails from the sampling period -- the sampling of the period -- during the investigation stage of the case. But, notably -- and this is really what moved the needle, as far as the Court's analysis -- CVP -- I am sorry, the defendants -- have already produced documents that establish -- and I am sorry.

My computer -- I don't know why this keeps happening. My computer is frozen, again, and my screen in blank. So, give me just one moment.

(Brief pause.)

THE COURT: Okay. I am back. I apologize for that.

So, given the defense argument that they have already produced all of the transaction documents to include to present, and given the point that has been made in the defense briefing and, again, today on the record, that all of that trading activity is established and can be established with respect to those documents that have already been produced, the Court finds that on the proportionality piece here, that it is disproportionate to the needs of this case with respect to the volume that would need to be reviewed and the attorney hours that would be involved.

And, again, the Court does not see how it is not --

how these e-mails would not be -- duplicative.

The Court understands the additional arguments that were raised today or made by the SEC, by Mr. Phillips, with respect to that the transaction documents may not capture all of the factors. However, the SEC does have that sampling of e-mails granted from, not surprising, but from that time period ending 2018 from the investigation stage; and, also, given that a large amount of these facts are not in dispute, again, on the proportionality, the Court just does not find that the request for the e-mails that are at issue in RFD Nos. 2, 4, 7, 8, 12, 18 and 30, that this is proportional or meets the standard under the rule. So, for these reasons, the motion is denied as to the e-mails.

I am going to turn now to the request for admissions. And that is No. 1 and, then, every odd numbered through RFA 209.

So, plaintiff argues that defendants' responses to its odd-numbered RFAs are deficient because defendants' answers include the same response that defendants cannot answer the request because the information is not obtainable without expert discovery and defendants' objections are meritless.

And plaintiff requests that this Court compel the defendants to provide responsive answers to this segment of RFA.

Let me just put the standard on the record.

So, under Federal Rule of Civil Procedure 36, a party may issue requests for admission to ask another party to admit the truth of any matters within the scope of discovery under Rule 26(b)(1) relating to facts, the application of law to fact, or opinions about either.

Under Rule 36, requests for admission should be simple and direct, so that they can be readily admitted or denied.

The answering party has five options when responding: 1, admit; 2, deny; 3, admit in part and deny in part; 4, respond that they are unable to admit or deny; or, 5, object.

If the party objects, the grounds for the objection must be stated. The requesting party may, in turn, move to determine the sufficiency of an answer or objection. Unless the court finds an objection justified, it must order that an answer be served.

On finding that an answer does not comply with Rule 36, the court may order either that the matter is admitted or that an amended answer be served.

With respect to the odd-numbered RFAs, the requests and answers at issue are substantially similar and read to this effect, except with the defendant entity and other details changed in each request.

And I am just going to use Request No. 9 as a demonstrative for purposes of the Court's ruling.

So, Request No. 9 states, "Admit that during the

calendar year 2019, CVP's principal business, as measured by net profits, was buying convertible notes from publicly-traded companies, later converting the notes to discounted shares of the issuer's stock and selling the stock into the market."

The response to Request No. 9 -- again, just as a demonstrative or to demonstrate and support the Court's ruling -- the defendants responded as follows: "Defendants' object to this request as vague, ambiguous, overly broad and unduly burdensome, premature as subject to expert analysis, and irrelevant to the claims and defenses in this dispute and requiring analysis disproportionate to the needs of the case.

Specifically, the term "principal business" is vague and ambiguous and irrelevant to whether defendants were required to register as dealers, under either plaintiff's or defendants' interpretation of the relevant provisions of the Securities Exchange Act.

Moreover, what constitutes "net profits" in any particular year for purportedly assessing CVP's principal business in any given year is also vague and ambiguous.

For example, plaintiff does not specify how profits are to be calculated where expenses are incurred in one year and revenue in another, nor how expenses should be allocated among the various types of investments that CVP made.

In any event, any such net profits calculation would be subject to expert analysis and discovery and is, therefore,

premature.

Subject to the foregoing objections, defendants admit that during the relevant period, CVP, from time to time, engaged in convertible debt transactions with publicly-traded companies, later converted the notes to discounted shares of the issuer's stock, and sold the stock into the market.

CVP also engaged in various other activities during this period, including non-convertible promissory notes, common stock and preferred stock purchases, and managing operating companies that develop, manufacture and sell various healthcare products.

In defendants' response to the motion, the defendants elaborate on their objections, stating that the dispute in this case is about what the statutory language means. And defendants state that plaintiff has tried to smuggle this disputed statutory language into these RFAs, and this language does not mean what plaintiff claims. So, defendants have denied the requests that incorporate that language verbatim.

Further, defendants argue, that answering the RFAs at issue would require adopting expert conclusions regarding how various financial metrics would be calculated. Defendants explain these answers are not reasonably ascertainable because CVP operates through a number of entities, which all perform various activities -- invested in real estate, purchased royalty interests and managed operating companies in oil and

gas services -- most of which have nothing to do with the convertible-loan activities that are the subject matter of the case.

Defendants add that plaintiff does not explain how it expect CVP to aggregate all of the cash flows from these activities, value the non-cash-based activities, then deduce whether the principal activity involves convertible notes.

Defendants contend that accurate answers to plaintiff's RFAs would require complex calculations and modeling from economic and accounting experts and these are not issues that could easily be answered by reviewing documents within the responding party's control.

Plaintiff argues that the requests are relevant to whether defendants acted as dealers because they request defendants to admit they engaged in dealer-related activities, and a person who devotes most or all of his business to dealer-related activities is likely to be a dealer.

Plaintiff responds to defendants' objection that the terms "principal business" and "net profit" are vague and ambiguous by stating that plaintiff used these terms in the even-numbered requests, which defendants denied.

Plaintiff further argues defendants can use reason and common sense in interpreting the phrases used in the RFAs and easily answer them.

In reply to defendants' objections that the RFAs are

premature and would necessitate expert analysis and discovery, plaintiff states these RFAs seek facts, not expert opinion, and it is illogical that defendants do not have enough -- or, I am sorry, that defendants have enough information -- sorry.

It is illogical that defendants do not have enough information to respond, given that they were able to respond to the even-numbered requests, but would need an expert to answer the odd-numbered.

In this case, the Court is denying the motion as to the RFAs, as well, based on the following: First of all, let me start with the plaintiff's distinction between the even and the odd-numbered RFAs.

The Court is not persuaded by that argument because the even-numbered requests relate to activities that the entity did not engage in. And, so, all of points that the plaintiff made in support of its motions, in contrasting that the defendants could respond to the even-numbered RFAs, again, given what is at issue in the even-numbered RFAs with respect to activity that the defendants were not engaged in, the Court just is not persuaded by that comparison.

With respect to plaintiff's point on relevancy, the Court credits the defense position with respect to the relevancy. And, also, the Court notes that without a definition or more specificity regarding principal business and net profit, the Court does not see how the defense is in a

position to answer the RFAs further than what has been provided and, also, credit the defense's objection with respect to the RFAs.

On the relevancy point, the fact that the principal business is not defined in the statute; and, again, when you combine that with the vagueness of the term, as well as net profit, the Court, under the standard, finds that the RFA responses are adequate in their current form; and, as a result, the Court denies the plaintiff's motion with respect to the RFAs, as well.

Okay. So, given that, the Court has now ruled on the three outstanding discovery motions that are at issue. As I identified at the start of this hearing, though, we still have a pending discovery motion at Docket Entry 74. This is the plaintiff's motion to compel. And the response from the defense is due tomorrow. So, the Court will take that motion under advisement and endeavor to address it quickly, understanding that the Court has contributed to the delay in getting discovery moving in this case.

So, the Court, again, will take the motion under advisement once it is fully briefed.

If a reply is needed, the Court will order one. And if a motion hearing is needed, the Court will set one, as well.

But the Court, again, acknowledging its role in contributing to the delays in discovery will endeavor to

address this motion quickly.

I have also read the most recent JFR that was filed on March 2nd at Docket Entry 82. I know, based on my review of that status report, that there are more discovery disputes that are percolating -- or, at least, as of March 2nd were percolating -- with respect to privilege assertions made by the SEC.

Is there an update on those meet and confers?

And I am almost afraid to ask this question because of another motion that will shortly be filed by the defense.

Is there a -- could either side provide me an update on the meet and confers?

MR. RICHMAN (Via Telephone): Thank you, your Honor.

This is Brian Richman from Gibson Dunn.

The parties have continued to meet and confer on the SEC's privilege log. And the SEC has agreed to consider our objections to that log and to get back to us this week on those objections.

THE COURT: Okay.

Mr. Phillips, anything you want to add or do you agree with Mr. Richman's assessment?

MR. PHILLIPS (Via Telephone): I do agree with Mr. Richman's assessment.

Thank you, your Honor.

I did have -- related to the issue of privilege, I did

have -- a couple of follow-up questions with respect to the Court's request earlier in the hearing on the supplemental briefing?

THE COURT: Yes. Go ahead.

MR. PHILLIPS (Via Telephone): So, first off, I apologize, but I am going to be on spring break with my family up through the next weekend, up through March 29th, which is the date that the Court requested that the supplemental briefing be due.

So, I appreciate the Court's comments earlier that the Court would be flexible about extension requests. But, in light of the spring break trip that I had planned, I was hoping that the Court could extend that date today to April 5th; and, then, we will endeavor to get the supplemental briefing in by then.

But I did also want, if possible, if the Court could just reiterate or clarify exactly what the Court is asking for in the supplemental briefing, just so we are sure that we are on the same page and we are giving the Court what it is seeking.

And, relatedly, I was wondering whether the Court is planning on issuing any sort of written order reflecting the Court's rulings today. And that may, if there is a written order, maybe perhaps the written order will set forth in writing what the Court is requesting, in terms of the

supplemental briefing.

But, if not, then I just want to make sure that we understand exactly what the Court is seeking with respect to that briefing.

THE COURT: Yes. Let me unpack all of it.

So, first of all, I will extend the deadline to April 5th. And I will, when I turn to the defense to see if there is anything further, I am happy to hear the defense out, as far as a few weeks. So, it would give them until April 19, if sufficient, or if they need more time, as well.

But, yes, I will extend SEC's deadline to April 5th.

One of your questions was whether or not a written decision will be entered. The answer is no. That is why I went into so much detail on this oral ruling, for efficiency sake and, then, the volume that was at issue in these motions.

And, so, your ruling is the transcript.

With respect to a minute order, a minute order will issue, but it will be very high level and very general with respect to just, if a motion is, you know, denied, or denied in part or granted in part. So, it will not have the specificity.

And, again, that is why we spent so much time today with respect to, on the record, to substantiate the Court's rulings today with respect to motions.

Regarding more detail regarding what the government -- or, I am sorry, what the Court -- is looking for, with respect

to the additional authority, the Court is just looking for something further to substantiate the deliberative process privilege.

And, as I noted in the Court's ruling, you know, right now I have arguments that have been made, but something further to include -- whether it is a declaration or an affidavit -- to substantiate the deliberative process privilege. Or a privilege log, even, I think, would be helpful with respect to those requests, from the Court's perspective.

And, then, also, then, give the defense an opportunity address the privilege or any other points that, you know, the SEC raises in the supplemental filing. But that is what I am looking for.

Do you have specific questions beyond that, Mr. Phillips?

MR. PHILLIPS (Via Telephone): Well, we will, obviously, take that back. But my initial reaction is that I don't think that we will be able to provide that -- and certainly not by that date -- because, I think, as we have told the Court and the defense, because we don't -- we said that these documents are not relevant and proportional to the needs of the case, that it would involve a lot of burden, we haven't collected the documents and put them on a privilege log.

And, so, the affidavit that usually is associated with that comes after we have separately identified the documents

and put them on a privilege log. And, then, the official looks at those documents and is able to give an affidavit or not.

So, that process has not even begun.

And we can and will cite cases to the Court and the defense counsel, not only with respect to the Court's request for supplemental briefing today, but, also, in connection with our meet and confer discussions, that a number of courts, including in this district -- and we haven't cited these previously. And I don't want to get into the area of argument on the pending motion, but a number of courts have said that it is actually not appropriate for a party to put documents on a privilege log that are not proportional or relevant to the needs of the case.

The purpose of a privilege log is to put documents on that are relevant and proportional, but are being withheld on the grounds of privilege. And some courts have held that if you actually -- if you put documents on a privilege log, you are waiving your relevance objection.

Again, I don't want to argue that; but, that, I think, all speaks to this issue of a privilege log and an affidavit.

So, I don't want to -- I don't want to -- take a firm position on these issues without conferring internally, but I don't think even if we thought that those cases did not apply, or we wanted to take a different position on, I know defendants take a different position, but even if we said, "All right. We

will put these documents on a privilege log and we could supply an affidavit," it is not possible to -- it just won't be possible to -- get it done by then.

So, I just want to kind of calibrate the expectations in that regard. I just don't think we will be able to do it because we just have not -- we haven't -- collected all of these documents; and, to do so, is part of the reason why we said it is not proportional. The burden involved in doing that would be substantial. And we think that the Court has recognized that in its rulings today.

THE COURT: With respect to -- with respect to -- what the SEC argued, though, regarding these RFDs, 54-57, I mean, the plaintiff did raise a deliberative process privilege, though, correct?

MR. PHILLIPS (Via Telephone): Well, we said that -- we said that -- these documents -- that to produce these documents would create privilege issues; and, that a number of them would be privileged; and, that part of the burden involved in that would be identifying them, asserting privilege. All of those issues would come up.

But, in our view, it is appropriate to say that in our response -- to flag the issue. We think that is what the rules require.

But to put them on a privilege log and come up with this affidavit is an extra step that not only don't we think is

warranted, based on proportionality and relevance, but -- and, again, we will cite these cases. We haven't cited them. So, I don't want to sandbag anybody, but the cases say that we are not supposed to be putting them on a privilege log when they are not relevant and proportional to the needs of the case.

And we think that the Court, basically today, for the most part -- and I don't want to characterize the Court's rulings -- but, in our view, the Court mostly has substantiated that view, that these internal documents would be deliberative and are not proportional to the needs of the case, in part, based on their deliberative nature.

THE COURT: Okay.

So, to the extent -- I am not ordering SEC's supplement to take any form. And, so, if the SEC's supplement is case law telling me -- telling the Court -- that I just got it wrong; and, you know, with respect to there doesn't need to be anything additional on deliberative process privilege, then that is the SEC's position.

So, I am not ordering the SEC -- that the supplement has to take X form or a specific form. And, so, I am going to leave the April 5th date on the calendar.

If the SEC decides to go the route that it wants to do a declaration and needs more time -- from an agency official -- then I will extend the deadline to accommodate that.

But I am gathering, from what you are saying, Mr.

Phillips, that it is not going to be that route. And, then, I think April 5th would be sufficient time for the supplemental filing.

Is that accurate?

MR. PHILLIPS (Via Telephone): As I said, I don't want to take a firm position without consulting internally; but, yes, what you said is accurate with respect to my current thinking.

And I agree that if we do go that route, that, yes, April 5th should be sufficient.

THE COURT: Okay.

MR. PHILLIPS (Via Telephone): Thank you, your Honor, for that clarification.

THE COURT: Sure.

And thank you for your clarification, as far as, you know, the case law and that, you know, you will go into that in the supplement.

Let me just ask the defense if two weeks, assuming that the SEC does make its filing on April 5th -- and I realize you don't have the benefit of seeing it -- I am just going to give you two weeks to respond, unless you know you have got a spring break trip or something else.

But if you need more time beyond that, I will be flexible because I realize it is hard to know how much time you need to respond without seeing the SEC's supplement.

But unless you have an identified conflict, is the defense comfortable with a two-week deadline for the response?

MR. RICHMAN (Via Telephone): Your Honor --

MR. GOLDSMITH (Via Telephone): Your Honor --

Go ahead, Brian.

MR. RICHMAN (Via Telephone): -- this is Brian Richman.

I think we will endeavor to respond in two weeks. If, for some reason, we have a conflict where, after reviewing the SEC's submission, we believe we need more time, we will come back to the Court and ask.

THE COURT: Okay. And that is fine.

And, again, I will be flexible with respect to the timing.

Okay. From SEC's standpoint, is there anything else that needs to be addressed at this time?

MR. PHILLIPS (Via Telephone): No, your Honor.

Thank you and we really appreciate -- and, I think, I speak on behalf of everybody, we really appreciate -- all of the work the Court has put into resolving these motions.

THE COURT: Thank you.

Mr. Goldsmith, Mr. Richman, from the defense standpoint, is there anything else to take up at this time?

MR. GOLDSMITH (Via Telephone): No, nothing else.

And I would wholeheartedly agree with Mr. Phillips and

appreciate the Court's time, as well.

THE COURT: Great.

Thank you, everyone, for your time today. I realize this was a long one. So, thank you, everyone.

And a special thanks to our court reporter, as well, for her time today.

So, everyone, have a good rest of your day. Take care. Bye-bye.

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I certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Joene Hanhardt March 17, 2023
Official Court Reporter