IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

SECURITIES AND EXCHANGE COMMISSION,	:	
Plaintiff,	:	
vs.	:	Civil Action No.
	:	**3:08-CV-0499-N**
W FINANCIAL GROUP, LLC,	:	
ADLEY H. ABDULWAHAB a/k/a Adley Wahab,	:	
MICHAEL K. WALLENS, SR., **and**	:	
MICHAEL K. WALLENS, JR.	:	
Defendants,	:	

PLAINTIFF SECURITIES AND EXCHANGE COMMISSION'S MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT AGAINST DEFENDANTS W FINANCIAL GROUP, LLC, ADLEY H. ABDULWAHAB a/k/a ADLEY WAHAB, MICHAEL K. WALLENS, SR. AND MICHAEL K. WALLENS, JR.

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I. PRELIMINARY STATEMENT

This matter involves the fraudulent offer and sale of so-called "Secured Debut Obligations" ("SDOs") to more than 180 primarily elderly investors. Plaintiff Securities and Exchange Commission ("Commission") submits this motion pursuant to Rule 56 of the Fed.R.Civ.P., seeking partial summary judgment concerning the appropriate monetary relief against the perpetrators of this fraud, W Financial Group, Inc. ("WFG"), Adley H. Abulwahab a/k/a Adley Wahab ("Wahab"), Michael K. Wallens, Sr. ("Wallens Sr.") and Michael K. Wallens, Jr ("Wallens Jr.")(collectively "Defendants"). There is no genuine issue of material fact concerning the appropriate monetary relief against Defendants.

The facts concerning Defendants' disgorgement liability are not in doubt.[1] Pursuant to established legal principles, each of the Defendants is liable for disgorgement of the amount of funds collected from investors, less funds returned to investors in the form of purported refunds of principal and purported interest payments. Attached to this Memorandum is the Declaration of William Rex Rector, a Certified Public Accountant employed by the Commission. Summarizing his exhaustive review of WFG business and bank records, Rector demonstrates that the Defendants' disgorgement liability is $13,797,966, plus prejudgment interest in the amount of $1,846,574.

Based on the language of Paragraph II of the Interlocutory Judgment by Consent Granting Interlocutory Injunction and Other Equitable Relief ("Interlocutory Judgment") [Docket # 73], the allegations in the Commission's Complaint are deemed admitted for the purpose of determining monetary relief. As set forth below, the Commission submits that these allegations

[1] The factual assertions in this memorandum are supported by evidence cited in Plaintiff's Statement of Undisputed Facts In Support Of Motion For Summary Judgment Against Defendants W Financial Group, LLC, Adley H. Abdulwahab A/K/A Adley Wahab, Michael K. Wallens, Sr., and Michael K. Wallens, Jr. Unless otherwise necessary, the citations will not be repeated in this memorandum. Rather, reference will be made to paragraph numbers of the applicable Statements of Undisputed Facts ("FF").

support third-tier civil penalties against each defendant. Rather than argue that the Court should impose civil penalties in amounts specified by the Plaintiff, the Commission requests that the Court exercise its discretion in awarding appropriate civil penalties based on the "deemed admissions."

In addition to the Rector analysis and the admissions derived from the Complaint, the Commission's motion is supported by facts admitted by the Defendants during the course of the litigation. As set forth in the Declaration of Angelia Stewart, each of the Defendants was served with requests for admissions ("RFAs"). Each of the Defendants failed to serve timely responses to the Commission's RFAs. Pursuant to Fed.R.Civ.P 36(a)(2), the facts delineated in the RFAs are "deemed admitted." [2] As discussed below, while these Rule 36 "deemed admissions" increase the quantum of evidence supporting the Commission's motion, they are cumulative. Without them, there is still legally sufficient evidence to warrant granting summary judgment.

Moreover, each of the individual Defendants in this matter has asserted the Fifth Amendment privilege against self-incrimination as to all matters relating to this litigation, including issues involving to monetary relief. By virtue of Defendants' invocation of the Fifth Amendment privilege in this civil case, the Court should draw appropriate adverse inferences concerning the matters relevant to this motion.

Finally, the Commission requests that the Court issue an order precluding the Defendants from offering evidence in response to the Commission's summary judgment motion.

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[2] Pursuant to Fed.R.Civ.P. 36, the matters set forth in the Requests for Admissions are "deemed admitted." Once the matter is admitted, Rule 36(b) provides that it is "conclusively established unless the court on motion permits withdrawal or amendment of the admission." Fed.R.Civ.P. 36(b). In this case there has been no Rule 36(b) motion filed, so the facts are **deemed admitted** pursuant to Rule 36(a). *Hulsey v. State of Tex.,* 929 F.2d 168, 171 (5th Cir.1991) (*citing* Fed.R.Civ.P. 36(a)). Federal Rule of Civil Procedure 56(c) specifies that "admissions on file" can be an appropriate basis for granting summary judgment. *In re Carney,* 258 F.3d 415, 420 (5th Cir.2001). "Since Rule 36 admissions, whether express or by default, are conclusive as to the matters admitted, they cannot be overcome at the summary judgment stage by contradictory affidavit testimony or other evidence in the summary judgment record." *Id.* (citing *Duke v. South Carolina Ins. Co.,* 770 F.2d 545, 548-49 (5th Cir.1985)).

Principles of fundamental fairness and justice require that a party who asserts the Fifth Amendment privilege to prevent discovery of evidence should be prohibited from presenting that evidence at trial or in response to a dispositive motion.

II. THIS MATTER IS RIPE FOR SUMMARY JUDGMENT

Summary judgment should be entered where the record establishes that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party bears the burden of establishing the propriety of summary judgment. *See Fontenot v. Upjohn Co.*, 780 F.2d 1190, 1194 (5th Cir. 1986) (citing *Heidi Darland v. Staffing Resources, Inc.*, 41 F. Supp. 2d 635 (N.D. Tex. 1999)). Once a properly supported motion for summary judgment is made, the adverse party must set forth specific facts showing that there is a genuine issue for trial. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 250 (1986). The substantive law will identify what facts are material. *Id.* at 248. A dispute as to a material fact is "genuine" only if the evidence is such that a reasonable jury could return a verdict for the non-moving party. *Id.* As described herein, there is no genuine issue as to any material fact concerning the Defendants' disgorgement liability. Nor is there any genuine dispute concerning the facts that should govern the determination of the Defendants' civil penalties. The Commission, therefore, is entitled to summary relief against each of the Defendants.

Fed.R.Civ.P. 56(d) permits a party to seek a summary judgment that disposes of certain claims, facts and issues, rather than the entire litigation. Courts routinely grant the Commission's motions for partial summary judgment on the issue of the proper amount of disgorgement. *See e.g. SEC v. v. Warren,* 534 F.3d 1368, 1369 (11th Cir. 2008); *SEC v. Kern,* 425 F.3d 143, 143-47 (2d Cir. 2005).

III. THE COMMISSION'S SUMMARY JUDGMENT EVIDENCE INCLUDES "DEEMED ADMISSIONS"

In addition to declarations and exhibits, the Commission's summary judgment evidence includes facts that are deemed admitted by the Defendants. First, the Agreed Interlocutory Judgment entered by the Court states that the allegations in the Commission's Complaint are deemed admitted for the purpose of determining the appropriate monetary relief. Second, as a result of the Defendants' failure to provide timely responses to the Commission's RFAs, the matters asserted in the RFAs are "deemed admitted" and "conclusively established" pursuant to Rule 36(b) of the Fed.R.Civ.P.

A. The Allegations in the Commission's Complaint are Deemed Admitted for the Purpose of Establishing Disgorgement, Prejudgment Interest and Civil Penalties

On July 25, 2008, the Court entered an Interlocutory Judgment by Consent Granting Interlocutory Injunction and Other Equitable Relief The Interlocutory Judgment enjoins each defendant from future violations of the securities registration and antifraud provisions of the federal securities laws. Sections 5(a), 5(c) and 17(a) of the Securities Act of 1933 ("Securities Act") [15 U.S.C. §§ 77e(a), 77e(c) and 77q(a); Section 10(b) of the Securities Exchange Act of 1934 and Rule 10b-5 thereunder [15 U.S.C § 78j(b) and 17 C.F.R. § 240.10b-5.

The Interlocutory Judgment does not quantify the Defendants' liability for disgorgement, plus prejudgment interest, or civil penalties. Paragraph II, however, declares that the Defendants "will pay disgorgement of ill-gotten gains, prejudgment interest thereon, and civil penalties pursuant to 20(d) of the Securities Act [15 U.S.C. § 77t(d)] and Section 21(d)(3) of the Exchange Act [15 U.S.C. § 78u(d)(3)]."

The Interlocutory Judgment explicitly relieves the Plaintiff of any obligation to present evidence on liability issues for the purpose of establishing monetary relief. Paragraph II states:

> In connection with the Commission's motion for disgorgement and/or civil penalties, and at any hearing held on such a motion: (a) Defendants will be precluded from arguing that federal securities law were not violated as alleged in the Complaint . . .; (b) Defendants may not challenge the validity of the Consent or this Interlocutory Judgment; (c) **solely for the purpose of such motion, the allegations of the Complaint shall be accepted as true and deemed true by the Court**; and (d) the Court may determine the issues raised in the motion on the basis of affidavits, declarations, excerpts of sworn depositions or investigative testimony, and documentary evidence . . . .

For this reason, the Court should regard the allegations in the Commission's Complaint as fully established for the purpose of considering the Commission's summary judgment motion.

B. The Summary Judgment Evidence Includes Matters "Deemed Admitted" Pursuant to Fed.R.Civ.P. Rule 36(b)

On December 9, 2008, the Commission served RFAs on Wahab, Wallens Sr. and Wallens Jr. [FF at ¶¶ 39-41]. Pursuant to Fed.R.Civ.P. Rule 36(a), the Defendants were obligated to respond to these RFAs no latter than January 12, 2009. None of the Defendants provided their responses within the prescribed time.[3] [*id.*].

Rule 36 provides that a party may serve any other party with written requests for admissions of the truth of any matter within the scope of Fed.R.Civ.P. 26(b). The matter is deemed admitted unless the party to whom the request is directed serves the requesting party with a written answer or objection thirty days after service of the request. *Fed.R.Civ.P* 36(a).

Any matter deemed admitted is "conclusively established unless the court on motion

[3] When Defendants' counsel served the Commission with tardy responses, his papers constituted little more than an unsupported refusal to provide any substantive information. [App 016-017, 134-152][Stewart Dec. at ¶¶ 5 and 6, Exhs. 4-6]. Mr. Teakell asserted objections to every RFA that can only be described as mystifying. First, Mr. Teakell contends that Defendants are not obligated to respond because "[t]here is a Rule 54 judgment in this case." [App 016-017, 134—135, 140-141, 146-147][Stewart Dec. at ¶¶ 5 and 6, Exhs. 4-6]. If Mr. Teakell had bothered to glance at the Agreed Interlocutory Judgment, he would have learned that this contention is wrong. Second, Mr. Teakell contends that Defendants refuse to respond because "[d]iscovery is in progress and has not been completed." [*id.*]. This objection is incomprehensible, as Mr. Teakell appears to describe precisely the circumstances that obligate Defendants to respond. Finally, Mr. Teakell objects that the Commission's RFAs are inappropriate because "they are duplications of the ones previously sent by Plaintiff." [*id.*] This objection is Kafkaesque, as Defendants refused to respond to the previous set of discovery requests on the grounds that they were purportedly premature. Once again, Defendants openly parade their strategy of obstruction and delay.

permits withdrawal or amendment of the admission." *Fed.R.Civ.P.* 36(b). *See Duke v. South Carolina Insurance Co.,* 770 F.2d 545, 549 (5th Cir. 1985); *In re Carney,* 258 F.3d 415, 420 (5th Cir. 2001). This provision has been enforced repeatedly by Courts in the Northern District of Texas. *See Robax Corp. v. Professional Parks, Inc.,* 2008 WL 3244150 *2 (N.D. Tex. 2008)(District Judge Sidney A. Fitzwater); *Unum Life Ins. Company of Am. v. Munoz,* 2007 WL 628084 *3 (N.D. Tex.)(Chief Judge Joe A. Fish); *Hall v. Advo, Inc.,* 2007 WL 210357 * 1-3 (N.D. Tex.)(District Judge Sam A. Lindsay); *Williams v. Conseco,* 202 WL 31107510 * 2-3 (N.D. Tex. 2002)(District Judge John H. McBryde); *Worsham v. Minyard Food Stores,* 2001 WL 611173 (N.D. Tex.)(District Judge Jorge A. Solis).

Federal Rule of Civil Procedure 56(c) specifies that "admissions on file" can be an appropriate basis for granting summary judgment. Fed.R.Civ.P. 56(c). Since Rule 36 admissions, whether express or by default, are conclusive as to the matters admitted, they cannot be overcome at the summary judgment stage by contradictory affidavit testimony or other evidence in the summary judgment record. *Duke v. South Carolina Ins. Co.,* 770 F.2d at 548-49; *United States v. Kasuboski,* 834 F.2d 1345, 1350 (7th Cir. 1987). *See also American Automobile. Ass'n (Inc.) v. AAA Legal Clinic of Jefferson Crooke, P.C.,* 930 F.2d 1117, 1119 (5th Cir. (Tex.) May 13, 1991)(default admissions cannot be overcome by conflicting trial testimony).[4]

While "deemed admissions" under Rule 36(b) may be sufficient, without additional evidence, to support a summary judgment motion without any additional evidence, the Commission is not requesting that the Court apply this principle here. *Kasuboski,* 834 F.2d 1345 at 1350 (*citing Duke v. South Carolina Ins. Co.,* 770 F.2d 545 (5th Cir.1985); *Donovan v. Carls*

[4] Rule 36 provides that the subject of the admissions may file a motion showing that there is good cause to withdraw the admissions. Here, such a motion would constitute a futile gesture, as the Commission's summary judgment motion is more than sufficiently supported by other evidence.

Drug Co., 703 F.2d 650 (2nd Cir.1983)). Indeed, the other evidence submitted by the Commission easily satisfies the burden of establishing the absence of a genuine issue of material fact. *See US v. Persuad,* 229 F.R.D. 686, 694 (M.D. Fla. 2005)(request to withdraw admissions moot where, even if defendant were relieved of his deemed admissions, the plaintiff would still be entitled to summary judgment).

IV. THE COURT SHOULD ORDER DEFENDANTS TO PAY DISGORGEMENT EQUAL TO THE TOTAL AMOUNT OF FUNDS COLLECTED FROM INVESTORS, LESS THE AMOUNT OF FUNDS RETURNED TO INVESTORS, PLUS PREJUDGMENT INTEREST THEREON

A. Well-Established Legal Principles Support Holding Each Defendant Liable for Disgorgement of All Funds Collected From Investors in the Fraudulent Scheme, Less Any Funds Returned to Investors

The central perpetrators in a fraud such as the WFG scheme are liable for disgorgement in the full amount of funds collected from investors, less any monies that are returned to the investors in the course of the scheme. Numerous courts have found that, where wrongdoers engaged in a the pervasively fraudulent offering of securities, the defendants must disgorge all proceeds that they collected in connection with the offering that have not already been returned to investors. *See SEC v. JT Wallenbrock & Assoc.,* 440 F.3d 1109, 1113 (9th Cir. 2006)(proper to hold principals in fraudulent scheme liable for disgorgement for entire amount collected, less amount returned to investors during the scheme); *SEC v. Better Life Club of Am., Inc.*, 995 F.Supp. 167, 179 (D.D.C. 1998)(proper to charge principals in fraudulent scheme with disgorgement of the total amount of unreturned investor principal); *SEC v. Chem. Trust,* 2000 WL 33231600 at *11 (S.D. Fla. 2000)(proper to charge principal with full amount raised from investors). *See also SEC v. Manor Nursing Ctrs., Inc.*, 458 F.2d 1104, 1082 (2nd. Cir. 1972); *SEC v. Merrill Scott & Assoc.,* 505 F.Supp.2d 1193, 1216 (D. Utah 2007); *SEC v. R.J. Allen & Assoc.,* 386 F.Supp. 866, 880 (S.D. Fla. 1974); *SEC v. Kenton Capital, Ltd.,* 69 F. Supp.2d 1, 15

(D.D.C. 1998); *SEC v. Continental Wireless Cable Television, Inc.,* 110 F.3d 69 (9th Cir. 1997). *See also SEC v. Interlink Data Network of Los Angeles, Inc.,* Fed. Sec. L. Rep. ¶ 98,049, 1993 WL 603274 (C.D. Cal. 1993); *SEC v. United Monetary Serv., Inc.,* Fed. Sec. L. Rep. ¶ 95,284, 1990 WL 91812 (S.D. Fla. 1990).

Furthermore, the disgorgement liability of the Defendants should not be reduced by expenses incurred in committing their fraud. The disgorgement amount is not reduced, for example, for commission payments to brokers and other business expenses connected with operating the fraudulent scheme. This disgorgement calculation comports with the "overwhelming weight of authority holding that securities laws violators may not offset their disgorgement liability with business expenses." *SEC v. Hughes Capital Corp.,* 917 F. Supp. 1080, 1086 (D.N.J. 1996). *See also SEC v. Great Lakes Equities Co.*, 775 F. Supp. 211, 214-215 (E.D. Mich. 1991) (rejecting deductions from the disgorgement amount for overhead, commissions, and other expenses); *SEC v. Benson,* 657 F. Supp. 1122, 1134 (S.D.N.Y. 1987) (stating that the "manner in which [party] chose to spend his misappropriations is irrelevant as to his objection to disgorge"); *SEC v. Kenton Capital, Ltd.*, 69 F. Supp.2d at 15-16.

Finally, it is appropriate in this case to hold each of the Defendants jointly and severally liable for the entire disgorgement amount. The District Court has broad discretion to hold offending parties jointly and severally liable for disgorgement in a securities case. *SEC v. Hughes Capital Corp.,* 124 F.3d 449, 455 (3rd Cir. 1997). The allegations in the Commission's Complaint, deemed admitted for the purpose of this motion, establish that the Defendants acted in concert to perpetrate the scheme at issue here.

B. The Summary Judgment Evidence Establishes that the Defendants Are Liable for Disgorgement in the Amount of $13,797,966, Plus Prejudgment Interest of $1,846,574

The Declaration of CPA Rex Rector and accompanying exhibits establish that the Defendants are jointly and severally liable for disgorgement in the amount of $13,797,966. [FF at ¶¶ 34-37]. As set forth by Mr. Rector, based on an exhaustive review of bank and business records, he determined that the Defendants collected a gross amount of $17,708,200 from WFG victims. [FF at ¶ 34]. Mr. Rector further concludes that the Defendants provided $3,080,139 to investors in refunds of principal and made purported interest payments of $666,478 to victims. [FF at ¶¶ 35 and 36]. Subtracting payments to investors from the amount collected, the Defendants' unjust enrichment totals $13,797,966. [FF at ¶ 37].

As set forth in the Rector Declaration, the Commission submits that the Court should fix the amount of Defendants' prejudgment interest at $1,846,574. As mandated by the Commission, Rector calculated prejudgment interest using the rate published quarterly by the IRS pursuant to Section 6621 of the Internal Revenue Code to calculate interest on tax underpayments. *See SEC v. First Jersey Sec., Inc.,* 101 F.3d 1450, 1476 (2d Cir. 1996)(appropriate to calculate prejudgment interest based on the rate used by the Internal Revenue Service for unpaid balances). [FF at ¶38].

In calculating prejudgment interest, it would obviously be appropriate to start the accumulation of interest at the date that each investor's funds were acquired by WFG and halt the accumulation at the date that final judgments are entered. The calculation offered by Mr. Rector, however, uses a simplified procedure that actually results in a reduced prejudgment interest amount. Prejudgment interest has been calculated on the entire disgorgement amount of $13,797,966 for the period starting March 1, 2007, the approximate date that Defendants

halted the unlawful sale of securities, and ending on December 31, 2009. This extremely conservative calculation yields a prejudgment interest figure of $1,846,574. [*id.*].

V. THE COURT SHOULD EXERCISE ITS DISCRETION TO AWARD CIVIL PENALTIES AGAINST THE DEFENDANTS IN APPROPRIATE AMOUNTS BASED ON THE ALLEGATIONS IN THE COMMISSION'S COMPLAINT

Pursuant to Paragraph II of the Interlocutory Judgment, the Commission is entitled to civil penalties against each defendant. Moreover, the allegations in the Commission's Complaint are deemed admitted for the purpose of determining appropriate civil money penalties against defendants. The Commission requests that the Court exercise its discretion to determine what civil penalties are appropriate in light of the conduct of Defendants, as alleged by the Commission.

Section 20(d) of the Securities Act and Section 21(d)(3) of the Exchange Act authorize the Commission to seek, and the Court to impose, a third-tier penalty if the defendant's violation (1) "involved fraud, deceit, manipulation, or deliberate or reckless disregard of a regulatory requirement" and (2) "directly or indirectly resulted in substantial losses or created a significant risk of substantial losses to other persons." These provisions authorize third-tier civil penalties of $120,000 per violation for a natural person and $600,000 per violation for any other person.[5]

Third-tier civil penalties against WFG, Wahab, Wallens Sr and Wallens Jr. are clearly appropriate under the facts of this case. Based on the allegations in the Commission's Complaint, which are deemed admitted, there is no question that the Defendants committed violations of the antifraud provisions involving fraud and deceit and that their violations resulted in substantial losses, or the risk of substantial losses, to investors. [FF at ¶¶ 1-38]. According to

[5] Given the multitude of victims injured by Defendants' fraud, the Commission submits that Defendants committed multiple violations and, accordingly, multiple civil penalties would be legally justified. Realistically, however, the Commission concedes that merely collecting the full amount of disgorgement from the Defendants is an unlikely occurrence.

the Complaint, the Defendants shared responsibility for the offer and sale of the securities and were jointly responsible for the egregious misrepresentations and omissions that induced investors to purchase SDOs. [*id.*]. The fundraising efforts were saturated with outrageous misrepresentations and omissions concerning the use of investor funds, the safety of the investment and Defendants' history of financial responsibility. [*id.*]. Moreover, Defendants together diverted virtually all investor funds to undisclosed uses involving substantial risk. [*id.*]

Moreover, while the Commission continues its efforts to provide meaningful restitution to investors, the victims of the fraudulent conduct are still likely to lose a substantial portion of their investment principal. Accordingly, it is appropriate to assess third-tier civil penalties against each of the Defendants. Rather than request a specific civil penalty amount, the Commission asks the Court to exercise its discretion to determine appropriate civil penalties against each of the Defendants.

VI. THE COURT SHOULD ISSUE A PRECLUSION ORDER

Each of the individual Defendants has chosen to assert the Fifth Amendment privilege rather than testify in this matter. [FF at 38]. Having made this choice, they should be precluded from presenting evidence in response to the Commission's motion.

There is no doubt that a party may assert a legitimate testimonial privilege as a shield and thus prevent an opponent from obtaining certain relevant evidence during pretrial discovery. It is likewise clear that a party cannot use the same undiscoverable evidence as a sword at trial in support of his claims or defenses. *See Lyons v. Johnson*, 415 F.2d 540, 542 (9th Cir. 1969); 4 *Moore's Federal Practice* ¶ 26.60 [6] (2d ed. 1987). Principles of fundamental fairness and justice require that a party who invokes a testimonial privilege elect either to waive the privilege in a timely manner and allow discovery of the evidence or to forego introducing the evidence at trial.

"[I]f a party fails to allow pre-trial discovery of evidence of his claim of privilege, a preclusion order should be entered to bar his subsequent use of evidence." *SEC v. Grossman*, 121 F.R.D. 207, 210 (S.D.N.Y. 1987) *citing SEC v. Cymaticolor*, 106 F.R.D. 545, 549-550 (S.D.N.Y. 1985); *SEC v. Benson*, [1984-1985 Transfer Binder] Fed. Sec. L. Rep. ¶ 92,001 (S.D.N.Y. 1985). *See also Goodman v. DeAzoulay*, 539 F. Supp. 10, 16 (E.D. Pa. 1981) (noting a similar unreported ruling in that case). In *SEC v. Benson*, 657 F. Supp. 1122 (S.D.N.Y. 1987), the court held that summary judgment in favor of the Commission was appropriate where the defendant had asserted his Fifth Amendment rights to prevent discovery. The court specifically held that the defendant was precluded from offering any evidence "disputing the plaintiff's evidence or supporting his own denials." 657 F. Supp. at 1129. *See also In Re Edmond,* 934 F.2d 1304, 1308-09 (4th Cir. 1991); *United States v. Parcels of Land*, 903 F.2d 36, 43 (1st Cir. 1990) (courts precluded parties from presenting evidence in opposition to a summary judgment motion after the parties had previously hidden their evidence behind a Fifth Amendment claim).

The preclusion doctrine is based on preventing unfairness and undue prejudice which would otherwise result from an assertion of the Fifth Amendment to block discovery. *See SEC v. Benson,* 657 F. Supp. at 1129. An order of preclusion is appropriate even if the same factual information is available through other sources, since the defendant might still gain an unfair surprise by concealing his theories or use of the evidence. *SEC v. Cymaticolor*, 106 F.R.D. at 549-50.

Although the Defendants are precluded by the Interlocutory Judgment from challenging the allegations in the Commission's Complaint, the Commission submits that the Court should go further. Defendants have used their privilege against self-incrimination in this case to prevent discovery by the Commission of their purported defenses and the evidentiary bases for their purported defenses. The Commission does not dispute the Defendants' right to do so, but their

assertion of that right has consequences. They cannot both hide their evidence and introduce it at this late stage. There is ample authority for the issuance of a preclusion order under the circumstances presented. In the interests of fairness, and the orderly conduct of this litigation, the Commission requests that Defendants be precluded from offering evidence in response to the Commission's summary judgment motion.

VII. CONCLUSION

For the reasons set forth above, the Commission requests that the Court grant Plaintiff's summary judgment motion and enter a final judgment against the Defendants.

Dated and signed on the 16th day of January, 2009.

/s/ Jeffrey B. Norris
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CERTIFICATE OF SERVICE

I hereby certify that on this 16TH of January, 2009, I electronically filed the foregoing ***Plaintiff's Memorandum in Support of Motion for Summary Judgment Against Defendants*** with the Clerk of the Court for the Northern District of Texas, Dallas Division, by using the CM/ECF system which will send a notice of electronic filing to the following CM/ECF participants.

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