UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff,

-against-

SEAN DAVID MORTON, VAJRA PRODUCTIONS, LLC, 27 INVESTMENTS, LLC, and MAGIC EIGHT BALL DISTRIBUTING, INC.,

Defendants,

-and-

MELISSA MORTON and PROPHECY RESEARCH INSTITUTE,

Relief Defendants.

REPORT & RECOMMENDATION
and
MEMORANDUM & ORDER

10 Civ. 1720 (LAK)(MHD)

TO THE HONORABLE LEWIS A. KAPLAN, U.S.D.J.:

The Securities and Exchange Commission commenced this civil enforcement lawsuit last year against Sean David Morton and three entities that he allegedly controlled, asserting claims for violation of sections 5(a), 5(c) and 17(a) of the Securities Act of 1933, 15 U.S.C. §§ 77e(a), 77e(c), 77q(a), section 10(b) of the Securities Exchange Act of 1934, 15 U.S.C. § 78j(b), and Rule 10b-5 thereunder, 17 C.F.R. § 240.10b-5. In addition to these four defendants, the Commission named two relief defendants, Mr.

Morton's wife, Melissa Morton, and an entity known as the Prophecy Research Institute.

In the wake of the commencement of this lawsuit, defendants, who are appearing pro se, have filed a series of motions purporting to challenge the case on a variety of grounds, including the purported insufficiency of service of process, the asserted facial inadequacy of the complaint, lack of jurisdiction (personal and subject-matter), improper venue and lack of standing. They have since also filed a motion for summary judgment. The Commission in its turn has opposed these motions and sought an order confirming that it has made valid service on the defendants. For the reasons that follow, we recommend that the defendants' motions to dismiss and for summary judgment be denied. Although not specifically labeled, we discern within the defendants' papers a motion for a dispositive relief on the basis of a purported default by the SEC, which we recommend be denied, and a motion to compel discovery, which we deny. We also deem the defendants properly served, and deny defendants' request for sanctions.

The Nature of the Case

In substance, plaintiff alleges that Mr. Morton defrauded more

than 100 investors of in excess of six million dollars by inducing them to invest in a non-existent entity called the Delphi Associates Investment Group, with the funds to be used in foreign-currency transactions, and that he did so based in major part on his claimed expertise in psychic predictions, a claim anchored by false representations that he had a 14-year history of accurately and precisely predicting the ups and downs of the market based on his psychic insight. (Compl. at ¶¶ 1-2, 4, 27). He is also said to have engaged in a flurry of other false statements that induced reliance by unwary members of the public. (Id. at ¶¶ 28-34). Thus, for example, he is alleged to have falsely claimed to prospective investors that previous investors in Delphi had made vast profits, that Delphi was "averaging 3 to 5% PER DAY", and that in June of 2006 "we have had gains of 12%, 19% and 26% in a single day." (Id. at ¶ 21). Plaintiff also asserts that Morton made false representations in 2007 that an audit of Delphi by Price Waterhouse had confirmed that it had earned very substantial profits, supposedly 117% for a less-than-six-month period. (Id. at ¶ 34).

Apart from these alleged false statements, the SEC alleges that none of the defendant entities has filed registration statements with the Commission for the offering of securities, even though they were receiving funds for investment and telling

investors that they would receive pro rata shares of the anticipated profits. (Id. at ¶ 7, 39; see also id. at ¶ 19). It also alleges that Morton took no steps to determine that his investors were accredited or sophisticated, and in fact disregarded evidence that his investors were neither accredited nor sophisticated. (Id. at ¶¶ 40-41).

Plaintiff further alleges that Morton placed the investors' funds in the accounts of the various defendant entities, which it describes as shell companies, and that, rather than investing all of the monies in foreign currency trading firms -- as he had promised potential investors he would -- he and his wife then diverted substantial funds to non-investment purposes, including transferring $240,000.00 to the relief defendant Prophecy Research Institute, Morton's non-profit religious organization. (Compl. at ¶¶ 29-30). Morton is also alleged to have commingled monies that were supposed to have been placed in specified accounts of each of the three defendant entities. (Id. at ¶¶ 31-33).

Based on these allegations, plaintiff asserts four claims. First, it invokes section 17(a) of the Securities Act, 15 U.S.C. § 77q(a), against Mr. Morton and the three institutional defendants, based on their use of false statements in interstate commerce and

the mail to induce members of the public to invest. (Id. at ¶¶ 43-48). Second, the Commission presses a comparable claim under section 10(b) of the Securities Exchange Act, 15 U.S.C. § 78b(j), and Rule 10b-5, 17 C.F.R. § 240.10b-5, against the same four defendants. (Id. at ¶¶ 50-55). Third, plaintiff invokes sections 5(a) and (c) of the Securities Exchange Act, 15 U.S.C. §§ 77e(a), (c), alleging that the four defendants offered to sell securities through a prospectus without having filed a registration statement or been eligible for an exception to the registration requirement. (Compl. at ¶¶ 57-59). Finally, the Commission presses a claim of unjust enrichment against the relief defendants, Melissa Morton and the Prophecy Research Institute. (Id. at ¶¶ 61-62). For relief, plaintiff seeks injunctive relief, an order of disgorgement, and civil penalties. (Id. at pp. 19-21).

The Motions to Dismiss

In defendants' initial motion, dated March 25, 2010, they mention in their notice of motion that they are seeking to dismiss the complaint for failure to state a claim, but they do not address this contention in their papers and instead focus solely on the service issue, contending that they were not properly served and that as a result this court lacks personal jurisdiction over them.

(Defs.' "Motion to Quash Service of Process / Motion to Dismiss" (the "Mar. 25, 2010 Motion") at 2-3; Defs.' Mem. of Law in Supp. of the Mar. 25, 2010 Motion at 2-5). In support of this affirmative defense, they proffer "Declarations of Fact" by Mr. and Mrs. Morton, both dated March 25, 2010, and an affidavit by a Ms. Vanessa Kelnhofer, a self-identified house- and pet-sitter friend of the Mortons. In substance, they say that for the period between March 11 and April 5, 2010, Mr. and Mrs. Morton had given the Postal Service a form to hold their mail (S. Morton Decl. in Supp. of the Mar. 25, 2010 Motion at ¶ 1: M. Morton Decl. in Supp. of the Mar. 25, 2010 Motion at ¶ 1; Defs.' Ex. 1), thus implying that they were not present at their residence, located at 2207 Hermosa Avenue, Hermosa Beach, California during that period. They report that on March 12, 2010 a process server came to the building where they lived, and on ascertaining that they were not at home, left a set of papers in front of the door to their apartment. (S. Morton Decl. in Supp. of the Mar. 25, 2010 Motion at ¶ 2; Kelnhofer Aff. at ¶¶ 1-5; Defs.' Exs. 2-4 in Supp. of the Mar. 25, 2010 Motion). They further aver that Ms. Kelnhofer came to the house two days later, saw the papers scattered in front of the front door and eventually took photographs of those papers. (Kelnhofer Aff. at ¶¶ 1-7, Defs.' Exs. 2-5 in Supp. of the Mar. 25, 2010 Motion).

Plaintiff responded to this motion on April 21, 2010, by proffering a series of affidavits from several process servers, as well as a declaration from one of the SEC's attorneys. These submissions establish a detailed and uncontradicted chronology of events concerning efforts to serve the Mortons and the various defendant entities. We briefly summarize that history.

On March 4, 2010 the Commission filed the complaint and received summonses for the defendants. (Ellenbogen Decl. at ¶ 3). On March 5, 2010 counsel for plaintiff used Federal Express to send a notice to each defendant of the filing of the suit, accompanied by a request for waiver of service. (Id. at ¶ 4 & Ex. A). Each notice and waiver request specified that the defendant had thirty days to waive service and that, absent such a waiver, the plaintiff would arrange for formal service. (Id. at ¶ 4). None of the defendants returned the waiver forms. (Id.).

On March 6, 2010, the SEC's counsel spoke with Mr. John Woodie, the registered agent for defendants Vajra Productions LLC and 27 Investments LLC. Mr. Woodie acknowledged receipt of the notice and waiver forms for these two defendants. (Id. at ¶ 5).

On March 11, 2010 plaintiff's counsel instructed a process

service company, known as Serving by Irving, to personally serve the Mortons and the defendant entities. (Id. at ¶ 6). On that day process server Hope Peck attempted to serve defendants at the Morton residence but found no one at home at that time. (Id. at ¶ 7 & Ex. B (Peck Aff.), at second para.). She returned on the evening of the following day, and at that time there were lights on inside the Mortons' apartment and Ms. Peck heard people inside. Moreover, she observed someone from inside the apartment looking at her through the front door peephole. Ms. Hope then announced through the door that she was serving the people inside with documents, and she slipped the documents under the front door. (Ellenbogen Decl. at ¶ 7; Peck Aff. at third para.).

On March 18, 2010 Ms. Peck returned to the apartment. She noted at that time that St. Patrick's Day decorations that she had observed (presumably from outside) in the apartment on her previous visit had been taken down in the interim, and she saw lights from a television screen reflected on one wall of the apartment. Nonetheless, when she knocked on the front door and on a side door to the apartment that she had discovered, no one inside responded. (Ellenbogen Decl. at ¶ 7; Peck Aff. at fourth para.).

The next day, another process server, Jerry Sales, arrived at

the Morton's address at 5:00 a.m. to begin a stakeout in an attempt to accomplish personal service. (Ellenbogen Decl. ¶¶ 8-10 & Ex. C (Sales Aff.) at second para.). At the outset, he knocked on both apartment doors but received no response, and he then sat in his car to await developments. At about 9:30 a.m. he spoke with a downstairs neighbor of the Mortons, named Vicki, who reported that she knew that the Mortons were at home because she had heard people moving about upstairs. She also gave Mr. Sales a physical description of the Mortons. At about 12:30 p.m. he observed that someone had exited the side door of the Mortons' apartment, and as he approached he discovered a woman who matched Vicki's description of Mrs. Morton in the garage doing laundry. He called out "Melissa," and the woman turned around and asked who he was. He responded that he was seeking to serve papers on her and her husband, at which point she claimed to be Vicki, the downstairs neighbor. Mr. Sales was aware that this claim was false since he had recently conversed with the real Vicki. He then handed "Melissa" three copies of the summons and complaint, one each for herself, for defendant Magic Eight Ball Distributions and for relief defendant Prophecy Research. Ms. Morton took the papers and dropped them on the ground. (Sales Aff. at second para.). That evening, Mr. Sales obtained photographs of Mr. and Mrs. Morton through Google and thereby confirmed that the woman he had served

was indeed Mrs. Morton. (Id. at third para. & annexed ex.; Ellenbogen Decl. ¶ 10).

On March 20, Mr. Sales returned to the Mortons' address and waited there from 5:00 a.m. to 1:00 p.m. in an effort to serve Mr. Morton. During that time he observed Mrs. Morton repeatedly walking between the apartment and the garage, but he never saw Mr. Morton. (Sales Aff. at fourth para.).

Because of the failure at that point to serve Mr. Morton and -- through him -- defendants Vajra and 27 Investments, plaintiff's counsel arranged for a process server to attempt service on Mr. Morton in New York later in March, when Morton was scheduled to appear as a featured speaker at a "New Life Expo" at the New Yorker Hotel in Manhattan. (Ellenbogen Decl. at ¶¶ 11-12). On March 26, 2010, process server Joshua A. Godar, also employed by Serving by Irving, was waiting at the New Yorker Hotel when he observed Mr. Morton -- whom he recognized from a photograph -- standing at the hotel front desk and registering as a speaker for the convention. (Ellenbogen Decl. at Ex. D (Godar Aff.) at third para.). He followed Morton and an associate into the elevator and called him by name, but Morton did not respond and instead pulled his hat down, and sought to conceal his face with a scarf. As they all

exited the elevator, Mr. Godar again called to Morton by name, and although Morton did not respond, his associate confirmed his identity. Mr. Godar followed Morton into the convention area and then into a back room, where he handed Morton three sets of the complaint and summonses, at which point Morton said "acknowledged and received; acknowledged and returned." When Mr. Godar attempted to photograph Morton, defendant prevented that by grabbing the process server's camera phone. Morton then attempted to return the documents, but Godar left the premises. (Id.; Ellenbogen Decl. at ¶¶ 13-14).

In addition to the personal service described by the various process servers, plaintiff's counsel arranged on April 1, 2010 to have Serving by Irving mail copies of the complaint and summonses to each of the defendants. (Ellenbogen Decl. at ¶ 15 & Ex. E (Ellenbogen Aff.)). The documents were enclosed in a mailing envelope which was not marked on the outside with any indication of its contents but rather bore the legend "personal and confidential" and was addressed to the Mortons at their Hermosa Beach residence. Apart from the pleadings and summonses, counsel included two copies of a notice and acknowledgment of service and a prepaid return envelope. (Id. at ¶ 15). The forms have never been returned. (Id. at ¶ 15 & Ex. E).

Finally, on April 7, 2010 plaintiff arranged for mail service, both by regular mail and by Federal Express, of the complaint and summonses on defendants Vajra and 27 Investments by mailing the documents to these defendants' registered agent, John Woodie. (Ellenbogen Decl. at ¶ 16). The mailings were sent by a Serving by Irving representative, Hailey Weng, to both defendants "c/o John Woodie" at the listed address for Mr. Woodie at 3600 Cerillos Road, Suite 714C-899, Santa Fe, New Mexico 87507. (Ellenbogen Decl. at Ex. F (Weng Aff.) at second & third paras.). Mr. Woodie subsequently signed and returned the acknowledgment of service to Serving by Irving. (Ellenbogen Decl. at ¶ 17 & Ex. F).

Contemporaneously with the filing of the SEC's opposition to the dismissal motion, on April 21, 2010 defendants filed a set of papers labeled "Administrative Notice." (Defs.' "Proof of Service" & annexed documents). These papers verge on the incoherent and in any event are completely devoid of any specific content pertinent to the service issue. Rather, they seem to take issue with the fact of, or conduct by, the SEC of its pre-suit investigation of defendants, and they allude to some documents that the Mortons had allegedly served years before on counsel for the SEC -- documents variously labeled as "Private International Administrative Remedy Demand in Accord with the Law of Nations & Administrative

Procedures Act" (dated December 6, 2007), "Notice of Default in Dishonor" (dated January 23, 2008), "Private International Administrative Remedy Demand in Accord with the Law of Nations & Administrative Procedures Act" (dated March 19, 2009), "Second Notice of Default in Dishonor" (dated May 22, 2009), and "Third Notice of Default in Dishonor" (dated June 23, 2009). (See "Administrative Notice" at Exs. 1-5).[1] These documents appear to respond to the SEC's subpoenas by demanding production of, among other things, the basis of the SEC's authority, the nature of any complaints the SEC has received, and copies of an SEC attorney's driver's license and passport. (See generally "Administrative Notice" at Exs. 1-2). They also state, without explanation, that a failure to respond to these demands "shall be deemed as your tacit acquiescence that the [SEC] . . . ha[s] no bona fide authority in these instant matters." (Id. at Ex. 1, p. 1-2). Apart from proffering these documents, the motion papers list the following defenses, albeit without any explanation of their basis: "subject matter jurisdiction, personal jurisdiction, venue, insufficient process, insufficient service of process and failure to join

[1] Defendants also attach a copy of a letter dated November 30, 2007 from the Commission, advising Mr. Morton of an investigation regarding Delphi, enclosing a subpoena compelling production of documents and testimony, and explaining the extent of Mr. Morton's obligations in complying with the subpoena. (Id. at Ex. 6).

necessary party." ("Proof of Service" at first page).

On April 29, 2010, defendants filed an additional set of papers, in the guise of a new motion "TO DISMISS FOR WANT OF JURISDICTION WITH PREJUDICE," but which also amounts to a reply in further support of the defendants' March 25 motion to dismiss. In a document labeled "Notice of Motion to Dismiss (Demurrer)," defendants state, without elaboration, that "[o]riginal service by Hope Peck . . . was improper by her own admission and affidavit" (Notice of Motion at p. 1), but they do not directly contest the accounts of service provided by Messrs. Sales and Godar and Ms. Weng and by plaintiff's counsel. Rather, they simply contend -- again without explanation -- that "[a]ll other descriptions, stories and tales of subsequent attempts at service [other than those of Ms. Peck] are irrelevant and just further admissions and stipulations by Plaintiff that original service was improper." (Id. at 2).

The balance of the papers in support of this second motion consist of a "Motion for Reconsideration," also labeled as a "Motion to Dismiss for Improper Process of Service [sic] and Lack of Jurisdiction and Procedural Defects/Denial of Due Process" and

declarations from both Mr. and Mrs. Morton.[2] A close reading of these papers reflects that the principal argument that they make regarding service is that they were not at home when Ms. Peck made the first two attempts to serve them. Thus they assert:

> The facts of the defective service are confirmed through affidavit by a neutral party [apparently Ms. Kelnhofer] and supported by a Confirmation of United States Postal Service Mail Hold due to pre-arranged traveling plans and said "Hold" was in effect at the time of the attempted service of process. The "Real Parties in Interest" [defendants' terms for Mr. and Mrs. Morton] were not at home at the time of said attempt to serve process and would not return home for 6-8 more days after defective service of process [according to defendants, on March 12, 2010] was scattered on the stairs of the empty house.

(Motion for Reconsideration at 2). In addition, in the document labeled "Motion", although not in the declarations of Mr. and Mrs. Morton, defendants assert that the Mortons "do not solely own or control" the four defendant entities, that they are not "registered agents for said entities" and that they do not know Mr. John Woodie. (Id. at 3). On the service topic, they ask, rhetorically, "If the SECURITIES AND EXCHANGE COMMISSION were confident in their

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[2] The defendants' reference to reconsideration appears to stem from a misunderstanding. Defendants allude to an earlier denial of their first motion to quash service, but this appears to have been a rejection of their papers insofar as they were not filed on the court's Electronic Case Filing system, not a court order denying the motion. (See "Motion for Reconsideration" at 1, 4-5). We treat that first motion, however filed, as undecided until now and properly before the court for decision.

faulty improper service, why would they attempt service multiple times . . . ?", and they question the use of private process servers in lieu of the United States Marshal. (Id. at 4).

The remaining points that defendants seek to make in this round of papers involve a potpourri of assertions. Thus they deny that they have engaged in conduct within the jurisdiction of the SEC, and also assert in conclusory terms that they do not have sufficient contacts with this district to permit invocation of in personam jurisdiction over them, that the court lacks subject-matter jurisdiction over the case, that the "rule of comity" commands dismissal, that venue is improper here, and that the court should "make a preliminary inquiry into this case" to determine whether "the complaint is patently without merits." (Id. at 3-8). Indeed, the only one of these items that defendants address other than in conclusory terms is the personal-jurisdiction question, as to which both Mr. and Mrs. Morton proffer declarations. Both state that they have no "business relationship with the SEC" and have never engaged in business regulated by the Commission. (S. Morton Decl. in Supp. of Motion for Reconsideration at ¶¶ 7-9; M. Morton Decl. in Supp. of Motion for Reconsideration at ¶¶ 7-9). Mrs. Morton also avers that she has no contacts with New York or the Southern District "to allow me to be brought into a court there,"

that she has no "offices, residences, domiciles, real estate businesses or corporate affiliations" there and that she receives no income from there. (M. Morton Decl. in Supp. of Motion for Reconsideration at ¶¶ 10-11). As for Mr. Morton, he somewhat similarly represents that he does not have "sufficient contacts within New York State" or the Southern District "to allow me to be brought into a court there," that he too has no residence, real estate or business affiliations here, and that he derives no "personal income" from New York or this District that derives "from any business or enterprise pertaining to the SEC, or anything regulated or controlled by the SEC." (S. Morton Decl. in Supp. of Motion for Reconsideration at ¶¶ 10-12).[3]

On or about May 14, 2010, defendants filed two additional sets of motion papers. One set, consisting of a notice of motion, memorandum of law and exhibits, was labeled "Motion to Dismiss Action Against Relief Defendants for Lack of Jurisdiction, Improper Venue and Additional Defects in Plaintiff's Claim," which we will

[3] We note that on November 11, 2010 the District Court penned a one-word endorsed order "Denied" on the April 29, 2010 motion papers labeled "Motion for Reconsideration". We are unclear as to the intended effect of that endorsement since that motion -- except insofar as it sought reconsideration of an apparent denial of access to ECF -- simply articulated arguments and positions pressed in defendants' numerous motions filed both before and after April 29, 2010.

refer to as the "Melissa Morton Motion" for brevity's sake. In the defendants' memorandum of law supporting this motion, they represent that they are seeking dismissal of the claims as against relief defendant Mrs. Morton, and they identify, as the bases for their application, the defenses of failure to state a claim, improper service of process and lack of personal and subject-matter jurisdiction, improper venue, and lack of standing by the SEC. (Defs.' Mem. of Law in Supp. of Melissa Morton Motion at 2-7). They also seek a transfer to California on the basis of forum non conveniens (id. at 5-6), and they complain about the court's asserted failure to properly docket their papers. (Id. at 7-8).

In explaining the 12(b)(6) aspect of their motion, defendants' memorandum of law contends that the complaint fails to allege that either Mr. or Mrs. Morton ever dealt in securities or anything else subject to regulation by the SEC. (Id. at 2-3). As for the personal-jurisdiction defense, they refer to their prior motion on service and reiterate that Ms. Peck failed to serve them. (Id. at 3-4). On the subject of subject-matter jurisdiction, they argue that it is lacking because the SEC does not regulate trading in Federal Reserve notes or foreign currency. (Id. at 3). In discussing venue, they assert, without any supporting evidence, that Mrs. Morton does not travel frequently to New York and does

not do so for business reasons, that she acted only in a secretarial capacity under the direction of a foreign exchange trader named Daryl Weber,[4] and that the SEC has sued an incorrect corporate defendant. (Id. at 4-5). They also suggest a discretionary transfer of the case to California, apparently based on the Mortons' residence there, Mrs. Morton's alleged ill health and the purported location of witnesses in that state. (Id. at 5-6). Finally, in arguing against standing by the Commission, they assert that the SEC has not alleged that it suffered any injury by virtue of defendants' conduct or that such injury could be

[4] In apparent, albeit unclear, support of defendants' assertion about Mr. Weber, they attach a partially signed document purporting to be a settlement of a possibly related dispute among a number of private parties, including Mr. Weber and a man named Christopher Bass as well as the Mortons. (Defs.' Ex. 3). It is not apparent from the papers what the significance of this document is supposed to be, although it recites that Mr. Bass invested in a certain foreign exchange account, that Mr. Weber made trades in the account and that Mr. Morton provided guidance to Mr. Weber concerning these trades (id. at p. 1), all of which seems to support the SEC's allegations here. In any event, we have received an unsolicited letter from an attorney named Jared R. Cooper, Esq., who represents that his firm is local counsel to Mr. Bass in his effort to satisfy a judgment that he obtained in the Eastern District of Washington against the same defendants as are named here (as well as against Mr. Weber and Delphi). He reports that the implication by the Mortons that the Washington lawsuit was settled is false and that the case went to a contested judgment in favor of Mr. Bass, which has since been registered here as well. (Letter to the Court from Jared R. Cooper, Esq. (June 30, 2010); id. at Ex. A). We have also received a letter from the SEC, in which they enclose a copy of the judgment in the Washington lawsuit. (Letter to the Court from Bennett Ellenbogen, Esq. (Mar. 15, 2011), at Ex. 1).

redressed in this lawsuit. (Id. at 6-7).

More or less simultaneously with the filing of the motion on behalf of Mrs. Morton, defendants filed a parallel motion on behalf of Mr. Morton. (Mot. to Dismiss Plaintiffs [sic] Complaint Pursuant to Fed. R. Civ. Proc. 12(b)(6) and all Elements Under Same Rule and Additional Defects in Plaintiff's Claim ("Sean Morton Motion")). In this set of papers, defendants rehash most of the same arguments made in the related motion for Mrs. Morton. (See generally Defs.' Mem. of Law in Supp. of Sean Morton Motion at 1-10). They also assert that the complaint is defective for failure to name Mr. Weber -- apparently the foreign-exchange trader working for or with Mr. Morton -- who they argue is a necessary party (id. at 1, 3; see also id. at 9), and they further assert that the summons was insufficient on its face because it did not list the plaintiff or its attorney. (Id. at 3). Finally, they argue that the lawsuit is meritless and that the SEC should be sanctioned for filing it. (Id. at 4-5).

By letter brief dated May 18, 2010 and a memorandum of law dated June 21, 2010, the SEC responded to defendants' various arguments in their most recent set of dismissal motions. (Letter to the Court from Bennett Ellenbogen, Esq. (May 18, 2010)). On June

28, 2010, defendants in turn filed what amounted to a reply, albeit in a document labeled "Dispositive Motion in Response to Plaintiff's Response in the Alternative Motion to Dismiss with Prejudice for Want of Jurisdiction, Lack of Standing, Failure to State a Claim and Other Procedural Defects" ("Dispositive Motion"). In these papers defendants principally reiterate their prior arguments, and also complain of purported ex parte letters to the court from the SEC, notably the May 18, 2010 letter brief responding to their motion (although they plainly received a copy), and they also make personal attacks against one attorney for the SEC, whom they accuse of harboring personal animus against them. (Dispositive Motion at 6-8). Defendants also include affidavits by Mr. and Mrs. Morton asserting inter alia in conclusory fashion that they have never sold securities, stocks, bonds, commodities or investment contracts or knowingly violated the pertinent laws. (M. Morton Aff. in Supp. of Dispositive Motion, at ¶¶ 2-6; S. Morton Aff. in Supp. of Dispositive Motion, at ¶¶ 2-3, 5). Mrs. Morton also asserts that Mr. Weber was responsible for trading in foreign-exchange accounts and that she functioned only as a secretary. (M. Morton Decl. in Supp. of Dispositive Motion at ¶¶ 7-8). As for Mr. Morton, he claims that more than 90 percent of the trades in which he was involved were "successful". (S. Morton Decl. in Supp. of Dispositive Motion at ¶ 4).

The parties submitted a handful of additional papers on these motions, which consist of two letters to the court from the SEC and one from defendants. The first, dated July 7, 2010, is from the Commission and seeks an order striking a portion of defendants' reply papers, which personally attacked one of the Commission's attorneys. The letter also notes that, of two private civil suits against the defendants, one (by Mr. Bass) resulted in a plaintiff's verdict and the other was scheduled to go to trial in New York State court. (Letter to the Court from Bennett Ellenbogen, Esq. (July 7, 2010)). The second letter from the SEC, dated March 15, 2011, accused Mr. Morton of undertaking a public campaign to falsely characterize this and other proceedings against him. (Letter to the Court from Bennett Ellenbogen, Esq. (March 15, 2011)).

By letter dated March 16, 2011, defendants responded by touting the alleged success rate of their investments, complaining about the conduct of SEC investigatory depositions, accusing the Commission of improperly targeting them and harming their business, and repeating accusations of personal misconduct against one of the SEC's attorneys. (Letter to the Court from Mr. & Mrs. Morton (March 16, 2011)). They also again accuse the SEC of ex parte communication with the court via the previous day's letter, despite

the fact that they clearly received a copy of the letter and it therefore could not have been an ex parte communication.

Finally, on March 21, 2011, the Court received another set of papers from the defendants, entitled "Motion for Subpoena Duces Tecum [and] Motion to Dismiss this Case for Lack of Subject Matter Jurisdiction on the Grounds that an Artificial Person, i.e. Corporation or not Natural, is Not a Legal Entity that can Commence a Lawsuit Pursuant to Rule 52(B) Plain Error not to Courts [sic] Attention and Pursuant to F.R.C.P. Rule 9.A" ("2011 Motion").[5] The first portion of this motion contains a broadly phrased request for all documents relating to the SEC's investigation of the defendants (2011 Motion at 1-2), which we take to be a motion to compel discovery under Rule 37.

In addition to rehashing the same arguments as the Morton's previous motions, the remainder of the 2011 Motion raises several new grounds on which, defendants contend, this enforcement action should be dismissed. First, it asserts that the SEC is a private

[5] The latter half of these papers appear to be another motion to dismiss, filed by Melissa Morton. This motion makes no arguments that have not already been made in either the 2011 Motion or the Mortons' previous motions, and hence our conclusions on those motions pertain to it as well.

corporation and, as such, is incapable of commencing a lawsuit (2011 Motion at 4-5); and second, it avers that the SEC's complaint is defective in that it did not include an affidavit or declaration (id. at 4-6) and was not based on the signatory's "personal knowledge as to the matters stated therein." (Id. at 7). The motion also requests sanctions against the SEC. (Id. at 9). The SEC has not yet responded to the 2011 Motion, but we address it sua sponte.

The Summary-Judgment Motion

In August 2010, defendants filed a motion for summary judgment. The sole explained basis for this motion -- which defendants filed before they answered the complaint and before the parties had engaged in any discovery -- rests on the assertion that the SEC has no jurisdiction over foreign-exchange trading. ("Summary Judgment Motion" at 5-6). The motion is accompanied by affidavits of Mr. and Mrs. Morton, once again stating that they had never sold "securities, stocks bonds or commodities" and had never sold investment contracts. (S. Morton Aff. in Supp. of Summary Judgment Motion at ¶¶ 2-3; M. Morton Aff. in Supp. of Summary Judgment Motion at ¶¶ 2-3). Defendants also summarily reiterate their previously asserted jurisdictional and service defenses. (Id. at ¶¶ 5-6; Rule 56.1 Statement at ¶ 7).

In opposition, the plaintiff first suggests that the Rule 56 motion is premature (Pl.'s Mem. in Opp'n to Summ. J., at 5), and then addresses it on the merits. (Id. at 6-11). It then reiterates its application for an order deeming service to be adequate. (Id. at 11-12). In reply, apart from reiterating previously articulated arguments, the defendants seem to suggest that they were not required to register as investment advisers. ("Response to SEC Mem. in Opp'n" at 5-6, 8-9).

ANALYSIS

I. The Dismissal Motions

We address the defendants' various arguments for dismissal in approximately the order in which they raise them. We then briefly focus on the summary judgment motion, and assess the SEC's request for an order confirming the adequacy of service of process. We conclude by assessing defendants' motion to compel discovery, within which we discern a request for dispositive relief on the basis of a purported default by the SEC.

A. Service of Process

Although the defendants have contested the adequacy of service of process, they have not challenged the essential facts that the plaintiff's affiants and attorney declarant have established. Those facts demonstrate that service was properly made on all defendants.

There is no dispute that the first attempt at service on Mr. and Mrs. Morton -- and through them on the defendant entities -- was not successful, since Ms. Peck first came to the Mortons' residence on March 11, 2009 and was unable to effect personal service because no one was at home. There is also no dispute that the second time she came, she could not achieve personal service because the person or persons then apparently inside the apartment did not open the door.[6] Having failed on these occasions to

[6] The SEC does not contend that shoving the summons and complaint under the door or leaving it in front of the door was itself adequate service, but there is no real dispute that doing so and then mailing the summons and complaint to the residence -- as plaintiff did -- was adequate. See, e.g., Errion v. Connell, 236 F.2d 447, 457 (9th Cir. 1956) (finding effective service where sheriff pushed papers through a hole in defendant's screen door after she spoke with him and ducked behind a door to avoid service); Slaieh v. Zeineh, 539 F.Supp.2d 864, 869 (S.D. Miss. 2008) ("Where a defendant attempts to avoid service [for example] by refusing to take the papers, it is sufficient if the server is in close proximity to the defendant, clearly communicates intent to serve court documents, and makes reasonable efforts to leave the papers with the defendant.") (quoting Doe v. Qi, 349

complete service, the plaintiff was free to pursue further attempts, and it plainly succeeded in that endeavor some days later, when Mr. Sales served Mrs. Morton personally at her home on March 18, 2009 and Mr. Godar served Mr. Morton at a hotel conference in New York on March 26, 2010. Notably, defendants do not dispute the various servers' accounts of these successful efforts, and indeed virtually concede the occurrence of these events.[7]

Personal service on the Mortons of course satisfies New York, California and federal requirements for them. Fed. R. Civ. P. 4(e)(1), (2)(A) ("Unless federal law provides otherwise, an individual . . . may be served in a judicial district of the United States by . . . following state law for serving a summons in an action brought in courts of general jurisdiction in the state where

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F.Supp.2d 1258, 1275 n.5 (N.D. Cal. 2004) and collecting cases).

[7] Although defendants make note of the fact that they gave a mail-hold notice to the Postal Service for the period from March 11 to April 5, 2010, they virtually admit that one or both was there at the time that Mr. Sales made his service efforts through a prolonged stake-out of their residence. Thus, after alluding to the efforts of Ms. Peck on March 11 and 12, they mention that they did not return until six to eight days later ("Motion to Quash Service of Process / Motion to Dismiss" at 2), which was precisely the time when Mr. Sales sought to serve them and succeeded in serving Mrs. Morton. (Sales Aff. at second & fourth paras.).

the district court is located or where service is made; or . . . delivering a copy of the summons and of the complaint to the individual personally[.]"); Cal. Code Civ. Pro. § 415.10 ("A summons may be served by personal delivery of a copy of the summons and of the complaint to the person to be served."); N.Y. C.P.L.R. § 308(1), ("Personal service upon a natural person shall be made by . . . delivering the summons within the state to the person to be served"); see also N.Y. C.P.L.R. § 313 ("A person . . . subject to the jurisdiction of the courts of the state . . . may be served with the summons without the state, in the same manner as service is made within the state . . . .").[8]

Apart from this form of service, the plaintiff satisfied several alternative means of service. For example, service was adequately accomplished by putting the pleadings and summons under or in front of the door of the Mortons' residence (after hearing people inside, observing someone looking through the front door's peephole, and announcing that documents were being served on the

[8] The SEC does not contend that serving Mrs. Morton personally at her home on March 18, 2009 was sufficient to accomplish service upon Mr. Morton, but there is no real dispute that doing so was indeed adequate to effect service upon him. Fed. R. Civ. Pro. 4(e)(2)(B) (service may be accomplished by "leaving a copy of [the summons and complaint] at the individual's dwelling or usual place of abode with someone of suitable age and discretion who resides there[.]").

people within) and then mailing other copies to the same residence. Cal. Code Civ. Proc. § 415.20 ("[A] summons may be served by leaving a copy of the summons and complaint at the person's dwelling house . . . in the presence of a competent member of the household . . . who shall be informed of the contents thereof, and by thereafter mailing a copy of the summons and of the complaint by first-class mail, postage prepaid to the person to be served at the place where a copy of the summons and complaint were left."); N.Y. C.P.L.R. §§ 308(4) ("Personal service upon a natural person shall be made by . . . affixing the summons to the door of . . . the . . . dwelling place or usual place of abode within the state of the person to be served and by . . . mailing the summons by first class mail to the person to be served . . . ."); see also Errion v. Connell, 236 F.2d 447, 457 (9th Cir. 1956) (finding effective service where sheriff pushed papers through a hole in defendant's screen door after she spoke with him and ducked behind a door to avoid service); Cadle Co. v. Stella, 1996 WL 328742 (S.D.N.Y. June 13, 1996) (affixing summons and complaint to front door of defendant's residence and subsequently mailing copy of summons and complaint effective service under N.Y. C.P.L.R. § 308(4)).

As for service on relief defendant Prophecy Research Institute and defendants Vajra, 27 Investments, and Magic Eight Ball, we need

not address the issue, since none of these defendants have appeared to contest the validity of service. No attorney has filed an appearance on their behalf in this case, and it is well-settled that corporations cannot appear pro se. See, e.g., Thomas and Agnes Carvel Found. v. Carvel, 736 F.Supp.2d 730, 740 (S.D.N.Y. 2010) (citing cases). Nevertheless, in the interest of completeness, we note that these entities were also adequately served by the act of the process servers personally handing copies of the complaint and summonses for those entities to the Mortons, who are principal or sole owners of the companies. "A corporation may be served through an officer or agent explicitly or implicitly authorized to accept service of process." In re: Grand Jury Subpoenas Issued to Thirteen Corporations, 775 F.2d 43, 46 (2d Cir. 1985) (finding that service upon a person "involve[d] in the financial affairs of the corporation" was adequate); see also Cal. Code Civ. Pro. § 416.10 ("A summons may be served on a corporation by delivering a copy of the summons and the complaint . . . [t]o the president, chief executive officer, or other head of the corporation, a vice president, a secretary or assistant secretary, a treasurer or assistant treasurer, a controller or chief financial officer, a general manager, or a person authorized by the corporation to receive service of process."); N.Y. C.P.L.R. § 311 ("Personal service upon a corporation . . . shall be made by delivering the

summons . . . to an officer, director, managing or general agent . . . or to any other agent authorized by appointment or by law to receive service.").[9]

Adequate service on defendants Vajra and 27 Investments was also made by mailing copies of the complaint and summonses to John Woodie, the registered agent for those two entities. Fed. R. Civ. Pro. 4(h)(1)(B); Cal. Code Civ. Pro. § 416.10(a) ("A summons may be served on a corporation by delivering a copy of the summons and the complaint . . . [t]o the person designated as agent for service of process . . . ."); N.Y. C.P.L.R. § 311-a(a) ("Service of process on any . . . limited liability company shall be made by delivering a copy personally to . . . any . . . agent authorized by appointment to receive process[.]").

In short, all defendants have been adequately served.

B. Personal Jurisdiction

The Mortons seek to challenge the court's in personam

[9] At one point the Mortons assert that they are not the "sole" owners of these entities. ("Motion for Reconsideration," at 3). Whether true or not, that does not undercut the fact that service on them was adequate to ensure notice to the companies.

jurisdiction over them based not only on their arguments about service of process, but also on their purported lack of ties to the forum state and district. This argument is fundamentally misconceived.

"When responding to a Rule 12(b)(2) motion to dismiss for lack of personal jurisdiction, the plaintiff bears the burden of establishing that the court has jurisdiction over the defendant." DiStefano v. Carozzi N. Am., Inc., 286 F.3d 81, 84 (2d Cir. 2001) (citation omitted). "[T]he plaintiff need only make a prima facie showing that the court possesses personal jurisdiction," with the pleadings construed in the light most favorable to the plaintiff and all doubts resolved in its favor. Id.

The federal securities laws authorize world-wide service of process, 15 U.S.C. §§ 77v(a) & 78aa, and they permit the exercise of personal jurisdiction provided that plaintiff meets the due-process standards imposed by the Fifth Amendment. See, e.g., SEC v. Unifund SAL, 910 F.2d 1028, 1033 (2d Cir. 1990); SEC v. Syndicated Food Servs, Int'l, Inc., 2010 WL 3528406, at *1 (E.D.N.Y. Sept. 3, 2010); SEC v. Dunn, 587 F.Supp.2d 486, 509 (S.D.N.Y. 2008); SEC v. Softpoint, Inc., 2001 WL 43611, at *2 (S.D.N.Y. Jan. 18, 2001).

The due-process test encompasses two requirements -- first, a minimum-contacts test, and, second, a reasonableness analysis. Dunn, 587 F.Supp.2d 486, 509 (quoting In re Parmalat Sec. Litig., 376 F.Supp.2d 449, 453 (S.D.N.Y. 2005)); see also Softpoint, Inc., 2001 WL 43611, at *2 (quoting Metro Life Ins. Co. v. Robertson-Ceco Corp., 84 F.3d 560, 567 (2d Cir. 1996)). Supreme Court decisions addressing the due-process minimum-contacts test have focused on suits in state court and diversity cases in federal court. In those circumstances, there is no question that the pertinent referent is the Fourteenth Amendment and that the minimum contacts in question are those with the forum state. See, e.g., Burger King Corp. v. Rudzewick, 471 U.S. 462, 471-476 (1985); World Wide Volkswagen Co. v. Woodson, 444 U.S. 286, 293-94 (1980). When the jurisdictional issue flows from a federal statutory grant that authorizes suit under federal-question jurisdiction and nation-wide service of process, however, the Fifth Amendment applies, and the Second Circuit has consistently held that the minimum-contacts test in such circumstances looks to contacts with the entire United States rather than with the forum state. See Chew v. Dietrich, 143 F.3d 24, 28 n.4 (2d Cir. 1998); Unifund, 910 F.2d at 1028, 1033; Texas Trading & Milling Corp. v. Federal Republic of Nigeria, 647 F.2d 300, 314 (2d Cir. 1982), overruled on other grounds, Frontera Resources Azerbaijan Corp. v. State Oil Co. of Azerbaijan Republic,

582 F.3d 393, 398-401 (2d Cir. 2009); Mariash v. Morrill, 496 F.2d 1138, 1143-44 (2d Cir. 1974); accord Dunn, 587 F.Supp.2d at 509 n. 32 (citing SEC v. Gonzalez de Castilla, 2001 WL 940560, at *3 (S.D.N.Y. Aug. 20, 2001)); Softpoint, Inc., 2001 WL 43611 at *3, *5 (citing cases).

If the plaintiff shows that defendants had substantial contacts with the United States, the court next must determine whether the assertion of personal jurisdiction "comports with 'traditional notions of fair play and substantial justice' – that is, whether it is reasonable under the circumstances of the case." Softpoint, Inc., 2001 WL 43611 at *5 (quoting Metro. Life Ins. Co., 84 F.3d at 568). In this analysis the defendant bears the burden to show "that the assertion of jurisdiction in the forum will 'make litigation so gravely difficult and inconvenient that [he] unfairly is at a severe disadvantage in comparison to his opponent." Id. (quoting Burger King, 471 U.S. at 478); accord, e.g., Syndicated Food Servs., 2010 WL 3528406 at *3. As a general matter, such unfairness will rarely be found, see, e.g., Asahi Metal Indus. Co. v. Supreme Court of Calif., 480 U.S. 102, 116 (1987) (Brennan, J., concurring), and such a result is still less likely in a federal-question case coupled with nationwide service of process. See, e.g., Softpoint, Inc., 2001 WL 43611, at *5 (citing 4 Wright,

Miller & Kane, Federal Practice & Procedure § 1067.1 at 169-70 (2000 Pocket Part)); see also Hallwood Realty Partners v. Gotham Partners, 104 F. Supp.2d 279, 285 (S.D.N.Y. 2000).

In this case the complaint alleges facts demonstrating that defendants have ample national contacts. Indeed, they are based in California and have engaged in national marketing and promotion of their business operations -- including by newsletter, website, a nationally syndicated radio show and public events throughout the United States, including in New York. (Compl. at ¶¶ 3, 20-23). Furthermore, defendants do not even attempt to dispute these facts.

As for the reasonableness of requiring them to defend here, defendants proffer no evidence that would demonstrate that litigation in this district would so unfairly prejudice them as to justify a finding of constitutional unreasonableness. Although the Mortons are located in California, they have apparently undertaken national sales efforts, and indeed Mr. Morton was served in this district while he was here to promote his business, which fact alone is sufficient to allow this court to exercise personal jurisdiction over him. See generally Burnham v. Superior Court of California, Cnty. of Marin, 495 U.S. 604, 610-28 (1990) (holding that a state court may exercise jurisdiction over a defendant who

was personally served with process while in the forum state). Moreover, Mrs. Morton concedes that she occasionally travels here, albeit for non-business purposes.[10] In any event, there is no reason to believe that the Mortons will be required to spend much, or even any, time in New York in this case. Furthermore, even if the Mortons continue to appear pro se, the only circumstances that may lead at least one of them (presumably Mr. Morton) to personally appear here might be the conducting of a few depositions, but defendants themselves argue that the bulk of the witnesses are in California, where they reside, thus minimizing any burden on them. See generally Syndicated Food Servs., 2010 WL 3528406, at *3.

In sum, this court may assert personal jurisdiction over the Mortons.[11]

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[10] Although defendants make conclusory allusions to vaguely stated health issues affecting Mrs. Morton (Defs.' Mem. of Law in Supp. of Melissa Morton Motion, at 5-6), those unsupported assertions are plainly inadequate to preclude jurisdiction. We also note that defendants' assertion that she and her husband were traveling in March 2010 undercuts the suggestion that she is severely impaired.

[11] Defendants do not directly address jurisdiction over the defendant entities. The same result must follow for them as for the Mortons. In any event, because the companies are not individuals, they cannot appear here on a pro se basis, which is their current status. See, e.g., Thomas and Agnes Carvel Found., 736 F.Supp.2d at 740 (citing cases). Unless an attorney appears to represent them, they will unavoidably face default judgments.

C. Venue

Defendants challenge venue on grounds similar to their attack on personal jurisdiction. They also argue at one point for a transfer for the litigants' convenience. Neither argument is merited.

Venue is proper if suit is brought in any district in which "any act or transaction constituting the violation occurred." 15 U.S.C. § 78aa; see also, e.g., Radzanower v. Touche Ross & Co., 426 U.S. 148, 152 (1976); SEC v. Roor, 1999 WL 553823, at *2 (S.D.N.Y. July 29, 1999).[12] Apart from general allegations in the complaint that venue here is based on the defendants' use of the means of interstate commerce and the mails, the complaint specifically alleges that Mr. Morton solicited investors in New York at a "New Life Expo" in October 2006. (Compl. at ¶ 12). Furthermore, in view of the allegations in the complaint that defendants obtained

[12] This provision is found in the Securities Exchange Act. Satisfaction of this requirement is deemed sufficient to meet the somewhat differently worded requirement for venue embodied in the Securities Act, 15 U.S.C. § 77p. See, e.g., Liles v. Ginn-La West End., Ltd., 631 F.3d 1242 (11th Cir. 2011) ("'[W]here a plaintiff states claims under both the [Securities Act of 19]33 and [Securities Exchange Act of 19[34] . . . the less restrictive jurisdiction and venue provisions contained in' the 1934 Act govern.") (quoting Hilgeman v. Nat'l Ins. Co. of Am., 547 F.2d 298, 302 n.7 (5th Cir. 1977)).

investments from more than 100,000 members of the public, it is reasonable to infer that at least some of them were based in New York when they made their investments. Indeed, plaintiff so represents (id.), and both sides refer to a lawsuit filed in New York Civil Court by an alleged victim against the Mortons. (Compl. at ¶ 13 (citing Dunn v. Morton, No. 021136/07 (N.Y. Civ. Ct. 2007); Letter from Morton to the Court (Mar. 16, 2011), at p. 6 & annexed ex.). Since any act performed in the district that is material to, and in furtherance of, a fraudulent scheme will suffice to justify venue, plaintiff's allegations and proffer are adequate to permit the suit to proceed here. See, e.g., Roor, 1999 WL 553823, at *2; Steinberg & Lyman v. Takacs, 690 F.Supp. 263, 267 (S.D.N.Y. 1998) ("[A]ny non-trivial act in the forum district which helps to accomplish a securities law violation is sufficient to establish venue.") (quoting First Fed. Sav. & Loan v. Oppenheim, Appel, Dixon, 634 F.Supp. 1341, 1350 (S.D.N.Y. 1986) and citing cases); SEC v. Nat'l Student Mktg Corp., 360 F. Supp. 284, 291-92 (D.D.C. 1973).

As for defendants' brief reference to the desirability of transferring the case to California for their convenience, the short answer is that they fail to address the principal pertinent factors. As a general matter, when a court is confronted by an

application to transfer under section 1404(a), it looks to a variety of considerations, although the choice of the forum by the plaintiff is entitled to deference, "because the purpose of § 1404(a) is not to shift the convenience from one party to the other." Roor, 1999 WL 553823, at *2 (citing Murphy v. Contemporary Mktg, Inc., 1995 WL 276201 (S.D.N.Y. May 11, 1995)). The other pertinent factors include the burden on the movant of litigating in the chosen forum, the interest of the forum state in the issues presented by the case, the plaintiff's interest in litigating in its chosen forum, the judicial system's interest in ensuring the most efficient resolution of the case, and the interests of the states in promoting specified social policies. See, e.g., id.

Given our deference to the SEC's choice of forum, defendants fail to justify requiring a transfer. Essentially their truncated argument boils down to the fact that they reside in California. They also make allusion to the presence of many (but unidentified) witnesses in California and to Mrs. Morton's undocumented ill health. There is no indication at the moment that large numbers of witnesses (other than Mr. and Mrs. Morton) are located in California, and apparently a number of alleged victims are located here. Moreover, if there are a number of California non-party witnesses, the SEC attorneys will in all likelihood be required to

travel to California if they wish to depose these individuals on defendants' home turf. As for the location of documents -- which defendants do not mention in their motion -- after the SEC's pre-suit investigation we infer that both sides have most if not all of the pertinent files. Moreover, if the SEC intends to depose the Mortons, it will also have to travel to California. Only if the case goes to trial would the Mortons be expected to travel here. Moreover, we note that the Mortons have operated a national business and Mr. Morton has been traveling to New York to promote it. In addition, Mrs. Morton impliedly concedes that she has traveled here for other purposes, and it appears in any event that -- despite the vague allusion to health problems by her -- she has been traveling at least as recently as last March.

In short, the siting of the litigation here will not impose an undue burden on the defendants. We also note that the prosecuting office of the SEC for this case is located here, and thus we may infer, at least on the present record, that the convenience of the plaintiff and the public interest in efficient litigation would be enhanced by preserving the lawsuit in its current location.

In sum, we see no compelling basis for upsetting the plaintiff's choice of forum.

D. Subject-Matter Jurisdiction

In seeking to challenge this court's subject-matter jurisdiction, defendants argue that the SEC has no authority to regulate trade in Federal Reserve notes or foreign-exchange transactions, which they seem to say were the underlying investments in which the Mortons were inviting members of the public to participate. This argument does not withstand scrutiny.

The Commission has alleged that defendants engaged in the sale, and the solicitation for sale, of investment contracts. (Compl. at ¶¶ 1, 39). The Securities Act and the Securities Exchange Act both include investment contracts in their respective definitions of "securities". 15 U.S.C. §§ 77b(a)(1), 78c(a)(10). An "investment contract" for purposes of these Acts "means a contract, transaction or scheme whereby a person invests his money in a common enterprise and is led to expect profits solely from the efforts of the promoter or a third party." SEC v. W.J. Howey Co., 328 U.S. 293, 298-99 (1946). This definition "embodies a flexible rather than a static principle, one that is capable of adaptation to meet the countless and variable schemes devised by those who seek the use of the money of others on the promise of profits." Id. at 299.

In order to determine whether a common enterprise exists, the courts have looked to both so-called vertical and horizontal commonality tests, under which, respectively, the financial fortunes of the investors are tied together by the pooling of assets and the pro rata distribution of profits (the horizontal test) and the fortunes of the investors and the promoters are linked (the vertical test). See, e.g., Revak v. SEC Realty Corp., 18 F.3d 81, 87 (2d Cir. 1994) (defining horizontal commonality) (quoting Hart v. Pulte Homes of Michigan Corp., 735 F.2d 1001, 1004 (6th Cir. 1984)); Walther v. Maricopa Int'l Inv. Corp., 1998 WL 186736, at *6 (S.D.N.Y. Apr. 17, 1998) (defining vertical commonality). Either horizontal or vertical commonality is sufficient to establish a common enterprise. See, e.g., Heine v. Colton, Hartnick, Yamin & Sheresky, 786 F.Supp. 360, 370 (S.D.N.Y. 1992). As pled here, and as Mr. Morton has apparently admitted during the investigatory process (see Ellenbogen Decl. at ¶ 6), each of these tests is met. Defendants represented that the money invested through Delphi would yield profits that would be shared among the investors on a pro rata basis. (Compl. at ¶¶ 1, 19). Moreover, the investing decisions that would produce these profits were to be made by Mr. Morton or his colleagues based on his purported psychic intuitions, and were not made by the investors themselves. (Compl. at ¶¶ 1, 4). Finally, contrary to defendants'

suggestion, the fact that the common enterprise involves the goal of investing in foreign-currency transactions does not take the investment contract outside the scope of the SEC's jurisdiction and, hence, of this court's jurisdiction. See, e.g., SEC v. Unique Fin. Concepts, Inc, 196 F.3d 1195, 1202-03 (11th Cir. 1999).[13]

Defendants also argue that this court lacks subject-matter jurisdiction because the SEC, which they aver is a private corporation, is incapable of filing suit, as it is not a natural person. (2011 Motion at 4-5). This contention is patently frivolous. The SEC is an agency of the United States government and is organized pursuant to federal statute. 15 U.S.C. § 78d; see generally 15 U.S.C. §§ 78d-78lll (listing, inter alia, the powers and duties of the Securities and Exchange Commission). It is authorized by statute to (among other things) enforce the nation's securities laws by investigating possible violations thereof and instituting civil enforcement actions in the courts of law. 15 U.S.C. §§ 77t(a), (b), (d), 78u(d); see also Tellabs, Inc. v. Makor

[13] We note that defendant Morton contends that he is not required to register with the SEC, but this is irrelevant to whether the SEC may regulate or challenge his sale of fraudulent contracts. See, e.g., SEC v. Montana, 464 F.Supp.2d 772, 782-84, 785 (S.D. Ind. 2006) (evaluating separate counts alleging violations of provisions prohibiting the sale of unregistered investment contracts, anti-fraud provisions, and provisions requiring registration as a broker or securities dealer).

Issues & Rights, Ltd., 551 U.S. 308, 313 (2007) ("Th[e Supreme] Court has long recognized that meritorious private actions to enforce federal antifraud securities laws are an essential supplement to criminal prosecutions and civil enforcement actions brought, respectively, by the Department of Justice and the Securities and Exchange Commission."); Freytag v. Comm'r of Internal Revenue, 501 U.S. 868, 887 n. 4 (1991) (referring to the SEC as a "principal agenc[y]" of the federal government). Of course, even if the SEC were a private corporation, that in no way would prevent it from filing lawsuits. See, e.g., Citizens United v. Fed. Election Comm'n, 130 S.Ct. 876, 886-887 (2010) ("[Plaintiff] is a nonprofit corporation. It brought this action in the United States District Court for the District of Columbia.").

E. Adequacy of the Complaint

Defendants' challenge to the adequacy of the complaint -- an argument that focuses on the allegations of sale of investment contracts -- is similarly misguided. We start by noting the limited scope of the court's review of a pleading under Rule 12(b)(6).

On a motion to dismiss for failure to state a claim, "[t]he issue is not whether a plaintiff will ultimately prevail but

whether the claimant is entitled to offer evidence to support the claims." Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), abrogated on other grounds by Harlow v. Fitzgerald, 457 U.S. 800 (1982); accord, e.g., Triestman v. Fed. Bureau of Prisons, 470 F.3d 471, 476 (2d Cir. 2006) (internal citation omitted). In assessing such a motion, the court must assume the truth of the well-pled factual allegations of the complaint and must draw all reasonable inferences against the movant. E.g., Achtman v. Kirby, McInerney & Squire, LLP, 464 F.3d 328, 337 (2d Cir. 2006); Still v. DeBuono, 101 F.3d 888, 891 (2d Cir. 1996). The pleader may not rely, however, on allegations that are only bare legal conclusions, see Starr v. Sony BMG Music Entm't, 592 F.3d 314, 317 n.1 (2d Cir. 2010) (discussing Rule 8(a)) (quoting Ashcroft v. Iqbal, 129 S. Ct. 1937, 1949-50 (2009)), or "legal conclusions couched as factual allegations." Starr, 592 F.3d at 321 (quoting Port Dock & Stone Corp. v. Oldcastle Northeast, Inc., 507 F.3d 117, 121 (2d Cir. 2007)).

The traditional test on a Rule 12(b)(6) motion required that the complaint not be dismissed unless "it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Leibowitz v. Cornell Univ., 445 F.3d 586, 590 (2d Cir. 2006) (quoting Conley v. Gibson, 355 U.S.

41, 45-46 (1957)). The Supreme Court has recently rejected this formulation, however, and a complaint is now subject to dismissal unless its well-pled factual allegations, if credited, make the claim "plausible." See Iqbal, 129 S. Ct. at 1949; Bell Atl. Corp. v. Twombly, 550 U.S. 544, 560-61 (2007). While the Supreme Court's recent decisions do not require a party to plead "detailed factual allegations" to survive a motion to dismiss, they do require that the plaintiff plead "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Starr, 592 F.3d at 321 (quoting Iqbal, 129 S. Ct. at 1949). In any event, "an unadorned, the-defendant-unlawfully-harmed-me accusation" will not suffice. Iqbal, 129 S. Ct. at 1949. In short, the pleading must do more than "tender[] naked assertions devoid of further factual enhancement", id. (internal quotation marks omitted), and in doing so must "'raise a right to relief above the speculative level.'" ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 98 (2d Cir. 2007) (quoting Twombly, 550 U.S. at 555).

When addressing a 12(b)(6) motion, the court may not consider evidence proffered by the moving party or its opponent. E.g., Roth v. Jennings, 489 F.3d 499, 509 (2d Cir. 2007); Healthcare Fin. Group, Inc. v. Bank Leumi USA, 669 F. Supp. 2d 344, 347 (S.D.N.Y.

2009) (internal citation omitted). Rather, the court is limited to reviewing the four corners of the complaint, any documents attached to that pleading or incorporated in it by reference, any documents that are "integral" to the plaintiff's allegations even if not explicitly incorporated by reference, and facts of which the court may take judicial notice. See, e.g., ATSI Commc'ns, Inc., 493 F.3d at 98; Roth, 489 F.3d at 509; Leonard F. v. Israel Disc. Bank, 199 F.3d 99, 107 (2d Cir. 1999).

In this case the plaintiff alleges that Mr. Morton was soliciting the public to invest through Delphi so as to allow Mr. Morton to make psychically guided investments in foreign-exchange currencies. The complaint further alleges that the investments were joint in the sense that the success or failure of the investments would be shared by all investors on a pro rata basis. (Compl. at ¶¶ 1, 2, 5, 6, 39). Plaintiff also alleges that the money was paid in by the investors with the expectation that profits would be earned from the efforts of Mr. Morton. (Compl. at ¶¶ 1, 35-38).

In short, the plaintiff adequately alleges that defendants engaged in the solicitation and sale of investment contracts.[14]

[14] As noted, at various points in defendants' motion papers they appear to claim that they did not engage in any fraud,

In their most recent motion, defendants also argue that the complaint is inadequate because it does not include an affidavit by its signatory, George S. Canellos, Esq., and therefore "is a violation of the authentication rule" and "should be struck in whole." (2011 Motion at 6). In support of this proposition, defendants cite to Florida Rule of Civil Procedure 1.510(e), which governs the form of affidavits submitted in support of a motion for summary judgment. (Id. at 6-7). Defendants make no effort to explain why a rule that governs the submission of materials on summary judgment motions in Florida state courts should be held to apply to a complaint in federal court, and we see no reason why we are not instead bound by the Federal Rules of Civil Procedure, which clearly state that they "govern the procedure in all civil actions and proceedings in the United States district courts[.]"[15] Fed. R. Civ. Pro. 1. As we have already found plaintiff's complaint to be entirely adequate under the Federal Rules, we need not

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presumably because they allegedly had a more than 90 percent success rate in their investments. Whether this is true or not cannot be determined on a Rule 12(b)(6) motion, which addresses only the face of the complaint.

[15] Defendants also cite to the Florida rules on summary judgment to support both their contention that the complaint must be stricken because Mr. Canellos did not have personal knowledge of the events alleged therein (2011 Motion at 7-9), and their request for sanctions. (Id. at 9). These submissions on these points are therefore meritless, and we deny their motion for sanctions.

entertain plaintiff's latest contentions to the contrary.[16]

In sum, plaintiff's complaint is entirely adequate.

F. Standing of the SEC

Defendants argue at one point that the SEC lacks standing to pursue its claims here, purportedly because it cannot meet the long-recognized test of constitutional standing, that is, injury caused by the alleged conduct and the redressability of the injury. This test, though applicable to private litigants, of course does not apply to the Commission, which is authorized by statute to pursue enforcement actions within its regulatory purview. 15 U.S.C. §§ 77t(b), (d), 78u(d). The SEC plainly has the standing granted to it by acts of Congress.

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[16] The 2011 Motion also refers to Rule 9, which requires allegations of fraud to be made with particularity. (2011 Motion at 1). To the extent that Rule 9 requires the SEC to not only "state with particularity the circumstances constituting fraud," Fed. R. Civ. Pro. 9(b), but also to "'specifically plead those [facts] which they assert give rise to a strong inference that the defendants had' the requisite state of mind" to commit fraud, Tellabs, Inc., 551 U.S. at 320 (quoting Ross v. A.H. Robins Co., 607 F.2d 545, 558 (2d Cir. 1979)), the SEC's allegations regarding Morton's purported predictions of market highs and lows and other material misrepresentations (see, e.g., Compl. at ¶¶ 27-41) easily satisfy this requirement.

G. Necessary Parties

In another passing argument, defendants contend that Mr. Weber, who reportedly was involved in some of defendants' investment activities, is a necessary party to this lawsuit. Such an argument, which is not fully articulated by defendants, implies that his presence as a party is necessary to a full adjudication of the claims and to the court's ability to provide such relief as may be necessary. (Defs.' Mem. of Law in Supp. of Sean Morton Motion at 1, 3, 9).

The exact role that Mr. Weber played, if any, is entirely unclear at present, although defendants seem to imply that he was instrumental in undertaking investment transactions. (See, e.g., Sean Morton Motion, at Ex. 1, p. 1). In any event, he is certainly not indispensable to this enforcement action. In his absence, the SEC will be required to prove the involvement of the current defendants in conduct that violated the pertinent provisions of the securities laws, and if it carries its burden, the court will be able to provide appropriate relief. If the SEC cannot meet that burden -- for example, because the evidence establishes that the named defendants had no involvement in the violations -- then relief will be denied. See generally Temple v. Synthes Corp., 498

U.S. 5, 6 (1998) (plaintiff need not name all joint tortfeasors as defendants).

In short, defendants' argument is manifestly baseless.

H. A Preliminary Judicial Factual Inquiry

Finally, as part of one of defendants' dismissal motions, they urge that this court undertake a factual inquiry to determine whether there is any merit to the SEC's lawsuit. Defendants, who are appearing pro se, have seemingly little appreciation of procedural requirements, but we infer that this demand explains their next step, which was to file a summary-judgment motion. We address that motion separately below, and find no grounds for such Rule 56 relief.

II. The Summary-Judgment Motion

As noted, defendants have separately sought summary judgment based on the premise that whatever they did was not within the purview of the SEC. Otherwise stated, they contend that they did not sell or solicit the sale of investment contracts. They also seem to say that their representations to the public were correct,

that is, that their investment decisions were overwhelmingly successful.

The short answer is that this motion is premature since defendants have not yet even answered the complaint and the parties have not yet engaged in discovery. The longer answer is that defendants do not carry even their initial Rule 56 burden.

The court may enter summary judgment only if it concludes that there is no genuine dispute as to the material facts and that, based on the undisputed facts, the moving party is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c); see, e.g., Celotex Corp. v. Catrett, 477 U.S. 317, 322-23 (1986); Feingold v. New York, 366 F.3d 138, 148 (2d Cir. 2004). "An issue of fact is 'material' for these purposes if it 'might affect the outcome of the suit under the governing law [while] [a]n issue of fact is 'genuine' if 'the evidence is such that a reasonable jury could return a verdict for the nonmoving party.'" Shade v. Hous. Auth. of the City of New Haven, 251 F.3d 307, 314 (2d Cir. 2001) (quoting Anderson v. Liberty Lobby, Inc. 477 U.S. 242, 248 (1986)). It is axiomatic that the responsibility of the court in deciding a summary-judgment motion "is not to resolve disputed issues of fact but to assess whether there are any factual issues to be tried,

while resolving ambiguities and drawing reasonable inferences against the moving party." Knight v. U.S. Fire Ins. Co., 804 F.2d 9, 11 (2d Cir. 1986); see, e.g., Ricci v. DeStefano, 129 S. Ct. 2658, 2677 (2009); Anderson, 477 U.S. at 255; Howley v. Town of Stratford, 217 F.3d 141, 150-51 (2d Cir. 2000).

The party moving for summary judgment bears the initial burden of informing the court of the basis for his motion and identifying those portions of the "pleadings, the discovery and disclosure materials on file, and any affidavits" that demonstrate the absence of a genuine issue of material fact. Fed. R. Civ. P. 56(c); see, e.g., Celotex, 477 U.S. at 323; Koch v. Town of Brattleboro, 287 F.3d 162, 165 (2d Cir. 2002). If the non-moving party has the burden of proof on a specific issue, the movant may satisfy his initial burden by demonstrating the absence of evidence in support of an essential element of the non-moving party's claim. See, e.g., Celotex, 477 U.S. at 322-23, 325; PepsiCo, Inc. v. Coca-Cola Co., 315 F.3d 101, 105 (2d Cir. 2002); Goenaga v. March of Dimes Birth Defects Found., 51 F.3d 14, 18 (2d Cir. 1995). If the movant fails to meet his initial burden, however, the motion will fail even if the opponent does not submit any evidentiary materials to establish a genuine factual issue for trial. See, e.g., Adickes v. S.H. Kress & Co., 398 U.S. 144, 160 (1970); Giannullo v. City of New York, 322

F.3d 139, 140-41 (2d Cir. 2003).

If the moving party carries his initial burden, the opposing party must then shoulder the burden of demonstrating a genuine issue of material fact. See, e.g., Beard v. Banks, 548 U.S. 521, 529 (2006); Celotex, 477 U.S. at 323-24; Santos v. Murdock, 243 F.3d 681, 683 (2d Cir. 2001). In doing so, the opposing party cannot rest "merely on allegations or denials" of the factual assertions of the movant, Fed. R. Civ. P. 56(e); see, e.g., Goldstein v. Hutton, Ingram, Yuzek, Gainen, Carroll & Bertolotti, 374 F.3d 56, 59-60 (2d Cir. 2004), nor can he rely on his pleadings or on merely conclusory factual allegations. See, e.g., Weinstock v. Columbia Univ., 224 F.3d 33, 41 (2d Cir. 2000). He must also "do more than simply show that there is some metaphysical doubt as to the material facts." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 586 (1986); see also Woodman v. WWOR-TV, Inc., 411 F.3d 69, 75 (2d Cir. 2005). Rather, he must present specific evidence in support of his contention that there is a genuine dispute as to the material facts. See, e.g., Celotex, 477 U.S. at 324; Scotto v. Almenas, 143 F.3d 105, 114 (2d Cir. 1998); Rexnord Holdings, Inc. v. Bidermann, 21 F.3d 522, 526 (2d Cir. 1994).

In support of the defendants' motion, they offer only a pair

of conclusory affidavits by Mr. and Mrs. Morton, asserting principally that they did not sell or solicit for sale any investment contracts or other securities. The premise for that assertion, however, is not factual, but rather legal -- that is, that the defendants' investment program involved foreign-currency trading, which they assert cannot be regulated by the SEC. As we have noted, however, the fact that such a program involves investments in foreign currency is not inconsistent with it amounting to the sale of investment contracts if the dealings of the defendants met the requirements for such contracts. Defendants offer no evidence to demonstrate that what they were doing was inconsistent with their selling such contracts, and hence they fail to meet their initial Rule 56 burden.

To the extent that they may also be understood to assert that their investment program was highly successful -- presumably an attempt to rebut some of the allegations of fraud[17] -- their motion

[17] Even if such investment success were proven, that showing would not render truthful other aspects of the alleged fraudulent statements, notably, the representation that the Mortons would use all investment funds to participate in currency trading. For example, the SEC alleges, and defendants do not dispute, that only $3.2 million of the $6 million they received was invested in currency trading and that they used $240,000.00 in investor funds for personal purposes, that is, to finance their Prophecy Research Institute. (Compl. at ¶¶ 6, 29).

also fails. This assertion is only that -- an assertion not grounded in any proffered evidence -- and it is hence not available to defendants as a basis for obtaining any summary-judgment relief.

III. The SEC's Request for an Order Regarding Service

The SEC has sought one form of affirmative relief, an order deeming the defendants to have been properly served. For the reasons noted at some length in addressing defendants' various motions to dismiss, we conclude that the Commission has plainly satisfied its burden to demonstrate proper service.

The plaintiff also seeks an order directing defendants to answer the complaint by a date certain. In view of the fact that defendants have moved to dismiss the complaint on numerous grounds and that this report and recommendation is subject to de novo review, we decline that request until the recommendation that the various dismissal motions be denied is finalized either by District Court affirmance or the expiration of defendants' time to seek such review.

IV. The Mortons' "Motion for Subpoena Duces Tecum" and "Notices of Default"

Finally, defendants' most recent submission to the court contains a "Motion for Subpoena Duces Tecum." (2011 Motion at 1), which we take to be a motion to compel discovery under Rule 37, particularly as it is accompanied by a request for sanctions on the plaintiff. (Id. at 9). As this request comes before the initiation of discovery in this case, it is premature and is therefore denied without prejudice.

We note, however, that the subpoena requested by this motion appears to demand that the SEC provide documents relating to the SEC investigation of the Mortons, and seems to suggest that the SEC's failure to respond to the Mortons' earlier (and incredibly overbroad) requests for the same documents somehow put the SEC into default and precluded the agency from pursuing this action. (See id. at 2; see also "Administrative Notice" at Exs. 1-5). Even if we were to construe these submissions as a motion for dismissal, it would have to be denied. The only stated basis for defendants' requested dispositive relief is that, prior to the institution of this action (and apparently during the SEC's initial investigation of them), they sent the SEC a request for documents that was

plainly overbroad, sought obviously irrelevant documents, and was not within the purview of any ongoing litigation. To the extent that they now contend that the SEC's failure to respond to this defective request precludes the prosecution of this action, we find absolutely no basis for this request. We therefore recommend that, insofar as defendants' papers could be read to encompass a motion for such relief, it should be denied.

CONCLUSION

For the reasons noted, we recommend that defendants' various motions to dismiss and their motion for summary judgment be denied. We also recommend that, insofar as defendants' March 2011 papers may be read to encompass a motion for dismissal premised on a purported default by the SEC, such motion be denied as well. We also grant plaintiff's motion to deem defendants properly served, and deny defendants' motions to compel discovery and for sanctions.

Pursuant to 28 U.S.C. § 636(b)(1)(c) and Rule 72(b)(2) of the Federal Rules of Civil Procedure, the parties shall have fourteen (14) days from this date to file written objections to the Report and Recommendation portion of this submission. See also Fed. R. Civ. P. 6(a), 6(d). Such objections shall be filed with the Clerk

of the Court and served on all adversaries, with extra copies to be delivered to the chambers of the Honorable Lewis A. Kaplan, Room 1310, and to the chambers of the undersigned, Room 1670, U.S. Courthouse, 500 Pearl Street, New York, New York 10007. Failure to file timely objections may constitute a waiver of those objections both in the District Court and on later appeal to the United States Court of Appeals. Small v. Sec'y of Health and Human Servs., 892 F.2d 15, 16 (2d Cir. 1989); Thomas v. Arn, 474 U.S. 140, 150-55 (1985), reh'g denied, 474 U.S. 1111 (1986).

Dated: New York, New York
March 31, 2011

MICHAEL H. DOLINGER
UNITED STATES MAGISTRATE JUDGE

Copies of the foregoing Report and Recommendation and Memorandum and Order have been mailed today to:

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