

anti-fraud provisions of the Commodity Exchange Act, 7 U.S.C. § 1 *et seq.* See generally Complaint (Dkt.No. 1). Upon information and belief, on the same day that the CFTC filed this lawsuit, Mescall was arrested by state criminal authorities, based at least in part upon the same conduct identified in the CFTC's Complaint. On September 16, 2009, the Court entered a preliminary injunction Order (Dkt.No. 14, hereafter "Order") against Defendants that, as relevant here: prohibited Mescall from attempting to transfer or dispose of any assets; commanded Mescall to repatriate his off-shore assets and turn them over to the court-appointed Receiver; and commanded Mescall to deliver to the Receiver all the information that the Receiver would need to secure access to Defendants' bank accounts. Order, pp. 5, 12.

At his September 29, 2009 deposition in this action, Mescall testified in detail and at length about approximately \$50,000 that, at that time, was held in an account at FBME Bank Ltd. in the Republic of Cyprus. See Transcript of Deposition of Sean F. Mescall, September 29, 2009 ("Mescall Dep.") at 75:1 – 82:10; 90:19 – 94:24 (Dkt.No. 25-5). Mescall testified that he opened this account earlier in 2009 in the name of another company he controlled, Patrick Fitzgerald Financial, Inc., and that on or around July 14, 2009 he transferred \$50,000 from one of CSF's accounts at Bank of America to this account. *Id.* at 78:5 – 80:15; 91:3 - 18. Mescall testified that, as of the date of his deposition, the balance of the Cyprus account consisted of the original \$50,000 deposit, minus some miscellaneous fees. *Id.* at 81:12 – 82:1. He estimated that the balance was "49,000, [or]something like that." *Id.* at 82:1. Mescall even admitted that he understood that the Cyprus account might have been "frozen" by the preliminary injunction Order. *Id.* at 80:8 – 25.

After Mescall's deposition, the Receiver diligently attempted to recover the Cyprus funds, both seeking Mescall's cooperation and working independently of Mescall. Mescall did

not cooperate with the Receiver and, despite his best efforts, the Receiver was not otherwise able to obtain the funds. *See* Amended Declaration of Joseph W. Grier, III, Esq. (“Grier Decl.”) at ¶¶ 9 -12 (Dkt.No. 35-2). Accordingly, on December 18, 2009, the Receiver and the CFTC filed their Joint Motion for an Order to Show Cause As To Why Defendant Sean F. Mescall Should Not Be Held In Contempt Of Court (Dkt.No. 25), in which the Receiver and the CFTC sought the assistance of this Court in obtaining the Cyprus funds.

The CFTC subsequently learned that Mescall already had surreptitiously repatriated \$49,665 from the Cyprus account in November 2009, that he concealed his receipt of those funds, and that he did not turn them over to the court-appointed Receiver, as required by the Order. In light of this development, the CFTC and the Receiver filed their Amended Joint Motion for an Order to Show Cause As To Why Defendant Sean F. Mescall Should Not Be Held In Contempt Of Court (Dkt.No. 35, hereafter “Amended Joint Motion”).

ARGUMENT

The Court has the authority to: (1) compel Mescall to turn over to the Receiver the \$49,665 that Mescall surreptitiously repatriated from Cyprus; (2) compel Mescall to testify as to the location or disposition of those funds; and (3) hold Mescall in contempt and order his incarceration, in the event Mescall fails to rebut the *prima facie* case of contempt set forth in the Amended Joint Motion, irrespective of whether that failure of proof results from his invocation of the Fifth Amendment privilege against self-incrimination and attendant refusal to testify or any other failure of proof.

First, the Court absolutely has the authority to compel Mescall to turn over to the Receiver the \$49,665 that Mescall surreptitiously repatriated from Cyprus because Mescall previously testified in detail about the source and location of those funds. Mescall Dep. at 75:1 –

82:10; 90:19 – 94:24. He admitted that they came from one of CSF’s bank accounts at Bank of America. *Id.* at 80:8 – 15; 91:3 – 18. He admitted that he alone had control over the Cyprus account. *Id.* at 82:7 – 10. Accordingly, by either turning those funds over to the Receiver or simply disclosing the new location and/or recent disposition of those funds, Mescall will not be disclosing any materially new information that potentially could expose him to additional criminal jeopardy.

Second, even assuming *arguendo* that Mescall’s testimony about the current location and/or recent of disposition of the Cyprus funds could be considered to constitute new information that could potentially be independent grounds for further criminal jeopardy, Mescall may not refuse to testify as to these facts because he has waived his Fifth Amendment right against self-incrimination by virtue of his expansive previous testimony on the subject. “It is well established that a witness ... may not testify voluntarily about a subject and then invoke the privilege against self-incrimination when questioned about the details.” *Mitchell v. United States*, 526 U.S. 314, 321 (1999) (citing *Rogers v. United States*, 340 U.S. 367, 373 (1951)). “The privilege is waived for the matters to which the witness testifies” *Id.* (quoting *Brown v. United States*, 356 U.S. 148, 154-55 (1958)). Because Mescall voluntarily testified at length and in detail about the Cyprus account and the source of the funds in that account, even admitting that he understood that the Cyprus account may be subject to the preliminary injunction Order, the doctrine of subject matter waiver precludes Mescall from using the shield of the Fifth Amendment to conceal the current location and/or recent disposition of these funds.

Finally, even assuming *arguendo* that Mescall has not waived his right to invoke the Fifth Amendment on this topic, he cannot avoid a contempt finding by invoking his Fifth Amendment rights and refusing to answer questions about the location or disposition of the Cyprus funds. It

is well-established that once a *prima facie* case of civil contempt has been shown, the burden shifts to the contemnor to produce evidence excusing his violation of a court order. *See United States v. Rylander*, 460 U.S. 752, 756 (1983); *United States v. Butler*, 211 F.3d 826, 831 (4th Cir. 2000). Because the CFTC and the Receiver have established, by clear and convincing evidence, a *prima facie* case of civil contempt with respect to Mescall's failure to turn over to the Receiver the \$49,665 that he surreptitiously repatriated from Cyprus (*see generally* Amended Joint Motion), the burden now rests with Mescall to prove an inability to comply with the Order.

As the Supreme Court held in similar circumstances, a contemnor may decline to rebut the *prima facie* case of contempt by invoking his Fifth Amendment rights and refusing to offer testimony that explains his present inability to comply with the court order, but that silence does not satisfy the contemnor's burden of proof on the question of contempt. *Rylander*, 460 U.S. at 758-61 (affirming the district court order incarcerating Mr. Rylander for contempt for failing to comply with an order enforcing an IRS summons for corporate books and records). The Supreme Court explained, "while the assertion of the Fifth Amendment privilege against compulsory self-incrimination may be a valid ground upon which a witness ... declines to answer questions, it has never been thought to be in itself a substitute for evidence that would assist in meeting a burden of production." *Id.* at 758. The Supreme Court concluded, "[t]he fact is that [Rylander's] refusal to come forward with such evidence [demonstrating a present inability to comply with the order] was accompanied by a claim of Fifth Amendment privilege may be an adequate reason for the court not compelling him to respond to cross-examination at the contempt hearing, but the claim of privilege is not a substitute for relevant evidence." *Id.* at 761.

In circumstances analogous to the instant case, where the contemnor failed to turn over certain assets and records to the court-appointed receiver, the U.S Court of Appeals for the Second Circuit affirmed the district court's order incarcerating the contemnor and rejected the contemnor's argument that his detention for contempt violated his Fifth Amendment right against self-incrimination. *Armstrong v. Guccione*, 470 F.3d 89, 99-100 (2d Cir. 2006). The Second Circuit held that the district court properly "found [Armstrong] in contempt for refusing to turn over missing corporate property; the court did not find him in contempt based on any refusal to testify." *Id.* at 99. The court reasoned that although Armstrong "does retain the right to refuse to testify as to the whereabouts of the missing corporate property, [t]his testimonial privilege, however, does not relieve him of his burden to demonstrate a present inability to comply with the turnover orders." *Id.* at 100.

Similarly, if a contemnor chooses to testify in a civil contempt proceeding, he cannot later argue in a criminal proceeding that such testimony was compelled in violation of his Fifth Amendment rights. *United States v. Butler*, 211 F.3d 826, 830-33 (4th Cir. 2000). In *Butler*, the court first endorsed the district court's handling of the *Rylander* question:

To avoid incarceration for civil contempt, Butler had to produce evidence demonstrating his present inability to turn over the \$350,000. Instead of meeting this burden, he initially attempted to do precisely what the Supreme Court in *Rylander* held a defendant cannot do: assert inability to comply with a court order, while at the same time refusing to answer any further questions on the issue through the invocation of his Fifth Amendment privilege. The district court in the contempt proceeding, citing *Rylander*, correctly denied Butler this option.

Id. at 832. The court next addressed the Fifth Amendment issue, writing "[t]rue, Butler found himself in a difficult position during the civil contempt proceedings. He faced the prospect of incarceration if he refused to account for the settlement proceeds; he feared that he would

incriminate himself if he did testify. This pressure does not amount to “compulsion” under the Fifth Amendment, however.” *Id.*

CONCLUSION

For the reasons stated above, the Court has the authority to compel responses from Mescall or to find him in contempt if he fails to rebut the *prima facie* case for contempt set forth in the Amended Joint Motion. The Commission appreciates the opportunity to brief this issue for the Court.

Respectfully submitted this 19th day of March, 2010.

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CERTIFICATE OF SERVICE

I hereby certify that, on this 19th day of March, 2010, I served a copy of the foregoing PLAINTIFF'S MEMORANDUM ON THE COURT'S AUTHORITY TO REQUIRE RESPONSES FROM DEFENDANT SEAN F. MESCALL on the following parties using the following means of service:

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