EXHIBIT 34

Positive
As of: Sep 07, 2010

SECURITIES AND EXCHANGE COMMISSION, Plaintiff, - against - ANDREAS BADIAN, et al., Defendants.

06 Civ. 2621 (LTS) (DFE)

UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

2009 U.S. Dist. LEXIS 120951

December 22, 2009, Decided
December 23, 2009, Filed

SUBSEQUENT HISTORY: Motion denied by SEC v. Badian, 2010 U.S. Dist. LEXIS 23470 (S.D.N.Y., Mar. 11, 2010)

PRIOR HISTORY: SEC v. Badian, 2009 U.S. Dist. LEXIS 51371 (S.D.N.Y., May 18, 2009)

CORE TERMS: rebuttal, expert reports, discovery, scheduling, disclosure, deadline, stock, manipulation, readable, common stock, consulted, conversation, electronic, machine, expert witness, presentation, subpoena, silent, rebut, deposition, attachment, trading, audio, transcription, manipulative, electronically, completion, telephone, preparing, disclose

COUNSEL: [*1] For Securities and Exchange Commission, Plaintiff: James Martin McHale, Kenneth John Guido, Jr., LEAD ATTORNEYS, Securities and Exchange Commission (DC), Washington, DC.

For Andreas Badian, Defendant: Caryn Gail Schechtman, James Peter Duffy, IV, Joshua Samuel Sohn, Megan Kathleen Vesely, DLA Piper US LLP (NY), New York, NY.

For Jacob Spinner, Mottes Drillman, Defendants: Richard Johnnie Babnick, Jr, Sichenzia Ross Friedman Ference, LLP, New York, NY.

For Pond Securities Corporation, doing business as Pond Equities, Ezra Birnbaum, Shaye Hirsch, Defendants: Eliot Lauer, LEAD ATTORNEY, Curtis, Mallet-Prevost, Colt & Mosle, LLP(NYC), New York, NY; Jacques Semmelman, LEAD ATTORNEY, Curtis, Mallet-Prevost, Colt and Mosle LLP, New York, NY.

For USA, Intervenor: Joshua I Klein, U.S. Attorney's Office, SDNY (St Andw's), New York, NY.

JUDGES: DOUGLAS F. EATON, United States Magistrate Judge.

OPINION BY: DOUGLAS F. EATON

OPINION

MEMORANDUM AND ORDER

DOUGLAS F. EATON, United States Magistrate Judge.

1. In this civil lawsuit, the Securities and Exchange Commission ("SEC") alleges that Andreas Badian, together with his brother Thomas Badian and their company Rhino Advisors, Inc. ("Rhino") engaged in manipulative trading in the securities [*2] of Sedona

Corporation. In June 2002, the SEC authorized a Formal Order of Private Investigation. In early 2003, Thomas Badian and Rhino entered into a consent decree and paid $ 1,000,000 in civil penalties. On December 3, 2003, the U.S. Attorney's Office in this District filed a criminal complaint against Thomas Badian and Andreas Badian and obtained warrants to arrest them. Andreas was arrested that day, but Thomas had left the United States and he has not returned.

2. The following appears to be undisputed. On May 24, 2004, for settlement purposes only, Caryn G. Schechtman of the law firm of DLA Piper LLP (attorneys for Andreas Badian) met at the U.S. Attorney's Office with several federal prosecutors and four staff members of the SEC, including Kevin Campion and Christopher Ehrman. Ms. Schechtman came with Tsvetan Beloreshki, an expert on future-priced securities who then worked at NERA Economic Consulting. Mr. Beloreshki presented five slides, which now appear as Exhibit G to Ms. Schechtman's 12/15/09 declaration. They consist of three charts and two graphs. Mr. Beloreshki stated that he had conducted a regression analysis that examined the impact of the trading of Sedona stock [*3] on the marketplace over a period of time. He stated his opinion that Rhino's trading of Sedona stock (a) had no effect on the market in Sedona stock and (b) was not consistent with a market manipulation scheme. (12/15/09 Schechtman Decl. PP 10-13.)

3. On October 21, 2004, the U.S. Attorney's Office dismissed it criminal complaint as to Andreas. In today's Memorandum and Order, all references to "Badian" refer only to Andreas Badian.

4. The SEC resumed its civil investigation, and filed the Complaint in the case at bar on April 4, 2006.

5. On April 6, 2007, Ms. Schechtman and her partner Joshua S. Sohn met with three SEC attorneys to discuss "ongoing discovery disputes and resolution possibilities." (12/15/09 Schechtman Decl. P 14.) The three SEC attorneys were Mr. Ehrman, Melissa (Lisa) Robertson, and James McHale (the latter a member of the SEC's Trial Unit). In her 12/15/09 Declaration, Ms. Schechtman says (PP 16-17):

> "At the April 2007 meeting, Mr. Sohn and I offered to have Mr. Beloreshki again present his regression analysis and opinion on market manipulation to the SEC, ...
>
> "Mr. Erhman, who had attended Mr. Beloreshki's presentation in May 2004, advised me and Mr. Sohn at the [*4] April 2007 meeting that he had already seen this presentation, and that the SEC takes the position that Mr. Beloreshki's methodology was flawed and that it was inappropriate to contest market manipulation by employing a regression analysis."

6. Twelve days later, on April 18, 2007, Mr. Erhman verified, and Mr. McHale signed, the SEC's responses to interrogatories, one of which asked the SEC: "Identify each person that you intend to call as an expert in this case." The response stated objections and then said: "In any event, the SEC has not yet retained an expert in this matter. However, it anticipates engaging an expert in the next month, and it will then disclose his or her identity to Defendants."

7. As it turned out, the Trial Unit did not request the SEC for authorization to retain an expert until on or about November 30, 2009. However, there appear to be various reasons for that delay. On May 3, 2007, I conducted a settlement conference with Badian and the six other defendants. In September 2007, a notice of appearance was filed by the Trial Unit's Kenneth Guido, Esq., who took over the day-to-day handling of this case. In December 2007 (I believe before any depositions were taken) [*5] Badian filed a motion to dismiss. It was denied by Judge Swain in August 2008; Badian then filed a motion for reconsideration, which was denied in April 2009. In the next four months, fact depositions were finally taken. Badian was deposed on June 10 and July 22, 2009.

8. Back on April 11, 2008, I had issued the Second Joint Amended Pre-Trial Scheduling Order, using Judge Swain's form of order. It said, in part: "All non-expert witness discovery in this matter shall be completed by December 15, 2008 All expert discovery shall be completed by July 13, 2009." Both of those deadlines were later adjourned by six months and then by two months. (See my handwritten endorsed orders filed 10/7/08 and 2/18/09; on the latter, I wrote: "It is extremely unlikely that I will grant any further extensions; this case focusses on events that occurred in 1999 to 2002.")

9. Judge Swain's form of order provides deadlines for expert witness disclosures by plaintiff(s) and then by defendant(s). It is silent about rebuttal disclosures, and it is also silent about expert depositions. But it leaves an additional 105 days before the completion of expert witness discovery. In a typical case, 105 days is ample time [*6] for rebuttal disclosures and also for expert depositions.

10. It is undisputed that my 2/18/09 adjournment caused Paragraph 2 of my 4/11/08 scheduling order to read, in effect, as follows:

> 2. Discovery
>
> a. All non-expert discovery in this matter shall be completed by August 15, 2009.
>
> b. Plaintiff(s) shall make expert witness disclosures described in Rule 26(a)(2) of the Federal Rules of Civil Procedure no later than 150 days before March 12, 2010, the date set forth in paragraph 2.c. below. Defendant(s) shall make such disclosures no later than 105 days before March 12, 2010, the date set forth in paragraph 2.c. below. Such disclosures shall be made in writing, signed and served, but shall not be filed with the Court.
>
> c. All expert witness discovery shall be completed by March 12, 2010.

11. The SEC did not serve any expert disclosures. On the evening of November 25, 2009, Badian served two expert reports, which I have now reviewed.

12. One report is co-authored by Mr. Beloreshki and Stephen D. Prowse, who has a Ph.D. in economics and is based in Dallas. Their report annexes six charts (none of which is the same as the three charts from Mr. Beloreshki's 2004 slide presentation) and nine graphs [*7] (only one of which is the same as one of the two graphs from his 2004 presentation). Other differences are now noted at pages 11-13 of the SEC's 12/18/09 memorandum. I note that Exhibit 3 to the Prowse & Beloreshki report lists the materials they reviewed; the list does not include the audio transcriptions of Badian and the other defendants, although it does list the Complaint, which quoted some of those conversations.

13. Badian's other expert is Fordham Law Professor Steve Thel. His report contains a discussion that runs only from P 7 to P 16. At P 11 he writes: "Because short selling is valuable and legitimate, it is not illegal per se, but is instead subject to regulation. Badian appears to have complied with all rules applicable to him in the sale of Sedona common stock." Mr. Thel does not directly address the Complaint's allegations that Rhino helped its client Amro to enter into a Convertible Debentures and Warrants Purchase Agreement with Sedona, that the Agreement specifically prohibited Amro from making any short sales of Sedona's stock, and that copies of that Agreement were provided to Badian. However, at P 12 Mr. Thel opines that "Amro and those working on its behalf had [*8] no incentive to depress the stock of Sedona common stock." At P 15, Mr. Thel opines that "Badian had no incentive to drive down the price of Sedona common stock," that "selling to hedge was rational and appropriate," and that "[it] cannot in any case be assumed that his sales contributed to price declines, let alone caused them."

14. Unlike Mr. Prowse and Mr. Beloreshki, Mr. Thel says he reviewed the audio transcriptions (February 21, 2001, and 20 dates from March 1 to 29, 2001). According to the Complaint, those audio transcriptions reveal that Badian directed defendant Graham to trade Sedona's stock to depress its price, to "clobber" the stock, to sell Sedona shares with "unbridled levels of aggression," and to be "merciless," and that later, when defendant Spinner asked Badian whether he was concerned that Sedona's stock price might begin to rise, Badian said he had a particular market maker "in the way" to keep the price from rising. Mr. Thel's report does not discuss any specific audio transcription. He merely gives a conclusory statement at P 16: "I reviewed transcripts of tape recordings of conversations between Badian and others relating to trading in Sedona common stock. I [*9] have considered those conversations carefully in reviewing this matter, and am confident of the opinions set out herein. In particular, the conduct described in those conversations is consistent with the conclusions stated herein, particularly the conclusion that Amro had a interest in selling Sedona common stock at the highest price available to it and did so."

15. Rule 26(a)(2)(B) says "The report must contain .

. . a complete statement of all opinions the witness will express and the basis and reasons for them." In my view, Mr. Thel's report has failed to comply with that requirement. At a minimum, he must serve a supplemental report which (a) states whether the Agreement between Amro and Sedona prohibited Amro from making any short sales of Sedona's stock during February and March 2001, and if so, what is the basis for Mr. Thel's opinion that "Badian appears to have complied with all rules applicable to him in the sale of Sedona common stock," and (b) analyzes each Badian conversation quoted or paraphrased in the Complaint, and states the basis for Mr. Thel's opinion that "it appears that Badian acted to secure the highest price available in the sale of Sedona common stock."

16. [*10] On December 3, 2009, the SEC prepared document subpoenas addressed to Badian's three experts, and served them in the next few days.

17. On December 4, 2009, the SEC electronically filed a motion. It gave a slightly garbled cite to Rule 26(a)(2)(C)(ii), which says:

> (C) *Time to Disclose Expert Testimony*. A party must make these disclosures at the times and in the sequence that the court orders. Absent a stipulation or a court order, the disclosures must be made:
>
> (i) . . . ; or
>
> (ii) if the evidence is intended solely to contradict or rebut evidence on the same subject matter identified by another party under Rule 26(a)(2)(B), within 30 days after that other party's disclosure.

(I note that the Rule does not say that a rebuttal report is permitted only from a party who has already served an initial expert report.)

18. It is undisputed that Badian's expert reports were due 105 days before March 12, 2010, namely November 25, 2009, the Wednesday before a four-day holiday. Badian served the expert reports electronically on November 25 at 7:36 p.m., and the SEC did not see them until Monday November 30. Nevertheless, the SEC computed the 30 days from November 25 and hence computed its deadline for [*11] rebuttal reports to be Monday December 28.

19. The SEC's December 4 motion requested an order:

> (a) continuing the date for serving rebuttal expert reports from December 28, 2009 to February 15, 2010, and
>
> (b) continuing the date for the completion of expert witness discovery from March 12 to March 30, 2010.

20. In the motion, the SEC's counsel stated that he had contacted Badian's counsel but had not yet received a response as to Badian's position. On December 7, Judge Swain granted the SEC's motion. On 3:43 p.m. on December 7, Badian's counsel faxed a letter to Judge Swain and to me asking that the December 7 order be vacated and stating that Badian would file opposition papers on December 14. On December 8, Judge Swain authorized me to rule on the dispute.

21. On December 9, 2009, Badian's counsel faxed me a short letter arguing that my 4/11/08 Scheduling Order "is expressly limited to initial expert reports and does not provide for rebuttal expert witnesses [or reports]." On the morning of December 10, 2009, I held a 75-minute telephone conference with the attorneys for the SEC and for Badian. I stated that my Scheduling Order was silent on rebuttal reports, but certainly did not exclude [*12] them. I noted that it allowed 105 days after defendants' expert reports until the completion of expert discovery, and that subdivision (C) (ii) of Rule 26(a) (2) is applicable because there is an "absen[ce]" of any contrary "stipulation" or "court order." I cited four cases: *Mayou v. Ferguson*, 2008 DSD 8, 544 F.Supp.2d 899 (D. S.D. Mar. 31, 2008); *Wegener v. Johnson*, 527 F.3d 687, 691 (8th Cir. June 6, 2008); *Lindner v. Meadow Gold Dairies, Inc.*, 249 F.R.D. 625, 636 (D. Haw. Mar. 19, 2008); and *Johnson v. Big Lots Stores, Inc.*, 253 F.R.D. 381, 383-85 (E.D. La. May, 2008). Nevertheless, Ms. Schechtman asked me to allow full briefing, so I did. Mr. Guido voiced various criticisms of the Prowse & Beloreshki report and the Thel report, and said that the SEC would probably move to compel more information

from those experts and then move to strike their opinions. I told the attorneys to continue discussing the SEC's document subpoenas. I also told Mr. Guido to continue pressing the SEC to authorize him to retain a rebuttal expert as soon as possible.

22. On December 10, 2009, Ms. Schechtman sent me copies of the Prowse & Beloreshki report and the Thel report. On December 15, she sent me a 12-page memorandum [*13] of law plus her 4-page declaration annexing Exhibits A-G.

23. On December 18, 2009, Mr. Guido faxed me a 16-page memorandum of law.

24. On December 21, 2009, Ms. Schechtman faxed me a one-page reply.

25. The SEC contends that no expert opinion testimony is needed for its case in chief but, if the trial judge allows Badian's opinion witnesses to testify on the defense case, then the SEC wants to preserve the option of possibly calling an opinion witness or witnesses on its rebuttal case. Badian argues that such a possibility ought to be suffocated right now because, he asserts, the SEC should have served a report in October by an expert containing a regression analysis responsive to Mr. Beloreshki's 2004 slide presentation. This argument is unreasonable. And Badian does not even suggest how the SEC should have anticipated the Thel report.

26. Badian cites *International Business Machines Corp. v. Fasco Industries, Inc.*, 1995 WL 115421 (N.D. Cal. Mar. 15, 1995). In that case, Judge Aguilar's scheduling order required the parties to disclose their expert witnesses simultaneously on January 11, 1995; yet it allowed only nine days after that before the cut-off for expert discovery. IBM's Complaint [*14] alleged that Fasco supplied it with defective blowers and hence breached their contract. IBM served reports from two experts opining that Fasco's blowers were defective; Fasco did not disclose any experts on that subject until February 10, 1995 (30 days after IBM's reports, but 21 days after the cut-off for expert discovery). Judge Aguilar wrote at *4: "It was presumptuous and reckless for Fasco not to seek guidance from the court" as soon as Fasco received IBM's expert reports. Nevertheless, his holding was that Fasco would be allowed to call two experts to rebut IBM's experts on the issue of whether Fasco's blowers were defective. The case at bar is an easier one for the same result, because (a) my Scheduling Order allowed a much longer time (105 days) for the completion of expert discovery, and (b) the SEC sought guidance from the court promptly after receiving Badian's expert reports.

27. The SEC indicates that its expert opinion evidence will be, in the words of Rule 26(a) (2) (C) (ii), "intended solely to contradict or rebut evidence on the same subject matter identified by" Badian's three experts. This portion of the Rule should not be a cause for further bickering during the [*15] discovery phase, although I do not presume to rule about the trial phase. I hereby advise both parties that I disagree with the narrow interpretation of this language which was given by Judge Aguilar; without citing any authority, he wrote at *3 that rebuttal experts "cannot put forth their own theories; they must restrict their testimony to attacking the theories offered by the adversary's experts." In my view, that interpretation is a recipe for needless delay during the discovery phase. Moreover, Judge Aguilar's interpretation was only dictum, since his next paragraph noted: "The reports ... of Fasco's technical experts . . . indicate that these witnesses will confine their testimony to c[ri]tiquing the validity of the 'creep instability theory" and other theories promulgated by IBM's experts." I agree with *MMI Realty Services, Inc. v. Westchester Surplus Lines Ins. Co.*, 2009 U.S. Dist. LEXIS 18379, 2009 WL 649894, *2 (D.Haw. Mar. 10, 2009): "Under this rule [26(a)(2)(C)(ii)], Holland [plaintiff's rebuttal expert] is free to support his opinions with evidence not cited in [defendant's experts'] reports so long as he rebuts the same 'subject matter' identified in those reports."

28. Badian also cites *Eckelkamp v. Beste*, 315 F.3d 863, 872 (8th Cir. 2002). [*16] There, the plaintiffs cited the 30-day rule, but they "did not move for leave to file this report until August 3, 2001," which was 16 days late because "defendants' expert report had been produced on June 18." In dictum, the court went on to say: "The district court's case order set its management requirements and did not provide for rebuttal reports, ..." It is unclear whether the case order had set a cut-off date for expert discovery.

29. Badian also cites *Akeva L.L.C. v. Mizuno Corp.*, 212 F.R.D. 306 (M.D. N.C. Dec. 20, 2002). Quite apparently, that was the case rejected by *Mayou v. Ferguson*, 2008 DSD 8, 544 F.Supp.2d 899, 901 (D.S.D. Mar. 31, 2008), where Judge Kornmann wrote: "I disagree with any decision to the effect that, where the

stipulation and the scheduling order are silent, such serves to prohibit any designation of a rebuttal expert being made by the plaintiff."

30. Badian also cites *Masler v. Marshall Fields*, 2007 U.S. Dist. LEXIS 98596, 2007 WL 6815352 (D. Minn. Dec. 21, 2007). Badian inaccurately states that the *Masler* scheduling order "was silent on rebuttal witnesses." In fact, the scheduling order set a deadline for Masler to serve a rebuttal report to any expert report by Macy's, but was silent as to [*17] whether Masler could serve a rebuttal report to any expert report by Schindler (the third-party defendant who supplied the escalator on which Masler was injured). Seeking to take an unfair advantage, Macy's put in no expert report and instead a report was put in by Schindler, whose deadline was the same as the deadline for Masler to rebut the Macy's report. In my view, Masler would and should have been allowed to rebut the Schindler report, except for two facts. First, unlike the SEC, Masler did not address his problem in "the proper way," which "was to move to modify the scheduling order once he received report from Schindler's expert." *Masler*, 2007 U.S. Dist. LEXIS 98596, [WL] at *5. Second, Masler's expert "d[id] not reveal the data or other information considered . . . in forming his opinions." 2007 U.S. Dist. LEXIS 98596, [WL] at *6.

31. Badian also quotes *Millenium Expressions, Inc. v. Chauss Marketing*, Ltd., 2006 U.S. Dist. LEXIS 4624, 2006 WL 288353, *2 (S.D.N.Y. Feb. 6, 2006), where Magistrate Judge Francis (using the language prior to the 2007 stylistic amendments) said that Rule 26(a) (2) (C) "applies only '[i]n the absence of other directions from the court,' . . . ." However, he was not asserting that "directions" can consist of silence. The rest [*18] of his sentence noted that "in this case the Court had ordered a discovery deadline of July 21, 2003. Millenium waited until September 12, 2003 to file its report.

32. The SEC's 12/18/09 memorandum cites three cases that are clearly on point: *Syringe Development Partners L.L.C v. New Medical Technology, Inc.*, 2001 U.S. Dist. LEXIS 2843, 2001 WL 403232, *36, n.7 (S.D.Ind. Feb. 9, 2001); *Aircraft Gear Corp. v. Marsh*, 2004 U.S. Dist. LEXIS 15897, 2004 WL 189982, *5 (N.D.Ill. Aug. 11, 2004); *City of Gary v. Shafer*, 2009 U.S. Dist. LEXIS 41004, 2009 WL 1370997, *2-3 (N.D.Ind. May 13, 2009).

33. In sum, I agree with the SEC that it is entitled to serve reports in rebuttal to the two reports received by the SEC on November 30, 2009. The next issue is whether the SEC has shown good cause for an extension from December 28, 2009 to February 15, 2010.

34. I note that February 15, 2010 is a Monday holiday, and our Court traditionally declares February 12 as a Court holiday. Accordingly, I will grant the extension only to Wednesday, February 10, 2010.

35. I find that the SEC has shown good cause for this extension. At Paragraphs 13-15, I have already noted some deficiencies in the Thel report. As for the Prowse & Beloreshki report, it is highly complicated. As to all three experts, [*19] the SEC discussed in my 12/10/09 telephone conference that it had not yet received any of the documents it had subpoenaed. The SEC's 12/18/09 memorandum, at pages 7-10 again discusses its need for these documents. I find that this discussion shows further good cause for an extension to February 10.

36. On the other hand, I reject the SEC's argument that this discussion shows a basis for granting the SEC additional time after that. At page 10, the SEC says that it "is preparing motions to compel the Expert[s] to produce documents to which the SEC is entitled under Rule 26(a)(2)(B) and the subpoenas served on them." In order to avoid any further extensions, I am today treating the SEC's 12/18/09 memorandum as a motion to compel. I am today compelling Badian's experts to produce some, but not all, of the documents listed in the SEC's subpoenas. I am also compelling the SEC's rebuttal expert to produce the same categories of documents as produced by the Badian expert being rebutted. Badian and the SEC remain free to stipulate, if they wish to, that their experts will produce more documents or fewer documents.

37. I hereby rule as follows:

By January 6, 2010, Badian's expert Steve Thel must [*20] **serve a supplemental report** which (a) states whether the Agreement between Amro and Sedona prohibited Amro from making any short sales of Sedona's stock during February and March 2001, and if so, what is the basis for Mr. Thel's opinion that "Badian appears to have complied with all rules applicable to him in the sale of Sedona common stock," and (b) analyzes each Badian conversation quoted or paraphrased in the Complaint, and states the basis for Mr. Thel's opinion that "it appears that Badian acted to secure the highest price available in the

sale of Sedona common stock," and (c) states separately, for each of the 21 dates of audio transcriptions listed in Exhibit C to the Thel Report, whether he reviewed only certain "audio clips" for that date and, if so, state which clips and which "renditions" (see the SEC's 12/18/09 memorandum, p. 10, last P).

By January 10, 2010, Badian's expert Steve Thel must serve copies of the documents described in Attachment A to today's Memorandum and Order (which is the attachment to his subpoena with handwritten modifications by me).

By January 10, 2010, Badian's experts Stephen Prowse and Tsvetan Beloreshki must serve copies of the documents described [*21] **in Attachment B to today's Memorandum and Order** (which is the attachment to their subpoenas with handwritten modifications by me).

By February 10, 2010, the SEC's experts must serve reports in full compliance with Fed.R.Civ.P. Rule 26(a)(2)(B), and must also serve copies of the same categories of documents as produced by the Badian expert being rebutted.

During the period of February 17-26, 2010, Badian's experts must appear in New York City for deposition by the SEC unless excused in writing by the SEC.

March 8, 2010 is the deadline for any sur-rebuttal expert report on behalf of Badian.

During the period of March 15-26, 2010, the SEC's experts must appear in New York City for deposition by Badian unless excused in writing by Badian.

All expert discovery must be commenced in time to be completed by March 30, 2010.

Any Daubert motion or other motion relating to an expert will not serve as a reason to delay the deadline for serving and filing any and all dispositive motions. That deadline continues to be May 27, 2010.

/s/ Douglas F. Eaton

DOUGLAS F. EATON

United States Magistrate Judge

Dated: New York, New York

December 22, 2009

ATTACHMENT A to Judge Eaton's 12/22/09 memorandum and order

DOCUMENTS [*22] SOUGHT FROM STEVEN SCOTT THEL

1. The machine readable form (i.e. "electronic copies") of the Expert Report by Steven Scott Thel ("Thel") dated November 24, 2009 ("Thel Report:"), and all drafts of the Thel Report, including all metadata attached to the electronic copies.

2. All documents obtained, reviewed, consulted, considered, and/or relied upon in any way related to the work performed in preparing the Thel Report, excluding the material identified in Exhibit C to the Thel Report. This request includes, but is not limited to [TEXT REDACTED BY THE COURT] documents examined but not relied on in the formation of the opinions in the Thel Report, as well as electronic copies of any Trading Data, Bloomberg L.P. data, FactSet Research Systems, Inc., data, and the NBER Business Cycle Dating Committee.

3. [TEXT REDACTED BY THE COURT] The engagement letters for Thel's services on the Thel Report, including the scope of the work requested by Badian's counsel.

4. All written correspondence, electronic mail, or instant messages by and between Thel and any [TEXT REDACTED BY THE COURT] counsel for Andrens Badian on any person acting on Badian's counsel's behalf ("DLA Piper") that comprises or refers [*23] to [TEXT REDACTED BY THE COURT] transmittal letters of documents from DLA Piper, on drafts of the Thel Report, or DLA Piper's comments.

5. All documents concerning any meeting, telephone conversations or other communications between Thel and/or DLA Piper regarding the Thel Report, documents related thereto, on the results of any other studies or reports of market manipulation.

6. All analyses, reports and testimony prepared for and/or presented in cases or administrative matters involving [TEXT REDACTED BY THE COURT]allegation of market manipulation, [TEXT

REDACTED BY THE COURT]and/or the effects thereof [TEXT REDACTED BY THE COURT]

7. All publications and presentations and other materials prepared by Thel as part of the author's professional experience that address market manipulation, [TEXT REDACTED BY THE COURT], and/or the effects thereof [TEXT REDACTED BY THE COURT]

8. All materials obtained, reviewed, consulted, considered, and/or relied upon in any way that identify "practices typically employed in a manipulative scheme" referred to in paragraph 6 of the Thel Report.

9. All materials obtained, reviewed, consulted, considered, and/or relied upon in any way that identify the meaning [*24] of "[m]anipulation" and "manipulative" terms of art in securities regulation practices referred to in paragraph 7 of the Thel Keport

10. All materials obtained, reviewed, consulted, considered, and/or relied upon in any way that identify "the variety of practices that might be employed in a manipulative scheme" referred to in paragraph 8 of the Thel Report.

11. All materials obtained, reviewed, consulted, considered, and/or relied upon in any way that identify sales that are "of the sort that would conventionally be called manipulative" referred to in paragraph 9 of the Thel Report.

12. All materials obtained, reviewed, consulted, considered, and/or relied upon in any way that identify practices that "give grounds for concern about the sort of questionable or inappropriate manipulation that has been identified in the decided cases or administrative action" referred to in paragraph 9 of the Thel Report

13. The names, addresses, phone numbers, work affiliations, and e-mail addresses of all persons who assisted in the preparation of the Thel Report [TEXT REDACTED BY THE COURT]

ATTACHMENT B to Judge Eaton's 12/22/09 memorandum and order

DOCUMENTS SOUGHT FROM STEPHEN D. PROWSE AND TSVETAN N. [*25] BELORESHKI

1. The machine readable form (i.e. "electronic copies") of the Expert Report by Stephen D. Prowse, Ph.D, CFA ("Prowse"), and Tsvetan N. Beloreshki ("Beloreshki"), dated November 24, 2009 ("Prowse Report:"), and all drafts of the Prowse Report, including all metadata attached to the electronic copies.

2. All documents obtained, reviewed, consulted, considered, and/or relied upon in any way related to the work performed in preparing the Prowse Report, including, but not limited to the "case specific" and "other" material reviewed identified in Exhibit 3 to the Prowse Report. This request includes, but is not limited to documents already produced in this action and documents examined but not relied on in the formation of the opinions in the Prowse Report, as well as electronic copies of the Trading Data, Bloomberg L.P. data, FactSet Research Systems, Inc., data, and the NBER Business Cycle Dating Committee data identified in Exhibit 3 to the Prowse Report.

3. All data obtained, reviewed, consulted, considered, and/or relied upon if any way to prepare Exhibits 4-14 of the Prowse Report in machine readable form, all calculations of that data including log tiles in machine readable [*26] form, and formulas for such calculations in machine readable form, including, but not limited to all electronically readable live spreadsheets with imbedded formulas that were used to produce Exhibit 4-14 of the Prowse Report.

4. All Tables, Spreadsheets, Graphs, and/or Charts, which were prepared in the course of the engagement to produce the Prowse Report, but on which the Experts did not rely in preparing that Report.

5. All data obtained, reviewed, consulted, considered, and/or relied upon in any way to prepare any of the materials described in paragraph 4 above in machine readable form, all calculations of that data in machine readable form, and formulas for such calculations in machine readable form, including, but not limited to all electronically readable live spreadsheets with imbedded formulas that were used to produce any of the materials described in paragraph 4 above.

6. [TEXT REDACTED BY THE COURT] The engagement letters entered into by either of them for their services on the Prowse Report, including the scope of the work requested by Badian's counsel.

7. All written correspondence, electronic mail, or

instant messages by and between Prowse, Beloreshki, and any [TEXT REDACTED [*27] BY THE COURT] counsel for Andreas Badian and any person acting on behalf of Badian's counsel ("DLA Piper") that comprises or refers to [TEXT REDACTED BY THE COURT] transmittal letters of documents from DLA Piper, or drafts of the Prowne Report or DLA Piper's comments.

8. All documents concerning any meeting, telephone conversations or other communications between Prowse, Beloreshki, and/or DLA Piper regarding the Prowse Report, documents related thereto, or the results of any other studies or reports of market manipulation.

9. All analyses, reports and testimony prepared for and/or presented in casts or administrative matters involving [TEXT REDACTED BY THE COURT] allegation of market manipulation, [TEXT REDACTED BY THE COURT] and/or the effects thereof [TEXT REDACTED BY THE COURT]

10. All publications and presentations and other materials prepared as part of the author's professional experience that address market manipulation, [TEXT REDACTED BY THE COURT] and/or the effects thereof, [TEXT REDACTED BY THE COURT]

11. A Color Copy of Exhibits to Prowse Report