

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

_____)	
SECURITIES AND EXCHANGE COMMISSION,)	
)	
Plaintiff,)	
)	
v.)	Case No. 19-cv-11655-IT
)	
COMMONWEALTH EQUITY SERVICES, LLC)	
d/b/a COMMONWEALTH FINANCIAL)	
NETWORK,)	
)	
Defendant.)	
_____)	

**PLAINTIFF’S OPPOSITION TO MOTION FOR PROTECTIVE ORDER AND
MOTION FOR ORDER ALLOWING DEPOSITIONS BY REMOTE MEANS**

Plaintiff Securities and Exchange Commission hereby opposes Commonwealth Equity Services, LLC’s (“Commonwealth”) motion for protective order, seeking to indefinitely delay depositions or party depositions. The Commission respectfully submits that, with the appropriate protocols in place, the parties can successfully proceed with remote depositions in a manner that is fair to the parties and witnesses. Accordingly, with this opposition, the Commission submits (i) a proposed order authorizing the taking of remote depositions and establishing appropriate protocols, and (ii) sample forms of a subpoena, *Exhibit A*, and notice, *Exhibit B*. Based upon the proposed order and sample forms, the Commission moves this Court, pursuant to Rule 30(b)(4), for an order allowing depositions taken by remote means.

In addition, given that the parties are in the process of completing document discovery and that the scheduling and taking of remote depositions is likely to involve preparation activities (*e.g.*, practicing among counsel and witnesses) and possible delays (*e.g.*, rescheduling of depositions that run into technical problems), the Commission proposes that the remote

deposition period occur over a eleven-week period, commencing October 1, 2020 and ending December 18, 2020.

I. With Appropriate Protocols, Depositions Should Go Forward By Remote Means

The Commission opposes an indefinite suspension of depositions until in-person depositions can be taken. Currently, there is no way to be certain how long it might be before the parties can safely congregate for an in-person depositions, in an enclosed room, for up to seven hours, without wearing a mask and other personal protective equipment. As the Court noted during our last status conference, other litigation matters have proceeded with remote depositions without reporting difficulties or seeking protective orders. *See, e.g., SEC v. Knox, et al.*, 1:18-cv-12058-RGS, ECF No. 187 (order allowing SEC's motion to require certain defendants' remote attendance at depositions).

The Commission also opposes Commonwealth's suggestion that the Court delay depositions of their employees until the end of the period. The Commission has the right to take depositions in the order best suited for preparation of its case. For example, the Commission may, and likely will, prefer to depose Commonwealth witnesses prior to completing all of its third-party depositions. Commonwealth witnesses may raise disputes or questions that can be resolved by deposing third-party witnesses. The Commission should not be forced forgo pursuing its reasonable preferences regarding the sequencing of discovery.

Finally, many of the perceived downsides to taking remote depositions can be minimized through appropriate protocols. To that end, the Commission submits the attached proposed order establishing such protocols. These protocols include:

- (1) Allowing any party to request a "test run," with the deponent and court reporter, within a week of the deposition date;
- (2) Requiring the party taking a deposition to provide electronic copies of planned exhibits two business days prior to a deposition;

(3) Providing for suspension of a deposition if (i) any Lead Counsel inadvertently becomes disconnected from a deposition, or (ii) the court reporter is unable to resolve technical difficulties that inhibit effective transcription of the deposition; and

(4) Limiting the video recording of depositions to a properly noticed videographer, and prohibiting the use of the video conferencing platform to make such video recordings.

See Proposed Order, ¶¶3, 5-6, 10, 13. With these proposed protocols, the parties can work together in good faith to take fair and effective depositions.

II. The Commission Requests a 11-Week Period to Complete Remote Depositions

Given the novelty of remote depositions, the extra protocols in place for pre-deposition preparation activities, and the possibility of temporary suspensions for technical difficulties, the Commission requests that the Court allow the parties eleven weeks to complete depositions, starting October 1 and completing by December 18, 2020. This extended deposition period will allow the parties, and any third-party subpoenaed for a deposition, sufficient time to familiarize themselves with the videoconferencing technology and prepare for remote depositions as authorized by the Court. Further, starting October 1st will also allow the parties to wrap up their document discovery, as suggested by the Court on our last status conference.

III. Conclusion

For the reasons stated herein, the Commission respectfully requests that the Court deny Commonwealth's motion for protective order, enter the Commission's proposed order authorizing the taking of remote depositions, and set the deposition discovery schedule to commence October 1, 2020 and complete by December 18, 2020.

Respectfully submitted,

SECURITIES AND EXCHANGE COMMISSION
By its attorneys,

/s/R.M. Harper II

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Dated: September 4, 2020

CERTIFICATE OF SERVICE

I hereby certify that this document filed through the ECF system will be sent electronically to the registered participants as identified on the Notice of Electronic Filing (NEF).

/s/Richard M. Harper II

Richard M. Harper II

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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**[PROPOSED] ORDER ALLOWING DEPOSITIONS BY REMOTE MEANS
AND ESTABLISHING REMOTE DEPOSITION PROTOCOLS**

After considering Defendant Commonwealth Equity Services, LLC’s motion for protective order, and Plaintiff Securities and Exchange Commission’s opposition and motion for order allowing depositions by remote means, the Court orders that the parties may subpoena and notice depositions to be taken by remote means, including video conferencing platforms such as WebEx and Zoom. These remote depositions may be subpoenaed and/or noticed in the forms proposed by the Commission and attached to its opposition. Further, these remote depositions shall commence no earlier than October 1, 2020 and be completed no later than December 18, 2020, and be taken by the parties using the following protocols:

1. The party noticing the deposition shall include the video-teleconference platform it intends to use in the notice of deposition, and if there are any objections to the noticed platform, the parties shall meet and confer to attempt to reach an agreement.
2. Counsel for the respective parties may appear by audio or audio-video teleconference. Counsel for a deponent (including a party being deposed) may appear by audio

teleconference, audio-video teleconference, and may appear from the same physical location as the deponent. However, the fact that pandemic-related restrictions may prevent counsel from physically being in the same location as a deponent shall not be a basis for objecting to a deposition, or delaying a deposition.

3. The parties will record a deposition session by stenographic means and may also record a deposition session by audio-video means. Only the official court reporter, and videographer if one is noticed, engaged for the deposition will create an audio or visual record of the deposition, and no attendee will attempt to separately create an audio or video record of the deposition through the use of the teleconference platform / application or otherwise. The video recording will focus on the deponent, not on anyone else who may be visible on a computer screen. This paragraph is not intended to and does not prevent the attorneys or participants to the deposition from taking their own notes during the deposition. The court reporter will participate by audio and/or audio-video teleconference. The videographer, if a videotaped recording of the deposition is noticed, will participate in-person with the deponent.

4. The oath of the deponent may be administered remotely by the court reporter, through the video-conference means, and this oath shall have the same effect as if given in the physical presence of the deponent.

5. At the request of any party, at a mutually agreeable time within a week of the deposition date, the deponent and court reporter shall conduct a “test run” to confirm that there are no technical problems associated with conducting the deposition remotely. Representatives from each party will be permitted to attend the “test run.”

6. Two business days prior to the deposition, counsel for the party taking the deposition will provide an electronic copy of all exhibits that counsel reasonably and in good

faith plan on using during the deposition, except for impeachment purposes. If any party subsequently determines that it is likely to need to use any additional exhibit(s), such party will notify the opposing party's counsel promptly and provide an electronic copy via email or file transfer protocol as soon as practicable. If any party determines during the deposition that it will use any additional exhibit(s), such party shall provide a an electronic copy via email or file transfer protocol during the deposition, and may begin asking questions about any such exhibit as soon as the opposing party attending the deposition has confirmed receipt of the exhibit and been afforded a reasonable opportunity to review it.

7. For each deposition, each Party will have one Lead Counsel responsible for questioning and making record objections. Each Party will identify their Lead Counsel when making their initial appearance at the deposition.

8. To ensure optimal audio quality and minimize the risk of disruption, all attendees (other than the deponent) who are not actively involved in questioning or stating objections shall mute their microphones unless and until they are required to speak.

9. No Party, counsel for any Party (other than counsel for the deponent), or employee or agent of any Party will be physically present with the deponent during remote testimony.

10. Once the deposition begins, if any Lead Counsel becomes inadvertently disconnected from the deposition, either by audio, video, or both, because of technical difficulties, that fact of their being disconnected shall be noted on the record as soon as any attendee becomes aware of that issue and the deposition must immediately be suspended until that Lead Counsel has re-joined and has full access to both audio and video. The suspended time will not count against the 7 hour time limitations in Federal Rule of Civil Procedure 30(d)(1).

The provisions of this paragraph do not apply to any purposeful disconnection from the deposition by counsel.

11. The court reporter and/or videographer will provide a telephone number for use by the attendees to inform the court reporter or videographer if a Lead Counsel becomes disconnected or is otherwise experiencing technical difficulties.

12. Any portion of the deposition that has been transcribed while a Lead Counsel is absent or experiencing technical difficulties as set forth in paragraph 10 must be re-read upon the resolution of the technical difficulty and that Lead Counsel must be given an opportunity to object to any questions or answers that occurred in his or her absence.

13. If at any time the court reporter indicates that he or she is unable to effectively transcribe the deposition due to technical difficulties, the deposition shall be paused and the parties will attempt to resolve those issues. If the technical difficulties cannot be resolved to the satisfaction of the court reporter, the deposition will be suspended. The same rule applies to any technical difficulty that prevents the deponent or any Lead Counsel from hearing or seeing the deposition. If the concerns cannot be resolved, then the deposition shall be suspended until the concerns are resolved by the Court or through other means. The paused or suspended time will not count against the 7 hour time limitations in Federal Rule of Civil Procedure Rule 30(d)(1).

14. During the taking of the deposition, the deponent will not view any document or other data or material unless the document or materials are first identified on the record.

15. During the taking of the deposition, the parties and deponent will not attempt to use any "chat" features.

16. While on the record during the deposition, there will be no communication by any counsel with the deponent by text, chat or otherwise, except for communications on the record.

17. However, while on breaks during the deposition and off the record, the deponent may speak privately with the counsel representing him. The deponent may also request, on the record, to speak privately to counsel if a pending question raises concerns for privilege, work product, or privacy. Such communications will take place by whatever separate, private audio or audio-visual means the deponent and counsel select. During all breaks, the virtual deposition “room” shall remain open for the court reporter, videographer, or any other attendees who are not participating in a breakout room or separate conference. The suspended time will not count against the 7 hour time limitations in Federal Rule of Civil Procedure Rule 30(d)(1).

18. If, during the course of questioning, a deponent wishes to review a document that is being displayed, the questioning counsel shall display all portions of the document reasonably requested by the deponent before requiring an answer to the question. If questioning counsel believes that the deponent is taking more than a reasonable amount of time to review a document and intends to go off the record such that the time for review is not counted against the 7 hour time limit in Federal Rule of Civil Procedure Rule 30(d)(1), questioning counsel shall so state, and give other counsel an opportunity to object.

United States District Court Judge

UNITED STATES DISTRICT COURT

for the

District of Massachusetts

SECURITIES AND EXCHANGE COMMISSION,

Plaintiff

v.

COMMONWEALTH EQUITY SERVICES, LLC d/b/a
COMMONWEALTH FINANCIAL NETWORK,

Defendant

Civil Action No. 19-cv-11655-IT

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Deponent

(Name of person to whom this subpoena is directed)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Table with 2 columns: Place (WebEx Video Conferencing Platform) and Date and Time (October __ 2020 at 9:30am (ET))

The deposition will be recorded by this method: Stenographic (and, if noticed, videography)

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and must permit inspection, copying, testing, or sampling of the material:

The following provisions of Fed. R. Civ. P. 45 are attached – Rule 45(c), relating to the place of compliance; Rule 45(d), relating to your protection as a person subject to a subpoena; and Rule 45(e) and (g), relating to your duty to respond to this subpoena and the potential consequences of not doing so.

Date: CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail address, and telephone number of the attorney representing (name of party), who issues or requests this subpoena, are:

Notice to the person who issues or requests this subpoena

If this subpoena commands the production of documents, electronically stored information, or tangible things before trial, a notice and a copy of the subpoena must be served on each party in this case before it is served on the person to whom it is directed. Fed. R. Civ. P. 45(a)(4).

Civil Action No. 19-cv-11655-IT

PROOF OF SERVICE

(This section should not be filed with the court unless required by Fed. R. Civ. P. 45.)

I received this subpoena for *(name of individual and title, if any)* _____
on *(date)* _____ .

I served the subpoena by delivering a copy to the named individual as follows: _____

_____ on *(date)* _____ ; or

I returned the subpoena unexecuted because: _____
_____ .

Unless the subpoena was issued on behalf of the United States, or one of its officers or agents, I have also
tendered to the witness the fees for one day's attendance, and the mileage allowed by law, in the amount of
\$ _____ .

My fees are \$ _____ for travel and \$ _____ for services, for a total of \$ _____ 0.00 .

I declare under penalty of perjury that this information is true.

Date: _____

Server's signature

Printed name and title

Server's address

Additional information regarding attempted service, etc.:

Federal Rule of Civil Procedure 45 (c), (d), (e), and (g) (Effective 12/1/13)

(c) Place of Compliance.

(1) For a Trial, Hearing, or Deposition. A subpoena may command a person to attend a trial, hearing, or deposition only as follows:

- (A) within 100 miles of where the person resides, is employed, or regularly transacts business in person; or
- (B) within the state where the person resides, is employed, or regularly transacts business in person, if the person
 - (i) is a party or a party's officer; or
 - (ii) is commanded to attend a trial and would not incur substantial expense.

(2) For Other Discovery. A subpoena may command:

- (A) production of documents, electronically stored information, or tangible things at a place within 100 miles of where the person resides, is employed, or regularly transacts business in person; and
- (B) inspection of premises at the premises to be inspected.

(d) Protecting a Person Subject to a Subpoena; Enforcement.

(1) Avoiding Undue Burden or Expense; Sanctions. A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

(2) Command to Produce Materials or Permit Inspection.

(A) *Appearance Not Required.* A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

(B) *Objections.* A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing, or sampling any or all of the materials or to inspecting the premises—or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

- (i) At any time, on notice to the commanded person, the serving party may move the court for the district where compliance is required for an order compelling production or inspection.
- (ii) These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

(3) Quashing or Modifying a Subpoena.

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

(B) *When Permitted.* To protect a person subject to or affected by a subpoena, the court for the district where compliance is required may, on motion, quash or modify the subpoena if it requires:

(i) disclosing a trade secret or other confidential research, development, or commercial information; or

(ii) disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party.

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

(e) Duties in Responding to a Subpoena.

(1) Producing Documents or Electronically Stored Information. These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

(B) *Form for Producing Electronically Stored Information Not Specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically Stored Information Produced in Only One Form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible Electronically Stored Information.* The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

(2) Claiming Privilege or Protection.

(A) *Information Withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

- (i) expressly make the claim; and
- (ii) describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

(B) *Information Produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information under seal to the court for the district where compliance is required for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

(g) Contempt.

The court for the district where compliance is required—and also, after a motion is transferred, the issuing court—may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena or an order related to it.

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DISTRICT OF MASSACHUSETTS

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Defendant.)	
_____)	

**PLAINTIFF SECURITIES AND EXCHANGE COMMISSION’S
NOTICE OF SUBPOENA TO NON-PARTY**

PLEASE TAKE NOTICE that, pursuant to Rules 30(b) and 45 of the Federal Rules of Civil Procedure, Plaintiff Securities and Exchange Commission will take the deposition upon oral examination of [NAME OF DEPONENT], before an officer authorized to administer oaths, on [DATE AND TIME] as reflected in the attached subpoena. The depositions will take place remotely via the WebEx video-conferencing platform. Please contact the undersigned counsel on receipt of this notice for a link to log on to the WebEx platform. The depositions will be recorded by stenographic [and videographic, if noticed] means and will continue until adjourned. You are invited to attend and cross examine.

SECURITIES AND EXCHANGE COMMISSION
By its attorneys,

/s/
Alfred A. Day (Mass. Bar No. 654436)
Richard M. Harper II (Mass. Bar No. 634782)
Securities and Exchange Commission
Boston Regional Office
33 Arch Street, 24th Floor
Boston, MA 02110
(617) 573-8900
daya@sec.gov
harperr@sec.gov

CERTIFICATE OF SERVICE

I hereby certify that, on October __, 2020, I served a true and correct copy of the foregoing by electronic mail on counsel for defendant Commonwealth Equity Services, LLC.

/s/ _____

Dated: October __, 2020