

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

U.S. COMMODITY FUTURES
TRADING COMMISSION,

Plaintiff(s)

Case No. 09-cv-3332 MJD/FLN

v.

TREVOR COOK d/b/a CROWN
FOREX, LLC, PATRICK KILEY
d/b/a CROWN FOREX, LLC,
UNIVERSAL BROKERAGE FX and
UNIVERSAL BROKERAGE FX
DIVERSIFIED, OXFORD GLOBAL
PARTNERS, LLC, OXFORD GLOBAL
ADVISORS, LLC, UNIVERSAL
BROKERAGE FX ADVISORS, LLC
f/k/a UBS DIVERSIFIED FX
ADVISORS, LLC, UNIVERSAL
BROKERAGE FX GROWTH, L.P.
f/k/a UBS DIVERSIFIED FX GROWTH,
L.P., UNIVERSAL BROKERAGE FX
MANAGEMENT, LLC f/k/a UBS
DIVERSIFIED FX MANAGEMENT,
LLC and UBS DIVERSIFIED GROWTH,
LLC,

Defendant(s),

R.J. ZAYED,

Receiver

**LENDER RESPONDENTS'
MEMORANDUM IN SUPPORT
OF MOTION TO COMPEL
AND STAY PROCEEDINGS**

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,

Plaintiff(s)

Case No. 09-CV-3333 MJD/FLN

v.

TREVOR G. COOK ,
PATRICK J. KILEY,
UBS DIVERSIFIED GROWTH, LLC,
UNIVERSAL BROKERAGE FX
MANAGEMENT, LLC,
OXFORD GLOBAL ADVISORS, LLC,
and OXFORD GLOBAL PARTNERS, LLC,

Defendants,

and

BASEL GROUP, LLC
CROWN FOREX, LLC,
MARKET SHOT, LLC,
PFG COIN AND BULLION,
OXFORD DEVELOPERS, S.A.,
OXFORD FX GROWTH, L.P.,
OXFORD GLOBAL MANAGED
FUTURES FUND, L.P., UBS DIVERSIFIED
FX ADVISORS, LLC, UBS DIVERSIFIED
FX GROWTH, L.P., UBS DIVERSIFIED
FX MANAGEMENT, LLC, CLIFFORD
BERG, and ELLEN BERG,

Relief Defendants.

R.J. ZAYED,

Receiver.

Lender Respondents Steven and Pamela Cheney, David Buysse, Walter Defiel, Steven and Jenene Fredell, Michael and Jennifer Heise, Michael and Cynthia Hillesheim, Larry Hopfenspirger, Steven Kautzman, James McIntosh, George and Karen Morisset, Terry Frahm, and Reynold and Judith Sundstrom (hereinafter collectively “Lender Respondents”), submit the following Memorandum of Law in Support of their Motion to Compel and Stay Proceedings.

INTRODUCTION

The Lender Respondents are filing this motion to obtain one of two orders from the Court. First, the Receiver has failed to produce documents regarding interviews the Receiver had with both Trevor Cook and his father in law, Clifford Berg, who worked for the Cook entities. More importantly, as the Receiver alleged in the Petitions commencing this summary proceeding, it was Clifford Berg who was the primary contact between the Lender Respondents and the Cook entities. The Lender Respondents have attempted to interview or depose Clifford Berg; however, Clifford Berg’s attorney has informed the Lender Respondent’s counsel that Clifford Berg is still a target of the U.S. Attorney’s investigation. Therefore, Berg’s counsel will not allow him to be interviewed and, if Berg is deposed, Berg will assert his Fifth Amendment privilege. Lender Respondents cannot properly prepare their defense of this action without Berg’s testimony. Therefore, the Lender Respondents request that the Court stay this proceeding until the U.S. Attorney decides that Berg is no longer a target of his investigation.

Second, with respect to The Receiver’s discovery responses, the Receiver has refused to produce documents, including interview notes with Cook and Berg, claiming

that such interviews were either not relevant to the issues in this proceeding or subject to some unheard of “receiver’s privilege.” The Receiver’s interview notes with either Cook or Berg are obviously highly relevant and central to this matter. The Lender Respondents are prepared to accept these documents pursuant to an attorney eyes only protective order. The Receiver still refuses. The Lender Respondents need these documents to properly prepare their defense.

Third, the Court will recall that United States moved to intervene in these proceedings in order to assert a privilege with respect to documents in the hands of the Mauzy Law Firm which this Court Ordered produced over four months ago. Despite intervening in this proceeding over one month ago, the United States has failed to make its Motion. The Lender Respondents request that the Mauzy Law Firm now produce the documents and no longer withhold the documents subject to the claims of either the Receiver or the United States.

Finally, the Lender Respondents served their document requests in this matter over four months ago and still have not received all the documents required to prepare their defense. The Receiver has now served deposition notices on the Lender Respondents. The Lender Respondents request that the Court enter a protective order prohibiting any depositions of the Lender Respondents until the Receiver produces *all* of these documents.

FACTUAL BACKGROUND

As the Court is well aware, Defendant Oxford Global Advisors, LLC (“Oxford”) is an entity owned or controlled by Defendant Trevor Cook which, pursuant to Cook’s

admission, was actually operated as a “Ponzi scheme.” Each of the Respondents loaned money to Oxford Global Advisors, LLC, and other Cook entities, pursuant to promissory notes in various amounts totaling approximately \$5,000,000 at an interest rate ranging from ten percent (10%) to twelve percent (12%). Prior to June 30, 2009, which date is also prior to the commencement of this receivership proceeding or any indication in the news media that the Cook Entities were engaged in a “Ponzi Scheme,” the Cook entities paid back each of the Respondents the principal balance due on their promissory notes. Since that time, each of the Respondents has, not surprisingly, owned the monies Oxford paid back to them.

The United States Security and Exchange Commission (the “SEC”) and the United States Commodity Futures Trading Commission (the “CFTC”) filed a Complaint against Defendant Trevor Cook (“Cook”) on November 23, 2009, alleging that Cook had operated a Ponzi scheme, and in furtherance thereof, had defrauded over 1000 investors. *See Complaint* [Document No. 1 in Case No. 09-3333]; *Complaint for Injunctive and Other Equitable Relief and for Penalties Under the Commodity Exchange Act* (Document No. 1 in Case No. 09-3332. R.J. Zayed was appointed Receiver on November 23rd, 2009. *See Order Appointing Receiver* [Document No. 13 in Case No. 09-3333]; *see also Amended Order Appointing Receiver* [Document No. 18 in Case No. 09-3333]; *Second Amended Order Appointing Receiver* [Document No. 68 in Case No. 09-3332]; *Order Continuing Appointment of Temporary Receiver* [Document No. 96 in Case No. 09-3332].

On April 13, 2010, Trevor Cook pled guilty to one count of mail fraud and one count of tax evasion in connection with the alleged Ponzi scheme. *United States v. Trevor Gilson Cook*, No. 10-cr-00075, Docket No. 7 (April 13, 2010) (attached as Exhibit B to the Receiver's Motion for Summary Proceedings).

On July 23, 2010, the Receiver filed the Petition in this case for the "Return of Receivership Assets from Lender Respondents." *Petition for Return of Receivership Assets from Lender Respondents*, [Document No. 390 in Case No. 09-3333]. For all practical purposes, the "Petition" is in the form of a Complaint. In the Petition, the Receiver asserts that the monies Respondents allegedly received from Oxford in repayment of their loans should be paid to the Receiver. The Petition then sets forth two claims for relief against the Respondents: (i) that the Respondents' receipt of the monies they loaned to the Cook entities were "fraudulent transfers" under Minnesota's adoption of the Uniform Fraudulent Transfers Act and (ii) that Respondents were unjustly enriched by the return of the monies they loaned to the Cook entities. Most importantly to this Motion, the Petition repeatedly states allegations that Cook's father in law, Clifford Berg, was not only the Lender Respondents' main contact with the Cook Entities, but also allegations that Mr. Berg had informed various individual Lender Respondents that there was an ongoing investigation into the Cook Entities. The allegations about Mr. Berg's dealings with the Lender Respondents is essentially the only allegations in the Petition relating to the Lender Respondents' good faith.

On November 17, 2010, after discovery commenced in this proceeding, the Lender Respondents served a subpoena duces tecum on Trevor Cook's attorneys, the Mauzy Law

Firm. *See, Subpoena Duces Tecum*, attached as Exhibit A to the Declaration of Gregory M. Erickson. The subpoena sought documents which “discusses, reflects, refers or relates” to any of the identified Defendants in either of the above captioned cases, the Receiver, or the Lender Respondents. The subpoena sought information directly relevant to the claims and defenses in this proceeding under Rule 26.

On November 19, 2010, the Receiver sent the Lender Respondents a letter objecting to the subpoena. *See November 19, 2010 letter from Peter Kohlepp to William Mohrman*, attached to the Declaration of Gregory M. Erickson as Exhibit B. In this letter, the Receiver identifies its main grounds for objecting to the subpoena: (i) the documents are not relevant, (ii) the production would be burdensome to the Mauzy Law Firm and (iii) the documents are the “property” of the Receiver. The Lender Respondents’ attorney responded to this letter on November 23, 2010, specifically notifying the Receiver that if it was the Receiver’s intention is to potentially protect any confidential investor information which could be produced in these document productions, the Lender Respondents would willingly execute a confidentiality or protective order deemed reasonably necessary for the Receiver to protect the confidentiality of investor information. However, counsel for Lender Respondents noted that if the intention of the Receiver was not to protect confidential investor information but rather to conceal documents which could potentially be relevant to Lender Respondents’ claims and defenses in this matter then Lender Respondents would be bringing the matter before the Magistrate or Judge Davis. *See, November 23, 2010 Letter*

from William F. Mohrman to Peter M. Kohlhepp, attached to the Declaration of Gregory M. Erickson as Exhibit C.

On November 24, 2010, the Receiver brought a motion to quash the subpoena. *See, Receiver's Motion to Quash* [Document No. 557 in Case No. 09-3332 and Document No. 597 in Case No. 09-3333]. Lender Respondents opposed the motion arguing that the Receiver had no standing to bring the motion and that the documents were relevant to Lender Respondents' defenses in the action. On December 22, 2010, Magistrate Judge Noel issued an order denying the Receiver's motion while also recognizing the Receiver's interest in the documents subpoenaed and the Receiver's right to object to their production. More specifically, the Order states:

“Based upon all the files, records and proceedings herein, **IT IS HEREBY ORDERED** that Receiver's Motions to Quash Subpoena [Civil No. 09-3332: #557][Civil No. 09-3333: #597] are **DENIED**. To the extent Receiver objects generally to the production of documents by the Mauzy law firm on the basis that only Receiver has the power to produce the documents pursuant to the Court's previous orders, that argument is rejected.

The Court further held that if the Receiver had specific objections to the production of specific documents, that the Receiver was required to produce a log setting forth the basis for each objection. *See, Order* [Document No. 594 in Case NO. 09-3332].

It was not until February 7, 2011 that counsel for the Receiver sent a letter to counsel for Lender Respondents in response to Magistrate Judge Noel's December 22, 2010 order requiring the Receiver to produce a log setting forth the Receiver's objections to certain documents requested by Lender Respondents, which objections are primarily based on the *Receiver's interpretation* of what documents are relevant to Lender

Respondents' defenses in this matter. *See, February 7, 2011 Letter from Tara Norgard to William F. Mohrman*, attached to the Declaration of Gregory M. Erickson as Exhibit D. Central to this Motion to Compel is the Receiver's continuing objection to statements obtained in the course of interviews with Mr. Cook. Throughout the February 7, 2011 letter, the Receiver repeatedly attempts to limit the Lender Respondents' discovery of potentially relevant material to information the Receiver deems "relevant." For example, the Receiver states "We do object to the unlimited inspection or production of certain hard copy documents that were generated as part of the ongoing interviews of Mr. Cook. As to these documents, *we will search them for relevant excerpts and produce that material to you.*" *Id.*, p. 1. (emphasis added) The letter also references documents contained on a hard drive created by the Receiver. With respect to those documents contained on the hard drive, the Receiver states, "Similarly, we do not object to producing *relevant* portions of the documents contained on the hard drive. Indeed, we have already searched the entirety of the interview material and have stood ready to produce this material to you for some time." In a related footnote, the Receiver makes further reference to "relevant excerpts." *Id.*, p. 2 and fn. 2 (emphasis added).

Specifically with regard to the Cook interview transcripts and related documents requested by Lender Respondents, the Receiver makes two objections. First, the Receiver objects on grounds of confidentiality that the disclosure of information would "prematurely reveal the details of the Receiver's ongoing investigative efforts and, in turn, severely impair the ability of the Receiver to perform his duties and obligations" and "the interviews of Mr. Cook are at the very heart of the Receiver's activities, which

simply cannot be compromised.” However, apparently the Receiver has no issue with “impairing” and “compromising” the ability of Lender Respondents to defend themselves against the Receiver’s claim for over \$7,000,000 damages against the Lender Respondents. The Receiver again presumes that it can determine what facts are relevant to the Lender Respondents’ cases and states that while “Receiver does not object to producing *relevant* excerpts of interview transcripts, exhibits, and documents that were used in the course of the interviews, [the] Receiver does object to the unlimited inspection or production of this interview material.” *Id.*

On February 25, 2011, Lender Respondents and the Receiver submitted a Stipulation and Joint Motion for Protective Order. *See, Stipulation and Joint Motion for Protective Order* [Document No. 637 in Case No. 09-3332 and No. 690 in Case No. 09-3333]. On March 2, 2010, Magistrate Noel issued a Protective Order pursuant to the stipulation between the parties. *See, Protective Order* [Document No. 646 in Case No. 08-3332 and No. 699 in Case No. 09-3333].

On March 3, 2011, the Receiver delivered copies of the Receiver’s first production of documents. However, what is noticeably missing is any reference to or production of information related to the interviews of Trevor Cook. *See, March 3, 2011 Letter from Peter Kohlhepp to Gregory M. Erickson*, attached the Declaration of Gregory M. Erickson as Exhibit E. Despite the existence of the Protective Order, the Receiver continues to refuse to produce documents and information undeniably related to the Lender Respondent defenses, including the Lender Respondents’ defense of “good faith” on the Receiver’s fraudulent transfer claims. Further, as the Receiver fully knows, the

standard for production of documents under Rule 26 is not relevance – it is whether the documents could lead to the discovery of admissible evidence. In this case, interview notes regarding interviews with Cook or Berg are likely to lead to the discovery of admissible evidence. In fact, production of all of the interview notes showing a lack of communications between Trevor Cook and Lender Respondents (and potentially the Receiver’s attempt to unlawfully coerce Cook into testifying against the Lender Respondents and his father-in-law Cliff Berg), which the Lender Respondents are confident will demonstrate that the Lender Respondents had no knowledge of the fraudulent nature of Cook’s Ponzi Scheme. In particular, the Receiver is refusing to produce interview notes with Trevor Cook (or produces redacted portions of the interview notes and transcripts or portions with entire pages missing), which are quite possibly the most relevant documents to this matter because the notes may suggest the Receiver knew from interviewing Cook that Lender Respondents had received their money in good faith and without any knowledge of Cook’s wrongdoing. In fact, it is inconceivable that the Receiver took the trouble to redact interview notes because those interview notes were not “relevant” to these proceedings.

In addition to the Receiver’s claims of lack of relevance and a “receiver’s privilege,” the Receiver, who after all is a former Assistant United States Attorney and was hired at the behest of United States Government agencies, informed the United States that it may want to assert a law enforcement privilege regarding documents in the hands of the Mauzy Law Firm. At the behest of the Receiver, the United States moved to intervene pursuant to Federal Rule of Civil Procedure 24 on February 14, 2011. The

basis for the United States' Motion was that the Receiver "had no legal standing to object" to the Subpoena of the Mauzy firm, but that the United States had a proprietary interest in the documents requested by the Mauzy firm. [Civil No. 09-3332: #626] [Civil No. 09-3333: #675]. The United States requested to intervene to "efficiently litigate a motion for a protective order." The Lender Respondents objected to the Motion arguing, among other things, that the United States had waived the assertion of any such privilege by delivering the documents to Cook's attorneys (It is difficult to imagine how a privilege could be sustained if the documents are delivered to the party against whom you are litigating). Nonetheless, Magistrate Judge Noel granted the United States' Motion on March 10, 2011 in order to properly address the United States Motion for a Protective Order. [Civil No. 09-3333: 700]. It has now been over a month since issuance of the Court's Order allowing intervention and the United States has failed to file a Motion for a Protective Order. It is becoming clearer and clearer that the Receiver, and its allies, are doing everything in their power to keep potentially exculpatory documents out of the hands of the Lender Respondents by whatever means necessary.

Finally, Lender Respondents have not had the opportunity to depose Clifford Berg, Trevor Cook's father-in-law, Lender Respondents' primary contact with the Cook entities. According to Berg's attorney, Berg remains under investigation by the U.S. Attorney for his role in the Cook scheme. Thus, Berg's criminal attorney advised Gregory Erickson that he would direct Berg to plead his Fifth Amendment rights to refuse to testify either at deposition or at trial in this proceeding. *See Erickson Declaration, ¶7*. Lender Respondents are confident that if granted the opportunity to

depose Berg, without the continuing threat of a criminal investigation, he would testify that neither he nor any of the Lender Respondents knew anything of Cook's fraud and that Lender Respondents accepted the repayment of their loans in good faith. Further, unless this action is stayed until Berg's criminal investigation is concluded, Lender Respondent's will be extremely prejudiced by Berg's exercise of his Fifth Amendment rights in front of the jury.

Because Lender Respondents have now concluded that the Receiver is withholding and refusing to produce documents undeniably relevant to this matter in an effort to prevent the production of potentially exculpatory information while at the same time refusing to stipulate to any extension of the upcoming trial date (assuming that the court would extend the trial date) in order to hamper Lender Respondents' trial preparation, Lender Respondents now file this motion requesting that the Court Order the Receiver to begin producing the documentation at issue immediately. The Receiver has, under the guise of cooperation and compliance with the Court's Orders, provided a log setting forth the Receiver's objections to the requested information. However, none of these objections provides any valid reason for why the documents cannot be disclosed with a designation of AEO, as allowed under the terms of the Protective Order.¹

Lender Respondents have no desire to increase the Receiver's burden to protect confidential investor information, but simply wish to obtain all relevant information necessary for the preparation of Lender Respondents' defenses in this matter.

¹ Neither the Receiver nor the United States has produced a single concrete reason why these documents cannot be produced on an AEO basis.

LEGAL ARGUMENT

A. The Proceedings Must Be Stayed Until Lender Respondents Are Afforded The Opportunity To Depose Clifford Berg.

It is well established that district courts have discretionary authority to stay a case when the interests of justice so require. *See United States v. Kordel*, 397 U.S. 1, 12 n. 27, 90 S.Ct. 763, 770 n. 27, 25 L.Ed.2d 1 (1970). The Constitution “does not require a stay of civil proceedings pending the outcome of criminal proceedings.” *Securities and Exchange Commission v. Dresser Industries, Inc.*, 628 F.2d 1368, 1375 (D.C.Cir.), *cert. denied*, 449 U.S. 993, 101 S.Ct. 529, 66 L.Ed.2d 289 (1980). “A court, however, has the discretion to stay civil proceedings, postpone civil discovery, or impose protective orders and conditions when the interests of justice seem to require such action, sometimes at the request of the prosecution, sometimes at the request of the defense.” *Afro-Lecon, Inc. v. United States*, 820 F.2d 1198, 1202 (Fed. Cir. 1987) (quotation omitted). Courts have previously stayed discovery when essential witnesses to the civil litigation will invoke their Fifth Amendment Rights because of a parallel criminal investigation. *Am. Express Bus. Fin. Corp. v. RW Prof'l Leasing Services Corp.*, 225 F. Supp. 2d 263, 264 (E.D.N.Y. 2002).

Clifford Berg was the only Cook employee with whom most of the Lender Respondents had any contact whatsoever, and was the primary contact for all of the Lender Respondents. Obviously, Berg is the most important witness besides Lender Respondents themselves regarding the good faith of Lender Respondents, as only he can testify regarding what the Cook entities communicated to Lender Respondents, and the

circumstances surrounding the return of each individual Lender Respondent's loan proceeds. The Receiver obviously believed Mr. Berg to be an essential witness, as the Receiver included a variety of allegations about Mr. Berg's knowledge and representations to Lender Respondents in the Receiver's Petition.

To Lender Respondents' knowledge, Mr. Berg is the only Cook employee still under criminal investigation. The U.S. Attorney has refused to give Mr. Berg a "clean bill of health," or to charge him. The Lender Respondents strongly suspect the Receiver and the various governmental entities of putting pressure on Mr. Berg to assist them in obtaining money for the receivership by testifying that Lender Respondents and others had knowledge of Cook's fraudulent scheme. Berg has stated through his criminal attorney that he will assert his Fifth Amendment privilege, and will refuse to testify on matters in this litigation until cleared by the U.S. Attorney. *See Erickson Declaration*, ¶ 7. Obviously if Mr. Berg is called as a witness at trial, asked about representations he made to Lender Respondents, and pleads his Fifth Amendment rights, it will be extremely prejudicial in the eyes of the jury. The jury will make the assumption that Mr. Berg's silence indicates that Lender Respondents were recipients of all manner guilty knowledge from Mr. Berg that he is now anxious to cover up, even if the truth is that Mr. Berg has been advised to assert his Fifth Amendment rights in answer to any question involving the Cook Entities.

This matter must be stayed until Berg is able to testify. First, Mr. Berg's testimony with regard to his level of knowledge, and the knowledge of Lender Respondents is of vast importance to Lender Respondents' defense of good faith.

Without the exculpatory testimony from Mr. Berg, the Lender Respondents may be forced to rely on their own personal testimony. Second, if the Lender Respondents do call Mr. Berg as a witness at trial, and Mr. Berg asserts the Fifth Amendment Privilege on the stand, the prejudicial effect on the jury would obviously be immense. In short, Mr. Berg's unimpeded testimony is essential to Lender Respondents' defenses, and this action should not proceed until Mr. Berg is in a position to testify fully and fairly. Unless this litigation is stayed, Lender Respondents will face great prejudice, and will be unable to fully protect their rights.

Finally, the Lender Respondents are extremely concerned that the Receiver and the U.S. Attorney are colluding with one another. Keeping the "Sword of Damocles" threat of prosecution hanging over Berg's head accomplishes the exact result the Receiver wants – Berg will be unable to testify at trial to corroborate the Lender Respondents' testimony that they had no knowledge of the Cook entities' fraud. It is extremely odd that the U.S. Attorney has successfully prosecuted the head of the criminal enterprise – Cook – but are still awaiting to determine whether to prosecute the underlings such as Berg.

The Lender Respondents' Motion to Stay should be granted.

B. The Receiver Has Failed To Assert A Valid Objection To Lender Respondents' Document Requests.

Lender Respondents seek a "second" order compelling production of documents responsive to the Subpoena Duces Tecum served on the Mauzy Law Firm. The subpoenaed documents relating to the investigation are highly relevant to the Lender

Respondents' defense that the Lender Respondents received the return of their capital from the Cook Entities in good faith. The Receiver states two primary objections to production: Law enforcement privilege which the Receiver admits it cannot raise and relevancy – neither of which reasonably justifies withholding the requested information.

1. Law Enforcement Privilege

The law enforcement privilege exists to protect ongoing criminal investigations. The privilege is a “judge-fashioned evidentiary privilege” and is not absolute. *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1124, 1125 (7th Cir.1997). Courts generally limit such privilege to protecting the “informal investigatorial and trial-preparatory processes ...” *Stephens Produce Co., Inc. v. National Labor Relations Board*, 515 F.2d 1373, 1376 (8th Cir.1975). To sustain a claim of law enforcement privilege, “(1) there must be a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege must be based on actual personal consideration by that official; and (3) the information for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege.” *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988).

“In making its determinations, the court must balance the government's interest in confidentiality against the litigant's need for the documents.” *In re U.S. Dept. of Homeland Sec.*, 459 F.3d 565, 570 (5th Cir. 2006) (quotation omitted). The proponent of the law enforcement privilege bears the burden of proving its claim. *Alexander v. F.B.I.*, 186 F.R.D. 154, 167 (D.D.C. 1999). Further, the party claiming the privilege must do so with specificity, and may not rely on conclusory affidavits regarding the harm disclosure

would cause to ongoing investigations. *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984). Investigatory interviews are covered by the privilege if they would reflect nothing more than the investigator's informal impressions. *Stephens*, 515 F.2d at 1376.

Courts usually examine ten factors from *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D.Pa. Mar.13, 1973) in determining whether the privilege applies: (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information; (2) the impact upon persons who have given information of having their identities disclosed; (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure; (4) whether the information sought is factual data or evaluative summary; (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question; (6) whether the police investigation has been completed; (7) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation; (8) whether the plaintiff's suit is non-frivolous and brought in good faith; (9) whether the information sought is available through other discovery or from other sources; (10) the importance of the information sought to the plaintiff's case. *See, e.g. Tuite v. Henry*, 98 F.3d 1411, 1417 (D.C.Cir.1996), *In re U.S. Dept. of Homeland Sec.*, 459 F.3d 565, 570 (5th Cir. 2006).

The Receiver's conclusory allegation that the subpoena served upon Trevor Cook's counsel (William Mauzy) would somehow implicate the "law enforcement

privilege” without any detailed description of how these documents in the possession of Trevor Cook’s counsel would compromise the United States’ ongoing investigation into Trevor Cook’s alleged co-conspirators is insufficient. The investigation transcripts in question clearly include factual testimony that relate to millions of dollars worth of litigation. The Lender Respondents are entitled to more than a letter filled with conclusory statements such as “disclosure of the results and objects of this investigation, beyond what is relevant to the action against Lender Respondents, would significantly interfere with the investigation.” Ex. D, February 7, 2011 Letter, p. 5. Why will the documents negatively impact the investigation? How will they impact it? These are the types of questions which must be answered in order to invoke the privilege. This simply has not been done here. In addition, the United States, which intervened in this litigation for the sole purpose of protecting its interests in the documents in question, have still failed to move to quash, or for a protective order. It is apparent that the tactics of the United States and the Receiver are simply attempts to stall the Lender Respondents, and prevent them from obtaining potentially exculpatory documents.

2. Waiver Of The Law Enforcement Privilege

The law enforcement privilege is a privilege like any other in that it “can be waived and, once waived, is lost.” *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1126 (7th Cir. 1997). Courts have found that one way the privilege may be waived is “[i]f the government engaged in conduct that would give it an unearned advantage over an opponent were it allowed to keep the tapes secret from him, this conduct would ‘waive’ (in the sense of forfeit) the privilege.” *Id.* “One way to waive the [law

enforcement] privilege is to allow a third party to have access to the documents.” *In re Polypropylene Carpet Antitrust Litig.*, 181 F.R.D. 680, 689 (N.D. Ga. 1998).

If Receiver interviewed Trevor Cook, and a record of those interviews has been disclosed to Trevor Cook’s attorneys, the work product privilege has been waived. More importantly, those interview notes are possibly the most relevant documents to this matter because the notes may suggest that Receiver knew from interviewing Cook that Lender Respondents had received their money in good faith and without knowledge of Cook’s wrongdoing. The Receiver’s assertion of the work product privilege of documents Receiver voluntarily produced to an adverse party in this litigation further fuels the Lender Respondents’ desire to obtain documents from neutral third parties in this action, for comparison with the documents the Receiver produces as well as for simple discovery.

It is undisputed that the United States has allowed numerous parties to this receivership unfettered access to these documents. The documents in question have been provided to at least four separate third parties: the SEC, the Receiver, Trevor Cook, and Trevor Cook’s counsel. However, there has been no production of *any* written agreements with these parties to protect the confidentiality of the United States’ interview transcripts. Therefore its claims of privilege have been waived on multiple occasions.

The Receiver has provided absolutely no evidence that disclosure of the subpoenaed documents to the Lender Respondents and their counsel in this litigation, who have admittedly done nothing wrong, could compromise the investigation more than disclosing the exact same information to an alleged co-conspirator (Trevor Cook) or to

the Receiver to aid in the Receiver's collection efforts. Further, the Receiver has failed to explain how the law enforcement privilege can still exist when the information has already been intentionally disclosed to the third party SEC who then provided the documents to the Receiver (another third party), and finally to Cook (a completely adverse third party), who happens to be the alleged co-conspirator who has been sentenced to twenty five years in prison for his role in orchestrating this ponzi scheme.

All information gleaned from Trevor Cook or other witnesses relating to the fraud, including: the representations made to the investors that their investments were all being held in separate accounts; all facts relating to attempts to conceal the true nature of the fraud from any investors (not just limited to the Lender Respondents); and, any attempts from the United States to coerce favorable testimony from Trevor Cook in an attempt to gain advantage in the pending summary proceeding is undeniably relevant to the Lender Respondents' "good faith" defense and should be provided before this proceeding moves forward.

3. The Documents Are Relevant To Lender Respondents' Defenses

First, as the Receiver admits, the Lender Respondents may defend against the fraudulent transfer claim by proving that the Receiver cannot demonstrate that the Lender Respondents failed to receive "reasonably equivalent value" for the return of their investment or that the Lender Respondents did not act in good faith when they received the return of their investment. Under the Uniform Fraudulent Transfer Act, and numerous decisions interpreting the Act, the return of principal to the Lender Respondents was exchanged for the reasonably equivalent value of cancelling the Cook

entities' debt to the Lender Respondents for their investment of principal. *Merrill v. Abbott* (In re *Independent Clearing House Co.*), 77 B.R. 843, 857 (D. Utah 1987) (“We conclude that the debtors received a ‘reasonably equivalent value’ in exchange for all transfers to a defendant that did not exceed the defendant's principal undertaking”). The subpoenaed records may, and in all likelihood will, contain records showing that the Lender Respondents received payments of principal back from the Cook entities.

Second, the Lender Respondents may defend against the Receiver's claims by asserting the defense of good faith – i.e., that the Lender Respondents knew nothing of the nature of the Ponzi scheme. All of the documents subpoenaed may lead to the discovery of admissible evidence on this issue because (i) the documents may show the extent to which Trevor Cook and his affiliates covered up the nature of the Ponzi scheme, (ii) the documents may reveal notes of communications or the communications themselves with the Lender Respondents demonstrating that the Lender Respondents did not know of the nature of the alleged Ponzi scheme; (iii) the documents may reveal admissions of the Receiver that the Lender Respondents did not know of the nature of the alleged Ponzi scheme; (iv) the Mauzy Law Firm's documents may reveal defenses to the claim that Cook's business were run as Ponzi schemes; (v) the documents may show that the monies the Lender Respondents received were not generated from the alleged Ponzi scheme; (vi) the documents may demonstrate the concerted efforts of Cook and his entities to conceal the Ponzi scheme from the Lender Respondents in particular; (vii) the documents may demonstrate that other third parties were involved in concealing the scheme from the Lender Respondents; and (viii) as the *Coffeyville* Court found, the

documents produced by the Mauzy Law Firm may reveal documents that the Receiver has in its possession but which the Receiver fails to produce.

Third, and most troubling, is that apparently some documents were given to the Mauzy Law Firm with the stipulation that these documents would only be used for client interviews and not shown to other parties. Obviously, the Lender Respondents cannot have the Receiver providing evidence in Court based on statements Cook made while reviewing documents which are now not produced to the Lender Respondents.

The Mauzy Law Firm's documents are highly relevant to Lender Respondents' good faith defense. As set forth above, the Receiver initially obtained a Court Order freezing the amounts that the Mauzy Law Firm received when Cook engaged the Mauzy Law Firm after the SEC and CFTC had commenced their investigations. The Mauzy Law Firm moved to unfreeze these funds to allow the Mauzy Law Firm to be compensated for representing Cook. The Receiver argued that the Mauzy Law Firm did not act in good faith in receiving those funds because the Mauzy Law Firm should have known that when it was hired as the criminal defense attorneys for an alleged Ponzi scheme operator, that the significantly large attorney fee retainer paid by the alleged Ponzi scheme operator must have been from the proceeds of the Ponzi scheme. The Court ruled in Mauzy's favor based on sealed records. Obviously, the Lender Respondents are much less likely than an experienced criminal defense attorney to have known or suspected that the monies received from the Cook entities were the proceeds of a Ponzi scheme, particularly when those Lender Respondents received these funds prior

to learning of any public information that Cook was being investigated as part of a Ponzi scheme.

While Lender Respondents acknowledge that the Receiver does have an obligation to protect confidential investor information, the Receiver is not acting with such intent, but rather is attempting to limit the documentary information made available to Lender Respondents for the preparation of the claims and defenses to their case. Lender Respondents have repeatedly offered to discuss an amicable confidentiality agreement for potentially confidential client investor information. (See November 23, 2010 letter from William F. Mohrman to Peter M. Kohlhepp). Further, the parties have stipulated to a protective order.

In summary, Rule 37 is to be construed broadly and thus encompasses “any matter that bears on, or that reasonably could lead to other matter that could bear on, any issue that is or may be in the case.” *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 351, 98 S.Ct. 2380, 57 L.Ed.2d 253 (1978) (citing *Hickman v. Taylor*, 329 U.S. 495, 501, 67 S.Ct. 385, 91 L.Ed. 451 (1947)). The Receiver cannot reasonably justify the refusal to produce the requested documents based on the argument that none of these requested documents is relevant to the subject matter of this case or that none could potentially lead to other relevant matter. Thus, given the existence of the Protective Order, to the extent that these documents may lead to discoverable information, the Receiver must be compelled turn them over.

C. Lender Respondents Are Entitled To a Protective Order Staying Depositions Until Delivery Of Complete Transcripts of Prior Interviews.

Lender Respondents also request that this Court issue a Protective Order under Rule 26(c) of the Federal Rules of Civil Procedure. This Court may, for good cause, issue an Order forbidding the proposed depositions of Lender Respondents until full disclosure by the Receiver of interview transcripts related to Lender Respondents' previous interviews with the Receiver. Fed.R.Civ.P. 26(c) requires that "good cause" be shown for a protective order to be issued. The burden is therefore upon the movant to show the necessity of its issuance, which contemplates "a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements ***." C. Wright and A. Miller, *Federal Practice and Procedure: Civil* § 2035 at 264-265. Such determination must also include a consideration of the relative hardship to the nonmoving party should the protective order be granted. *United States v. Kordel, supra*, 397 U.S. 1, 4-5, 90 S.Ct. 763,765 (1970).

The good cause is quite simple in this context. The Receiver has already taken the opportunity to interview each individual Lender Respondent at a time when Lender Respondents were unrepresented by counsel. Lender Respondents have requested the transcripts or notes from these interviews for review by Lender Respondents' current counsel in preparation of noticed depositions of Lender Respondents. The reason for this request is clear. Lender Respondents were questioned on a broad variety of topics, and Lender Respondents' counsel wants the opportunity to review the answers provided by Lender Respondents and go over Lender Respondents' testimony to insure that no minor

detail is changed, which would give the Receiver an opportunity to cast doubt on the truth of Lender Respondents' testimony on broader issues. It would be malpractice for Lender Respondents' counsel to allow any individual Lender Respondent to appear for a deposition before reviewing the Lender Respondent's previous interview with the Receiver. The Receiver is obviously attempting to gain an unfair advantage by tripping up the Lender Respondents with the secret interview transcripts. This Court not only has good cause to forbid the depositions of Lender Respondents until production of the interview notes, but must limit these depositions in the interests of justice.

CONCLUSION

Despite the issuance of a protective order, the Receiver continues to limit the production of documents to documents which the Receiver deems appropriate for the defense of Lender Respondents' case. Such a restriction is wholly inappropriate. In effect, the Receiver is potentially concealing documents which could be relevant to the Lender Respondents' claims and defenses in this matter and the motion to compel must be granted. Further, despite the United States' intervention in the case, the United States has still yet to make a Motion to quash the Subpoena, nor asserted any rights to a Protective Order, more than a month after joining the proceeding allegedly for that purpose, but what has been revealed to be a stalling technique. This Court should compel the Mauzy Firm to produce documentation over the objections of the Receiver, or the tardy objections of the United States. This Court should also forbid the depositions of the individual Lender Respondents in the interests of justice until the Receiver produces the interview notes from the Receiver's prior interviews at which the Lender Respondents

were unrepresented. Finally, Mr. Berg's assertion of his Fifth Amendment rights severely damages the Lender Respondents' ability to show that they received their loan repayments in good faith, and this matter must be stayed until Mr. Berg is able to testify.

MOHRMAN & KAARDAL, P.A.

Dated: April 11, 2011.

s/William F. Mohrman

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