

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

R.J. ZAYED, IN HIS CAPACITY AS
COURT- APPOINTED RECEIVER FOR
TREVOR G. COOK, ET AL.,
Petitioner,

Case No. 11-CV-01042 SRN/FLN

vs.

DAVID BUYSSE, STEVEN AND
PAMELA CHENEY, WALTER DEFIEL,
JOHN DZIK, TERRY FRAHM,
STEVEN AND JENENE FREDELL,
WILLIAM HARRIS, MICHAEL HEISE,
MICHAEL AND CYNTHIA HILLESHEIM,
LARRY HOPFENSPIRGER, STEVEN
KAUTZMAN, JAMES MCINTOSH,
GEORGE AND KAREN MORISSET,
AND REYNOLD SUNDSTROM, AND
DOT ANDERSON,

Respondents.

**MEMORANDUM OF LAW IN SUPPORT OF LENDER
RESPONDENTS' MOTION TO EXTEND SCHEDULING ORDER**

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 Motion to Extend Scheduling Order.

FACTUAL BACKGROUND

At the hearing on the Lender Respondents’ Motion to Compel and Motion to Stay, and the Receiver’s Motion to Compel heard in front of Judge Noel on April, 25, 2011, the Receiver’s attorney Peter Kohlhepp stated that the discovery deadline in this summary proceeding (which is now a separate case pursuant to Judge Michael Davis’ Order entered on April 19, 2011 in Case No. 09-03333 as Docket No. 761) expired on July 1, 2011 pursuant to the scheduling order entered on November 17, 2011 as Docket No. 588 in Case No. 09-3333. (A copy of this Pretrial Order is attached to the Declaration of Gregory M. Erickson as Exhibit 1.) This scheduling order set a discovery deadline of July 1, 2011 and an expert disclosure deadline of May 1, 2011 with rebuttal experts due on June 1, 2011. *Id.* Moreover, if the Court will recall, the scheduling order provided for “expedited” dates because of Judge Davis’ July 20, 2010 ex parte Order based on the Receiver’s ex parte motion for, among other things, an “expedited” scheduling order. *See*, Docket No. 350 in Case No. 09-03332.

This pending summary proceeding (now case) was being litigated under the “main” receivership cases filed by the SEC and the CFTC seeking the appointment of the Receiver, until Judge Davis’ April 19, 2011 Order. (File No. 09-03333 (SEC) and 09-03332 (CFTC)). Lender Respondents had moved to dismiss the summary proceeding arguing that the Court did not have subject matter jurisdiction over the summary proceeding because, among other reasons, the Receiver had to commence a separate civil

action with a separate case number based on the Receiver's claims in the Petition rather than being part of the underlying receivership proceedings which for the most part have nothing to do with the Lender Respondents. While there have been limited docket entries directly related to the summary proceeding, there have been numerous filings in the underlying receivership proceedings (the docket in 09-3332 is up to at least Docket No. 727 as of April 26, 2011 and the docket in 09-3333 is up to Docket No. 764 as of April 26, 2011 – new docket filings are added virtually daily). The vast majority of these docket entries have nothing to do with the above captioned case, which was previously captioned in the two receivership proceedings.

Thus, regardless of whether the filing had to do with general receivership issues such as a motion for approval of the receiver's attorney fees or issues specifically bearing on the summary proceeding involving the Lender Respondents, the caption for each docket filing was the same. More importantly, none of the captions involving any summary proceeding specifically identifies any of the "Respondents" such as the Lender Respondents in the caption. Simply put, unless the document filed on ECF with respect to a summary proceeding somehow referred specifically to that summary proceeding in the body of the document, there was no way to tell whether that document related to a specific summary proceeding. Thus, the attorneys and support staff in the Lender Respondents' office who were working on this case and who received via ECF all docket filings on the underlying receivership proceedings could not immediately tell if a filing related to this summary proceeding.

On December 21, 2010, the Court entered another document identified in the caption as simply "Pretrial Order" in Case No. 09-3333 as Docket No. 639 (A Copy of this Pretrial Order is attached as Exhibit 2 to the Erickson Declaration). There was nothing on the face of this Pretrial Order to indicate that it was not a Pretrial Order governing the above captioned case and previous summary proceeding. For instance, the Pretrial Order did not reference any particular Pretrial Conference after which the Pretrial Order was entered.

As a result, after the Lender Respondents' attorneys received this December 21, 2011 Pretrial Order via the ECF system, Lender Respondents' attorney Gregory Erickson believed that the Court had amended the November 17, 2011 Pretrial Order in this case with new dates. *See*, Erickson Declaration. Mr. Erickson believed that the Court had *sua sponte* amended the Pretrial Order as a result of the hearing held on the Lender Respondents' Motion to Dismiss only two business days earlier on December 17, 2011. *Id.* Mr. Erickson believed that after this hearing the Court may have entertained significant doubts regarding whether the Court had subject matter jurisdiction and thus wanted the parties to avoid expediting discovery on a case which could be dismissed.

As a result, Mr. Erickson directed that the calendars of members of the firm reflecting dates in the Court's November 17, 2011 scheduling order be changed to the dates contained in the December 21, 2011 scheduling order. These changes were significant. Among other things, the December 21, 2011 scheduling order extended the discovery deadline three months from July 1, 2011 to October 1, 2011 and the date for disclosure of experts and reports from May 1, 2011 to November 1, 2011. Since

December 21, 2011, Lender Respondents' attorneys have been operating under the assumption that these new dates governed deadlines in this case. It was only after the April 25, 2011 hearing on the cross-dispositive motions that Lender Respondents' attorneys learned that the Court had entered the December 21, 2011 scheduling order in conjunction with another summary proceeding or matter related to Patrick Kiley.

Fortunately, because Judge Michael Davis has now entered an Order requiring this summary proceeding to have its own file number and assignment to Judge Susan Richard Nelson, this problem will not occur in the future.

Since the April 25, 2011 hearing, Lender Respondents' attorney William Mohrman has discussed this matter with the Receiver's counsel Tara Norgard. *See*, William F. Mohrman Declaration. On April 27, 2011, Mr. Mohrman sent Ms. Norgard a letter outlining proposed new scheduling dates. *See*, Mohrman Declaration at Exhibit 1. For the most part, deadlines are extended from one to two months from the prior scheduling order. In an April 27, 2011 email, Ms. Norgard stated she would stipulate to the entry of a new scheduling order with the dates Mr. Mohrman proposed. *See*, Mohrman Declaration at Exhibit 2. However, Ms. Norgard conditioned her stipulation upon Mr. Mohrman's agreement to provide specific dates for the Lender Respondents' depositions. In a phone call, Mr. Mohrman informed Ms. Norgard that he would agree to produce his clients for deposition sometime in late May or early June. However, Mr. Mohrman also stated that based on the Lender Respondents' pending motion for a protective order prohibiting Lender Respondents' depositions until the Receiver produces all documents pursuant to document requests and a subpoena served on the Mauzy Law

Firm over five months ago, any agreement would be contingent on the Court's ruling on this Motion. In addition, because of the compressed timelines and the fact that Lender Respondents' attorneys represent thirteen separate individuals, some of whom are retired and not actively checking e-mail and retrieving voicemails, it would be difficult to agree to exact deposition times on very short notice. Nonetheless, Mr. Mohrman assured Ms. Norgard that he and the Lender Respondents would fully cooperate in scheduling depositions for the Lender Respondents and confirmed this in an email. *See*, Mohrman Declaration at Exhibit 3. Finally, Mr. Mohrman told Ms. Norgard that if they were unable to file a stipulation by the close of business on April 28, 2011, the Lender Respondents would file a Motion to Extend the Scheduling Order as a "prophylactic" action. In addition, Mr. Mohrman told Ms. Norgard that he would like to get this matter heard as quickly as possible and suggested that she agree that the hearing on such a Motion could be scheduled at the same time as the hearing on the United States' pending Motion for a Protective Order currently scheduled for May 9, 2011. Ms. Norgard agreed so long as she could file her response 7 days after the Lender Respondents filed this Motion. Mr. Mohrman agreed to this stipulation. *See*, Mohrman Declaration.

Finally, prior to filing this Motion, Gregory Erickson attempted to contact Ms. Norgard to get her to modify her conditions slightly but he was unable to reach Ms. Norgard because Ms. Norgard was in meetings. *See*, Erickson Declaration.

Lender Respondents are confident that we will be able to address these scheduling issues with Ms. Norgard, but are unable to complete them prior to the filing of this motion because of the proximity of the expert witness disclosure deadline and the

necessity to allow her seven days to respond to the motion in the unlikely event that a stipulation cannot be reached. *Id.*

LEGAL ARGUMENT

A. The Lender Respondents Have Shown “Good Cause” to Extend the Scheduling Order Under Local Rule 16.3.

Rule 16 of the Federal Rules of Civil Procedure provides that a pre-trial schedule “may be modified only for good cause and with the judge’s consent.” Local Rule 16.3 entitled “Extension of a Discovery Schedule” provides in pertinent part:

(b.) A Judge or Magistrate Judge may rule upon a motion to extend or modify a pretrial discovery schedule with or without a hearing. Every such motion shall be accompanied by a statement describing:

- (1) What discovery remains to be completed;
- (2) What discovery has been completed;
- (3) Why all discovery has not been completed; and
- (4) How long it will take to complete discovery.

LR. 16.3 (b).

Under the Rule 16.3 factors, the good cause exists to extend the scheduling order.

1. Almost All Discovery Remains To Be Completed.

In conformance with the Local Rule 16.3, almost all discovery remains to be completed. As the Court recently heard, the Receiver and Intervenor United States are still preventing the Lender Respondents from seeing the documents at the Mauzy Law Firm based on a subpoena served on November 17, 2011 – over five months ago. As a result, the discovery which currently remains to be completed is the resolution of the

pending motions to compel, disclosure of experts and expert reports, the completion of written discovery and document production, and the conduct of approximately 18-20 depositions between the parties. The discovery deadline has not expired, but the expert discovery disclosure and report deadline is imminent and the Lender Respondents are not able to comply with the deadline for the reasons more fully discussed above. Thus, the Lender Respondents and the Receiver will require the requested extension in order to complete discovery within the amended deadlines.

2. Much of the Discovery Has Not Been Completed Because Lender Respondents' Attorneys Believed That Discovery Closed On October 1, 2011 and Expert Disclosures Were Not Due Until November 1, 2011. .

Much of the discovery has not been completed because the discovery deadline has not expired, and the requested extension of the expert discovery deadlines is necessary because of confusion regarding the issuance of the "Pretrial Order" changing deadlines on December 21, 2011. As set forth above, there was nothing on the face of this Pretrial Order to indicate that it was not a Pretrial Order governing the above captioned summary proceedings. For instance, the Pretrial Order did not reference any particular Pretrial Conference after which the Pretrial Order was entered. Frankly, this confusion is yet another reason why Lender Respondents' attorneys believe that this matter was improperly commenced as a summary proceeding.

3. The Proposed Scheduling Order Only Extends The Currently Scheduled Dates For One or Two Months.

The proposed amendment to the scheduling order is incorporated into the Lender Respondents' Proposed Order. This amendment has already been reviewed and approved

by the Receiver's attorney, pending the resolution of the scheduling issues discussed in Ms. Norgard's e-mail. The amended scheduling order includes a thirty to sixty day (60) extension on various dates and the summary proceedings still will be resolved well in advance of an average district court case.

4. Lender Respondents Have Demonstrated "Good Cause" Sufficient to Obtain an Extension of the Pre-Trial Order.

"The primary measure of good cause is the movant's diligence in attempting to meet the order's requirements." *Rahn v. Hawkins*, 464 F.3d 813, 822 (8th Cir.2006). In the present case, the cause of the need for the extension was the confusion surrounding the December 21, 2011 "Pretrial Order" and prior manner in which this summary proceeding was captioned. The Lender Respondents have aggressively litigated this case from the beginning (e.g. by filing an immediate motion to dismiss and serving written discovery immediately after given permission by Judge Noel) and Lender Respondents cannot be characterized as idly sitting by while important deadlines approached unnoticed.

Further, when a party cannot legitimately meet a deadline, the proper course is to seek an extension of the deadline before the deadline expires. *Trost v. Trek Bicycle Corp.*, 162 F.3d 1004, 1008 (8th Cir.1998). Lender Respondents discovered the mis-calendaring of the pending expert discovery deadline on Monday and have been diligently following up ever since (including a tentative agreement regarding deadlines with Ms. Norgard) leading up to the filing of the present motion. Lender Respondents have clearly acted diligently to alert all parties of the need to file the present motion.

CONCLUSION

Based upon the foregoing, Lender Respondents' Motion to Extend the Pre-Trial Order deadlines should be granted.

Dated: April 28, 2011.

MOHRMAN & KAARDAL, P.A.

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