
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

R.J. Zayed, in his Capacity as
Court-Appointed Receiver for Trevor G. Cook et al., Civil No. 0:11-cv-01042-SRN - FLN

Petitioner,

**DOT ANDERSON’S OBJECTIONS TO THE
PROTECTIVE ORDER GRANTING THE
RECEIVER’S MOTIONS FOR
PROTECTIVE ORDER**

v.

David Buysse, et al,

Respondents.

INTRODUCTION

Dot Anderson (“Anderson”) respectfully submits these objections to Magistrate Judge Noel's October 19, 2011, Order Granting the Receiver’s Motions for Protective Order (“the Order”). The order forecloses Anderson from conducting any meaningful examination of the Receiver or Receivership Entities on any issue, finding that responses to contention interrogatories alone are sufficient. The Order incorrectly assumes the only issues sought in the depositions are the underlying facts for the claims, and fails to recognize the other benefits identified by the parties. Anderson cannot cross-examine an interrogatory response, ask it whether it considered other facts or issues, or explore with it the effect other facts would have on the answer. And prohibiting the depositions is fundamentally unfair, impinging on Anderson’s ability to develop a record for summary judgment. Although there are sixteen topics in Anderson’s 30(b)(6) notice, the Order identifies only four that overlap, when finding that Anderson had “ample opportunity” to conduct discovery on the issues.

Distilled to its essence, the Order takes the extraordinarily unfair position that because the Receiver has responded to some contention interrogatories, no deposition of anyone on the Receivership Entities' behalf, or even the Receiver as named plaintiff, is appropriate.

Anderson respectfully requests that the Court set aside the Order and permit the depositions.

FACTS

A. Anderson's Request to Close Her Account.

The Receiver seeks to clawback \$102,000 from Anderson -- and millions from the Lender Respondents ("LR's"), claiming that they received "preferential" withdrawals, and were unjustly enriched compared to other investors. The Receiver claims the Respondents did not take the funds in good faith, and should have known there were potential problems with the Cook entities.

Anderson made her investment with "Basel Institutional" on June 15, 2009. *See* Document No. 128 (Declaration of Peter Kohlhepp ("Kohlhepp Dec.") Ex. 1 (Anderson Depo.) at 44. Anderson provided \$102,000 to her grandson Gryzbowski, who worked for a Receivership Entity, to be invested with Basel. *Id.* at 43. The account opening documents Anderson signed gave her the right to request her funds back at any time. *See* Document No. 136 (Declaration of Adam S. Huhta in Opposition to Receiver's Motion for Protective Order) ("Huhta Dec.") Ex. 2 (Gryzbowski Depo.) at 185-86. Shortly after her investment, Anderson saw an article addressing the lawsuit filed by the Phillips' -- Ohio investors who had invested in Crown Forex -- and decided to close her account. She signed the necessary paperwork, and the Receiver claims she received the \$102,000

she had invested. Gryzbowski did not ask anyone to handle his grandmother's withdrawal differently than any other account. Huhta Dec. Ex. 2 (Gryzbowski Depo.) at 186. The Receiver's document production confirms that the funds were withdrawn from the "Basel" account into which Anderson's deposit was made.

"Basel" was apparently being set up given the bankruptcy involving the Crown Forex entities. Cook intended to run it legitimately. Huhta Dec. Ex. 1 (Cook Depo.) at 122. Basel was not able to get the trading platform set up. According to Cook "It never got started." Huhta Dec. Ex. 1 (Cook Depo) at 122-123. "Her [Anderson's] money was just sitting there and it wasn't being managed or it wasn't being traded or anything." Huhta Dec. Ex. 1 (Cook Depo.) at 122-123. Cook testified that if a withdrawal request was made, they were all honored up to a certain day. *Id.* at 123-124. Cook was not involved in Anderson's decision to close her account. *Id.* at 125. Anderson did not profit from her brief investment. *Id.* at 126-27. She put in \$102,000, and received at most \$102,000 back. *Id.*

B. Anderson's Motion to Compel.

Because the Order claims that Anderson "did not identify any deficiencies in the Receiver's Interrogatory responses" (Order at 6), Anderson provides the following outline of her outstanding Motion to Compel.

Although the Receiver maintains that the Respondents were unjustly enriched compared to other investors in the Cook Entities, the Receiver refused to answer an interrogatory identifying those other investors, what payments of interest and principal

those other investors received (but have not had claw back actions instituted against them by the Receiver), and when those payments were made. The issue is directly relevant to whether Respondents were “unjustly enriched” when compared to others investors.

Indeed, the Phillips – the Ohio investors who initially filed suit, whose lawsuit received the newspaper coverage seen by Anderson -- received hundreds of thousands of dollars in principal payments in the months before the Cook’s scheme collapsed. The Phillips’ received a \$52,500 distribution from the Receivership Entities on July 8, 2009 *after* they filed their lawsuit against Cook and others, and within a week of Anderson’s request to close her account, but have not had to disgorge those funds.

And there are others who profited from the scheme the Receiver intends to allow to keep 100% of the principal they received from the Receivership Entities. In December 2010, the Receiver sent out 150 demand letters to investors who received more money from Receivership Entities than they invested. The demand letters asked these 150 “winning investors” for the “profit” back, but allowed them to keep the principal. *See* 0:09-cv-03333-MJD –FLN Document 658, (Seventh Status Report Of Receiver) for a discussion of the letters sent to “winning” investors. Anderson’s Motion to Compel seeks a verified interrogatory answer about other investors, includes a request for these demand letters, any information those investors sent to the Receiver, and other documents the Receiver failed to copy and produce relating to the basis for the fraudulent transfer and unjust enrichment claims. *See* Document No. 149 (Motion) and Document No. 151(Memorandum in Support of Motion to Compel); Document No. 152 (Huhta Declaration); Document No. 152-3 (Ex. 3 to Huhta Declaration – Letter from Huhta to

Kohlhepp outlining deficiencies in Receiver's discovery responses). Magistrate Noel heard argument on that motion on October 31, 2011, and took the matter under advisement. *See* Document No. 171.

C. The Protective Order.

On September 1, 2011, the LRs noticed the Receiver's deposition, and a 30(b)(6) deposition. *See* Document No. 136 (Huhta Dec. ¶5.) The topics of the 30(b)(6) deposition included the factual basis for the claims against all the Respondents, including Anderson. *Id.* ¶6. On September 8, the Receiver filed a Motion for Protective Order seeking to prevent the depositions. *Id.* ¶8.

Because Anderson's counsel thought that the Receiver and the LRs might reach an agreement withdrawing the deposition notices in the meet and confer process, counsel served a deposition notice on behalf of Anderson to preserve Anderson's ability to participate in the 30(b)(6) deposition. *Id.* at ¶9. Anderson's notice contained 16 topics, many of which did not duplicate contention interrogatories already served, including:

- Facts supporting the contention that Anderson did not complete paper work requesting a withdrawal.
- The circumstances involving the return to Anderson of \$102,000 in July 2009, including, the identification of each person involved and why the funds were returned.
- The terms under which Anderson's money could be returned to her.
- Facts supporting the contention that Anderson was not owed \$102,000.
- Facts supporting the contention that the Receivership Entities were not obligated to return to Anderson the money she had invested.
- The reasons why Basel International or any entity with "Basel" in its name was created.
- The status of any Basel entity, including:
 - whether any clients' funds in Basel were actually invested;

- What investors provided funds for any “Basel” entity;
- Withdrawal requests from any “Basel” entity;
- Any Receivership Entity’s efforts to return funds to Basel investors;
- Any Basel entity’s role in the alleged Ponzi scheme.

See Document No. 128-17.

The Order found that “Respondents, including Respondent Anderson, have had ample opportunity to obtain the information they seek through interrogatories. The categories of information listed in Respondents’ Fed. R. Civ. P. 30(b)(6) deposition notice are nearly identical to their contention interrogatories.” To reach this conclusion, Magistrate Judge Noel compared the “categories of information listed in Respondents’ Fed.R.Civ.P. 30(b)(6) deposition notice” with the Respondents contention interrogatories. Thus, Magistrate Judge Noel ruled that “most – if not all – of the information sought by Respondents, including Anderson, has already been disclosed, the Court finds that the burden of such a deposition outweighs its likely benefit.” Magistrate Judge Noel’s Order is clearly erroneous and contrary to existing law. Local Rule 72.2(a).

ARGUMENT

A. STANDARD OF REVIEW

The district court must overturn a decision by a magistrate judge on a nondispositive issue if the decision is "clearly erroneous or contrary to law." Fed. R. Civ. P. 72(a). A decision is “‘clearly erroneous’ when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Chakales v. Comm'r of Internal Revenue*, 79 F.3d

726, 728 (8th Cir. 1996). "A decision is 'contrary to the law' when it 'fails to apply or misapplies relevant statutes, case law or rules of procedure.'" *Knutson v. Blue Cross & Blue Shield of Minn.*, 254 F.R.D. 553, 556 (D. Minn. 2008).

B. OBJECTIONS

1. The Order's Factual Findings Were Insufficient and Therefore The Order is Clearly Erroneous and Contrary To Law.

Fed. R. Civ. P. 26(b)(2)(C) allows the Court to limit discovery if "the party seeking discovery has had ample opportunity to obtain the information by discovery in the action" or "the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues." Rule 26 allows a court to issue a protective order only upon showing of "good cause," including undue burden or expense. "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 ." *Gen. Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973). "It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error." *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979). Protective orders totally prohibiting a deposition are rarely granted absent extraordinary circumstances. *Salter v. Upjohn Co.*, 593 F.2d 649, 653 (5th Cir. 1979); *N.F.A. Corp. v. Riverview Narrow Fabrics*, 117 F.R.D. 83 (M.D.N.C. 1987).

The Order contains no factual findings or discussion of the depositions' burdens or expense. Nor could it – the Receiver submitted no affidavit or declaration from the Receiver or Receivership Entities about any burdens or expense associated with the depositions. Because the Receiver did not submit any “particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements,” they failed to carry their burden of proof. *See Gen. Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973). Without any factual support or any findings on the issue, the Order fails to apply Rule 26's requirements and is clearly erroneous and contrary to law.

The only “burdens” argued by the Receiver was in preparing a witness to testify and attending a deposition. *See* Document No. 127 (Receiver's Memorandum) at 17. These purported “burdens” are those faced by every deponent, and entity faced with a 30(b)(6) deposition. By Court order the Receiver has unfettered access to every employee -- whose cooperation is mandated - so there are no obstacles to designating an appropriate person to testify on the Receivership Entities' behalf. *See SEC v. Cook et al*, 09-cv-3333 MJD/JJK Document No. 13 ¶ VI (*Order Appointing Receiver*). Because the Receiver submitted no affidavit or declaration outlining any inappropriate burden or expense associated with the depositions, he failed to carry the burden of establishing a protective order. And the order fails to identify any burdens, so is clearly erroneous and contrary to law.

2. The Fact That Four Contention Interrogatories Duplicate The 16 Deposition Topics Does Not Establish That Anderson Had Ample Opportunity To Obtain The Information.

The Order is clearly erroneous and contrary to law because it fails to recognize the benefits of a deposition of the Receiver or a 30(b)(6) designee that were identified by Anderson and the LR's, and erroneously concluded Anderson had ample opportunity to obtain the information sought.

The Order notes that only four of Anderson's contention interrogatories were similar to the sixteen separate 30(b)(6) deposition topics. Yet the Order finds that Anderson had ample opportunity to obtain the information. Order at 6.

There are a number of significant benefits to the deposition Anderson sought, which cannot be supplied by a contention interrogatory response. First, there were additional topics served by Anderson not covered by interrogatories. Those include the basis for the claim Anderson did not complete paper work requesting a withdrawal, the identification of each person involved and why the funds were returned to her, the terms under which Anderson's money could be returned to her (since the Receiver claims that refunding her money at her request was improper); the contention that Anderson was not owed \$102,000 by a Receivership Entity (when she provided \$102,000 for investment); the facts supporting the claim that the Receivership Entities were not obligated to return to Anderson the money she had invested when requested (since the account opening documents allow Anderson to request in writing that her account be closed and her investment returned to her); and the reasons why the Basel entity was created, whether any clients' funds were provided to Basel for investment were actually invested, what

investors provided funds for any “Basel” entity, withdrawal requests from any “Basel” entity by investors, any Receivership Entity’s efforts to return funds to Basel investors, and the Basel entity’s role in the alleged Cook Ponzi scheme, among others. These are important issues bearing on the claims and defenses about which there are no interrogatories. Anderson could not serve more interrogatories to address these issues, because she had already served the allotted 25. Thus, the order erroneously concludes that Anderson had the opportunity to discover the information sought.

Assuming Anderson must demonstrate the Receiver’s discovery responses are deficient, there are many deficiencies that auger in favor of a deposition. Anderson has an outstanding Motion to Compel addressing the basis of the unjust enrichment and fraudulent transfer claims, and why some investors are treated preferentially. And Anderson identified a number of interrogatories, when opposing the motion for protective order, that had been deficiently answered, including:

- Interrogatory No. 9, which sought the facts relating to the return to Anderson of her funds. The response fails to: (1) discuss who made the transfers (2) identify any discussions within the entities about closing Anderson’s account (3) take into consideration that proper paperwork was prepared and submitted to close Anderson’s account (4) discuss WHY Anderson’s funds were returned, or at whose request.
- Interrogatory No. 12 which asked for facts on which the Receiver relies for the contention that Anderson did not provide reasonably equivalent value in exchange for her withdrawal.

See Document No. 135 at 19-20.

The deficient response claims that:

[t]he money was stolen by Cook and his co-conspirators immediately upon receipt. The stolen money was used to further the scheme by, among other things: paying earlier victims; paying salaries and commissions of salespersons and employees who were used by Cook and his co-conspirators to lure in more victims; paying operating expenses associated with maintaining the appearance of legitimacy; funding promotional activities to lure more victims; paying the personal expenses of Cook and his co-conspirators; and using the money to support their extravagant lifestyles.”

See Document No. 128 (Kohlhepp Dec.) Ex. 17 at 18-19. Contrary to the argumentative “responses” prepared by the Receiver’s counsel, the documents illustrate that Anderson’s funds were simply sitting in a bank account at Associated Bank, and there were no withdrawals from that account supporting any of the “facts” asserted in the interrogatory response. Anderson ought to be able to depose someone to explore the basis for this inaccurate response. These are only a few of the deficiencies in the receiver’s interrogatory responses. Anderson ought to be able to explore the basis for these “facts” with a witness unvarnished by the Receiver’s counsel. The Order fails to discuss any of these benefits identified by the parties.

And counsel should be permitted to choose the method of discovery and follow up on information provided in written interrogatories. The court in *In Re Douglas Asphalt Co.*, 436 B.R. 246, 251(S. D. Ga. 2010) dismissed a similar argument, finding that a party and their counsel should be permitted to chose the method of discovery they thought appropriate. The court noted:

The deposition-discovery regime set out by the Federal Rules of Civil Procedure is an extremely permissive one to which courts have long accorded a broad and liberal treatment.... (internal citations omitted). Here, the Law Firms have a right to conduct discovery in whatever manner they choose, and F & D has not shown good cause to restrict that right.

* * *

As to whether contention interrogatories are more appropriate than a Rule 30(b)(6) deposition for inquiry into the remaining five topics-that question is for the Law Firms to decide.

Id. at 251. Anderson would like to depose the Receiver or a witness who can testify to the facts on behalf of the Receivership Entities, so that she can probe the basis for the Receiver's claims and interrogatory responses. The depositions would permit the opportunity to explore areas not covered by written discovery and probe the basis for the contention interrogatories, rather than be forced to rely on responses that cannot be cross-examined or questioned. Importantly, the Receiver's "verification" of those contention interrogatories claims that the Receiver lacks personal knowledge of the facts identified in the responses.

I do not have any personal knowledge concerning any of the events described in the foregoing Objections and Responses and, therefore, base this verification solely upon a good faith belief formed after a reasonable investigation under the circumstances into the events described in the foregoing Objections and Responses and a review of documents, witness statements and testimony concerning those events.

See CASE 0:11-cv-01042-SRN-FLN Document No. 144-2. A 30(b)(6) deposition would require the Receivership Entities to designate someone with knowledge of the properly noticed deposition topics, and subject them to cross-examination so that Anderson can probe the basis for, accuracy, and veracity of the facts identified. Allowing cross-examination would permit Anderson to prepare for summary judgment, and illustrate significant problems in the Receiver's positions.

Other courts recognize the benefits of depositions over contention interrogatories alone. For example, in response to identical issues and arguments as raised by the Receiver here, a District Court reversed a Magistrate Judge's decision to deny a 30(b)(6) deposition. *S.E.C. v. Kramer*, 778 F. Supp. 2d 1320 (M.D. Fla. 2011). The court noted:

In this instance, [the Magistrate] relied upon the Commission's assertion that, because Commission counsel lacked "independent knowledge" of the facts and because only Commission counsel worked on the case, a deposition of the Commission would necessarily intrude upon the work product and deliberative process privileges. Kramer, however, sought to discover only the facts underlying the claim against him and not the mental impressions of Commission counsel. Rule 30(b)(6) contains no requirement that Kramer first seek by other means of discovery the facts underlying the claim against him. Under Rule 30(b)(6), the Commission could designate any person (i.e., someone other than counsel) to depose in response to Kramer's request.

* * *

Permitting the Commission in this instance to assert a blanket claim of privilege in response to a Rule 30(b)(6) notice creates an unworkable circumstance in which a defendant loses a primary means of discovery without a meaningful review of his opponent's claim of privilege.

S.E.C. v. Kramer, 778 F. Supp. 2d 1320 (M.D. Fla. 2011).

Contention interrogatories are an inadequate substitute for deposition testimony. *See Ierardi v. Lorillard, Inc.*, 1991 WL 158911 at *1-2 (E.D.Pa. 1991) (noting that "the deposition process provides a means to obtain more complete information and is, therefore, favored.") Parties to litigation do not have to accept their opponent's statement that all relevant evidence has been produced via a given discovery vehicle—they are entitled to test this assertion in questioning witnesses during depositions." *Iris Corp. Berhad v. United States*, 06-801C, 2008 WL 4885120 (Fed. Cl. Oct. 30, 2008). Corporate representative depositions are recognized as appropriate tools that complement other methods of discovery. "Rule 30(b)(6) ... is an additional, supplementary and complimentary deposition process designed to aid in the efficient

discovery of facts.” *See Mitsui & Co. (U.S.A.), Inc. v. Puerto Rico Water Resources Authority*, 93 F.R.D. 62, 65 (D.P.R. 1981); *Atlantic Cape Fisheries v. Hartford*, 509 F.2d 577 (1st Cir. 1975). Because the Order fails to recognize or apply these issues, it is clearly erroneous and contrary to law.

CONCLUSION

Accordingly, Anderson respectfully requests that the Court reject the Order and permit Anderson’s 30(b)(6) deposition and the Receiver’s deposition.

Dated: November 2, 2011

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