

UNITED STATES DISTRICT COURT  
FOR THE DISTRICT OF MINNESOTA

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UNITED STATES SECURITIES	:
AND EXCHANGE COMMISSION,	:
	:
Plaintiff,	:
	:
v.	: CIVIL ACTION
	: FILE NO. 09-cv-3333 (MJD/JJK)
	:
TREVOR G. COOK, and	:
PATRICK J. KILEY, et al.,	:
	:
Defendants,	:
	:
and	:
	:
BASEL GROUP, LLC, et al.	:
	:
Relief Defendants.	:

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**Memorandum of Law by Receiver R.J. Zayed  
on Trevor Cook’s Waiver of Fifth Amendment Protections**

Requiring Trevor Cook to turn over assets to the Receiver does not intrude upon his rights under the Fifth Amendment. Cook waived any Fifth Amendment protection that may have applied with respect to turning over his assets when he voluntarily turned over more than \$30,000 worth of gift cards to the Receiver. Cook now tells the Court that he will not turn over any *additional* assets because it would violate his privilege against self-incrimination. Cook cannot have it both ways, turning over assets when it benefits him while continuing to hide other assets from the Receiver. Approving Cook’s

strategy would make a mockery of the Court's Orders and runs afoul of basic Fifth Amendment jurisprudence.

**I. Cook has waived Fifth Amendment protections as to his assets**

Cook asserts that the act of turning over assets as required under the Court's Orders is a testimonial act. The Receiver disagrees that merely turning over assets to the Receivership is in fact testimonial. However, accepting Cook's argument on this issue for the sole purposes of this brief, Cook has already 'testified' about his assets on at least two occasions. First, on December 11, 2009 he turned over to the Receiver more than \$22,000 in gift cards from Holiday, Target, SuperAmerica, Cub Foods, Home Depo, AMC Theater, Regal Cinema, Nordstroms, Cheesecake Factory, Olive Garden, Old Chicago, Ruby Tuesday, Chilis, Applebees, PetSmart, Bath&Body Works, and numerous phone cards. Zayed Decl.<sup>1</sup> ¶ 3. He also turned over five credit cards. *Id.* Then on December 14, 2009, Cook turned over another \$8,000 worth of Target gift cards. *Id.* ¶ 4.

It is a longstanding rule that a defendant's "voluntary offer of testimony upon any fact is a waiver as to all other relevant facts, because of the necessary connection between all." *Johnson v. United States*, 318 U.S. 189, 195 (1943) (quoting 8 Wigmore, *Evidence* § 2276(2) (3d ed. 1940)). The policy behind this rule is one of basic fairness. As the Supreme Court stated in *Brown*, "[a defendant] cannot reasonably claim that the Fifth Amendment gives him not only this choice but, if he elects to testify, an immunity from cross-examination on the matters he has himself put in dispute. It would make of the

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<sup>1</sup> References to Zayed Decl. refer to the Declaration of R.J. Zayed, Receiver, dated January 15, 2010 and filed herewith.

Fifth Amendment not only a humane safeguard against judicially coerced self-disclosure but a positive invitation to mutilate the truth a party offers to tell.” *Brown v. United States*, 356 U.S. 148, 156–57 (1958). As the Supreme Court noted more recently, “[a] witness may not pick and choose what aspects of a particular subject to discuss without casting doubt on the trustworthiness of the statements and diminishing the integrity of the factual inquiry.” *Mitchell v. United States*, 526 U.S. 314, 322 (1999). This is precisely what Cook seeks to do—discuss (in this case, turn over) only the assets that he believes will benefit him before the Court.

Having established a waiver, the question turns to the scope of that waiver. As the Supreme Court instructed in *Johnson*, the waiver extends to “all other relevant facts.” 318 U.S. at 195. Cook voluntarily testified about assets in his possession when he turned over a portion of those assets to the Receiver. He did not do this accidentally or out of the goodness of his heart. He did it to present himself in the most positive light he could to the Court when he was caught violating the Court’s Orders. Cook also testified with respect to his assets when he provided the Receiver with a laundry list of expenses and asked the Receiver to provide him and his wife with thousands of dollars in monthly living expenses from the Receivership estate to maintain his lifestyle. Zayed Decl. ¶ 7. Having “testified” about certain assets for his benefit, Cook cannot now shield all other relevant facts on these topics. *See, e.g., United States v. Angulo-Palacios*, No. 05-50787, 2006 U.S. App. LEXIS 24838 (9th Cir. Oct. 3, 2006) (testimony on direct about knowledge of marijuana in vehicle allowed cross-examination about any drugs in vehicle over fifth-amendment objection), *United States v. Tebrugge*, 134 F. App’x 291 (11th Cir.

2005) (testimony on direct about stolen firearms allowed cross-examination on stolen furniture over fifth-amendment objection); *United States v. Cuozzo*, 962 F.2d 945, 948 (9th Cir. 1992) (cross-examination on prior fraudulent activities proper in order to rebut direct testimony that defendant lacked fraudulent intent); *United States v. Hearst*, 563 F.2d 1331, 1340–41 (9th Cir. 1977) (Hearst’s testimony that she acted involuntarily “placed in issue her behavior during the entire period from abduction to arrest”).

In a case very similar to this one, a defendant was found to have waived Fifth Amendment protections as to assets by disclosing some assets earlier in the litigation. *Bayview Loan Servicing, LLC v. McNaughton*, No. 2:05-cv-254, 2007 U.S. Dist. LEXIS 61893 (W.D. Mich. Aug. 22, 2007). There, the Court held:

[f]urthermore, even if I found some of the documents were testimonial and incriminating, defendants have waived their Fifth Amendment rights by disclosing assets and information in responding to requests for information. A party may waive the Fifth Amendment privilege. . . . The McNaughtons in response to interrogatories identified two checking accounts they held in an email of September 28, 2005. Matt Holman identified for Joanne Schneider at Bayview a variety of assets held or previously held by the McNaughtons. Defendants cannot seek to assert a Fifth Amendment privilege to information they have already disclosed during the course of this litigation or in discussions prior to the filing of this lawsuit.

*Id.* at \*12–13. Like the McNaughtons in *Bayview*, Cook has voluntarily disclosed details on certain assets and transactions in this case. He did so yet again in open court on January 12, 2010. After the Court Ordered him not to dispose of the Lexus he was seen driving in video footage admitted into evidence, Cook exclaimed “that’s not even my car.” Zayed Decl. ¶ 6. Thus, Cook has repeatedly shown his desire to make certain

disclosures about his assets and spending; he cannot now assert the Fifth Amendment allows him to hide the remaining details.

**II. Cook has already turned over assets that were unknown to the Receiver, thereby waiving Fifth Amendment protections**

Cook has argued in previous briefs that under the Act of Production doctrine, the Fifth Amendment shields him from turning over any assets, records, or other evidence unless the existence of that evidence is a “foregone conclusion.” (Cook Supplemental Memorandum at 8–10, Docket No. 113-1).

What Cook did not realize when he presented this argument is that he has already turned over assets, the existence of which were not a “foregone conclusion” and which required his subjective intent, discretion and which he voluntarily produced. By doing so, he has waived any Fifth Amendment protections he may have had on the topic of his assets. Cook’s contemptuous purchase of certain gift cards, specifically those to Target and Cub Foods, were known to the Receiver. But the full quantity was not known. For instance, the Receiver only knew about \$8,000 from Target rather than the \$16,000 in Target cards that Cook eventually turned over.

In addition, the Receiver had no knowledge that Cook had also purchased gift cards at Holiday, SuperAmerica, Home Depo, AMC Theater, Regal Cinema, Nordstroms, Cheesecake Factory, Olive Garden, Old Chicago, Ruby Tuesday, Chilis, Applebees, PetSmart, Bath&Body Works, and numerous phone cards. Zayed Decl. ¶ 3. The Receiver’s knowledge of these gift cards was far from a foregone conclusion. Therefore,

Cook's argument and the authority cited therein reinforce the conclusion that he has waived his Fifth Amendment privilege by disclosing these assets.

But the gift cards were not the only thing that Cook turned over. In addition, he turned over five credit cards, four of which were entirely unknown to the Receiver. Zayed Decl. ¶¶ 3–4. The only reason the fifth card was known to the Receiver was because the Eagan Police Department informed the Receiver of this account after Cook used it to purchase some of the gift cards discussed above. Zayed Decl. ¶ 3. Cook's decision to turn over not only assets (the gift cards), but also credit cards further supports a waiver over his assets and financial transactions generally.

### **CONCLUSION**

In this case, Cook attempts the most blatant abuse of the Fifth Amendment's protections against self incrimination: disclosing only what he deems favorable to him at the moment, while refusing to provide information on any other assets on Fifth Amendment grounds. Cook's prior voluntary disclosures waive his privilege as to assets and financial transactions generally and the Court should overrule his objections to turning over assets and accounts based on the Fifth Amendment.

Dated: January 15, 2010

s/ Russell J. Rigby

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