

---

---

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, UNIVERAL  
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.

---

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

UNITED STATES SECURITIES  
AND EXCHANGE COMMISSION,

Case No: 09-cv-3333 MJD/FLN

Plaintiff(s)

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.

---

**RECEIVER'S RESPONSE TO THE RESPONDENTS' OBJECTIONS TO  
REPORT AND RECOMMENDATION**

**INTRODUCTION**

A district court is afforded wide discretion in the administration of an equity receivership. Here the Court has exercised that discretion by authorizing the summary proceedings filed against the Respondents. Such summary proceedings are appropriate so long as they provide the affected third party with due process. After the benefit of full briefing and a lengthy hearing on this issue, Magistrate Judge Noel concluded that these summary proceedings do adequately protect the Respondents' due process rights. The Respondents nevertheless object to Judge Noel's conclusion, maintaining that summary proceedings "must" somehow prejudice them. But they remain unable to identify a single concrete example of the prejudice—because there simply is none.

These summary proceedings have followed the Federal Rules of Civil Procedure and have afforded the Respondents every procedural protection that would be available to them under a plenary proceeding. Moreover, the summary proceedings do not affect any right to a jury trial that the Respondents may have under the Seventh Amendment. Chief Judge Davis authorized these procedures to facilitate efficient, organized and expeditious recovery of funds improperly dissipated by Trevor Cook's Ponzi scheme while protecting the due process rights of third parties. Because the Respondents have failed to show any resulting prejudice, let alone a prejudice that rises to the level of denying due process, the

Receiver is entitled to litigate his claims in the context of these summary proceedings. Accordingly, the Respondents' objections should be overruled and their Motion to Dismiss denied.

### **BACKGROUND**

On July 23, 2010 the Receiver filed a Petition with this Court seeking the return of Receivership assets from the Respondents. *Petition for Return of Receivership Assets from Investor Respondents*, SEC Docket No. 384 (July 23, 2010). The Receiver filed this Petition pursuant to specific summary procedures authorized by this Court. *Order Allowing Summary Proceedings*, SEC Docket No. 380 (July 20, 2010). On September 1, 2010 the Respondents filed the motion to dismiss presently at issue, contending that the summary proceedings against them were improper. *Respondents' Motion for an Order Dismissing Summary Proceedings*, SEC Docket No. 452 (Sept. 1, 2010); *Respondents' Amended Motion for an Order Dismissing Summary Proceedings*, SEC Docket No. 454 (Sept. 1, 2010). The Respondents and the Receiver briefed the motion to dismiss according to the Federal Rules of Civil Procedure and the District of Minnesota's Local Rules. *Investor/Respondents' Memorandum of Law in Support of Their Motion to Dismiss the Receiver's "Summary Proceedings" Petition*, SEC Docket No. 455 (Sept. 1, 2010); *Receiver's Opposition to Respondents' Motion to Dismiss*, SEC Docket No. 505 (Sept. 23, 2010); *Respondents' Reply Memorandum of Law in Support of Their Motion to Dismiss the Receiver's "Summary Proceedings" Petition*, SEC Docket No. 517 (Sept. 30, 2010). An oral argument was held before

Magistrate Judge Franklin Noel on December 17, 2010. *Court Minutes*, SEC Docket No. 638 (Dec. 17, 2010). Thereafter, Magistrate Judge Noel issued a Report and Recommendation recommending that the Respondents' Motion to Dismiss be denied. *Report and Recommendation*, SEC Docket No 696 (Feb. 25, 2011) (hereinafter "R&R"). On March 11, 2011, the Respondents filed an Answer to the Receiver's Petition as well as objections to Magistrate Judge Noel's Report and Recommendation. *Respondents' Objections to Report and Recommendation*, SEC Docket No. 702 (Mar. 3, 2011) (hereinafter "Respondents' Objections").

Magistrate Judge Noel's Report and Recommendation and District of Minnesota Local Rule 72.2(b) required the Respondents, as the parties filing objections, to file a complete transcript of the December 17, 2010 hearing by March 11, 2011, unless the parties were prepared to stipulate that the District Court is not required to review a transcript of the hearing. The Receiver did not so stipulate, and is not prepared to do so now. The Respondents have failed file the transcript.<sup>1</sup> The Respondents' failure to comply with Local Rule 72.2(b) is sufficient grounds for the Court to overrule their objections. Nevertheless, the Receiver now responds to the Respondents' Objections to Magistrate Judge Noel's Report and Recommendation.

---

<sup>1</sup> A transcript of the hearing was filed today, but it was filed as a result of the *Receiver* requesting a copy of the transcript for his own records.

## RESPONSES TO OBJECTIONS

### **1. Summary Proceedings Are Appropriate So Long As the Respondents Have Due Process**

The Respondents objection is based on the same argument that failed before Magistrate Judge Noel; namely, that summary proceedings are categorically inappropriate where the third party claims an ownership right in the property at issue. But as the Receiver argued and Magistrate Judge Noel recognized, a particular summary proceeding is appropriate so long as it safeguards the third party's due process. *Receiver's Opposition to Respondents' Motion to Dismiss*, SEC Docket No. 505, at 12–23; *R&R* at 7. Federal courts are in accord in holding that it is the substance of the due process provided, not the form of the proceedings, that matters. *See, e.g., SEC v. Wencke*, 783 F.2d 829 (9th Cir. 1986); *SEC v. Elliot*, 953 F.2d 1560 (11th Cir. 1992); *SEC v. Universal Financial*, 760 F.2d 1034 (9th Cir. 1985). This issue was extensively briefed and argued by the parties before Magistrate Judge Noel and the Receiver considers the record sufficient to speak for itself.

### **2. The Summary Proceeding Brought By the Receiver Provides the Respondents with Due Process**

The Respondents object to Magistrate Judge Noel's conclusion that Respondents' due process rights will be fully protected in these proceedings. The Respondents observe that "extreme prejudice . . . would result were [they] denied the procedural protections afforded to them by the United States Constitution." *Respondents' Objections* at 1. The Receiver agrees that due process is of

paramount importance in ensuring fairness in any judicial proceeding. That is why he advocated—and the Court endorsed—summary proceedings that afford parties their full due process. Respondents fail to identify any actual, specific prejudice to them as a result of these summary proceedings.

Chief Judge Davis’ Order Allowing Summary Proceedings applied the Federal Rules of Civil Procedure to the summary proceedings it authorized, providing the procedural safeguards necessary to protect the Respondents’ rights. *Order Allowing Summary Proceedings*, SEC Docket No. 380, at 3–4 (July 20, 2010). For example, the Order required the Receiver to serve a petition “pursuant to Rule 4,” required the petition to state the grounds for relief “as required by Rule 8(a),” and provided the Respondents with twenty-one days to answer or otherwise plead “pursuant to Rule 12.” *Id.* ¶ 1–3. The Order also specified that discovery must be conducted “according to the Federal Rules of Civil Procedure, as modified by the Court in its expedited discovery schedule.” *Id.* ¶ 6.

Magistrate Judge Noel’s Report and Recommendation explicitly recognizes that the Federal Rules of Civil Procedure are in full force and effect in these summary proceedings. *R&R* at 8. The Receiver served Respondents with a Petition that stated the grounds for the relief sought, pursuant to Rules 4, 8(a), and 9(b). The Respondents were given twenty-one days to answer or otherwise plead. The Receiver then agreed by stipulation to provide the Respondents with additional time to respond. *Stipulation*, SEC Docket No. 421 (Aug. 26, 2010). In lieu of an answer, the Respondents moved to dismiss under Federal Rule of Civil

Procedure 12. They were afforded the same full briefing schedule under the Federal and Local Rules that is applicable to Rule 12 motions in plenary proceedings. They were given an opportunity to argue their motion to dismiss at a December 17, 2010 hearing. Magistrate Judge Noel then issued a Report and Recommendation following the hearing and allowed the Respondents an opportunity to object in the manner specified by the Local Rules—the same process afforded to litigants in plenary proceedings. Magistrate Judge Noel expressly stated that he evaluated Receiver’s Petition in the same manner as he would have evaluated a civil complaint in a plenary proceeding. *R&R* at 3.

These summary proceedings have also afforded the Respondents an opportunity to conduct vigorous discovery under the Federal Rules of Civil Procedure. Magistrate Judge Noel issued a Scheduling Order allowing six full months for discovery in this case. *Pretrial Schedule*, SEC Docket No. 588 (Nov. 17, 2010) (“Scheduling Order”). The Scheduling Order also provides many other standard pretrial procedures, including setting deadlines for the disclosures of expert witnesses and serving of expert reports, summary judgment motions, and a trial ready date. *Id.* at 2–3. The Respondents have pursued extensive discovery using the means provided by the Federal Rules, serving forty-one document requests and seven interrogatories on the Receiver. The Receiver timely provided written responses to these discovery requests under Rules 26, 33 and 34 and produced over 12,000 pages of responsive documents to the Respondents. The Receiver has also offered to make hundreds of thousands of additional documents

available for inspection, even though those documents have nothing to do with the claims and defenses in this action. Respondents also have served third party subpoenas under Federal Rule of Civil Procedure 45 and the Receiver's objections to one of those subpoenas was the subject of written and oral argument and a written opinion by the Court. *Receiver's Amended Memorandum of Law In Support of Motion to Quash Subpoena*, SEC Docket No. 610 (Dec. 3, 2010); *Investor Respondents' Memorandum of Law In Opposition to the Receiver's Motion to Quash a Subpoena Served on a Third Party*, SEC Docket No. 620 (Dec. 10, 2010); *Order*, SEC Docket No. 640 (Dec. 22, 2010).

Because the Respondents cannot identify any actual prejudice, they resort to abstract—and unfounded—assertions. The Respondents first contend that summary proceedings, simply by virtue of allowing expeditious litigation or litigation “upon narrower lines,” are prejudicial. *Respondents' Objections* at 3. But expeditious does not equate to prejudice. Indeed, the right to a speedy trial is a touchstone of the criminal system that parallels the civil context in which these proceedings are taking place. The Respondents then offer to pay any filing fees and stipulate to the present Scheduling Order if the Receiver would agree to re-file this action as separate plenary proceedings. *Id.* They conclude that the only possible explanation for the Receiver's unwillingness to accept this offer is that the summary proceedings are unfair towards them. But the Court did not set up and authorize summary proceedings solely with these Respondents in view. Rather, the Court authorized the Receiver to bring summary proceedings to allow

the Receiver to more efficiently fulfill his broad responsibility to recover *all* assets improperly dissipated by Trevor Cook's Ponzi scheme—not just those in the possession of the Respondents. The Receiver has pursued at least two other actions using these summary proceedings and intends to initiate others. *See, e.g., First Amended Petition for Return of Receivership Assets from Respondent Wells Fargo Home Mortgage*, SEC Docket No. 396 (Aug. 4, 2010); *First Amended Petition for Return of Receivership Assets from Respondent New York Community Bank*, SEC Docket No. 395 (Aug. 4, 2010). The Respondents have not offered to pay the filing fees for *all* summary proceedings—past, present and future.

Finally, the Respondents contend that the Court's Summary Proceeding Order limits their defenses and right to full discovery, and thus their rights are curtailed by the summary proceedings. *Respondents' Objections* at 2, n.1. But nowhere does the Summary Proceedings Order limit the Respondents' defenses. Indeed, the Summary Proceeding Order is fully consonant with Federal Rule of Civil Procedure, which provide for discovery relevant to the claim or defense of any party. Fed. R. Civ. P. 26(b)(1). The Summary Proceedings Order allows discovery relevant to "any statutory or common law defenses [the Respondents] may wish to raise." *Order Allowing Summary Proceedings*, SEC Docket No. 380, at 5.

**3. The Receiver Will Not Oppose the Respondents' Demand for A Jury Trial**

The Respondents also object on the basis that Magistrate Judge Noel did not express an opinion as to whether the Respondents have a right to a jury trial. *Respondents' Objections* at 4. The Court did not address that issue because the fact of summary proceedings is simply irrelevant to whether the Respondents are entitled to a jury trial under the Seventh Amendment. *See Receiver's Opposition to Respondents' Motion to Dismiss*, SEC Docket No. 505, at 8–9. Nonetheless, the Receiver will not oppose the Respondents' demand for a jury trial on all issues triable to a jury. Thus, the Respondents' objection on this basis is moot.

**4. The Respondents Have Not Cited Any Case Where the Fact of Summary Proceedings Impacted the Legal Standard Applied to an Appeal**

The Respondents make their final objection by noting that Magistrate Judge Noel's Report and Recommendation did not address what legal standard will be applied to any appeal of this action. *Respondents' Objections* at 5. To the contrary, Magistrate Judge Noel's Report and Recommendation explicitly stated that, in the event the Respondents wish to appeal from a final judgment, they may file a notice of appeal with the district court and appeal to the 8th Circuit. *R&R* at 8, n.4. Moreover, Respondents have not cited a single case where the fact of a summary proceeding had any effect whatsoever on the standards applied to appeals. Nor have they articulated any reason why an appeal from these summary proceedings would be treated any differently were they plenary. Many of the

Federal Courts of Appeals cases discussed in the Receiver's and Respondents' briefs were appeals of summary proceedings instituted by a court-appointed receiver. *See, e.g., SEC v. Wencke*, 783 F.2d at 835; *SEC v. Elliot*, 953 F.2d at 1566; *SEC v. Ross*, 504 F.3d 1130, 1143–44 (9th Cir. 2007). There simply is no lack of “clarity” on this issue, as Respondents would have the Court believe.

### **CONCLUSION**

For the reasons set forth above, the Court should adopt Magistrate Judge Noel's Report and Recommendation and enter an order denying the Respondent's Motion to Dismiss.

Dated: March 25, 2011

Respectfully submitted,

s/ Peter M. Kohlhepp

R.J. Zayed (MN Bar No. 309,849)

Tara C. Norgard (MN Bar No. 307,683)

Russell J. Rigby (MN Bar No. 323,652)

Brian W. Hayes (MN Bar No. 294,585)

Peter M. Kohlhepp (MN Bar No. 390,454)

Carlson, Caspers, Vandenburg & Lindquist

225 S. 6<sup>th</sup> Street, Suite 3200

Minneapolis, MN 55402

Telephone: (612) 436-9600

Facsimile: (612) 436-9605

Email: rzayed@ccvl.com