
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

U.S. COMMODITY FUTURES
TRADING COMMISSION,

Plaintiff(s)

Case No: 09-cv-3332 MJD/JJK

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/JJK

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.

**MEMORANDUM OF LAW IN SUPPORT OF RECEIVER'S MOTION
FOR AN ORDER FOR A RULE TO SHOW CAUSE
AGAINST L. EDWARD BAKER**

R.J. Zayed, Receiver in *CFTC v. Cook et al.*, 09-cv-3332 and *SEC v. Cook et al.*, 09-cv-3333, has moved the Court for an Order for a Rule to Show Cause as to why L. Edward Baker should not be held in contempt for violation of this Court's Orders. This memorandum explains the background for this motion and the reasons it should be granted.

FACTS

A. The Court's Receivership and Asset Freeze Orders

These cases concern a \$190 million Ponzi scheme run by Trevor Cook and others. On November 23, 2009, the Court appointed R.J. Zayed as Receiver of the Defendant and Relief Defendant Estates and froze all assets of the Receiver Estates. *See Order Appointing Receiver*, SEC Docket No. 13 (Nov. 23, 2009); *see also Amended Order Appointing Receiver*, SEC Docket No. 18 (Nov. 24, 2009); *Second Amended Order Appointing Receiver*, SEC Docket No. 68 (Dec. 11, 2009); *Order Imposing Asset Freeze and Other Ancillary Relief*, SEC Docket No. 14 (November 23, 2009); *Order Identifying Frozen Accounts*, SEC Docket No. 15 (November 23, 2009); *Ex Parte Statutory Restraining Order*, CFTC Docket No. 21 (November 23, 2009); *Order Continuing Appointment of Temporary Receiver*, CFTC Docket No. 96 (Dec. 11, 2009).

The Receiver is charged with locating and preserving all assets that remain from the scheme for the benefit of over 1,000 investors who were defrauded by Cook and his

colleagues. In doing so, the Receiver is authorized to, among other things, “take such action as necessary and appropriate to prevent the dissipation or concealment of any funds or assets or for the preservation of any such funds and assets of the Receiver Estates.” *Second Amended Order Appointing Receiver*, SEC Docket No. 18, at I.G.

The Court’s Orders provide clear instructions to anyone in possession of Receivership assets. All assets of the Defendants and Relief Defendants are frozen, including “all other funds, accounts, and other assets to which proceeds from the Defendants’ offering can be traced or which were acquired with proceeds of the Defendants’ offering.” *Order Imposing Asset Freeze and Other Ancillary Relief*, SEC Docket No. 14, at I. All persons in possession of Receivership assets are ordered to turn over to the Receiver “any and all property, including records of any nature, of which any of the Receiver estates are the owners or have an interest in” *Second Amended Order Appointing Receiver*, SEC Docket 68, at IX. In addition, anyone holding or controlling Receivership assets is prohibited from disposing of or taking any action that interferes with “the taking control, possession, or management, by the Receiver, of any assets of the Receiver Estates, or . . . in any way interfere[s] with or harass the Receiver, or . . . interfere[s] in any manner with the exclusive jurisdiction of this Court over the Receiver Estates.” *Second Amended Order Appointing Receiver*, SEC Docket No. 68, at VII.D.; *see also Order Imposing Asset Freeze and Other Ancillary Relief*, SEC Docket No. 14, at p. 8; *Ex Parte Statutory Restraining Order*, CFTC Docket No. 21, at I.A.

B. Baker's Receipt of Receivership Assets

Baker is the founder and Chairman & CEO of Mesa Holdings, a holding company of SEC-registered investment advisor firms. (Exhibit B to Declaration of Tara C. Norgard in Support of Receiver's Motion for an Order for a Rule to Show Cause Against L. Edward Baker, filed herewith ("Norgard Decl."), at ¶ 6.) Between September 8, 2008, and June 1, 2009, Cook, through the Receivership Entity Oxford Global FX, invested approximately \$3.75 million in Mesa. All of this money was obtained from defrauded investors pursuant to Cook's Ponzi scheme. Of the \$3.75 million, \$2 million was an equity investment (Norgard Decl. Ex. A, ¶ 16; Ex. C); \$1.05 million was unsecured debt (Norgard Decl. Ex. A ¶ 16; Ex. D); \$500,000 was secured debt in the form of a zero coupon note (Norgard Decl. Ex. A ¶ 16; Ex. E); and approximately \$200,000 was invested in currency investment funds pursuant to private placement memoranda (Norgard Decl. Ex. F).

Prior to the Receivership, Cook brought a lawsuit in Hennepin County District Court against Baker and Mesa stemming from these investments. (Norgard Decl. Ex. A.) Among other things, Cook alleged breach of contract, conversion, and breach of fiduciary duty. (*Id.*) The Receiver now stands in the shoes of Cook in that lawsuit. On or around December 3, 2009, the Receiver and his counsel spoke with Baker's counsel regarding this Court's Orders and the Hennepin County action. (Norgard Decl. ¶ 8.) On December 9, 2009, the Receiver and Baker's counsel filed a stipulation with the Hennepin County District Court requesting that the litigation be stayed pursuant to this Court's Orders. (Norgard Decl. Ex. G.) On January 20, 2010, the Receiver and Baker's counsel wrote a

joint letter to the Honorable George F. McGunnigle of the Hennepin County District Court, advising that:

Among other things, Judge Davis has stayed the continuation or enforcement of any suit or proceeding against or affecting any of the Defendants, Relief Defendants, or Receiver Estates Nevertheless, the parties to the above-captioned case (with the Receiver standing in the place of Trevor Cook) are trying to work toward an amicable agreement to resolve this dispute

(Norgard Decl. Ex. H.) This Court's Receivership and Asset Freeze Orders were enclosed with the letter to Judge McGunnigle. (*Id.*)

On May 20, 2010, the Receiver met personally with Baker and his attorneys to discuss potential settlement of the Receiver's claims against Baker and Mesa. (Norgard Decl. ¶ 11.) In that meeting, the Receiver made clear that Baker was subject to this Court's Receivership and Freeze Orders. (*Id.*) The Receiver also explicitly told Baker about the Receivership's claims against Baker for return of the investor money that flowed to him and his business entities from the defrauded investors. (*Id.*) After that meeting, Receivership attorneys continued to work and meet with Baker and his attorneys in an attempt to reach a global settlement of the Hennepin County lawsuit and the other (yet unfiled) claims the Receiver had against Baker. (*Id.*)

C. Baker's Bankruptcy Filing

Despite having actual notice of this Court's Receivership and Freeze Orders and their application to him, and without giving any notice to the Receiver, Baker filed a Chapter 7 bankruptcy petition on June 11, 2010. *In re Baker*, BKY No. 10-44428,

Docket No. 1. Baker listed the Receiver as a creditor holding an unsecured claim of \$3,757,728.75. *Id.* Baker filed his bankruptcy petition as a “no asset” case.¹

Forced into a bankruptcy forum by Baker’s contemptuous actions, the Receiver has had to retain bankruptcy counsel to carry out his duties under the Court’s Orders and to protect his claim against Baker for the benefit of the defrauded investors. On July 7, 2010, the Receiver filed a Motion for Relief from the Automatic Stay, which sought authorization to pursue this motion for contempt and liquidate his claims against Baker in this Court. *Id.*, Docket No. 17.

The bankruptcy court granted the motion in part, lifting the automatic stay for purposes of these contempt proceedings. *Id.*, Docket No. 22. However, the bankruptcy court denied the motion insofar as the Receiver sought relief from the stay to liquidate his claims against Baker. *Id.* As a result of the denial, the Receiver has incurred additional expenses in recovering assets that were provided to Baker. For example, to obtain discovery in the bankruptcy court for purposes of liquidating his claim, the Receiver, through his bankruptcy counsel, had to file a motion for examination under Fed. R. Bankr. P. 2004. *Id.*, Docket No. 23. Moreover, to discharge his duties as Receiver, and to avoid the burden of doing so in different forums with different rules and potentially different treatment of similar asset retrieval issues, the Receiver has appealed the bankruptcy court’s order denying relief from the automatic stay. *Id.* at Docket Nos. 24, 25. In sum, Baker’s bankruptcy filing has interfered with this Court’s jurisdiction and

¹ Baker’s case is designated as a “zero asset” case because his bankruptcy notice instructs creditors not to file claims. This is because his petition indicates there are no assets in the bankruptcy estate.

infused unnecessary cost and complexity into the Receiver's ability to discharge his duties under the Court's Orders.

ARGUMENT

The Court has inherent authority to enforce compliance with its own orders. *Shillitani v. United States*, 384 U.S. 364, 370 (1966). This may be done through civil contempt proceedings. *In re Long Visitor*, 523 F.2d 443, 448 (8th Cir. 1975) (citing *Shillitani v. United States*, 384 U.S. 364 (1966)).

A. Civil Contempt Proceedings

Civil contempt proceedings are authorized by 18 U.S.C. § 401(3) which states, in pertinent part, that “[a] court of the United States shall have power to punish by fine or imprisonment, or both, at its discretion, such contempt of its authority, and none other, as ... [d]isobedience or resistance to its lawful writ, process, order, rule, decree, or command.” The purpose of a civil contempt proceeding is wholly remedial and is intended to either coerce compliance with a prior court order or compensate for losses suffered as a result of non-compliance with that order. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *Commodity Futures Trading Commission v. Premex, Inc.*, 655 F.2d 779, 785 (7th Cir. 1981).

In a civil contempt proceeding, the moving party must prove, by clear and convincing evidence, that the respondent has violated the court's order. *McComb*, 336 U.S. at 191; *NLRB v. Ralph Printing & Lithography Co.*, 433 F.2d 1058, 1062 (8th Cir. 1970). To make a *prima facie* showing of contempt the movant need only prove that a respondent has failed to comply with a valid court order. *Heinold Hog Market, Inc. v.*

McCoy, 700 F.2d 611, 615 (10th Cir. 1983). A district court does not have to find that the violation was “willful” or intentional. *McComb*, 336 U.S. at 191; *United States v. Ofe*, 572 F.2d 656 (8th Cir. 1978); *Faegre & Benson, LLP v. Purdy*, 367 F.Supp.2d 1238, 1243 (D. Minn. 2005). In civil contempt proceedings, the issue is compliance with the order, not intent to violate it. *In re General Motors Corp.*, 61 F. 3d 256, 258 (4th Cir. 1995); *Donovan v. Mazzola*, 716 F.2d 1226, 1240 (9th Cir. 1983), *cert. denied*, 464 U.S. 1040 (1984). As stated by the United States Supreme Court:

The absence of willfulness does not relieve from civil contempt Since the purpose is remedial, it matters not with what intent the defendant did the prohibited act. The decree was not fashioned so as to grant or withhold its benefits dependent on the state of minds of respondents. . . . An act does not cease to be a violation of a law and a decree merely because it may have been done innocently.

Mc Comb, 336 U.S. at 191. Nor does reliance on the advice of counsel excuse non-compliance with an order that is, in fact, lawful. *United States v. Asay*, 614 F.2d 655, 661 (9th Cir. 1980).

Once a *prima facie* case has been shown, the burden shifts to the respondent to come forward with evidence showing categorically and in detail why he or she was unable to comply with court orders. *United States v. Rylander*, 460 U.S. 752, 755, 757 (1983) *reh. denied*, 462 U.S. 1112 (1983); *Chicago Truck Drivers v. Brotherhood Labor Leasing*, 207 F.3d 500, 505 (8th Cir. 2000). Further, if the respondent is responsible for an inability to comply, such a defense is unavailable. *United States v. Bryan*, 339 U.S. 323, 330-32 (1950); *U.S. v. Seetapun*, 750 F.2d 601, 605 (7th Cir. Ill. 1984). Good faith on the part of the respondent does not constitute a defense. *Donovan*, 716 F.2d at 1240.

The Court “has broad discretion in using its contempt power to require adherence to court orders. *O’Conner v. Midwest Pipe Fabricators, Inc.*, 972 F.2d 1204, 1209 (10th Cir. 1992), citing *United States v. Riewe*, 676 F.2d 418 (10th Cir. 1982). Judicial sanctions in civil contempt proceedings may be employed for either or both of two purposes: 1) to compensate the complainant for losses sustained; and 2) to coerce the contemnor into compliance with the court’s order. *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1947); *Chaganti & Associates, P.C. v. Nowotny*, 470 F.3d 1215, 1225 (8th Cir. 2006).

B. Baker Violated This Court’s Orders.

The Eighth Circuit has held that civil contempt “consists in failing to do something ordered to be done by a court in a civil action for the benefit of the opposing party therein, or by willfully destroying, removing, concealing, or disposing of the subject-matter of the litigation.” *Dakota Corporation v. Slope County, N.D.*, 75 F. 2d 584, 586 (8th Cir. 1935). The Court's Second Amended Order Appointing Receiver in the SEC Action specifically stays all borrowers and other persons from commencing a proceeding "affecting any of the Defendants, Relief Defendants, or Receiver Estates." Docket No. 68, at VII.A. The Order Continuing Appointment of the Temporary Receiver in the CFTC Action is equally clear that, except by leave of the Court, all persons and entities are stayed from "[d]oing any act or thing to interfere with the Receiver taking control, possession or management of the property subject to the receivership, or to in any way interfere with the Receiver or the duties of the Receiver[.]" Docket No. 96, at IV.

Baker's bankruptcy is a proceeding that affects the Receiver Estates and that interferes with the Receiver taking control of Receivership property that was fraudulently transferred to Baker and Mesa. Thus, Baker's commencement of bankruptcy proceedings—without the Receiver's cooperation or permission and without leave of the Court—is in contempt of the Court's Orders.

C. Baker's Violations Have Hampered the Receiver's Ability to Perform His Duties and Caused Undue Strain on Receiver Resources.

By violating the Court's Asset Freeze and Receivership Orders, Baker has unilaterally imposed undue expense and complication on the Receiver's recovery effort.

With respect to his claims against Baker personally, the Receiver was forced to engage specialized bankruptcy counsel to educate another court, in a different forum, with unique rules and procedures, for an action that rightfully falls under this Court's exclusive Receivership jurisdiction. These expenditures of extra time and resources will continue as long as the Receiver is subject to the automatic bankruptcy stay. None of these additional resources would have been expended had Baker not violated the Court's Orders in the first instance.

Moreover, all of the Receiver's other claims for return of investor funds have or will be brought before this Court in summary or similar proceedings. By relegating the Receiver's claim to bankruptcy, Baker has not only violated this Court's Orders, he has attempted to extract the Receiver's claim from the jurisdiction of this Court, thereby threatening inconsistent results and treatment of individuals who have unjustly received Receivership funds.

Baker's bankruptcy also severely complicates the Receiver's ability to recover investor funds from Mesa and other Baker entities. As alleged in the Hennepin County case, Baker is the alter ego of his various business entities, including Mesa. As such, the Receiver must now evaluate whether the automatic bankruptcy stay precludes him from proceeding against Baker's alter ego entities.

Baker's bankruptcy also threatens to extinguish the Receiver's claims against Baker and Baker's entities altogether. In Chapter 7 bankruptcy, creditor claims typically are pooled and paid out of the bankruptcy estate on a pro rata basis, then discharged at the close of the bankruptcy case. In his bankruptcy petition, which is a no asset case, Baker lists an uncontested claim by the Receiver for the \$3.75 million that Baker and Mesa received from Receivership entities. If processed through and discharged in this bankruptcy case, not only will the Receiver be left with nothing, if it is determined that there was full accord and satisfaction of the Receiver's \$3.75 million claim in bankruptcy, he may be unable to recover those funds from any other entity after the bankruptcy case is closed.

There are many other complications and costs that Baker's contempt has imposed. If any assets are discovered, they are defaulted to the bankruptcy estate where all creditors are entitled to a share. Bankruptcy has also impeded, and possibly foreclosed, settlement negotiations between Baker and the Receiver. Because the bankruptcy laws prohibit Baker from conveying anything of value from the bankruptcy estate, and because he is personally named in the Hennepin County action, settlement has been thrown into question.

This Court's Orders were issued to facilitate recovery of investor money from many individuals and entities. Baker had actual notice of these Orders at least six months before he filed his bankruptcy petition. If Baker is allowed to disobey the Court's Orders by filing bankruptcy and thwart recovery by hiding behind the automatic bankruptcy stay, the Receiver's ability to fulfill his mandate becomes exponentially more expensive—and potentially fruitless with respect to his claims against Baker and his business entities.

D. Remedies Sought by the Receiver

If this Court finds Baker in contempt, the Receiver requests that this Court require him to pay the Receiver's attorneys' fees incurred in preparation of the pleadings filed herewith and in preparation of all the Receiver's filings in the bankruptcy court. An award of attorneys' fees is an appropriate sanction for civil contempt. *See, e.g., Kehm v. Procter & Gamble Mfg. Co.*, 724 F.2d 630, 630 (8th Cir. 1984). Attorneys' fees are especially appropriate in this action where Baker's contemptuous bankruptcy filing has incurred undue expense for the Receiver. *See Chicago Truck Drivers v. Bhd. Labor Leasing*, 207 F.3d 500, 505 (8th Cir. 2000) ("Civil contempt may be employed . . . to compensate the complainant for losses sustained[.]").

The Receiver further requests that the Court except from bankruptcy discharge the \$3.75 million claim to the Receiver listed on Baker's bankruptcy petition and the award of attorneys' fees requested in this motion. But for Baker's contemptuous bankruptcy filing, the Receiver would be able to pursue his claims against Baker in fulfillment of this Court's Receivership Orders. Thus, excepting the Receiver's claims from discharge in bankruptcy is the only way to put the parties in the position they would have been in had

Baker not violated this Court's orders. *See Chicago Truck Drivers*, 207 F.3d at 504–05 (stating that "[o]ne of the overarching goals of a court's contempt power is to ensure that litigants do not anoint themselves with the power to adjudge the validity of orders to which they are subject" and that civil contempt may be employed to "coerce the defendant into compliance with a court order").

This Court has concurrent jurisdiction with the bankruptcy court on most discharge issues. *In re Bingham*, 163 B.R. 769, 771–72 (Bankr. N.D. Tex. 1994); *see also In re Everly*, 346 B.R. 791, 796 (B.A.P. 8th Cir. 2006) (holding that "[T]he bankruptcy court shares jurisdiction with other courts of competent jurisdiction" over all exceptions to discharge other than those in 11 U.S.C. § 523(a)(2), (4), or (6)). This Court has the power to except the Receiver's claim from discharge under, for example, 11 U.S.C. § 523(a)(19). As reflected in the Hennepin County pleadings, the Receiver's claims against Baker include violation of state securities laws and common law fraud in connection with the purchase of a security. (*See* Norgard Decl. Exs. A and B.) Moreover, as the Receiver expressly advised on May 20, 2010, the Receiver also has claims against Baker for return of the investor money that flowed to him and his business entities from the defrauded investors. (Norgard Decl. ¶ 11.) Exception from discharge also can be made under 11 U.S.C. § 105, which allows for any order to be entered to carry out the integrity of the bankruptcy process.

CONCLUSION

For all of the forgoing reasons, the Receiver respectfully requests that this Court grant the Receiver's Motion and enter an order requiring L. Edward Baker to show cause as to why he should not be held in contempt of Court.

Dated: August 11, 2010

Respectfully submitted,

s/ R.J. Zayed

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