
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

R.J. Zayed, in his Capacity as Court-Appointed
Receiver for Trevor G. Cook et al.,

Petitioner,

v.

Case No: 11-cv-01042 SRN/FLN

David Buysse, Steven and Pamela Cheney,
Walter Defiel, John Dzik, Terry Frahm,
Steven and Jenene Fredell, William Harris,
Michael and Jennifer Heise,
Michael and Cynthia Hillesheim, Larry Hopfenspirger,
Steven Kautzman, James McIntosh,
George and Karen Morrisset, Reynold Sundstrom, and
Dot Anderson,

Respondent.

**RECEIVER'S MEMORANDUM OF LAW IN SUPPORT OF RECEIVER'S
MOTION FOR A PROTECTIVE ORDER AGAINST RESPONDENT
ANDERSON'S REQUEST TO DEPOSE THE RECEIVER OR A PERSON
DESIGNATED BY HIM UNDER FEDERAL RULE OF CIVIL
PROCEDURE 30(b)(6)**

The Receiver seeks a Protective Order against a deposition sought by Respondent Dot Anderson of the Receivership under Federal Rule of Civil Procedure 30(b)(6) that has no legitimate discovery purpose, and, moreover, would impose an enormous, costly, and needless burden on the Receivership. The end result of forcing the Receiver to prepare and testify under Rule 30(b)(6) would not provide any additional information to Respondent Anderson, vividly illustrating the extraordinary waste that the requested depositions would impose on

the Receiver and the Court. Every conceivable fact related to this clawback action has already been produced through documents, written discovery responses, and depositions. There is nothing more to be discovered through a deposition of the Receivership that is not work product or privileged information. Testimony by the Receiver or any representative of a Receivership Entity under Rule 30(b)(6) would necessarily require the Receiver and attorneys who work with him to prepare a witness to testify, inevitably disclosing their legal and factual theories in the process. Such discovery is prohibited under Federal Rule of Civil Procedure 26 and controlling Eighth Circuit precedent.

The Rule 30(b)(6) deposition the Respondent Anderson seeks is also entirely duplicative of other discovery in this case and would impose an enormous burden on Receivership resources. What Respondent Anderson seeks here is essentially two bites at the apple—having served written discovery directed at the Receiver’s contentions, she now claims a right to re-visit the Receiver’s answers via live deposition testimony. Moreover, without the buffer of written discovery, the only conceivable way for the Receiver to protect his trial strategy and legal theories during a 30(b)(6) deposition would be to hire a non-attorney to review and familiarize himself with the millions of documents that the Receiver has seized, and then designate that person as a Rule 30(b)(6) witness. This would be an enormous and unwarranted drain Receivership resources that outweighs any benefit to the Respondent may hope to gain.

Respondent Anderson has not—and cannot—make the required showing of need for the noticed deposition because every fact that could lead to the discovery of admissible evidence in this case is already known to her or is readily available to her in the discovery process through less burdensome processes.

II. BACKGROUND OF THE CASE

In this action, as to Respondent Anderson the Receiver seeks to claw back \$102,000 that was fraudulently and preferentially transferred to her by Trevor Cook (“Cook”) on July 15, 2009.

In June 2009 Respondent Anderson testified that she “invested” money in Cook’s fraudulent scheme through her grandson, Grant Grzybowski, an employee of Cook. Specifically, Respondent Anderson testified that she learned about the “investment” opportunity with Cook’s fraudulent currency program “because my grandson worked for Trevor [Cook].” (Declaration of Peter Kohlhepp, September 19, 2011 (“Kohlhepp Decl. II”), ¶ 2, Ex. 1, at D. Anderson Dep. Tr. at 11:21.) Respondent Anderson testified that she then “invested” \$100,000.00 in June 2009. (*Id.* at D. Anderson Dep. Tr. at 18:12.) She provided an additional \$2,000 as an up front cost for the investment.

On July 7, 2009, a group of investors who had been trying, without success, to withdraw their money from the Cook entities, filed suit against Trevor Cook and others. (the “Phillips case”) *Phillips v. Cook et al.*, 09-cv-1732 (Docket No. 1) (D. Minn.). That same day, Chief Judge Davis issued a Temporary Restraining Order in the Phillips case freezing certain assets in the control of defendants and

bank accounts that the investor-plaintiffs were able to identify as of that date.

Phillips v. Cook et al., 09-cv-1732 (Docket No. 37) (D. Minn.). On July 9, 2009,

the Minneapolis Star Tribune published an article about the Phillips case and how

Cook did not honor their requests to withdraw from the investment program.

(Kohlhepp Decl. II, ¶ 3, Ex. 2.) A second article was published on July 12, 2009.

(*Id.* at ¶ 4, Ex. 3.) On July 15, 2009, Judge Ann Montgomery issued a second TRO

covering additional assets that had been discovered since the suit initially was

filed. *Phillips v. Cook et al.*, 09-cv-1732 (Docket No. 38) (D. Minn.).¹

Respondent Anderson testified that at some point on or before July 15, 2009, she read a Star Tribune article “in regards . . . to the Ponzi scheme with relation to Trevor [Cook].” (Kohlhepp Decl. II, ¶ 2, Ex. 1 at D. Anderson Dep. Tr. at 45:1-8.) Respondent Anderson immediately called Grzybowski and asked him

to close her account. (*Id.* at D. Anderson Dep. Tr. at 44:10-25, 45:14-20.)

Specifically, Respondent Anderson called Grzybowski and asked him “is it possible to get my investment back.” (*Id.* at D. Anderson Dep. Tr. at 48:14-20.)

Grzybowski responded that he would try to do that. (*Id.* at D. Anderson Dep. Tr. at 48:14-20.) Either that same day or the next day Grzybowski called Respondent

Anderson back and told her that he was able to get her money out and that it

would be sent back to her TCF account. (*Id.* at D. Anderson Dep. Tr. at 52:23-

¹ Chief Judge Davis issued additional orders in the Phillips case pertaining to accounts held by Cook, his co-conspirators, and entities associated with Cook’s scheme on July 24, 2009 (Docket No. 58), September 15, 2009 (Docket No. 136), and September 18, 2009 (Docket No. 143).

53:1.) Grzybowski also told Respondent Anderson that if she had called six hours later, she would not have been able to get the money out. (*Id.* at D. Anderson Dep. Tr. at 55:1-12.) On or about July 15, 2009, Cook caused two wires, in the amounts of \$101,000.00 and \$1,000.00 respectively, which consisted of funds from a commingled account involving other defrauded investors, to be sent from Basel Group LLC account number XXX-5214 to Respondent Anderson's TCF Bank account number XXX-XX-2219. Both before and after July 15, 2009, many other investors in Cook's scheme were desperately but unsuccessfully trying to get their money out. *See, e.g., Phillips v. Cook et al.*, 09-cv-1732 (D. Minn.), at Docket Nos. 24, 122, and 197 (First, Second, and Third Amended Complaints).

On November 23, 2009, the SEC and the CFTC brought suit against Cook, Patrick Kiley, and various fraudulent entities that they used to perpetrate the fraud. *SEC v. Cook, et al.*, 09-cv-3333 (D. Minn.) and *CFTC v. Cook, et al.*, 09-cv-3332 (D. Minn.). Chief Judge Michael J. Davis issued another Asset Freeze Order and appointed R.J. Zayed as the Receiver in both actions. Although investors had given Cook and his colleagues \$190 million to invest in various "currency programs," when the Receiver was appointed only \$1,843,609.55 remained in the Receivership Entities' accounts at Associated Bank and Wells Fargo.

On April 13, 2010, Cook pleaded guilty to the fraud and is now serving a 25 year sentence in federal prison. *U.S. v. Cook*, 10-cr-75, Docket No. 27 (D. Minn.) One of his co-conspirators, Chris Pettengill, has also pleaded guilty and is awaiting sentencing. *U.S. v. Pettengill*, 11-cr-192, Docket No. 6 (D. Minn. June

13, 2011.) On March 7, 2011, the SEC brought suit against another of Cook's co-conspirators, Jason Bo-Alan Beckman; the Court appointed R.J. Zayed as the Receiver in that action, as well. *SEC v. Beckman et al.*, 11-cv-574, Docket No. 9, 10 (D. Minn.). On July 19, 2011, the U.S. Attorney's Office indicted Beckman and two other co-conspirators, Patrick Kiley and Gerald Durand, on criminal charges related to their roles in the Ponzi scheme. *U.S. v. Beckman et al.*, 11-cr-228 (D. Minn.).

Early in his investigation, the Receiver discovered that \$102,000 had been sent to Respondent Anderson the same day as the second Asset Freeze Order was issued in the Phillips case. Pursuant to Chief Judge Davis's Receivership Orders, e.g., Second Amended Order Appointing Receiver, *SEC v. Cook*, 09-cv-3333 (Docket No. 68), at I(H) (D. Minn. Dec. 11, 2009), the Receiver interviewed Respondent Anderson by telephone on March 3, 2010. (Kohlhepp Decl. II ¶ 5.) The Receiver also interviewed Grant Gryzbowski on January 6, 2010. (*Id.* ¶ 6.)²

On July 20, 2010 Chief Judge Davis issued an Order authorizing summary proceedings to recover funds dissipated by Cook and his co-conspirators in the course of the Ponzi scheme, including the \$102,000 that was wired to Respondent Anderson. *Order Allowing Summary Proceedings*, 09-cv-3333, Docket No. 380 (D. Minn. July 20, 2010); *Order Allowing Summary Proceedings*, 09-cv-3332,

² The Receiver did not participate in or attend the interviews of Respondent Anderson or Grant Gryzbowski.

Docket No. 350 (D. Minn. July 20, 2010). On July 23, 2010, the Receiver brought this summary proceeding.

II. DISCOVERY IN THIS ACTION

A. The Court's Order on Summary Proceedings

As part of the Order authorizing this summary proceeding, Chief Judge Davis limited discovery to the following two issues:

- i. The amount and/or value of Receivership funds or assets received; and
- ii. Any statutory or common law defenses the third [party] recipient of Receivership assets may wish to raise.

Order Allowing Summary Proceedings, 09-cv-3333, Docket No. 380 (D. Minn. July 20, 2010); *Order Allowing Summary Proceedings*, 09-cv-3332, Docket No. 350 (D. Minn. July 20, 2010).

B. Discovery By Respondent Anderson

Discovery in this summary proceeding commenced on November 12, 2010. Since that time, the Receiver has provided and participated in extensive fact discovery:

- The Receiver has copied and affirmatively produced over 25,813 pages of documents to Respondent Anderson. The search for and production of these documents included all documents and things in the possession, custody and control of the Receiver, whether from the files the Receiver seized from the fraudulent entities or any other source. (Kohlhepp Decl. II, ¶ 7.)

- To the extent the Receiver has documents obtained from the SEC related to this action, the Receiver has obtained permission from the SEC to produce those documents to all Respondents in this action. (Kohlhepp Decl. II, ¶ 8.)
- To the extent the Receiver has documents obtained from his own independent investigation, the Receiver has searched and produced all documents that refer or relate to Respondent Anderson. (Kohlhepp Decl. II, ¶ 9.)
- In addition to producing copies of all documents that relate to or refer to Respondent Anderson, starting in and continuing after January 2011, the Receiver has, under Federal Rule of Civil Procedure 34(b)(2), offered to make available for Respondent Anderson's inspection all hard copy and electronic files that were seized from the fraud. (Kohlhepp Decl. II, ¶¶ 10-16, Exs. 4-10.)
- The Receiver produced all of his investigators' notes from the pre-suit interviews of Respondent Anderson and her grandson, Grant Gryzbowski, and further, made his investigators available for deposition. Counsel for Respondent Anderson also participated in the depositions of the Receiver's investigators, Rick Ostrom on July 18, 2011 and David Austrum, on August 11, 2011. (Kohlhepp Decl. II, ¶ 17.)
- The Receiver has produced every transcript and exhibit from the ten depositions of Trevor Cook in fall 2010. (Kohlhepp Decl. II, ¶ 19, Ex. 11.)

- The Receiver stipulated to a motion by other Respondents in this action for an Order to make Trevor Cook available for deposition. (Docket 109.) Counsel for the Receiver assisted opposing counsel in arranging for that deposition, which took place on July 20, 2011 in the Greeneville federal prison where Mr. Cook is incarcerated. Counsel for Respondent Anderson participated in that deposition by providing questions to be asked on her behalf by counsel for other Respondents.
- Counsel for Respondent Anderson participated in the deposition of former Cook employee Ryan Moeller on July 27, 2011. Counsel for Respondent Anderson also participated in the deposition Respondent Anderson's grandson, former Cook employee Grant Grzybowski, on September 2, 2011. The Receiver rescheduled this deposition three times to accommodate Anderson's counsel's schedule. (Kohlhepp Decl. II, ¶ 19.)

C. Respondent Anderson's First Rule 30(b)(6) Notice

On July 14, 2011 Respondent Anderson served a Rule 30(b)(6) notice on the Receiver. (Kohlhepp Decl. II, ¶ 20, Ex. 12.) The notice sought testimony regarding "each and every fact" that the Receiver contended supported his allegations with respect to Respondent Anderson (Topics 1-10, 13-14), as well as "[t]he circumstances involving the return to Dot Anderson of \$102,000 in July 2009, including, without limitation, the identification of each person involved and why the funds were returned to her"; and "[h]ow much money Dot Anderson provided to any Receivership Entity, and the terms under which Mrs. Anderson's

money could be returned to her.” (Topics 11-12). (*Id.*)

In response, counsel for the Receiver advised Respondent Anderson of the Receiver’s objections and, in an effort to avoid costly and needless discovery disputes, suggested the Respondent Anderson obtain the factual information supporting the Receiver’s allegations through interrogatories. (Kohlhepp Decl. II, ¶ 21, Ex. 13.) Respondent Anderson then signed a joint stipulation to extend the discovery deadlines to allow Respondents (Respondent Anderson included) time to obtain the information they sought through interrogatories. (Docket 113.) Respondent Anderson agreed to withdraw her deposition notice, but reserved her right to pursue and object to all discovery. *Id.* at 2.

On August 19, 2011 the Receiver served supplemental responses, totaling 22 pages, to the fifteen interrogatories Respondent Anderson had served as part of her first set of written discovery. (Kohlhepp Decl. II, ¶ 22, Ex. 14.) On August 1, 2011, the Receiver provided his response to Respondent Anderson’s second set of written discovery, including substantive responses to four Interrogatories. (Kohlhepp Decl. II, ¶ 23, Ex. 15.) Respondent Anderson also served a third set of written discovery on August 15, 2011, including four additional interrogatories, which the Receiver substantively responded to on September 14, 2011. (Kohlhepp Decl. II, ¶ 24, Ex. 16.)

D. Respondent Anderson’s Second Rule 30(b)(6) Notice

Respondent Anderson never advised the Receiver of any alleged deficiencies in any of the discovery responses served by the Receiver, including

the contention interrogatories at the heart of this motion. Instead, without warning and after business hours on Friday, September 9, 2011, Respondent Anderson served another notice of deposition pursuant to Rule 30(b)(6), which included the original topics from her July 14, 2011 notice, and adding the following:

15. The reasons why Basel International or any entity with “Basel” in its name was created.
16. The status of any Basel entity, including, without limitation:
 - a. whether any clients’ funds were provided to Basel for investment were actually invested;
 - b. What investors provided funds for any “Basel” entity;
 - c. Withdrawal requests from any “Basel” entity;
 - d. Basel’ bank accounts;
 - e. Any Receivership Entity’s efforts to return funds to Basel investors;
 - f. Any Basel entity’s role in the alleged Cook Ponzi scheme.

(Kohlhepp Decl. II, ¶ 25, Ex. 17.) The deposition notice demanded the deposition a mere four business days later, on September 15, 2011. *Id.*

The morning of the next business day, counsel for the Receiver responded that the topics listed in the Rule 30(b)(6) notice were duplicative of the interrogatories that the Receiver agreed to supplement pursuant to the parties’ July 21, 2011 stipulation and that the Receiver had responded to those interrogatories over three weeks earlier. (Kohlhepp Decl. II, ¶ 16, Ex. 10.) Counsel for the Receiver further explained that Respondent Anderson had failed to identify any deficiencies in the supplemental responses. *Id.* Because the goal of the stipulation and interrogatory responses was to provide Respondent Anderson with the requested discovery without the cost and distraction of motion practice on the

propriety of the requested deposition, counsel for the Receiver requested that Respondent Anderson identify any alleged deficiencies in the Receiver's interrogatory responses and set up a time for a Local Rule 37.1 meet and confer to discuss them. *Id.*

Respondent Anderson responded that while she would be willing to move the time of the noticed deposition, she believed she was entitled to cross-examine the Receivership Entities' positions on the issues and "probe the basis for [the Receiver's] assertions" through a live witness. (Kohlhepp Decl. II, ¶ 26, Ex. 18.) Respondent Anderson further stated that she was no longer comfortable relying on written responses alone, and that any meet and confer on the Receiver's written discovery responses "would not obviate my request for [a deposition]." (*Id.*) On September 13, 2011 counsel for the Receiver met and conferred with Respondent Anderson over the telephone. Counsel for the Receiver again attempted to meet and confer regarding any alleged deficiencies in the Receiver's interrogatory responses. (Kohlhepp Decl. II, ¶ 27, Ex. 19.) Counsel for Respondent Anderson refused to participate in a L.R. 37.1 meet and confer regarding the Receiver's written discovery responses. (*Id.*) Counsel for Respondent Anderson maintained that she had a right to depose a designee of the Receivership and intended to exercise it regardless of any written discovery. (*Id.*)

III. ARGUMENT

The Federal Rules of Civil Procedure allow for liberal discovery—within certain limitations. *See, e.g., In re ADC Telcoms, ERISA Litig.*, 2005 U.S. Dist.

LEXIS 20224, No. 03-cv-2989, at *18 (D. Minn. Sept. 15, 2005) (“While broad in nature, Rule 26 is not without its limits.”).

“Mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation” are not discoverable. Fed. R. Civ. P. 26(b)(3)(B); *In re GMC*, 209 F.3d 1051, 1054 (8th Cir. 2000). The Court also “must limit the frequency or extent of discovery” if it determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive;
- (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the action; or
- (iii) 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.

Fed. R. Civ. P. 26(b)(2)(C). The Court may also, in association with a request for discovery, “for good cause, issue an order to protect a party or person from annoyance, embarrassment [or] oppression or undue burden or expense. . . .” Fed. R. Civ. P. 26(c). The Court may also, as it has done here, otherwise limit the scope of discovery by Court Order. Fed. R. Civ. P. 26(b)(1); Order, *CFTC v. Cook*, 09-cv-3332 (Docket No. 350) (D. Minn. July 20, 2010); *SEC v. Cook*, 09-cv-3333 (Docket No. 380) (D. Minn. July 20, 2010).

A. The Deposition Respondent Anderson Seeks Should Be Prohibited Because It Seeks Disclosure of Attorney Work Product and Privileged Information

The Eighth Circuit recognizes the problems inherent in what Respondents seek to do: Depositions of attorneys involved with litigation strategy are highly disfavored because such depositions inevitably embroil the court and the parties in time-consuming and distracting disputes regarding what is and what is not privileged information. *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986). Further, the practice detracts from the quality of client representation because the relationship is tainted by the fear that counsel will be interrogated. *Id.* Accordingly, the Eighth Circuit allows a party to depose opposing litigation counsel only in the extremely limited circumstance where:

- i) no other means exist to obtain the information than to depose opposing counsel;
- ii) the information sought is relevant and nonprivileged; and
- iii) the information is crucial to the preparation of the case.

Shelton, 805 F.2d at 1327. As the party seeking the deposition, it is Respondents' burden to make this showing. *Id.*; see also *West Peninsular Title Co. v. Palm Beach County*, 132 F.R.D. 301, 302 (S.D. Fla. 1990).

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- iv) no other means exist to obtain the information than to depose opposing counsel;
- v) the information sought is relevant and nonprivileged; and
- vi) the information is crucial to the preparation of the case.

Shelton, 805 F.2d at 1327. As the party seeking the deposition, it is Respondents' burden to make this showing. *Id.*; see also *West Peninsular Title Co. v. Palm Beach County*, 132 F.R.D. 301, 302 (S.D. Fla. 1990).

1. The *Shelton* Test Applies

The Receiver functions as litigation counsel in this action. The Receiver has an active role in developing litigation strategy. He signed the Petition, as well as other pleadings filed in this action. Courts in the Eighth Circuit apply the *Shelton* rule even to attorneys who, unlike the Receiver, are not intimately involved in the litigation. See *Desert Orchid Ptnrs, L.L.C. v. Transaction Sys. Architects, Inc.*, 237 F.R.D. 215, 220 (D. Neb. 2006) (applying *Shelton* rule to in-house counsel who was involved with the defense strategy even though he was not trial counsel and had some first hand knowledge of relevant facts).

Respondent Anderson cannot escape the *Shelton* test by purporting to seek a 30(b)(6) deposition of a person designated by the Receiver. Courts recognize that Rule 30(b)(6) depositions in this circumstance are often "back door" attempts

to depose opposing counsel. The defendant in *SEC v. Buntrock et al.* argued that its notice of 30(b)(6) deposition to the SEC did not fall under *Shelton* because the SEC could designate any person under the rule. 217 F.R.D. 441, 444 (N.D. Ill. 2003). But the court disagreed: “[T]he notice seeks, if not the deposition of opposing counsel, then the practical equivalent thereof.” *Id.* The *Buntrock* court explained:

The investigation in this matter was conducted by SEC attorneys and by SEC employees working under the direction of attorneys. Thus, the 30(b)(6) notice would necessarily involve the testimony of attorneys assigned to this case, or require those attorneys to prepare other witnesses to testify. . . . [E]ven if a non-attorney witness were designated, they would have to have been prepared by those who conducted the investigation, and that preparation would include disclosure of SEC attorneys’ legal and factual theories.

Id.

Similarly, in *Resolution Trust Corp. v. Kazimour*, a case from this Circuit, the plaintiff corporation was served with a Rule 30(b)(6) notice seeking a designee to testify as to the facts that supported the contentions contained in its complaint. 1993 W.L. 13009325, at *3 (N.D. Ia. 1993). The Plaintiff had no person that it could designate other than its counsel of record. *Id.* The court quashed the defendant’s Rule 30(b)(6) deposition, explaining that “[a] deposition of a person required by the court to be created by counsel under the circumstances of this case would violate Fed.R.Civ.P. 26(b)(3). The process of sifting through scores of documents and selecting the ones that counsel believes are most damaging to a

particular defendant, if revealed at a deposition, would disclose absolutely protected opinion work-product.” *Id.*

Insofar as it relates to Respondent Anderson, this clawback action seeks the return of \$102,000 in funds that were transferred to her on July 15, 2009, as the Ponzi scheme was collapsing. The Receiver was not appointed in this case until nearly four months after the transfer at issue occurred. None of the facts underlying this action are known to the Receiver or his staff first-hand. Rather, the facts underlying the allegations in this action were obtained from the files that the Receiver and his staff seized upon his appointment, documents relative to the transfers that were subpoenaed from banks and financial institutions, and third party witnesses. Testimony by a Rule 30(b)(6) designee of the Receivership necessarily would involve testimony of one of the Receiver’s attorneys or agents or would require the Receivers’ attorneys to prepare a witness to testify, disclosing their legal and factual theories in the process. The exercise of preparing a Rule 30(b)(6) witness of the Receivership would necessarily require the application of fact to law. This is far afield of the purpose a deposition, and even further afield of the purpose of Rule 30(b)(6). Rule 30(b)(6) is meant to be a mechanism for discovering facts from a large, complicated, and opaque corporate entity where it is often impossible to discover the identity of individuals with the particular knowledge sought. A Rule 30(b)(6) deposition is certainly not an appropriate way to test the facts that an entity believes supports its allegations.

Respondent Anderson cannot avoid *Shelton* simply by purporting to depose a designee of the Receivership. As the party seeking the deposition, it is Respondent Anderson's burden to show all three Shelton factors. *Shelton* at 1327; *see also West Peninsular Title Co. v. Palm Beach County*, 132 F.R.D. 301, 302 (S.D. Fla. 1990). Respondent Anderson cannot meet the requirements of the *Shelton* test at all.

2. Respondent Anderson Fails To Meet *Shelton* Factor 1 Because All Facts Respondent Anderson Seeks Have Been Made Known To Her

Every document containing any fact that the Receiver has relative to this action has either been copied and provided to Respondent, or made available for her inspection under Federal Rule of Civil Procedure 34(b). Every witness the Receiver believes to have information relative to this action has been identified to Ms. Anderson in Rule 26(a) disclosures. Moreover, every interrogatory served by Respondent Anderson has been answered in extraordinary detail by the Receiver. Respondent Anderson has never complained that the Receiver's discovery responses were deficient in any way.

The Receiver not only timely responded to all discovery in this action, he supplemented his discovery responses as additional information became known to him. Specifically, on August 19, 2011, the Receiver provided extensive supplemental responses to Respondent Anderson's contention interrogatories nos. 7-14. The topics listed in the Respondent's notice of Rule 30(b)(6) deposition largely parallel these interrogatories:

Respondent’s 30(b)(6) Topics (notice of deposition served on September 9, 2011) (Kohlhepp Decl. II, ¶ 25, Ex. 17)	Respondents’ Interrogatories (Receiver served supplemental responses on August 19, 2011) (Kohlhepp Decl. II, ¶ 22, Ex. 14)
<p>Topic No. 3: “Each and every fact that supports the allegations . . . that the transfer of funds to Dot Anderson was made in an effort to hinder, delay, or defraud creditors.” (See also Topics Nos. 5 and 6, seeking the same information.)</p>	<p>Interrogatory No. 14: “Identify all facts and documents which support the contention . . . that the transfer to Ms. Anderson was made with ‘actual intent to hinder, delay, or defraud creditors.’” (See also Interrogatory No. 10, seeking the same information.)</p>
<p>Topic No. 8: “Each and every fact that supports your claim that Dot Anderson did not receive any payments . . . in good faith.” (See also Topic No. 4, seeking the same information.)</p>	<p>Interrogatory No. 11: “Identify all facts on which you rely for the contention that Ms. Anderson did not take the funds . . . in good faith.” (See also Interrogatory No. 13, seeking the same information.)</p>
<p>Topic 9: “Each and every fact that supports your claim that Dot Anderson did not provide reasonably equivalent value.”</p>	<p>Interrogatory No. 12: “Identify all facts on which you rely for the contention that Ms. Anderson did not provide reasonably equivalent value.”</p>
<p>Topics Nos. 11: “The circumstances involving the return to Dot Anderson of \$102,000 in July 2009, including, without limitation, the identification of each person involved and why the funds were returned to her.” (See also Topics Nos. 1, 2, 10, seeking subsets of the same information.)</p>	<p>Interrogatory No. 9: “Identify the facts, circumstances, and communications related to the transfer of funds . . . to Respondent [Anderson]”</p>

Significantly, Respondent Anderson refuses to identify any substantive deficiencies in *any* of the Receiver’s responses to written discovery and cannot explain why the discovery she now seeks could not have been obtained via contention interrogatories. *See SEC v. Rosenfeld*, 1997 U.S. Dist. LEXIS 13996,

at *9 (S.D.N.Y. Sept. 12, 1997) (“Rosenfeld does not provide any reasons why claim contention interrogatories at the close or towards the close of factual discovery . . . will not provide him with the necessary claim contentions the SEC will make at trial.”); *SEC v. Morelli*, 143 F.R.D. 42, 48 (S.D.N.Y. 1992) (“Given plaintiff’s stated willingness to respond to interrogatories under Fed. R. Civ. P. 33(b), this discovery device represents an appropriate method for Morelli to inquire into the SEC’s contentions.”). Given the myriad work product and privilege issues engendered by depositions of attorneys involved in the investigation of financial fraud, contention interrogatories provide Respondent Anderson with an alternative way to discover the substantial equivalent of information they seek. At the same time, contention interrogatories minimize the likelihood that the Receiver or his attorneys will be forced to disclose information protected by the work product doctrine. It is for this reason that the Receiver suggested that Respondent Anderson serve contention interrogatories, and it is for this reason that the Receiver supplemented the only contention interrogatories that Respondent Anderson ever served in complete, exhaustive detail.

Further, Respondent Anderson has had every opportunity to get facts relevant to this case from first-hand sources. *See Newkirk v. Conagra Foods, Inc.*, 2010 U.S. Dist. LEXIS 60835, at *17 (D. Neb. May 27, 2010) (applying the *Shelton* rule and prohibiting deposition of a party’s attorneys because the party had already produced thousands of pages of relevant documents and made relevant fact witnesses available for deposition). Respondent Anderson was a party to the

transaction at issue and therefore has first-hand knowledge of the facts. She also through her counsel participated in the deposition of Trevor Cook and obtained all transcripts and exhibits from previous depositions of him. In addition, the Receiver produced 35 pages of responses to interrogatories, complete with pin cites to documents and deposition transcripts. The Receiver has also produced numerous documents and made the entirety of the seized files available for inspection. The Receiver produced for deposition his investigators who participated in the pre-suit interviews of Respondent Anderson and Grant Gryzbowski. The Receiver has also served Rule 26(a) disclosures that identify all documents and witnesses who may have discoverable information. In short, Respondent Anderson has had over ten months of unfettered discovery. The alternative means available to her to get what she now seeks under Rule 30(b)(6) were myriad.

3. Respondent Anderson Fails To Meet *Shelton* Factor 2 Because Any Information Beyond The Discoverable Facts Are Privileged

Any information beyond the facts discoverable through the above-referenced documents and witnesses are protected by Federal Rule of Civil Procedure 26(b)(3), attorney-client privilege, and/or the work product doctrine. Courts consistently disallow even 30(b)(6) depositions in circumstances like those present here for the very reason that such depositions are “an inappropriate attempt to depose opposing counsel and to delve into the theories and opinions of [Receivership] attorneys.” *SEC v. Buntrock*, 217 F.R.D. at 444. In *SEC v.*

Rosenfeld, for example, the court issued a protective order precluding the defendant from taking a Rule 30(b)(6) deposition of the SEC. The court concluded that the topics of the noticed 30(b)(6) deposition—which related to the allegations in the SEC’s complaint—“clearly call[ed] for the revealing of information gathered by the SEC attorneys in anticipation of bringing the instant enforcement proceedings.” *Rosenfeld* at *5. See also *SEC v. Buntrock*, 217 F.R.D. 441, 445 (N.D. Ill. 2003) (concluding that a 30(b)(6) notice of deposition directed to the SEC and seeking the results of the SEC’s investigation was “intended to ascertain how the SEC intends to marshal its facts, documents, and testimonial evidence, and to discover the inferences the SEC believes can be drawn from that evidence,” quashing the deposition notice and barring the deposition); *SEC v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992) (forbidding a 30(b)(6) deposition of the SEC because the deposition “constitutes an impermissible attempt by defendant to inquire into the mental processes and strategies of the SEC”).

Here, Respondent Anderson seeks testimony about the Receiver’s contentions. Any such testimony would simply recite the information that has already been detailed in the Receiver’s responses to the contention interrogatories—interrogatories that mirror precisely the noticed deposition topics. To the extent Respondent Anderson hopes to elicit testimony beyond the facts that support the Receiver’s contentions, that testimony calls for the mental impressions, conclusions and legal theories of the Receiver and his counsel. See

Morelli, 143 FRD at 147. This is precisely the type of information that the *Resolution Trust Corp., Buntrock, Rosenfeld, and Morelli* courts vigorously protected.

4. Respondent Anderson Fails To Meet *Shelton* Factor 3 Because Any Information Beyond The Discoverable Facts Are Not Crucial To Her Preparation of the Case

Although Respondent Anderson certainly would like to have the mental impressions and trial strategy of the Receiver, she is not entitled to it. Nor is it necessary for her preparation of the case. Respondent Anderson has retained competent counsel of her own choosing to represent her in this action who likely has developed mental impressions and trial strategy relative to Respondent Anderson's defense in this action. Respondent Anderson and her counsel presumably have also had their own communications relative to this action. Respondent Anderson is no more entitled to this information from the Receiver and his counsel than the Receiver is entitled to it from her.

Every fact that underlies this action has been made available to Respondent Anderson. She does not need, nor is she entitled to, anything beyond that from the Receiver. Respondent Anderson simply cannot meet her burden under *Shelton*. The information she seeks could have been (and was) obtained, *inter alia*, via contention interrogatories, depositions of fact witnesses with first hand knowledge, and review of relevant documents. To the extent Respondent Anderson seeks the Receiver's trial strategy, investigative decisions, and mental

impressions, that information is privileged and *Shelton* precludes depositions seeking it.

B. The Deposition Respondent Anderson Seeks Should Be Prohibited Under Federal Rule of Civil Procedure 26(b)(2)(C)

Federal Rule of Civil Procedure 26(b)(2)(C) states that upon motion or on its own, “the court must limit the frequency or extent of discovery” if it determines that one of the three enumerated factors cited in the rule applies. In this case, the deposition Respondent Anderson seeks is improper because each of the Rule 26(b)(2)(C) factors applies. *See* Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii).

1. The Deposition Respondent Anderson Seeks Should Be Prohibited Under Federal Rule of Civil Procedure 26(b)(2)(C)(i) Because It Is Unreasonably Cumulative or Duplicative and Can Be (And Has Already Been) Obtained From Other Sources That Are More Convenient, Less Burdensome, and Less Expensive

As stated in Part A(2), *supra*, the deposition topics attached to Respondent Andersons’ notice of 30(b)(6) deposition largely mirror interrogatories that the Receiver has already answered in exhaustive detail. (Kohlhepp Decl. II, ¶ 25, Ex. 17 *with* Kohlhepp Decl. II, ¶ 22, Ex. 14, ¶ 23, Ex. 15, and ¶ 24, Ex. 16.) Moreover, Respondent Anderson has had every opportunity to obtain the facts she seeks by other discovery in this action. Every document seized by the Receiver has either been copied for her or made available for her inspection. To the extent relevant information was obtained by the Receiver through his own investigation or from the SEC, the Receiver produced that information, as well. Respondent Anderson not only had the opportunity to depose Trevor Cook, the Receiver produced copies

of every transcript of earlier depositions that had been taken of him, along with every exhibit. Although he had no duty or obligation to do so, the Receiver went so far as to produce his investigators' notes from the pre-suit interviews of Respondent Anderson and Grant Gryzbowski and made his investigators available to be deposed. Respondent Anderson also attended depositions of third parties to this action and was free to subpoena any other witnesses or documents of her choosing.

There simply is no fact that Respondent Anderson could obtain by Rule 30(b)(6) deposition that would not be cumulative or duplicative of what has already been copied and provided to her, made available for her inspection, or obtainable from fact witnesses who have been or who were available to be deposed. Under these circumstances, it would be inordinately burdensome and wastefully expensive, to force the Receiver to prepare a 30(b)(6) witness on the same information that Respondent Anderson has had equal access to for the past eight months.

2. The Deposition Respondent Anderson Seeks Should Be Prohibited Under Federal Rule of Civil Procedure 26(b)(2)(C)(ii) Because She Has Had Ample Opportunity To Obtain the Information By Discovery In This Action

Respondent Anderson had had over ten months—since November 12, 2010—to obtain discovery in this action. As explained above, every discoverable fact in the Receiver's possession, custody or control has been given to Respondent Anderson or made available to her in the form of written discovery responses,

documents, depositions, and whatever independent investigation she wished to undertake. She has had freedom to subpoena whatever third party information she wished. Moreover, the Receiver went so far as to stipulate to an extension of the discovery schedule specifically so that all Respondents, including Respondent Anderson, could serve whatever additional contention interrogatories that she wished to obtain the same information she sought by deposition under Rule 30(b)(6).

Given that she has had every opportunity to conduct discovery in this action, and that the Receiver has provided her complete access to all discoverable information in his possession, custody and control, the discovery she now seeks by Rule 30(b)(6) deposition should be precluded under Federal Rule of Civil Procedure 26(b)(2)(C)(ii).

3. The Deposition Respondent Anderson Seeks Should Be Prohibited Under Federal Rule of Civil Procedure 26(b)(2)(C)(iii) Because Its Burden And Expense Would Outweigh Any Benefit

Forcing the Receiver to testify would also impose a burden on the Receiver and the Court that outweighs any plausible benefit to Respondents. *See* Fed. R. Civ. P. 26(b)(2)(C)(iii). A deposition of Receiver or a designee of the Receiver would necessarily raise numerous thorny issues of work product and attorney-client privilege. Sorting through these complex disputes would unnecessarily waste the Court's and the parties' time and resources, while providing

Respondents with no new information. *See SEC v. Rosenfeld*, 1997 U.S. Dist. Lexis 13996, at *10 (S.D.N.Y. Sept. 12, 1997) (“[T]o proceed by way of the Rule 30(b)(6) deposition sought by defendant Rosenfeld would undoubtedly place an undue burden on the SEC and the court, which would have to make a multitude of otherwise unnecessary decisions about issues of attorney work product . . . privilege.”) Educating and preparing a witness to testify under Rule 30(b)(6) would also impose extraordinary burden on the Receiver and the limited resources he has to fulfill his court-ordered mandate to recover whatever assets he can from the worldwide wreckage of this fraud. Insofar as Respondent Anderson seeks testimony from the Receiver beyond what is listed in her notice under Rule 30(b)(6), that testimony would be protected—or entirely speculative. The Receivership Entities were never legitimate companies. They were tools used by Cook and his co-conspirators to perpetrate a massive fraud that spanned the globe and robbed over 700 people of their lives savings. The true inner workings of that fraud likely will never be known to anyone. For whatever it may be worth, Respondent Anderson has already had the opportunity to depose Cook—a man who failed a court-ordered lie detector test—and she could have deposed more of his colleagues. However, there is simply nothing more that is discoverable from the Receiver beyond that which has already been discovered.

In contrast to the tremendous burden that a deposition of the Receiver would impose on both the Receiver and the Court, there is no conceivable benefit for Respondent Anderson to gain from the deposition.

C. The Deposition Respondent Anderson Seeks Should Be Prohibited Under Federal Rule of Civil Procedure 26(c)

The Receiver has made every possible effort to provide Respondent Anderson with every fact relating to the clawback claims against her in this action. For all of the reasons set forth in this memorandum, contention interrogatories, not a deposition of the Receiver or his staff, is the appropriate means to obtain the facts sought by the deposition that Respondent Anderson seeks.

Given the complete—and extraordinary—access to information that has been available to Respondent in discovery and that anything more impinges on privileged information, the only purpose the deposition sought by Respondent Anderson could possibly serve is to annoy, embarrass, oppress, and impose undue burden and expense on the Receiver. As such, in addition to all of the other reasons set forth in this motion, there is good cause under Federal Rule of Civil Procedure 26(c)(1)(A) for a Protective Order against the deposition sought by Respondent Anderson.

IV. CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that the Court prohibit Respondent Anderson from taking a Rule 30(b)(6) deposition of the Receivership Entities and enter the Proposed Protective Order filed herewith.

Dated: September 19, 2011

Respectfully submitted,

s/ Peter Kohlhepp

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