

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

U.S. COMMODITY FUTURES
TRADING COMMISSION,
Plaintiff(s),

Case No. 09-cv-3332 MJD/FLN

vs.

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, UNIVERSAL
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
Plaintiff(s),

Case No. 09-cv-3333 MJD/FLN

vs.

TREVOR G. COOK,
PATRICK 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.

RESPONDENTS' OBJECTIONS TO REPORT AND RECOMMENDATION

Respondents Steven and Pamela Cheney, David Buysse, Walter Defiel, Steven and Jenene Fredell, Michael and Jennifer Heise, Michael and Cynthia Hillesheim, Larry Hopfenspirger, Steven Kautzman, James McIntosh, George and Karen Morisset, Terry Frahm, and Reynold and Judith Sundstrom (hereinafter collectively "Respondents") submit this Brief objecting to the Report and Recommendation by the Honorable Franklin L. Noel, the United States Magistrate Judge, on February 25, 2011, recommending denial of Respondents' Motion for an Order Dismissing Summary Proceedings.

INTRODUCTION

Respondents moved for dismissal of the summary proceedings in this action because of the extreme prejudice that would result to Respondents were they denied the procedural protections afforded to them by the United States Constitution in the interests of expeditiously handing over their property to the Receiver. Specifically, Respondents cited the overwhelming case law setting forth the rule that summary proceedings may not be used to divest non-parties of property which they hold with a claim of right and that courts which attempt to divest non-parties of property which they hold with a claim of right lack subject matter jurisdiction to adjudicate the claims. Magistrate Judge Noel concluded that Respondents must show that they would be prejudiced by the procedures used in the summary proceedings as opposed to plenary proceedings. Magistrate Judge Noel went on to find that Respondents would not be prejudiced as long as the Federal Rules of Civil Procedure fully applied to the summary proceedings, and recommended

that the summary proceedings be governed by the Federal Rules of Civil Procedure. If indeed these proceedings are governed by the full Federal Rules of Civil Procedure, including all of their appellate rights, i.e., the right to have the same standards applied on appeal to the 8th Circuit, then Respondents' interests will potentially be procedurally protected.¹ However, Respondents still have concerns about this ongoing summary proceeding, and thus, Respondents submit the following objections to Magistrate Judge Noel's Report and Recommendation.

OBJECTIONS

1. Respondents Object to Magistrate Judge Noel's Denial of Respondents' Motion to Dismiss.

Respondents object to denial of Respondents' Motion to Dismiss the Summary Proceedings, notwithstanding Magistrate Judge Noel's assurance that the Federal Rules of Civil Procedure will be followed to fully protect Respondents' interests. Respondents specifically object to Magistrate Judge Noel's finding on page 8 of the Report and Recommendation that as the Federal Rules of Civil Procedure will apply in this action, Respondents will face no prejudice. As Respondents have previously laid out in their memoranda of law, the law is quite clear that summary proceedings may not be used to take the property of a non-party to the suit who holds it with a claim of right and that courts lack subject matter jurisdiction to adjudicate these claims in this manner. *See, e.g.*

¹ One massive difference between a plenary and summary proceeding is that parties' claims and defenses and discovery rights are not limited except as limited by the Federal Rules of Civil Procedure. The *Ex Parte* Order determining how these claims are going to be adjudicated attempts to limit the Respondents' defenses and right to full discovery in this matter. Judge Noel's Report and Recommendation does nothing to address how Respondents' rights will be negatively affected by this Order to which Respondents had no ability to object.

2 Clark on Receivers § 584 at 955 (3d ed. 1959), 16 Fletcher Cyc. Corp. § 7779, *Dold Packing Co. v. Doermann*, 293 F. 315, 331 (8th Cir. 1923), *Eberhard v. Marcu*, 530 F.3d 122, 136 (2d Cir. 2008). Despite the overwhelming case law on the subject, Magistrate Judge rejects this contention on page 7 of the Report and Recommendation. Magistrate Judge Noel and the Receiver each assure Respondents that they will face no prejudice, but if this summary proceeding will be no different than a plenary proceeding, why is it useful? It is obvious that the nature of a summary proceeding is intended to allow litigation to proceed more expeditiously, or upon narrower lines, which clearly is prejudicial to Respondents' interests, as Respondents are entitled to the full protection of a plenary proceeding.

In addition, nothing in Judge Noel's Report and Recommendation addressed Respondents' concern that this matter can be fully litigated in the lower courts and then dismissed by the Eighth Circuit because this Court lacks subject matter jurisdiction to decide this case on anything other than in the context of a plenary proceeding. If the pursuit of this proceeding on a summary basis is for the express purpose of saving a few filing fees (because it will actually have the exact same procedural protections as a plenary proceeding), then the Respondents will cover those fees (and stipulate to the scheduling order which is still in place in the replacement plenary proceeding) to ensure that their rights are fully protected. Since Respondents are willing to proceed on this basis, the only reason for this Court to proceed on a summary basis rather than on a plenary basis as is required by the litany of case law cited in Respondents' memoranda is because Respondents' rights are not identical to their rights under a plenary proceeding.

This is the basis for Respondents' continuing objection that this Court lacks subject matter jurisdiction to decide their claims in the absence of a plenary proceeding which will fully protect their constitutional rights.

2. Magistrate Judge Noel Did Not Fully Address the Prejudice to Respondents of Losing Their Jury Trial Right and Did Not Fully Address the Potential Prejudice to Respondents' Appellate Rights.

Magistrate Judge Noel refuses to address the question of Respondents' entitlement to a jury trial, instead finding that said question may be litigated upon Respondents' request of a jury trial. (Report and Recommendation, p. 8). However, the question of a jury trial is central to the question of whether Respondents' rights are actually being protected by the pending summary proceeding. Respondents are entitled to a jury trial on the claims against them, and Respondents have found case law suggesting that Respondents will not be allowed a jury trial in this litigation as this is a summary proceeding related to a receivership. Surely loss of Respondents' right to a jury trial constitutes extreme prejudice to the interests of Respondents. Respondents object to Magistrate Judge Noel's refusal to rule on the questions regarding Respondents' right to a trial by jury. Denial of this right will clearly deprive this Court of subject matter jurisdiction and was one of the linchpins of Respondents' Motion to Dismiss. To deny their Motion to Dismiss while refusing to decide whether Respondents will have a right to a jury trial makes it impossible for this Court to decide whether it possesses subject matter jurisdiction over this matter. Respondents have contemporaneously filed a Jury Trial Request with their Answer so the question of whether or not this ruling is ripe is no longer at issue.

Also, Judge Noel in his Report and Recommendation states that Respondents will be able to appeal any adverse decision to the 8th Circuit. (Report and Recommendation, p. 8). The Report and Recommendation does not address what legal standard will be applied to Respondents' appeal, and whether or not this standard will be identical to the standard in a plenary proceeding. The absence of any clarity on this issue again makes it impossible to know whether or not Respondents' due process rights are being protected in this process.

CONCLUSION

Respondents are gratified that Magistrate Judge Noel shared their concerns regarding prejudice to Respondents' constitutional rights if procedural protections available to Respondents in a plenary proceeding under the Federal Rules of Civil Procedure were denied. However, Respondents are still concerned about numerous aspects of Magistrate Judge Noel's Report and Recommendation. First, as a general matter, Respondents believe the case law clearly states that summary proceedings simply may not be used to take money from third parties who hold the property under a claim of right. Magistrate Judge Noel's assurances that Respondents will receive their full procedural rights does not explain why, then, a summary proceeding is preferable to proceeding on a plenary basis where it is assured that Respondents' constitutional rights will be protected.

Further, Respondents continue to be gravely concerned about the immense prejudice that will result if Respondents are denied their constitutional right to a jury trial in this summary proceeding, an issue Magistrate Judge Noel did not fully analyze and

decide. For these reasons, Respondents object to Magistrate Judge Noel's Report and Recommendation, and request that the Court grant Respondents' Motion to Dismiss based upon lack of subject matter jurisdiction and require that the plenary proceedings be consolidated before this Court, or, at a minimum, order the protection of Respondents' constitutional right to a trial by jury and further order that any decision in this summary proceeding shall be appealable under the exact same standard as a plenary proceeding.

Dated: March 11, 2011.

MOHRMAN & KAARDAL, P.A.

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