

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

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

Case No. 09-cv-3332 MJD/JJK

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

Case No. 09-cv-3333 MJD/JJK

Plaintiff(s),

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' RESPONSIVE MEMORANDUM OF LAW IN OPPOSITION
TO UNITED STATES' MOTION TO INTERVENE**

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 Responsive Memorandum of Law in Opposition to United States' Motion to Intervene.

INTRODUCTION

The United States has moved to intervene as a matter of right under Fed. R. Civ. Pro. 24(a)(2) based upon a conclusory allegation that the subpoena served upon Trevor Cook's counsel (William Mauzy) would somehow implicate the "law enforcement privilege" without any detailed description of how these documents in the possession of Trevor Cook's counsel would compromise the United States' ongoing investigation into Trevor Cook's alleged co-conspirators. There can be no dispute that the documents in question have been provided to at least four separate third parties: the SEC, the Receiver, Trevor Cook, and Trevor Cook's counsel. Further, in the United States' memorandum and related affidavit, there is absolutely no description about how disclosure of the subpoenaed documents to the Investor Respondents and their counsel in this litigation (hereafter "Investor Respondents") who have admittedly done nothing wrong, could compromise the United States' investigation more than disclosing the exact same information to an alleged co-conspirator (Trevor Cook) or to the Receiver to aid in the

Receiver's collection efforts. There also is no description whatsoever in either the United States' memorandum or its affidavit of how the law enforcement privilege can still exist when the information has already been intentionally disclosed to the third party SEC who then provided the documents to the Receiver (another third party), and finally to Cook (a completely adverse third party), who happens to be the alleged co-conspirator who has been sentenced to twenty five years in prison for his role in orchestrating this ponzi scheme.

The subpoenaed documents relating to the United States' investigation are highly relevant to the Investor Respondents' defense that the Investor Respondents received the return of their capital from the Cook Entities in good faith. All information gleaned from Trevor Cook or other witnesses relating to the fraud, including: the representations made to the investors that their investments were all being held in separate accounts; all facts relating to attempts to conceal the true nature of the fraud from any investors (not just limited to the Investor Respondents); and, any attempts from the United States to coerce favorable testimony from Trevor Cook in an attempt to gain advantage in the pending summary proceeding is undeniably relevant to the Investor Respondents' "good faith" defense and should be provided before this proceeding moves forward.

The Investor Respondents find themselves in a position where the United States is attempting to intervene in their summary proceeding (for which a motion to dismiss is currently pending) in an attempt to conceal documents relevant to the Investor Respondents' claims and defenses which have already been provided to every interested

party to this receivership save the parties from which the receiver is attempting to claw back millions of dollars. This cannot stand for reasons more fully discussed below.

ARGUMENT

The United States should not be allowed to intervene in the present dispute unless and until it demonstrates that there is actually an enforceable privilege which it can rely upon to support its claimed intervention. The memorandum and affidavit before the Court clearly falls short of the requirements necessary to intervene in the present dispute.

Federal Rule of Civil Procedure 24 permits intervention by “anyone . . . who: . . . (2) claims an interest relating to the property which is the subject of the action and is so situated that disposing of the action may as a practical matter impair or impede the movant’s ability to protect it interest unless existing parties adequately represent that interest.” In order to show a protectable “interest” the United States must first demonstrate that a law enforcement privilege exists with respect to these documents, and that the privilege has not been waived by its conduct, specifically its intentional disclosure of the documents in question to numerous third parties.

1. LAW ENFORCEMENT PRIVILEGE

The law enforcement privilege exists to protect ongoing criminal investigations. The privilege is a “judge-fashioned evidentiary privilege” and is not absolute. *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1124, 1125 (7th Cir.1997). Courts generally limit such privilege to protecting the “informal investigatorial and trial-preparatory processes ...” *Stephens Produce Co., Inc. v. National Labor Relations Board*, 515 F.2d 1373, 1376 (8th Cir.1975). To sustain a claim of law enforcement privilege, “(1) there

must be a formal claim of privilege by the head of the department having control over the requested information; (2) assertion of the privilege must be based on actual personal consideration by that official; and (3) the information for which the privilege is claimed must be specified, with an explanation why it properly falls within the scope of the privilege.” *In re Sealed Case*, 856 F.2d 268, 271 (D.C. Cir. 1988).

The proponent of the law enforcement privilege bears the burden of proving its claim. *Alexander v. F.B.I.*, 186 F.R.D. 154, 167 (D.D.C. 1999). “In making its determinations, the court must balance the government's interest in confidentiality against the litigant's need for the documents.” *In re U.S. Dept. of Homeland Sec.*, 459 F.3d 565, 570 (5th Cir. 2006) (quotation omitted). Further, the party claiming the privilege must do so with specificity, and may not rely on conclusory affidavits regarding the harm disclosure would cause to ongoing investigations. *Friedman v. Bache Halsey Stuart Shields, Inc.*, 738 F.2d 1336, 1341 (D.C. Cir. 1984). Investigatory interviews are covered by the privilege if they would reflect nothing more than the investigator's informal impressions. *Stephens*, 515 F.2d at 1376.

Courts usually examine ten factors from *Frankenhauser v. Rizzo*, 59 F.R.D. 339, 344 (E.D.Pa. Mar.13, 1973) in determining whether the privilege applies:

- (1) the extent to which disclosure will thwart governmental processes by discouraging citizens from giving the government information;
- (2) the impact upon persons who have given information of having their identities disclosed;

- (3) the degree to which governmental self-evaluation and consequent program improvement will be chilled by disclosure;
- (4) whether the information sought is factual data or evaluative summary;
- (5) whether the party seeking discovery is an actual or potential defendant in any criminal proceeding either pending or reasonably likely to follow from the incident in question;
- (6) whether the police investigation has been completed;
- (7) whether any interdepartmental disciplinary proceedings have arisen or may arise from the investigation;
- (8) whether the plaintiff's suit is non-frivolous and brought in good faith;
- (9) whether the information sought is available through other discovery or from other sources; and
- (10) the importance of the information sought to the plaintiff's case. *See, e.g. Tuite v. Henry*, 98 F.3d 1411, 1417 (D.C.Cir.1996), *In re U.S. Dept. of Homeland Sec.*, 459 F.3d 565, 570 (5th Cir. 2006).

The investigation transcripts in question clearly include factual testimony that relate to millions of dollars worth of litigation. The Investor Respondents are entitled to more than a memorandum filled with conclusory statements such as “disclosure of these documents [who have already been disclosed to Cook, the Receiver, and the SEC] will negatively impact the government’s investigation” when these documents may support the Investor Respondent’s defenses in litigation over amounts in excess of five million dollars (\$5,000,000.00). Why will they negatively impact the investigation? How will

they impact it? These are the types of questions which the government is required to answer in order to invoke the privilege. This simply has not been done here.

2. WAIVER OF THE LAW ENFORCEMENT PRIVILEGE

The law enforcement privilege is a privilege like any other in that it “can be waived and, once waived, is lost.” *Dellwood Farms, Inc. v. Cargill, Inc.*, 128 F.3d 1122, 1126 (7th Cir. 1997). Courts have found that one way the privilege may be waived is “[i]f the government engaged in conduct that would give it an unearned advantage over an opponent were it allowed to keep the tapes secret from him, this conduct would ‘waive’ (in the sense of forfeit) the privilege.” *Id.* Obviously, “[o]ne way to waive the [law enforcement] privilege is to allow a third party to have access to the documents.” *In re Polypropylene Carpet Antitrust Litig.*, 181 F.R.D. 680, 689 (N.D. Ga. 1998). It is undisputed that the United States has allowed numerous parties to this receivership unfettered access to these documents. It has produced no written agreements with these parties to protect the confidentiality of the United States’ interview transcripts. Therefore its claims of privilege have been waived.

3. INTERVENTION TO QUASH A SUBPOENA

Under Fed. R. Civ. Pro. 24(a)(2), the court must permit the intervention of a party who “claims an interest relating to the property or transaction that is the subject of the action....” Intervention in a subpoena enforcement action is “permissive only, not mandatory.” *Donaldson v. United States*, 400 U.S. 517, 529, 91 (1971); *SEC v. Jerry T. O'Brien, Inc.*, 467 U.S. 735, 749 n. 19 (1984). The United States Supreme Court ruled that the “interest relating to the property” under Rule 24 must be a “significantly

protectable interest,” and thus that a taxpayer could not intervene to prevent a third party from producing records relating to the taxpayer pursuant to subpoena. *Donaldson v. U.S.*, 400 U.S. 517 (1971), superseded by statute on other grounds as recognized in *Tiffany Fine Arts, Inc. v. U.S.*, 469 U.S. 310 (1984).¹ As in *Donaldson*, a very similar case involving an attempt by a third party to quash the production of documents in a summary enforcement proceeding, the United States’ “asserted interest, however, is nothing more than a desire ... to counter and overcome [the Third Parties’] willingness, under summons, to comply and to produce records.” In this case, as has already been established, the United States has no significantly protectable interest at stake in the above-captioned action.

CONCLUSION

For the reasons set forth above, the Investor Respondents respectfully request that this Court deny the United States’ motion to intervene.

¹ *Tiffany Fine Arts* recognized that Congress had enacted 26 U.S.C. §7609 which required that taxpayers be informed about, and be allowed to intervene in, an action relating to service by the I.R.S. of a third-party summons for production of documents relating to the third party. This does not relate to the cited holding regarding Fed. R. Civ. Pro. 24(a)(2).

Dated: February 22, 2011.

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