

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

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

Civil No. 11-CV-1042 (SRN/FLN)

Petitioner,

MEMORANDUM AND ORDER

v.

**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,**

Respondents.

R.J. Zayed, Tara C. Norgard, Russell J. Rigby, Brian W. Hayes & Peter M. Kohlhepp, Carlson, Caspers, Vandenburg & Lindquist, 225 S. Sixth Street, Minneapolis, Minnesota, 55402, for Petitioner

William F. Mohrman, Gregory M. Erickson & James R. Magnuson, Mohrman & Kaardal, P.A., 33 South Sixth Street, Suite 4100, Minneapolis, Minnesota 55402, for Lender Respondents

Adam S. Huhta, Huhta Law Firm, PLLC, 36 South Ninth Street, Suite 200, Minneapolis, Minnesota 55402, for Respondent Anderson

SUSAN RICHARD NELSON, United States District Court Judge

This matter is before the Court on Respondents' timely appeals [Doc. Nos. 176 & 177] from the October 19, 2011 Order issued by Magistrate Judge Franklin L. Noel [Doc. No. 162]. The Order granted Petitioner's Second Amended Motion for a Protective Order Against Respondents' Request to Depose the Receiver in His Personal Capacity or Under Federal Rule of

Civil Procedure 30(b)(6) [Doc. No. 122] and Petitioner's Motion for a Protective Order as to Respondent Anderson's Request to Depose the Receiver or a Person Designated by Him Under Federal Rule of Civil Procedure 30(b)(6) [Doc. No. 126].

The Court's review of decisions of the Magistrate Judge on nondispositive matters is limited to determining whether the Order is clearly erroneous or contrary to law. D. Minn. L.R. 72.2(a). This Court pays great deference to a magistrate judge's nondispositive determinations. See Reko v. Creative Promotions, Inc., 70 F. Supp. 2d 1005, 1007 (D. Minn. 1999) (Montgomery, J.) ("The standard of review applicable to an appeal of a magistrate judge's order on a nondispositive issue is extremely deferential."). Respondents have failed to establish that Magistrate Judge Noel's decision is either clearly erroneous or contrary to law. Therefore, the Court affirms the Order and denies the appeals.

I. BACKGROUND

In August 2010, Trevor Cook pled guilty to one count of mail fraud and one count of tax evasion related to his role in operating a \$158 million Ponzi scheme. (See Sentencing Judgment of 8/25/10 [Doc. No. 18], United States v. Cook, 10-CR-75 (JMR)). Several months earlier, in November 2009, this Court created a receivership to preserve and apportion any assets involved in Cook's Ponzi scheme on behalf of the victims of the fraud. (Order of 11/23/09 [Doc. No. 21] CFTC v. Cook, et al., 09-CV-3332 (MJD/JJK)). Petitioner R.J. Zayed ("Receiver" or "Petitioner") was appointed as Receiver and given "full power to sue" in order to perform all acts necessary to preserve the value of the assets. (Id. at 6-7.) The Court further recognized Zayed as "the agent of this Court" in carrying out the duties of "marshaling, preserving, accounting for and liquidating the assets" in question and "directing, monitoring and supervising

Defendants' activities. . . ." (Id. at 6.)

Pursuant to this grant of authority, in July 2010, the Receiver/Petitioner moved for an order permitting him to institute summary proceedings in the instant case against Respondents. (Petition for the Return of Receivership Assets from Investor Respondents [Doc. No. 1].) The Receiver alleges that at some point after mid-June 2009, Cook became aware that his collapsing Ponzi scheme was under investigation, and that Respondents consequently received preferential transfers of receivership funds. (Id. at ¶ 31.) With the exception of Respondent Dot Anderson, all of the other Respondents ("Buysse Respondents") invested in Cook's scheme through Clifford Berg, Cook's father-in-law. (Id.) Dot Anderson invested \$102,000 in Cook's scheme through her grandson, Grant Gryzbowski, who worked for a Cook entity. (Ex. 2 to Huhta Decl. at 2-3 [Doc. No. 136].) The Receiver contends that Respondents' "insider connection[s]" led to the preferential disbursement of transferred funds which decreased the receivership's "ability to compensate other defrauded investors." (Receiver's Obj. and Response to Resps.' Second Set of Interrogatories at 23, Ex. 1 to Am. Decl. of Peter M. Kohlhepp [Doc. No. 132].) Chief Judge Davis granted the Receiver's motion to institute these proceedings, finding that "[s]ummary proceedings for the purpose of recovering investor assets transferred to third parties by Cook pursuant to the Ponzi scheme are appropriate as a means to ensure consistent treatment of the various recipients of the transfers, promote judicial efficiency, and decrease litigation costs for the Receivership." (Order at 4, CFTC v. Cook, Civ. No. 09-3332 (D. Minn. July 20, 2010) [Doc. No. 350].)

Discovery commenced in November 2010, at which time the Buysse Respondents served document requests calling for "each and every document which discusses, refers or relates to"

Cook and his entities. (Resps.' First Set of Interrogs. and Req. for Prod. of Docs. at 11-14, Ex. 1 to Kohlhepp Decl. [Doc. No. 43].) In response to this and other requests, the Receiver made available approximately 150 boxes of documents and 60 hard drives and produced 25,000 pages of documents to all Respondents. (See Joint Stip. to Extend Deadline at 4 [Doc. No. 115].) The parties also subpoenaed documents from various third parties. (Id.) The Receiver contends that, to the extent that he obtained documents from his own independent investigation, he searched for and produced all documents that refer or relate to Respondents. (Am. Kohlhepp Decl. ¶ 5 [Doc. No. 132].) Moreover, the Receiver made documents available to Respondents and assisted them in arranging depositions:

Since at least January 18, 2011, and repeatedly thereafter, we have offered to make all seized hard copy and electronic files from the Receiver Estates available to you. You have not taken us up on these offers, nor have you asked for any specific information from those files beyond the documents we have already physically produced to you. In addition to making all of those files available to you, we stipulated to your motion to depose one of the leaders of the fraud, Trevor Cook; we even helped you set up that deposition. The seized files, the people who ran and worked for the fraudulent entities, and your clients are the sources of first-hand knowledge of the issues in this case.

(Email of 7/8/11 from T. Norgard to G. Erickson, Ex. 4 to Am. Kohlhepp Decl. [Doc. No. 132-4].) Respondents did, in fact, depose Cook, two of his employees, the Receiver's investigators and two investors who attempted to close their accounts in June 2009, but were unable to do so. (Stipulation to Extend Expert Discovery Deadline at 4-5 [Doc. No. 170].)

A. First Deposition Notices and Contention Interrogatories

In July 2011, the Buysse Respondents sought to depose the Receiver personally, or the "receivership" as a corporate entity, under Fed. R. Civ. P. 30(b)(6). They sent the Receiver a Rule 30(b)(6) notice that listed seven different categories of testimony. (Notice of Dep. of Pet'r

at 6, Ex. 12 to Am. Kohlhepp Decl. [Doc. No. 132-12].) Respondent Anderson also served Petitioner with a Rule 30(b)(6) deposition notice. (Resp. Anderson's Notice of Dep. of Pet'r, Ex. 12 to Kohlhepp Decl. [Doc. No. 128-13].) Anderson sought information supporting "each and every fact" behind certain allegations in the Receiver's Petition. (Id. at 6.) In addition, Anderson identified as a Rule 30(b)(6) area of inquiry "the circumstances involving the return to Dot Anderson of \$102,000 in July 2009 and "how much money Dot Anderson provided to any Receivership Entity, and the terms under which Mrs. Anderson's money could be returned to her." (Id.)

Arguing that he had no personal knowledge of the facts at issue, and because he is also trial counsel, the Receiver suggested that the Respondents obtain the requested information through contention interrogatories instead of depositions, and possibly avoid time-consuming motion practice related to the depositions. (Stipulation at 2 [Doc. No. 113].) Respondents jointly agreed and the parties also stipulated to the extension of the discovery schedule to accommodate the time needed to propound and respond to Respondents' contention interrogatories. (Id.) The Receiver provided a timely, detailed fifty-page response to the Buysse Respondents' thirteen contention interrogatories, with pinpoint cites to Bates numbered documents, deposition transcripts and other information. (Receiver's Objs. & Responses to Resps.' Second Set of Interrogs., Ex. 14 to Am. Kohlhepp Decl. [Doc. No. 132-14].) The Magistrate Judge's Order included a chart, reproduced below, comparing the Buysse Respondents' Rule 30(b)(6) topics with their interrogatories. (Order of 10/19/11 at 4.)

<p>Respondents' Fed. R. Civ. P. 30(b)(6) topics (Amended Kohlhepp Decl., Docket No. 132, Ex. 12, at 6.)</p>	<p>Respondents' interrogatories (Amended Kohlhepp Decl., Docket No. 132, Ex. 13 at 9-11.)</p>
<p>1. Each and every fact that the Petitioner asserts supports the allegations contained in Paragraphs 31 and 32 of the Petition.</p> <p>2. Each and every fact that the Petitioner asserts supports the allegations contained in Paragraph 34 of the Petition that the transfers of funds to Lender Respondents were made in an effort to hinder, delay, or defraud creditors of any of the Receivership Entities.</p> <p>3. Each and every fact that the Petitioner asserts supports the allegations contained in Paragraphs 35 and 36 of the Petition.</p> <p>4. Each and every fact that the Petitioner asserts supports the allegations contained in Paragraphs 39 and 40 of the Petition.</p> <p>5. Each and every fact that the Petitioner asserts supports the allegations contained in Paragraph 41 of the Petition.</p> <p>6. Each and every fact that the Petitioner asserts supports the allegations contained in Paragraphs 44, 45, and 46 of the Petition.</p> <p>7. Each and every fact that supports the Petitioner's allegation that the Lender Respondents not receive their payments from the Receivership Entities in good faith.</p>	<p>9. Identify each and every fact supporting your allegation in paragraph 31 of the Petition that "each Respondent received at least one preferential transfer... after Cook became aware that Crown Forex SA was in liquidation and that his Ponzi scheme had been discovered by the SEC. . . ."</p> <p>10. Identify each and every fact supporting your allegation in paragraph 32 of the Petition that "the money used to pay Respondents came from the Receivership Entities funded with the money of victims of the scheme . . ."</p> <p>12. Identify each and every fact supporting your allegation in paragraph 34 of the Petition that "Cook initiated the transfers to each Respondent on or after June 29, 2009 with actual intent to avoid, hinder, or delay payments to other creditors of Cook and the Receivership Entities."</p> <p>13. Identify each and every fact supporting your allegation in paragraph 35 of the Petition that "each Respondent knew or should have known that the transfers they received on or after June 29, 2009, were fraudulent conveyances."</p> <p>14. Identify each and every fact supporting your allegation in paragraph 36 of the Petition that Lender Respondents received payments preferentially over hundreds of investors who were unable to withdraw money they had invested in the Receivership Entities, specifically your contention that investors were unable to withdraw money from the Receivership Entities on or before June 30, 2009.</p> <p>15. Identify each and every fact supporting your allegation in paragraph 39 of the Petition that all funds transferred to Lender Respondents by the Receivership entities were transferred pursuant to a Ponzi scheme.</p> <p>16. Identify each and every fact supporting your allegation in paragraph 40 of the Petition that Cook and the Receivership Entities transferred funds to the Lender Respondents with actual intent to hinder, delay, or defraud creditors.</p> <p>18. Identify each and every fact supporting your allegation in paragraph 44 that each Lender Respondent has been unjustly enriched by the return of their funds from the Receivership entities.</p> <p>19. Identify each and every fact supporting your allegation in paragraph 45 of the Petition that Lender Respondents' retention of their funds "violates fundamental principles of justice, equity, and good conscience. "</p> <p>20. Identify each and every fact supporting your allegations in paragraph 46 of the Petition.</p> <p>21. Identify each and every fact supporting your allegations that Lender Respondents did not receive the return of their funds from the Receivership Entities in "good faith."</p>

In addition to the discovery responses produced to the Buysse Respondents, the Receiver provided responses to Respondent Anderson's three sets of interrogatories. Anderson's

interrogatories and Rule 30(b)(6) notice covered overlapping areas of inquiry. The Magistrate Judge compared the documents in a chart that is reproduced below. (Order of 10/19/11 at 6 [Doc. No. 162].)

Anderson’s Fed. R. Civ. P. 30(b)(6) topics (Kohlhepp Decl., Docket No. 128, Ex. 17, at 3-4)	Anderson’s interrogatories (Kohlhepp Decl., Docket No. 128, Ex. 14, at 14-20)
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.” (Topics Nos. 5 and 6 seek the same information.)	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.’” (Interrogatory No. 10, seeks the same information.)
Topic No. 8: “Each and every fact that supports your claim that Dot Anderson did not receive any payments . . . in good faith.” (Topic No. 4 seeks the same information.)	Interrogatory No. 11: “Identify all facts on which you rely for the contention that Ms. Anderson did not take the funds . . . in good faith.” (Interrogatory No. 13 seeks the same information.)
Topic 9: “Each and every fact that supports your claim that Dot Anderson did not provide reasonably equivalent value.”	Interrogatory No. 12: “Identify all facts on which you rely for the contention that Ms. Anderson did not provide reasonably equivalent value.”
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.” (Topics Nos. 1, 2, 10 seeks subsets of the same information.)	Interrogatory No. 9: “Identify the facts, circumstances, and communications related to the transfer of funds . . . to Respondent [Anderson]”

B. Respondent Anderson’s Second Deposition Notice

In September 2011, Anderson sent an additional Rule 30(b)(6) notice, directed to the “Receivership Entities,” listing her original topics and adding two more: “the reasons why Basel International or any entity with ‘Basel’ in its name was created” and “the status of any Basel entity.” (Anderson Second 30(b)(6) Notice at 5, Ex. 17 to Kohlhepp Dec. [Doc. No. 128-17].) These topics were not addressed in Anderson’s interrogatories.

C. Buysse Respondents’ Second Deposition Notices

Having received the Receiver’s interrogatory responses, the Buysse Respondents re-

served deposition notices seeking to depose the Receiver personally or under Rule 30(b)(6). (Rule 30(b)(6) Dep. Notice & Zayed Dep. Notice, Exs. 16 & 17 to Am. Kohlhepp Decl. [Doc. Nos. 132-16 & 132-17].) The Buysse Respondents did not identify any deficiencies in the Receiver's interrogatory responses, nor were they willing to meet and confer about them. (Communications Between Counsel, Exs. 18 & 19 to Am. Kohlhepp Decl. [Doc. Nos. 132-18 & 132-19].)

The Receiver then moved for a protective order to preclude the depositions. (Doc. Nos. 122 & 126.) Magistrate Judge Noel granted the Receiver's motions, finding that under Fed. R. Civ. P. 26(b)(2)(C)(ii)-(iii), Respondents "have had ample opportunity to obtain the information they seek through interrogatories" and that "the burden of such a deposition outweighs its likely benefit." (Order of 10/19/11 at 7-8 [Doc. No. 162].)

II. DISCUSSION

The Court considers Respondents' specific objections in their Appeals from the Magistrate Judge's Order to determine whether the Order is clearly erroneous or contrary to law. 28 U.S.C. § 636(b)(1)(A); Fed. R. Civ. P. 72(a); D. Minn. L.R. 72.2(a). "A finding is clearly erroneous when, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." Chase v. Comm'r, 926 F.2d 737, 740 (8th Cir. 1991) (quoting United States v. U.S. Gypsum Co., 333 U.S. 364, 395 (1948)). Accordingly, this "standard of review . . . is extremely deferential." Reko v. Creative Promotions, Inc., 70 F. Supp. 2d 1005, 1007 (D. Minn. 1999) (Montgomery, J.).

A. The Magistrate Judge Considered Respondents' Arguments

Respondents argue that Magistrate Judge Noel's analysis of their legal arguments was merely cursory and clearly erroneous. The Buysse Respondents argue that there are at least five areas of questioning identified in their Rule 30(b)(6) Notices that are not duplicative of their interrogatory requests and that "Magistrate Judge Noel simply ignored these questions in finding that [the Buysse] Respondents have access to all of the information they seek from the Receiver's previous discovery responses." (Buysse Resps.' Objs. at 3 [Doc. No. 177].) Respondent Anderson likewise argues that her Rule 30(b)(6) Notice contains areas of inquiry not duplicated in her interrogatories.

That the Magistrate Judge did not address all of Respondents' legal arguments point-by-point in the Order does not mean that he "ignored" or failed to consider them. As this Court found in an earlier ruling in this very case, ". . . a failure to address a specific argument is not itself a reason for overturning the Magistrate Judge's decision. Rather, the R & R's failure to address a theory is tantamount to the R & R rejecting the theory without comment. . . ." (Order of 6/1/11 at 9 [Doc. No. 108]); see also Hill v. Smithkline Beecham Corp., 393 F.3d 1111, 1116 (10th Cir. 2004) (finding that the district court's failure to address the appellant's arguments "may be properly construed as an implicit denial of those arguments.") Because the underlying motions were fully briefed and argued, the Court construes any silence as to particular arguments in the Magistrate Judge's ruling as an implicit rejection of such arguments.

B. Full and Fair Opportunity for Discovery

Respondents argue that the issuance of a Protective Order prohibiting the Receiver's depositions denies them a full and fair opportunity to develop their case and prepare for trial. The Federal Rules, however, authorize the courts to limit the frequency or extent of discovery in

certain circumstances. Pursuant to Fed. R. Civ. P. 26(b)(2)(C), discovery may be limited if the court determines that:

- (i) the discovery sought is unreasonably cumulative or duplicative, or can be obtained from 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)(i)-(iii).

Magistrate Judge Noel found that Respondents had ample opportunity, particularly through interrogatories, to obtain the requested information. He specifically noted the overlapping areas of inquiry, finding that “most – if not all – of the information sought by Respondents, including Respondent Anderson, has already been disclosed” Further, he found that the burden of deposing the Receiver outweighed any benefit. The three enumerated grounds for limiting discovery in Rule 26(b)(2)(C) are separated by the disjunctive “or.” Therefore, any one of the three grounds would permit a court to restrict discovery. In this case, the Magistrate Judge determined that all three applied: the noticed depositions of the Receiver were unreasonably duplicative, Respondents had ample opportunity to obtain this information by other means, and the burden of the proposed depositions outweighed its likely benefit. Moreover, if Respondents found the interrogatory responses in any way deficient, they certainly could have met and conferred with the Receiver to identify any such deficiencies and presumably could have requested supplemental interrogatory responses. They did not.

Respondents also argue that, “for illustrative purposes,” they identified five areas of inquiry on which they wished to depose the Receiver, but which were not covered in the contention interrogatories.¹ (Buysse Resps.’ Objs. at 6-7 [Doc. No. 177].) The Magistrate Judge, however, determined that the Respondents had ample opportunity to obtain this information throughout the course of extensive fact discovery. (Order of 10/19/11 at 7 [Doc. No. 162].) Moreover, not only did Respondents have the opportunity, but the Receiver contends that he actually produced documents relevant to the “five separate areas” in question. (Pet’r’s Resp. at 8-9 [Doc. No. 179].) Given that the Magistrate Judge’s decision is fully supported by the authority of Rule 26 and the facts before him, it was not contrary to law or clearly erroneous.

C. Burden

Respondents take issue with the lack of sworn affidavits documenting the burden found by the Magistrate Judge and contend that the Magistrate Judge did not sufficiently describe the burden.

The facts of this case do not warrant such additional support, because the burden is

¹ These areas include:

(1) whether any other investors were repaid their principal after June 29, 2009; (2) what facts in the Receiver’s possession indicate that Clifford Berg was aware that Trevor Cook was operating a Ponzi scheme or that Crown Forex was insolvent prior to June 29, 2009; (3) whether the Receiver has any information regarding Gerry Durand’s theft of account opening documents for the Phillips and others; (4) whether the absence of these documents inhibited the Phillips’ efforts to retrieve their money; and, (5) what facts the Receiver has regarding the contractual relationship between Lender Respondents and the Cook Currency Trading Entities, specifically, supporting the Receiver’s contention that Lender Respondents did not lend money to the Cook Currency Trading Entities.

Id.

manifest. The parties stipulated to the use of contention interrogatories as a means of avoiding the Receiver's deposition. While they did so without waiving their rights, the purpose of serving contention interrogatories was to avoid the time-consuming burden that the depositions would entail. The Receiver provided lengthy, detailed responses. After having done so in an effort to avoid the time and expense of the proposed depositions and any attendant motion practice, to then require the Receiver to submit to depositions on essentially the same subject matter, constitutes a clear burden. The reasoning in the Magistrate Judge's order, in which he painstakingly describes the history of discovery and lays out the overlapping areas of inquiry, underscores that this is the burden supporting his ruling.

Furthermore, because the Receiver is both an attorney, trial counsel, and, in his role as Receiver, "an agent of the Court," the legal feasibility of deposing him is questionable in the first instance, and Respondents' attempts to do so generated the very type of motion practice that the parties ostensibly sought to avoid.² Any deposition of the Receiver would likely give rise to numerous objections on grounds of privilege and work product. In S.E.C. v. Rosenfeld, No. 97 CIV 1467 (RPP), 1997 WL 576021, *4 (S.D.N.Y. Sept. 16, 1997), the court granted the S.E.C.'s motion for a protective order, quashing the defendant's notice for a Rule 30(b)(6) deposition of the agency. Basing its decision on Rule 26(c), the court also noted the difficulties that such a

² The Eighth Circuit has held that a party seeking the deposition of trial counsel for an opposing party must demonstrate that: (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. Shelton v. Am. Motors Corp., 805 F.2d 1323, 1327 (8th Cir.1986). The court further noted that "[t]he harassing practice of deposing opposing counsel (unless that counsel's testimony is crucial and unique) appears to be an adversary trial tactic that does nothing for the administration of justice but rather prolongs and increases the costs of litigation, demeans the profession, and constitutes an abuse of the discovery process." Id. at 1330.

proceeding would entail:

Lastly, to 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 and law enforcement privilege, whereas no prejudice to defendant Rosenfeld has been shown if he is required to conduct discovery by the other methods suggested in this opinion.

Id. These concerns are implicated in this case as well.

For all of these reasons, the Court finds that the Magistrate Judge properly concluded under Fed. R. Civ. P. 26(b)(2)(C)(iii) that the burden of the proposed depositions outweighed any likely benefit.

III. CONCLUSION

Respondents have failed to show that the Magistrate Judge's Order is clearly erroneous or contrary to law.

THEREFORE, IT IS HEREBY ORDERED THAT:

1. Respondents' Appeals [Doc. Nos. 176 & 177) are **DENIED**; and
2. Magistrate Judge Noel's Order [Doc. No. 162] is **AFFIRMED**.

Dated: Dec. 2, 2011

s/Susan Richard Nelson
SUSAN RICHARD NELSON
United States District Court Judge