

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

R.J. ZAYED, in his capacity  
as court appointed receiver  
for the Oxford Global Partners, LLC,  
Universal Brokerage FX,  
and other receiver entities,

CIVIL NO. 13-232 (DSD/JSM)

AMENDED ORDER

Plaintiff,

v.

ASSOCIATED BANK, N.A.,

Defendant.

The above matter came before the Court upon Defendant's Motion to Compel the Receiver's Designee to Attend the Rule 30(b)(6) Depositions of Crown Forex, LLC and Oxford Global FX, LLC [Docket No. 114] and the Receiver's Motion to Compel Third-Party Subpoena Respondent Michael Behm to Answer Deposition Questions [Docket No. 126]. Brian Hayes, Esq., Michael La Porte, Esq. and Tara Norgard, Esq. appeared on behalf of the Receiver. Charles Webber, Esq. appeared on behalf of defendant Associated Bank, N.A. Eric Newmark, Esq. appeared on behalf of third party Michael Behm.

The Court, being duly advised in the premises, upon all of the files, records and proceedings herein, and for the reasons stated on the record and set forth in the Memorandum below, now makes and enters the following Order:

IT IS HEREBY ORDERED that

1. Defendant's Motion to Compel the Receiver's Designee to Attend the Rule 30(b)(6) Depositions of Crown Forex, LLC and Oxford Global FX, LLC [Docket No. 114] is **DENIED** for the reasons stated in the Memorandum below. On or before **September**

**16, 2016**, the Receiver shall supplement its responses Interrogatory No. 9 and provide a fulsome response.

2. The Receiver's Motion to Compel Third-Party Subpoena Respondent Michael Behm to Answer Deposition Questions [Docket No. 126] is **GRANTED**. For the reasons stated on the record, on or before June 17, 2016, the deposition of Michael Behm shall be reconvened, and the deponent shall respond to the questions that were posed to him during the April 26, 2016 deposition. The deponent shall not be permitted to assert the common interest privilege as a basis for refusing to answer those questions.

Dated: September 9, 2016

*s/ Janie S. Mayeron*  
JANIE S. MAYERON  
United States Magistrate Judge

### **MEMORANDUM**

#### **I. FACTUAL BACKGROUND**

On November 23, 2009, the District Court appointed the Receiver as an "Agent of the Court" with full power to sue, collect money, initiate actions, and employ counsel. U.S. Commodity Futures Trading Commission v. Trevor Cook, File No. 09-cv-3332, Docket No. 21-1, pp. 7-9; see also Complaint, ¶¶ 18, 19 [Docket No. 1].

On January 29, 2013, the Receiver initiated the instant action against Associated Bank, N.A. ("Bank"). [Docket No. 1]. The Complaint alleged four counts:

In Count I, the Receiver alleged that the Bank aided and abetted fraud. Relevant to the instant motion, the Receiver alleged that the Bank had actual knowledge of the

fraud and “subjectively knew that there was a high probability of illegal activity and deliberately avoided investigating the matter.” Complaint, ¶¶ 72-74. Additionally, the Receiver alleged that the Bank provided substantial assistance to the fraudsters. Complaint, ¶ 75.

In Count II, the Receiver alleged that the Bank aided and abetted a breach of fiduciary duty. Relevant to this motion, the Receiver alleged that the Bank had actual knowledge of the breach of fiduciary duty of and rendered substantial assistance to the fraudsters. Complaint, ¶ 87.

In Count III, the Receiver alleged that the Bank aided and abetted conversion. Relevant to this motion, the Receiver alleged that the Bank had actual knowledge of conversion of funds entrusted to the receiver entities and rendered substantial assistance to the fraudsters. Complaint, ¶ 93.

In Count IV, the Receiver alleged that the Bank aided and abetted false representations and omissions. Relevant to this motion, the Receiver alleged that the Bank knew the representations about Crown Forex LLC and Basel LLC were false, yet continued to assist investors in transferring funds into their accounts. Complaint, ¶¶ 96, 97.

On October 5, 2015, the Bank served its first set of 19 interrogatories on the Receiver. See Declaration of Michael R. La Porte (“La Porte Decl.”) [Docket No. 120], ¶ 2; Ex. B (Defendant Associated Bank, N.A.’s First Set of Interrogatories). The interrogatories included the following contention interrogatories that bear on the instant motion:

INTERROGATORY NO. 5

Describe with specificity the factual basis for your claim that Associated Bank had actual knowledge of fraud, a breach of any fiduciary duty, conversion, or false representations or omissions occurring in relation to the Cook-Kiley Accounts and/or Cook-Kiley Entities, including: (i) the identity of each officer, director, employee, agent, or representative of Associated Bank who had actual knowledge of such fraud, a breach of any fiduciary duty, conversion, or false representations or omissions; (ii) the date that such person obtained actual knowledge of the fraud, a breach of any fiduciary duty, conversion, or false representations or omissions; and (iii) the source from which each such person obtained actual knowledge of the fraud, a breach of any fiduciary duty, conversion, or false representations or omissions.

INTERROGATORY NO. 6

Describe with specificity the factual basis for your claim that Associated Bank had constructive knowledge of fraud, a breach of any fiduciary duty, conversion, or false representations or omissions occurring in relation to the Cook-Kiley Accounts and/or Cook-Kiley Entities, including: (i) the identity of each officer, director, employee, agent, or representative of Associated Bank who had constructive knowledge of such fraud, a breach of any fiduciary duty, conversion, or false representations or omissions; (ii) the date that such person obtained constructive knowledge of the fraud, a breach of any fiduciary duty, conversion, or false representations or omissions; and (iii) the source from which each such person obtained constructive knowledge of the fraud, a breach of any fiduciary duty, conversion, or false representations or omissions.

INTERROGATORY NO. 7

Describe with specificity the factual basis for your claim that Associated Bank was willfully blind to fraud, a breach of any fiduciary duty, conversion, or false representations or omissions occurring in relation to the Cook-Kiley Accounts and/or Cook-Kiley Entities, including (i) the identity of each officer, director, employee, agent, or representative of Associated Bank who you contend was willfully blind to fraud, a breach of any fiduciary duty, conversion, or false representations or omissions occurring in relation to the

Cook-Kiley Accounts and/or Cook-Kiley Entities, including and (ii) the date that such willful blindness first occurred.

INTERROGATORY NO. 8

Describe with specificity the factual basis for your claim that Associated Bank violated federal or state statutes, rules, and/or regulations with respect to the Cook-Kiley Accounts and/or Cook-Kiley Entities, including (i) the date of the violation, (ii) the identity of the person responsible for the violation, (iii) the specific statute, rule, regulation, or policy that was violated, and (iv) the factual basis for the contention that such a violation occurred.

INTERROGATORY NO. 9

Describe with specificity any and all damages you claim in this litigation, including (i) the amount of compensatory, monetary, exemplary, and/or punitive damages you claim in this litigation; (ii) the total amount of costs and/or expenses you claim as damages in this litigation; and (iii) the factual basis for your claims regarding compensatory, monetary, exemplary, and/or punitive damages.

INTERROGATORY NO. 10

Describe with specificity the factual basis for your claim that Associated Bank provided substantial assistance to the Ponzi Scheme or any fraud, a breach of any fiduciary duty, conversion, or false representations or omissions related to the Cook-Kiley accounts, including (i) the identity of each officer, director, employee, agent, or representative of Associated Bank who you contend provided substantial assistance to the Ponzi Scheme or any fraud, a breach of any fiduciary duty, conversion, or false representations or omissions related to the Cook-Kiley accounts; (ii) the date that such person provided substantial assistance; (iii) the factual basis for your claim that substantial assistance was provided; (iv) the identity of each officer, director, or employee of any Cook-Kiley Entity that was responsible for, supervised, or was aware of the substantial assistance; and (v) the facts that you contend differentiate the alleged substantial assistance from routine professional services.

Id., Ex. B, pp. 16-19.

On November 4, 2015, the Receiver served its responses to the Bank's interrogatories. With the exception of Interrogatory No. 9, bearing on damages,<sup>1</sup> the Receiver relied in whole or in part relied on its response to Interrogatory No. 5 for his responses to Interrogatory Nos. 7, 8 and 10. See La Porte Decl, Ex. C (Plaintiff's Responses to Defendant's First Set of Interrogatories).<sup>2</sup> Further, according to the Bank, the majority of the Receiver's responses to Interrogatory Nos. 5, 8 and 10 repeated the allegations in the Complaint. See Defendant Associated Bank, N.A.'s Reply ("Def.'s Reply") [Docket No. 124], p. 6 (citing Lakatos Decl., Ex. 20 (redline comparison between Complaint and Receiver's responses to the Bank's first set of interrogatories Nos. 5, 8 and 10)). In the Preliminary Statement to the responses, and in each of the Receiver's responses to Interrogatory Nos. 5, 7, 8, 9 and 10, the Receiver indicated that discovery had just begun and was in its early stages. La Porte Decl., Ex. C, pp. 1, 17, 42, 43, 49, 52.

On February 23, 2016, the Bank served notices of deposition on the Receiver. Declaration of Stephen M. Medlock ("Medlock Decl.") [Docket No. 117], Ex. 1 (Defendant Associated Bank, N.A.'s First Rule 30(b)(6) Deposition Directed to R.J. Zayed in his Capacity as Receiver for the Estate of Patrick Kiley D/B/A Crown Forex, LLC), Ex. 2 (Defendant Associated Bank, N.A.'s First Rule 30(b)(6) Deposition Directed

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<sup>1</sup> See Declaration of Alex C. Lakatos ("Lakatos Decl.") [Docket No. 125], Ex. 21 (Receiver's Objections and Responses to Respondents' Second Set of Interrogatories (Nos. 8-21)), pp. 6-25.

<sup>2</sup> La Porte had stated in his Declaration that Exhibit C were Plaintiff's Responses to Defendant Associated Bank's Interrogatories. La Porte Decl., ¶ 3. In fact, Exhibit C were the interrogatories propounded by the Bank to the Receiver. The Court requested that counsel for the Receiver provide to the Court the responses, which counsel did do. To date, those have not been filed in lieu of Exhibit C.

to R.J. Zayed in his Capacity as Receiver for Oxford Global FX, LLC). The Bank sought to depose the Receiver on a number of topics, four of which are at issue in the instant motion. The topics, and the Receiver's specific objections, are as follows:

**Topic 4:** The factual basis for your responses to Associated Bank's First Set of Interrogatories, First Set of Requests for Admission, Second Set of Requests for Admission, and Third Set of Requests for Admission.

**Receiver's Objection:** The Receiver objects to this topic insofar as the premise – that there is or was a “factual basis” for all responses to the above-listed discovery – is false. For example, for numerous requests for admission, the Receiver objected on the legal basis that the request exceeded the scope of Rule 26, and did not otherwise respond. By way of further example, for several interrogatories the Receiver did not respond at all because the Bank had exceeded the number of interrogatories that it had agreed to and that the Court set forth in the discovery plan. Therefore, the Receiver incorporates each of its objections to each item set forth in each of the discovery sets mentioned above in Topic 4.

The Receiver also objects to this topic because it is overbroad, unduly burdensome, and not proportionate to the needs of this case. The Receiver also objects to this topic because 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 – namely, through the respective discovery methods themselves. The factual basis for the Receiver's responses to the Bank's First Set of Interrogatories, for example, are set forth in those responses.

**Topic 6:** The factual basis for your damages claims and calculations.

**Receiver's Objection:** The Receiver objects to this topic because 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 – for example, through document (e.g., Interrogatory No. 9, and Request for Production No. 9) and expert discovery.

**Topic 17:** The factual basis for your claim that Associated Bank had actual and/or constructive knowledge of the Ponzi Scheme and/or that Associated Bank was willfully blind to the Ponzi Scheme.

**Receiver's Objection:** The Receiver objects to this topic because it is overbroad, unduly burdensome, and not proportionate to the needs of this case. The Receiver also objects to this topic because 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, including but not limited to, for example, Request for Production No. 7 from the Requests for Production and Interrogatory Nos. 6 and 7 from the Bank's First Set of Interrogatories.

**Topic 18:** The factual basis for your claim that Associated Bank provided substantial assistance to the Ponzi Scheme.

**Receiver's Objection:** The Receiver objects to this topic because 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, including but not limited to, for example, Interrogatory No. 10 from the Bank's First Set of Interrogatories.

Medlock Decl., Ex. 4 (Plaintiff R.J. Zayed's Objections and Response to Associated Bank, N.A.'s First Rule 30(b)(6) Deposition Directed to R.J. Zayed in His Capacity as Receiver for the Estate of Patrick Kiley D/B/A Crown Forex, LLC). The Receiver also interposed general objections to the Rule 30(b)(6) deposition notice on grounds that it violated the case law of Shelton v. American Motors Corp., 805 F.2d 1323, 1327 (8th Cir. 1986), and Zayed v. Buysse, Case No. 11-cv-1042 (SRN/FLN) (D. Minn. Dec. 2, 2011) [Docket No. 186], would impose an extraordinary burden and waste of litigation resources on the Receiver, and was not the appropriate vehicle to obtain facts underlying its suit against the Bank. La Porte Decl., Ex. C, pp. 1-2.

On April 12, 2016, the Bank filed the instant motion to compel the Receiver to designate a witness to testify on deposition topics 4, 6, 17 and 18. In support of its

motion, the Bank argued that the Receiver's lack of involvement with, or personal knowledge of, the Receivership Entities prior to their failure did not relieve him of his obligations to designate a Rule 30(b)(6) deponent. Defendant Associated Bank, N.A.'s Motion to Compel the Receiver's Designee to Attend the Rule 30(b)(6) Depositions of Crown Forex, LLC and Oxford Global FX, LLC [Docket No. 116], pp. 9-12. The Bank submitted that the Receiver was well-positioned to provide testimony regarding the factual basis for his damages calculation and for statements made in his interrogatory responses, as the Receiver has broad authority to compel individuals to assist him, the benefit of an extensive investigation into the Bank's records, access to documents produced to the SEC, and transcripts of ten different depositions of Trevor Cook. Id., pp. 12-13. Further, the Bank would be prejudiced if prevented from deposing the Receiver or his designee because the factual bases for the Receiver's claims are undeniably relevant. Id., pp. 13-14.

The Bank also contended that the Receiver could not assert the attorney-client privilege or work-product doctrines to shield himself from discovery of the bases for his claims or defenses. Id., pp. 14-15 (citing Marvin Lumber & Cedar Co. v. PPG Indus., Inc., 168 F.R.D. 641, 645-46 (D. Minn. 1996); United States v. McDonnell Douglas Corp., 961 F. Supp. 1288, 1290 (E.D. Mo. 1997)). Specifically, the Bank maintained that deposing the Receiver was not prohibited under Shelton, because the Bank did not intend to inquire into the Receiver's litigation strategy or attorney work product. Id., pp. 16-18.

The Bank additionally argued that Zayed v. Buysse, Case No. 11-cv-1042 (SRN/FLN) (D. Minn. Oct. 19, 2011), did not excuse the Receiver from submitting to a

Rule 30(b)(6) deposition. Id., pp. 18-20. According to the Bank, Buyse supported compelling the Receiver to attend the Rule 30(b)(6) deposition because the Bank has declined the Receiver's suggestion that it seek information through contention interrogatories; the Bank's Rule 30(b)(6) topics are not merely restatements of its earlier written discovery requests; and the Receiver has not sufficiently answered the Bank's discovery requests. Id., pp. 20-24. The Bank noted that unlike Buyse, which was a summary proceeding, the instant case is a "full-fledged lawsuit" requiring that the Receiver prove actual knowledge and affirmative wrongdoing by the Bank. Id., pp. 25-26. Thus, the likely benefit of the depositions outweighed any burden on the Receiver. Id.

Lastly, preparing a witness to testify would not be unduly burdensome on the Receiver, and interrogatories are no substitute for a Rule 30(b)(6) deposition. Id., pp. 26-29.

The Receiver responded that the rule in Shelton applied in this case because a Rule 30(b)(6) deposition notice that is directed towards an attorney who investigated facts (or directed others to investigate them) in anticipation of suit, is deemed to be directed towards counsel. Receiver's Response to Associated Bank's Motion to Compel the Receiver's Designee to Attend the Rule 30(b)(6) Depositions of Crown Forex, LLC and Oxford Global FX, LLC [Docket No. 119], pp. 10-12. Contrary to the Bank's argument, the Receiver is not a fact witness, as the Receiver was not appointed until after the operative facts in this case had occurred. Id., pp. 12-14.

The Receiver further contended that other means exist for the Bank to obtain the information it was seeking. In particular, the Receiver maintained that the information

could be obtained from the Bank and its employees, as they had first-hand knowledge of the facts underlying the Ponzi scheme. Id., p. 15. Although the Bank complained that it could not obtain the desired information through contention interrogatories, it did not explain why that was the case, and merely asserted that the choice of discovery methods should be its own. Id., pp. 16-17.

Additionally, the Receiver has already produced all of the information in his possession that was responsive to the Bank's discovery requests, and the Bank's objections to the Receiver's responses are baseless. Id., pp. 15-21. As such, any deposition testimony regarding information beyond the discoverable facts would impinge upon the Receiver's (i.e., trial counsel's) mental impressions, conclusions, opinions and legal theories. Id., pp. 22-24.

Finally, the Receiver argued that the deposition should be prohibited under Rule 26(b)(2)(C) because it would be unreasonably cumulative or duplicative and the information sought could be obtained from other sources that are more convenient, less burdensome, and less expensive; and the burden and expense of the depositions outweighed any possible benefit. Id., pp. 25-29.

In reply, the Bank reiterated that it was not seeking to depose the Receiver regarding legal strategy or work product. Def.'s Reply, pp. 2-3. The Bank urged that the Receiver is a party to this lawsuit, and in that capacity, he has retained trial counsel and verified interrogatory responses. Id., pp. 3-4.

The Bank further submitted that the Receiver's discovery responses revealed additional facts that were not supported by documents or testimony produced in this case, and therefore, the Bank was entitled to inquire about the bases of these facts. Id.,

pp. 4-6. Although preparing a Rule 30(b)(6) witness is inconvenient, burdensome and expensive, this is often true of 30(b)(6) depositions, and therefore, is not a valid ground on which to deny the Bank's chosen means of discovery. Id., pp. 6-7.

With regard to the Receiver's argument that he cannot be deposed because he came into this lawsuit after the relevant facts had transpired, the Bank maintained that the Receiver is the equivalent of a new manager or successor company of the Ponzi scheme entities, and courts do not refuse to order a 30(b)(6) deposition on the basis of new management. Id., pp. 7-8. Further, the Receiver has had nearly seven years to familiarize himself with the facts of this case. Id., p. 8.

On June 2, 2016, the Court held a hearing on the instant motion, along with the Receiver's motion to compel Michael Behm to answer deposition questions. The Court issued its ruling on the latter motion at the hearing and took the Bank's motion under advisement.

On July 11, 2016, the Bank requested permission to submit a supplemental memorandum in support of its motion based on two depositions that took place after the hearing. Letter to Court dated July 11, 2016. The Court granted the request and permitted each party to submit a supplemental memorandum, and any supporting declaration or affidavits.

The Bank filed its supplemental memorandum, arguing that the need to conduct a Rule 30(b)(6) deposition of the Receiver had become even more apparent since the date of the hearing. Defendant Associated Bank, N.A.'s Supplemental Brief in Support of its Motion to Compel [Docket No. 149], p. 1.

With regard to the Receiver's damage calculations, the Bank represented that the Receiver's only witness, Scott Hlavacek (an SEC accountant who analyzed the fraudsters' bank accounts in connection with the SEC's case against Trevor Cook), testified repeatedly that he was unable to explain the material differences between the Receiver's damages calculations and his own. Id., pp. 1-2. Hlavacek also testified that the Receiver likely had additional evidence that had not been shared with the Bank. Id., p. 2. According to the Bank, the Receiver had originally designated Hlavacek as an expert witness but subsequently reclassified him as a summary fact witness, thereby leaving no one who could explain the Receiver's damages calculations, other than the Receiver's Rule 30(b)(6) designee. Id., pp. 3-4. As for document discovery, the Receiver has repeatedly changed his damages calculations, and no documents produced thus far explain how the Receiver arrived at these alternative calculations, the methodology he used, any amounts he subtracted, or how the calculations relate to Hlavacek's own calculations. Id., pp. 4-5.

Additionally, on June 2, 2016, the day of the hearing on the instant motion, and two days before the close of discovery, the Receiver produced a handwritten affidavit from Leo Domenichetti, attesting to a number of facts not contained in the Receiver's discovery responses. Id., p. 6. At his subsequent deposition, Domenichetti testified that the Receiver's counsel had hand-drafted and supplied some of the key facts in his declaration, and Domenichetti knew some of these facts were false. Id., pp. 6-8. According to the Bank, Domenichetti's testimony showed that the Receiver's written discovery did not tell the whole story, and at a minimum, the Bank should be allowed to inquire about Domenichetti's affidavit. Id., p. 8.

In response, the Receiver argued that the Bank incorrectly characterized Hlavacek as the Receiver's witness, as Hlavacek is an SEC employee who the parties agreed would testify as a summary fact witness familiar with the Receivership Entities' bank records. Receiver's Supplemental Memorandum in Opposition to Defendant's Motion to Compel a Rule 30(b)(6) Deposition [Docket No. 151], pp. 2-3. Although the Bank complained that Hlavacek's calculations were frequently off by millions of dollars compared to the Receiver's calculations, the Receiver contended that Hlavacek's analysis was based on information available to the SEC at the time of its investigation, and the Receiver continued to gather information and update his damages calculations accordingly. Id., p. 3. Further, the Receiver has produced the underlying bank records necessary to determine the amount of investors' losses via simple arithmetic, and thus the Bank cannot complain that there is no witness to explain the Receiver's loss calculations. Id., pp. 3-4.

Finally, the Receiver asserted that Domenichetti's affidavit and deposition had no bearing on the necessity of the Bank's request to depose the Receiver, and Domenichetti's testimony did not demonstrate that the Receiver's counsel suborned perjury. Id., pp. 5-7.

## II. DISCUSSION

Under general federal receivership law, a receiver is an officer of the court that appointed the receiver. 1 Clark on Receivers, § 34 (3d ed. 1959). "The receiver is a neutral court officer appointed by the court." Sterling v. Stewart, 158 F.3d 1199, 1201 n. 2 (11th Cir. 1998). "The receiver is but the creature of the court; he has no powers except such as are conferred upon him by the order of his appointment and the course and practice of the court." Booth v. Clark, 58 U.S. 322, 331, 17 How. 322, 15 L.Ed. 164 (1854); SEC v. American Principals Holding, Inc. (In re San Vicente Medical

Partners Ltd.), 962 F.2d 1402, 1409 (9th Cir. 1992). A receiver does not represent a particular party but rather acts on behalf of the receivership entities to gather and collect assets for the court to distribute to those entitled to the funds, often the injured investors.

Sec. & Exch. Comm'n v. Nadel, M.D. Fla Case No. 8:09-cv-87-T-26TBM, Order dated April 25, 2012 [Docket No. 822], p. 14 (footnote omitted).

While a receiver may also be an attorney, the receiver does not act as an attorney in the course of fulfilling the duties of the receiver, and usually hires his or her own attorney, with the court's permission, when legal representation of the receiver is necessary.

The receiver, who does not function as an attorney in the receivership, does not maintain an attorney-client relationship in the receivership other than the position of client. The receiver is a client of the law firm or firms chosen and approved to represent the receiver in the conduct of the receivership.

Id. "The receiver has also been described as 'an indifferent person between the parties, appointed by the court . . . [to] secure[] funds which this court . . . will have the means of distributing among the persons entitled to those funds.'" Id. at p. 14 n.51 (quoting Gulf Refining Co. of La. v. Vincent Oil Co., 185 F.87, 89-90 (5th Cir. 1911)).

The Court finds the reasoning in Nadel to be persuasive, and concludes that the Receiver's status as a court-appointed agent (who happens to be an attorney) does not relieve him of his obligation under Rule 30(b)(6) either to provide testimony or to designate a witness to testify on his behalf. In other words, the Receiver cannot cloak himself in the protections of the work-product doctrine and insulate himself from discovery by choosing to associate with his lawyer and taking on the additional role of trial counsel. The Bank is entitled to discover the underlying factual basis for the Receiver's contentions prior to trial. Trial by ambush is not permitted.

At the same time, the Court finds that a Rule 30(b)(6) deposition is not the appropriate means for the Bank to obtain the information it is seeking. While it is true that parties generally have the right to select the discovery vehicle for the information they seek to pursue, this right is not unfettered. Rule 26(b)(1) and (2) allow the Court to consider several factors, including the burden or expense of the proposed discovery versus its likely benefit.<sup>3</sup> Applying these factors to the Bank's motion, the Court finds the following with respect to each of the four topics at issue:

With respect to Topic 4, the scope and breadth of this topic borders on the frivolous, and the Court will not rewrite it. Rule 30(b)(6) requires the requesting party to

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<sup>3</sup> Rule 26(b)(1) states:

(1) Scope in General. Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit. Information within this scope of discovery need not be admissible in evidence to be discoverable.

The relevant language of Rule 26(b)(2)(C) states:

On motion or on its own, the court must limit the frequency or extent of discovery otherwise allowed by these rules or by local rule 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; . . .

“describe with reasonable particularity the matters for examination” and requires that the “[t]he persons designated must testify about information known or reasonably available to the organization.” Requiring the Receiver to prepare a witness to testify about the factual basis for each of its responses to the Bank’s multitudinous interrogatories and requests for admission is impracticable and unduly burdensome.

As to Topics 17 and 18, the Court concludes that the appropriate vehicle for obtaining this information is via contention interrogatories, and not depositions, particularly in light of the fact that (1) the Receiver has no personal knowledge of any of the facts; (2) the information sought is cumulative or duplicative of discovery already produced to the Bank; (3) if the Receiver’s responses to the Bank’s interrogatories were deficient, steps could have been taken to identify the deficiencies and seek more complete answers; and (4) the topics will inevitably result in frequent objections based on attorney-client privilege or work product. See Buysse, Order dated Dec. 2, 2011 [Docket No. 186], pp. 9-13 (affirming denial of 30(b)(6) depositions of Receiver where depositions were unreasonably duplicative, respondents had ample opportunity to obtain information by other means, the burden of depositions outweighed their likely benefit, and any deposition of the Receiver, “who is both an attorney, trial counsel, and in his role as Receiver, an ‘agent of the Court’ . . . will likely give rise to numerous objections on grounds of privilege and work product.”) (citing S.E.C. v. Rosenfeld, No. CIV 1467 (RPP), 1997 WL 576012, at \*4 (S.D.N.Y. Sept. 16, 1997)); see also F.D.I.C. v. Wachovia Ins. Servs., Inc., 2007 WL 2460685, at \*4 (D. Conn. Aug. 27, 2007); S.E.C. v. Buntrock, 217 F.R.D. 441, 444-46 (N.D. Ill. 2003); Resolution Trust Co. v. Kazimour,

1993 WL 13009325, at \*\*2-3 (N.D. Iowa Nov. 16, 1993); S.E.C. v. Morelli, 143 F.R.D. 42, 47-48 (S.D.N.Y. 1992)).

Recognizing that fact discovery is now complete, the Receiver is reminded of his duty under Rule 26(e)(1)(A) to supplement any discovery responses, including Interrogatory Nos. 5, 7, 8 and 10, particularly in light of his statements in his initial responses that discovery was in its early stages.

With respect to Topic 6, for the same reasons stated above with respect to Topics 17 and 18, the Court finds that the appropriate vehicle for obtaining this information is via contention interrogatories.

As for the Receiver's response to Interrogatory No. 9, the Court finds that it is woefully inadequate, especially where it has interposed an objection that discovery is its early stages. Therefore, the Receiver shall supplement its response to Interrogatory No. 9 and provide a fulsome response.

The Court also finds that the Bank's supplemental arguments regarding Hlavacek's damages calculations and Domenichetti's deposition testimony have no bearing on the propriety of a Rule 30(b)(6) deposition of the Receiver. Regarding Hlavacek, the Receiver has represented that he has already produced all of the underlying bank records necessary for the Bank to conduct its own calculation of investors' losses. Thus, there is no reason to depose the Receiver to explain why his damages calculations differ from Hlavacek's. As for Domenichetti, the Court rejects the Bank's assertion that his testimony reveals the existence of additional factual evidence not produced by the Receiver. The Receiver represented that he has produced all

evidence responsive to the Bank's discovery requests, and the Bank has not indicated what evidence it believes is missing based on Domenichetti's testimony.

### **III. CONCLUSION**

For all of these reasons, the Court denies the Bank's motion to compel the Receiver to attend the Rule 30(b)(6) depositions of Crown Forex, LLC and Oxford Global FX, LLC. However, the Receiver is ordered to supplement its responses to Interrogatory No. 9. Further, the Receiver is reminded of his duty under Rule 26(e)(1)(A) to supplement any of his remaining discovery responses, in light of his objections that discovery was in its early stages when it provided his initial responses to the Bank.

J.S.M.