

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

U.S. COMMODITY FUTURES
TRADING COMMISSION,

Plaintiff(s)

Case No: 09-cv-3332 MJD/FLN

v.

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, UNIVERAL
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/FLN

Plaintiff(s)

v.

TREVOR G. COOK,
PATRICK J. 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.

**RECEIVER’S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION
TO COMPEL DISCOVERY RELATED TO HIS CLAIMS AGAINST
CERTAIN RESPONDENTS**

It has now been almost five months since fact discovery began, and over eight months since the Receiver filed his Petition. The Respondents have managed to stall this action for far too long; it is time for discovery to move forward. Accordingly, the Receiver respectfully moves the Court for an order compelling Steven and Pamela Cheney, David Buysse, Walter Defiel, Steven and Jenene Fredell, Michael Heise, Michael and Cynthia Hillesheim, Larry Hopfenspirger, Steven Kautzman, James McIntosh, George and Karen Morisset, Terry Frahm, and Reynold Sundstrom (“the Respondents”) to appear for depositions without further delay and to fully respond to the Receiver’s interrogatories.

I. BACKGROUND

On November 16, 2010 the Receiver served his first set of Interrogatories on the Respondents. (Declaration of Peter M. Kohlhepp, Apr. 11, 2011 [hereafter, “Kohlhepp Decl.”], ¶ 2, Ex. 1.)

On November 17, 2010 the Court issued a Scheduling Order for this action. (Pretrial Schedule, No. 09-cv-3333 [“SEC case”], Document No. 588.)

On December 16, 2010 the Respondents responded to the Receiver’s Interrogatories, raising a number of objections. (Kohlhepp Decl. ¶ 3, Ex. 2.) For example, the Respondents generally objected to the interrogatories as contention

interrogatories because “discovery has just commenced” and specifically raised the same objection as to Interrogatory Nos. 2, 3, and 5–9, 11–14. (*Id.*)

On January 18, 2011 the Receiver sent a letter to the Respondents proposing a time for depositions and asking about the availability of the Respondents during that time. (*Id.* ¶ 4, Ex. 3.)

On January 24, 2011 the Respondents sent a letter to the Receiver stating that they would not appear for depositions until all notes and recordings of any conversations the Receiver had with the Respondents were produced. (*Id.* ¶ 5, Ex. 4.)

On March 2, 2011 the Court entered a Protective Order in this action. (SEC Docket No. 699.) The very next day, the Receiver produced over 1,100 documents containing over 12,000 pages to the Respondents, including all non-privileged notes and recordings, to the extent they exist, of the Receiver’s conversations with the Respondents. (Kohlhepp Decl. ¶ 6, Ex. 5.)

On March 11, 2011 the Respondents filed an Answer to the Receiver’s claims. (SEC Docket No. 701.)

On April 1, 2011 the Receiver noticed the Respondents’ depositions for dates spanning a period of three weeks, beginning on April 18, 2011. (Kohlhepp Decl. ¶ 7, Exs. 6–21.)

On April 6, 2011 the Receiver sent a letter to the Respondents outlining the deficiencies in the Respondents’ discovery responses—including identifying

specific deficiencies in the responses to Interrogatory Numbers 1–3 and 5–14. (*Id.* ¶ 8, Ex. 22.)

On April 7, 2011 the parties met and conferred by telephone regarding the depositions the Receiver noticed and the deficiencies in the Respondents discovery responses. (*Id.* ¶ 9.) Counsel for the Respondents flatly refused to produce the Respondents for the noticed depositions and stated that the Respondents would be moving for a protective order. (*Id.* ¶ 10–11, Ex. 23–24.) Specifically, counsel for the Respondents stated that the Respondents would not appear until (1) the Respondents are provided with the irrelevant portions of the Trevor Cook deposition transcripts in unredacted form, and 2) Clifford Berg decides not to assert his 5th Amendment privilege and agrees to talk with the Respondents. (*Id.*)

At the April 7 meet and confer, the Respondents also maintained their refusal to provide substantive responses to the Receiver's Interrogatory Numbers 1, 2 and 5–14. (*Id.*) In fact, the only supplemental facts the Respondents agreed to provide are dates and amounts for money that each Respondent transferred to Cook's scheme and got out of the scheme. (*Id.* ¶ 10–11, Ex. 23–24.) The Respondents refused to provide any additional substantive information on the bases that the interrogatories are (1) unduly burdensome and/or vague, (2) seek contentions, and (3) seek information that would be available at the depositions the Receiver had noticed. (*Id.*)

II. ARGUMENT

A. **The Respondents Must Appear for the Noticed Depositions Without Further Delay.**

The Receiver properly noticed the Respondents' depositions pursuant to Rule 30(b)(1). The Receiver noticed the depositions at least three weeks in advance, to occur either at the offices of CCVL or at such other time and place mutually agreed upon by counsel. (*See* Kohlhepp Decl. ¶ 7, Exs. 6–21.) Each Respondent whose deposition was noticed is a party to this action. We are now over four months into fact discovery, and the Respondents have been in possession of the documents produced by the Receiver, including all non-privileged notes and recordings that exist from the Receiver's interviews of the Respondents, for over a month. But the Respondents refuse to appear for the noticed depositions until two "preconditions" are met: (1) the Receiver produces unredacted copies of Trevor Cook deposition transcripts and (2) Clifford Berg agrees to testify. (*Id.* ¶ 11, Ex. 24.) There is simply no basis in the Rules of Civil Procedure for this delay tactic.

Federal Rule of Civil Procedure 26(d)(2) makes it clear that discovery is not quid pro quo and the Receiver is free to pursue various methods of discovery independently. But the Respondents refuse to appear for the noticed depositions until they are satisfied with the Receiver's document production. (*Id.*) This type of stonewalling is specifically prohibited by Rule 26. *Keller v. Edwards*, 206 F.R.D. 412, 416 (D. Md. 2002) ("While an attorney representing a party or witness that has been served with a valid notice of deposition properly may communicate

to the noticing party any objections to the service, sequence or timing of the deposition, he may not unilaterally refuse to produce his client until certain conditions are fulfilled.”).

Further, the Respondents’ ability to answer questions at their own depositions has absolutely nothing to do with the Trevor Cook depositions. The Receiver noticed the Respondents depositions to find out what the *Respondents* know. Even if the Cook depositions were somehow relevant to the Respondents’ *personal knowledge*—which they are not—the Receiver has already produced unredacted copies of the portions of the Cook deposition transcripts that do reference the Respondents. And even if the irrelevant portions of the deposition transcripts were to be produced, the Respondents would not have access to that information because it would be designated AEO under the Protective Order—a fact conceded by the Respondents at the April 7, 2011 meet and confer. (Kohlhepp Decl. ¶ 10, Ex. 23.) And as explained above, the Receiver has produced the specific interview notes the Respondents demanded in their January 24, 2011 letter as an earlier “precondition” to discussing depositions. (*See* Kohlhepp Decl. ¶ 6, Ex. 5.) The Court should not allow the Respondents to continue fabricating various “preconditions” as a tactic to stymie discovery.

Even more puzzling is the Respondents’ contention that because Clifford Berg apparently intends to assert his 5th Amendment privilege, the Respondents cannot be deposed. (*Id.* ¶ 11, Exs. 24.) During the April 7, 2011 meet and confer, the Respondents stated that they need to be able to interview Mr. Berg so that he

can “refresh [the Respondents] recollections” prior to their depositions. (*Id.* ¶ 10, Ex. 23.) It is unclear why Mr. Berg must refresh the recollections of the Respondents before they can be deposed. Certainly the Respondents are not contending that Mr. Berg’s cooperation is necessary to ensure that the Respondents’ deposition testimony will be consistent? The Receiver is merely seeking to discover what the *Respondents* know. Discovery in this case should and will go forward whether or not Clifford Berg chooses to assert his 5th Amendment privilege.

B. The Respondents Must Provide the Information Requested by the Receiver’s Interrogatories.

The Respondents fail to identify or describe a single, concrete fact in response to the Receiver’s Interrogatories and continue to maintain that they are not required to do so. Rather, they cling to rote objections: that the interrogatories are overly burdensome and vague, that they are not obligated to provide their contentions, and that the Receiver can obtain the information sought at the depositions they are refusing to attend. (Kohlhepp Decl., ¶ 3, Ex. 2; ¶ 10, Ex. 23.) The Court should not permit baseless objections to further delay this action. The Receiver’s Interrogatories are narrowly targeted and—consistent with Rule 26(b)(1)—reasonably calculated to lead to the discovery of admissible evidence. To the extent they are contention interrogatories, such interrogatories are entirely proper and at this stage of fact discovery the Receiver is entitled to responses.

1) The Court Should Compel the Respondents To Substantively Respond to Interrogatory Numbers 1, 2, and 6–8.

As an initial matter, Interrogatory Numbers 2 and 6–8 are not contention interrogatories. (Kohlhepp Decl. ¶ 2, Ex. 1) Rather, they seek relevant facts about the transfer of money between the Respondents and the Cook entities and related communications—facts to which the Receiver is entitled. *In re Grand Casinos*, 181 F.R.D. 615, 618 (D. Minn. 1998) (interrogatory requesting the identity of each person having “personal knowledge of any facts at issue” and further asking that the party “separately state the facts and observations within each person’s knowledge” was “not a ‘contention interrogatory’ at all but, instead, is a permissible fact interrogatory, which is calculated to discover information.”). Because Interrogatory Numbers 2 and 6–8 are permissible fact interrogatories, the Court should compel the Respondents to provide substantive responses to them without further delay.

The Respondents purport to respond to Interrogatory Numbers 1, 2 and 6–8 by simply identifying “individuals with knowledge.” (Kohlhepp Decl. ¶ 3, Ex. 2) But this response is deficient. The interrogatories ask the Respondents to identify specific, concrete facts and materials of which the identified person has knowledge. (*Id.*) Because these interrogatories are permissible fact interrogatories, the Respondents cannot avoid their obligation to provide substantive responses by merely identifying individuals with knowledge. The Court should compel the Respondents to identify specific responsive facts and

materials in response to Interrogatory Numbers 1, 2, and 6–8 within seven days of the Court’s order.

2) The Court Should Compel the Respondents To Substantively Respond to Interrogatory Numbers 10–14.

The Respondents maintain that Interrogatory Numbers 10–14, seeking the identification and description of all facts that the Respondents rely on for their asserted defenses, are per se improper because they are contention interrogatories. (Kohlhepp Decl. ¶¶ 3, 10, Exs. 2, 23) But that is simply not the law. These interrogatories are entirely proper under Rule 33(a):

[Interrogatories requesting a party to ‘set forth in detail all of the facts upon which [the party] intends to rely in support of its allegation’] seek disclosure of facts upon which the defenses were pled, and any additional corroborative or supporting facts marshaled since the pleading was interposed. That is what defendants are expected to disclose, and this Court looks askance at total resistance to discovery predicated upon semantic games.

Mead Corp. v. Riverwood Natural Res. Corp., 145 F.R.D. 512, 516 (D. Minn. 1992).

The Respondents also contend that the Receiver is not entitled to know all facts on which the Respondents rely for their asserted defenses because those facts are privileged and it would be unduly burdensome to identify them. (Kohlhepp Decl. ¶ 10, Ex. 23) But again, the Respondents are simply wrong as a matter of law. *Facts* relevant to the Receiver’s claims are not privileged. *Mead Corp.*, 145 F.R.D. at 518 (“The disclosure of relevant facts does not necessarily reveal the origin of the facts or how, why and by whom certain facts upon which defendants

rely were selected.”). The Receiver is entitled to discover the factual bases for the defenses the Respondents have asserted. *Id.*

Nor are the contention interrogatories premature. Fact discovery has been ongoing for over four months and closes in less than three. (Pretrial Schedule, SEC Doc. No. 588.) The Respondents have filed an Answer to the Receiver’s claims, specifically asserting that the Respondents received the money from Cook’s scheme in good faith and in exchange for reasonably equivalent value. (SEC Docket No. 701.) The Receiver produced over 12,000 pages of documents to the Respondents over a month ago. The Respondents have been aware of the Receiver’s claims for over eight months now and have had over a month to review the documents produced by the Receiver. There is simply no basis for delaying a substantive response any further.

Finally, the Receiver is entitled to know the bases for the Respondents’ contentions now so that he can appropriately focus his discovery for the time remaining under the Scheduling Order. This District has recognized the need for timely answers to contention interrogatories:

[T]he Court finds that Medtronic must answer the [contention] interrogatory now. Under our rules, discovery is broad. . . . Medtronic’s insistence that the Parties wait to conduct discovery on this particular defense is untenable. Medtronic asserted this defense. It certainly should expect discovery requests related to it. Moreover, the Court finds persuasive CPI’s argument that holding off on discovery prejudices CPI’s ability to design an effective discovery strategy that complies with the Pretrial Scheduling Order in this case.

Medtronic, Inc. v. Guidant Corp., 2003 U.S. Dist. LEXIS 26039, at *9–10 (D. Minn. Jan. 8, 2003). The Court should compel the Respondents to provide substantive responses to Interrogatory Numbers 10–14 within seven days of this Court’s order.

3) The Fact that the Receiver Has Noticed Depositions Does Not Relieve the Respondents of their Obligation to Substantively Respond to Interrogatories Numbers 1, 2, 6–8, and 10–14.

The Respondents seek to avoid providing substantive responses to Interrogatory Numbers 1, 2, 6–8, and 10–14 by insisting that the Receiver can obtain the same information at the depositions the Receiver has noticed. (Kohlhepp Decl. ¶ 10, Ex. 23) But this objection is circular—the Respondents refuse to appear for the noticed depositions. Moreover, the methods of discovery may be used in any sequence, and the Receiver need not wait until depositions to obtain the information sought by permissible fact and contention interrogatories. Federal Rule of Civil Procedure 26(d)(2). The Court should not allow further game-playing. The Receiver is entitled to substantive responses to the interrogatories he served.

III. CONCLUSION

To avoid further delay or expense, the Receiver respectfully requests that the Court order the Respondents to make themselves available for depositions and to substantively respond to the Receiver’s Interrogatory Numbers 1, 2, 6–8, and 10–14, as requested in the Receiver’s Motion.

Dated: April 11, 2011

Respectfully submitted,

s/ Peter Kohlhepp

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