

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, 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

**LENDER RESPONDENTS'
MEMORANDUM IN
OPPOSITION TO THE
RECEIVER'S MOTION TO
COMPEL**

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

UNITED STATES SECURITIES
AND EXCHANGE COMMISSION,

Plaintiff(s)

Case No. 09-CV-3333 MJD/FLN

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.

Lender 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 “Lender Respondents”), submit the following Memorandum of Law in Opposition to the Receiver’s Motion to Compel.

INTRODUCTION

In its Memorandum of Law in Support of its Motion to Compel, the Receiver asserts that the Lender Respondents have “stalled” this litigation too long and the Court should Order the Lender Respondents to appear for their depositions and respond to certain discovery requests the Receiver has served. The Receiver’s assertion that the Lender Respondents have “stalled” this litigation is absurd. It is the Receiver who has “stalled” this litigation by refusing to allow production of interview notes with the Lender Respondents, Trevor Cook and individuals associated with Trevor Cook. Upon the commencement of the discovery in this action in November, 2010, the Lender Respondents served discovery on the Receiver and a subpoena on Trevor Cook’s law firm. Despite the fact that the Receiver did not have standing to move to quash the subpoena, the Receiver nonetheless brought such a motion which, although the Court denied, the Court allowed the Receiver the opportunity to designate certain documents as “privileged.” It took the Receiver well over one month to designate such documents. In addition, the Receiver designated several documents as privileged under something the Receiver calls the “Receivership privilege” to which the Receiver has been unable to

point to any case law or other legal support of this privilege. Moreover, after asserting this privilege with respect to such documents, the Receiver then alerted the U.S. Attorney's Office that it may have a privilege to assert in this matter. Thus, the U.S. Attorney's moved to intervene in this action to assert any privilege which the U.S. Attorney's office may have. Despite the fact that the Court granted the U.S. Attorney's office's motion to intervene on March 10, 2011, the U.S. Attorney's office has yet to file its Motion for a Protective Order with respect to the documents in the possession of the Mauzy Law Office. Thus, despite the fact that this Court denied the Receiver's Motion to Quash the Subpoena served on the Mauzy Law Office on December 22, 2010, it was not until February 7, 2011 that the Receiver sent notice of its privilege log and also objected to further production despite this Court's denial of the Receiver's Motion to Quash. To this date, the Lender Respondents have still not received the documents from the Mauzy Law Office and the Receiver has still failed to produce interview notes related to Trevor Cook. As a result, the Lender Respondents moved for a protective order and/or to stay this litigation.

In addition, the Receiver moves to compel the Lender Respondents to completely Answer "contention interrogatories" the Receiver served requesting the Lender Respondents to specify, for instance, "all defenses" the Lender Respondents will assert in this matter along with "all facts" supporting such defenses. This type of interrogatory is completely contrary to federal law. In the written discovery process, parties are not entitled to each and every detail that could possibly exist in the universe of facts. *IBP, Inc. v. Mercantile Bank*, 179 F.R.D. 316, 321 (D.Kan.1998) ("To require specifically

each and every fact and application of law to fact, however, would too often require a laborious, time-consuming analysis, search, and description of incidental, secondary, and perhaps irrelevant and trivial details. The burden to answer then outweighs the benefit to be gained.”). Nor is Defendant U.S. Bank entitled to a narrative account of the Lender Respondents’ “defenses”. See *Lucero v. Valdez*, 240 F.R.D. 591, 594 (D.N.M.2007) (“Contention interrogatories should not require a party to provide the equivalent of a narrative account of its case, including every evidentiary fact, details of testimony of supporting witnesses, and the contents of supporting documents.”).

The Receiver’s Motion to Compel should be denied and the Lender Respondents’ Motion for a Protective or to Stay should be granted.

BACKGROUND

The Lender Respondents incorporate by reference the facts set forth in their Motion to Stay or in the alternative for a Protective Order. This factual background section will focus on facts relevant to the Receiver’s Motion to Compel.

First, while the Receiver complains primarily about the Lender Respondents’ Responses to the Receiver’s contention interrogatories, the Receiver has responded to the Lender Respondents’ Interrogatories with the same objections that the Receiver now complains of with the Lender Respondents. For instance, in Interrogatory No. 2, the Lender Respondents’ sought information related to the facts in this matter. The Receiver responded as follows:

Interrogatory No.2: Identify each and every person having knowledge of any facts related to any of the allegations contained in the Receiver's Petition or Memorandum in Opposition to Respondents' Motion to Dismiss, or Respondents' Memorandum

and/or Reply Memorandum in Support of Respondents' Motion to Dismiss, and with respect to each such person describe in all possible detail each and every fact of which each such identified person has knowledge.

Response: The Receiver objects to this Interrogatory on the grounds that it is overly broad, unduly burdensome, and seeking information neither relevant to any claim or defense in this action nor reasonably calculated to lead to the discovery of admissible evidence. The Receiver further objects to this Interrogatory because it seeks information protected by the attorney-client privilege or work product doctrine. The Receiver further objects to this Interrogatory as vague and ambiguous, and particularly vague and ambiguous to the extent it seeks the identity of each and every person having knowledge of any facts related to any of the allegations contained in the *Respondents* Memorandum and/or Reply Memorandum in Support of Respondents' Motion to Dismiss. Subject to the foregoing general and specific objections, and without limiting the Receiver's right to the Investor Respondents to the Receiver's Initial Disclosures.

Interrogatory No.7: State the substance of each and every conversation or written communication with any individual Respondent which You claim in any way constitutes an admission against interest against said individual Respondent or any other Respondent; and for each such oral or written communication, state the date, form and substance of the communication and, if oral, identify to whom such communication was made and identify each and every person who was present at the time such communication was made, and if such communication is contained or referred to in a document, identify each and every such document containing or referring to any such communication.

Response: The Receiver objects to this Interrogatory on the grounds that it improperly seeks legal conclusions. Subject to the foregoing general and specific objections, see the response to Interrogatory 3.

See, the Receiver's Responses to the Lender Respondents' Interrogatories attached to the Gregory Erickson Declaration as Exhibit 1. Thus, in response to the Lender Respondents' Interrogatories seeking information related to the facts in this matter and any admissions against interest the Receiver believes that the Lender Respondents made in this case, the Receiver simply referred the Lender Respondents to the Receiver's Initial Disclosures. However, in its Initial Disclosures, the Receiver simply identified the Lender Respondents along with the statement that each of the Lender Respondents has:

Information relating to the circumstances surrounding the transfer of money from the Investor Respondents to Trevor Cook and his entities and the transfer of money from Trevor Cook and his entities to the Investor Respondents.

See, Receiver's Initial disclosures attached to the Erickson Declaration as Exhibit 2.

In addition, while now claiming that Clifford Berg is not a significant witness in this action, the Receiver identified Clifford Berg as the first fact witness in its disclosures along with an identical statement as quoted above.

Despite these responses to the Lender Respondents' Interrogatories, the Receiver now complains regarding the Lender Respondents' Interrogatories which are contain more information than the information disclosed by the Receiver.

LEGAL ARGUMENT

A. The Lender Respondents Properly Responded and Reserved Objections to Interrogatories No. 1, 2 and 6.

As set forth below, the Receiver is seeking to compel responses to the following discovery requests:

INTERROGATORY NO. 1:

Identify each person answering these interrogatories, supplying information, or assisting in any way with the preparation of the answers to these interrogatories, and with respect to each such person, specify in all possible detail every fact they have knowledge of and the identity of every document which discusses, reflects, or relates to any such fact.

RESPONSE NO. 1. Subject to the general objections, Investor Respondents further object to this interrogatory as vague, in failing to define "assisting" in the context of this interrogatory. Respondents further object to this interrogatory as requesting information protected by the attorney-client privilege. Respondents further object to this interrogatory as overly burdensome, in requesting "each and every fact they have knowledge of." Subject to these objections, other than the Investor Respondents attorneys, the following people have participated in answering these interrogatories:

- A. Steven and Pamela Cheney
11915 County Road 10
Plymouth, MN 55442
Telephone: (763) 559-1980

Steven and Pamela Cheney have factual information supporting their potential defenses to the claims set forth in the Receiver's Petition, and have factual information regarding their dealings with Defendants in the above-captioned action and representatives of the Receivership Entities.

- B. David Buysse
34894 Faribault St
Frontenac, MN 55026
Telephone: (651) 301-0101

David Buysse has factual information supporting his potential defenses to the claims set forth in the Receiver's Petition, and has factual information regarding his dealings with Defendants in the above-captioned action and representatives of the Receivership Entities.

- C. Walter Defiel
1390 Park St
White Bear Lake, MN 55110
Telephone: (651) 778-8434

Walter Defiel has factual information supporting his potential defenses to the claims set forth in the Receiver's Petition, and has factual information regarding his dealings with Defendants in the above-captioned action and representatives of the Receivership Entities.

- D. Steven and Jenene Fredell
2880 Highridge Terrace
Eagan, MN 55121
Telephone: (651) 454-1555

Steven and Jenene Fredell have factual information supporting their defenses to the claims set forth in the Receiver's Petition, and have factual information regarding their dealings with Defendants in the above-captioned action and representatives of the Receivership Entities.

- E. Michael and Jennifer Heise
8745 W. Highway 101
Savage, MN 55378

Telephone: (952) 356-7143

Michael and Jennifer Heise have factual information supporting their potential defenses to the claims set forth in the Receiver's Petition, and have factual information regarding their dealings with Defendants in the above-captioned action and representatives of the Receivership Entities.

- F. Michael and Cynthia Hillesheim
20281 170TH Ave
New Ulm, MN 56073
Telephone: (507) 359-9073

Michael and Cynthia Hillesheim have factual information supporting their potential defenses to the claims set forth in the Receiver's Petition, and have factual information regarding their dealings with Defendants in the above-captioned action and representatives of the Receivership Entities.

- G. Larry Hopfenspirger
2025 Nicollet Avenue, Suite 203
Minneapolis, MN 55404
Telephone: (612) 672-6707

Larry Hopfenspirger has factual information supporting his potential defenses to the claims set forth in the Receiver's Petition, and has factual information regarding his dealings with Defendants in the above-captioned action and representatives of the Receivership Entities.

- H. Steven Kautzman
23406 164TH St
Big Lake, MN 55309
Telephone: (763) 370-8344

Steven Kautzman has factual information supporting his potential defenses to the claims set forth in the Receiver's Petition, and has factual information regarding his dealings with Defendants in the above-captioned action and representatives of the Receivership Entities.

- I. James McIntosh
1800 Bridge Hollow Drive
Wanship, Utah 84017
Telephone: (435) 336-4139

James McIntosh has factual information supporting his potential defenses to the claims set forth in the Receiver's Petition, and has factual information regarding his dealings with Defendants in the above-captioned action and representatives of the Receivership Entities.

- J. George and Karen Morisset
1431 Mooney Dr. W.
St. Paul, MN 55112
Telephone: (651) 631-8683

George and Karen Morisset have factual information supporting their potential defenses to the claims set forth in the Receiver's Petition, and have factual information regarding their dealings with Defendants in the above-captioned action and representatives of the Receivership Entities.

- K. Reynold and Judith Sundstrom
17000 205th Ave NW
Big Lake, MN 55309
Telephone: (612) 889-9833

Reynold and Judith Sundstrom have factual information supporting their potential defenses to the claims set forth in the Receiver's Petition, and have factual information regarding their dealings with Defendants in the above-captioned action and representatives of the Receivership Entities.

- L. Terry Frahm
12787 Durham Way
Apple Valley, MN 55124
Telephone: (612) 865-5224

Terry Frahm has factual information supporting his potential defenses to the claims set forth in the Receiver's Petition, and has factual information regarding his dealings with Defendants in the above-captioned action and representatives of the Receivership Entities.

INTERROGATORY NO. 2:

For each Respondent, identify every person with knowledge of facts relevant to (1) the Respondent's defenses to the claims in the Receiver's Petition, or (2) to any transfer of funds made by or to that Respondent related to the claims in the Receiver's Petition, and further summarize in detail each person's knowledge.

RESPONSE NO. 2. Subject to the general objections, Investor Respondents object to this Interrogatory as a contention interrogatory and discovery has just

commenced in this action. In addition, Investor Respondents further object to this Interrogatory as overly burdensome in requesting in detail each person's "knowledge." Investor Respondents further object to this interrogatory as vague in failing to define the "knowledge" of which the Receiver wishes a detailed summary. The Investor Respondents further object to this interrogatory to the extent it seeks information regarding the Investor Respondents' "defenses" to the Petition as the Investor Respondents have not yet filed a responsive pleading to the Petition. Subject to these objections, Investor Respondents would identify the individuals identified in response to Interrogatory No. 1 and the individuals identified in the Investor Respondents' Initial Disclosures.

INTERROGATORY NO. 6:

For each Respondent who contends he or she transferred funds to Trevor Cook, Clifford Berg, or any one of the Receivership Entities (including all past or present directors, officers, employees, agents, or representatives of any of the Receivership Entities), describe the facts and circumstances surrounding each such transfer and identify all persons with knowledge of such transfer.

RESPONSE NO. 6. Subject to the general objections, Investor Respondents further object to this Interrogatory as a contention interrogatory and discovery has just commenced in this action. In addition, Investor Respondents also object to this Interrogatory as overly burdensome in requesting the "the facts and circumstances surrounding each such transfer." Investor Respondents further object to the interrogatory as vague, in failing to define the breadth of the term "facts and circumstances surrounding each such transfer." Subject to these objections, the Investor Respondents would identify each Investor Respondent as having knowledge of the transfer as well as individuals associated with the Receivership Entities including, but not limited to, Clifford Berg.

The Lender Respondents' have properly responded to Interrogatory No. 1, 2 and 6 seeking the identity of individuals with knowledge of the facts in this matter and a general description of their knowledge. The Lender Respondents have fully identified, at this stage of the litigation, the persons who have knowledge of facts at issue in this matter and general discussion of the facts of which they have knowledge. However, the Receiver argues that it is entitled to "all facts." The Lender Respondents properly objected to this Interrogatory.

are not required to provide a full narrative of everything each of these individuals have knowledge. Rather, such information may be obtained in depositions. Moreover, the Receiver has interviewed each of the Lender Respondents. However, with respect to the Lender Respondents' interrogatories seeking the same information, the Receiver objected and provided less information than the Lender Respondents have provided. Simply put, the same rules must apply to both parties.

Federal courts hold that interrogatory seeking "all facts" supporting various contentions in a lawsuit are overbroad. *Grynborg v. Total S.A.*, 03-cv-01280-WYD-BNB, 2006 WL 1186836 at *6-*7 (D.Col. May 3, 2006); *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 173 (S.D.N.Y.2004); *Thompson v. United Transp. Union*, Civ.A. 99-2288-JWL, 2000 WL 1375293 at *1 (D.Kan. Sept.15, 2000); *Hiskett v. Wal-Mart Stores, Inc.*, 180 F.R.D. 403, 404-05 (D.Kan.1998); *Hilt v. SFC Inc.*, 170 F.R.D. 182, 186-87 (D.Kan.1997); *see also First United Fund Ltd. v. American Banker, Inc.*, 127 Misc.2d 247, 251, 485 N.Y.S.2d 489, 493 (Sup.Ct.1985); *Clean Earth Remediation & Const. Services, Inc. v. Am. Int'l Group, Inc.*, 245 F.R.D. 137, 141 (S.D.N.Y. 2007). The reason these types of contention interrogatories are considered overbroad is because they essentially require a party to provide a narrative regarding the party's case:

To require specifically "each and every" fact and application of law to fact, however, would too often require a laborious, time-consuming analysis, search, and description of incidental, secondary, and perhaps irrelevant and trivial details. The burden to answer then outweighs the benefit to be gained. Other discovery procedures, such as depositions and production of documents, better address whatever need there be for that kind of secondary detail. The court sustains the objections of plaintiff, therefore, to the extent Interrogatories 1 through 5 and 7

through 12 are overly broad and unduly burdensome in seeking “each and every fact and application of law to fact” for the allegations they identify.

IBP, Inc. v. Mercantile Bank of Topeka, 179 F.R.D. 316, 321 (D. Kan. 1998).

Rather, these cases only require a party to identify the material or principal facts.

IBP, Inc., 179 F.R.D. at 321.

In addition, Fed. R. Civ. P. 33 (a)(2) was recently amended in 2007 to provide:

An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, **but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.**

As set forth above, the Lender Respondents have appropriately responded to Interrogatory No. 1, 2 and 6. First, the Lender Respondents have identified each and every individual who may have information regarding the issues in this matter. Second, with respect to each such individual, the Lender Respondents have also provided a narrative identifying the material or principal facts. Third, to the extent that the Receiver is seeking to have the Lender Respondents literally identify “all facts” supporting their contentions in this case, the Interrogatory is overly broad.

Moreover, these interrogatories are indisputably contention interrogatories seeking to have the Lender Respondents identify facts which are under the control of the Receiver. To the extent that the Lender Respondents will provide any information in response to these interrogatories, the response will not be based entirely on information under the control or knowledge of the Lender Respondents. In addition, as set forth in the Lender Respondents’ Motion to Compel, if the Receiver is not complying with Rules

and producing documents and identifying persons with knowledge, the Lender Respondents will not be able to provide “all facts” which the Receiver seeks. This point is especially relevant here given the most critical facts regarding the Lender Respondents and their defenses are contained in the Receiver’s interview notes and documentation related to the Cook entities.

Furthermore, as set forth above, the Receiver provided the exact same objection to the Lender Respondents’ contention interrogatories. What is most egregious on the facts of this matter is that the Receiver interviewed many of the Lender Respondents and yet has failed to provide a detailed description and summary of the facts surrounding each interview and exactly what the Lender Respondents allegedly told the Receiver. Nonetheless, the Receiver apparently wants the Lender Respondents to provide such a response to its contention interrogatories.

Finally, the Receiver cites *In re Grand Casinos, Inc.*, 181 F.R.D. 615, 618 (D. Minn. 1998) to argue that the Lender Respondents have improperly categorized Interrogatories 1, 2 and 6 as premature contention interrogatories. While Lender Respondents did list this as an objection, the Lender Respondents’ primary objection was the overbreadth of the interrogatories and the fact that the Lender Respondents fully responded. Contrary to the Lender Respondents’ answer and objections, the defendant in *Grand Casino* refused to answer the interrogatory at all including the identification of persons with knowledge. *In re Grand Casinos, Inc.*, is meaningless in this case.

The Receiver’s Motion to Compel further responses to Interrogatory No. 1, 2 and 6 should be denied.

B. The Lender Respondents Properly Responded and Reserved Objections to Interrogatories No. 7 and 8.

The Receiver's Interrogatory No. 7 and 8 seeking all "communications" related to the facts transfer of funds to or from the Cook Entities is over broad and this information is best obtained through depositions. The Interrogatories and the Responses are set forth below:

INTERROGATORY NO. 7:

For each Respondent who contends he or she transferred funds to Trevor Cook, Clifford Berg, or any one of the Receivership Entities (including all past or present directors, officers, employees, agents, or representatives of any of the Receivership Entities), describe any communications related to the funds, including all communications that occurred both before and after any such transfer, and identify the persons with whom the communication occurred.

RESPONSE NO. 7. Subject to the general objections, Investor Respondents further object to this Interrogatory as a contention interrogatory and discovery has just commenced in this action. In addition, Investor Respondents also object to this Interrogatory as overly burdensome in requesting the all communications with the Receivership Entities and Trevor Cook and Clifford Berg. Investor Respondents further object to the interrogatory as vague, in failing to define the breadth of the term "communications." Subject to these objections, the Investor Respondents would identify each Investor Respondent as having knowledge of any such communication regarding the transfer as well as individuals associated with the Receivership Entities including, but not limited to, Clifford Berg.

INTERROGATORY NO. 8:

For each Respondent, describe the facts and circumstances surrounding each transfer of funds from Trevor Cook, Clifford Berg, or any one of the Receivership Entities (including all past or present directors, officers, employees, agents, or representatives of any of the Receivership Entities) to the Respondent, including but not limited to the transfers identified in the Receiver's Petition and the attached Exhibits 1 and 2, and including but not limited to any communications related to such transfers, and identify the persons with whom the communication occurred.

RESPONSE NO. 8. Subject to the general objections, Investor Respondents further object to this Interrogatory as a contention interrogatory and discovery has just commenced in this action. In addition, Investor Respondents also object to this Interrogatory as overly burdensome in requesting the "the facts and

circumstances surrounding each such transfer.” Investor Respondents further object to the interrogatory as vague, in failing to define the breadth of the term “facts and circumstances surrounding each such transfer.” In addition, Investor Respondents also object to this Interrogatory as overly burdensome in requesting all communications with the Receivership Entities and Trevor Cook and Clifford Berg. Investor Respondents further object to the interrogatory as vague, in failing to define the breadth of the term “communications.” Subject to these objections, the Investor Respondents would identify each Investor Respondent as having knowledge of any such communication related to the transfer as well as individuals associated with the Receivership Entities including, but not limited to, Clifford Berg.

Similarly to the argument set forth above, the Lender Respondents’ have properly responded to Interrogatory No. 7 and 8. Parties are not required to detail each and every communication they have had with other parties in a matter. *See, above, IBP, Inc., infra.* Rather, such information is best obtained in a deposition. “In many instances depositions, rather than interrogatories, will better serve the purpose of obtaining detailed facts.” *Hilt v. SFC Inc.*, 170 F.R.D. 182, 187 (D. Kan. 1997).

Moreover, as set forth above, the Receiver has interviewed each of the Lender Respondents. However, with respect to the Lender Respondents’ interrogatories seeking the same information regarding such communications, the Receiver objected and provided less information than the Lender Respondents have provided. As set forth above, the same rules must apply fully to both parties.

Finally, and most importantly, the Receiver has not produced all of the records, including interviews of the Lender Respondents as well as Cook, in order that the Lender Respondents can fully respond to these Interrogatories as set forth in the Lender Respondents Motion to Compel.

INTERROGATORY NO. 10:

For each Respondent, identify each defense that the Respondent intends to assert, and for each defense identify all facts on which the Respondent relies for such assertions, all persons with knowledge of such facts, and all documents on which the Respondents rely for such assertions.

RESPONSE NO. 10. Subject to the general objections, Investor Respondents further object to this Interrogatory as requiring the Investor Respondents to assert their legal defenses in this proceeding prior to the Investor Respondents filing a responsive pleading in this case. Investor Respondents are not required to submit an Answer to the Receiver's Petition until disposition of Investor Respondents' Motion to Dismiss.

This is perhaps the most troubling of the Receiver's Interrogatories. The problem with Interrogatory No. 10 is the premise to the Interrogatory – i.e. “every defense the Lender Respondents intend to assert.” This interrogatory does not seek information regarding the application of law to facts. Rather, the interrogatory requests that the Lender Respondents first identify their legal defenses in this case. This is wholly improper as set forth below.

First, the Receiver cannot request in interrogatories that the Lender Respondents' attorneys identify their legal defenses in this matter:

The remaining controversy is over an interrogatory seeking defendants' contentions with respect to any justifications they may urge in defense of allegedly unlawful restrictive provisions. Defendants object on the grounds that the query demands legal contentions, not properly discoverable in this jurisdiction. The Court agrees.

U. S. v. Glaxo Group Ltd., 302 F. Supp. 1, 18 (D.D.C 1969) rev'd, 410 U.S. 52, 93 S. Ct. 861, 35 L. Ed. 2d 104 (1973) and decision supplemented, 328 F. Supp. 709 (D.D.C. 1971) rev'd, 410 U.S. 52, 93 S. Ct. 861, 35 L. Ed. 2d 104 (1973) and amended, 558-68, 1972 WL 543 (D.D.C. Mar. 21, 1972)

While it is proper to make inquiry in interrogatories regarding the application of facts to legal contentions, it is not proper to ask what the legal contentions are:

Interrogatories may be used for several distinct purposes. One of them is to exact from the opposing party his contentions as to factual issues, thereby narrowing the scope of the trial, preventing surprise, and reducing the costs and labor of securing evidence. To take a simple illustration, in an action for negligence it is proper by an interrogatory to require the plaintiff to specify of what he claims the alleged negligence consists; and, similarly, to require the defendant who pleads contributory negligence as a defense, to specify of what he contends the alleged negligence consists. **On the other hand, it is not appropriate to resort to interrogatories in order to ascertain contentions of the opposing party in respect to matters of law. That is not the function of discovery.**

U. S. v. Maryland & Virginia Milk Producers Ass'n, 22 F.R.D. 300, 301 (D.D.C. 1958)(citation omitted).

The Lender Respondents want to be very clear about this issue. Parties may ask in interrogatories what facts support the legal contentions the parties have raised in the case either by claim in a complaint or counterclaim or by affirmative defense. However, a party may not ask a party to identify what legal defenses the party will make in the case which are not required to be made in an affirmative defense because such a request necessarily requires the disclosure of the attorney's mental impressions, conclusions and theories. Such an interrogatory by necessity seeks attorney's mental impressions and work product. Simply put, it is not the Lender Respondents who will be identifying the legal defenses in this case, it will be the Lender Respondents' attorneys' opinions. Under Rule 26 (b) (3), the court must protect against the disclosure of the party's attorney's "legal conclusions and theories." Interrogatory No. 10 is an improper invasion of the attorney client work product doctrine.

INTERROGATORY NO. 11:

For each Respondent, identify all facts on which the Respondent relies for the contention that no fraudulent transfer occurred, all persons with knowledge of such facts, and all documents on which the Respondent relies for such contentions.

RESPONSE NO. 11. Subject to the general objections, Investor Respondents object to this interrogatory as a contention interrogatory. Discovery has just begun in this proceeding. Investor Respondents further object to this Interrogatory as a result of the pending Motion to Dismiss which would make such response unnecessary. In addition, Investor Respondents also object to this Interrogatory as overly burdensome in requesting “all facts” supporting any claim that no fraudulent transfer occurred. Investor Respondents further object because Investor Respondents have not yet filed a pleading contending that no fraudulent transfer occurred. Subject to these objections, Investor Respondents state that no fraudulent transfer occurred upon the payment of funds from the Receivership Entities to each Investor Respondent because (i) the Receivership Entities received reasonably equivalent value for each transfer including but not limited to a reduction of the Receivership Entities’ liabilities to each Investor Respondent and (ii) each Investor Respondents received the transfer in “good faith.” The persons with knowledge of such facts would be the individuals identified in Investor Respondents’ Initial Disclosures. Pursuant to Rule 33 (c), Investor Respondents will produce documents responsive to the request for the identity of documents. Discovery is continuing.

INTERROGATORY NO. 12:

For each Respondent, identify all facts on which the Respondent relies for the contention that he or she took the funds identified in the Receiver’s Petition and the attached Exhibits 1 and 2 in good faith, all persons with knowledge of such facts, and all documents on which the Respondent relies for such contentions.

RESPONSE NO. 12. Subject to the general objections, Investor Respondents object to this interrogatory as a contention interrogatory. Discovery has just begun in this proceeding. Investor Respondents further object to this Interrogatory as a result of the pending Motion to Dismiss which would make such response unnecessary. In addition, Investor Respondents also object to this Interrogatory as overly burdensome in requesting “all facts” supporting any claim that the Investor Respondents received funds in good faith. Investor Respondents further object because Investor Respondents have not yet filed a pleading contending that no fraudulent transfer occurred. Subject to these objections, Investor Respondents state that they received each transfer in good faith because each Investor Respondent did not have knowledge that the Receivership Entities were operating as a Ponzi scheme. The persons with knowledge of such facts would be the individuals identified in Investor Respondents’ Initial Disclosures. Pursuant to

Rule 33 (c), Investor Respondents will produce documents responsive to the request for the identity of documents. Discovery is continuing.

INTERROGATORY NO. 13:

For each Respondent, identify all facts on which the Respondent relies for the contention that he or she provided reasonably equivalent value in exchange for the funds identified in the Receiver's Petition and the attached Exhibits 1 and 2, all persons with knowledge of such facts, and all documents on which the Respondent relies for such contentions.

RESPONSE NO. 13. Subject to the general objections, Investor Respondents object to this interrogatory as a contention interrogatory. Discovery has just begun in this proceeding. Investor Respondents further object to this Interrogatory as a result of the pending Motion to Dismiss which would make such response unnecessary. In addition, Investor Respondents also object to this Interrogatory as overly burdensome in requesting "all facts" supporting any claim that the Receivership Entities received reasonably equivalent value for the transfers. Investor Respondents further object because Investor Respondents have not yet filed a pleading contending that no fraudulent transfer occurred. Subject to these objections, Investor Respondents state that the Receivership Entities received reasonably equivalent value for each transfer because the Receivership Entities' liabilities to each Investor Respondent were reduced by the transfer dollar for dollar. The persons with knowledge of such facts would be the individuals identified in Investor Respondents' Initial Disclosures. Pursuant to Rule 33 (c), Investor Respondents will produce documents responsive to the request for the identity of documents. Discovery is continuing.

INTERROGATORY NO. 14:

For each Respondent, identify all facts on which the Respondent relies for the contention that he or she was not unjustly enriched, all persons with knowledge of such facts, and all documents on which the Respondent relies for such contentions.

RESPONSE NO. 14. Subject to the general objections, Investor Respondents object to this interrogatory as a contention interrogatory. Discovery has just begun in this proceeding. Investor Respondents further object to this Interrogatory as a result of the pending Motion to Dismiss which would make such response unnecessary. In addition, Investor Respondents also object to this Interrogatory as overly burdensome in requesting "all facts" supporting any contention that the Investor Respondent was not unjustly enriched. Investor Respondents further object because Investor Respondents have not yet filed a pleading contending that no unjust enrichment occurred. Subject to these objections, Investor Respondents state that they were not unjustly enriched because they received their own money back from the Receivership Entities and the parties' relationship was governed by

a contract. The persons with knowledge of such facts would be the individuals identified in Investor Respondents' Initial Disclosures. Pursuant to Rule 33 (c), Investor Respondents will produce documents responsive to the request for the identity of documents. Discovery is continuing.

Interrogatories No. 11-14 are classic contention interrogatories. Unlike Interrogatory No. 10 which demands that the Lender Respondents' attorneys identify their defenses to the Receiver's claims, Interrogatories No. 11-14 are proper facially (except with respect their depth) because they identified a legal issues in the case (i.e., fraudulent transfer, good faith, etc.) and requested that the Lender Respondents identify what facts support these defenses. However, while Interrogatories No. 11-14 are proper, Rule 33 was specifically amended in 2007 with respect to such contention interrogatories to provide that the Court may order that such interrogatories need not be responded to until a later time. Fed. R. Civ. P. 33 (a)(2) as recently amended in 2007 provides:

An interrogatory may relate to any matter that may be inquired into under Rule 26(b). An interrogatory is not objectionable merely because it asks for an opinion or contention that relates to fact or the application of law to fact, **but the court may order that the interrogatory need not be answered until designated discovery is complete, or until a pretrial conference or some other time.**

With respect to Interrogatories No. 11-14, the Lender Respondents have fully responded. As set forth above, the Lender Respondents identified the persons who support the defenses and have identified the material facts supporting the defense. In Interrogatory No. 11, the Receiver requests all facts supporting the contention that no fraudulent transfer occurred. The Lender Respondents identified all persons with knowledge and stated:

Investor Respondents state that no fraudulent transfer occurred upon the payment of funds from the Receivership Entities to each Investor Respondent because (i)

the Receivership Entities received reasonably equivalent value for each transfer including but not limited to a reduction of the Receivership Entities' liabilities to each Investor Respondent and (ii) each Investor Respondents received the transfer in "good faith."

This is a complete response.

In Interrogatory No. 12, the Receiver requests all facts supporting the contention that the Lender Respondents received their monies in "good faith." Again, the Lender Respondents identified all persons with knowledge and stated:

Investor Respondents state that they received each transfer in good faith because each Investor Respondent did not have knowledge that the Receivership Entities were operating as a Ponzi scheme. The persons with knowledge of such facts would be the individuals identified in Investor Respondents' Initial Disclosures.

This is a complete response.

In Interrogatory No. 13, the Receiver requests all facts supporting the contention that the Lender Respondents received their monies for "reasonably equivalent value."

Again, the Lender Respondents identified all persons with knowledge and stated:

Subject to these objections, Investor Respondents state that the Receivership Entities received reasonably equivalent value for each transfer because the Receivership Entities' liabilities to each Investor Respondent were reduced by the transfer dollar for dollar.

This is a complete response.

Finally, in Interrogatory No. 14, the Receiver requests all facts supporting the contention that the Lender Respondents were not unjustly enriched when they received back their monies. Again, the Lender Respondents identified all persons with knowledge and stated:

Investor Respondents state that they were not unjustly enriched because they received their own money back from the Receivership Entities and the parties' relationship was governed by a contract.

This is a complete response.

Moreover, to the extent that the Receiver desires more information from the Lender Respondents, the Lender Respondents can amend their responses at a later date. The Lender Respondents simply cannot provide more information in response to these Interrogatories until the Receiver responds.

Finally, the Receiver cites *Mead Corp. v. Riverwood Natural Res. Corp.*, 145 F.R.D. 512 (D. Minn. 1992) for the proposition that the Lender Respondents may not object to interrogatories as contention interrogatories stating that such an objection is a semantic game. However, in *Mead Corp.*, the defendant answered the contention interrogatories in full as follows:

Riverwood also objects because its investigation and preparation of this case is still underway and Riverwood does not yet know which particular supportive facts it intends to rely upon.”

Mead Corp., 145 F.R.D. at 515 (D. Minn. 1992).

The Lender Respondents agree – the defendants' response in *Mead Corp.* was insufficient. However, contrary to the defendant in *Mead Corp.*, the Lender Respondents provided information in response to the Interrogatory including the name of persons with knowledge and, consistent with the applicable Federal Rules, the material facts and *IBP, Inc. v. Mercantile Bank of Topeka*, 179 F.R.D. 316, 321 (D. Kan. 1998).

Finally, because of the potential problems with contention interrogatories, many courts have determined that contention interrogatories need not be answered until

discovery is complete or nearing completion. *See, e.g., Vishay Dale Elecs., Inc. v. Cyntec Co.*, No. 8:07CV191, 2008 WL 4868772, at *5 (D.Neb. Nov. 6, 2008) (denying the motion to compel answers to contention interrogatories until the end of discovery); *Lucero v. Valdez*, 240 F.R.D. 591, 594 (D.N.M.2007) (“[T]here is considerable support for deferring answers to contention interrogatories until after a substantial amount of discovery has been completed.”); *In re Convergent Techs. Sec. Litig.*, 108 F.R.D. 328, 348 (N.D.Cal.1985) (denying motion to compel and ordering plaintiffs to answer contention interrogatories 60 days after completion of defendants' document production). *See also* 10A Federal Procedure, Lawyers Ed. § 26:545 (Database updated Sept. 2010) (“Although contention interrogatories ... are permitted, the obligation to respond to them is often postponed until near the end of the discovery period unless the proponent carries its burden of demonstrating why they are necessary earlier on.”). Therefore, it is perfectly reasonable and well within the bounds of the federal rules for Lender Respondents to decline to provide any additional responses “until designated discovery is complete.”

In addition, the Receiver argues that the Lender Respondents are refusing to provide “facts” by claiming privilege without providing any examples of what it is alleging. To be perfectly clear, the Lender Respondents are not holding back providing any facts to the Receiver within their knowledge based on any privilege. The Receiver’s Motion to Compel should be denied.

CONCLUSION

The Receiver's Motion to Compel should be denied.

MOHRMAN & KAARDAL, P.A.

Dated: April 18, 2011.

s/William F. Mohrman

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