
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Petitioner,

v.

Case No: 11-cv-01042 SRN/FLN

David Buysse, Steven and Pamela Cheney,
Walter Defiel, John Dzik, Terry Frahm,
Steven and Jenene Fredell, William Harris,
Michael and Jennifer Heise,
Michael and Cynthia Hillesheim, Larry Hopfenspirger,
Steven Kautzman, James McIntosh,
George and Karen Morrisset, Reynold Sundstrom, and
Dot Anderson,

Respondents.

**RECEIVER’S MEMORANDUM OF LAW IN SUPPORT OF
HIS MOTION FOR A PROTECTIVE ORDER AGAINST RESPONDENTS
REQUEST TO DEPOSE THE RECEIVER IN HIS PERSONAL CAPACITY
OR UNDER FEDERAL RULE OF CIVIL PROCEDURE 30(b)(6)**

The Receiver seeks a Protective Order against depositions of the Receiver that have no legitimate discovery goals, but rather, are entirely duplicative of discovery that has already been provided by documents, written discovery responses, and testimony of other witnesses, and are otherwise designed to uncover the thoughts and strategy of counsel. Respondents¹ have not—and

¹ “Respondents” in this pleading are 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 Respondents are

cannot—make the required showing of need for the depositions because every fact that could lead to the discovery of admissible evidence in this case is already known to them or was readily available to them in the discovery process.

The depositions Respondents seek also are entirely duplicative of other discovery in this case and would impose an enormous burden on Receivership resources. What the Respondents seek here is essentially two bites at the apple—having served written discovery directed at the Receiver’s contentions, they now claims a right to re-visit the Receiver’s answers via live deposition testimony. Without the buffer of written discovery, the only conceivable way for the Receiver to protect his trial strategy and legal theories during a 30(b)(6) deposition would be to hire a non-attorney to review and familiarize himself with the millions of documents that the Receiver has seized, and then designate that person as a Rule 30(b)(6) witness. This would be an enormous and unwarranted drain Receivership resources that outweighs any benefit to the Respondent may hope to gain. A deposition of the Receiver in his personal capacity would be similarly wasteful because the information he has to offer has already been produced; any information beyond that is protected by the attorney work product doctrine and/or attorney client communication.

represented by the Mohrman & Kaardal law firm. Respondent Dot Anderson is represented by separate counsel and her notice seeking a 30(b)(6) deposition of the Receivership is the subject of a separate Motion for Protective Order that the Receiver is filing concurrent with this Motion. Respondent William Harris is represented by separate counsel and is not seeking to depose the Receivership or the Receiver.

Respondents cannot make the required showing of need for the noticed depositions because every fact that could lead to the discovery of admissible evidence in this case is already known to them or was readily available to them in the discovery process through less burdensome processes.

I. BACKGROUND OF THE CASE

In this action, the Receiver seeks to claw back \$6.2 million² that was fraudulently and preferentially transferred to Respondents in late June and early July 2009 as this Ponzi scheme was collapsing. Respondents are friends and colleagues of Cook's father-in-law, Clifford Berg. When Berg got the inside track from Cook that the SEC was conducting more than a "routine audit," he cashed Respondents out of the program and delivered cashier's checks to them equal to the amount of principal they thought they had "invested," plus the fictional "interest" they thought they had earned. Meanwhile, over 700 other investors who lacked this inside connection were stuck with catastrophic losses.

A. Trevor Cook Preferentially Transferred over \$6 Million to His Father-in-Law's Friends and Colleagues As His Scheme Was Collapsing

Each Respondent "invested" in Cook's scheme through Trevor Cook's father-in-law, Clifford Berg ("Berg"). (Declaration of Peter M. Kohlhepp, September 19, 2011 [hereinafter "Kohlhepp Decl. I"], ¶ 2, Ex. 1, at 20-21.)

Although Berg is a carpet salesman by trade, he worked to bring his friends and

² This figure has since been reduced since Respondent John Dzik settled with the Receiver, and Respondent William Harris returned the amount equal to "interest" he received on his purported investment.

colleagues into Cook's currency program on the side. Berg had an agreement with Cook that if there were ever any problems, Cook would get Berg's clients' money out of the scheme. (*Id.* at 12-13.) Berg also had a similar agreement with many of Respondents—Berg promised that he would keep an eye on their investments and get their money out if there ever was a problem. (*Id.* at 13-15.)

On June 22, 2009, the SEC arrived at the Van Dusen mansion to serve subpoenas on the Cook entities and conduct a surprise inspection of the scheme. On June 29 & 30, 2009 and July 1, 2009, Cook caused \$6,975,483.50 to be withdrawn from the accounts of Receivership Entities Crown Forex LLC and UBS Diversified Growth, LLC and cut into cashiers' checks payable to Clifford Berg, his wife Ellen Berg, and each of Berg's "clients." *Petition for Return of Receivership Assets from Investor Respondents ("Petition")*, 11-cv-1042 (Docket No. 2) ¶¶ 31-36, Exs. 1-2 (D. Minn. July 23, 2010). Cook gave the checks to Berg, who in turn, distributed them to Respondents. At least Respondents Fredells, Frahm, Cheneys, Hopfenspirger, Heise, Buysse, Kautzman, Hillesheims, Sundstrom, McIntosh, and Defiel knew of an "investigation" or "audit" related to Trevor Cook, Bo Beckman, or the Receivership Entities at the time they received these cashiers' checks. (Kohlhepp Decl. I, ¶ 2, Ex. 1, at p. 36.)

On November 23, 2009, the SEC and the CFTC brought suit against Cook, Patrick Kiley, and various fraudulent entities that they used to perpetrate the fraud. *SEC v. Cook, et al.*, 09-cv-3333 (D. Minn.) and *CFTC v. Cook, et al.*, 09-cv-3332 (D. Minn.). Chief Judge Michael J. Davis issued another Asset Freeze Order and

appointed R.J. Zayed as the Receiver in both actions. Although investors had given Cook and his colleagues \$190 million to invest in various “currency programs,” when the Receiver was appointed only \$1,843,609.55 remained in the Receivership Entities’ accounts at Associated Bank and Wells Fargo.

On April 13, 2010, Cook pleaded guilty to the fraud and is now serving a 25 year sentence in federal prison. *U.S. v. Cook*, 10-cr-75, Docket No. 27 (D. Minn.) One of his co-conspirators, Chris Pettengill, has also pleaded guilty and is awaiting sentencing. *U.S. v. Pettengill*, 11-cr-192, Docket No. 6 (D. Minn. June 13, 2011.) On March 7, 2011, the SEC brought suit against another of Cook’s co-conspirators, Jason Bo-Alan Beckman; the Court appointed R.J. Zayed as the Receiver in that action, as well. *SEC v. Beckman et al.*, 11-cv-574 (D. Minn.), Docket No. 9, 10. On July 19, 2011, the U.S. Attorney’s Office indicted Beckman and two other co-conspirators, Patrick Kiley and Gerald Durand, on criminal charges related to their roles in the Ponzi scheme. *U.S. v. Beckman et al.*, 11-cr-228 (D. Minn.)

Early in his investigation, the Receiver discovered the collection of cashier’s checks that had been issued to Respondents and Cliff Berg and his wife, Ellen, just days before the first Asset Freeze Order was issued in the Phillips case. Pursuant to Chief Judge Davis’s Receivership Orders, Attorneys for the Receiver issued subpoenas to Respondents to understand what facts they knew about the circumstances of the transfers. Second Amended Order Appointing Receiver, *SEC v. Cook*, 09-cv-3333 (Docket No. 68), at I(H) (D. Minn. Dec. 11, 2009.) From

February 26, 2010 through March 23, 2010, attorneys for the Receiver conducted pre-suit interviews of each Respondents for the same purpose.³

On July 20, 2010 Chief Judge Davis issued an Order authorizing summary proceedings to recover funds dissipated by Cook and his co-conspirators in the course of the Ponzi scheme, including the \$6.2 million that was funneled to Respondents. Order, *CFTC v. Cook*, 09-3332 (Docket No. 350) (D. Minn. July 20, 2010); *SEC v. Cook*, 09-cv-3333 (Docket No. 380) (D. Minn. July 20, 2010). On July 23, 2010, the Receiver brought this summary proceeding.

II. DISCOVERY IN THIS ACTION

A. The Court's Order on Summary Proceedings

As part of the Order authorizing this summary proceeding, Chief Judge Davis limited discovery to the following two issues:

- i. The amount and/or value of Receivership funds or assets received; and
- ii. Any statutory or common law defenses the third [party] recipient of Receivership assets may wish to raise.

(Order, *CFTC v. Cook*, 09-3332 (Docket No. 350) (D. Minn. July 20, 2010); *SEC v. Cook*, 09-cv-3333 (Docket No. 380) (D. Minn. July 20, 2010).

B. Discovery by Respondents

Discovery in this summary proceeding commenced on November 12, 2010. Since that time, the Receiver has provided and participated in extensive fact discovery:

³ The Receiver did not participate in or attend any interviews of Respondents.

- The Receiver has produced over 25,000 documents in response to Respondents' document requests. The search for and production of these documents included all documents and things in the possession, custody and control of the Receiver, whether from the file the Receiver seized from the fraudulent entities or any other source. (Kohlhepp Decl. I, ¶ 21.)
- To the extent the Receiver has documents obtained from the SEC related to this action, the Receiver has obtained permission from the SEC to produce those documents to all Respondents in this action. (Kohlhepp Decl. I, ¶ 3, Ex. 2; Kohlhepp Decl. I, ¶ 4, Ex. 3.)
- To the extent the Receiver has documents obtained from his own independent investigation, the Receiver has searched and produced all documents that refer or relate to Respondents. (Kohlhepp Decl. I, ¶ 3, Ex. 2; Kohlhepp Decl. I, ¶ 5.)
- In addition to producing copies of all documents that relate to or refer to Respondents, starting in and continuing after January 2011, the Receiver has, under Federal Rule of Civil Procedure 34(b)(2), offered to make available for Respondents' inspection all other hard copy and electronic files that were seized from the fraud. (*See, e.g.* Kohlhepp Decl. I, ¶ 3, Ex. 2; Kohlhepp Decl. I, ¶ 6, Ex. 4.))
- The Receiver produced all of his investigators' notes from the pre-suit interviews of Respondents and Grant Gryzbowski, and further, produced for deposition the investigators who participated in these interviews.

- The Receiver has produced every transcript and exhibit from the ten depositions of Trevor Cook occurring from October 5, 2010 to December 12, 2010.
- The Receiver stipulated to a motion by other Respondents in this action for an Order to make Trevor Cook available for deposition. (Docket No. 109.) Counsel for the Receiver assisted opposing counsel in arranging for that deposition, which took place on July 20, 2011 in the Greeneville federal prison where Mr. Cook is incarcerated. (Kohlhepp Decl. I, ¶ 7, Ex. 5.)
- Respondents deposed former Cook employees Ryan Moeller and Grant Gryzbowski. Upon the request of counsel for Respondents, counsel for the Receiver sought and obtained permission from the SEC to produce transcript of deposition that the SEC took of Mr. Moeller on December 17, 2011 in separate proceedings. (Kohlhepp Decl. I, ¶ 4, Ex. 3.)

B. Respondents' First Request to Depose the Receiver

On June 22, 2011, Respondents informed the Receiver that they would seek to depose the Receiver. (Kohlhepp Decl. I, ¶ 8, Ex. 6.) Respondents contended that they were entitled to depose the Receiver to discover the facts that support the Receiver's claims against Respondents. (Kohlhepp Decl. I, ¶ 9, Ex. 7; Kohlhepp Decl. I, ¶ 7, Ex. 5.) Attorneys for the Receiver responded by noting that the Receiver has no personal knowledge of any of the relevant facts and moreover Respondents could not meet the Eighth Circuit's *Shelton* test, which identifies the extremely limited circumstances under which litigation counsel can be deposed.

(Kohlhepp Decl. I, ¶ 10, Ex. 8.) In response, Respondents simply repeated their demand to depose the Receiver, noting only that the Receiver was a named party in this action. (Kohlhepp Decl. I, ¶ 11, Ex. 9.)

On July 8, 2011, Respondents took a different tact and advised the Receiver that they intended to depose the Receivership under Federal Rule of Civil Procedure 30(b)(6). (Kohlhepp Decl. I, ¶ 12, Ex. 10.) The Receiver's counsel advised Respondents of the Receiver's objections and requested a meet-and-confer on the issue. (Kohlhepp Decl. I, ¶ 13, Ex. 11.) The Receiver's counsel also reminded Respondents that all hard copy and electronic files seized from Trevor Cook and the Receivership Entities had been available to Respondents since at least January 18, 2011. (*Id.*) The Receiver's counsel further reminded Respondents that they had not inspected any of these files nor had they asked for any specific information from those files beyond the documents that the Receiver physically produced. (*Id.*) On July 11, 2011, Respondents served a Rule 30(b)(6) notice on the Receiver. (Kohlhepp Decl. I, ¶ 14, Ex. 12). The notice sought testimony regarding "each and every fact" that the Receiver contended supported his allegations in paragraphs 31-32, 34-36, 39-40, 42, and 44-46 of the Petition, as well as "each and every fact" supporting the Receiver's allegation that Respondents did not take the funds they received in good faith. (*Id.* at 4.)

The parties had a phone conference on July 11, 2011 to meet and confer, in which Respondents' counsel advised that the goal of the Rule 30(b)(6) deposition was to learn the factual basis for the allegations in the Receiver's complaint.

(Kohlhepp Decl. I, ¶ 7, Ex. 5.) In response to that stated goal, and as a way to avoid costly motion practice, counsel for the Receiver suggested that Respondents request the factual information they sought through interrogatories. (*Id.*) Because Respondents were too late in the discovery process to serve these interrogatories, the parties submitted a stipulation to the Court and asked for a brief extension of the case schedule that would allow Respondents to serve the interrogatories and the Receiver to respond. (*Id.*)

Respondents then served a set of thirteen contention interrogatories that mirrored their withdrawn Rule 30(b)(6) notice, seeking the identification of “each and every fact” supporting the Receiver’s allegations in paragraphs 31-32, 33, 34-36, 39-40, 42, and 44-46 of the Petition, as well as “each and every fact” supporting the Receiver’s allegation that Respondents did not take the funds they received in good faith. (Kohlhepp Decl. I, ¶ 15, Ex. 13.) The Receiver, in turn, compiled and served an exhaustive fifty page response to those interrogatories. (Kohlhepp Decl. I, ¶ 16, Ex. 14.) Those responses not only provide comprehensive and detailed answers, complete with copious citations to documents and deposition transcripts, they are also specific to each Respondent.

Respondents never identified any deficiencies in the Receiver’s interrogatory responses. Instead, by letter dated September 1, 2011, Respondents perfunctorily concluded that “it is impossible to obtain the information Respondents require in the absence of a deposition,” (Kohlhepp Decl. I, ¶ 17, Ex. 15), and served two “alternative” deposition notices: one seeking to depose the

“Petitioner” under Federal Rule 30(b)(6), which mirrors the contention interrogatories that the Receiver responded to on August 22, 2011, (Kohlhepp Decl. I, ¶ 18, Ex. 16), and a second seeking to depose the Receiver, R.J. Zayed, personally (Kohlhepp Decl. I, ¶ 19, Ex. 17.) The topics of Respondents’ September 1, 2011 Rule 30(b)(6) notice of deposition are set out below next to the corresponding contention interrogatories that the Receiver has already answered:

Respondents’ 30(b)(6) Topics (see Kohlhepp Decl. I, ¶ 18, Ex. 16)	Respondents’ Contention Interrogatories (see Kohlhepp Decl. I, ¶ 15, Ex. 13)
<p>1. Each and every fact that the Petitioner asserts supports the allegations contained in Paragraphs 31 and 32 of the Petition.</p> <p>2. Each and every fact that the Petitioner asserts supports the allegations contained in Paragraph 34 of the Petition that the transfers of funds to Lender Respondents were made in an effort to hinder, delay, or defraud creditors of any of the Receivership Entities.</p> <p>3. Each and every fact that the Petitioner asserts supports the allegations contained in Paragraphs 35 and 36 of the Petition.</p>	<p>9. Identify each and every fact supporting your allegation in paragraph 31 of the Petition that "each Respondent received at least one preferential transfer... after Cook became aware that Crown Forex SA was in liquidation and that his Ponzi scheme had been discovered by the SEC. . . .”</p> <p>10. Identify each and every fact supporting your allegation in paragraph 32 of the Petition that “the money used to pay Respondents came from the Receivership Entities funded with the money of victims of the scheme . . .”</p> <p>[. . .]</p> <p>12. Identify each and every fact supporting your allegation in paragraph 34 of the Petition that "Cook initiated the transfers to each Respondent on or after June 29, 2009 with actual intent to avoid, hinder, or delay payments to other creditors of Cook and the Receivership Entities.”</p> <p>13. Identify each and every fact supporting your allegation in paragraph 35 of the Petition that "each Respondent knew or</p>

<p>4. Each and every fact that the Petitioner asserts supports the allegations contained in Paragraphs 39 and 40 of the Petition.</p> <p>5. Each and every fact that the Petitioner asserts supports the allegations contained in Paragraph 41 of the Petition.</p> <p>6. Each and every fact that the Petitioner asserts supports the allegations contained in Paragraphs 44, 45, and 46 of the Petition.</p>	<p>should have known that the transfers they received on or after June 29, 2009, were fraudulent conveyances."</p> <p>14. Identify each and every fact supporting your allegation in paragraph 36 of the Petition that Lender Respondents received payments preferentially over hundreds of investors who were unable to withdraw money they had invested in the Receivership Entities, specifically your contention that investors were unable to withdraw money from the Receivership Entities on or before June 30, 2009.</p> <p>15. Identify each and every fact supporting your allegation in paragraph 39 of the Petition that all funds transferred to Lender Respondents by the Receivership entities were transferred pursuant to a Ponzi scheme.</p> <p>16. Identify each and every fact supporting your allegation in paragraph 40 of the Petition that Cook and the Receivership Entities transferred funds to the Lender Respondents with actual intent to hinder, delay, or defraud creditors.</p> <p>[. . .]</p> <p>18. Identify each and every fact supporting your allegation in paragraph 44 that each Lender Respondent has been unjustly enriched by the return of their funds from the Receivership entities.</p> <p>19. Identify each and every fact supporting your allegation in paragraph 45 of the Petition that Lender Respondents' retention of their funds "violates fundamental principles of justice, equity, and good conscience. "</p>
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<p>7. Each and every fact that supports the Petitioner's allegation that the Lender Respondents not receive their payments from the Receivership Entities in good faith.</p>	<p>20. Identify each and every fact supporting your allegations in paragraph 46 of the Petition.</p> <p>21. Identify each and every fact supporting your allegations that Lender Respondents did not receive the return of their funds from the Receivership Entities in “good faith.”</p>
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C. The Receiver Requested a Meet and Confer To Discuss Respondents’ Renewed Attempt to Depose the Receiver

On September 6, 2011, the Receiver asked to meet and confer on Respondents’ renewed request to depose the Receiver so that the parties could have a meaningful discussion and attempt to work toward a resolution of this issue. (Kohlhepp Decl. I, ¶ 20, Ex. 18.) To that end, the Receiver asked Respondents to identify any alleged deficiencies by interrogatory number and explain what additional information they believe they are entitled to. (*Id.*) Respondents refused and summarily demanded to depose the Receiver. (Kohlhepp Decl. I, ¶ 21, Ex. 19.) Claiming a “right” to depose the Receiver, Respondents contended that because Respondents were deposed, the Receiver should be, too. (*Id.*) When the parties met and conferred by phone on September 7, 2011, counsel for Respondents explained that now they seek a deposition that includes, but is not limited to the topics in their Rule 30(b)(6) notice. When asked what additional topics they sought to cover, counsel for Respondents offered, “All of [the Receiver’s] decisions relative to this case.” (Kohlhepp Decl. I, ¶ 22.) Counsel for Respondents further stated that because the Receiver is a lawyer, “he

can answer legal questions.” (*Id.*) Counsel for Respondents advised that he had legal authority that contradicted the Receiver’s position and provided that authority as part of the meet-and-confer process. However, those cases, which are discussed *infra*, are neither on point nor controlling in this case.

III. ARGUMENT

The Federal Rules of Civil Procedure allow for liberal discovery—within certain limitations. *See, e.g., In re ADC Telcoms, ERISA Litig.*, 2005 U.S. Dist. LEXIS 20224, No. 03-cv-2989, at *18 (D. Minn. Sept. 15, 2005) (“While broad in nature, Rule 26 is not without its limits.”).

“Mental impressions, conclusions, opinions, or legal theories of a party’s attorney or other representative concerning the litigation” are not discoverable.

Fed. R. Civ. P. 26(b)(3)(B). The Court also “must limit the frequency or extent of discovery” 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; or
- (iii) the burden or expense of the proposed discovery outweighs its likely benefit, considering the needs of the case, the amount in controversy, the parties’ resources, the importance of the issues at stake in the action, and the importance of the discovery in resolving the issues.

Fed. R. Civ. P. 26(b)(2)(C). The Court may also, in association with a request for discovery, “for good cause, issue an order to protect a party or person from annoyance, embarrassment [or] oppression or undue burden or expense. . . .” Fed.

R. Civ. P. 26(c). The Court may also, as it has done here, otherwise limit the scope of discovery by Court Order. Fed. R. Civ. P. 26(b)(1); (Order, *CFTC v. Cook*, 09-3332 (Docket No. 350) (D. Minn. July 20, 2010); Order, *SEC v. Cook*, 09-cv-3333 (Docket No. 380) (D. Minn. July 20, 2010).

A. Respondents and the Receiver Are Not Similarly Situated: Respondents are Non-Attorney Fact Witnesses; the Receiver Is Litigation Counsel with No First-Hand Knowledge

In a September 6, 2011 email, Respondents' counsel argued that because Respondents were deposed, the Receiver also must be deposed. But this argument is both irrelevant and absurd—the parties are not similarly situated. First, the Receiver does not have any relevant personal knowledge; Respondents do. (See Part 4, *infra*.) Second, Respondents seek deposition testimony regarding the Receiver's contentions, while the Receiver's depositions of Respondents merely sought Respondents' recollections of facts that they experienced first-hand. If Respondents were truly arguing for symmetry, the Receiver would be allowed to depose Respondents' counsel to explore how Respondents' counsel thinks about the facts in this case. Of course, Respondents' counsel recognize the myriad work product and privilege issues that questions regarding contentions raise and argued that same point in refusing even *written* contention interrogatories until compelled to do so. *See, e.g.*, Docket No. 88 at 16. Written interrogatories are, in fact, the appropriate avenue to seek contentions while guarding protected information.

What Respondents seek here is not symmetrical discovery; rather, they seek an opportunity to discover the Receiver's trial strategy directly through live

deposition, while their own work product remains insulated by written discovery. Their parity lacks parity in fact—and fails.

B. The Receiver and his Attorneys Serve as Litigation Counsel in this Action and Respondents Have Failed to Make the Showing Necessary to Depose Them

The Eighth Circuit recognizes the problems inherent in what Respondents seek to do: Depositions of attorneys involved with litigation strategy are highly disfavored because such depositions inevitably embroil the court and the parties in time-consuming and distracting disputes regarding what is and what is not privileged information. *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986). Further, the practice detracts from the quality of client representation because the relationship is tainted by the fear that counsel will be interrogated. *Id.* Accordingly, the Eighth Circuit allows a party to depose opposing litigation counsel only in the extremely limited circumstance where:

- i) no other means exist to obtain the information than to depose opposing counsel;
- ii) the information sought is relevant and nonprivileged; and
- iii) the information is crucial to the preparation of the case.

Shelton, 805 F.2d at 1327. As the party seeking the deposition, it is Respondents' burden to make this showing. *Id.*; see also *West Peninsular Title Co. v. Palm Beach County*, 132 F.R.D. 301, 302 (S.D. Fla. 1990).

1. The *Shelton* Test Applies

The Receiver functions as litigation counsel in this action. The Receiver has an active role in developing litigation strategy. He signed the Petition, as well

as other pleadings filed in this action. Courts in the Eighth Circuit apply the *Shelton* rule even to attorneys who, unlike the Receiver, are not intimately involved in the litigation. See *Desert Orchid Ptnrs, L.L.C. v. Transaction Sys. Architects, Inc.*, 237 F.R.D. 215, 220 (D. Neb. 2006) (applying *Shelton* rule to in-house counsel who was involved with the defense strategy even though he was not trial counsel and had some first hand knowledge of relevant facts).

Respondents cannot escape the *Shelton* test by purporting to seek a 30(b)(6) deposition of a “person designated by [the Receiver].” Respondents themselves state that the noticed 30(b)(6) deposition is an “alternative” to a deposition of the Receiver himself. (Kohlhepp Decl. I, ¶ 15, Ex. 13. Courts also recognize that Rule 30(b)(6) depositions in this circumstance are often “back door” attempts to depose opposing counsel. The defendant in *SEC v. Buntrock et al.* argued that its notice of 30(b)(6) deposition to the SEC did not fall under *Shelton* because the SEC could designate any person under the rule. 217 F.R.D. 441, 444 (N.D. Ill. 2003). But the court disagreed: “[T]he notice seeks, if not the deposition of opposing counsel, then the practical equivalent thereof.” *Id.* The *Buntrock* court explained:

The investigation in this matter was conducted by SEC attorneys and by SEC employees working under the direction of attorneys. Thus, the 30(b)(6) notice would necessarily involve the testimony of attorneys assigned to this case, or require those attorneys to prepare other witnesses to testify. . . . [E]ven if a non-attorney witness were designated, they would have to have been prepared by those who conducted the investigation, and that preparation would include disclosure of SEC attorneys’ legal and factual theories.

Buntrock, 217 F.R.D. at 444. Similarly, in *Resolution Trust Corp. v. Kazimour*, a case from this Circuit, the plaintiff corporation was served with a Rule 30(b)(6) notice seeking a designee to testify as to the facts that supported the contentions contained in its complaint. 1993 W.L. 13009325, at *3 (N.D. Ia. 1993). The Plaintiff had no person that it could designate other than its counsel of record. *Id.* The court quashed the defendant’s Rule 30(b)(6) deposition, explaining that “[a] deposition of a person required by the court to be created by counsel under the circumstances of this case would violate Fed.R.Civ.P. 26(b)(3). The process of sifting through scores of documents and selecting the ones that counsel believes are most damaging to a particular defendant, if revealed at a deposition, would disclose absolutely protected opinion work-product.” *Id.*

In this case, all investigations that were conducted in furtherance of the Receivership—whether into the Ponzi scheme run by Cook and his co-conspirators, the specific transfers that are the subject of this action, or other matters—were conducted by the Receiver, his attorneys, or his agents. Testimony by a Rule 30(b)(6) designee of the Receivership necessarily would involve testimony of one of the Receiver’s attorneys or agents or would require the Receivers’ attorneys to prepare a witness to testify, disclosing their legal and factual theories in the process. Respondents want to depose a representative of the Receivership regarding “each and every fact [the Receiver] asserts supports” specific allegations in the Petition. Educating a witness as to the Receiver’s contentions would not only impose extraordinary burden and waste of litigation

resources on the Receiver, it would necessarily require the application of fact to law. This is far afield of the purpose a deposition, and even further afield of the purpose of Rule 30(b)(6). Rule 30(b)(6) is meant to be a mechanism for discovering facts from a large, complicated, and opaque corporate entity where it is often impossible to discover the identity of individuals with the particular knowledge sought. A Rule 30(b)(6) deposition is certainly not an appropriate way to test the facts that an entity believes supports its allegations. Thus Respondents cannot end-run *Skelton* simply by purporting to depose a designee of the Receivership.

Nor does fact that the Receiver initiated this action relieve Respondents of the burden of passing the *Shelton* test. *See SEC v. Buntrock et al.*, 217 F.R.D. 441, 445 (N.D. Ill. 2003) (explaining that a deposition of the SEC, the named party in the litigation, is the “practical equivalent” of deposing opposing counsel and therefore is only permitted if it passes the *Shelton* test). Whether styled as a deposition of the Receiver, a deposition of a designee of the Receivership, or both, Respondents seek to depose opposing counsel and accordingly must pass the *Shelton* test.

2. Respondents Fail To Meet *Shelton* Factor 1 Because All Facts They Seek Have Already Been Made Known To Them

It is apparent that Respondents have not—and cannot—make the showing required by *Shelton*. First, other means exist for Respondents to obtain the full scope of any legitimate discovery they seek. As explained in Part II.B., *supra*, the

Receiver has already provided substantive, specific, and detailed responses to Respondents' contention Interrogatories Nos. 8-21, which duplicate the topics of information that Respondents purport to "need" from the depositions.

Significantly, Respondents have never identified any substantive deficiencies in the Receiver's responses, or explained why the information they seek cannot be obtained via contention interrogatories. *See SEC v. Rosenfeld*, 1997 U.S. Dist. LEXIS 13996, at *9 (S.D.N.Y. Sept. 12, 1997) ("Rosenfeld does not provide any reasons why claim contention interrogatories at the close or towards the close of factual discovery . . . will not provide him with the necessary claim contentions the SEC will make at trial."); *SEC v. Morelli*, 143 F.R.D. 42, 48 (S.D.N.Y. 1992) ("Given plaintiff's stated willingness to respond to interrogatories under Fed. R. Civ. P. 33(b), this discovery device represents an appropriate method for Morelli to inquire into the SEC's contentions."). Given the myriad work product and privilege issues engendered by depositions of attorneys involved in the investigation of financial fraud, contention interrogatories provide Respondents with an alternative way to discover the substantial equivalent of information they seek. At the same time, contention interrogatories minimize the likelihood that the Receiver or his attorneys will be forced to disclose information protected by the work product doctrine. It is for this reason that the Receiver suggested that Respondents serve contention interrogatories, and it is for this reason that the Receiver answered the contention interrogatories subsequently served in complete, exhaustive detail.

Further, Respondents have had every opportunity to get facts relevant to this case from first-hand sources. *See Newkirk v. Conagra Foods, Inc.*, 2010 U.S. Dist. LEXIS 60835, at *17 (D. Neb. May 27, 2010) (applying the *Shelton* rule and prohibiting deposition of a party's attorneys because the party had already produced thousands of pages of relevant documents and made relevant fact witnesses available for deposition). Respondents themselves were parties to the transactions at issue and therefore have first-hand knowledge of the facts. Respondents also deposed Cook, and obtained all transcripts and exhibits from previous depositions of Cook. They have also subpoenaed documents and depositions of third parties. In addition to that, the Receiver served fifty pages of detailed responses to contention interrogatories, complete with pin cites to documents and deposition transcripts. The Receiver has produced tens of thousands of documents and made the entirety of the seized files available for inspection. The Receiver produced for deposition his investigators who engaged in pre-suit interviews of Respondents, as well as the investigators' notes of those depositions. The Receiver has also served Rule 26(a) disclosures that identify all documents and witnesses who may have discoverable information. In short, Respondents have had over ten months of unfettered discovery. The alternative means available to Respondents to discover information they seek by deposition of the Receiver were myriad.

3. Respondents Fail To Meet *Shelton* Factor 2 Because Any Information Beyond The Discoverable Facts Are Privileged

Any information beyond the facts discoverable through the above-referenced documents and witnesses are protected by Federal Rule of Civil Procedure 26(b)(3), attorney-client privilege, and/or the work product doctrine. Courts consistently disallow even 30(b)(6) depositions in circumstances like those present here for the very reason that such depositions are “an inappropriate attempt to depose opposing counsel and to delve into the theories and opinions of [Receivership] attorneys.” *SEC v. Buntrock*, 217 F.R.D. at 444. In *SEC v. Rosenfeld*, for example, the court issued a protective order precluding the defendant from taking a Rule 30(b)(6) deposition of the SEC. The court concluded that the topics of the noticed 30(b)(6) deposition—which related to the allegations in the SEC’s complaint—“clearly call[ed] for the revealing of information gathered by the SEC attorneys in anticipation of bringing the instant enforcement proceedings.” 1997 U.S. Dist. LEXIS 13996, at *5 (S.D.N.Y. Sept. 12, 1997); *see also SEC v. Buntrock*, 217 F.R.D. 441, 445 (N.D. Ill. 2003) (concluding that a 30(b)(6) notice of deposition directed to the SEC and seeking the results of the SEC’s investigation was “intended to ascertain how the SEC intends to marshal its facts, documents, and testimonial evidence, and to discover the inferences the SEC believes can be drawn from that evidence,” quashing the deposition notice and barring the deposition); *SEC v. Morelli*, 143 F.R.D. 42, 47 (S.D.N.Y. 1992) (forbidding a 30(b)(6) deposition of the SEC because the

deposition “constitutes an impermissible attempt by defendant to inquire into the mental processes and strategies of the SEC”).

Here, Respondents seek testimony about the Receiver’s contentions. Accordingly, any such testimony would simply recite the information that has already been detailed in the Receiver’s responses to the contention interrogatories—interrogatories that mirror precisely the noticed deposition topics. To the extent Respondents hope to elicit information beyond the facts that support the Receiver’s contentions, that information impinges on the Receiver’s mental impressions, conclusions, opinions, and legal theories. *See Morelli*, 143 F.R.D. at 47. Counsel for Respondents admitted as much during the September __ meet and confer, stating that Respondents intend to probe “all [the Receiver’s] decisions relative to this case” through the noticed depositions. (Kohlhepp Decl. I, ¶ 22.) That is precisely the type of information that the courts in *Resolution Trust Corp.*, *Buntrock*, *Rosenfeld*, and *Morelli* vigorously protect.

During the meet and confer process, counsel for Respondents provided counsel for the Receiver with authority that they allege require the requested deposition. *In re Kelton Motors, Inc.*, a case cited by counsel for Respondents in this regard, involved a bankruptcy trustee who moved for a protective order on grounds that “*all*” facts known to the trustee were protected by the work product doctrine and that the trustee had no first-hand knowledge of any relevant facts. 130 B.R. 183, 184 (Bankr. D. Vt. 1991) (emphasis added). The trustee had apparently withheld all information from the opposing party, including the identity

of the person who allegedly received the preferential transfer, the date of such transfer, and witnesses who knew such facts. *Id.* at 184.

The instant case could not be more different. The Receiver answered all interrogatories posed by Respondents and Respondents has not once alleged that those responses were insufficient. The files the Receiver seized were, literally, an open book to Respondents. Fact witnesses were identified and deposed. In stark contrast to *Kelton*, everything but the Receiver's work product and privileged communications have been made available to Respondents in this action.

Moreover, *Kelton* is from the District of Vermont, which is not bound by the *Shelton* rule. In the Eighth Circuit, the work product doctrine *can* be raised to preclude a deposition, particularly if there are alternative means to obtain the information sought. And unlike *Kelton*, this is not a bankruptcy action. The cases cited above, which like the present action arise from an SEC enforcement action, provide more apt analogies. Most importantly, though, *Kelton* allowed the trustee to be deposed because he "may be the only party available with knowledge about the facts." *Id.* at 184. That is most certainly not the case here.

There are simply no circumstances under which Respondents could meet their burden under *Shelton*. The information they seek could have been—and indeed, was—obtained, *inter alia*, via contention interrogatories, depositions of fact witnesses with first hand knowledge, and through relevant documents. To the extent Respondents seek the Receiver's trial strategy, investigative decisions, and

mental impressions, that information is privileged and *Shelton* precludes depositions seeking it.

4. Respondents Fail To Meet *Shelton* Factor 3 Because Any Information Beyond The Discoverable Facts Are Not Crucial To Their Preparation of the Case

It is clear that Respondents seek legal conclusions, mental impressions, and trial strategy of the Receiver. Not only is this protected information, Respondents do not need it to prepare their case. Respondents have retained competent counsel of their own choosing to represent them in this action who likely has developed mental impressions and trial strategy relative to Respondents defenses in this action. Respondents and their counsel presumably have also had their own communications relative to this action. Respondents are no more entitled to this information from the Receiver and his counsel than the Receiver is entitled to it from them and their counsel.

Every fact that underlies this action has been made available to Respondents. They do not need, nor are entitled to, anything beyond that from the Receiver. Respondents simply cannot meet their burden under *Shelton*. The information she seeks could have been (and was) obtained, *inter alia*, via contention interrogatories, depositions of fact witnesses with first hand knowledge, and review of relevant documents. To the extent Respondents seek the Receiver's trial strategy, investigative decisions, and mental impressions, that information is privileged and *Shelton* precludes depositions seeking it.

C. The Deposition Respondents Seek Should Be Prohibited Under Federal Rule of Civil Procedure 26(b)(2)(C)

Federal Rule of Civil Procedure 26(b)(2)(C) states that upon motion or on its own, “the court must limit the frequency or extent of discovery” if it determines that one of the three enumerated factors cited in the rule applies. In this case, the depositions Respondents seek are improper because each of the Rule 26(b)(2)(C) factors applies. *See* Fed. R. Civ. P. 26(b)(2)(C)(i)-(iii).

1. The Depositions Respondents Seek Should Be Prohibited Under Federal Rule of Civil Procedure 26(b)(2)(C)(i) Because It Is Unreasonably Cumulative or Duplicative and Can Be (And Has Already Been) Obtained From Other Sources That Are More Convenient, Less Burdensome, and Less Expensive

As explained above, the deposition topics attached to Respondents’ notice of 30(b)(6) duplicate the interrogatories that the Receiver has already answered in exhaustive detail. Beyond that, counsel for Respondents have demanded to know about the Receiver’s decisions relative to this case and answers to legal questions, which is protected information. Moreover, Respondents have had every opportunity to obtain the facts they seek by other discovery in this action. Every document seized by the Receiver has either been copied for them or made available for inspection. To the extent relevant information was obtained by the Receiver through his own investigation or from the SEC, the Receiver produced that information, as well. Respondents not only had the opportunity to depose Trevor Cook, the Receiver produced copies of every transcript of earlier depositions that had been taken of him, along with every exhibit. Although he had

no duty or obligation to do so, the Receiver went so far as to produce his investigators' notes from the pre-suit interviews of Respondents, as well as that of Grant Gryzbowski, and made his investigators available to be deposed. Respondents also attended depositions of third parties to this action and was free to subpoena any other witnesses or documents of their choosing.

There simply is no fact that Respondents could obtain by deposition that would not be cumulative or duplicative of what has already been copied and provided to them, made available for their inspection, or obtainable from fact witnesses who have been or who were available to be deposed. Under these circumstances, it would be inordinately burdensome and wastefully expensive, to force the Receiver to be personally deposed, or prepare a 30(b)(6) witness on the same information that Respondents have had equal access to for the past ten months.

2. The Depositions Respondents Seek Should Be Prohibited Under Federal Rule of Civil Procedure 26(b)(2)(C)(ii) Because They Have Had Ample Opportunity To Obtain the Information By Discovery In This Action

Respondents had over ten months—since November 12, 2010—to obtain discovery in this action. As explained above, every discoverable fact in the Receiver's possession, custody or control has been given to Respondents or made available to them in the form of written discovery responses, documents, depositions, and whatever independent investigation they wished to undertake. The Receiver went so far as to stipulate to an extension of the discovery schedule

specifically so that all Respondents could serve whatever additional contention interrogatories that they wished.

Given that they had every opportunity to conduct discovery in this action, and that the Receiver has provided them complete access to all discoverable information in his possession, custody and control, the depositions they now seek should be precluded under Federal Rule of Civil Procedure 26(b)(2)(C)(ii).

3. The Depositions Respondents Seeks Should Be Prohibited Under Federal Rule of Civil Procedure 26(b)(2)(C)(iii) Because The Burden And Expense of Those Proceedings Would Outweigh Any Benefit

Forcing the Receiver to testify would also impose a burden on the Receiver and the Court that outweighs any plausible benefit to Respondents. *See* Fed. R. Civ. P. 26(b)(2)(C)(iii). A deposition of Receiver or a designee of the Receiver would necessarily raise numerous thorny issues of work product and attorney-client privilege. Sorting through these complex disputes would unnecessarily waste the Court's and the parties' time and resources, while providing Respondents with no new information. *See SEC v. Rosenfeld*, 1997 U.S. Dist. Lexis 13996, at *10 (S.D.N.Y. Sept. 12, 1997) (“[T]o proceed by way of the Rule 30(b)(6) deposition sought by defendant Rosenfeld would undoubtedly place an undue burden on the SEC and the court, which would have to make a multitude of otherwise unnecessary decisions about issues of attorney work product . . . privilege.”) Educating and preparing a witness to testify under Rule 30(b)(6)

would also impose extraordinary burden on the Receiver and the limited resources he has to fulfill his court-ordered mandate to recover whatever assets he can from the worldwide wreckage of this fraud. Insofar as Respondents seek testimony from the Receiver beyond what is listed in their notice under Rule 30(b)(6), that testimony would be protected—or entirely speculative. The Receivership Entities were never legitimate companies. They were tools used by Cook and his co-conspirators to perpetrate a massive fraud that spanned the globe and robbed over 700 people of their lives savings. The true inner workings of that fraud likely will never be known to anyone. For whatever it may be worth, Respondents already deposed Cook—a man who failed a court-ordered lie detector test—and they could have deposed more of his colleagues. However, there is simply nothing more that is discoverable from the Receiver beyond that which has already been discovered.

In contrast to the tremendous burden that a deposition of the Receiver would impose on both the Receiver and the Court, there is no conceivable benefit for Respondents to gain from the deposition. (*Id.*)

D. The Depositions Respondents Seek Should Be Prohibited Under Federal Rule of Civil Procedure 26(c)

The Receiver has made every possible effort to provide Respondents with every fact relating to the clawback claims against them in this action. For all of the reasons set forth in this memorandum, contention interrogatories, not the

depositions of the Receiver or his staff, are the appropriate means to obtain the facts sought by the deposition that Respondents seek.

Given the complete—and extraordinary—access to information that has been available to Respondents in discovery and that anything more impinges on privileged information, the only purpose the deposition sought by Respondents could possibly serve is to annoy, embarrass, oppress, and impose undue burden and expense on the Receiver. As such, in addition to all of the other reasons set forth in this motion, there is good cause under Federal Rule of Civil Procedure 26(c)(1)(A) for a Protective Order against the deposition sought by Respondents.

E. The Receiver Has No Personal Knowledge of the Facts Relevant to This Action

Respondents' attempts to depose the Receiver himself are also improper because the Receiver has no first-hand knowledge of the facts at issue in this action. *See Lewelling v. Farmers Ins. Of Columbus, Inc.*, 879 F.2d 212, 218 (6th Cir. 1989) (plaintiffs were barred from deposing their employer's chief executive officer who lacked knowledge about any pertinent facts); *Thomas v. International Bus. Machs.*, 48 F.3d 478, 483 (10th Cir. 1995) (deposition of corporate officer in age discrimination action was quashed he lacked personal knowledge). Moreover, Respondents are not permitted to depose the Receiver if the same information could be obtained from other sources through "less intrusive means," where the Receiver does not have any unique knowledge of the facts. *Cardenas v. Prudential Ins. Co. of Am.*, 2003 U.S. Dist. LEXIS 9510, at *2-3 (D. Minn. May 16, 2003).

The Receiver, like an executive officer, lacks direct knowledge of any relevant facts.

The Receiver was appointed nearly five months after Respondents received their fraudulent transfers from Clifford Berg, Trevor Cook's father-in-law. (*See* Petition.) He has no personal knowledge whatsoever of the relevant facts, nor could he, because he had not yet been appointed by Chief Judge Davis. To the extent the Receiver has knowledge of relevant facts, that knowledge was obtained from the Receiver's lawyers and compiled in anticipation of litigation – thus, the information is privileged attorney-client communication or work-product (or both) and cannot be disclosed. Moreover, Respondents could have obtained (and did obtain) the relevant facts from former employees of Cook's scheme or from other sources. *See Cardenas*, 2003 U.S. Dist. Lexis 9510, at *4.

Respondents cite *In re Kelton Motors, Inc.*, 130 B.R. 183, 184 (Bankr. D. Vt. 1991) for the proposition that the Receiver must make himself available for deposition even though he lacks personal knowledge of any relevant facts. As explained, *supra*, *Kelton Motors*, a bankruptcy case from outside the Eighth Circuit, is readily distinguishable on its face and in any event, is not controlling here. Equally important, *Kelton* turned on the fact that, under the particular circumstances of the case, “the trustee may be the only party available with knowledge about the facts” and he was seeking to protect all of them from discovery. That is not the fact here. Rather, Respondents seek to do exactly what

the *Kelton* court makes clear it will not tolerate: “preemptively depose the trustee for the mere sake of deposing the trustee.” *Id.* at 185.

The Court should issue a Protective Order forbidding the Receiver’s deposition and requiring Respondents to obtain the facts they seek through less intrusive means.

IV. CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that the Court bar Respondents from taking the deposition of the Receiver individually or the Receivership as an entity under Rule 30(b)(6) and enter the Proposed Protective Order filed herewith.

Dated: September 19, 2011

Respectfully submitted,

s/ Tara C. Norgard

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