

**UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA**

R.J. ZAYED, IN HIS CAPACITY AS
COURT- APPOINTED RECEIVER FOR
TREVOR G. COOK, ET AL.,
Petitioner,

Case No. 11-CV-01042 SRN/FLN

vs.

DAVID BUYSSE, STEVEN AND
PAMELA CHENEY, WALTER DEFIEL,
JOHN DZIK, TERRY FRAHM,
STEVEN AND JENENE FREDELL,
WILLIAM HARRIS, MICHAEL HEISE,
MICHAEL AND CYNTHIA HILLESHEIM,
LARRY HOPFENSPIRGER, STEVEN
KAUTZMAN, JAMES MCINTOSH,
GEORGE AND KAREN MORISSET,
AND REYNOLD SUNDSTROM, AND
DOT ANDERSON,

Respondents.

**LENDER RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO THE
RECEIVER'S MOTION FOR PROTECTIVE ORDER**

Lender Respondents David Buysse, Steven and Pamela Cheney, Walter Defiel,
Terry Frahm, Steven and Jenene Fredell, Michael Heise, Michael and Cynthia
Hillesheim, Larry Hopfenspirger, Steven Kautzman, James McIntosh, George and Karen
Morisset, and Reynold Sundstrom (hereinafter collectively the "Lender Respondents")
submit the following Memorandum of Law in Opposition to the Receiver's Motion for
Protective Order.

INTRODUCTION

The Receiver has stuck to a remarkably consistent game plan throughout this litigation. The Receiver has attempted to bury Lender Respondents in irrelevant discovery, while stymieing Lender Respondents' efforts to discover relevant information. Lender Respondents' counsel has arrived at depositions only to be handed documents for the first time that are essential to the proceeding. Obtaining relevant documents from the Receiver's office has been similar to the proverbial tooth extraction process. Despite his protests, the Receiver is, and has been, at a considerable power advantage over Lender Respondents¹, and has never hesitated to use his informational edge against the Lender Respondents.

Now, the Receiver is claiming that he has always been forthright with Lender Respondents and the Court, and that a deposition will "waste the Receivership's assets." Lender Respondents find this latter position remarkable, coming as it does on the heels of at least five extensive depositions of witnesses whose testimony has no conceivable relevance to any claim or defense at issue in this proceeding.² In addition, Lender Respondents note that it is highly improbable that a deposition of the Receiver would cost the Receivership more than the extensive briefing prepared in support of the Receiver's Motion.

¹ The Receivers' law firm has spent nearly Three Million dollars reviewing the hundreds of thousands of documents in the Receiver's possession, and familiarizing itself with every aspect of the operations of the Cook Currency Trading Entities.

² For example, the Receiver recently spent five hours meeting with witnesses (an amount of time larger than the deposition preparation of our individual Lender Respondents in this action) who had never met with or heard of any Respondent in this case and who testified that they had no knowledge relating to the topics discussed in the Petition for Return of Receivership Assets.

The Receiver is once again attempting to use his position to gain a strategic litigation advantage. The Receiver has had every opportunity to interview and depose each Lender Respondent, including initially interviewing some of them without counsel present, and cross-examining each Lender Respondent in detail on their answers to the Receiver's contention interrogatories. Now, the Receiver is attempting to remove himself from the litigation that he chose to start by protesting that he may not be deposed. However, the applicable case law is completely contrary to the Receiver's position. The Receiver bears a heavy burden in requesting that the Court deny Lender Respondents the right to conduct any deposition of the Receiver, a party to this action. Receivers do not possess any special rights to be free from deposition, and the simple fact that an attorney was chosen as Receiver does not allow the Receiver to escape the normal duties of a party to appear for a noticed deposition. The Receiver has produced no case law which provides the basis for the Receiver, a named party to the litigation, to avoid being deposed.

The Receiver also alleges that his attorneys have handled aspects of information-gathering for the Receivership, and thus, that his testimony regarding the litigation would be second-hand or attorney-client privileged. The Lender Respondents did not force the Receiver to choose his own law firm to gain the benefits of this lucrative litigation despite the fact that it does not appear that any of the attorneys selected to prosecute this case have substantial bankruptcy or creditor remedies experience. The Receiver made that choice personally for the financial benefit of his own law firm. The Receiver should not be allowed to simultaneously benefit from his appointment of his own firm as

attorneys through the fees generated, but also by absolutely inuring himself and the other agents of the Receivership from any attempt by Lender Respondents to ascertain what testimony the Receiver will give at trial. Further, factual information an attorney tells his client is discoverable. The Receiver has a fiduciary responsibility to stay abreast of the activities of the Receivership, and he has a duty to answer questions from Lender Respondents on the factual information he has learned from his supervision of the activities of the Receivership's agents.

Any concerns the Receiver has about jeopardizing the attorney-client privilege is a mere smoke-screen. The Receiver is a very experienced lawyer, as are his attorneys. They are fully aware of how to assert the privilege in a deposition. In addition, Lender Respondents are clearly not attempting to depose the Receiver in his newly asserted position of trial counsel, but as the named plaintiff in the above-captioned action.

Finally, the Receiver has not signed a verification of his Interrogatories answers, and has not signed an Affidavit in Support of this Motion. There is no sworn testimony from the Receiver regarding his knowledge, or lack thereof. This fact in and of itself mandates denial of the Receiver's pending motion. Despite the Receiver's protests, the Receiver is not above the law, and should not be allowed to ignore his duty to fully and fairly participate in discovery, just as Lender Respondents have.

FACTS

1. Background of the Litigation

Defendant Oxford Global Advisors, LLC ("Oxford") is an entity owned or controlled by Defendant Trevor Cook which, pursuant to Cook's admission, was actually

operated as a “Ponzi scheme.” Each of the Lender Respondents loaned money to Oxford Global Advisors, LLC, and other Cook entities at interest rates ranging from ten percent (10%) to twelve percent (12%). At the time of investment, Lender Respondents were not privy to any information which would raise any concerns about a potential ponzi scheme, or the solvency of the Cook Currency Trading Entities. In fact, there was no public information available that would cast any doubt on the legitimacy of the Cook Currency Trading Entities. A number of professional investors were convinced of the benefits of the Cook Currency Trading Entities. Deposition Transcript of Trevor Cook, p. 97, a true and correct copy of which is attached to the Declaration of Gregory Erickson as Ex. 1. Most of the Lender Respondents knew Clifford Berg, Trevor Cook’s father-in-law, through his job as a carpet salesman. Berg, in concert with Trevor Cook, persuaded each Lender Respondent to lend money to the Cook Currency Trading Entities. Each Lender Respondent was assured that his or her money would be kept in a segregated account, would gain a set return, and would be retrievable on demand. *See, e.g.* Deposition Transcript of Terry Frahm, p. 73, attached to the Declaration of Gregory Erickson as Exhibit 2.

Prior to June 30, 2009, which date is also prior to the commencement of this receivership proceeding or any public indication that the Cook Entities were engaged in a “Ponzi Scheme,” the Cook Currency Trading Entities paid each of the Respondents the balance due them. Clifford Berg had been informed by Trevor Cook that there was an “investigation,” but had no knowledge whatsoever as to the grounds of the investigation, or of any danger whatsoever to the investments of Lender Respondents. Cook Depo., p.

116, Erickson Dec., Exhibit 2. Nevertheless, Clifford Berg decided to close Lender Respondents' accounts, and return their money. Trevor Cook has testified that Clifford Berg had no knowledge of a ponzi scheme, nor insolvency of the Cook Currency Trading Entities. *Id* at p. 79. No Lender Respondent had access to any information of any fraudulence or financial problems with the Cook Currency Trading Entities at the point at which he or she received the return of his or her funds, and did not learn of the fraud until much later. *See, e.g.* Deposition Transcript of Steven Cheney, pp. 101-102, attached to the Declaration of Gregory Erickson as Exhibit 3. Indeed, there has been no evidence to suggest that even if Lender Respondents had attempted to investigate the legitimacy of the Cook Currency Trading Entities after receiving their money back, they would have been able to obtain any information suggesting impropriety. Trevor Cook was actively attempting to conceal problems with the Cook Currency Trading Entities to shield himself from criminal charges. Cook Depo, p. 115, Erickson Dec., Ex. 1. Consequently, each Lender Respondent received the return of his or her funds in good faith.

The United States Security and Exchange Commission (the "SEC") and the United States Commodity Futures Trading Commission (the "CFTC") filed a Complaint against Defendant Trevor Cook ("Cook") on November 23, 2009, alleging that Cook had operated a Ponzi scheme, and in furtherance thereof, had defrauded over 1000 investors. *See Complaint* [Document No. 1 in Case No. 09-3333]; *Complaint for Injunctive and Other Equitable Relief and for Penalties Under the Commodity Exchange Act* (Document No. 1 in Case No. 09-3332. R.J. Zayed was appointed Receiver on November 23rd, 2009. *See Order Appointing Receiver* [Document No. 13 in Case No. 09-3333]; *see also*

Amended Order Appointing Receiver [Document No. 18 in Case No. 09-3333]; *Second Amended Order Appointing Receiver* [Document No. 68 in Case No. 09-3332]; *Order Continuing Appointment of Temporary Receiver* [Document No. 96 in Case No. 09-3332].

On April 13, 2010, Trevor Cook pled guilty to one count of mail fraud and one count of tax evasion in connection with the alleged Ponzi scheme. *United States v. Trevor Gilson Cook*, No. 10-cr-00075, Docket No. 7 (April 13, 2010).

On July 9, 2010, (more than one year after the Lender Respondents had received all of their funds from the Cook Currency Trading Entities) the Receiver filed a Motion for an Order Allowing Summary Proceedings. *Receiver's Motion for Order Allowing Summary Proceedings* [Document No. 340 in Case No. 09-3332]. On July 20, 2010, without argument or any papers filed in opposition, this Court granted the Receiver's Motion. *Order Allowing Summary Proceedings* [Document No. 350 in Case No. 09-3332]. The Order directed the Receiver to file a Summary Proceedings Petition, serve the "Petition" under Rule 4 on the Respondents and give Respondents 21 days "under Rule 12" from the date of service to "Answer or otherwise plead." *Id* at p. 4. The Order further provided that the parties would schedule a status conference with the Court 14 days after service of the Answer to establish an "expedited discovery schedule" to be limited to "i. [t]he 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.***" *Id* at. p. 5 (emphasis added).

On July 23, 2010, the Receiver filed a Petition for the “Return of Receivership Assets from Lender Respondents.” *Petition for Return of Receivership Assets from Lender Respondents*, [Document No. 1 in Case No. 11-01042]. For all practical purposes, the “Petition” is in the form of a Complaint. In the Petition, the Receiver asserts that the monies Respondents received from Oxford in repayment of their loans should be paid to the Receiver. The Petition then sets forth two claims for relief against the Respondents: (i) that the Respondents’ receipt of the monies they loaned to Oxford were “fraudulent transfers” under Minnesota’s adoption of the Uniform Fraudulent Transfers Act and (ii) that Respondents were unjustly enriched by the return of the monies they loaned to Oxford. Interestingly enough, although the Receiver continually refers to the transfers to Lender Respondents as “preferential,” the Receiver has never attempted to initiate bankruptcy proceedings in order to recover these supposedly “preferential transfers,” and the Receiver is incapable of recovering on a claim for “preferential transfers” in this action against the Lender Respondents because only Bankruptcy Courts possess the authority granted by Congress to unwind payments made in preference to the debtor’s other creditors.

The parties commenced discovery in November, 2010, and have since been have been engaged in a complex and often contentious discovery process, which has resulted in several motions to compel. The parties have taken approximately 30 depositions, the vast majority of which have been noticed by the Receiver (the Lender Respondents have taken four depositions). Declaration of Gregory Erickson, ¶ 2. The Receiver has produced thousands of documents, which renders the Receiver’s attempt to use

deposition exhibits that have never been produced to Lender Respondents surprising. In his Memorandum, the Receiver continually references the documents available for viewing at the Receiver's offices. As approximately 5 terabytes of information and hundreds of thousands of documents are contained thereon, Lender Respondents' counsel has justifiably had difficulty winnowing out the relevant documents. Erickson Dec., ¶ 2. The Receiver has used this excuse to surprise Lender Respondents with relevant documents from the Receiver's files on a regular basis.

The Receiver has shown a continuing pattern of obfuscation and deleterious conduct in discovery that makes it extremely difficult to trust his bald assertion that a deposition of the Receiver would reveal no new information. Extremely relevant new information has been revealed by the Receiver sporadically throughout this litigation at times most beneficial to the Receiver. Two examples illustrate this conduct best.

First, during the deposition of Trevor Cook, Trevor Cook testified that a number of professional investors had invested with the Cook Currency Trading Entities. Cook Depo., p. 97, Erickson Dec., Ex. 1. Obviously, this evidence is relevant to the question of "good faith," whether Lender Respondents, who are not professional investors, had information available to them sufficient to put them on notice of the illegality of the Cook Currency Trading Entities. Lender Respondents sent an interrogatory asking the Receiver to identify professional corporate investors who had invested with the Cook Currency Trading Entities. Lender Respondents' Third Set of Interrogatories to the Receiver, Erickson Declaration, Ex. 3. The Receiver responded by directing Lender Respondents to the whole list of investors, attached as an exhibit to an Affidavit on

PACER. A true and correct copy of the Receiver's Response is attached to the Erickson Dec. as Exhibit 4. The Receiver and his office were sufficiently well-informed as to the claims of each investor as to allow a simple response identifying which were professional or corporate investors, but refused, in an attempt to force Lender Respondents to expend additional legal fees. Respondents have since identified seven investors who were either professional investors themselves or were referred by professional investors. Erickson Dec., ¶ 3.

Second, before the deposition of Howard and Sharon Phillips, which was absolutely and incontrovertibly irrelevant to any claims at issue in this litigation, Lender Respondents requested on numerous occasions that the Receiver produce any documents the Receiver was planning to use at the deposition along with the Phillips account opening documents and all correspondence between the Phillips and the Receivership Entities. Erickson Dec., ¶ 4. This is because the Receiver had previously introduced an exhibit at the Deposition of Gina Berg that had not previously been produced to Lender Respondents in discovery. *Id.* The Receiver refused, and insisted that Lender Respondents' attorneys travel to the Receiver's office to look through terabytes of information to find relevant documents for themselves. *Id.* Upon downloading approximately ten thousand documents using Boolean file searches, Lender Respondents were unable to find any account-opening documents for the Phillips. *Id.* The Receiver refused to inform Lender Respondents that the Phillips were only in possession of one account opening document for their daughter's account and nothing else. *Id.* This fact supported Trevor Cook's assertion in his deposition that Gerry Durand had absconded

with all of his clients' documentation which included the Phillips' client opening documents, which interfered with the Cook Currency Trading Entities' efforts to repay the Phillips. Cook Depo., p. 198, Erickson Dec., Ex. 2. A simple acknowledgement from the Receiver that no account opening documents currently existed would have answered Lender Respondents' question, and would have allowed them to avoid wasting an entire day of expensive and ultimately fruitless search. *Id.* The Receiver chose to conceal the fact that they did not possess any account opening documents for the Phillips for two reasons:

- 1) to conceal information which is damaging to the Receiver's case; and
- 2) to exhaust the litigation resources of the Lender Respondents. *Id.*

Since the Receiver has elected to engage in a continued course of conduct attempting to conceal relevant information from the Lender Respondents, including his intentional failure to provide any sworn testimony in support of the pending motion, it is difficult to trust his unverified claim that the Lender Respondents will not discover new information at a deposition of the Receiver.

The Receiver answered the interrogatories produced by Lender Respondents at considerable length. However, the Receiver's answers, though voluminous, were not complete and were not verified by the Receiver. Erickson Dec., ¶ 5. Lender Respondents wish to ask a variety of follow-up questions, as well as have an opportunity to cross-examine the Receiver on a variety of his factual claims. *Id.* The Receiver has been given the opportunity to review Lender Respondents' answers to the Receiver's

contention interrogatories, and then follow up and cross-examine Lender Respondents in their depositions. Lender Respondents must have the same opportunity.

ARGUMENT

I. THE RECEIVER IS A PARTY TO THIS ACTION AND MAY NOT AVOID A PARTY DEPOSITION.

The Receiver has no grounds for a protective order allowing him to avoid deposition as a party. The Receiver's Memorandum of Law mixes its analysis of why the Receiver should not be required to submit to a party deposition with its analysis of why a 30(b)(6) deposition is not appropriate in this case. However, the primary arguments against the Receiver being forced to appear as a party at a deposition, as have the Lender Respondents, is that: (1) the Receiver has no personal knowledge of facts, but learned facts from his attorneys; (2) the Receiver is litigation counsel, and as such, may not be deposed under 8th Circuit precedent; and (3) the Receiver has already responded to the deposition topics, rendering a deposition duplicative. These arguments are completely legally baseless. There is no privilege protecting a party from disclosing facts learned from his or her attorney. Lender Respondents have no interest in the Receiver's testimony as an attorney, but as a party to the action. And finally, the Receiver's interrogatory answers were incomplete, and Lender Respondents are not bound by its Rule 30(b)(6) topics in a deposition of an individual party. The Receiver's Motion must be denied.

1. Liberal Deposition Rules.

Federal Rule of Civil Procedure 30(a)(1) states that a party “may, by oral questions, depose any person, including a party....” The discovery rules “are to be accorded a broad and liberal treatment.” *Hickman v. Taylor*, 329 U.S. 495, 507, 67 S.Ct. 385, 91 L.Ed. 451 (1947). Specifically, Federal Rule of Civil Procedure 30 “provides a broad right.” *Credit Lyonnais, S.A. v. SGC Int'l, Inc.*, 160 F.3d 428, 430 (8th Cir. 1998). Federal Rule of Civil Procedure 26 allows a district court to issue an order protecting a party from discovery only upon showing of “good cause” including annoyance, embarrassment, oppression, or undue burden or expense. “The burden is therefore upon the movant to show the necessity of its issuance, which contemplates a particular and specific demonstration of fact, as distinguished from stereotyped and conclusory statements .” *Gen. Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204, 1212 (8th Cir. 1973). “It is especially difficult to show grounds for ordering that discovery not be had when... it is a deposition that is sought.” *S.E.C. v. Dowdell*, 53 Fed. R. Serv. 3d 1443 (W.D. Va. 2002). “It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error.” *Salter v. Upjohn Co.*, 593 F.2d 649, 651 (5th Cir. 1979). Receivers may be deposed like any other party. *Hannover Corp. of Am. v. Beckner*, 211 B.R. 849, 852 (M.D. La. 1997); *Correspondent Services Corp. v. J.V.W. Investments Ltd.*, 173 F. Supp. 2d 171, 181 (S.D.N.Y. 2001).

The Receiver has not cited any extraordinary circumstances which would justify protecting him from a deposition. The Receiver has already taken full advantage of the liberal nature of the discovery rules, noticing and conducting a multitude of depositions,

many of which have no discernable application to any of the claims or defenses in this action. The Receiver has conducted depositions of all three of Cliff Berg's daughters, at least two of whom had no relevant knowledge whatsoever. The Receiver extensively deposed two parties from a previous action against Trevor Cook, apparently for the sole purpose of establishing that some unfortunate people invested with Trevor Cook and lost their money, a fact that was assumed in Judge Davis's Order and to which Lender Respondents would have readily stipulated. In addition, the Receiver has deposed each Respondent, and some of the Respondents' family members at length. Now, the Receiver is attempting to close the door behind him, and not allow Lender Respondents the opportunity to conduct a full and fair deposition of the Receiver, after the Receiver has had every opportunity to conduct the maximum amount of relevant and irrelevant discovery.

2. For Purposes of a Deposition, the Receiver's Status is Party, Not Litigation Counsel.

The Receiver attempts to hide behind his own self-serving appointment of his own law firm as his attorneys to forestall Lender Respondents' attempts to obtain discovery of relevant information. The Receiver points to the fact that he has signed several pleadings as evidence that the Lender Respondents are attempting to depose "litigation counsel." However, the Receiver's true status in this litigation is Plaintiff (or "Petitioner"). The Receiver is a party to this litigation, and is subject to the duties and responsibilities of a party, to participate in full and fair discovery, including depositions.

Numerous courts have found that in bankruptcy, “appointing a trustee's firm as his own counsel is a very questionable practice.” *In re Michigan Interstate Ry. Co., Inc.*, 32 B.R. 325, 326 (Bankr. E.D. Mich. 1983). In light of the similar duties and responsibilities of a receiver, it is surely similarly questionable for a receiver to use the funds from the receivership to fill the coffers of his own law firm. Indeed, some states, including New York, affirmatively ban Receivers from appointing their own law firm as counsel barring a compelling reason for doing so. N.Y. Comp. Codes R. & Regs. tit. 22, § 36.2. Leaving aside the ethical considerations of the Receiver funding his own firm with receivership funds, the instant dispute is another example of why refusing to hire outside counsel is dangerous. If the Receiver had opted to hire outside counsel, as he has now apparently done with regard to future claw-back cases, the Receiver would have no privilege concerns. The Receiver should not be rewarded for intermingling the Receivership with his own law firm so as to allow the Receiver to claim some nebulous privilege to avoid providing Lender Respondents with the information within his control.

The Receiver argues that, as litigation counsel, he falls under the test expressed in *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986). However, the Receiver's appointment of himself as litigation counsel does not free him from his obligations as a party. Attorneys representing themselves in litigation are not allowed to skip depositions on the grounds that the opposing party is seeking discovery from an attorney. In a similar gambit, a plaintiff attorney who was proceeding pro se attempted to argue, using similar language to the *Shelton* decision, that she should not be forced to appear for deposition because she was acting as her own attorney, and “deposing

opposing counsel disrupts litigation and interferes with the adversarial process.”

Lockhart v. Sullivan, 925 F.2d 214, 218-19 (7th Cir. 1991), abrogation on other grounds recognized by *Williams v. Chicago Bd. of Educ.*, 155 F.3d 853, 857 (7th Cir. 1998). The Court found this argument to be “meritless in that defendants were attempting to depose plaintiff not in her capacity as attorney, but as the plaintiff in this case.” *Id.* Similarly, Lender Respondents are not attempting to depose the Receiver in his capacity as “litigation counsel,” (regardless of the fact that other attorneys at the Receiver’s firm have been responsible for practically every aspect of this litigation), but as the named plaintiff/petitioner in this litigation.

Additionally, cases involving a receiver can be identically likened to those cases involving bankruptcy trustees who are required to appear for deposition. For example, in *In re Kelton Motors*, 130 B.R. 183, 184 (D.Vermont 1991), the Trustee was seeking turnover of an alleged preferential transfer to the Bank. The Debtor was not cooperative and its principals asserted constitutional privileges. *Id.* The Bank properly noticed the Trustee’s deposition under Fed.R.Civ.P. Rule 30. In response, the Trustee filed a Motion for Protective Order under Fed.R.Civ.P. Rule 26(c), asking that the deposition not be had because, among other things, that the Trustee had no first-hand knowledge of any relevant facts. The Court refused to prohibit the deposition and held that facts known to the Trustee were not immune from discovery. *Id.* The fact that the Trustee was not a party to the underlying transaction, and therefore did not have firsthand knowledge of any relevant facts, did not demonstrate good cause for issuance of protective order precluding

the Bank from deposing the Trustee in adversary proceeding brought by Trustee seeking to avoid alleged preferential transfer to the Bank. The Court specifically stated:

A strong showing is required before a party will be denied entirely the right to take a deposition. *Marshall v. S.K. Williams Co.*, 462 F.Supp. 722 (E.D.Wis.1978). Moreover, the Trustee's burden in seeking a protective order is to make a particular and specific demonstration of fact amounting to good cause. *Dynamics Corp. v. Selb Mfg. Co.*, 481 F.2d 1204 (8th Cir.1973), *cert. denied*, 414 U.S. 1162, 94 S.Ct. 926, 39 L.Ed.2d 116 (1974). Here, Trustee's sole demonstration of good cause is that Trustee was not a party to the underlying transaction, and therefore, has no "first hand knowledge" of any relevant facts. First hand knowledge is not a prerequisite to being deposed. Allegations to that effect do not amount to good cause sufficient to preclude the taking of a deposition. *Transcontinental Motors, Inc. v. NSU Motoren. Adtiengesellschaft*, 45 F.R.D. 37 (S.D.N.Y.1968); *Amherst Leasing Corp. v. Emhart Corp.*, 65 F.R.D. 121 (D.Conn.1974). Trustee has also not demonstrated that the deposition will lead to annoyance, embarrassment, oppression, or undue burden or expense.

Id. at 184-185. The Court further concluded that the Trustee might be the only party available with knowledge about facts in light of lack of cooperation by debtor's principals and their assertion of constitutional privileges. *Id.* at 185. In this case, although Lender Respondents have deposed Trevor Cook, the Receiver is in possession of a host of relevant facts gathered from his extremely expensive investigation into the acts of the Receivership entities. Lender Respondents must be allowed to depose the Receiver in order to ascertain the relevant facts in this litigation.

3. The Receiver is Required to Testify Regarding Facts He Has Learned.

The *Kelten* decision also illustrates a problem with another of the Receiver's arguments. The Receiver has protested that he has no "personal knowledge" of the facts at issue, and thus, that only the Lender Respondents should be forced to appear for deposition. As *Kelten* makes clear, lack of "personal knowledge" is insufficient to protect against a notice of deposition. The Receiver claims that *Kelten* does not apply

because it is not from the district, and because this is not a case in bankruptcy³, and further, that other means of discovery are available to Lender Respondents. However, no other means of discovery will allow Lender Respondents to examine the Receiver, who is undoubtedly a well-informed party on a variety of issues germane to the claims and defenses in this issue. Further, Lender Respondents are entitled to test the supposed lack of knowledge on the part of the Receiver. “A witness cannot escape examination by claiming that he has no knowledge of any relevant facts, since the party seeking to take the deposition is entitled to test his lack of knowledge....” *Minter v. Wells Fargo Bank, N.A.*, 258 F.R.D. 118, 125 (D. Md. 2009), *quoting* 8 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure*, § 2037 (2d.2009).

The Receiver argues that most of the facts in his possession were communicated to him by his attorneys, and are thus subject to privilege. However, “there is simply nothing wrong with asking for facts from a deponent even though those facts may have been communicated to the deponent by the deponent's counsel.” *State Farm Mut. Auto. Ins. Co. v. New Horizont, Inc.*, 250 F.R.D. 203, 214 (E.D. Pa. 2008) (quotation omitted). If such were the case, 30(b)(6) depositions could never proceed where the deponent had met with a lawyer beforehand. In this case, the Receiver was appointed to oversee the Receivership and all necessary investigations related thereto, including, if necessary, through agents. It was the Receiver’s duty at all times to be informed about the facts

³ Lender Respondents find the Receiver’s protests that this case is not in bankruptcy interesting, as the Receiver’s Memorandum continually references supposedly “preferential” transfers received by Lender Respondents, a cause of action only cognizable in bankruptcy, in an attempt to muddle preferential transfer and fraudulent transfer law. Other than the lack of a power to avoid preferential transfers, a fact that disposes of all the issues in this case in Lender Respondents’ favor, a receiver’s duties are identical for all practical intents and purposes to that of a Trustee.

revealed by the Receiver's investigation, which now form the basis for the Receiver's claims, and the Receiver may not now assert attorney client privilege simply because he learned facts from attorneys he selected to act on behalf of the Receivership. As Lender Respondents have previously argued, the Receiver made the decision to intermingle the administration of the Receivership and this litigation by using the same attorneys to investigate on behalf of the Receivership who are now tasked with attempting to divest Lender Respondents of their retirement funds. The Receiver should not be allowed to use this decision to cut off Lender Respondents' right to discovery that would be available to Lender Respondents in litigation against any other party.

4. The Interrogatory Responses Are Not a Proper Substitute.

The Receiver argues that the interrogatory responses provided by his law firm are adequate, and that the deposition topics are duplicative. As an initial matter, a deposition is usually favored over interrogatories, "because it allows cross-examination of evasive, recalcitrant or hostile witnesses." *In re China Merchants Steam Nav. Co.*, 259 F. Supp. 75, 78 (S.D.N.Y. 1966) (quotation omitted). "Because of its nature, the deposition process provides a means to obtain more complete information and is, therefore, favored." *Kelly v. Provident Life & Acc. Ins. Co.*, 04CV807-AJB BGS, 2011 WL 2448276 (S.D. Cal. June 20, 2011) (quotation omitted). A party "is not precluded from conducting oral depositions merely because plaintiff considers them less than the optimal means of securing information. Indeed, there is nothing which necessarily prohibits the pursuit of information by more than one discovery vehicle." *United Technologies Motor Sys., Inc. v. Borg-Warner Auto., Inc.*, CIV.A. 97-71706, 1998 WL 1796257 (E.D. Mich.

Sept. 4, 1998). Lender Respondents have the right to depose the Receiver, just as they were deposed, and cross-examined by the Receiver. In addition, the Receiver's speculation about potential topics at his personal deposition is baseless. Only 30(b)(6) depositions are required to include the matters for examination "with reasonable particularity." Parties are allowed to be deposed on any relevant, non-privileged matters.

The Receiver's interrogatory responses, vaunted as complete by the Receiver's Memorandum of Law in Support of his Motion for Protective Order, are not only incomplete, but are not even sworn. In fact, the Receiver does not even submit his sworn affidavit or declaration supporting the contentions in the Memorandum of Law. There is no sworn testimony in the record by the Receiver relating to this Motion. The discovery sought by Lender Respondents is not duplicative or cumulative, but is relevant and essential to Lender Respondents' defenses.

The Receiver's comparison of the Lender Respondents' interrogatories with the notice of 30(b)(6) deposition has no bearing on whether the Receiver has provided Lender Respondent with all relevant facts. As an initial matter, Lender Respondents are entitled to depose the Receiver on all facts relevant to this litigation, and are not limited to any specific topics. In addition, Lender Respondents would not even be limited in a 30(b)(6) deposition, as the topics are only a guide to the entity furnishing the witness. *Am. Gen. Life Ins. Co. v. Billard*, C10-1012, 2010 WL 4367052 (N.D. Iowa Oct. 28, 2010). The Receiver's argument that he has responded to the topics set forth in Lender Respondents' 30(b)(6) deposition notice is not only incorrect factually, but meaningless legally.

Based solely on the Receiver's responses, Lender Respondents are entitled to have the Receiver answer the following questions, which are provided to demonstrate that deposition questions exist which do not implicate any privileged information: whether any other investors were repaid their principal after June 29, 2009; what facts in the Receiver's possession indicate that Clifford Berg was aware that Trevor Cook was operating a ponzi scheme or that Crown Forex was insolvent prior to June 29, 2009; whether the Receiver has any information regarding Gerry Durand's theft of account opening documents for the Phillips and others, and whether the absence of these documents inhibited the Phillips' efforts to retrieve their money; and, what facts the Receiver has regarding the contractual relationship between Lender Respondents and the Cook Currency Trading Entities, specifically, supporting the Receiver's contention that Lender Respondents did not lend money to the Cook Currency Trading Entities. None of these questions have been answered, each of these topics are within the knowledge of the Receiver, and a deposition is the most effective means of obtaining this information along with many other questions of this nature. Lender Respondents cannot submit contention interrogatories in perpetuity, as they are limited by the Federal Rules of Civil Procedure and they are entitled to answers to the Lender Respondent's questions which are not "sanitized" by the Receiver's counsel.

Lender Respondents note that the Receiver is hypocritical in complaining that Lender Respondents wish to depose the Receiver on ground already covered by responses to contention interrogatories. The Receiver served contention interrogatories on Lender Respondents on a variety of topics, and then covered each of these areas in his deposition

of each individual Lender Respondent. In fact, the attorney for the Receiver went over each interrogatory response with each Lender Respondent, re-asking each question. For example, the Receiver's counsel informed Lender Respondent Michael Heise that he would be revisiting interrogatory responses. "Okay. Well, I'm just going to go over the answers that your attorney has provided to that question on your behalf in a little bit more detail... [quoting Lender Respondents' answer to the Receiver's Interrogatory number 6] Initially, Heise was more interested in investing in the mutual funds offered by the Cook entities and working through with Bo Beckman rather than making a loan to the Cook entities.'" Do you see that? A. Yes. Q. Is that true?" M. Heise Depo., p. 247, Erickson Dec., Ex. 6. The Receiver's counsel asked substantially similar questions at each of Lender Respondents' depositions. *See, e.g.* Deposition of Reynold Sundstrom, p. 199, Erickson Dec., Ex. 7, Steven Fredell Deposition, p. 191, Erickson Dec., Ex. 8.

The Receiver has been allowed to cross-examine each individual Lender Respondent, ask follow-up questions based on answers to interrogatories, and conduct full discovery. This discovery has included the Receiver's attempts to systematically verify each of Lender Respondents' interrogatory answers, and to cross-examine Lender Respondents on said answers to the Receiver's contention interrogatories. It would be unjust to allow the Receiver's counsel to carefully craft an artfully worded interrogatory response, and thus allow the Receiver to escape the necessity for cross-examination and follow-up questions. In short, Lender Respondents have consistently taken the position that it would be fundamentally unfair to allow the Receiver to conduct full and fair discovery, while limiting Lender Respondents in their ability to reciprocate.

II. IF THE RECEIVER MAY AVOID DEPOSITION, HE STILL MUST PRODUCE A 30(B)(6) WITNESS.

The Receiver has absolutely no legal grounds for a protective order excusing him from appearing for a deposition as a party to this action. However, even if the Court finds that the Receiver does not have relevant facts in his possession, the Receiver should still be required to prepare a rule 30(b)(6) witness on behalf of the Receivership.

1. Lender Respondents' 30(b)(6) Notice Is Valid.

The Receiver responds at length to Lender Respondents' Notice of 30(b)(6) Deposition. In fact, the Receiver entangles his 30(b)(6) analysis so completely with his party deposition analysis that it is difficult to separate the two. This is because the Receiver's only cognizable legal arguments are against a 30(b)(6) deposition. Lender Respondents were clear that the 30(b)(6) deposition was noticed as an alternative to the Receiver's deposition. In other words, if the Receiver argued that he had no knowledge of the litigation, the Receiver could appoint another agent of the Receiver to answer said questions. Lender Respondents must point out that this would be a derogation of the Receiver's duty, however, as the Receiver is required to be knowledgeable about acts of the Receivership, especially about litigation to which the Receiver is a party.

The cases cited by the Receiver are inapt, as they all involve the S.E.C., a governmental entity tasked with investigative and prosecutorial functions. The Receiver is not the S.E.C., and is not entitled to the same privileges. For example, the S.E.C. has investigatory privileges which the Receiver does not share. However, even the S.E.C. must respond to relevant discovery. "[The S.E.C.] is not entitled to special consideration

concerning the scope of discovery, especially when it voluntarily initiates an action.” *S.E.C. v. Collins & Aikman Corp.*, 256 F.R.D. 403, 414 (S.D.N.Y. 2009). To the extent that the Receiver appointed attorneys from his firm as agents in gathering information related to the Receiver’s claims against Lender Respondents, and has reused said attorneys in the instant litigation, the Receiver cannot be allowed to benefit from this choice by denying Lender Respondents the opportunity to obtain relevant information in discovery. To do so would give the Receiver an unfair advantage in this litigation.

2. The Cases Cited by the Receiver Are Inapt.

The Receiver relies chiefly on three cases involving the S.E.C. to support his position that the Receiver should not be forced to produce a witness with knowledge. A recent case that conducted a detailed examination of the issue on facts similar to this case, concluded that permitting the S.E.C. to “assert a blanket claim of privilege in response to a Rule 30(b)(6) notice creates an unworkable circumstance in which a defendant loses a primary means of discovery without a meaningful review of his opponent’s claim of privilege.” *S.E.C. v. Kramer*, 778 F. Supp. 2d 1320 (M.D. Fla. 2011). In the *Kramer* case, the S.E.C. made the same arguments the Receiver makes in its Memorandum, including that the S.E.C. lacked independent knowledge, and that because S.E.C. counsel worked exclusively on the case, that a deposition would necessarily intrude on privileged material. *Id.* The Court denied the S.E.C.’s motion, finding that the S.E.C. did not have to appoint an attorney to appear for the 30(b)(6) deposition, and that the deponent retained the right to refuse to answer questions based upon privilege. *Id.* *Kramer* is on

point where the cases cited by the Receiver are not, because Lender Respondents seek facts from the Receiver, not his mental impressions of the case.

The other cases cited by the Receiver all include specific requests for privileged material, and are readily distinguishable from this case. First, the *Rosenfeld* decision is not on point as the Receiver is not the S.E.C., a governmental entity tasked with investigating and enforcing acts of Congress. In addition, the Receiver chose the agents of the Receivership. The Receiver should not be allowed to use attorneys in an attempt to make any information discovered by said agents privileged. Despite the Receiver's wild surmising, Lender Respondents are not seeking the Receiver's legal theories, only the facts relevant to his claims. As other courts have found, *Rosenfeld* does not apply when Defendants "seek only the facts supporting Plaintiffs' claim ... which is not privileged from discovery as work product." *Dunkin' Donuts Inc. v. Mary's Donuts, Inc.*, 206 F.R.D. 518, 521 (S.D. Fla. 2002).

Second, the Defendant in the *Buntrock* decision was not seeking "merely facts." Instead, the Defendant in that case sought "legal theories and explanations of those theories: the S.E.C.'s legal position in this case, and how it arrived at that position." *S.E.C. v. Buntrock*, 217 F.R.D. 441, 446 (N.D. Ill. 2003) *aff'd*, 02 C 2180, 2004 WL 1470278 (N.D. Ill. June 29, 2004). In this case, although some of the topics set forth in the 30(b)(6) deposition notice have some similarities to Lender Respondents' contention interrogatories, Lender Respondents are seeking facts, not legal conclusions. To the extent that any of Lender Respondents' questions requested privileged material, the Receiver would be perfectly capable of invoking the privilege and refusing to answer.

SEC v. Morelli does not apply to the facts in this case. Besides the fact that the S.E.C. and the Receiver are not similarly situated, *SEC v. Morelli* stood for the general proposition that a party's attorney generally should not be deposed. The Receiver was not obliged to use attorneys to work on behalf of the Receivership in an investigative capacity. To the extent the Receiver chose to do so, the Receiver should not be rewarded by being allowed to fail to disclose relevant information. The S.E.C. is a governmental agency assigned an investigative and prosecutorial function, and cannot avoid using attorneys to both investigate and litigate on its behalf. The Receiver's free choice to delegate Receivership and litigation duties to his own colleagues should not be accorded similar deference because it was wholly unnecessary.

III. THE RECEIVER'S RULE 26 ARGUMENTS ARE NOT BASED IN FACT.

The Receiver makes an additional argument for protective order on the grounds that the requested discovery violates Rule 26. Specifically, the Receiver claims that appearing at the deposition would impose enormous costs on the receivership, that the Receiver could be forced to disclose privileged material, that the deposition will be duplicative, and that Lender Respondents are attempting to harass the Receiver. In point of fact, Lender Respondents are attempting to discover facts in the possession of Receiver that have not previously been produced, and appearing at deposition would have been far less expensive than preparing this Motion.

1. A Deposition Would Impose Negligible Costs on the Receivership.

The Receiver makes the claim, remarkable in a twenty-five page memorandum, that a deposition would burden the Receivership with unreasonable costs. The Receiver's Motion will cost the Receivership far more than it would have cost to simply appear at the deposition, in addition to once again embroiling Lender Respondents in a needlessly expensive litigation dispute. The cost of appearing for a deposition would be negligible, and the Receiver's protests to the contrary are not credible.

2. Lender Respondents Are Not Interested in Duplicative Testimony.

The Receiver assures the Court and Lender Respondents that all relevant facts have been produced to the Lender Respondents. However, in view of the new, relevant information that has been produced on an ongoing basis, Lender Respondents find it extremely difficult to believe the Receiver's bald, unsworn assertion. "Parties to litigation do not have to accept their opponent's statement that all relevant evidence has been produced via a given discovery vehicle-they are entitled to test this assertion in questioning witnesses during depositions." *Iris Corp. Berhad v. United States*, 06-801C, 2008 WL 4885120 (Fed. Cl. Oct. 30, 2008). A protective order will not be issued precluding the depositions solely because the testimony may prove repetitive. *Evergreen Trading, LLC v. United States*, 80 Fed.Cl. 122, 136 (2007). In any event, Lender Respondents have a number of follow up questions to the Receiver's answers to Lender Respondents' interrogatories to which they are entitled. The Receiver was allowed to follow up on Lender Respondents' contention interrogatory responses in individual depositions, and there is no just reason for denying Lender Respondents the right to reciprocate.

3. A Deposition of the Receiver Would Not Result in the Unintended Revelation of Privileged Material.

The Receiver is an experienced lawyer, as are his attorneys. The Receiver's counsel is more than capable of objecting to questions implicating attorney-client privileged material, and the Receiver is more than capable of answering questions that do not implicate attorney-client privileged material. The risk that the Receiver will be "forced" to answer questions that implicate the attorney-client privilege or attorney mental impressions privilege is certainly no more prevalent in a deposition of the Receiver than in the deposition of any other party. A deposition would be a simple and cost-effective discovery method that would only cost the Receiver a few hours, but would allow the Lender Respondents the opportunity to discover the relevant, non-privileged information possessed by the Receiver, and to cross-examine him on his factual allegations. If this Court grants the Receiver's Motion to Compel, the Receiver will have been allowed to extract full discovery from Lender Respondents, while avoiding such discovery himself. This is clearly unfair, and would be a violation of the letter and spirit of the Federal Rules of discovery.

CONCLUSION

For all the foregoing reasons, the Receiver's Motion for a Protective Order must be denied.

MOHRMAN & KAARDAL, P.A.

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s/Gregory M. Erickson

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