



## CARLSON, CASPERS, VANDENBURGH & LINDQUIST

INTELLECTUAL PROPERTY LITIGATION & COUNSELING

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October 5, 2011

VIA EMAIL

Gregory M. Erickson  
Morhman & Kaardal  
33 South Sixth, Suite 4100  
Minneapolis, MN 55402

**Re: *Zayed v. Buysse et al.*, 11-cv-1042 (D. Minn.)**

Dear Mr. Erickson:

Fact discovery has now been closed for two weeks, yet many deficiencies in the Respondents' discovery responses remain. Given that the non-dispositive motion deadline is only a week and a half away, please provide a date this week when you are available to meet and confer on these issues.

### ***A. Verifications of Respondents' Interrogatory Responses***

Respondents have neither signed nor verified (1) their Responses to the Receiver's Interrogatories Nos. 16-22, served on August 16, 2011 and (2) the Second Amended Responses to the Receiver's First Set of Interrogatories (Nos. 1-15). According to your own arguments, even if the blank verification forms that accompany these responses were signed, they would be improper under Federal Rule of Civil Procedure 33.

Unlike the Receiver, each Respondent has personal knowledge of the facts contained in the responses he or she provided. In the unsolicited letter you sent to Magistrate Judge Noel on October 3, 2011, you argued that it is improper for a person with personal knowledge to qualify his or her verification with the phrase "to the best of my knowledge." Yet the yet-to-be signed verification that accompanies Respondents' interrogatory responses do just that, and then pile on additional qualifications:

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I reserve the right to make any changes in the foregoing Answers if it appears at any time that omissions or errors have been made therein **or that more accurate information is available**; and that **subject to the limitations set forth herein**, the said Answers are true **to the best of my knowledge, information, and belief**.

For witnesses with personal knowledge—Respondents—this “verification” is clearly insufficient under Federal Rule of Civil Procedure 33.

### ***B. Outstanding Documents***

We are now two weeks beyond the close of fact discovery, and you have yet to produce responsive documents that are in the Respondents’ possession, custody, or control.

First, you have not produced any documents responsive to the Receiver’s Second Set of Requests for Production of Documents (Nos. 7-16), served on August 16, 2011. In your letter of September 15, 2011, enclosing your written responses to the Receiver’s Second Set of Requests, you asked whether we would like your document production sent via US mail or email. I responded via email that same day, requesting that the documents be emailed to me, and restated that request in a September 26, 2011 email. You have not responded. Please produce all responsive documents today, so as to avoid unnecessary motion practice.

Second, during our August 22, 2011 meet and confer, you agreed to produce documents in response to the Receiver’s requests and provided a number of dates by which you promised to produce them. As I stated in my September 12 and 26, 2011 emails, I understand that the documents you handed to me on September 9, 2011 following the deposition of Gina Cook were only a portion of the documents that you agreed to produce during our August 22, 2011 meet and confer. Since September 9, 2011 you have made increasingly hollow promises to produce documents by several now-past deadlines. The outstanding documents include:

- Information sufficient to show how the Respondents used or invested the money they received from the Receivership Entities;
- All correspondence Mr. Kautzman had with the State Attorney General related to Entrust, along with any associated documents; all communications with the SEC or other local, state, or federal government agencies related to Entrust, along with any associated documents; and any documents Mr. Kautzman provided to any local, state, or federal government agencies related to Entrust;
- All email communications between Mr. Frahm and Entrust, including all email communication between Mr. Frahm and Todd Grill;

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- All emails responsive to the Receiver's document requests that are in Mr. McIntosh's possession, custody or control, including any responsive emails from Mr. McIntosh's personal email accounts and work-related email accounts from his time as an employee of Shaw; and
- All notes created by Mr. Hopfenspirger during the Receiver's interview of Mr. Hopfenspirger in the spring of 2009.

*C. Deficient Interrogatory Responses*

**Interrogatories Must be Answered as to "Each Respondent"**

The Receiver's interrogatories are specific as to "each Respondent." Yet Respondents have failed to answer Interrogatory numbers 2, 3, 4, 5, 10, and 13 on an individual basis.

Although we do not object to their responses being combined in a single document, Respondents are required to answer each interrogatory individually. Without a response as to each Respondent, the Receiver is left to guess what information relates to each of them. Indeed, this has already proven to be problematic with previous general responses where in depositions it has become clear that the general responses are not made with respect to all Respondents. It is not the Receiver's duty to parse through general responses to determine which part, if any, is being made as to each Respondent.

Please cure this deficiency immediately.

**Response to Interrogatory No. 3**

In response to Interrogatory No. 3, Respondents collectively and generally respond that "to the extent that the Investor Respondents are in possession, custody, or control of [documents related to their defenses], those documents will be produced under Fed. R. Civ. P. 33(c)." First, we assume this is a typographical error and that you intended to rely on Fed. R. Civ. P. 33(d); if you are in fact relying on subpart (c) of the rule in this and other responses, please let us know immediately so we can address that issue.

Second, you are required to identify which specific documents relate to each Respondent. Please supplement Respondents' answer to Interrogatory No. 3 to identify which documents, by Bates number, that each specific Respondent relies on pursuant to Rule 33(d) in answering Interrogatory No. 3.

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#### **Response to Interrogatory No. 4**

Interrogatory No. 4 requires each Respondent to identify all documents he or she relied on in preparing responses to the Receiver's discovery requests. The response was not made as to each individual Respondent and moreover, refused to identify any specific documents. Please supplement Respondents answer to Interrogatory No. 4 to identify which documents, by Bates number, that each specific Respondent relies on pursuant to Rule 33(d) in answering Interrogatory No. 4.

#### **Response and Amended Response to Interrogatory No. 5**

Interrogatory No. 5 requires each Respondent to provide an accounting of all funds he or she transferred to Trevor Cook, Clifford Berg, or any one of the Receivership entities. Respondents have failed to provide any substantive response to this interrogatory whatsoever. For purposes of this interrogatory, the Receiver instructs that the term "accounting" means a complete list, of each transfer of funds made by each Respondent, including the amount of each such transfer, the date of each such transfer, and the method used to make each such transfer. If you require further clarification for what is sought in Interrogatory No. 5, please let us know immediately.

#### **Amended Response to Interrogatory No. 9**

Interrogatory No. 9 requires each Respondent to provide a complete accounting of all funds he or she received from Trevor Cook or any Receivership Entity. Your supplemental responses refer generally to information "reflected in a Bates numbered supplemental document production." For example, in subpart (i) Mr. Buysse states that the returns he realized on his investments of the money he received from Cook's entities are "reflected in a Bates numbered supplemental production." As discussed above, despite fact discovery having been closed for over two weeks Mr. Buysse has not produced the documents he apparently relies on. Please immediately produce the documents referenced. Further, please identify, by Bates number, the specific documents each Respondent relies on in response to each part of this interrogatory, as required by Fed. R. Civ. P. 33(d).

#### **Amended Response to Interrogatory No. 10**

Interrogatory No. 10 requires each Respondent to identify each defense that he or she intends to assert, and for each defense to identify all facts that you rely on, all persons with knowledge of each such fact, and all documents that you rely on for each such fact. Respondents' "amended response" to this interrogatory is insufficient. For example, in paragraph (iv) Respondents collectively and generally state—without identifying any supporting facts—that the Receiver's claims are barred by Minn. Stat. 513.33. Similarly, Respondents fail

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to identify any facts supporting the assertions that the Receiver's claims are barred by "the Receiver's failure to timely file an involuntary bankruptcy" (para. ii); that the Receiver failed to mitigate damages (para. viii); that the Receiver's claim is barred by the "doctrine of payment" (para. ix) or by electing not to pursue these claims in bankruptcy (para. xv); and that the damage in this case was caused by "third parties" (para. xvii). We also note that in paragraph x, Respondents identify a motion that does not exist in support of their supposed defense. Please supplement each Respondent's response to this interrogatory to identify all facts that each Respondent relies on for each of the defenses identified.

### **Response to Interrogatory No. 11**

Interrogatory No. 11 requires each Respondent to identify all facts he or she relies on for the contention that no fraudulent transfer occurred, all persons with knowledge of each such fact, and all documents that each Respondent relies on for each such fact. Respondents' September 15, 2011 second supplemental responses appear to have amended an earlier response to this interrogatory, although it is not labeled as such. Regardless, Respondents collectively respond to the request for the identity of documents by promising to produce documents pursuant to Rule 33(c). The response also states that "[d]iscovery is continuing," but discovery closed the day you served those responses.

Please supplement Respondents' answer to Interrogatory No. 11 to identify which documents, by Bates number, that each specific Respondent relies on pursuant to Rule 33(d) in answering Interrogatory No. 11.

### **Second Amended Response to Interrogatory No. 12**

Interrogatory No. 12 requires each Respondent to identify all facts he or she relies on for the contention that he or she took the funds he or she received in good faith, all persons with knowledge of each such fact, and all documents that each Respondent relies on for each such fact. Again, the Respondents' supplemental response generally and collectively states that documents will be produced pursuant to Rule 33(c) and that "discovery is continuing." Discovery closed the day you served those responses. Regardless, please identify the documents that each Respondent relied on in making the initial answer or any supplemental answers to this interrogatory.

### **Response and Amended Response to Interrogatory No. 14**

Interrogatory No. 14 requires each Respondent to identify all the facts that he or she relies on for the contention that he or she was not unjustly enriched, all persons with knowledge of each such fact, and all documents that the Respondents rely on for each such fact. In response, Respondents simply assert that he or she "received the return of his loans, as provided

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for in his contract with the Cook Currency Trading Entities.” But the Receiver in his response to your contention interrogatories specifically identified facts showing that the manner in which the Respondents received money was *inconsistent* with the provisions of their contract. (See, e.g. Receiver’s Objections and Responses to Respondents’ Interrogatory No 13, at pp. 35-36.) For each Respondent, please specifically identify all facts that support your assertion that he or she received the money “as provided in his contract.”

The Respondents’ initial answer also states collectively that documents will be produced pursuant to Rule 33(c). Assuming again that you meant Rule 33(d), please clarify whether you continue to rely on the identification of documents as part of your answer to Interrogatory No. 14. If so, please identify which documents, by Bates number, that each Respondent relied on in making the initial answer or any supplemental answers to this interrogatory.

#### **Response to Interrogatory No. 19**

Interrogatory No. 19 seeks a description of the facts and circumstances surrounding Michael or Jennifer Heise’s attempt to roll over Ms. Heise’s IRA into the Receivership Entities on or about June 26, 2009, and a description of the facts and circumstances that resulted in funds from Ms. Heise’s IRA being re-deposited in the Heise’s personal bank account at Klein Bank. The Heises’ response is conclusory, evasive, and incomplete. Please supplement the Heises’ response to this interrogatory to provide *all* responsive information, including but not limited to:

- A description of any communications with employees/agents of Klein bank regarding Ms. Heise’s IRA funds;
- An explanation of how the Heises came into possession of the two checks at IR002726, and IR002727(see IR023587-IR023594, showing that these checks were deposited at same time as the \$728,000.00 check that Michael Heise received from Cliff Berg, on June 30, 2011); and
- An explanation of who deposited of the two checks at IR002726, and IR002727 into the Klein Bank account.

#### **Response to Interrogatory No. 20**

Interrogatory No. 20 seeks information regarding the disposal of the desktop computer that Terry Frahm allegedly used to draft the letter he contends he sent to Trevor Cook on May 5, 2009. Again, Mr. Frahm’s response is conclusory and insufficient. Please supplement Mr. Frahm’s response to this interrogatory to provide *all* responsive information, including but not limited to:

- Identifying when specifically in 2010 the Dell computer was recycled;

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- Identifying every person who was involved in the decision to dispose the computer and the disposal itself;
- Whether any files were copied on to other media before the hard drive was destroyed; and
- If any files were copied, where and in what form they presently exist.

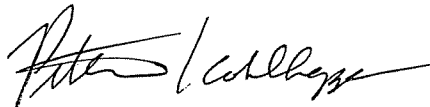
***D. Identification of Documents Produced by Each Respondent***

You informed me via a telephone call during the week of September 12 that your firm had sent a letter to us specifying which documents produced by you pertain to which Respondents. As I informed you in my September 26, 2011 email, that letter was never delivered. I ask again, please email us a copy of that letter.

***E. Mauzy Firm Documents***

We continue to await a response to my September 6, 2011 and September 26, 2011 emails regarding any files that your firm may have copied from the Mauzy firm. I repeat, please let me know if you have copied any documents in the Mauzy firm's possession, and if so, please provide us with copies of all such documents.

Very truly yours,



Peter M. Kohlhepp

cc: Daniel Gerdtts (via email)  
Adam Huhta (via email)