

**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' OBJECTIONS TO PROTECTIVE ORDER

Respondents Steven and Pamela Cheney, David Buysse, Walter Defiel, Steven and Jenene Fredell, Michael and Jennifer Heise, Michael and Cynthia Hillesheim, Larry Hopfenspirger, Steven Kautzman, James McIntosh, George and Karen Morisset, Terry Frahm, and Reynold and Judith Sundstrom (hereinafter collectively “Lender Respondents”) submit this Brief objecting to the Order issued by the Honorable Franklin L. Noel, the United States Magistrate Judge, on October 19, 2011, granting the Receiver’s Motion for Protective Order denying Lender Respondents the opportunity to conduct a deposition of the Receiver.

INTRODUCTION

Magistrate Judge Noel’s Order granting the Receiver’s Motion for a Protective Order denying Lender Respondents any opportunity to depose the Receiver ignores Lender Respondents’ arguments, summarily denies Lender Respondents the right to depose the Receiver as a party without any analysis whatsoever, and rests on several incorrect factual assumptions and faulty legal theories. Specifically, the legal analysis in Magistrate Judge Noel’s Order consists of only a cursory comparison of Lender Respondents’ Notice of Taking 30(b)(6) Deposition with the information already produced by the Receiver in discovery. Magistrate Judge Noel did not analyze Lender Respondents’ Notice of Taking Deposition of the Receiver personally before granting the Receiver’s Motion to bar said deposition. Magistrate Judge Noel’s determination that the Receiver had produced all necessary discovery to Lender Respondents and that a deposition would be duplicative is clearly erroneous. Lender Respondents have a general right to depose an opposing party, and to cross-examine the Receiver on the basis for his

claims, a right the Receiver has already exercised against Lender Respondents. Lender Respondents identified at least five different areas of questioning Lender Respondents are entitled to question the Receiver on at deposition. Magistrate Judge Noel simply ignored these questions in finding that Lender Respondents have access to all of the information they seek from the Receiver's previous discovery responses.

Magistrate Judge Noel's Order is not only contrary to existing law and the facts in this action, but is fundamentally procedurally unfair to Lender Respondents. Magistrate Judge Noel's Order is not based upon any sworn testimony whatsoever as the Protective Order was granted without the submission of a Declaration by the Receiver, and solely upon the unsworn arguments of the Receiver's counsel. Further, the Receiver has had the opportunity to fully participate in discovery. The Receiver has interviewed each Lender Respondent and retrieved their documents before litigation began, served contention interrogatories, reviewed the responses, and then deposed each Lender Respondent and cross-examined them on any subject the Receiver wished. Lender Respondents have had no opportunity to reciprocate. If Lender Respondents are not allowed the same tools as the Receiver, Lender Respondents will face extreme prejudice, as Lender Respondents would have no opportunity to obtain more detail directly from the Receiver on the basis for his claims, the various other investigations undertaken by the Receiver, and will have absolutely no ability to prepare for the Receiver's eventual testimony at trial. Magistrate Judge Noel's Order must be set aside.

FACTS

The Receiver brought his Second Amended Motion for a Protective Order on for hearing before Magistrate Judge Noel on October 3, 2011. The Receiver sought a Protective Order denying Lender Respondents' their right to depose the Receiver, on a variety of grounds, including Fed. R. Civ. P. 26(b)(2)(C). In less than one page of analysis, Magistrate Judge Noel agreed with the Receiver's contention that the deposition testimony sought by Lender Respondents would be duplicative of the Receiver's other responses in discovery, and therefore that the Receiver's deposition would be barred as overly burdensome, based upon his own conclusions which were not supported by any declaration from the Receiver, and as duplicative of other discovery. Magistrate Judge Noel found that "Respondents... have had ample opportunity to obtain the information they seek through interrogatories." Magistrate Judge Noel reached this conclusion by comparing the "categories of information listed in Respondents' Fed.R.Civ.P. 30(b)(6) deposition notice" with the Respondents contention interrogatories. Thus, Magistrate Judge Noel ruled that "most – if not all – of the information sought by Respondents... has already been disclosed, the Court finds that the burden of such a deposition outweighs its likely benefit." Magistrate Judge Noel's Order is clearly erroneous and contrary to existing law. Local Rule 72.2(a).

OBJECTIONS

1. Magistrate Judge Noel's Factual Findings Were Insufficient.

Magistrate Judge Noel granted the Receiver's Motion for a Protective Order denying Lender Respondents the opportunity to depose the Receiver. However,

Magistrate Judge Noel's Order includes very little analysis. Fed. R. Civ. Pro. 26(b)(2)(C) allows the Court to limit discovery if "the party seeking discovery has had ample opportunity to obtain the information by discovery in the action" or "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."

Because of the complete lack of sworn testimony on which he could make factual findings, Magistrate Judge Noel did not describe any burden that would result to any party in this litigation. It is inarguable that the Receiver has spent far more of the Receivership's funds filing and litigating the instant motion than possibly would have resulted from appearing for one day of deposition testimony. In addition, the Receiver did not provide any testimony regarding any burden that would result from appearing for deposition other than the time associated with appearing for the deposition itself.

Magistrate Judge Noel does not spend time describing any particular burden that would result to the Receiver through a deposition, but instead appears to be holding, without providing any facts supporting said holding, that the burden would outweigh the benefit because Lender Respondents would receive no benefit from deposing the Receiver.

Magistrate Judge Noel apparently arrived at this conclusion after a cursory comparison of Lender Respondents' Rule 30(b)(6) Notice with the Receiver's responses to Lender Respondents' contention interrogatories, and completely ignored the other categories of information sought which were described with particularity in Lender Respondents Memorandum of Law and the supporting Declaration of Gregory M. Erickson.

As an initial matter, Lender Respondents did not provide the Receiver with topics for the Notice of Taking the Receiver's party Deposition, nor were Lender Respondents required to. Rule 30 only requires a party to provide topics in a notice of 30(b)(6) deposition, solely for the purpose of allowing an entity to properly prepare its representative to testify. Parties are not limited by the topics set forth in their Rule 30(b)(6) deposition notice. Lender Respondents would not have been limited to the topics described in the Rule 30(b)(6) Notice even if Lender Respondents had not included a Notice of Deposition of the Receiver as a party. 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). Lender Respondents had no responsibility to furnish topics to the Receiver for his party deposition, as Lender Respondents have the right to question the Receiver, as a party, regarding any relevant non-privileged matters. Fed. R. Civ. P. 30(a).

Simply put, even if Lender Respondents were only interested in cross-examining the Receiver on his responses to Lender Respondents' contention interrogatories, Magistrate Judge Noel's Order would be in error. As more fully described in Lender Respondents' Memorandum of Law in Opposition to the Receiver's Motion, the Receiver had the opportunity to fully cross-examine each Lender Respondent on his or her responses to the Receiver's contention interrogatories. It would be fundamentally unfair to deny Lender Respondents the right to reciprocate. In addition, Lender Respondents are not required to trust blindly in the Receiver's word that he has produced all relevant information in the responses carefully crafted by his attorneys. "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 of the potential for repetitive testimony. *Evergreen Trading, LLC v. United States*, 80 Fed.Cl. 122, 136 (2007).

More importantly, Magistrate Judge Noel’s Order simply ignored the fact that Lender Respondents have already identified, for illustrative purposes, five separate areas on which the Lender Respondents wished to question the Receiver at deposition, at a minimum. None of these areas are covered by Lender Respondents’ 30(b)(6) Deposition Notice, nor have any been answered thus far in discovery. These areas of question were: 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; 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. See, Declaration of Gregory M. Erickson, ¶ 5, filed as Document 134 in Case Number 11-CV-11042. Lender Respondents have a variety of other questions to put to the Receiver, but

supplied a small sampling simply as evidence that there are a multitude of relevant questions that had not been answered by the Receiver in response to Lender Respondents' contention interrogatories. Lender Respondents are entitled to question the Receiver on these and other topics. Magistrate Judge Noel's finding that "most – if not all – of the information sought by Respondents ... has already been disclosed...." is clearly in error because it was in direct contradiction of the evidence presented by the parties.

2. A Protective Order Denying Lender Respondents the Right to Depose the Plaintiff is in Error Legally.

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). This is in keeping with the authority stating that discovery rules in general "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). "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).

The reason depositions are so rarely denied is because depositions are generally considered to be superior discovery devices. 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).

Magistrate Judge Noel expressed satisfaction that Lender Respondents “have had an opportunity obtain the information they seek through interrogatories.” Magistrate Judge Noel came to this conclusion by comparing Lender Respondents 30(b)(6) Deposition Notice with the Receiver’s responses to Lender Respondents’ contention interrogatories. Lender Respondents have already shown that the topics contained in Lender Respondents’ 30(b)(6) Deposition Notice have no bearing on Lender Respondents’ Deposition Notice for the Receiver. Further, Lender Respondents have previously identified for illustrative purposes only, five different areas of examination Lender Respondents were planning to question the Receiver on during the Receiver’s deposition. Magistrate Judge Noel did not analyze these questions, nor make any finding that the Receiver had responded to these questions in answer to the Lender Respondents’ contention interrogatories. Nor could Magistrate Judge Noel make such a finding, because Lender Respondents had not previously submitted contention interrogatories

regarding these topics. Lender Respondents have not had the opportunity to fully question the Receiver on all relevant topic areas.

Magistrate Judge Noel granted the Receiver's Motion for a Protective Order with no analysis whatsoever regarding the information sought by Lender Respondents in a personal deposition of the Receiver as the named Petitioner in this litigation. Magistrate Judge Noel's contention that the Receiver has already supplied all relevant information is therefore puzzling. In order for Magistrate Judge Noel to be correct, he must have analyzed all of the possible information the Receiver could have furnished at deposition and compared it to the information the Receiver has already produced. However, such a task is clearly impossible, and was not even attempted by Magistrate Judge Noel, who contented himself with a simple comparison of the Receiver's carefully crafted discovery responses to the 30(b)(6) Deposition Notice.

However, the Receiver has already evinced an intention to rely on documents that have been "made available" to Lender Respondents amongst some 5 terabytes of data at the Receiver's office. In light of this fact, neither Lender Respondents nor the Court have any basis for confidence that the Receiver would testify at trial within the bounds of the information already laid out in response to Lender Respondents' discovery requests. The Protective Order denying Lender Respondents the right to depose the Receiver grants the Receiver the enormous advantage at trial. The Receiver has the opportunity to fully question each Lender Respondent, while keeping his own testimony fully to himself, outside of the answers shaped and reshaped by his attorneys. Magistrate Judge Noel's Decision is contrary to existing law.

3. Magistrate Judge Noel Had No Other Basis For a Protective Order.

Magistrate Judge Noel's Order appears to be based solely on a faulty Rule 26 analysis regarding the burdens on the parties, and duplication of past discovery. However, even if Magistrate Judge Noel had based his Order on a finding that Lender Respondents were not entitled to depose the Receiver, this would be in error. A bankruptcy trustee, similarly situated to the Receiver, was allowed to be deposed on the theories in his case, despite not having any firsthand knowledge of the underlying facts. *In re Kelton Motors*, 130 B.R. 183, 184 (D.Vermont 1991). In *Kelton*, the Court noted the "strong showing" necessary to entirely bar a deposition, and that the Receiver had sufficient knowledge of the facts supporting his claims to allow for deposition. *Id.* "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). Magistrate Judge Noel had no basis for limiting Lender Respondents' right to depose the Receiver, and the Order should be set aside.

CONCLUSION

For all of the foregoing reasons, Magistrate Judge Noel's Order granting the Receiver's Motion for a Protective Order must be set aside in its entirety.

Dated: November 2, 2011.

MOHRMAN & KAARDAL, P.A.

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