

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MINNESOTA

United States Securities and Exchange Commission,)	FILE NO. 09-cv-3333 (MJD/JJK)
)	
Plaintiff,)	
)	
v.)	
)	
Trevor G. Cook, and)	
Patrick J. Kiley, et al.,)	
)	
Defendants,)	
)	
and)	
)	
Basel Group, LLC, et al.,)	
)	
Relief Defendants.)	

U.S. Commodity Futures Trading Commission,)	FILE NO. 09-cv-3332 (MJD/JJK)
)	
Plaintiff,)	
)	
v.)	
)	
Trevor Cook d/b/a Crown Forex, LLC,)	
Patrick Kiley d/b/a Crown Forex,)	
LLC, et al.,)	
)	
Defendants.)	

**DEFENDANT TREVOR GILSON COOK'S MEMORANDUM OF LAW
IN SUPPORT OF MOTION TO PURGE CONTEMPT**

INTRODUCTION

Defendant, Trevor Gilson Cook, submits this Memorandum of Law in support of his motion to lift this Court's Memorandum Order and Opinion of January 25, 2010. (Doc. 167)(hereinafter "Contempt Order"). From April 13, 2010, the date of his guilty plea, Cook either purged his contempt or compliance with this Court's purge conditions became impossible. As a result, this Court should retroactively lift its Contempt Order, effective April 13, 2010.

PROCEDURAL HISTORY

On November 23, 2009, the Securities and Exchange Commission ("SEC") and Commodity Futures Trading Commission ("CFTC") filed complaints against Cook, Pat Kiley and several entities with which they were involved alleging that Cook and Kiley had engaged in a \$190 million securities fraud. (SEC Doc. No. 1; CFTC Doc. No. 1.) The Court immediately issued an Order Imposing Asset Freeze and Other Ancillary Relief in the SEC proceeding and an *Ex Parte* Statutory Restraining Order in the CFTC matter ("Asset Freeze Orders"). (SEC Doc. No. 14; CFTC Doc. No. 21.) Both Orders required Cook to turn over all funds, assets or other property belonging to investors. (*Id.*) The Court also appointed a Receiver on November 23, 2009 who immediately took possession of the Oxford Global Partners headquarters located at 1900 LaSalle in Minneapolis and the UBFX headquarters located at 12644 Tiffany Court in Burnsville, Minnesota. (*Id.*)

On December 10, 2009, the SEC and CFTC subsequently moved the Court for an Order finding Cook in contempt asserting that Cook had violated the asset freeze orders. (SEC Doc. No., 56; CFTC Doc. No. 83.) At the contempt hearing, Cook asserted his Fifth Amendment right against self-incrimination. On January 25, 2010, the Court held Cook in contempt of the Asset Freeze Orders. (SEC Doc. No. 167; CFTC Doc. No. 178.) Cook has been in custody in the

Sherburne County Jail since January 25, 2010 as ordered by the Court. (*See* Declaration of Trevor G. Cook, ¶3.)¹

On March 30, 2010, the United States filed a Felony Information against Cook (Court File No. 10-CR-0075) alleging one count of mail fraud and one count of tax evasion. (*See* Affidavit of Piper Kenney Webb, Ex. 1.)² On April 13, 2010, Cook pled guilty to both counts. (Webb Aff., Ex. 2.) Effective April 13, 2010, Cook no longer asserts his Fifth Amendment privilege against self-incrimination with respect to the Court's Asset Freeze Orders. (Cook Dec., ¶9.) Since the date of his guilty plea, Cook has been cooperating with federal agents, attorneys for the Receivership, and attorneys for the SEC and CFTC by: (1) detailing Forex trading investments with which he and others were involved; (2) disclosing bank accounts that still may have some value; (3) disclosing assets that Graham Cook had been holding. (*See* Affidavit of IRS Agent John Tschida, ¶6, Webb Aff., Ex. 3.) In fact, Cook has met with the Receiver and law enforcement on 11 occasions. (Cook Aff., ¶4.) He is scheduled to meet with them again on September 20, 2010. (*Id.*) Cook and his attorneys will continue to do so as long as requested. Cook has answered all questions asked of him. (*Id.*) He has not asserted his Fifth Amendment privilege to any of these questions and his attorneys have not directed him to refuse to answer any questions posed. (*Id.*)

On August 16, 2010, Cook signed a Representations and Waiver of Statute of Limitations verifying that he has disclosed all assets and proceeds of the fraud known to him and waiving any defense based on the running of the limitations period if his representations are false. (Webb Aff., Ex. 32.)

¹ Subsequent references to the Declaration of Trevor G. Cook will be referred to as "Cook Dec., ¶
—."

² Subsequent references to the Affidavit of Piper Kenney Webb will be referred to as "Webb Aff., ¶
—."

Cook has also resolved the cases with the SEC and CFTC. On August 16, 2010, Cook signed a Consent to Entry of Order of Permanent Injunction in the SEC case; the Consent was filed with the Court on August 25, 2010. (SEC Doc No. 410). Consequently, the Court entered an Order of Permanent Injunction and Other Relief on August 27, 2010. (SEC. Doc. No. 423.) On August 23, 2010, Cook signed a Consent to Entry of Permanent Injunction in the CFTC case which was filed with the Court on September 9, 2010. (CFTC Doc. No. 436.)

On August 24, 2010, Judge Rosenbaum sentenced Cook to 300 months in prison and ordered him to pay restitution in the amount of \$158,211,092.34 as a result of his guilty plea. (Webb Aff., Ex. 4.) In sentencing Cook, the Court specifically wrote in its Judgment that, “Defendant shall not receive credit for time served in custody for Contempt of Court. Defendant shall receive credit for any time served in official detention following his arrest on this offense.”

Id.

LEGAL BACKGROUND

It is axiomatic that incarceration for civil contempt is coercive in nature, as opposed to punitive when the Court confines “a contemnor indefinitely until he complies with an affirmative command.” *International Union, United Mine Workers of America v. Bagwell*, 512 U.S. 821, 828 (1994). In such cases, “the contemnor is able to purge the contempt and obtain his release by committing an affirmative act, and thus ‘carries the keys of his prison in his own pocket.’” *Id.* quoting *In re Nevitt*, 117 F. 448, 451 (8th Cir. 1902). A contemnor can obtain release either by complying with the purge conditions, or by showing that he is presently incapable of compliance because “to jail one for a contempt for omitting an act he is powerless to perform would... make the proceeding purely punitive, to describe it charitably. At the same time, it would add nothing to the [receivership] estate.” *Maggio v. Zeitz*, 333 U.S. 56, 75 (1948).

The United States Supreme Court reaffirmed the *Maggio* principle in *United States v. Rylander*, 460 U.S. 752, 755 – 57 (1982), stating:

In a civil contempt proceeding... , of course, a defendant may assert a present inability to comply with the order in question... [w]hile the court is bound by the enforcement order, it will not be blind to evidence that compliance is now factually impossible. Where compliance is impossible, neither the moving party nor the court has any reason to proceed with the civil contempt action. It is settled, however, that in raising this defense, the defendant has a burden of production.

Based on *Rylander*, the Eighth Circuit has defined a contemnor's burden of production as to inability, saying:

a mere assertion of 'present inability' is insufficient to avoid a civil contempt finding. Rather, alleged contemnors defending on the ground of inability must establish: (1) that they were unable to comply, explaining why 'categorically and in detail...' (2) that their inability to comply was not 'self-induced...' and (3) that they made 'in good faith all reasonable efforts to comply...'

Chicago Truck Drivers v. Brotherhood Labor Leasing, 207 F.3d 500, 506 (8th Cir. 2000); quoting *In re Power Recovery Sys., Inc.*, 950 F.2d 798, 803 (1st Cir.1991); *Federal Trade Commission v. Affordable Media, LLC*, 179 F.3d 1228, 1239 (9th Cir.1999); *Commodity Futures Trading Comm'n v. Wellington Precious Metals, Inc.*, 950 F.2d 1525, 1529 (11th Cir.)

That Cook has spent nearly eight months in custody under civil contempt is powerful evidence of his inability. *Chadwick v. Janecka*, 312 F.3d 597, 612 (3rd Cir. 2002)(quoting and interpreting *Maggio*, 333 U.S. at 75, that "long confinement ('the shadow of prison gates'), together with a denial of possession and corroborating evidence 'may be enough' to convince a court that the contemnor is not being 'willfully disobedient' but simply cannot comply); *United States ex rel. Thom v. Jenkins*, 760 F.2d 736, 740 (7th Cir. 1985)(stating "we note that each passing month of incarceration strengthens Thom's claim of inability... for it can be assumed that at a certain point any man will come to value his liberty more than \$115,752.68 and the

pride lost in admitting that he has lied.”). The law of civil contempt does not require this Court to be blind to the fact that Cook is de jure and de facto incapable of engaging in litigation or otherwise taking action to obtain information or enforce rights on his own behalf due to his incarceration and the appointment of a Receiver. Moreover, the link between length of time spent in custody and the punitive nature of contempt was aptly described by Judge Posner who said:

We should keep a bright line between civil and criminal contempt. Putting a person in prison... without a full trial, and with none of the safeguards of the criminal process, ... is an anomaly in our system, and is permitted only when the purpose is not to punish for past miscreancy but to induce a specific act that the law has a right to coerce,.... As soon as it is clear that the inducement won't work, the purpose of civil contempt lapses, and the continued imprisonment ... becomes penal, and requires a criminal proceeding.

In re Crededio, 759 F.2d 589, 590 (7th Cir.1985).

As will be explained below, Cook’s offered evidence justifies a finding that he has either complied with this Court’s purge conditions or is presently incapable of doing so. Cook will be available for testimony, subject to cross-examination at the September 29, 2010 hearing, as to the substance of the attached Declaration of Trevor G. Cook. *See United States v. Sorrells*, 877 F.2d 346, 351 (5th Cir. 1989)(discussing the importance of the contemnor being subjected to meaningful cross examination when claiming present inability); *accord Maggio*, 333 U.S. at 75-76 (stating that credible testimony can be enough to meet a contemnor’s burden of production). For these reasons, there is nothing further Cook can do to comply with the purge conditions set forth in this Court’s Contempt Order.

ARGUMENT

I. COOK IS PRESENTLY INCAPABLE OF FURTHER ASSISTING IN OBTAINING INVESTOR FUNDS SENT TO FOREIGN AND DOMESTIC ACCOUNTS AS WELL AS PREFERRED PERSONS.

This Court's Contempt Order states that Cook must "(1) repatriate and surrender to the Receiver \$27,061,728.35 from the offshore accounts," "(4) recover and surrender to the Receiver \$6,141,470... paid to preferred persons in late 2009" and "(5) take appropriate steps to turnover \$2,005,857.88... transferred to domestic accounts." To meet his burden of production, Cook must explain why he cannot obtain these funds, show that his inability to do so is not self induced and demonstrate his good faith, reasonable efforts to comply. *Chicago Truck Drivers*, 207 F.3d at 506. Cook has met this burden of production on present incapability through the attached declaration.

A. Cook is Unable to Comply With the Court's Order.

First, Cook cannot obtain the above referenced funds because he does not presently control them, nor did he directly control them when this Court's Order took place. *Falstaff Brewing Corp. v. Miller Brewing Co.*, 702 F.2d 770, 781 (9th Cir 1983)(stating "on these facts, Falstaff could not be compelled to produce documents over which it has had no control"). *C.f.*, *Electrical Workers Pension Trust Fund of Local Union 58, IBEW v. Gary's Elec. Service Co.*, 340 F.3d 373, 384 (6th Cir. 2003) (faulting contemnor who took personal control of corporate funds necessary to satisfy a judgment).

The largest foreign institution at issue is Crown Forex SA, which was sent approximately \$12 million. Cook was able to deposit and withdraw money at Crown Forex SA until it was forced into bankruptcy by the Swiss Financial Market Supervisory Authority ("FINMA") in May 2009. (Cook Dec., ¶11.) FINMA now has exclusive control over Crown Forex. Cook did,

however, hire a Swiss law firm in July 2009 to file bankruptcy claims with FINMA on behalf of investors. (*Id.*) The Receiver has been in contact with both FINMA and the Swiss law firm. (*Id.*) Moreover, Cook has met with attorneys and investigators for the Receiver, the U.S. Attorney's Office, and attorneys for the SEC and CFTC on 11 occasions. (*Id.* at ¶4). During these meetings, Cook has discussed the inner workings of Crown Forex and identified leaders of the company. (*Id.* at ¶11.) Cook is scheduled for additional interviews with these parties in September and October. (*Id.*; Webb Aff., ¶34.) Cook is unable to further comply with the Court's order by turning over these funds.

Regarding the approximately \$1 million unaccounted for at Saxo Bank, in order to properly account for these funds, records from Saxo Bank are necessary. These funds were deposited in UBS Diversified, Oxford FX Growth or Oxford Global FX accounts. (SEC Doc. No. 109-3.) Cook is not the signatory on any of these accounts. (Cook Dec., ¶12.) Bo Beckman is the signatory on the Oxford accounts. Pat Kiley is the signatory on the UBS accounts. (*Id.*) However, Cook has signed a Bank Secrecy and Privacy Waiver and a Power of Attorney for Saxo Bank in an effort to assist the Receiver in obtaining information concerning these funds. (Webb Aff., Exs. 6-7.) Cook is unable to further comply with the Court's order by turning over these funds.

Similarly, Cook is not a signatory on the Fimat International Bank account, the Forex Capital Markets HSBC account, the Fund Advisors Group account at UBS AG or the account at Newedge Group. (Cook Dec., ¶13.) Despite this fact, Cook signed powers of attorney and Bank Secrecy and Privacy Waivers to assist the Receiver in accessing information concerning funds transferred to these accounts. (*Id.*) Cook has also signed waivers and powers of attorney for the other foreign entities and gambling accounts to which investor funds were sent. (*Id.* at ¶¶13, 15).

Moreover, Cook has answered all questions posed to him during the 11 interviews concerning the funds sent to offshore and domestic accounts. (*Id.* at ¶¶ 14, 15, 19.) Cook has done everything he is capable of doing to comply with the Court's order.

The Court has also ordered Cook to recover and surrender to the Receiver roughly \$6 million from preferred persons. Cook has no control over these individuals. There is a pending lawsuit in which the Receiver is seeking recovery of this image. (Cook Dec., ¶18.) Under these circumstances, Cook is unable to comply with the Court's order to recover these funds.

B. Cook's Inability to Comply is not Self-Induced.

Cook's inability to comply with the Court's order is not self-induced. When considering this prong, any self-induced lack of control must have arisen after the time the relevant order took effect, not before. *Gary's Elec. Service Co.*, 340 F.3d at 384. Cook's punishment for stealing the investor's money has already been meted out, to hold him in contempt because he could have returned the investor's money at some point before this Court's order would simply be to place Cook in debtor's prison, a practice no longer favored in this country. *Securities and Exchange Commission v. Moss*, 644 F.2d 313, 317 – 18 (4th Cir. 1981)(Erwin, J. dissenting); *Shuffler v. Heritage Bank*, 720 F.2d 1141, 1148 – 49 (9th Cir. 1983)(explaining that the compensatory purpose of contempt sanctions only cures damages resulting from the contumacious behavior, not the underlying debt). The Court in *Maggio*, 333 U.S. at 64, articulated this principle, stating:

Conduct which has put property beyond the limited reach of the turnover proceeding may be a crime, or, if it violates an order..., a criminal contempt, but no such acts, however reprehensible, warrant issuance of an order which creates a duty impossible of performance, so that punishment can follow.

Cook's inability to comply here was not self-induced.

C. Cook has Made in Good Faith All Reasonable Efforts to Comply.

Finally, Cook has made all reasonable, good faith efforts to comply with the Court's Order. Effective April 13, 2010, as part of the plea negotiations in his criminal case, Cook abandoned his assertion of the Fifth Amendment and underwent extensive questioning from both the Receiver and Government agents on numerous occasions. And Cook has assisted the Receiver by signing each and every document put before him. Cook's efforts are further evidenced by his willingness to waive the limitations period should the Government later determine that his representations regarding assets were false. (Webb Aff., Ex. 32.)

The Receiver has full and exclusive power to control Cook's accounts, including the numerous offshore and domestic accounts at issue here. Cook's ability to act is limited to cooperating with the Receiver, which distinguishes him from other unsuccessful contemnors who utilize legal processes to hinder compliance efforts. *See Huber v. Marine Midland Bank*, 51 F.3d 5 (2nd Cir. 1995)(holding that continued abuse of legal process can defeat a present incapacity defense). However, Cook has attempted to assist the Receivership in its duties by signing either a Bank Secrecy and Privacy Waiver, a Power of Attorney or both for nearly all the accounts at issue. Given his current legal status, Cook can do no more.

II. COOK EITHER HAS TURNED OVER, OR IS INCAPABLE OF TURNING, OVER CASH AND OTHER ASSETS THAT HE POSSESSED AFTER THE FREEZE ORDER.

In contrast to the offshore accounts, domestic accounts and preferred persons discussed above, it is now evident that Cook actually possessed cash and other valuables during the period of this Court's Asset Freeze Order. He should no longer be held in civil contempt, however, because he has now turned these items over to the Government or Receiver, to the best of his ability.

Condition (2) of the Court's order requires that Cook "surrender to the Receiver \$670,000 in cash," while conditions (3) and (6) require the turnover of an additional \$115,500 from the sales of vehicles and wire transfers to Graham Cook. The total amount of cash subject to turnover is \$800,500. Cook has surrendered \$565,000 in cash, as well as the approximate value of \$200,000 in gold coins, silver coins and various foreign currencies. Cook accounts for the balance as living expenses between June 2009 and January 2010, gambling losses, bills and expenses for the Van Dusen Mansion, as well as payments to employees and Patrick Kiley. (Cook Dec., ¶¶ 16, 17, 20.) Cook has turned over all cash over which he exercises control. He has no ability to further comply with the Court's order in this respect.

The remaining conditions pertain to specific items of property. Cook has complied with the Order regarding the cars, watches and Faberge eggs. Cook cannot turn over the concert tickets, submarine or houseboat because these items were never in his possession. (Cook Dec., ¶¶ 22, 24.) The claim that Cook owned a submarine and houseboat was based on an e-mail sent by Cook to a friend. Cook was joking in the e-mail -- he has never owned either item, though Cook's silence at the Show Cause hearing justified the Court's finding that he did. Given the amount of time and resources expended by the Government and Receiver in scrutinizing Cook's financial records, the Court can reasonably infer that had Cook actually purchased either item, some further proof would have been found.

Condition (7) pertains to Julia Gilsrud's testimony that in July 2009, certain documents were removed from her work station. Cook and his lawyers looked for his documents but did not find them. (Webb Aff., ¶3.) Cook is in a similar position to the contemnor in *United States v. Rizzo*, 539 F.2d 458, 466 (5th Cir. 1976), could not find business records sought by the Internal Revenue Service. The Fifth Circuit reversed a finding of contempt in that case because good

faith efforts to locate the records were made by the contemnor. *Id.* Similarly in this case, if the records existed or could be found by reasonable diligence, the Receiver would have come upon them during one of his inspections of the Van Dusen Mansion or other locations that he now controls.

III. THIS COURT SHOULD LIFT CONTEMNOR'S CONTEMPT RETROACTIVELY, AS HIS INCAPACITY EXISTED IN APRIL 2010.

The logic behind the defense of present incapability is that because civil contempt is meant to be coercive, at the point when a contemnor cannot comply with the purge conditions, his incarceration becomes punitive. *Armstrong v. Guccione*, 470 F.3d 89, 110 (2nd Cir. 2006). In the present motion, Cook seeks to prove not only that he is presently incapable of further compliance with this Court's contempt order, but also that his incapacity existed on April 13, 2010. As a result, this Court should retroactively lift its contempt order, effective April 13, 2010, so that Cook will be entitled to custody credit towards his federal sentence for the time he spent in custody between then and now.

At least two Circuit Courts of Appeal have confronted issues similar to this. *Tankersley v. Fisher*, 291 Fed.Appx. 933, 934 (11th Cir. 2008); *United States v. Slaughter*, 900 F.2d 1119, 1126 (7th Cir.1990). These two cases hold that for a contemnor who is serving a period of incarceration both for civil contempt and for a criminal charge, at the time the civil contempt order ceases to have legal force, the contemnor is entitled to credit for the period of incarceration towards his criminal sentence. *Id.* While neither *Tankersley* nor *Slaughter* involve identical facts to the case at bar, the principle articulated in both has equal force here. *Id.* Cook, therefore, acknowledge that upon his plea of guilty, its Contempt Order ceased to have coercive effect. Cook's incarceration after April 13, 2010 was, therefore, punitive as it should be given the nature of the criminal charges against him.

At the January 2010, contempt hearing, it was apparent that Cook persisted invoking his Fifth Amendment rights. This Court determined that such an invocation was improper as to the turnover of the specific items listed in it Contempt Order. On April 13, 2010, Cook waived his Fifth Amendment rights as to the underlying criminal charges by pleading guilty. Upon doing this, he also began to cooperate with the Receiver and the Government as to locating his assets. Under these circumstances, it seems appropriate to find that Cook's incapacity to comply with the Court's order began as of April 13, 2010.

IV. COOK RESPECTFULLY REQUESTS THIS COURT NOT TO IGNORE THAT LIFTING THE CONTEMPT ORDER WILL HAVE NO NEGATIVE EFFECT ON THE RECEIVERSHIP.

Lifting this Court's contempt order will have only one real effect, it will definitively allow Cook to begin serving his federal criminal sentence.³ The Receiver has stated "[a]fter sentencing, Cook has no incentive to cooperate with the Receiver unless he believes the government will seek to further reduce his sentence based on that cooperation." *See* <http://www.cookkileyreceiver.com/faqs.cfm> (responding to Question Six). The sentiment that this Court's Contempt Order is the only remaining incentive for Cook to cooperate is misguided. Putting aside the fact that Cook has promised, under oath, to continue to assist the Receiver, lifting the contempt order will not effect this Court's jurisdiction over Cook. If, after this Court lifts the Contempt order, Cook becomes uncooperative with the Receiver, then the Receiver can simply bring another motion for an order to show cause. This Court would then have the power to toll Cook's prison sentence until he complies with new purge conditions. *See Tankersley v. Fisher*, 291 Fed.Appx. 933, 934 (11th Cir. 2008); *United States v. Slaughter*, 900 F.2d 1119, 1126 (7th Cir.1990).

³ Cook contends that his criminal sentence is running concurrently with his civil contempt sentence, and will raise this issue, if necessary by a separate motion in the criminal case.

Additionally, as a matter of criminal sentencing, Cook's post-sentence cooperation can still benefit him. Federal Rule of Criminal Procedure 35(b) allows the Government wide latitude to request a post-sentence modification for substantial assistance. The Government has made no promises to Cook in this regard, but he is aware that such a motion would be possible if his continued assistance is helpful in locating assets or prosecuting co-conspirators.

Finally, Cook is cognizant that this Court's asset freeze orders and turnover orders remain in effect and, through operation of a permanent injunction, will most likely have legal effect when he completes his prison sentence in roughly 25 years. Cook has also admitted under oath that he has disclosed all assets and fraud proceeds that he is aware of, that this information is material to an ongoing criminal investigation and that he will be prosecuted if these representations are false. (Webb Aff., Ex. 32.) He has furthermore waived the statute of limitations for any prosecution arising should his representations be false. (*Id.*)

The investor's concern that Cook has hidden assets is understandable because they have no reason to trust Cook's representations given the nature of his crimes. But Cook's financial condition upon his release will be scrutinized, and his experiences in this case show that any efforts at hiding assets will not be ignored. Cook can do nothing else to assure this Court, the Government, the Receiver and the investors that he is not hiding assets since "it is difficult to prove a negative by documentation." *Huber*, 51 F.3d at 11.

CONCLUSION

On April 13, 2010, Cook effectively surrendered in this matter and began good faith efforts to purge his contempt by turning over previously hidden assets and cooperating with the Receiver. Since then, it has become clear that Cook does not have the ability to repatriate or surrender many of the assets listed in this Court's Contempt Order. Because this Court's

Contempt Order lost its coercive effect on April 13, 2010, this Court should retroactively lift it, effective on that date. Doing so will allow Cook to serve the prison sentence he deserves, without hindering in any way the ongoing proceedings in this case.

Date: September 10, 2010

Respectfully submitted,

By: /s/ William J. Mauzy

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