
UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Petitioner,

v.

Case No: 11-cv-01042 SRN/FLN

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

Respondents.

**RECEIVER'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION
TO COMPEL DISCOVERY RELATED TO HIS CLAIMS AGAINST
CERTAIN RESPONDENTS**

It has now been eleven months since fact discovery opened in this action, and a month since it closed. Nonetheless, significant deficiencies remain in Respondents' interrogatory answers and document production.¹ The Receiver has given Respondents numerous opportunities to remedy these deficiencies without involving the Court, but non-dispositive motions are now due under the

¹ "Respondents" in this motion and accompanying pleadings refers collectively to Respondents Steven and Pamela Cheney, David Buysse, Walter Defiel, Steven and Jenene Fredell, Michael Heise, Michael and Cynthia Hillesheim, Larry Hopfenspirger, Steven Kautzman, James McIntosh, George and Karen Morrisset, Terry Frahm, and Reynold Sundstrom, all represented by the firm Mohrman & Kaardal, P.A.

Scheduling Order in this action, and as such, the Receiver cannot wait any longer without losing the opportunity to seek judicial assistance.

Accordingly, the Receiver respectfully moves the Court for an Order compelling Respondents to: (A) respond to Interrogatories Nos. 5, 9, 10, 11, 12, 14, 19 and 20; (B) produce all documents responsive to Requests for Production 7, 8, 9, and 12; and (C) detail their disposal of the funds they received from the Ponzi scheme as well as produce supporting documents.

I. BACKGROUND

On October 5, 2011 the Receiver's counsel sent a letter to Respondents identifying, explaining, and reiterating the outstanding discovery deficiencies and requesting a meet and confer. (Declaration of Peter Kohlhepp, October 17, 2011 [hereinafter "Kohlhepp Decl.," ¶ 3, Ex. 1.) Respondents' counsel did not respond. The Receiver's counsel then sent another letter on October 7, 2011, suggesting a specific time to meet and confer. (Kohlhepp Decl., ¶ 4, Ex. 2.) Once again Respondents' counsel did not respond. When the Receiver's counsel called to meet and confer, Respondents' counsel replied that he was not prepared to meet and confer. (Kohlhepp Decl., ¶ 5.) The Receiver was finally able to schedule a meet and confer with counsel for Respondents on October 10, 2011, which at their request, was continued to Tuesday, Oct. 11, 2011. (Kohlhepp Decl., ¶ 6.)

During the meet and confer, Respondents' counsel agreed to supplement certain interrogatories and provide certain documents by October 14, 2011. (Kohlhepp Decl., ¶ 7, Ex. 3.) But as more fully explained below, Respondents

largely failed to do so. In addition, Respondents flatly refuse to produce other information that is relevant to defenses they have raised and to which the Receiver is entitled.

II. ARGUMENT

A. The Court Should Compel Respondents to Supplement Deficient Interrogatory Responses.

1. Respondents Must Supplement Interrogatory Nos. 5 and 9 to Specifically Identify, by Date, Amount, and Method, Each Transaction with a Receivership Entity.

Interrogatory Nos. 5 and 9 seek a full accounting of all funds transferred between Respondents and Trevor Cook, Clifford Berg, or any of the Receivership Entities. (Kohlhepp Decl. ¶ 8, Ex. 4.) The Receiver is entitled to this information because the timing of Respondents' transactions, the frequency of their transactions, the amounts of their transactions, and the method by which the transactions were made (check, wire transfer, etc.) is directly relevant to the Receiver's claims for fraudulent transfer and unjust enrichment. Respondents have not disputed the relevance of this information. Puzzlingly though, they continue to refuse to provide any information other than the total amount they contend they transferred to the Receivership Entities and received from the Receivership Entities.

The Receiver has gone so far as to assist Respondents in answering these interrogatories. Specifically, the Receiver produced a list of all transactions between Respondents and Receivership Entities that the Receiver has been able to

identify from other sources, including the date of the transfer, the method of the transfer, the amount of the transfer, and the person or entity making or receiving the transfer. (Kohlhepp Decl., ¶ 9.) At a minimum, each Respondent should be compelled to certify whether this is a complete listing of all funds transferred to or received by them from the Receiver Estates, and if not, to identify any missing transactions. Respondents should also specifically identify the facts and documents they rely on for disputing the transaction. Based on the summary information that Respondents have provided in response to Interrogatory Nos. 5 and 9, it appears that at least Respondents Cheneys, Buysse, Hopfenspirger, Fredells, and Hillesheims dispute one or more of the transactions that the Receiver has been able to identify. (Kohlhepp Decl., ¶ 8, Ex. 4 at 11-12.)

2. Respondents Must Respond to Interrogatory No. 10 and Identify the Facts They Rely on for the Defenses They Have Asserted.

The Receiver's Interrogatory No. 10 requests the following:

For each Respondent, identify each defense that the Respondent intends to assert, and for each defense identify all facts on which the Respondent relies for such assertions, all persons with knowledge of such facts, and all documents on which Respondents rely for such assertions.

(Kohlhepp Decl., ¶ 8, Ex. 4 at 38-42.) As to the defenses listed in paragraphs 1, 6, 7, 9, 11, 17, 19, 20, and 21 of Respondents' Answer (Dkt. No. 69), Respondents' response to Interrogatory 10 is deficient. (*Id.*) These deficient responses are excerpted below:

(1) Failure to State a Claim: The Receiver's Petition fails to state a claim because (a) the Lender Respondents were not unjustly enriched to the extent they received a return of their principal and their loan was subject to written contract which would preclude equitable relief, (b) the Lender Respondents did not receive a fraudulent transfer because their receipt of their loan funds was in good faith – i.e., they had no knowledge or reason to know of the alleged ponzi scheme and they received reasonably equivalent value and (c) the court does not have subject matter jurisdiction over this petition.

(6) Accord and Satisfaction: The repayment of the Lender Respondents' loans was in satisfaction of the debt owed by the Cook entities to the Lender Respondents.

(7) Preceding Breach of Contract: The Receiver's claims are barred because if the Cook entities were using the loan proceeds to engage in a ponzi scheme, the use of the loan proceeds for such purpose was a breach of the loan agreement.

(9) Doctrine of Payment: See response to vi above.

(11) Unclean Hands: The Receiver's claims are barred by the doctrine of unclean hands because if the Cook entities were engaged in a ponzi scheme, the Receiver's claims are derivative of the Cook entities' claims.

(17) Damages by Third Parties: The harm in this case was caused by persons or entities involved with the Cook entities not the Lender Respondents.

(19) Subject matter and personal jurisdiction: See Motion to Dismiss.

(20) Receiver Cannot Bring a Fraudulent Transfer Claim: See Dot Anderson's Motion to Dismiss.

(21) In pari delicto: If the Cook entities were engaged in a Ponzi scheme, they were engaged in illegal activity and not entitled to equitable relief as against an innocent party who is in possession of funds loaned to the Cook entities.

Respondents fail to explain how defenses 1, 19, and 20 are not mooted or precluded by Judge Nelson's denial of Respondents' and Respondent Anderson's motions to dismiss. *See Order, Zayed v. Buysse et al.*, 11-cv-1042 (D. Minn. June 1, 2011) (specifically rejecting these defenses). For defenses 6, 7, 9, 11, 17 and 21, Respondents provide only a one-sentence description and refuse to identify any specific facts or documents that support them.

Interrogatory No. 10 is proper under Rule 33(a), and Respondents are obligated to answer it in full:

[Interrogatories requesting a party to 'set forth in detail all of the facts upon which [the party] intends to rely in support of its allegation'] seek disclosure of facts upon which the defenses were pled, and any additional corroborative or supporting facts marshaled since the pleading was interposed. That is what defendants are expected to disclose, and this Court looks askance at total resistance to discovery predicated upon semantic games.

Mead Corp. v. Riverwood Natural Res. Corp., 145 F.R.D. 512, 516 (D. Minn. 1992). Fact discovery is now closed; there is no conceivable basis for Respondents' refusal to identify the facts that support their defenses. If Respondents intend to maintain the defenses they have identified, they are obligated to specifically identify the facts that they rely on for each. The Receiver is entitled to know the bases for Respondents' defenses now so that he can adequately prepare for trial. *Medtronic, Inc. v. Guidant Corp.*, 2003 U.S. Dist. LEXIS 26039, at *9–10 (D. Minn. Jan. 8, 2003).

For each defense identified in response to Interrogatory No. 10, the Court should compel Respondents to either identify all facts that they rely on or withdraw the defense.

3. Respondents Must Identify Specific Documents in Response to Interrogatory Nos. 11, 12, and 14.

Interrogatory Nos. 11, 12, and 14 seek the identity of all facts on which the Respondent relies for the contention that no fraudulent transfer occurred (Interrogatory No. 11); that he or she took the funds in good faith (Interrogatory No. 12); and that he or she was not unjustly enriched (Interrogatory No. 14); all persons with knowledge of such facts, and all documents on which the Respondent relies for such contentions. (Kohlhepp Decl., ¶ 8 Ex. 4 at 42, 47, and 53.)

Respondents' responses are deficient in two ways.

First, Respondents have refused to identify any documents that they rely on for the contentions provided. Instead, Respondents provide a one-line amended response that states "Lender Respondents relied upon the documents identified in their amended response to the Receiver's Interrogatory number 3." (Kohlhepp Decl., ¶ 8, Ex. 4 at 46, 52.) The amended response to Interrogatory No. 3 merely states that Respondents "have produced" documents and goes on to list them. (*Id.* at 9.) This is not sufficient. The Receiver has identified specific documents and deposition transcript citations in his responses to Respondents' contention interrogatories. Respondents must do the same.

Second, the response to each of Interrogatory Nos. 11, 12, and 14 states that “Pursuant to Rule 33(d), Investor Respondents will produce documents responsive to the request for the identity of documents.” (Kohlhepp Decl., ¶ 8, Ex.4 at 43, 52, and 54.) This is not a proper use of Rule 33(d). Nor is the one-line “amended response” to Interrogatory Nos. 11 and 12, stating that “Lender Respondents relied upon the documents identified in their amended response to the Receiver’s Interrogatory number 3.” (Kohlhepp Decl., ¶ 8, Ex.4 at 46, 52.) Federal Rule of Civil Procedure 33(d) permits a party to respond to an interrogatory by specifying records in which the information sought can be found “in sufficient detail to enable the interrogating party to locate and identify them as readily as the responding party could.” But “[i]t is not sufficient for a responding party to simply direct the interrogating party to a mass of business records.” *Graske v. Auto-Owners Ins. Co.*, 647 F. Supp. 2d 1105, 1108 (D. Neb. 2009); *see also Medtronic, Inc. v. Guidant Corp.*, 00-1473 (MJD/JGL), 2003 U.S. Dist. LEXIS 26039, at *11-12 (D. Minn. Jan. 8, 2003).

Accordingly, Respondents must either withdraw their improper reference to Rule 33(d), or they must amend their responses to Interrogatory Nos. 11, 12, and 14 to *specifically identify*, by bates number, the appropriate documents.

4. Respondents Must Supplement Interrogatory Nos. 19 and 20.

At the October 10, 2011 meet and confer, Respondents agreed to supplement their responses to Interrogatory Nos. 19 and 20 by October 14, 2011. (Kohlhepp Decl., ¶ 7, Ex. 3.) They failed to do so. If the Receiver receives

adequate supplementation before the scheduled hearing in this matter, he will withdraw this portion of the motion.

Interrogatory No. 19 seeks specific information related to Michael or Jennifer Heise's attempt to roll over Ms. Heise's IRA into the Receivership Entities on or about June 26, 2009, as the Ponzi scheme was collapsing. This information is relevant to Respondent Heise's defense of good faith, as it relates to a "red flag" that there were problems with the Entities. Respondent Heise's deficient response is wholly conclusory and omits at least the following information:

- 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.

The Court should compel Respondent Heise to fully respond to Interrogatory No. 19.

Interrogatory No. 20 seeks specific information regarding the disposal of the desktop computer that Terry Frahm allegedly used to draft a letter he contends he sent to Trevor Cook on May 5, 2009, allegedly requesting his accounts be closed. Respondent Frahm's response is deficient and omits at least the following information:

- An identification of when specifically in 2010 the Dell computer was recycled;
- An identification of every person who was involved in the decision to dispose the computer and the disposal itself;
- Information regarding whether any files were copied on to other media before the hard drive was destroyed; and
- If any files were copied, information as to where and in what form they presently exist.

The Receiver is entitled to this information because it is relevant to Respondent Frahm's defense of good faith. The Court should compel Respondent Frahm to fully respond to Interrogatory No. 19.

B. The Court Should Compel Respondents to Produce Documents In Response to Request for Production Nos. 7, 8, and 12.

The Receiver served Request for Production Nos. 7, 8, and 12 over two months ago. In written responses served on September 15, 2011, Respondents promised to produce responsive documents, but as of this filing, they have yet to do so. (Kohlhepp Decl., ¶ 10, Ex. 5 at 3-6.) Respondents now say that that they will produce responsive documents by October 31, 2011. (Kohlhepp Decl., ¶ 11.) Fact discovery closed on September 15, 2011. Given that Respondents have made a practice of renegeing on promises to produce documents by certain dates (*see, e.g.* footnote 2, *infra*), the Receiver cannot rely on Respondents' word and risk losing the ability to seek the Court's assistance. Accordingly, the Receiver now moves to compel production. If Respondents produce all responsive documents by the scheduled hearing in this matter, the Receiver will withdraw this portion of the motion.

Request for Production No. 7 seeks all tax returns and supporting documents filed with the IRS or the Minnesota Department of Revenue that are related to funds sent to or received from the Receivership Entities. (Kohlhepp Decl, ¶ 10, Ex. 5 at 3.) Respondents have agreed to produce – but as of this filing have not produced – the portion of their federal and state returns showing how they claimed, for tax purposes, each transfer of funds from the Receivership Entities. The Receiver requested that Respondents also provide the signature page for each tax-related document they produce; Respondents have refused to say whether they will do so. Whether and how Respondents claimed funds received from the Ponzi scheme on their tax returns is relevant to both Respondents’ alleged good faith and their assertion that they provided “loans” rather than investments to the Receivership Entities. The Receiver is entitled to this information, and the Court should compel Respondents to produce it.

Request for Production No. 8 seeks all communications and documents and things sent to or received from any tax professional, accountant, or other financial professional that relate to funds sent to or received from the Receivership Entities. (Kohlhepp Decl, ¶ 10, Ex. 5 at 4.) This information is relevant to both Respondents’ contention that they provided “loans” as well as probative of what “red flags” each Respondent was aware of or should have been aware of regarding the Receivership Entities. Respondents have agreed to produce all responsive documents (Kohlhepp Decl., ¶ 11); the Court should compel them to do so.

Request for Production No. 12 seeks all documents and things, including communications, related to Respondent Heise's effort to roll over Jennifer Heise's IRA account into the Receivership Entities on or about June 26, 2011, as the Ponzi scheme was collapsing. (Kohlhepp Decl., ¶ 10, Ex. 5 at 5-6.) This information is relevant to Respondent Heise's defenses, in particular the contention that he took the funds he received from the Ponzi scheme in good faith. Respondent Heise has agreed to produce all responsive documents (Kohlhepp Decl., ¶ 11), but as of this filing has failed to do so. The Court should compel him to produce what he said he would produce.

C. The Court Should Compel Respondents to Produce Information and Documents Showing How they Disposed of the Funds they Received from the Ponzi Scheme.

Interrogatory No. 9 seeks information related to Respondents' disposition of the funds that they received from the Ponzi scheme (Kohlhepp Decl., ¶ 8, Ex. 4 at 34), and Request for Production No. 5 seeks documents sufficient to provide a complete accounting of all such funds, from receipt through the present (Kohlhepp Decl., ¶ 8, Ex. 4 at 61). *How* and *when* Respondents disposed of the money they received from the Ponzi scheme is clearly relevant to their alleged good faith in receiving and keeping it.

Respondents have repeatedly promised to provide this information and the associated documents over the course of three separate meet and confers and four

months' time.² But to date they have provided only scattered bits of incomplete information. The Court should compel Respondents to provide complete responses to the Receiver's Interrogatory No. 9 and, in response to Request for Production No. 5, compel Respondents to produce a *complete* set of documents sufficient to show Respondents' disposition of the money they received.

1. Interrogatory No. 9

Interrogatory No. 9 seeks an accounting of the funds received from Trevor Cook, Clifford Berg, or any of the Receivership Entities from the date such funds were received by the Respondents through the present. (Kohlhepp Decl., ¶ 8, Ex. 4 at 34.)

The responses to this interrogatory are deficient in at least two ways. First, they consist of general, conclusory statements. For one example, see Second Amended Response at (vi): "portions of the money have now been spent on Heise's business;" and "Mr. Heise also reinvested some of the money in IRA and

² At a **first** meet and confer, held on June 21, 2011, counsel for the Respondents agreed to provide the following: the specific dates money was transferred/spent; specific amounts of money transferred/spent; if all or part of the money was spent—what it was spent on, how much was spent on each item and what date each amount was spent on; what type of investment it was put in; how long it stayed in a particular investment; and what the rate of return was for each place, fund, and/or financial instrument any of the money was invested in, from the time it was received through the present; and documents sufficient to show this information. (Kohlhepp Decl., ¶ 12, Ex. 6.) At a **second** meet and confer, held on August 22, 2011, the Respondents again promised to provide the requested information and documents within 20 days. (Kohlhepp Decl., ¶ 13, Ex. 7.) At a **third** meet and confer, held on October 10, 2011, the Respondents again promised to produce documents sufficient to show the rates of return for any Respondent who re-invested his or her money. (Kohlhepp Decl., ¶ 7, Ex. 3.)

retirement accounts.” (*Id.* at 36.) This response does not specify how much money was used for each purpose, or the date on which it was used. For another example, see Second Amended Response at (iv): “Respondent Terry Frahm invested his money with Western International Services.” (*Id.*) This response does not specify whether Respondent Frahm invested some or all of the money he received from the Ponzi scheme with Western, nor does it specify the date on which he invested it.

Second, each response to Interrogatory 9 states that “the returns of these investments are reflected in the bates numbered supplemental production.” This is an improper response. Under the Federal Rules, Respondents must either provide the specific information requested, or, pursuant to Rule 33(d), *specifically* identify by bates number the document from which the information can be obtained. *Graske v. Auto-Owners Ins. Co.*, 647 F. Supp. 2d 1105, 1108 (D. Neb. 2009). At the October 10, 2011 meet and confer, Respondents promised to amend their response to specifically identify documents, but they have failed to do so. (See Kohlhepp Decl., ¶ 7, Ex. 3.)

The Court should compel Respondents to supplement their responses to Interrogatory No. 9 with at least the following information:

- the specific dates money was transferred/spent;
- specific amounts of money transferred/spent;
- if all or part of the money was spent – what it was spent on, how much was spent on each item and what date each amount was spent on;
- what type of investment it was put in;
- how long it stayed in a particular investment; and

- what the rate of return was for each place, fund, and/or financial instrument any of the money was invested in, from the time it was received through the present.

Respondents have already *promised* this information; given that fact discovery closed over a month ago, the Court should compel them to actually provide it.

2. Request for Production No. 5

Similarly, Request for Production No. 5 seeks documents sufficient to provide an accounting of the funds transferred from Receivership Entities to the Respondents from the date of such transfer to the present. (Kohlhepp Decl., ¶ 8, Ex. 4 at 61.)

At the October 10, 2011 meet and confer, Respondents *again* promised to provide documents sufficient to show the rates of return for each Respondent who reinvested the money he or she got from the Ponzi scheme. (Kohlhepp Decl., ¶ 7, Ex. 3.) On October 11, 2011, Respondents did finally produce some additional documents, but the production is grossly incomplete—at least Respondents Buysse, Frahm, Fredell, Heise, Hillesheim, Kautzman, and Sundstrom, have failed to produce documents showing the rate of return or the date of their reinvestment for at least some portion of money that they reinvested.

Moreover, at the October 10, 2011 meet and confer, Respondents backtracked from their previous promises and now refuse to provide information related to how Respondents spent the money, other than what Respondents may have testified to at depositions. (Kohlhepp Decl., ¶ 7, Ex. 3.) There are two problems with Respondents' position. First, the Receiver is entitled to information

detailing how Respondents disposed of *all* the money they received from the Ponzi scheme, not just those portions that they reinvested. How and when Respondents used the money—including how they spent it—is highly relevant to their good faith in receiving and keeping the money. Second, this is exactly the type of information that is difficult to obtain from a deposition—Respondents who were asked at depositions about how they spent the money they received could provide only incomplete recollections and guesses. Written discovery responses and document productions provide a means for Respondents to gather and compile complete and accurate responses.

Accordingly, the Court should compel Respondents to produce documents sufficient to show at least the following information for each Respondent:

- the specific dates money was transferred/spent;
- specific amounts of money transferred/spent;
- if all or part of the money was spent – what it was spent on, how much was spent on each item and what date each amount was spent on;
- what type of investment it was put in;
- how long it stayed in a particular investment; and
- what the rate of return was for each place, fund, and/or financial instrument any of the money was invested in, from the time it was received through the present.

III. CONCLUSION

For the foregoing reasons, the Receiver respectfully asks the Court to compel Respondents to answer Interrogatory Nos. 5, 9, 10, 11, 12, 14, 19 and 20 as requested in the foregoing memorandum and to produce all documents responsive to Requests for Production Nos. 7, 8, and 12.

Dated: October 17, 2011

Respectfully submitted,

s/ Peter M. Kohlhepp

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