

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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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.

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**LENDER RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO THE  
RECEIVER'S MOTION TO COMPEL**

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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 to  
Compel.

## INTRODUCTION

The Receiver's Motion to Compel shows a complete disregard for judicial economy and is a transparent attempt to force Lender Respondents to expend unnecessary additional legal fees. The information the Receiver seeks has either already been produced by Lender Respondents, or is irrelevant to the claims and defenses in this action. The Receiver has already had access to full discovery, a privilege not enjoyed by Lender Respondents. The Receiver has deposed each Lender Respondent. These depositions took place after the Receiver reviewed Lender Respondents' answers to the Receiver's contention interrogatories. Lender Respondents have produced the documents in their possession related to the claims and defenses at issue in this litigation, totaling approximately 2,500 pages. Lender Respondents have produced in excess of one hundred pages of discovery responses. In sharp contradistinction, Lender Respondents have been denied the right to depose and cross-examine the Receiver. The Receiver has evinced an intention to use documents at trial which have not been produced to Lender Respondents, somewhere in millions of pages of documents that have been "made available" through the Receiver's office. In short, the Receiver has consistently attempted to gain a litigation advantage at every turn in discovery. This Motion is yet another example of the Receiver's misconduct.

The instant Motion to Compel either requests information that the Lender Respondents have agreed to produce by October 31st, or demands information that have no conceivable application to any claim and defense in this action. The Receiver is attempting to use the present discovery as "post-judgment discovery," attempting to ease

his path to dispossessing Lender Respondents of their assets in the event that the Receiver is successful on his claims. However, despite the Receiver's unsupported assertions, Lender Respondents' use of their funds has absolutely no relevance to the Receiver's claims or Lender Respondents' defenses. Instead, the Receiver is continuing his transparent attempts to harass Lender Respondents through means of litigation in the hopes of forcing them through sheer superior economic might to submit to his legally insupportable claims.

### FACTS

The Court is familiar with the background of this litigation, so Lender Respondents will confine their factual allegations to the instant discovery dispute.

Lender Respondents have been consistently open and forthcoming with the Receiver, in a manner markedly distinct from the Receiver's reciprocation in discovery. Before Lender Respondents were even parties to this action, the Receiver interviewed most of the Lender Respondents individually and without counsel present. Declaration of Gregory Erickson ("Erickson Dec."), ¶ 4. Many of the Lender Respondents also produced their documentation directly to the Receiver before this litigation, including documentation regarding the current location of their assets. *Id.* When discovery commenced in this litigation, Lender Respondents answered the Receiver's contention interrogatories in detail in the over 100 pages of discovery responses Lender Respondents have provided, and produced thousands of pages of documents, comprising all relevant non-privileged documents in Lender Respondents' possession. *See* Lender Respondents' Third Amended Responses to the Receiver's First Set of Discovery Requests, Erickson

Dec., Ex. 1; and Lender Respondents' Amended Responses to the Receiver's Second Set of Discovery Requests, Erickson Dec., Ex. 2. Lender Respondents appeared for depositions, at which the Receiver's counsel had the opportunity to cross-examine each Lender Respondent on their affirmative defenses. Lender Respondents have each made an effort to be as open and accommodating as possible during the discovery process.

Lender Respondents never agreed to the full post-judgment-type discovery described in the Receiver's Motion papers. Erickson Dec., ¶ 6. Counsel for Lender Respondents consistently objected to the Receiver's repeated deposition questioning regarding the current location of Lender Respondents' assets. See pages 76-79 of the deposition transcript of Steven Fredell, Erickson Dec., Ex. 3. This is because the Receiver has never provided Lender Respondents with any meaningful explanation as to the relevance of this information. It is clear to Lender Respondents that the Receiver is attempting to ease the potential post-judgment discovery process by locating Lender Respondents' assets in discovery. The Receiver's counsel even repeatedly attempted to elicit answers from Lender Respondents over the objections of counsel by asking if Lender Respondents intended to abide by their counsel's instruction not to answer. *Id.* As a result of this aggressive questioning, the Receiver managed to obtain some testimony from individual Lender Respondents regarding the current location of their assets. *Id.* Counsel for Lender Respondents then learned that most Lender Respondents had already responded in detail to the Receiver's requests for the location of Lender Respondents' assets. Erickson Dec., ¶ 5. In an effort to save resources, counsel for Lender Respondents agreed to produce some limited discovery regarding the

performance of Lender Respondents' current investments, and some information regarding the location of Lender Respondents' assets. *Id.* Counsel for Lender Respondents also allowed some limited questioning on Lender Respondents' current investments. See pages 99-100 of the deposition transcript of Michael Heise, Erickson Dec., Ex. 4. However, Lender Respondents never agreed to the full post-judgment discovery demanded by the Receiver, despite the Receiver's allegations to the contrary.

Lender Respondents have agreed to produce a number of documents in response to the Receiver's request for production of documents 7, 8, and 12. Erickson Dec., ¶10. Further, Lender Respondents have agreed to answer the Receiver's interrogatories 19 and 20. Erickson Dec., ¶ 9. Lender Respondents have agreed to respond to these requests by October 31<sup>st</sup>, and will do so. *Id.* The Receiver's efforts to compel information which the Lender Respondents have already agreed to provide is a waste of resources.

All told, Lender Respondents have provided over 100 pages of discovery responses, including multiple contention interrogatory answers, approximately 2,500 pages of documents, have answered questions during the Receiver's investigation (sometimes without counsel present), and have submitted to depositions. The Receiver has been able to avoid deposition, and despite providing thousands of pages of documents, has evinced an intention to rely on others culled from terabytes of information contained on the Receiver's computer which have been "made available" for Lender Respondents' to sift through. In short, the Receiver has consistently used the discovery process to his litigation advantage.

## ARGUMENT

### **1. LEGAL STANDARD.**

The Federal Rules of Civil Procedure provide for liberal discovery, but with limits to protect parties. The Court may order discovery of any matter “relevant to the subject matter involved in the action.” Fed. R. Civ. P. 26(b)(1). However, the Court must limit discovery if the “(i) discovery sought is unreasonable cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity to obtain the information by discovery in the same action; or (iii) 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.” Fed. R. Civ. P. 26(b)(2). In the *ex parte* order in which the Receiver was granted access to summary proceedings against Lender Respondents, discovery was limited to: (1) “the amount and/or value of Receivership funds or assets received” and (2) “any statutory or common law defenses the third [party] recipient of Receivership assets may wish to raise.” Order Allowing Summary Proceedings, C.F.T.C. v. Cook, 09-CV-3332, Doc. No. 350.

The Receiver requests that this Court compel Lender Respondents to reply to the Receiver’s discovery requests. Many of the Receiver’s requests will be moot. Lender Respondents have agreed to produce much of the information sought by the Receiver, and will do so in the time agreed upon by counsel. The Receiver’s Motion to Compel on

these matters is a waste of the resources of this Court, the parties, and the Receivership itself.

The remainder of the discovery sought by the Receiver has already been produced to the Receiver on multiple occasions in a variety of different formats. The Receiver has had the opportunity to interview each Lender Respondent and receive copies of their documents before commencing this litigation. The Receiver has served discovery requests, including many contention interrogatories on Lender Respondents. Lender Respondents have over 100 pages of discovery responses to the Receiver, and have amended their responses several times. Lender Respondents have produced approximately 2,500 pages of documents, which compose all of the relevant, non-privileged documents in Lender Respondents' possession. The vast majority of the relevant documents in this action were in the Receiver's possession. The Receiver has had an opportunity to cross-examine each Lender Respondent on his or her responses to the Receiver's contention interrogatories, and cross-examine each one on all affirmative defenses.

On the other hand, Lender Respondents have had no opportunity to depose the Receiver, as the Court found that the Receiver's contention interrogatories were sufficient to provide Lender Respondents with the discovery they sought. The Court further found that the Lender Respondents would be denied an opportunity to cross-examine the Receiver on his claims. Lender Respondents have provided the Receiver with deposition testimony, documents, and full discovery responses on each of the discovery requests that is the subject for the instant Motion to Compel. The Receiver's Motion must be denied,

as forcing Lender Respondents to respond would be overly burdensome, Lender Respondents have already responded to the Receiver's requests, and the Receiver is seeking irrelevant information in an attempt to harass Lender Respondents and to obtain impermissible post-judgment discovery. The Receiver's Motion must be denied.

**2. The Receiver's Interrogatories Have Been, or Will Be Fully Answered.**

**i. Lender Respondents have answered Interrogatories 5 and 9 With All Relevant, Non-Duplicative Information.**

The Receiver seeks to Compel Lender Respondents to specifically identify the transactions to and from the Cook Currency Trading Entities. The Receiver makes the wholly conclusory statement that the "Receiver is entitled to this information because the timing of Respondents' transactions, the frequency of their transactions, the amount 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." On the contrary, this information is wholly irrelevant to the Receiver's claims. The only pertinent information is the amount the Lender Respondents lent to the Cook Currency Trading Entities, and the amount of money that was returned to Lender Respondents. The Receiver has no case law support for his statement that the timing (between transfers), frequency, amount, or method of the transactions between the Lender Respondents and the Cook Currency Trading Entities has any bearing whatsoever on whether Lender Respondents received their loan repayment in good faith.

In fact, Lender Respondents have provided the Receiver all pertinent information regarding transfers between Lender Respondents and the Cook Currency Trading

Entities. The Receiver refers to a transaction list prepared by the Receiver purporting to set forth all of the transactions between each Lender Respondent and the Cook Currency Trading Entities. The Lender Respondents have already responded in great detail to the Receiver's Interrogatories 6 and 8, detailing each Lender Respondents' transfers to and from the Cook Currency Trading Entities. Further, the Receiver questioned each individual Lender Respondent extensively in his or her deposition regarding the timing of all transfers to and from the Cook Currency Trading Entities, even examining each Lender Respondent using the list of transactions the Receiver had prepared.

The Receiver's confusion as to the basis for Lender Respondents' information mentions a number of Lender Respondents as "disputing one or more of the transactions that the Receiver has been able to identify." However, the Receiver is aware of the reason for any discrepancies between the figures of Lender Respondents and the Receiver. To take one representative example, Lender Respondent David Buysse testified at deposition that he transferred \$50,000.00 in cash to the Cook Currency Trading Entities, a fact set forth in Lender Respondents' answer to Interrogatory Number 6. See, Transcript of Buysse Deposition, pp. 91-92, attached to the Erickson Dec. as Exhibit 6. This transaction, in connection with the transactions set forth in the Receiver's list of transactions for Buysse completes the list of transactions that took place between Buysse and the Cook Currency Trading Entities. The Receiver's complaints that Lender Respondents have failed to identify the facts surrounding disputed transactions are simply untrue.

The Receiver has had every opportunity ascertain the amount of money Lender Respondents transferred to, and received from the Cook Currency Trading Entities. Lender Respondents have identified the transfers to and from the Cook Currency Trading Entities, and have identified the reasons for discrepancies. Any further discovery on the “method, frequency, timing, or amount” of these transfers is utterly irrelevant, duplicative, and a transparent attempt to harass Lender Respondents. Lender Respondents have already produced all relevant information, including the total amount of transfers to and from the Cook Currency Trading Entities. The Receiver’s Motion to compel further response to Interrogatories 5 and 9 must be denied.

**ii. Lender Respondents Have Responded to Interrogatory 10.**

The Receiver argues that Lender Respondents must be required to lay out all facts supporting each affirmative defense in response to Interrogatory Number 10. Lender Respondents have already laid out the pertinent facts supporting their defenses in response to more specific interrogatories from the Receiver. For example, the Receiver demands that the Lender Respondents provide more detail on their defense that the Receiver has failed to state a claim. Lender Respondents state that the Receiver failed to state a claim as Lender Respondents received the return of their funds in good faith and pursuant to a written contract. Lender Respondents have already set forth the facts supporting their good faith in relevant detail in response to the Receiver’s Interrogatory Numbers 11 and 12. The Receiver is not entitled to a narrative account of the Lender Respondents’ defenses. *See Lucero v. Valdez*, 240 F.R.D. 591, 594 (D.N.M.2007), *see also IBP, Inc. v. Mercantile Bank*, 179 F.R.D. 316, 321 (D.Kan.1998) (“To require

specifically each and every fact and application of law to fact, however, would too often require a laborious, time-consuming analysis, search, and description of incidental, secondary, and perhaps irrelevant and trivial details. The burden to answer then outweighs the benefit to be gained.”). *Id.*

In addition, the Receiver had every opportunity to cross-examine each Lender Respondent on the basis for each affirmative defense at deposition. The Receiver’s failure to examine each Lender Respondent on his or her basis for an affirmative defense should not be used to force Lender Respondents to craft a preliminary summary judgment memorandum. The Receiver is attempting to force Lender Respondents to waste their resources, despite the fact that the Receiver is fully aware of the Lender Respondents’ defenses and the evidence supporting said defenses.

The Receiver demands that Lender Respondents set forth why three of Lender Respondents’ defenses are not rendered moot by Judge Nelson’s denial of Lender Respondents’ Motion to Dismiss. The Lender Respondents do not agree with Judge Nelson’s decision on their Motion to Dismiss, and are preserving the defenses asserted in the Motion to Dismiss, including jurisdiction. The grounds for these defenses are set forth in Lender Respondents’ Motion to Dismiss. Lender Respondents are not compelled to abandon these defenses in light of Judge Nelson’s ruling, but are specifically preserving said defenses for appeal.

**iii. Lender Respondents Have Responded Specifically to Interrogatories 11, 12, and 14.**

The Receiver alleges that Lender Respondents have failed to specifically identify documents which support their assertions that they received their funds in good faith, and that no unjust enrichment or fraudulent transfer occurred. The Receiver asserts that “the Receiver has identified specific documents and deposition transcript citations in his responses to Respondents’ contention interrogatories. Respondents must do the same.” As an initial matter, the Receiver is creating a false equivalence. The Receiver and Lender Respondents have not had similar access to discovery. The Receiver was allowed to serve contention interrogatories, which Lender Respondents answered. The Receiver was then allowed to cross-examine each Lender Respondent and their family members on their defenses, and the facts supporting said defenses. Lender Respondents have now been denied the opportunity to depose the Receiver. Lender Respondents have only had access to contention interrogatories, carefully shaped by the Receiver’s counsel, while the Receiver has been allowed to interview and depose each Lender Respondent, and even cross-examine each Lender Respondent using their responses to the Receiver’s contention interrogatories. The Receiver’s claim that each Lender Respondent must now draft a narrative setting forth which documents support their assertions is absolutely absurd, especially in the face of the Receiver’s stated intention to rely upon documents which have not been produced to Lender Respondents, but which have been “made available” somewhere hidden in terabytes of information on the Receiver’s computers.

The Receiver’s request is not only baseless on his stated grounds of “equality,” but is duplicative. Each Lender Respondent has answered multiple questions regarding their good faith, and has produced all relevant, non-privileged documents in his or her

possession. The Receiver cannot possibly be unsure about the bases for any of Lender Respondents' defenses. Nor is the Receiver's stated goal of preparing for trial persuasive. Lender Respondents have been left to guess at the potential exhibits or testimony the Receiver will use to support his case. On the contrary, the Receiver cannot help but be aware of what each Lender Respondent will say at trial, and which documents each Lender Respondent will rely upon by virtue of Lender Respondents 50+ hours of deposition testimony.

The cases set forth by the Receiver are inapplicable, as each required a party producing a large quantity of documents to specify which documents related to the interrogatory. *Graske* involved a case in which a party produced nearly 7,000 documents in response to several interrogatories, without providing any interrogatory answers. *Graske v. Auto-Owners Ins. Co.*, 647 F. Supp. 2d 1105, 1108 (D. Neb. 2009). In *Medtronic*, the party produced almost 300,000 documents which it invited its opposing party to sift through in a search for documents. Lender Respondents have produced 2,500 documents, and have specifically identified which documents were produced by which Lender Respondent. Further, Lender Respondents have fully answered the Receiver's contention interrogatories. Each Lender Respondent has relied on those documents that he or she produced, as well as the documents produced by the Receiver to support his or her defenses.

The Receiver's claim is not only legally baseless, but needless. Lender Respondents have already fully identified the documents each will rely upon in their amended response, which directed the Receiver to a bates-numbered range of documents

produced by each Lender Respondent, as well as the documents produced by the Receiver in discovery. Each Lender Respondent has relied upon, and will rely upon the documents in each Lender Respondents' possession, as well as the documents germane to each Lender Respondent which have been produced by the Receiver. The Receiver appears to be requesting that each Lender Respondent identify which documents produced by the Receiver are most helpful to each individual defense. However, the Lender Respondents' defenses and the support thereof have been clear to the Receiver since the first interviews with each Lender Respondent. The Receiver's attempt to require Lender Respondents' counsel to pore over the thousands of documents set forth by the Receiver and identify to the Receiver which documents relate to which Lender Respondent, and which documents are most relevant is not only an abuse of the discovery process, but is an attempt to discover protected attorney work product mental impressions.

**iv. Lender Respondents Have Agreed to and Will Produce Amended Responses to Interrogatories 19 and 20.**

The Receiver's Motion to Compel responses to Interrogatories 19 and 20 is a waste of resources. Lender Respondents have agreed to produce responses to said Interrogatories and will do so.

**3. Lender Respondents Have Produced or Have Agreed to Produce All Relevant Documents.**

Lender Respondents have agreed to provide the documents responsive to the Receiver's requests 7, 8, and 12. Lender Respondents are interested in litigating this matter in a cost-effective manner. Lender Respondents will provide the documents they

have previously agreed to provide by October 31<sup>st</sup>, 2011. The Receiver's Motion to Compel production of documents Lender Respondents have agreed to provide and are in the process of gathering is a waste of the resources of Lender Respondents, this Court, and the Receivership.

**4. How Lender Respondents Used Their Funds is Entirely Irrelevant to this Litigation, and the Receiver is Not Entitled To Any Discovery Lender Respondents Have Not Already Provided or Agreed to Provide.**

Lender Respondents have consistently asserted that the Receiver has no right to discovery on Lender Respondents' assets. Numerous courts have found that federal discovery rules "prohibit a litigant from discovering an opponent's assets 'until after a judgment against the opponent has been rendered.'" *Resolution Trust Corp. v. Thornton*, 41 F.3d 1539, 1547 (D.C. Cir. 1994), *quoting FTC v. Turner*, 609 F.2d 743, 745 (5th Cir.1980); *accord Sanderson v. Winner*, 507 F.2d 477, 479-80 (10th Cir.1974), *cert. denied*, 421 U.S. 914, 95 S.Ct. 1573, 43 L.Ed.2d 780 (1975); *RTC v. Feffer*, 793 F.Supp. 11, 14 (D.D.C.1992). The Receiver's attempts to ascertain the state of the Lender Respondents' assets is an impermissible attempt to conduct post-judgment discovery under Fed. R. Civ. Pro. 69 before a judgment has been entered.

The Receiver attempts to disingenuously suggest that the post-judgment discovery as to the location of each Lender Respondents' assets are probative of Lender Respondents' good faith. The return realized currently on Lender Respondents' investments, the type of investment Lender Respondents currently favor, and an economic tracing of the current location of the funds Lender Respondents received back from the Cook Currency Tracing Entities are utterly irrelevant to the claims at issue in

this action. As this Court is well aware, the good faith analysis relates to the exact moment each Respondent received the return of his or her funds. Under Minnesota statute, a transfer is not fraudulent if “a person who ***took in good faith*** and for a reasonably equivalent value....” Minn. Stat. § 513.48(a) (emphasis supplied). The statute says nothing about retaining in good faith, but makes clear that the relevant time period is at the time the transferee received the funds. *See also, Seligson v. New York Produce Exch.*, 394 F. Supp. 125, 133 (S.D.N.Y. 1975), *Cohen v. Sutherland*, 257 F.2d 737, 742 (2d Cir. 1958) (examining good faith defense in bankruptcy context, and stating that the relevant time period is “at the time of the transfer”).

Lender Respondents could have been informed the day after receiving their funds of the existence of a ponzi scheme and it would be utterly irrelevant to their good faith defense. Obviously, every Lender Respondent is now aware that Trevor Cook has admitted to being involved in fraudulent activity. In fact, under the Receiver’s version of the “good faith defense,” every payment ever made by the Cook Currency Trading Entities would be in bad faith, as Trevor Cook’s conviction and guilty plea are public knowledge. Despite the Receiver’s legally unsupported assertions to the contrary, no discovery regarding the current state of the Lender Respondents’ funds is relevant to this action.

The Receiver may also claim that the return currently realized or the investment vehicle favored by the Lender Respondents is relevant to good faith. However, this evidence is also clearly immaterial. First, the current state of the investment market is different than the state of the market when Lender Respondents were dealing with the

Cook Currency Trading Entities. In addition, even if Lender Respondents received a lesser return than they had received from the Cook Currency Trading Entities, there is no conceivable way in which this evidence would be relevant, as many are invested in funds and products so different from the Cook Currency Trading Entities as to be impossible to compare.

Lender Respondents have already been interviewed by the Receiver on the whereabouts of the money they received from the Cook Currency Trading Entities, at which point, many of the Lender Respondents fully revealed the location of their assets to the Receiver. Lender Respondents' counsel strongly objected to the use of the discovery process to obtain post-judgment discovery, and objected in Lender Respondents' depositions. However, it soon became clear that most of the Lender Respondents had already revealed the current location of the funds that had been returned by the Cook Currency Trading Entities. Thereafter, Lender Respondents answered questions regarding the current return realized on their investments, and some limited questions regarding their current investments. Lender Respondents have never agreed to the full post-judgment discovery described by the Receiver, but have simply agreed to produce limited discovery, despite their strong relevance objections, in the interests of preserving resources. The Receiver has received all relevant information regarding the funds that were transferred to Lender Respondents, and a large amount of utterly irrelevant information that will only be useful to the Receiver if he obtains a personal judgment against Lender Respondents. The Receiver is certainly not entitled to any additional information, and his Motion to Compel must be denied.

**CONCLUSION**

For all the foregoing reasons, the Receiver's Motion to Compel must be denied.

MOHRMAN & KAARDAL, P.A.

Dated: October 24, 2011

s/Gregory M. Erickson

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