

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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U.S. COMMODITY FUTURES  
TRADING COMMISSION,

Plaintiff(s)

Case No. 09-cv-3332 MJD/JJK

v.

TREVOR COOK d/b/a CROWN  
FOREX, LLC, PATRICK KILEY  
d/b/a CROWN FOREX, LLC,  
UNIVERSAL BROKERAGE FX and  
UNIVERSAL BROKERAGE FX  
DIVERSIFIED, OXFORD GLOBAL  
PARTNERS, LLC, OXFORD GLOBAL  
ADVISORS, LLC, UNIVERSAL  
BROKERAGE FX ADVISORS, LLC  
f/k/a UBS DIVERSIFIED FX  
ADVISORS, LLC, UNIVERSAL  
BROKERAGE FX GROWTH, L.P.  
f/k/a UBS DIVERSIFIED FX GROWTH,  
L.P., UNIVERSAL BROKERAGE FX  
MANAGEMENT, LLC f/k/a UBS  
DIVERSIFIED FX MANAGEMENT,  
LLC and UBS DIVERSIFIED GROWTH,  
LLC,

Defendant(s),

R.J. ZAYED,

Receiver

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UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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UNITED STATES SECURITIES  
AND EXCHANGE COMMISSION,

Plaintiff(s)

Case No. 09-cv-3333 MJD/JJK

v.

TREVOR G. COOK ,  
PATRICK J. KILEY,  
UBS DIVERSIFIED GROWTH, LLC,  
UNIVERSAL BROKERAGE FX  
MANAGEMENT, LLC,  
OXFORD GLOBAL ADVISORS, LLC,  
and OXFORD GLOBAL PARTNERS, LLC,

Defendants,

and

BASEL GROUP, LLC  
CROWN FOREX, LLC,  
MARKET SHOT, LLC,  
PFG COIN AND BULLION,  
OXFORD DEVELOPERS, S.A.,  
OXFORD FX GROWTH, L.P.,  
OXFORD GLOBAL MANAGED  
FUTURES FUND, L.P., UBS DIVERSIFIED  
FX ADVISORS, LLC, UBS DIVERSIFIED  
FX GROWTH, L.P., UBS DIVERSIFIED  
FX MANAGEMENT, LLC, CLIFFORD  
BERG, and ELLEN BERG,

Relief Defendants.

R.J. ZAYED,

Receiver.

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**INVESTOR RESPONDENTS' MEMORANDUM OF LAW IN OPPOSITION TO  
THE RECEIVER'S MOTION TO QUASH A SUBPOENA SERVED ON A THIRD  
PARTY**

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Investor 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 "Respondents") submit this Memorandum of Law in Opposition to the Receiver's Motion to Quash the Subpoena the Investor Respondents served on Trevor Cook's attorneys.

**INTRODUCTION**

The Receiver has moved to quash a subpoena the Investor Respondents served on a third party - Trevor Cook's attorneys. Under consistent federal case law, and as a matter of common sense, the Receiver has absolutely no standing to quash a subpoena served on a third-party:

Ordinarily a party has no standing to seek to quash a subpoena issued to someone who is not a party to the action unless the objecting party claims some personal right or privilege with regard to the documents sought.

9A Wright & Miller, Fed. Prac.& Proc. § 2459 (3d ed.); *see also*, the 37 cases cited at footnote 6 of §2459 supporting this federal discovery rule.

The only exception to this consistently interpreted legal ruling, as quoted above, is if the party moving to quash the third party subpoena can establish either (i) some sort of

evidentiary privilege with respect to the documents (i.e., attorney client privilege) or (ii) some sort of personal right to the documents (i.e., a party's employment or medical records which are not relevant to the lawsuit). *See*, the 59 cases cited at footnote 7 supporting this proposition at § 2459 of Wright & Miller.

The Receiver does not have either a privilege or a personal right to any of the documents sought – nor could it. Because the Receiver is an officer of the Court, the Receiver could not possibly assert any privilege with respect to documents in the possession of Trevor Cook's attorneys - the primary adverse party to the Receiver in this litigation - because Trevor Cook's attorney's possession of such records would have destroyed any privilege. In addition, the Receiver could not possibly assert any "personal right" regarding the documents (such as the privacy interest in the employment or medical records of a person) because the Receiver is an officer of the Court, *Gaskill v. Gordon*, 27 F.3d 248 (7th Cir. 1994). There is no "personal privacy right" to be asserted – *all* of the Receiver's actions must be transparent as an officer of the Court.

Rather, the Receiver first argues that it moved to quash the subpoena to protect Trevor Cook's attorneys from being subjected to the unarticulated, unspecified and unverified burden of producing the subpoenaed records. The Receiver has graciously volunteered to produce the same records that the Investor Respondents have subpoenaed from Cook's attorneys in order to relieve Cook's attorneys from this burden. However, the history of this litigation clearly indicates no such beneficent attitude on the part of the Receiver with regard to Cook or his attorneys. The Receiver has previously – and unsuccessfully - sought to freeze and disgorge Trevor Cook's payment of what are

believed to be over \$1,000,000 in legal fees to the Mauzy Law Firm and Cook's other attorneys. *See*, Motions at Document No.'s 31, 66 and 73 of Case No. 09-3332 and related memoranda and affidavits filed in support of an in opposition to the Motions as well as the Court's Order allowing the attorneys to retain the monies paid by the Ponzi operators at Document No. 186. The Receiver is also unlikely to harbor good will for the Mauzy Law Firm as a result of its recent representation of Trevor Cook in contempt proceedings for Cook's alleged non-cooperation with the Receiver. *See*, Document No. 615 in Case No. 09-3333.

The Receiver's argument that its sole intent is to relieve Cook's attorneys from the burden of producing these documents is a challenge to the credulous. It is absurd to believe that the Receiver is concerned in the least about burdens on Cook's attorneys with whom the Receiver has already locked horns in a direct and personal manner to disgorge the payment of Cook's attorney fees. Instead, it is clear that the Receiver's true interest is in preventing the production of potentially exculpatory documents to the Investor Respondents.

Second, the Receiver argues, without any evidentiary support, that the documents are not relevant to what the Receiver argues is the limited scope of these proceedings. However, as the Receiver admits, the Court Order authorizing these summary proceedings provides that the Investor Respondents may present any "statutory and common law defenses the Investor Respondents may wish to raise." *See*, Court Order at ¶5 (ii) [Document No. 350 in Case No. 09-3332]. All of the documents requested in the subpoena - which solely seek documents relating to the parties in this action - are

relevant to all of Investor Respondents' defenses, including to the Investor Respondents' defense of "good faith" on the Receiver's fraudulent transfer claims. Further, the documents are likely to lead to the discovery of the admissible evidence. The documents sought will include evidence of communications, and more importantly, lack of communications, between Cook and the Investor Respondents, which the Investor Respondents are confident will demonstrate that the Investor Respondents had no knowledge of the fraudulent nature of the Cook's Ponzi scheme.

Outside the context of the Receiver's efforts to bootstrap its claims against the Investor Respondents into this summary proceeding, where the Receiver filed an unopposed motion seeking to restrict the issues in this matter prior to its commencement, the Receiver's efforts to quash the subpoena would be laughed out of court. Because of the Receiver's aggressive attempts to limit the range of issues in this matter and discovery, the Investor Respondents have reason to believe that Receiver filed this Motion to Quash because the Receiver knows that Cook's attorneys are in possession of exculpatory documents which the Receiver was planning to refuse to produce.

Under unequivocal federal case law, the Receiver has no standing to file this Motion to Quash a subpoena served on a third party. The Motion is frivolous and the Court should award fees under Rule 26.

### **FACTUAL BACKGROUND**

The United States Security and Exchange Commission (the "SEC") and the United States Commodity Futures Trading Commission (the "CFTC") filed a Complaint against Defendant Trevor Cook ("Cook") on November 23, 2009, alleging that Cook had

operated a Ponzi scheme, and in furtherance thereof, had defrauded over 1000 investors. *See Complaint*, SEC Docket No. 1 (Nov. 23, 2009); *Complaint for Injunctive and Other Equitable Relief and for Penalties Under the Commodity Exchange Act*, CFTC Docket No. 1 (Nov. 23, 2009). R.J. Zayed was appointed Receiver on November 23<sup>rd</sup>, 2009. *See Order Appointing Receiver*, SEC Docket No. 13 (Nov. 23, 2009); *see also Amended Order Appointing Receiver*, SEC Docket No. 18 (Nov. 24, 2009); *Second Amended Order Appointing Receiver*, SEC Docket No. 68 (Dec. 11, 2009); *Order Continuing Appointment of Temporary Receiver*, CFTC Docket No. 96 (Dec. 11, 2009).

On April 13, 2010, Trevor Cook pled guilty to one count of mail fraud and one count of tax evasion in connection with the alleged Ponzi scheme. *United States v. Trevor Gilson Cook*, No. 10-cr-00075, Docket No. 7 (April 13, 2010) (attached as Exhibit B to the Receiver's Motion for Summary Proceedings).

On July 9, 2010, the Receiver filed a Motion for an Order Allowing Summary Proceedings. *Receiver's Motion for Order Allowing Summary Proceedings*, CFTC Docket No. 340 (July 9, 2010). On July 20, 2010, without argument or any papers filed in opposition, this Court granted the Receiver's Motion. *Order Allowing Summary Proceedings*, CFTC Docket No. 350 (July 20, 2010). The Order directed the Receiver to file a Summary Proceedings Petition, serve the "Petition" under Rule 4 on the Respondents and give Respondents 21 days "under Rule 12" from the date of service to "Answer or otherwise plead." *Id* at p. 4. The Order further provided that the parties would schedule a status conference with the Court 14 days after service of the Answer to establish an "expedited discovery schedule" to be limited to "i. [t]he amount and/or value

of Receivership funds or assets received; and ii. any statutory or common law defenses the third recipient of Receivership assets may wish to raise.” *Id* at. p. 5.

On July 23, 2010, the Receiver filed a Petition for the “Return of Receivership Assets from Investor Respondents.” *Petition for Return of Receivership Assets from Investor Respondents*, SEC Docket No. 390 (July 23, 2010). For all practical purposes, the “Petition” is in the form of a Complaint. In the Petition, the Receiver asserts that the monies Respondents allegedly received from Oxford in repayment of their loans should be paid to the Receiver. The Petition then sets forth two claims for relief against the Respondents: (i) that the Respondents’ receipt of the monies they loaned to Oxford were “fraudulent transfers” under Minnesota’s adoption of the Uniform Fraudulent Transfers Act and (ii) that Respondents were unjustly enriched by the receipt of the monies they loaned to Oxford. The Respondents have moved to dismiss under Rule 12, which Motion will be heard at the same time as the Receiver’s Motion to Quash the Subpoena.

On November 17, 2010, after discovery commenced in this proceeding, the Investor Respondents served a subpoena duces tecum on Trevor Cook's attorneys, the Mauzy Law Firm. *See*, Exhibit 2 to the Peter Kohlhepp Declaration. The subpoena sought documents which “discuss, reflects, refers or relates” to any of the identified Defendants in either of the above captioned cases, the Receiver, or the Investor Respondents. The subpoena is directly relevant to the claims and defenses in this proceeding under Rule 26. On November 23, 2010, the Receiver sent the Investor Respondents a letter objecting to the subpoena. *See*, Exhibit 3 to the Peter Kohlhepp Declaration. In this letter, the Receiver identifies its main grounds for objecting to the

subpoena: (i) the documents are not relevant, (ii) the production would be burdensome to the Mauzy Law Firm and (iii) the documents are the “property” of the Receiver. The Investor Respondents’ attorney responded to this letter on November 23, 2010, specifically notifying the Receiver that it had no standing to assert any of these objections and that the objections were entirely unfounded. *See*, Exhibit 5 to the Peter Kohlhepp Declaration.<sup>1</sup> In his letter, the Investor Respondents’ attorney laid out the arguments that are contained in this Memorandum and stated that because the Receiver did not have standing, the Investor Respondents would be seeking attorney fees if the Receiver brought a Motion to Quash the subpoena.

### **LEGAL ARGUMENT**

#### **A. The Receiver Bears The Burden of Persuasion On This Motion.**

The Receiver bears the burden of persuasion on its Motion to Quash:

As numerous cases have held, the movant has the burden of persuasion on a motion to quash a subpoena. Correspondingly, courts will deny motions for failing to state the grounds upon which the court should quash the subpoena.

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<sup>1</sup> The Receiver also attempts to paint the Investor Respondent’s attorney as not diligent in responding to the Receiver’s November 19, 2010 letter until November 23, 2010 because the Receiver’s letter demanded that the Respondent Investor’s attorney respond “no later than Monday, November 22.” This argument is unfounded. First, while the Receiver points out the time it sent a subsequent November 23, 2010 email, the Receiver fails to point out the time it sent the November 19, 2010 email. According to the Investor Respondents’ attorney’s email account, the Receiver’s letter was received on Friday, November 19, 2010 at 5:10 p.m. – after the close of business. Under the Federal Rules of Civil Procedure, the letter was not considered delivered until Monday, November 22. In any event, the Investor Respondents attorney did not see the email until sometime either during the day on November 22, 2010 or November 23, 2010 and was not able to respond to the letter until November 23, 2010 because of the attorney’s schedule – as reflected by the fact that the attorney was not able to send a letter response until very late on the night of November 23, 2010. *See*, Declaration of William F. Mohrman.

9A Wright & Miller, Fed. Prac.& Proc. § 2459 (3d ed.); *see also, In re Subpoena Duces Tecum to AOL, LLC*, 550 F. Supp. 2d 606 (E.D. Va. 2008).

As set forth below, the Receiver cannot even establish its standing to bring this Motion much less sustain its burden of persuasion to quash the subpoena.

**B. The Receiver Has No Standing To Bring This Motion.**

As set forth above, Wright & Miller, at §2459, unequivocally state that a party generally has no standing to object or quash a subpoena served on a third party. At footnote 6, Wright and Miller go on to cite 36 cases supporting this consistent federal ruling including *Brown v. Braddick*, 595 F.2d 961, 967 (5<sup>th</sup> Cir. 1979); *Covad Communications Co. v. Revonet, Inc.*, 2009 WL 3739278 (D.S.D. 2009) (slip op.); *Iron Workers' Local 25 Pension Fund v. Watson Wyatt & Co.*, 2009 WL 648503 (E.D. Mich. 2009) (ERISA plans are independent legal entities, so defendant trustees' attorneys cannot object to subpoena on plan's behalf); *Armor Screen Corp. v. Storm Catcher, Inc.*, 2008 WL 5049277 (S.D. Fla. 2008) (defendants failed to establish expectation of privacy in business transactions); *Kingsway Financial Services, Inc. v. Pricewaterhouse-Coopers LLP*, 2008 WL 4452134, \*3 n.3 (S.D. N.Y. 2008); *Flint Hills Scientific, LLC v. Davidchack*, D.C.Kan.2001, 2001 WL 1717902 (Absent a showing of the plaintiff's personal right or privilege with respect to the medical records of her doctor, the plaintiff's motion to quash a subpoena of medical records of her doctor was denied); *Gatewood v. Stone Container Corp.*, 170 F.R.D. 455 (S.D.Iowa 1996)(employer lacked standing to challenge subpoena duces tecum served by employee against union in employment discrimination action, since employer failed to assert any personal right with respect to

subject matter of subpoena); *Smith v. Midland Brake, Inc.*, 162 F.R.D. 683 (D.C.Kan.1995)(defendant corporation had no standing to challenge subpoena served on its employee because it did not show privilege or a personal right to be protected); *Clayton Brokerage Co. v. Clement*, 87 F.R.D. 569, 571 (D.C.Md.1980)(The defendants, who were neither in possession nor control of documents involved in a subpoenas duces tecum, nor the persons to whom the subpoenas were directed, lacked standing to move to quash the subpoenas); *Shepherd v. Castle*, 20 F.R.D. 184, 188 (D.C.Mo.1957); and *U.S. v. Gordon*, 247 F.R.D. 509 (E.D. N.C. 2007)(individuals do not have personal right in bank records kept by their bank).

The Investor Respondents string cite these cases only to demonstrate that this federal legal ruling that a party has no standing to object to a subpoena served on a third party is a long standing and consistently sustained rule without any contradictory authority.

The only exception to this long standing rule is if the party asserts that the documents in the possession of the third party are subject to some form of privilege or the party has a “personal right” in the documents. *U.S. v. Gordon*, 247 F.R.D. 509 (E.D. N.C. 2007) (individuals do not have personal right in bank records kept by their bank). However, the “personal right” refers to private documents such as employment or medical records which have no bearing on the lawsuit. *See*, 9A Wright & Miller, Fed. Prac.& Proc. § 2459 (3d ed.) and cases cited at footnote 7.

In response to this “no standing” rule, the Receiver makes the following arguments which are not supported by either the facts or the law. First, the Receiver’s

Amended Memorandum makes the wholly conclusory argument that the Receiver, a Court appointee, has “a personal right” in the documents sought based on the Court’s “turnover” order at the commencement of the Receivership. However, the Court’s “turnover” order does not create any personal right or privilege in the documents the Investor Respondents seek. The Court’s turnover order did not provide or contemplate that any entities who turn over documents to the Receiver may not keep a copy of those documents. In fact, Cook’s attorneys would have committed malpractice by not keeping a copy of the documents they turned over to the Receiver in order to have an accurate record of the documents produced to the Receiver. Moreover, the Receiver obviously did not interpret the Order as prohibiting others from maintaining copies of records turned over to the Receiver since the Receiver’s own Motion acknowledges that the Mauzy Law Firm is in possession of copies of numerous documents the Receiver claims are owned by the Receiver. It is only now that the Receiver is objecting to third parties producing these records based on its patently insincere concern with relieving those third parties of the burden of producing the records.

The Investor Respondents are extremely troubled by the one factual argument the Receiver makes. At page 10 of its Amended Memorandum, the Receiver argues that the Investor Respondents’ subpoena will require the production of the Receiver’s alleged “work product” of interview notes with Trevor Cook which are apparently in the possession of the Mauzy Law Firm. If the Receiver interviewed Trevor Cook, and a record of those interviews has been disclosed to Trevor Cook’s attorneys, the work product privilege has been waived. More importantly, those interview notes are possibly

the most relevant documents to this matter because the notes may suggest that the Receiver knew from interviewing Cook that Investor Respondents had received their money in good faith and without knowledge of Cook's wrongdoing. This Receiver's assertion of the work product privilege of documents the Receiver voluntarily produced to an adverse party in this litigation further fuels the Investor Respondents' desire to obtain documents from neutral third parties in this action, for comparison with the documents the Receiver produces as well as for simple discovery.

Finally, none of the cases the Receiver cites supports its attempt to quash the subpoena based on the facts in this case – In fact, the cases support the Investor Respondents. The Receiver's Memorandum first cites *Minn. Sch. Bds. Ass'n Ins. Trust v. Employers Ins. Co.*, 183 F.R.D. 627, 629 (N.D. Ill. 1999) ("It is well-settled that a party has standing to object to a subpoena directed at a nonparty when the party claims a 'personal right or privilege' regarding the documents sought."). *Minnesota Sch. Boards* is easily distinguishable. In *Minnesota Sch. Boards*, an insurance coverage case, the defendant insurance company had shared work product information with the defendant insurance company's reinsurer (i.e., a reinsurer is an insurance company that insures another insurance company's risks) in order to keep the reinsurer informed in the event the reinsurer had to provide additional coverage. The plaintiff served a subpoena seeking these records from the reinsurer claiming that the work product privilege was waived through disclosure to the reinsurer. The defendant insurance company moved to quash. The *Minnesota Sch. Boards* Court sustained the objection, finding that communications between an insurance company and its potential reinsurer involving litigation are

protected work-product and the work product privilege is not waived through the communication to the reinsurer. “Communications to one's insurer made as a consequence of pending litigation are privileged work product.” *Minnesota Sch. Boards*, 183 F.R.D. 627 at 631. *Minnesota Sch. Boards* is not even remotely on point with the facts in this action. Certainly, the Receiver was not sharing work product with the attorneys of a Ponzi scheme operator whose crimes led to the appointment of the Receiver and against whom the Receiver filed several contempt motions. Rather, the disclosure of such records to an adversary in this litigation is the very definition of a waiver of the privilege.

Next, the Receiver cites *Haworth, Inc. v. Herman Miller, Inc.*, 998 F.2d 975, 977 (Fed. Cir. 1993) to argue that a party may quash a subpoena served on a third party when documents are available from the party itself. However, *Haworth* actually held the opposite. *Haworth* involved a motion to compel production based on a subpoena which the third party refused to answer. The third party quite reasonably argued that because, as everyone apparently admitted, the opposing party in the proceeding was in possession of the records sought from the third party, the party that served the subpoena on the third party should first attempt to obtain the records from the opposing party in the litigation rather than put the third party through the burden and expense of producing the records. *Hayworth's* analysis is based entirely on protecting a third party from the burdens of responding to a subpoena *based on the third party asserting such burdens*. However, *Hayworth* does not support the opposing party in the litigation seeking to argue that the

subpoena will subject the third party to some undefined and unverified burden when the third party has not asserted any such burden.

Next, the Receiver cites *Cantrell v. U.S. Bioservices Corp.*, 2009 WL 1066011 (W.D. Mo. Apr. 21, 2009) which the Receiver asserts “quashed a third-party subpoena when the same documents were available from a party to the litigation.” However, similarly to *Hayworth*, the motion to quash in *Cantrell* was brought by the third party from whom the documents were sought, and the Court found that “[u]nder the circumstances, the subpoena would impose an undue burden on a non-party.” There is no basis for such a finding here. The Mauzy Law Firm has not asserted that production would be an undue burden, and the Receiver has no standing to assert that production would be an undue burden on the Mauzy Law Firm.

Finally, the Receiver cites *Coffeyville Res. Ref. & Mktg, LLC v. Liberty Resources Ins. Corp.*, No. 4:MC0017, E.D. Ark. November 8, 2008 (a copy of this decision is attached as Exhibit 1 to the Mohrman Declaration). However, *Coffeyville* fully supports the Investor Respondents’ position on this Motion. In *Coffeyville*, a party moved to quash a subpoena served on a third party. The *Coffeyville* Court denied the Motion, specifically finding that “there is no absolute rule prohibiting a party from seeking to obtain the same documents from a non-party as can be obtained from a party, nor is there an absolute rule providing that the party must first seek those documents from an opposing party before seeking them from a non-party.” Further, the *Coffeyville* Court ruled that as the Party Defendant had not provided evidence or information regarding the

extent of the burden on the third party, and importantly, as the recipient of the subpoena had not moved to quash, the Court would not quash the subpoena.

Not only has the Receiver not identified what burden would be placed on the Mauzy Law Firm (i.e., are the documents voluminous, etc.), but the Mauzy Law Firm has not moved to quash or otherwise objected to the subpoena. Piper Webb of the Mauzy Law Firm informed the Investor Respondents' attorney that the only reason the Mauzy Law Firm has not produced the documents is because the Receiver informed Mauzy that the Receiver would bring this motion – i.e., the Mauzy Law Firm has no objections to producing the documents. *See*, Exhibit 6 to the Kohlhepp Declaration. In fact, it is the understanding of the Investor Respondents that the documents they seek from the Mauzy Law Firm are not voluminous and could be easily produced. *See*, Mohrman Declaration.

Finally, the Receiver cites Fed. R. Civ. P. 26(b)(2)(C)(i-ii) to argue that the Court may limit discovery if it is unreasonably cumulative or duplicative. However, this is to protect the party being burdened with production – i.e., the Mauzy Law Firm – not the Receiver who bears no burden.

The Receiver has no personal privacy right in the documents sought by the subpoena nor any privilege right. As such, the Receiver has no standing to object to the subpoena. The Receiver's Motion should be denied.

**C. The Receiver's Arguments Regarding Its Claims Only Demonstrate the Relevance of the Documents Sought in the Investor Respondents' Subpoena.**

The Receiver's Amended Memorandum argues, once again in a wholly conclusory fashion, that because the Receiver is asserting fraudulent transfer and unjust enrichment

claims, the issues in this matter are limited and the subpoenaed records have no relevance to the claims. This argument is of course absurd.

First, as the Receiver admits, the Investor Respondents may defend against the fraudulent transfer claim by proving that the Receiver cannot demonstrate that the Investor Respondents failed to receive “reasonably equivalent value” for the return of their investment or that the Investor Respondents did not act in good faith when they received the return of their investment.<sup>2</sup> First, under the Uniform Fraudulent Transfer Act, and numerous decisions interpreting the Act, the return of principal to the Investor Respondents was exchanged for the reasonably equivalent value of cancelling the Cook entities’ debt to the Investor Respondents for their investment of principal. *Merrill v. Abbott (In re Independent Clearing House Co.)*, 77 B.R. 843, 857 (D. Utah 1987) (“We conclude that the debtors received a ‘reasonably equivalent value’ in exchange for all transfers to a defendant that did not exceed the defendant’s principal undertaking ....”). The subpoenaed records may, and in all likelihood will, contain records showing that the Investor Respondents received payments of principal back from the Cook entities.

Second, the Investor Respondents may defend against the Receiver’s claims by asserting the defense of good faith – i.e., that the Investor Respondents knew nothing of the nature of the Ponzi scheme. All of the documents subpoenaed may lead to the discovery of admissible evidence on this issue because (i) the documents may show the

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<sup>2</sup> The Receiver also classifies the Investor Respondents as “insiders” for purposes of the Uniform Fraudulent Transfer Act. None of the Investor Respondents come within the definition of an “insider” under the UFTA which defines an insider as either a family member or some type of business “partner” of the transferee. There is absolutely no evidence that any of the Investor Respondents are “insiders.”

extent to which Trevor Cook and his affiliates covered up the nature of the Ponzi scheme, (ii) the documents may reveal notes of communications or the communications themselves with the Investor Respondents demonstrating that the Investor Respondents did not know of the nature of the alleged Ponzi scheme; (iii) the documents may reveal admissions of the Receiver that the Investor Respondents did not know of the nature of the alleged Ponzi scheme; (iv) the Mauzy Law Firm's documents may reveal defenses to the claim that Cook's business were run as Ponzi schemes; (v) the documents may show that the monies the Investor Respondent received were not generated from the alleged Ponzi scheme; (vi) the documents may demonstrate the concerted efforts of Cook and his entities to conceal the Ponzi scheme from the Investor Respondents in particular; (vii) the documents may demonstrate that other third parties were involved in concealing the scheme from the Investor Respondents; and (viii) as the *Coffeyville* Court found, the documents produced by the Mauzy Law Firm may reveal documents that the Receiver has in its possession but which the Receiver fails to produce.

Third, and most troubling, is that apparently some documents were given to the Mauzy Law Firm with the stipulation that these documents would only be used for client interviews and not shown to other parties. Obviously, the Investor Respondents cannot have the Receiver providing evidence in Court based on statements Cook made while reviewing documents which are now not produced to the Investor Respondents.

The Mauzy Law Firm's documents are highly relevant to Investor Respondents' good faith defense. As set forth above, the Receiver initially obtained a Court Order freezing the amounts that the Mauzy Law Firm received when Cook engaged the Mauzy

Law Firm after the SEC and CFTC had commenced their investigations. The Mauzy Law Firm moved to unfreeze these funds to allow the Mauzy Law Firm to be compensated for representing Cook. The Receiver argued that the Mauzy Law Firm did not act in good faith in receiving those funds because the Mauzy Law Firm should have known that when it was hired as the criminal defense attorneys for an alleged Ponzi operator, that the significantly large attorney fee retainer paid by the alleged Ponzi operator must have been from the proceeds of the Ponzi scheme. The Court ruled in Mauzy's favor based on sealed records. Obviously, the Investor Respondents are much less likely than an experienced criminal defense attorney to have known or suspected that the monies received from the Cook entities were the proceeds of Ponzi scheme, particularly when those Investor Respondents received these funds prior to any public information that Cook was being investigated as part of a Ponzi scheme.

Finally, with respect to the Receiver's arguments regarding the unjust enrichment claim, the unjust enrichment will be dismissed to the extent of the return of principal. Simply put, the Investor Respondents are not unjustly enriched by the return of their principal.

**D. The Receiver's Arguments That It Is Willing To Provide Full and Fair Discovery Are Disingenuous Given This Motion.**

The Receiver argues that it is more than willing to provide for full and fair discovery but that the Investor Respondents subpoena is simply going to delay this case and cost the other creditors more money. Like the rest of the arguments in the Receiver's Memorandum, this "concern" is unfounded and disingenuous. First, with respect to

slowing the proceeding and costing the creditors money, if the Receiver had allowed the Mauzy Law Firm to produce the documents, the documents would have been produced at no expense to the creditors or the Receiver. The only delay and expense has been caused by this Motion.

Second, the Receiver fails to point to one specific reason why the documents are not relevant to these proceedings, instead choosing to rely on broad allegations regarding the factual disputes in this litigation. Nonetheless, as the Receiver well knows, the standard on this Motion is not whether the documents sought are relevant to the claims or defenses, but whether the documents sought are likely to lead to the discovery of admissible evidence. All of the requests are directed to documents which in any way discuss any of the indentified parties to this action, the Receiver, the U.S. Attorney and the Investor Respondents. Quite frankly, the Investor Respondents would have been committing malpractice if they had not served document requests seeking the production of such records.

Finally, given the Receiver's lack of standing to make this Motion and lack of any concrete factual basis to support the Motion – i.e., any privilege or personal right – coupled with the Receiver's aggressive efforts to obtain monies from the Investor Respondents in a summary proceeding that the Investor Respondents have consistently argued is outside this Court's subject matter jurisdiction and the Receiver's consistent attempts to hurry this matter while limiting discovery and issues for trial, the Investor Respondents are left with only one logical rationale for the Receiver to bring this Motion: The Receiver has documents subject not only to the Investor Respondents' discovery

requests to the Receiver, but also the subpoena to the Mauzy Law Firm, which the Receiver intends not to produce because the documents exculpate the Investor Respondents.

There is simply no other logical rationale for the Receiver's Motion and the Receiver's Motion should be denied.

**E. Under Rule 26, The Court Should Award Fees to the Investor Respondents For Having to Defend Against This Motion.**

As set forth above, the Receiver has no standing to bring this Motion and it appears the Motion was brought in effort to keep relevant documents from being produced to the Investor Respondents. Under Rule 26, the Court is authorized to award the Investor Respondents their expenses and attorney fees for responding to this Motion. The Investor Respondents request that the Court authorize an award of attorney fees and authorize the Investor Respondents to present an application for such attorney fees in responding to this Motion.

**CONCLUSION**

For the reasons set forth above, the Receiver's Motion to Quash should be denied.

DATED: December 10, 2010

**MOHRMAN & KAARDAL, P.A.**

s/ William F. Mohrman

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