

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

United States Securities
and Exchange Commission,

Plaintiff,

MEMORANDUM OPINION
AND ORDER

v.

Civil No. 09-3333 (MJD/JJK)

Trevor Cook, d/b/a Crown
Forex, LLC and Patrick J. Kiley,
d/b/a Crown Forex, LLC et al.,

Defendants.

U.S. Commodity Futures
Trading Commission,

Plaintiff,

v.

Civil No. 09-3332 (MJD/JJK)

Trevor Cook, d/b/a Crown
Forex, LLC and Patrick J. Kiley,
d/b/a Crown Forex, LLC et al.,

Defendants.

John E. Birkenheier, Adolph J. Dean, Jr., Steven L. Klawans and Justin M Delfino, and Robyn A. Millenacker, Assistant United States Attorney, Counsel for Plaintiff United States Securities and Exchange Commission ("SEC").

Susan Gradman and David Slovick, Commodity Futures Trading Commission and Robyn A. Millenacker, Assistant United States Attorney,

Counsel for Plaintiff United States Commodity Futures Trading Commission (“CFTC”).

William J. Mauzy and Piper Kennedy Webb, Counsel for Defendant Trevor Cook.

This matter is before the Court upon the SEC’s and the CFTC’s motion for an order to show cause why Defendant Trevor Cook should not be held in contempt of the asset freeze orders issued in both cases.

Background

On November 23, 2009, the SEC and CFTC moved the Court for preliminary injunctive relief against the Defendants and Relief Defendants based on allegations that the Defendants conducted a fraudulent investment scheme by which they had taken at least \$190 million from at least 1,000 victims. (Comp. ¶ 1.) In support of their motion for preliminary injunctive relief, the government offered the declaration of Scott Hlavacek, an Accountant with the SEC’s Regional Chicago Office. (Doc. No. 4 (Hlavacek Declaration¹)). As part of the SEC’s investigation into Trevor Cook and Patrick Kiley and other named entities, Hlavacek reviewed a number of documents, including bank records. (Id. ¶ 3.)

¹Admitted as Ex. 21 at the Preliminary Injunction evidentiary hearing on December 4, 2009.

From his review of bank records and other documents, Mr. Hlavacek determined that from July 2006 through July 2009, the Defendants' bank accounts received at least \$190 million from at least 1,000 investors. (Id. ¶ 38.) Mr. Hlavacek further determined that from August 2006 through July 2009, Cook and Kiley used \$108 million of the investors' money to fund banking and trading accounts, and to trade in foreign currencies. (Id. ¶ 39.) Hlavacek further determined that Cook and Kiley used \$42.8 million of investors' money for their own use: \$18 million was diverted to buy ownership interests in two trading firms; \$12.8 million to finance the construction of a casino in Panama; \$4.8 million that Cook lost through gambling; \$2.8 million that Cook used to acquire the Van Dusen mansion; \$2.7 million withdrawn in cash and cashier's checks; \$1.3 million to make payments to lawyers; \$1 million to a private investment firm; and \$1 million to pay personal credit cards and bank payments. (Id.)

Based in part on Hlavacek's declaration, this Court issued the initial asset freeze orders on November 23, 2009. By the Order entered in the SEC's case, Civil No. 09-3333, all assets of the Defendants and Relief Defendants, in whatever form and wherever located, were frozen. In addition, Defendants were restrained from, directly or indirectly,

transferring, selling, encumbering, receiving, changing, pledging, assigning, liquidating, incurring debt upon (such as mortgage or credit card debt), or otherwise disposing of, or withdrawing, any funds, accounts, or other assets (including, but not limited to, funds, accounts, insurance policies, real estate, automobiles, marine vessels, contents of safe deposit boxes, precious metals, other personal property, cash, securities, free credit balances, fully paid-for securities, and/or property pledged or hypothecated as collateral for loans, and all other assets) owned by, controlled by, held for the benefit of, or in the possession of the Defendants.

Defendants were further ordered to repatriate any funds or assets held in foreign banks or transferred out of the United States. Further, Defendants were ordered to provide to the SEC a sworn accounting of the assets, funds and property, from the Defendants' receipt of money from members of the public related to foreign currency trading activities, the amount and location of assets and funds and the uses to which such funds were put. (Doc. No. 14.)

Also in the SEC case, the Court issued an Order appointing a Receiver over the Defendants and Relief Defendants, referred to herein as the Receiver Entities, which includes the estates of Trevor Cook and Patrick Kiley, UBS Diversified Growth LLC, Universal Brokerage FX Management, LLC, Oxford Global Advisors, LLC, Oxford Global Partners, LLC, Basel Group, LLC, Crown Forex, LLC, Market Shot, LLC, PFG Coin and Bullion, Oxford Developers, S.A., Oxford

FX Growth, LP, Oxford Global Managed Futures Fund, L.P., UBS Diversified FX Advisors, LLC, UBS Diversified FX Growth L.P. and UBS Diversified FX Management, LCC, Clifford and Ellen Berg, and every other corporation, partnership trust and/or other entity which is directly or indirectly owned by or under the control of Cook and Kiley. (SEC Doc. No. 13.)

In the Order issued in the CFTC's case, Civil No. 09-3332, Cook was "restrained and enjoined from directly or indirectly withdrawing, transferring, removing, dissipating, selling, alienating, liquidating, encumbering, pledging, leasing, loaning, assigning, concealing, converting, or otherwise disposing of any funds, assets or other property, wherever located, including funds, property or assets held outside the United States." (CFTC Doc. No. 21.) By this Order, the Court also appointed a Receiver to take custody, control and possession of all funds, property and other assets in the possession or under the control the Defendants. (Id.) The Order further required Defendants to turn over to the Receiver all funds and assets belonging to customers or commodity pool participants, as well as precious metals, other commodities funds and other assets belonging to members of the public now held by the Defendants. (Id.)

After the evidentiary hearing on the government's motions for a preliminary injunction, Cook agreed to be subject to asset freeze orders, and Agreed Orders were entered on December 8, 2009. Pursuant to the Agreed Orders, Cook was subject to the same restraints as contained in the temporary orders discussed above. (SEC Doc. No. 77; CFTC Doc. No. 52.)

On December 10, 2009, both the SEC and the CFTC moved the Court for an order to show cause as to why Defendant Trevor Cook should not be held in civil contempt of the Asset Freeze Orders based on the following:

- 1) On December 1, 2009, Cook obtained \$2,700 in gift cards from the Cub Foods store in Eagan by charging such purchase to a Barclay's credit card;
- 2) On December 3, 2009, Cook incurred purchases at the same Cub Foods store totaling \$2,784.51 using the Barclay's credit card;
- 3) Thousands of dollars were charged to Target Stores to obtain gift cards using the same Barclay's credit card used at the Cub Foods Store;
- 4) On October 20, 2009, Cook sold a car to Morrie's Motors and received a cashier's check in the amount of \$37,500. Neither the money nor an accounting was turned over to the Receiver as required by the Agreed Orders;
- 5) On October 15, 2009, Cook sold a car to Premier Marketing and received

a cashier's check in the amount of \$16,500. Neither the money nor an accounting was turned over to the Receiver as required by the Agreed Orders; and

6) On July 2, 2009, Cook withdrew \$600,000 from the Oxford Global FX, LLC account at Associated Bank. Neither the money nor an accounting was turned over to the Receiver as required by the Agreed Orders.

In addition, the government asserts that Cook has not repatriated assets held in foreign countries, as required by the Asset Freeze Orders, has not turned over investor funds held in domestic institutions and has not produced an accounting detailing the receipt and disbursement of investor funds or identifying the assets and liabilities of the Receiver Entities.

An evidentiary hearing on the governments' motions to show cause was held on January 8, 2010 and on January 12, 2010.

Findings of Fact

A. Notice of the Asset Freeze Orders

Evidence was presented to the Court that on November 24, 2009 at the Van Dusen mansion, Cook was handed copies of the Court's November 23, 2009 Asset Freeze Orders, and that the Court-Appointed Receiver, RJ Zayed, went through the Orders with Cook and pointed out its key provisions. (Tr. 59-60, 215.) In

addition, on November 25, 2009, Cook's lawyers received copies of the Asset Freeze Orders and the Order Appointing a Receiver by Federal Express. (Ex. 15 and 37; Tr. 122-24, 217-18.) Based on this evidence, it is clear that Cook had actual notice of the Asset Freeze Order as of November 24, 2009.

Cook argues that he was not legally served the November 23, 2009 Orders until December 3, 2009. However, Rule 65(d) of the Federal Rules of Civil Procedure provides that persons bound by injunctive orders are those "who receive actual notice of it by personal service or otherwise." This language "makes it clear the amenities of original process need not be followed." Wright & Miller, *Federal Practice & Procedure* § 2956 (2007.) The Eighth Circuit has held that a person had actual notice, and thus bound to an injunctive order, when the injunctive order was mailed to him, and he was informed of the order by phone. Matter of Carter, 691 F.2d 390, 391 (8th Cir. 1982).

Accordingly, the Court finds that Cook was bound by the November 23, 2009 Orders as of November 24, 2009, when a copies of said Orders were shown to Cook, and the relevant portions of the Orders were explained to him by the Receiver.

B. Control of Investor Funds

At the evidentiary hearing, the government again presented the testimony of Scott Hlavacek. Hlavacek testified that in this capacity, he traced the bank records of Trevor Cook and the Receiver Entities. (Tr. 122.) In reviewing bank records of Cook's personal account, Hlavacek determined that from July 2006 through October 2009, approximately \$19 million was deposited into Cook's personal account. (Tr. 129.) Of this amount, approximately \$18.8 million came from the accounts of the Receiver Entities, \$300,000 was directly deposited from investor contributions and \$355,000 was received from sources other than investor funds. (Id.)

Hlavacek also testified that he reviewed bank records from Wells Fargo and Associated Bank for the accounts of the Receiver Entities. From his review of these records, he created summaries. (Tr. 122.) Through a review of these accounts, Hlavacek determined that Cook was the signatory on several accounts maintained by the Receiver Entities, including Market Shot, LLC, Oxford Global FX, LLC, Oxford Global Investments, LLC and Oxford Global Partners, LLC. (Tr. 147-48; Ex. 9.)

The government also presented the testimony of Julia Gilsrud, who worked as an administrative assistant to Patrick Kiley. (Tr. 68.) In this position, she also provided administrative support to Trevor Cook. (Id.) As part of her duties, she would keep track of investor funds that were received, and would deposit such funds into the bank accounts indicated on the paperwork that accompanied the investor funds. (Tr. 68-69.) She also wired funds at the direction of Cook or Kiley. (Tr. 69.) Even though Cook was not a signatory to accounts in the name of UBFX, Crown Forex and Basel Group, she would nonetheless transfer funds to and from such accounts at the direction of Cook. (Tr. 70.) For one particular account, in the name of UBFX, Gilsrud used a stamp of Patrick Kiley's signature, and she further testified that Cook also had a stamp with Kiley's signature. (Tr. 71.)

In reviewing the bank records, Hlavacek also determined that funds from the accounts of the Receiver Entities were transferred to offshore accounts. (Exs. 1-5.) He further determined that funds held in accounts over which Cook was not a signatory were transferred to offshore accounts held in his name or for his benefit, or in the name of entities he did control. (Tr. 136-37, 147-48; Exs 1-5, 9 and 13.)

The bank records reviewed by Hlavacek indicate that from August 2006 through July 2009, a total of \$46,401,929 was transferred to certain offshore

accounts. Of this total, \$3,065,374 was transferred offshore after June 22, 2009 - the date upon which the SEC served an investigative subpoena on Cook. \$42,801,929 was transferred from accounts held by several Receiver Entities and the remaining \$3,600,00 was transferred from Cook's personal account. The offshore accounts at issue are located in Denmark, the Middle East, Sweden, Switzerland, Germany and Central America. (Exs. 1-5.)

In reviewing these bank records, Hlavacek was also able to prepare schedules, and from those schedules, a summary of the funds transferred from the various Receiver Entities' accounts that remain unaccounted for at this time. (Tr. 127; Ex. 1.) For example, Hlavacek determined that \$12,123,529.37 is unaccounted for and not returned from the Crown Forex accounts located in Switzerland. (Id.; Exs. 1 and 2.) The total amount of investor funds, transferred to the offshore accounts, that is unaccounted for is \$27,061,728.35. (Id.; Ex. 1-5.)

1. Crown Forex Account

With respect to the monies unaccounted for that were transferred to the Crown Forex account in Switzerland, Cook argues that the government has failed to show that Cook had possession of such funds when the Asset Freeze Orders were issued. At the evidentiary hearing, however, Hlavacek testified as to

documents he reviewed from the Swiss government concerning Crown Forex, S.A. (Tr. 130-32.) These documents, prepared by the financial regulators in Switzerland, referred to as FINMA, provided that “[t]he shareholders of Crown Forex SA are Trevor Cook, of Burnsville, USA [holder of] 51% [of the shares], and Ibrahim Hasanien [holder of] 49% [of the shares].” (Ex. 13, p. 3.) Contrary to Cook’s assertions, the Court finds that the government has met its burden of demonstrating that Cook did possess such funds at the time the Asset Freeze Orders were issued.

Cook was asked at the evidentiary hearing as to location of the unaccounted for \$12 million that had been transferred to the Crown Forex account in Switzerland from the accounts of Cook and other Receiver Entities. In response, Cook asserted his Fifth Amendment privilege. (Tr. 159.)

2. Saxo Bank

With regard to monies transferred to Saxo Bank, Cook argues that such account is the name of Oxford FX Growth LP, for which Bo Beckman is the registered agent. (See Ex. 3.) The account from which these monies were transferred, however, is subject to the Asset Freeze Order. (SEC Doc. No. 14, p. 6.) In addition, from one of the exhibits attached to the Hlavacek Declaration

submitted in support of the Asset Freeze Order, it appears that funds were transferred from an Oxford Global Advisors account at Voyager Bank to the Oxford FX Growth LP account shortly before the transfers from Oxford FX Growth LP to Saxo Bank. (SEC Doc. No. 4, Ex. 18 (Summary of Beckman Transactions).) Also, Oxford Global Advisors is listed on the wire transfer documents provided in support of the Hlavacek's summary in Exhibit 3. Evidence has been presented to the Court that Cook was one of the principals of Oxford Global Advisors. (See e.g., SEC Doc. 4, Ex. 36 (Deposition of Thomas Richardson).)

The Court further notes that the remaining Saxo Bank accounts listed in Exhibit 3 are in the name of UBS Diversified FX Growth, L.P. Funds were transferred into the Saxo Bank account from the UBS Diversified FX Growth, L.P. account at Wells Fargo, for which Patrick Kiley was the sole authorized signatory. (Hlavacek Decl., ¶ 5(m).) However, Julia Gilsrud provided testimony that Cook routinely directed her to transfer funds from accounts, including UBS accounts, for which he was not a signatory. (Tr. 70.) Accordingly, the Court finds that the government has met its burden of demonstrating that \$9,388,000 transferred to Saxo Bank in the name of UBS Diversified FX Growth, L.P. and Oxford FX Growth

LP are subject to the Asset Freeze Orders.

At the evidentiary hearing, Cook was asked the location of the \$1 million currently unaccounted for, that had been transferred to the Saxo Bank accounts from certain of the Receiver Entities' accounts, to which he asserted his Fifth Amendment privilege. (Tr. 159.)

3. Other Offshore Accounts

With respect to other foreign accounts listed in Exhibit 4, Cook argues the government has not presented any evidence to show that Cook had control of such accounts. The accounts from which the monies were transferred are all subject to the Asset Freeze Orders. (SEC Doc. No. 14.) Hlavacek testified that Exhibit 4 is a summary of a series of transactions out of Cook's personal account and other Receiver Entity accounts to other offshore accounts over which Cook had control, such as Market Shot, Basel Group, and the UBS entities. (Tr. 70 (Gilsrud), 134 and 148 (Hlavacek); Ex. 9.) As discussed above, the Court also finds that the government has put forth evidence of Cook's involvement with Oxford FX Growth. A total of \$9,611,550 was transferred to these accounts, and to date, such funds have not been accounted for or returned. (Tr. 134; Ex. 4 p.1.)

At the evidentiary hearing, Cook was asked whether he controlled the

foreign accounts listed in Exhibit 4. In response, Cook asserted his Fifth Amendment privilege. (Tr. 156.)

4. Offshore Gambling Accounts

Hlavacek also testified that investor funds were also transferred from Receiver Entity accounts to offshore gambling accounts. (Tr. 135-140.) He prepared a summary chart, listing wire transfers from a Wells Fargo UBS Growth LLC account to various offshore gambling accounts totaling \$4,324,874 (Tr. 135; Ex. 5.) The wire transfer documents from which Hlavacek prepared the Exhibit 5 summary indicate a number of wire transfers, initiated by Patrick Kiley, for the benefit of Cook. For example, the third wire transfer included in Exhibit 5 shows that Patrick Kiley initiated a wire transfer in the amount of \$200,000 from the UBS Diversified Growth, LLC account to an account ending in 4794. Next to the account number is "Cook". The remaining wire transfers to the account ending in 4794 do not include Cook's name, yet the government asks the Court to infer all such accounts ending in 4794 are for the benefit of Cook. The Court finds this is a reasonable inference. In addition, with respect to a transfer to Antigua Overseas Bank LTD in the amount of \$183,450, the government submitted additional evidence demonstrating that Cook controlled this account. (Ex. 12)

Cook was asked whether he controlled any of the accounts at these offshore gambling institutions at the evidentiary hearing. In response, Cook again asserted his Fifth Amendment privilege and did not answer the question posed. (Tr. 156.)

5. Transfers to Domestic Accounts

From December 2008 through July 2009, \$2,005,857.88 was transferred from a Crown Forex LLC account at Associated Bank to two domestic financial institutions: Core Alternative Investments and G5 Currency Fund. (Ex. 8.) These funds have not been turned over to the Receiver, nor has an accounting been prepared to show the current status of such funds. (Tr. 61 (Sackreiter), 127, 145-46 (Hlavacek).) While not a signatory on the Crown Forex account, Cook nonetheless exercised control over this account. (Tr. 70 (Gilsrud).)

6. Transfers to Preferred Persons

On June 29, 2009, Cook directed Julia Gilsrud to withdraw \$3,223,600 from the Crown Forex account at Associated Bank, and purchase 14 cashier's checks. (Tr. 74-76 (Gilsrud), Tr. 142 (Hlavacek), Ex. 6.) The cashier's checks were given to Cook. (Tr. 74-75 (Gilsrud).) On June 30, 2009, Cook withdrew \$3,672,672 from a UBS account at Wells Fargo, and used such funds to purchase 11 cashier's checks. (Tr. 142 (Hlavacek); Ex. 6.)

7. Cash Withdrawals - Transfers to Graham Cook

On June 24, 2009 Cook withdrew \$10,000 in cash from the Oxford Global FX account at Associated Bank. (Tr. 149 (Hlavacek); Ex. 7). Cook is the sole member of Oxford Global FX. (Tr. 149.)

On July 2, 2009, Cook withdrew \$600,000 in cash from the Oxford Global FX account at Associated Bank. (Tr. 88-92 (Simon); Ex. 32; Tr. 149 (Hlavacek); Ex. 7.) Cook informed the bank manager that he was going to use the money to purchase a boat. (Tr. 90-91 (Simon); Ex. 32.)

On August 14, 2009, Cook cashed a cashier's check in the amount of \$60,000. (Tr. 149 (Hlavacek); Ex. 7.) This check was also drawn on the Oxford Global FX account at Associated Bank. (Id.)

On July 15, 2009, Cook wired his brother Graham Cook, a total of \$62,000: \$22,000 from the Oxford Global FX account at Associated Bank and \$40,000 from the UB FX Management account at Associated Bank. (Tr. 149; Ex. 7.)

C. Purchase of Gift Cards

From November 21, 2009 through December 3, 2009, Cook used two credit cards to purchase \$7,510 worth of gift cards from Cub Foods. (Exs. 22, 23, 25, 26 and 27; Tr. 103-112 (Nelson).)

From December 1 through 3, 2009, Cook used credit cards to purchase \$16,000 worth of gift cards from Target Stores. (Exs. 16 and 17; Tr. 92-97 (Mahnke).) On December 2, 2009, Gina Cook, Trevor Cook's wife, was observed using a Target gift card. (Ex. 18-21; Tr. 97-101 (Mahnke).)

After the initial show cause order issued on December 11, 2009, Cook turned over five previously undisclosed credit cards, including the Barclay's card, and approximately \$22,000 worth of gift cards.

D. Missing Assets and Records

1. Missing Computer and Documents

Julia Gilsrud testified that the computer she used while working for Kiley and Cook was replaced in July 2009 by Graham Cook. (Tr. 72.) She further testified that Graham Cook provided computer services for the company. (Id.) Before the computer was replaced, she testified that she was told that Trevor and Graham would be looking at her computer, so she was to leave it on at the end of the day. (Id.) The next morning, she noticed that at least one document, and many emails were missing. (Id.) She reported this to Graham, who told her that her computer would be swapped with another computer. (Id.) She further noticed that many paper documents were missing, such as wire transfers, that

were in or around her work area. (Id. 73.)

2. Automobiles

In October 2009, Cook sold a Maserati automobile to a local car dealer for \$37,500. (Tr. 85 (Swenson).) Payment was made by cashier's check made out to Trevor Cook. (Id.; Ex. 29.)

In October 2009, Cook also sold a Hummer automobile to a local car dealer for \$16,000. (Tr. 82 (Plummer).) Payment was made in cash. (Id.)

Cook currently is in possession of three automobiles: a Lexus 430, a BMW and a Lexus SUV. (Tr. 186-88 (Gina Cook), Tr. 201 (Guertin); Ex. 36.)

3. Miscellaneous Assets

In an email to a business associate, Cook stated that he owned a 60 foot houseboat and a submarine. (Ex. 14.)

The Receiver also discovered that Cook owns a collection of Faberge eggs and expensive watches. (Tr. 62 (Sackreiter).)

On November 17, 2009, a credit card statement in the name of Trevor Cook shows that he purchased \$3,459 worth of tickets to a Bon Jovi concert. (Ex. 31; Tr. 62-64 (Sackreiter).)

On December 1, 2009, Cook was seen by a Cub Foods manager with a large

amount of cash. (Tr. 115 (Mulloy).) On January 9, 2010, Cook was again seen by a Cub Foods employee with a large amount of cash, and was seen driving away in a Lexus 430 automobile. (Tr. 206 (Guertin); Exs. 33 and 34.)

Cook was questioned as to each of the items listed above. His only response was to assert his Fifth Amendment privilege. (Tr. 156-158.)

These assets have not been turned over to the Receiver.

Conclusions of Law

The party seeking contempt bears the initial burden of proving, by clear and convincing evidence, that the alleged contemnors violated a court order. Chicago Truck Drivers v. Brotherhood Labor Leasing, 207 F.3d 500, 505 (8th Cir. 2000). If the alleged contemnor is pleading an inability to comply with the Court's Order, the burden is on the contemnor to show an inability to comply. Id. To prove such a defense, the alleged contemnors must establish 1) he is unable to comply, explaining why categorically and in detail; and 2) that his inability to comply was not self-induced. Id. at 506.

There is no requirement that the Court find its Order was willfully or intentionally violated. "If the acts done are clearly in contravention of the court's decree, the intention is of no consequence." Nat'l Labor Rel. Bd. v. Ralph Printing

& Lithographing Co., 433 F.2d 1058, 1062 (8th Cir. 1970); United States v. Ofe, 572 F.2d 656, 657 (8th Cir. 1978) (“Willfulness need not be proven in civil, as opposed to criminal, contempt proceedings.”)

The CFTC and the SEC assert they have met their burden of making a prima facie showing that Cook repeatedly violated the Court’s Asset Freeze Orders. The evidence shows that Cook had actual notice of the Asset Freeze Orders as of November 24, 2009. In addition, the government cites to the evidence that Cook dissipated, transferred or otherwise encumbered, large sums of cash and valuable tangible assets that can be traced back to investors funds. Cook has failed, however, to provide an accounting of such funds, or to repatriate or turn over such funds to the Receiver. Finally, the government asserts that the evidence establishes that Cook continues to violate the Court’s Orders by refusing to surrender any assets and the millions of dollars within his control or to cooperate with the Receiver’s efforts to marshal assets.

The government further argues that in light of Cook’s repeated assertions of his Fifth Amendment privilege to remain silent, the government is entitled to an adverse inference. Baxter v. Palmigiano, 425 U.S. 308, 318-20 (1976); Pagel v. SEC, 803 F.2d 942, 946-47 (8th Cir. 1986). Taken together, the adverse inference and the

clear and convincing evidence produced at the evidentiary hearings compel the conclusion that Cook is in contempt of the Asset Freeze Orders. The burden then shifts to Cook to show his inability to purge his contempt. See Chicago Truck Drivers, 207 F.3d at 505; Armstrong v. Guccione, 470 F.3d 89, 99 (2nd Cir. 2006).

The government asserts that Cook has failed to meet this burden.

In response to the motions of the SEC and the CFTC, Cook did not offer any evidence as to his present inability to comply with the Asset Freeze Orders. Instead, Cook argues that he should not be held in contempt for failing to provide an accounting, turn over assets or to repatriate such assets transferred overseas, because such acts would compel him to incriminate himself in violation of his Fifth Amendment privilege to remain silent.

In support, Cook cites to Curcio v. United States 354 U.S. 118 (1957) for the proposition that the Court cannot punish a refusal to answer questions with a contempt sanction when the subject of interrogation properly invokes the Fifth Amendment. Cook's reliance on Curcio is misplaced, however, as to his role as corporate custodian.

In Curcio, the Supreme Court addressed the issue of whether the secretary-treasurer of a local union could invoke his Fifth Amendment privilege by refusing

to answer federal grand jury questions as to the whereabouts of union books and records. The Court first noted that it is settled law that a corporation is not protected by the constitutional privilege against self-incrimination. Id. 354 U.S. at 122. This is true even after the corporation is dissolved. Id. “[B]ooks and records of corporations cannot be insulated from reasonable demands of governmental authorities by a claim of personal privilege on the part of their custodian.” Id. This principle was later applied to labor unions. Id. at 1148-49 (citing United States v. White, 322 U.S. 694 (1944)). The Court further noted that

when acting as a representative of a collective group [such individual] cannot be said to be exercising their personal rights and duties nor to be entitled to their purely personal privileges. . . . In their official capacity, therefore, they have no privilege against self-incrimination. And the official record and documents of the organization that are held by them in a representative capacity cannot be the subject of the personal privilege against self-incrimination, even though production of the papers might tend to incriminate them personally.

Id. at 123 (quoting White 322 U.S. at 699).

Because corporations or other entities are not afforded any Fifth Amendment privileges, the Supreme Court has determined that a corporate custodian may not invoke the Fifth Amendment in order to refuse to surrender corporate records. See Braswell v. United States, 487 U.S. 99, 109 (1988) (finding

that “the custodian’s act of production is not deemed a personal act, but rather an act of the corporation. Any claim of Fifth Amendment privilege asserted by the agent would be tantamount to a claim of privilege by the corporation-which of course possesses no such privilege.”) The Second Circuit thereafter extended the ruling in Braswell to the production of corporate assets. Armstrong, 470 F.3d at 94 (finding that corporate custodian can be compelled to produce the companies’ records and assets; and that such corporate custodian cannot escape production by relying on the Fifth Amendment). See also, SEC v. Aquacell Batteries, Inc., No. 6:07-cv-Orl-22DAB, 2008 WL 495372, at *4 (M.D. Fla. Feb. 20, 2008) (ordering corporate custodian to turn over corporate computers, finding no valid Fifth Amendment privilege applies to the Receiver’s collection of such assets).

Cook is thus not excused from complying with the Asset Freeze Orders by his assertion of the Fifth Amendment, where the assets and funds to be produced belong to corporations or other entities created by Cook, and over which he exerted control. See also SEC v. Universal Express, Inc., 546 F. Supp.2d 132, 135-36 (S.D.N.Y. 2008); SEC v. Princeton Econ. Int’l Ltd., 152 F. Supp.2d 456, 459 (S.D.N.Y. 2001). This principle applies to limited liability companies and limited partnerships. See Bellis v. United States, 417 U.S. 85, 100-01 (1974); SEC v. Brown,

Civil No. 06-1213, 2007 WL 4192000 (D. Minn. July 16, 2007). Based on the Court's findings of fact herein, the Court finds that Cook is properly deemed the custodian of the assets and funds held in the name of the various Receiver Entities.

By simply asserting the Fifth Amendment privilege in response to the motions to show cause, Cook has failed to meet his burden of demonstrating his present inability to comply with the Asset Freeze Orders. United States v. Rylander, 460 U.S. 752, 758 (1983).

But while the assertion of the Fifth Amendment privilege against compulsory self-incrimination may be a valid ground upon which a witness such as Rylander declines to answer questions, it has never been thought to be in itself a substitute for evidence that would assist in meeting a burden of production.

Id. at 758.

The obligation to turn over assets includes entity assets acquired with funds obtained from the entities' accounts. Cook remains custodian of such assets even though a Receiver has been appointed to protect such assets. Armstrong, 470 F.3d at 99. Cook also has an obligation to turn over and repatriate assets, and meeting such obligation does not require him to take any testimonial actions. Id. at 110.

While Cook cannot be required to prepare a personal accounting, he can be

required to direct that an accounting be prepared on behalf of the entities he controls. SEC v. Dunlap, 253 F.3d 768, 776 (4th Cir. 2001).

Finally, Cook's burden cannot be met by producing self-serving, uncorroborated statements to prove his present inability to comply with the Court's order. Princeton, 152 F. Supp.2d at 460; U.S. ex rel. Thom v. Jenkins, 760 F.2d 736, 740 (7th Cir. 1985). Where the Court finds that a defendant could, at some time in the past, have complied with a court order, the Court can presume a present ability to comply. Id. (citing Rylander, 460 U.S. at 757).

Based on the above, the Court hereby finds that the government has demonstrated, by clear and convincing evidence, that Cook has violated, and continues to violate, the applicable Asset Freeze Orders. The government has demonstrated that the funds in the accounts listed in the Asset Freeze Order can be traced to investors. Such funds are thus subject to the Asset Freeze Orders, which require the funds be repatriated, turned over or that an accounting be prepared identifying the amount and location of assets and funds.

In addition, the government has demonstrated that Cook had control of such accounts and the corporate entities in whose names such accounts were created, and did so at the time the Asset Freeze Orders were issued. The Court

will also draw an adverse inference against Cook based on his assertion of the Fifth Amendment with respect to all questions concerning the control of the funds and assets at issue, or the current status of such funds. Baxter, 425 U.S. at 318-20.

The government further demonstrated that Cook's only source of income - from 2006 through 2009 - was investor funds. Accordingly, any assets in his possession, purchased with investor funds, are subject to the Asset Freeze Orders and must be surrendered to the Receiver. SEC v. Byers, 637 F. Supp. 2d 166, 177 (S.D.N.Y. 2009) (citing SEC v. Better Life Club of Am., Inc., 995 F. Supp. 167, 181 (D.D.C. 1998) (“[W]hen legitimate assets are co-mingled with illegitimate ones such that the assets cannot be separated out, a constructive trust may extend over the entire asset pool.”)).

The same is true for the proceeds of any assets sold, where the asset was purchased with investor funds. Thus, the proceeds from the sale of the Maserati and the Hummer are subject to the Asset Freeze Orders. The Court further finds that Cook violated the Asset Freeze Orders by purchasing thousands of dollars of gift cards after said Orders were issued.

The SEC and CFTC ask that the Court incarcerate Cook until such time as he complies with the provisions of the Asset Freeze Order. See Singh v. Capital

Univ. Law & Graduate Ctr School, 238 F.3d 424, 2000 WL 1720616 (6th Cir. 2000)

(finding that “incarceration has long been established as an appropriate sanction for civil contempt”) (citing Hicks on Behalf of Feiock v. Feiock, 485 U.S. 624, (1988)). Incarceration will be deemed remedial if the defendant stands committed unless and until he performs the affirmative act required by the court's order.

Given the amount of investor money at issue, and Cook’s repeated violations of the Asset Freeze Orders, the Court finds that the appropriate remedy for the contempt finding in this case is to incarcerate Cook until such time as he purges such contempt.

IT IS HEREBY ORDERED that Defendant Trevor Cook is hereby in contempt of this Court’s Asset Freeze Orders. [SEC Doc. Nos. 14 and 52; CFTC Doc. Nos. 21 and 77] Defendant Trevor Cook shall immediately be taken into custody by the United States Marshal for the District of Minnesota to be incarcerated until such time as he purges himself of the contempt as follows:

1) repatriate and surrender to the Receiver \$27,061,728.35 from the offshore accounts; 2) surrender to the Receiver \$670,000 in cash; 3) recover and surrender to the Receiver \$62,000 Cook transferred to his brother in July 2009; 4) recover and surrender to the Receiver \$6,141,470 that Cook paid to preferred persons in late

June 2009; 5) take appropriate steps to turnover \$2,005,857.88 that Cook transferred to domestic accounts; 6) surrender to the Receiver \$53,500 that Cook received from the sale of the Maserati and Hummer in October 2009; 7) surrender to the Receiver the computer, emails and wire transfer confirmations taken from Julia Gilsrud in July 2009; 8) surrender the houseboat and submarine to the Receiver; 9) surrender the BMW, Lexus 430 and Lexus SUV that remain in Cook's possession; 10) surrender to the Receiver the Bon Jovi concert tickets purchased in November 2009, Cook's collection of Faberge eggs and watches; and 11) take appropriate steps to ensure compliance with the Court's Asset Freeze Orders by those Receiver Entities of which he is a principal.

Date: January 25, 2010

s/ Michael J. Davis _____
Michael J. Davis
Chief Judge
United States District Court