UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

U.S. Commodity Futures
Trading Commission,

Plaintiff,

v.

MEMORANDUM OPINION
AND ORDER
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.

United States Securities
and Exchange Commission,

Plaintiff,

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.

Susan Gradman, Senior Trial Attorney, Commodity Futures Trading Commission and Robyn A. Millenacker, Assistant United States Attorney, Counsel for Plaintiff United States Commodity Futures Trading Commission ("CFTC").

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").

Christopher W. Madel, Robins, Kaplan, Miller & Ciresi L.L.P, Counsel for The Law Office of William J. Mauzy and William J. Mauzy.

Peter B. Wold, Peter B. Wold P.A., Counsel for Patrick Kiley.

John D. Thompson, Oberman Thompson & Segal, LLC, Counsel for Trevor Cook.

This matter is before the Court upon the motions of The Law Office of William J. Mauzy and William J. Mauzy, The Law Office of Oberman Thompson & Segal, LLC, and the law firm Peter B. Wold, P.A., (collectively "the Movants") for clarification that the Court's November 23, 2009 Asset Freeze Orders (SEC Doc. No. 14 and CFTC Doc. No. 21) do not apply to the fees they obtained pursuant to nonrefundable, earned-upon-receipt or flat fee agreements with their respective clients. The CFTC and SEC oppose the motions.

A. Background

1. Asset Freeze Orders dated November 23, 2009

The Court's November 23, 2009 Asset Freeze Order in the SEC case froze "all funds held for the benefit of the Defendants and/or Relief Defendants by the

following law firms . . . Oberman Thompson & Segal, LLC . . .; Law Offices of William J. Mauzy . . .; Peter B. Wold, P.A. . . ." (SEC Doc. No. 14 at 7.) The Asset Freeze Order issued in the CFTC case required any person or entity served with a copy of said order to deliver to the Receiver "[p]ossession and custody of all funds and all other assets, belonging to customers or commodity pool participants as described in the complaint . . ." (CFTC Doc. No. 21 at 9.)

2. The Law Office William J. Mauzy and William J. Mauzy ("Mauzy")

On June 23, 2009, Mauzy and Defendant Trevor Cook executed an Agreement as to Retainer, Fees and Expenses. Another Agreement as to Retainer, Fees and Expenses was executed on August 19, 2009 which contained identical terms but with a larger fee obligation. Both agreements provide for non-refundable, earned-upon-receipt retainers to secure Mauzy's availability and to provide representation in the SEC case, and in a related criminal investigation. The agreements further provide that the fees would be deposited in Mauzy's business account, as opposed to a client-trust account.

3. Peter B. Wold, P.A. ("Wold")

On July 3, 2009, Wold and Defendant Patrick Kiley executed an Agreement as to Retainer, Fees and Expenses. This agreement provides for a non-

refundable, minimum payment for the retention of Wold's representation in matters relating to the SEC investigation and to any potential criminal investigation. (Wold Ex. 1.) The agreement further provides that costs associated with the case would be billed monthly against the cost retainer. (Id.)

4. The Law Office of Oberman Thompson & Segal, LLC ("OTS")

On June 24, 2009, the OTS law firm and Cook entered into a non-refundable retainer fee agreement by which OTS would serve as general counsel with respect to any civil action relating to government investigations into the companies with which Cook may have an affiliation, e.g., Oxford Global Partners, LLC, Universal Brokerage FX, Inc. (Thompson Affidavit, Ex. A.) The agreement provided for a certain sum of money, which would be deposited into OTS's general business account. (Id.) The agreement further provided the fee was a "flat-rate" fee based on the degree of difficulty of the case, expectations of the client and the necessity of declining other work. (Id.) The fee was also to cover routine costs and expenses, such as secretarial and paralegal expenses, couriers, local travel, and long distance phone calls. (Id.)

On July 7, 2009, OTS entered into an additional retainer to perform work on an hourly basis in response to the commencement of a related civil action,

Phillips v. Cook et al., Civ. No. 09-1732, because such suits were outside the scope of the first agreement. (Thompson Aff. ¶ 14; Ex. D.) This agreement required Cook to pay a retainer, which would be kept in the trust account, and which would be applied to the final accounting. (Id.) The amounts paid under this agreement were paid from the trust account to OTS's business account by October 12, 2009. (Thompson Aff. ¶ 16.)

On October 9, 2009, OTS and Cook revised their fee arrangement. (Id. ¶ 18; Ex. F.) As an accommodation to Cook, OTS agreed to represent Cook in the Phillips action, at no additional charge, and agreed to represent Cook in other ancillary state court actions, on a contingency fee basis. (Id.) Thereafter, OTS ceased representing Cook with respect to the government investigations. (Id.)

B. Whether the Fees Are Subject to Asset Freeze Order

The Movants argue that the retainer fees paid them by their clients were not being held in trust for the Defendants and/or Relief Defendants as such fees were paid pursuant to either a non-refundable, earned-upon-receipt fee agreements, or that the fees were earned by the time the Asset Freeze Orders were issued.

Minnesota law clearly recognizes nonrefundable, earned-upon-receipt fee

agreements. See In re Lochow, 469 N.W.2d 91, 98 (Minn. 1991); Bunker v. Meshbesher, 147 F.3d 691, 695 (8th Cir. 1998). Minnesota Rule of Professional Conduct 1.5(b) provides that "[a]ll agreements for the advance payment of nonrefundable fees to secure a lawyer's availability for a specific period of time or a specific service shall be reasonable in amount and clearly communicated in writing signed by the client." Thus, as long as the retainer agreement is in writing, and its terms are deemed reasonable, the courts will recognize a non-refundable retainer that seeks to secure the availability of an attorney or the provision of specific services by an attorney.

Here, the Court has reviewed the fee retainer agreements at issue, and finds that the fees charged are reasonable in light of the work to be performed. This is a complex case involving a large conspiracy and scheme to defraud that can easily consume thousands of hours of attorney's time. With regard to criminal representation, the Court notes that recent complex criminal defense matters have charged fees more than four times the amount charged by Mauzy. (Decl. of Casey T. Rundquist at ¶¶ 3-5 & Exhibit A (defense team in Petters case received over $3 million in court-approved fees after asset freeze).) Similarly, Wold and Kiley entered into a fee agreement to secure representation for Kiley

relating to the SEC investigation of Kiley, UBS Growth, and UBFX, as well representing Kiley through the ongoing investigation, pre-indictment. Given the services provided thereunder, the fees charged by Wold were reasonable.

Finally, the Court finds that the fees charged by OTS were reasonable. OTS's representation of Cook required large amounts of time and labor - as the allegations describe a $190 million Ponzi scheme, with international scope, involving a complex arbitrage currency scheme. Thompson's hourly rate is $375 per hour, and this is a reasonable rate, given his experience, reputation and ability.

Both the SEC and the CFTC ask the Court to find that Mauzy, Wold and OTS be not allowed to retain the fees paid because the source of such funds are likely the fruits of Cook's and Kiley's fraud, and that counsel knew or should have known that such funds were likely obtained by fraud. The SEC conducted a surprise walk-in of Cook's offices in mid June 2009 and the CFTC issued a subpoena to Oxford Global Partners, LLC in care of Cook in June 2009 as well. Additionally, a civil lawsuit was filed in July 2009 against Cook, Kiley and others in which the plaintiffs alleged fraud. Cook filed a motion to stay the SEC investigation pending a criminal investigation, and numerous articles have

appeared in newspapers detailing the alleged fraud. Under these circumstances, the CFTC and the SEC argue that counsel was aware of sufficient facts to put them on notice that the source of the fees paid were from defrauded customers. Therefore, the funds paid over to counsel should be deemed subject to the November 23, 2009 Asset Freeze Order. See S.E.C. v. Princeton Economic Int'l. Ltd., 84 F. Supp. 2d 443, 447 (S.D.N.Y. 2000) (citing Gala Enters. Inc. v. Hewlett Packard Co., 989 F. Supp. 525 532 (S.D.N.Y. 1998) ("A lawyer who blindly accepts fees from a client under circumstances that would cause a reasonable lawyer to question the client's intent in paying the fees accepts the fees at his peril.").

The Court disagrees. When the fee retainer agreements were entered into, the SEC's and CFTC's investigations had only begun, and no criminal investigation had commenced. The same is true for the civil lawsuit. In July 2009, the record in the civil suit contained only pleadings and limited evidence. Under these circumstances, the Court will not find that counsel knew or should have known that the source of the funds paid were from a fraudulent scheme. Where an attorney reasonably relies on representations made to him/her by the client about the funds, and the attorney provided services for a reasonable fee, the attorney is entitled to retain such funds. See Nat'l Credit Union Admin. Bd., 133

F.3d 1097, 1102-03 (8th Cir. 1998).

The Court further notes that the cases relied upon by the government are all factually distinguishable. For example, the S.E.C. v. Princeton case is inapposite because the agreement at issue was a refundable fee agreement. 84 F. Supp.2d at 444-47. The government also relied on S.E.C. v. Comcoa, Ltd., 887 F. Supp. 1521, 1525 (S.D. Fla. 1995). Comcoa, however, involved a lawyer that moved funds from a trust account to his business account *after* the freeze order had issued, and drafted a fee agreement where the funds in this account would become nonrefundable upon the institution of an SEC enforcement action. Id. 887 F. Supp. at 1523-24. There is no dispute that all of the agreements at issue were entered into months before the Asset Freeze Orders were issued.

The Court thus finds that the fees paid pursuant to the fee retainer agreements with Mauzy, Wold and OTS are not subject to the Asset Freeze Orders as such fees were not being held in trust for their respective clients when such Orders issued.

IT IS HEREBY ORDERED that the Motions for Clarification of the Courts Asset Freeze Orders dated November 23, 2009 (SEC Doc. Nos. 23, 39 and 40; CFTC Doc. Nos. 31, 66 and 73) are GRANTED.

This Court hereby clarifies its November 23, 2009 Orders (SEC Doc. No. 14, CFTC Doc. No. 21) do not apply to the nonrefundable, earned-upon receipt fee agreements specifically identified in this Memorandum and Order with The Law Office of William J. Mauzy, The Law Office of Oberman Thompson & Segal, LLC and the law firm Peter B. Wold, P.A. or the fees received pursuant to those agreements.

The Court further clarifies that its November 23, 2009 Orders do not apply to other fees and costs received by Oberman Thompson & Segal, LLC prior to the date of the above-referenced Orders, for legal services rendered and costs incurred prior to the date of the above-referenced Orders.

Date: January 27, 2010

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