UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

R.J. ZAYED, In His Capacity As Court-Appointed Receiver For The Oxford Global Partners, LLC, Universal Brokerage, FX, and Other Receiver Entities,

Plaintiff,

vs.

ASSOCIATED BANK, N.A.,

Defendant.

Case No. 13-cv-00232 (DSD-JSM)

Defendant Associated Bank, N.A.'s Memorandum of Law In Support of Its Motion to Compel the Receiver's Designee to Attend the Rule 30(b)(6) Depositions of Crown Forex, LLC and Oxford Global FX, LLC

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Plaintiff R.J. Zayed, as receiver for various entities (the "Receiver"), is suing Associated Bank, N.A. for $91 million, alleging that Associated Bank aided and abetted a large Ponzi scheme. One would expect that a defendant facing a nearly nine-figure damage demand would ask to depose the plaintiff to learn the factual basis for the claims. And one would expect that request to be non-controversial.

The Receiver has balked, claiming that his status as a court-appointed receiver should excuse him—or even someone designated to testify on his behalf—from testifying about the factual basis for his claims. This has been an ongoing issue. At the motion to dismiss stage, the Receiver claimed that his court-appointed status meant that he should not be subject to an *in pari delicto* defense, despite stepping into the shoes of Crown Forex, LLC, Oxford Global FX, LLC, and other companies owned by Trevor Cook and Patrick Kiley (the "Receivership Entities"). *See* ECF No. 73 at 13-14. In discovery, the Receiver refused to answer requests for admission because he is a court-appointed receiver, not the CEO of a going concern. *See* ECF No. 96 at 2. Now, the Receiver has refused to designate a 30(b)(6) witness to testify on behalf of two of the entities in whose shoes he stands, Crown Forex, LLC and Oxford Global FX, LLC.

Receivers are not immune from 30(b)(6) depositions. Indeed, court-appointed receivers in Ponzi-scheme cases routinely testify at depositions

about the factual basis for their claims, and courts often compel those that refuse to do so. *See, e.g.*, *Wiand v. Wells Fargo Bank, N.A.*, No. 12-cv-557, slip op. at 4-5 (M.D. Fla. 2013) (ECF No. 142) (granting defendants' motion to compel Ponzi-scheme receiver to answer depositions questions that are "factual in nature"); *Mosier v. Stonefield Josephson, Inc.*, 2013 WL 4859635, at *7 (C.D. Cal. 2013), *aff'd*, 2016 WL 703104 (9th Cir. 2016) (noting Ponzi-scheme receiver was deposed); *Donell v. Fid. Nat. Title Agency of Nev., Inc.*, 2012 WL 1118944, at *7 (D. Nev. Apr. 2, 2012) (same); *N.Y. Life Ins. Co. v. Waxenberg*, 2009 WL 632896, at *9 n.2 (M.D. Fla. 2009) (same); *Terry v. June*, 2005 WL 3466550, at *4 n.2 (W.D. Va. 2005) (citing Ponzi-scheme receiver's Rule 30(b)(6) deposition). The Eighth Circuit remanded this case for discovery on the question whether "Associated Bank either had actual knowledge of or substantially assisted in the asserted torts." *Zayed v. Associated Bank, N.A.*, 779 F.3d 727, 735 (8th Cir. 2015). That discovery necessarily includes such basic questions as:

- What evidence does the Receiver have that Associated Bank employees knew about the Ponzi scheme?
- What evidence does the Receiver have that Associated Bank employees assisted the Ponzi scheme's principals?

Those are the very questions that Associated Bank needs answered, and the Receiver is the only one who can provide the answers.

As he has done in every other case that has proceeded to discovery, the Receiver has relied on *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986) and refused to testifying about *any* topic. But the plaintiff in *Shelton* wanted to depose the defendant's in-house counsel about documents compiled "from among voluminous files in preparation for litigation," which the Eighth Circuit held was non-discoverable work product. *Shelton*, 805 F.2d at 1326. That is decidedly not the case here. Associated Bank seeks non-legal testimony concerning the factual basis for the Receiver's complaint, discovery responses, and $91 million damage demand. This Court has correctly rejected parties' efforts to advance a "broadbrush view of *Shelton*," and it should do so again here. *Oehmke v. Medtronic, Inc.*, 2015 WL 2242041, at *7 (D. Minn. 2015) (Mayeron, M.J.) (quoting *United States v. Philips Morris, Inc.*, 209 F.R.D. 13, 15 (D.D.C. 2002)).

The testimony that Associated Bank seeks here is precisely the sort of testimony that this Court permitted in *Oehmke*. 2015 WL 2242041, at *8 (distinguishing *Shelton* and denying motion for protective order). Accordingly, Associated Bank respectfully asks the Court to compel the Receiver to designate witnesses to testify on behalf of Crown Forex, LLC and Oxford Global FX, LLC at Rule 30(b)(6) depositions.

BACKGROUND

A. Associated Bank Properly Noticed the Receiver's Rule 30(b)(6) Designees.

On February 23, 2016, Associated Bank served Fed. R. Civ. P. 30(b)(6) notices of deposition on the Receiver in his capacity as the court-appointed receiver for Oxford Global FX, LLC and Crown Forex, LLC. *See* Exs. 1 and 2.[1] These notices included topics on which the Receiver is uniquely positioned to provide relevant, non-legal testimony, such as the factual basis for his denials of certain requests for admission, his interrogatory responses and his damages calculations. *See* Ex. 1 at 3-4.

During a March 18, 2016 meet-and-confer, Associated Bank and the Receiver discussed Associated Bank's Rule 30(b)(6) deposition notice. *See* Medlock Decl. ¶ 6; Ex. 3. The Receiver indicated that he had objections to some, if not all, of the deposition topics. *See* Medlock Decl. ¶ 6. One day *after* the Oxford Global FX, LLC deposition was scheduled to occur and hours before the Crown Forex, LLC deposition was scheduled to begin, the Receiver objected to making *any* witness available to testify on *any* topic. *See* Ex. 4 at 1-2; Ex. 5 at 1-2. Specifically, the Receiver objected to "presenting a witness under Rule 30(b)(6) under the established case law of *Shelton v. American*

[1] "Ex." refers to exhibits to the declaration of Stephen M. Medlock, which has been filed with this motion.

Motors, Corp., 805 F.2d 1323, 1327 (8th Cir. 1986)." Ex. 4 at 1; *see also* Ex. 5 at 1. The Receiver argued that

> The Receiver functions as litigation counsel in this action. The Receiver has an active role in developing litigation strategy. All investigations that were conducted in furtherance of the Receivership—whether into the Ponzi scheme run by Cook and his co-conspirators, transfers that were the subject of investor recovery actions, and matters relating to this case—were conducted by the Receiver, his attorneys, or his agents. Testimony by a Rule 30(b)(6) designee of the Receivership necessarily would involve testimony of one of the Receiver's attorneys or agents or would require the Receiver's attorneys to prepare a witness to testify, disclosing their mental processes and strategies in doing so.

Ex. 4 at 1; *see also* Ex. 5 at 1.

The Receiver's assertion that Associated Bank plans to depose trial counsel regarding litigation strategy is incorrect. The Receiver need not designate his trial counsel to serve as a Rule 30(b)(6) deponent. There are several former employees of the Receivership Entities, excluding the fraudsters themselves, whom the Receiver can designate. Moreover, Associated Bank is not seeking to depose the Receiver's designee regarding legal matters. Associated Bank will seek testimony regarding non-legal matters, including the factual basis for allegations contained in the Receiver's complaint and discovery responses.

To narrow the matters in dispute, Associated Bank is moving to compel testimony from the Receiver in his capacity as court-appointed receiver for

Oxford Global FX, LLC and Crown Forex, LLC on just four topics, which are set out below, along with the Receiver's objection to each topic.

> **Topic 4:** The factual basis for your responses to Associated Bank's First Set of Interrogatories, First Set of Requests for Admission, Second Set of Requests for Admission, and Third Set of Requests for Admission.
>
> **Receiver's Objection:** The Receiver objects to this topic insofar as the premise – that there is or was a "factual basis" for all responses to the above-listed discovery – is false. For example, for numerous requests for admission, the Receiver objected on the legal basis that the request exceeded the scope of Rule 26, and did not otherwise respond. By way of further example, for several interrogatories the Receiver did not respond at all because the Bank had exceeded the number of interrogatories that it had agreed to and that the Court set forth in the discovery plan. Therefore, the Receiver incorporates each of its objections to each item set forth in each of the discovery sets mentioned above in Topic 4. The Receiver also objects to this topic because it is overbroad, unduly burdensome, and not proportionate to the needs of this case. The Receiver also objects to this topic because the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive – namely, through the respective discovery methods themselves. The factual basis for the Receiver's responses to the Bank's First Set of Interrogatories, for example, are set forth in those responses.
>
> **Topic 6:** The factual basis for your damages claims and calculations.
>
> **Receiver's Objection:** The Receiver objects to this topic because the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive – for example, through document (*e.g.*, Interrogatory No. 9, and Request for Production No. 9) and expert discovery.
>
> **Topic 17:** The factual basis for your claim that Associated Bank had actual and/or constructive knowledge of the Ponzi Scheme

> and/or that Associated Bank was willfully blind to the Ponzi Scheme.
>
> **Receiver's Objection:** The Receiver objects to this topic because it is overbroad, unduly burdensome, and not proportionate to the needs of this case. The Receiver also objects to this topic because the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive, including but not limited to, for example, Request for Production No. 7 from the Bank's First Set of Requests for Production and Interrogatory Nos. 6 and 7 from the Bank's First Set of Interrogatories.
>
> **Topic 18:** The factual basis for your claim that Associated Bank provided substantial assistance to the Ponzi Scheme.
>
> **Receiver's Objection:** The Receiver objects to this topic because the discovery sought is unreasonably cumulative or duplicative, or can be obtained from some other source that is more convenient, less burdensome, or less expensive, including but not limited to, for example, Interrogatory No. 10 from the Bank's First Set of Interrogatories.

See Ex. 4 at 3-4, 8-9 (objections to Oxford Global FX, LLC deposition notice); Ex. 5 at 3-4, 8-9 (objections to Crown Forex, LLC deposition notice).

B. Associated Bank Has Complied with Local Rules 7.1 and 37.1.

On April 1, 2016, Associated Bank and the Receiver met and conferred to discuss the Receiver's objections to Associated Bank's Rule 30(b)(6) deposition topics. *See* Ex. 6; *see also* Medlock Decl. ¶ 9. The parties were unable to agree. *See* Ex. 7. The Receiver maintained his position that he should not be required to make any designee available to testify on any topic. *Id.* at 1. Instead, the Receiver offered to answer three additional interrogatories.

LEGAL STANDARD

"It is very unusual for a court to prohibit the taking of a deposition altogether and absent extraordinary circumstances, such an order would likely be in error." *Salter v. Upjohn Co.,* 593 F.2d 649, 651 (5th Cir. 1979); *see also Montsinger v. Flynt*, 119 F.R.D. 373, 378 (M.D.N.C. 1988) ("Absent a strong showing of good cause and extraordinary circumstances, a court should not prohibit altogether the taking of a deposition."); *Jennings v. Family Mgmt.*, 201 F.R.D. 272, 275 (D.D.C. 2001) (stating that "courts regard the complete prohibition of a deposition as an extraordinary measure which should be resorted to only in rare occasions") (internal quotation marks omitted); 4 J. Moore, et al., *Moore's Federal Practice* ¶ 26.69 (2d ed. 1989) ("In view of the general philosophy of full discovery of relevant facts . . . it is rare that a court will order that a deposition not be taken at all.").

Under Federal Rule of Civil Procedure 26(b)(1), parties may obtain discovery "regarding any nonprivileged matter that is relevant to any party's claim or defense." "Information within this scope of discovery need not be admissible in evidence to be discoverable." *Id.* Evidence is relevant if it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence," Fed. R. Evid. 401, and the scope of relevance under Rule 26 is even broader and favors disclosure. *See St. Croix Printing*

Equip. Inc. v. Sexton, 2008 WL 4290950, at *3 (D. Minn. 2008) ("In the context of discovery, 'relevant' has been defined as encompassing 'any matter that bears on, or that reasonably could lead to other matters that could bear on, any issue that is or may be in the case.'") (internal quotation marks omitted).

Where, as here, a party fails to produce documents or to designate a corporate witness on specified topics, the court may compel production of the requested discovery and may require the party to provide a properly prepared witness to testify about the designated 30(b)(6) topics. Fed. R. Civ. P. 37(a)(3)(B)(ii); *Caldwell v. Morpho Detection, Inc.,* 2011 WL 2784100, at *2 (E.D. Mo. 2011).[2]

ARGUMENT

I. The Receiver Should Be Compelled To Designate A Rule 30(b)(6) Witness.

Providing testimony around written discovery responses is par for the course in any litigation. Yet the Receiver has refused to provide *any* witness for deposition on the central factual issues in the case. His position is

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[2] *See also Lee v. Nucor-Yamato Steel Co. LLP,* 2008 WL 4014141, at *3 (E.D. Ark. 2008) (granting motion to compel deposition of 30(b)(6) witness on topics which were "reasonably calculated to lead to the discovery of admissible evidence"); *Floe Int'l Inc. v. Newman's Mfg. Inc.*, 2005 WL 6218040, at *5-6 (D. Minn. 2005) (granting motion to compel Rule 30(b)(6) deposition), *aff'd* 2006 WL 6116643 (D. Minn. 2006).

unwarranted. The Receiver, like all other litigants, is required to designate a Fed. R. Civ. P. 30(b)(6) representative to testify at deposition. Receivers enjoy no special consideration under the Rules of Civil Procedure that would enable them to ignore a properly noticed deposition.

The Receiver has argued that because he was not personally involved with the receivership entities before their failure, he has no relevant factual information to provide. But, the fact "[t]hat the [Receiver] had no involvement with [the Receivership Entities] before [their] failure does not, standing alone, relieve it of its obligations to designate a 30(b)(6) deponent." *FDIC v. 26 Flamingo, LLC*, 2013 WL 3975006, at *4 (D. Nev. 2013) (quoting *FDIC v. Wachovia Ins. Servs., Inc.*, 2007 WL 2460685, at *2 (D. Conn. 2007)) (granting motion to compel deposition testimony); *Resolution Trust Corp. v. Sands*, 151 F.R.D. 616, 618-19 (N.D. Tex. 1993) (denying protective order concerning Rule 30(b)(6) deposition of the receiver of a defunct bank); *Cadillac Ins. Co. v. Am. Nat'l Bank of Schiller Park*, 1991 WL 259013, at *3 (N.D. Ill. 1991) ("[C]ourts have held that the so-called receiver may not utilize the separate identity of the defunct corporation as a litigation sword.") (granting motion to compel and denying motion for protective order).

Therefore, the Receiver "must make a conscientious good-faith endeavor to designate the persons having knowledge of the matters sought by [Associated Bank] and to prepare those persons in order that they can answer

fully, completely, unevasively, the questions posed by [Associated Bank] as to the relevant subject matters." *FDIC v. Butcher*, 116 F.R.D. 196, 199 (E.D. Tenn. 1986) (internal quotation marks omitted) (granting motion to compel), *aff'd* 116 F.R.D. 203 (E.D. Tenn. 1987). Thus, district courts routinely require a court-appointed receiver "to produce a deponent who was adequately prepared for the deposition, even though it had not participated in the underlying . . . transactions on which the litigation focused." *Wachovia Ins. Servs., Inc.*, 2007 WL 2460685, at *2; *Resolution Trust Corp. v. Sands*, 151 F.R.D. 616, 618 (N.D. Tex. 1993) (overruling objections that receiver "lack[ed] an individual with personal knowledge concerning the loan transactions that form the basis of [the] lawsuit" and that "there [were] less burdensome means of obtaining the information requested"); *see also, e.g.*, *FDIC v. Brudnicki*, 2013 WL 5814494, at *2-3 (N.D. Fla. 2013) (permitting 30(b)(6) deposition of receiver on multiple topics)..

For instance, in *Brudnicki*, the district court allowed a defendant to take the Rule 30(b)(6) deposition of the FDIC, which was acting as a receiver for a failed financial institution. 2013 WL 5814494, at *2-3. The court held that "the FDIC's lack of personal knowledge of the pre-failure events occurring at the failed bank does not relieve the FDIC of its obligations to designate and produce a Rule 30(b)(6) deponent." *Id.* at *2. Instead, the FDIC's lack of pre-failure involvement with the bank only bore on the

reasonableness of the discovery requested in the Rule 30(b)(6) notice. *Id.* Applying this reasonableness test, the district court permitted the defendants to depose a representative of the receiver on several topics including, "the factual basis for the FDIC's responses to interrogatories," "the factual basis for 'any failure by Defendants to act with the requisite care in approving [certain transactions]," "policies and procedures that were not followed by the Defendants," and "warnings from governmental authorities that Defendants failed to comply with in the approval of [certain transactions]." *Id.* at *3 (citation omitted).

As in *Brudnicki*, Associated Bank seeks testimony from the Receiver regarding the factual basis for allegations made by the Receiver himself, in his own complaint, the factual basis for his damages calculations, and the factual basis for statements made in his interrogatory responses. *See, e.g.*, Ex. 1 at Topics 4, 6, 17-19. These are some of the most routine discovery topics in any civil case. There is no basis to excuse the Receiver from providing testimony regarding them.

The Receiver is well-positioned to provide this testimony. He has broad authority to compel individuals to assist him, as the court order appointing him states:

> [The Ponzi schemers, the Cook-Kiley Entities] and all other persons or entities served with a copy of this Order shall cooperate fully with and assist the Receiver in the performance of

> his duties. . . . This cooperation and assistance shall include, but not be limited to, providing any information to the Receiver that the Receiver deems necessary to exercising the authority and discharging the responsibilities of the Receiver under this Order.

Ex. 8 at 6-7.[3] In addition, the Receiver has the full benefit of an extensive investigation into the Cook-Kiley Entities. For example, in November 2009, the Receiver seized and copied 21 hard drives found in a property owned by Patrick Kiley. Ex. 10 at 6. Another 41 hard drives were seized and copied at the Van Dusen Mansion in Minneapolis. *Id.* at 7. The Receiver also has access to numerous documents produced to the SEC as well as the transcripts of ten different depositions of Trevor Cook that occurred in the fall of 2010. In addition, the Receiver conducted an extensive pre-filing investigation into Associated Bank, including the review of several thousand pages of Associated Bank's records and interviews with former Associated Bank employees. Thus, the Receiver in this case is in a far better position to designate a representative to testify than the FDIC was in *Brudnicki*.

Moreover, Associated Bank will be prejudiced if it is prevented from deposing the Receiver or his designee. The topics on which Associated Bank seeks testimony are undeniably relevant. "Aiding and abetting liability is

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[3] *See also* Ex. 9 at 8-9 ("Defendants Cook and Kiley, the Defendant Shell Companies, the Relief Defendants, their agents, servants, employees, attorneys, any persons acting for or on behalf of the Receiver Estates, and entities under their direct or indirect control shall cooperate with and assist the Receiver.").

based on proof of a scienter—the defendants must *know* that the conduct they are aiding and abetting is a tort." *Zayed*, 779 F.3d at 733 (quoting *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 186 (Minn. 1999)). Therefore, the Receiver's factual basis for claiming that Associated Bank has actual knowledge of the Ponzi scheme is a relevant and necessary inquiry. The Receiver must also prove that Associated Bank gave "substantial assistance" to the scheme, which requires "something more than . . . routine professional services." *Zayed*, 799 F.3d at 735 (quoting *Witzman*, 601 N.W.2d at 188-89). Thus, the Receiver's factual bases for his substantial assistance allegations are also relevant. Finally, the Receiver's factual basis for his damages calculations is also a relevant inquiry.

This is all information that the Receiver—who has been charged by the court with responsibility to understand the losses of investors and compensate them, and has spent years and millions of dollars doing so—is uniquely qualified to provide.

II. As in *Oehmke*, Associated Bank Seeks to Depose the Receiver Regarding Non-Privileged, Factual Matters.

A. The Receiver's Privilege and Work-Product Objections Do Not Shield the Receiver from Factual Inquiries.

Associated Bank has made it clear to the Receiver that it seeks the factual bases for the allegations in his complaint and interrogatory responses, not communications with his attorneys or documents prepared in anticipation

of litigation. It is fundamental that a party cannot use attorney-client privilege or the work-product doctrine to shield itself from discovery of the bases for a pleaded claim or defense. *See, e.g.*, *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.*, 168 F.R.D. 641, 645-46 (D. Minn. 1996) (ordering response to 30(b)(6) deposition notice inquiring into facts underlying party's investigation of issue, despite objections based on attorney-client privilege and work product doctrine); *United States v. McDonnell Douglas Corp.*, 961 F. Supp. 1288, 1290 (E.D. Mo. 1997) (overruling work product objection to Rule 30(b)(6) deposition question and holding that defendant was entitled to inquire into the factual bases of the government's allegations), *aff'd* 132 F.3d 1252 (8th Cir. 1998).[4] The Receiver cannot shield himself from discovery of the facts underlying his complaint and discovery responses merely because an attorney prepared those documents.

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[4] *SEC v. Merkin*, 283 F.R.D. 689, 697 (S.D. Fla. 2012) ("using 30(b)(6) depositions to obtain the factual grounds for an opponent's positions and defenses is 'not novel'"); *EEOC v. Caesars Entm't, Inc.*, 237 F.R.D. 428, 434 (D. Nev. 2006) (allowing 30(b)(6) deposition questions to elicit "facts and the source of information about the defendants' claims and defenses which are clearly relevant and discoverable within the meaning of Rule 26(b)"); *Protective Nat'l Ins. Co. of Omaha v. Commonwealth Ins. Co.*, 137 F.R.D. 267, 283 (D. Neb. 1989) (ordering that 30(b)(6) deponent "must recite the facts upon which [the party] relied [on] to support the allegations of its answer and counterclaim which are not purely legal, even though those facts may have been provided to [the party] by [the party's] lawyers").

B. The Receiver's Privilege and Work Product Objections Ignore this Court's holding in *Oehmke*.

Relying on *Shelton*, the Receiver argues that *any* inquiry into the factual basis for his complaint and interrogatory responses are protected by the work-product doctrine and attorney-client privilege. *See* Ex. 4 at 1; Ex. 5 at 1. However, this Court's recent analysis of *Shelton* in *Oehmke*, 2015 WL 2242041, at *7, demonstrates why *Shelton* does not apply here.

In *Shelton*, the Eighth Circuit found objectionable the "practice of taking the deposition of opposing counsel . . . in an attempt to identify the information that opposing counsel has decided is *relevant and important to his legal theories and strategy.*" *Id.* at 1327 (emphasis added). The Eighth Circuit reiterated this key point in *Pamida, Inc. v. E.S. Originals, Inc.*: "the *Shelton* test was intended to protect against the ills of deposing opposing counsel in a pending case *which could potentially lead to the disclosure of the attorney's litigation strategy.*" 281 F.3d 726, 730 (8th Cir. 2002) (emphasis added).

Accordingly, this Court recently held in *Oehmke*, that "the holding in *Shelton* was premised on the court's determination that plaintiff was seeking to delve into the work product of defendant's in-house counsel." 2015 WL 2242041, at *7 (Mayeron, M.J.). Because the Rule 30(b)(6) deposition in *Oehmke* would not seek to delve into opposing counsel's work product, this

Court correctly concluded that *Shelton* was not applicable and denied the motion for a protective order.

Here, as in *Oehmke*, "[t]he facts in this case do not invoke any of the concerns expressed by the Eighth Circuit in *Shelton*." 2015 WL 2242041, at *7. As an initial matter, Associated Bank does not intend to depose Receiver's counsel, but rather the Receiver's designee. That the Receiver is a *party* to this litigation makes this case wholly different from *Shelton*, where the dispute was over whether plaintiffs could depose defendants' in-house litigation counsel. Although Receiver argues that he "has an active role in developing litigation strategy," Exs. 4 & 5 at 1, a court-appointed receiver may not avoid every deposition topic simply by asserting that he or she is helping with strategy in the case, as is true for every party.

Moreover, as in *Oehmke*, Associated Bank does not intend to depose the Receiver (or his designee) about the Receiver's litigation strategy or work product. *See id.* Instead, Associated Bank intends to ask the Receiver non-legal questions about the basis for the factual allegations contained in his complaint and interrogatory responses. Like in *Oehmke*, Associated Bank is entitled to depose the Receiver regarding "his own statements" in his complaint and interrogatory responses. *Id.* Other courts read *Shelton* the same way this Court did in *Oehmke*. For example, *Boston Edison Co. v. United States*, 75 Fed. Cl. 557 (2007), concluded that *Shelton* did not apply

because the attorney to be deposed was a fact witness and the proposed deposition would not "delve into any matters pertaining to [the lawyer's] representation of Boston Edison as a member of its legal team, including his mental impressions or legal conclusions formed in that capacity." *Id.* at 563. And, in *United States v. Philip Morris Inc.*, 209 F.R.D. 13 (D.D.C. 2002), the court concluded that *Shelton* is not "nearly so sweeping as Defendants suggest," and explained that the Eighth Circuit "did *not* state that depositions of all opposing counsel were presumptively barred . . . nor even that trial counsel's deposition should not have been taken," but "held that because responses to the particular questions asked would provide a road map of trial counsel's litigation strategy, her answers were protected by the work-product doctrine." *Id.* at 16. The Court should come to the same conclusion here that it did in *Oehmke*; Associated Bank should be allowed to depose Receiver or his designee as a fact witness.

III. *Buysse* Does Not Excuse The Receiver From Meeting His Rule 30(b)(6) Obligations.

The Receiver improperly attempts to expand the unpublished opinion in *Zayed v. Buysse,* No. 11-cv-01042-SRN-FLN, slip op. (D. Minn. Oct. 19, 2011) (ECF No. 162) (attached as Ex. 11)—in which Magistrate Judge Noel held that in narrow circumstances wholly unlike this case, a Rule 30(b)(6) deposition of the Receiver was not necessary—into a broad rule that the

Receiver is *never* required to submit to a 30(b)(6) deposition. But *Buysse* does not stand for that broad proposition, and interpreting it that way would be contrary to the objectives of the Federal Rules of Civil Procedure. *See, e.g.*, *Olson v. Snap Prods., Inc.*, 183 F.R.D. 539, 543 (D. Minn. 1998) (declining to adopt a "position [that] would inevitably chill a core function of judicial proceedings—the search for the truth—by permitting corporations to insulate factual witnesses from future discovery"). Such a *per se* prohibition on deposing a receiver would render Rule 30(b)(6) void, and create an inequitable imbalance in civil discovery.[5]

In fact, *Buysse* does not in any way suggest that *Wiand*, No. 12-cv-557, ECF No. 142, at 4-5, *FDIC v. Brudnicki*, 2013 WL 5814494, at *2-3, *Cadillac Ins. Co. v. Am. Nat'l Bank of Schiller Park*, 1991 WL 259013, at *3, or any of the myriad other cases compelling receivers to submit to Rule 30(b)(6) depositions are wrongly decided. Indeed, Magistrate Judge Noel does not cite any case law at all and relies only on the facts that were before him. As such,

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[5] Realizing the error of this objection, in recent correspondence the Receiver attempts change his position, contending that he "does not argue, nor has he ever argued, that he is 'exempt' from Rule 30(b)(6) under all circumstances." Ex. 19 at 1. But the plain import of his objections is that the Receiver is entitled to a blanket "receiver" exemption from 30(b)(6) depositions. For example, he agues that he should be excused from any 30(b)(6) deposition because he is not a "large, complicated, opaque corporate entity," exs. 4 & 5 at 2—true for all receivers—and because he "has an active role in developing litigation strategy," *id.* at 1—true for many if not all receivers.

all that *Buysse* offers is an example of one particular instance where a 30(b)(6) deposition was not appropriate. The factors that led to that conclusion in *Buysse* point the opposite direction here.

A. *Buysse* Supports Compelling the Receiver To Attend Rule 30(b)(6) Depositions because He has not Afforded an "Ample Opportunity" To Obtain Discovery Through Other Means.

Buysse held that a Rule 30(b)(6) deposition was not warranted, in part, because in that case "the party seeking discovery [already] has had ample opportunity to obtain the information by discovery in the action." Ex. 11 at 7. Magistrate Judge Noel reached that conclusion for three basic reasons: (1) the *Buysse* parties agreed that in the first instance, plaintiffs would seek information through contention interrogatories, rather than through a 30(b)(6) deposition, *id.* at 3 ("Receiver suggested that Respondents request the factual information they sought through interrogatories. The next day, Respondents sent the Receiver a set of thirteen interrogatories"); (2) "[t]he categories of information listed in Respondents' Fed. R. Civ. P. 30(b)(6) deposition notice are nearly identical to their contention interrogatories," *id.* at 7; and (3) the Receiver answered the contention interrogatories such that "most—if not all—of the information sought by Respondents . . . has already been disclosed." *Id.* at 7-8. None of those factors is present here—indeed all three considerations point in precisely the opposite direction.

First, in stark contract to *Buysse*—where plaintiffs agreed to seek the information they wanted from the Receiver through contention interrogatories—Associated Bank has *declined* the Receiver's suggestion that it seek the information that it desires through interrogatories. *See* Medlock Decl. ¶ 9 (declining offer of three additional interrogatories in lieu of a 30(b)(6) deposition). Associated Bank's decision to seek information through a deposition, rather than interrogatories, is Associated Bank's choice to make:

> The Federal Rules of Civil Procedure provide a variety of tools to litigants to accomplish discovery: initial disclosures, subpoenas, interrogatories, requests for the production of documents, and depositions upon written questions, to name a few. *The Rules do not allow an opposing party to dictate by fiat the form discovery will take.* A party may not respond to an interrogatory by saying, 'take my deposition if you want to know.' *Likewise, a party duly served with a deposition notice cannot refuse to be deposed by saying 'send me an interrogatory or deposition by written questions.'*

Gowan v. Mid Century Ins. Co., 2016 WL 126746, at *6 (D.S.D. 2016) (emphasis added); *see also Richardson v. Sugg*, 220 F.R.D. 343, 348 (E.D. Ark. 2004) (holding that "a party is free [to] choose its method of discovery," and requiring that deponent give oral testimony, notwithstanding deponent's preference to receive written questions). Here, Associated Bank seeks the opportunity to probe at the level of detail a deposition provides.

Second, unlike *Buysse*—where the 30(b)(6) topics were nearly verbatim the same as what the Receiver already had answered through contention

interrogatories, *see* Ex. 11 at 4—in this case, Associated Bank's 30(b)(6) topics are not a rehash of its earlier written discovery requests. For example, Associated Bank earlier asked the Receiver to "[a]dmit or deny that You have no evidence that, during the relevant period, [Associated Bank employee Lien Sarles] knew about the Ponzi scheme." Ex. 12 at Req. 33. Receiver denied this request for admission, and similar requests for admission as to eight other Associated Bank employees. *See id.* at Reqs. 33-37, 39-42, 44-45. Associated Bank does not know the factual bases for these denials. Accordingly, it seeks a Rule 30(b)(6) deposition, in part, to discover the factual bases for these denials.

Similarly, Associated Bank asked the Receiver to admit or deny that Lien Sarles—whom the Receiver alleges was the fraudsters' principal contact at Associated Bank—"received no money from any Employee [of the fraudsters]." Ex. 13 at Req. 10. The Receiver denied this request for admission, *id.*, and Associated Bank followed up with a interrogatory asking for Receiver's factual basis for its denial. Ex. 14 at Interrog. 19. In response, Receiver stated, in full: "It is the Receiver's understanding that Sarles attended poker games with Employees of the Cook-Kiley Entities. Money was exchanged at these events." *Id.* That response raises more questions than it answers, *e.g.*, does the Receiver have any evidence to support his so-called "understanding"? Assuming money was "exchanged," did Mr. Sarles receive

any of it (or did he lose money)? If Mr. Sarles received money, did it exceed his poker winnings? Was it more than penny ante? Again, Associated Bank seeks to follow up regarding the factual basis for the Receiver's discovery responses, not to ask questions identical to what it already requested.

Third, unlike *Buysse*, where the Receiver apparently answered the prior discovery requests sufficiently, in this case, the Receiver has dodged many of Associated Bank's prior discovery requests. Despite being served with several interrogatories and requests for admission, the Receiver has not provided Associated Bank with the factual basis for his allegations, including: (1) the names of any Associated Bank employees who knew about the Cook-Kiley Ponzi scheme; (2) the dates when Associated Bank employees became aware of the Cook-Kiley Ponzi scheme; and (3) how each Associated Bank employee became aware of the Cook-Kiley Ponzi scheme.

Indeed, Receiver's own objections to his Rule 30(b)(6) deposition make clear that he has not answered significant portions of Associated Bank's written discovery requests. For example, he states "for numerous requests for admission, the Receiver objected on the legal basis that the request exceeded the scope of Rule 26, and did not otherwise respond." Ex. 4 at Topic 4; *see also* Ex. 5 at Topic 4. Receiver's objections similarly state that "for several interrogatories the Receiver did not respond at all because the Bank had exceeded the number of interrogatories that it had agreed to and that the

Court set forth in the discovery plan." Ex. 4 at Topic 4; *see also* Ex. 5 at Topic 4. While Associated Bank disagrees that Receiver's objections to its written objections are proper, what is beyond dispute is that Associated Bank's questions—unlike the questions in *Buysse*—remain unanswered.

The Receiver's interrogatory responses are similarly a poor substitute for deposition testimony. The Receiver's initial responses to Associated Bank's interrogatories were not signed under oath, as Fed. R. Civ. P. 33(b)(3) requires. Even after Associated Bank alerted the Receiver of that oversight, and asked for the interrogatories to be sworn, the Receiver provided only a milquetoast "oath": "I do not have any personal knowledge concerning any of the events described in the Responses and, therefore, base this verification solely upon a good faith belief formed after a reasonable investigation into the events described in the Responses and a review of documents, witness statements and testimony concerning those events." *See* Ex. 17. Setting aside whether this diluted oath is even proper, the Receiver's reluctance to stand behind his interrogatory answers not only shows why his interrogatory responses are not sufficient to answer Associated Bank's prior questions, but also raises new questions that should be tested through a deposition—*e.g.*, What is meant by a "reasonable investigation"? What documents, witness statements, and testimony were reviewed?

B. Unlike *Buysse*, the balance of burdens here favors a Rule 30(b)(6) deposition.

The second rationale in *Buysse*—which relates closely to the first—was that "in light of the fact that most—if not all—of the information sought by Respondents . . . has already been disclosed . . . the burden of such deposition outweighs its likely benefit." Ex. 11 at 7-8. But as Associated Bank demonstrated above, the information that Associated Bank seeks has not already been disclosed. Moreover, the balance of burdens in this case cuts the opposite way from *Buysse*.

As Magistrate Judge Noel recognized, *Buysse* was a "summary proceedin[g] in which discovery would be limited." *See* Ex. 16. The only remedy the Receiver sought there was the clawback of assets that certain investors had received, to the detriment of other investors. Unlike this case, the Receiver's case in *Buysse* did not require any showing of wrongdoing by the Respondents. Rather, the Receiver sought to prove that "[p]ursuant to Minn. Stat. § 513.41, et seq., each transfer made to Respondents on or after June 29, 2009 was a fraudulent transfer as to the other investors defrauded by the scheme, and the Receiver has the power to avoid such transfers." Ex. 15 ¶ 42.

This, by contrast, is not a summary proceeding. It is a full-fledged lawsuit in which the Receiver seeks to recover $91 million in damages from

Associated Bank for aiding and abetting fraud, conversion, and breaches of fiduciary duties. The Receiver's case requires that he prove actual knowledge and affirmative wrongdoing by Associated Bank. In these circumstances, considerations of burden weigh in favor of granting Associated Bank access to normal discovery mechanisms so it can learn the factual basis of the Receiver's claims against it.

IV. The Receiver's Remaining Objections Are Meritless.

A. Preparing a Witness to Testify is not Unduly Burdensome.

The Receiver argues that "[e]ducating a witness as to the Receiver's contentions would . . . impose an extraordinary burden and waste of litigation resources of the Receiver." Ex. 4 at 2; *see also* Ex. 5 at 2. This argument is of no moment. The fact that the Receiver must expend some time preparing a witness to testify at deposition about the basis of his demand for $91 million in damages is entirely unremarkable. Courts have long recognized that preparing a Rule 30(b)(6) deponent requires time and effort. *See, e.g.*, *Sprint Commc'ns Co., L.P. v. Theglobe.com, Inc.*, 236 F.R.D. 524, 528 (D. Kan. 2006) (Rule 30(b)(6) "implicitly requires persons to review all matters known or reasonably available to [the litigant] in preparation for the 30(b)(6) deposition") (internal quotation marks omitted). If, after making a conscientious effort to prepare a Rule 30(b)(6) witness, that witness cannot testify on certain matters, so be it. "[A] witness's inability to testify as to

information unavailable to the company he represents will not constitute a violation of [a Rule 30(b)(6)] deposition order." *Dairyland Power Co-op. v. United States*, 79 Fed. Cl. 709, 715 (2007); *see also Banks v. Office of Senate Sergeant-at-Arms*, 241 F.R.D. 370, 375 (D.D.C. 2007) (a Rule 30(b)(6) designee need not conduct investigations beyond what is "reasonably known to the company"). The Receiver's complaint that he must prepare a witness to testify is the lament of nearly every litigant that must prepare a Rule 30(b)(6) witness to testify. The Receiver should not be treated any differently.

B. Three Interrogatories Are No Substitute for a Rule 30(b)(6) Deposition.

While the Receiver contends that discovery should be limited to three lawyer-drafted interrogatory answers, *see* Medlock Decl. ¶ 9, Associated Bank—like every other litigant—should be allowed to seek information through multiple discovery vehicles. Defendants "[are] not precluded from conducting oral depositions merely because plaintiff considers them less than the optimal means of securing information." *United Techs. Motor Sys., Inc. v. Borg-Warner Auto., Inc.*, 1998 WL 1796257, at *3 (E.D. Mich. 1998); *see also Sec. Ins. Co. of Hartford v. Trustmark Ins. Co.*, 218 F.R.D. 29, 34 (D. Conn. 2003) ("[N]othing precludes a deposition either in lieu of or in conjunction with such interrogatories."). "The essence of live depositions is the opportunity to pursue lines of inquiry through a give and take that is

impossible to achieve solely through written communication," and further, "depositions exist to test and verify the record evidence with sworn testimony." *Empire Home Servs., L.L.C. v. Empire Iron Works, Inc.*, 2007 WL 1218717, at *12 (E.D. Mich. 2007). Thus, as Associated Bank pointed out earlier, "[a] party duly served with a deposition notice cannot refuse to be deposed by saying 'send me an interrogatory or deposition by written questions." *Gowan*, 2016 WL 126746, at *6.

Receivership cases are no exception to this rule. Courts hold that contention interrogatories and Rule 30(b)(6) depositions "are not truly duplicative" and a receiver must both answer the interrogatories *and* designate a Rule 30(b)(6) witness. *FDIC v. Hays*, 1998 WL 1782547, at *2 (W.D. Tex. 1998) (ordering that bank's receiver submit to a Rule 30(b)(6) deposition); *Brudnicki*, 2013 WL 5814494, at *3 (requiring receiver to designate Rule 30(b)(6) witness); *Butcher*, 116 F.R.D. at 203 (requiring receiver to answer contention interrogatories and submit to Rule 30(b)(6) deposition). In these cases, "mak[ing] further inquiry into the [Receiver's] responses to . . . contention interrogatories . . . is not redundant" or duplicative. *Brudnicki*, 2013 WL 5814494, at *3. "[T]he ability to question, probe and obtain elucidation of an answer to a contention interrogatory is a process that provides a means to obtain more complete information." *Id.*

Associated Bank, like any other litigant, should be permitted to seek

discovery through multiple means, including interrogatories and Rule 30(b)(6) depositions. And the Receiver, like any other plaintiff, should be required to provide a witness for deposition testimony.

C. Rule 30(b)(6) Applies to the Receiver.

Finally, the Receiver argues that Rule 30(b)(6) should be limited to "large, complicated, opaque corporate entit[ies], where it is often impossible to discover the identities of individuals with the particular knowledge sought." Ex. 4 at 2; *see also* Ex. 5 at 2. But Rule 30(b)(6) is not restricted to "large, complicated, opaque corporate entit[ies]," but applies to *any* "public or private corporation, a partnership, an association, a governmental agency, or other entity." Fed. R. Civ. P. 30(b)(6). The entities that the Receiver represents are precisely the sort of entities that Fed. R. Civ. P. 30(b)(6) was intended to reach. For this reason, numerous courts have compelled receivers to testify at a Rule 30(b)(6) deposition. *See, e.g.*, *26 Flamingo, LLC*, 2013 WL 3975006, at *1; *Wiand*, Ex. 19 at 4-5; *Wachovia Ins. Servs., Inc.*, 2007 WL 2460685, at *2. These cases are predicated upon the fundamental notion that a party pursuing a claim must produce a representative to testify about the basis for that claim. The Receiver is not exempt from this principle and cannot use his status as a receiver to avoid a statutorily authorized discovery mechanism.

CONCLUSION

The Court should grant Associated Bank's motion and compel the Receiver, or a witness designated on his behalf, to attend Rule 30(b)(6) depositions in his capacity as court-appointed receiver for Oxford Global FX, LLC and Crown Forex, LLC.

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