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 Reply 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

In his opposition, the Receiver concedes that court-appointed receivers are frequently deposed. *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"). And he does not meaningfully distinguish this Court's holding in *Oehmke v. Medtronic, Inc.*, 2015 WL 2242041 (D. Minn. 2015) (Mayeron, M.J.).

Instead, the Receiver devotes most of his brief to raising arguments that were addressed already—and debunked—in Associated Bank's opening brief. None of the concerns expressed in *Shelton v. American Motors Corp.,*

805 F.2d 1323 (8th Cir. 1986) apply here. As this Court explained in *Oehmke*, the *Shelton* rule does not apply to circumstances such as these where a party affirmatively commits, as Associated Bank has done, to depose the Receiver on factual matters only. 2015 WL 2242041, at *7. Indeed, in Associated's opening brief and below, we specifically set forth *factual* questions we need answered. Nor should this Court's analysis in *Oehmke* be limited to its facts, as the Receiver suggests.

Moreover, the Receiver is not required to name himself as a Fed. R. Civ. P. 30(b)(6) witness; there are many individuals with knowledge of the facts whom the Receiver could designate as a Rule 30(b)(6) witness. The notion that a lawyer would have to be deposed is fiction advanced by the Receiver to avoid discovery. Finally, the Receiver cannot hide behind his prior discovery responses, which are insufficient and illustrate why a Rule 30(b)(6) deposition is necessary.

I. As this Court Explained in *Oehmke*, The *Shelton* Rule Does Not Apply.

The Receiver's opposition is built on the faulty assumption that Associated Bank is effectively seeking to depose opposing counsel regarding their legal strategy. ECF No. 119 at 9. Not so. In its opening brief, Associated Bank explained that it "does not intend to depose the Receiver (or his designee) about the Receiver's litigation strategy or work product. . . . 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." ECF No. 116 at 17-18.

The Receiver also improperly assumes that he is the opposing counsel in this matter. That is not the case. The Receiver is a *party*. He has the power to retain trial counsel and has done so here. The Receiver recently demonstrated that he is the client, and not opposing counsel, by verifying interrogatory responses in his capacity as client.[1] *See* ECF No. 116 at 24. Because *Shelton* is limited to the "practice of taking the deposition of opposing counsel," *Shelton* does not apply. *Shelton*, 805 F.2d at 1327 (emphasis added).

None of the cases that the Receiver cites in his opposition should alter this Court's *Oehmke* opinion. In *Resolution Trust Corp. v. Kazimour*, 1993 WL 13009325, at *2 (N.D. Iowa 1993), the district court held that a receiver did not need to designate a Rule 30(b)(6) witness when there was "absolutely no person that it could designate other than counsel of record in response to [the] Rule 30(b)(6) notice." In this case, by contrast, the Receiver can designate any number of non-lawyers to testify about the factual bases for his pleadings and discovery responses, including former employees of the

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[1] Had Receiver signed as a lawyer, it would be "utterly improper. Interrogatories are served on parties, and [the party's] answers must be signed by the party . . . ." *Fonville v. District of Columbia*, 230 F.R.D. 38, 45 (D. D.C. 2005).

Receivership Entities (like Julia Gilsrud, Erik Erikson, and John Loebel) or investigators (like Richard Ostrom). For example, Kyle Garman (1) worked for both Mr. Kiley and Mr. Cook, (2) is a first-hand fact witness to topics in the 30(b)(6) notice, and (3) has already voluntarily cooperated several times with the Receiver. The Receiver does not attempt to argue otherwise.

Similarly, in *SEC v. Buntrock*, the district court held that a Rule 30(b)(6) deposition could not "delve into the theories and opinions of SEC attorneys." 217 F.R.D. 441, 444 (N.D. Ill. 2003). That is not a problem here. As in *Oehmke*, the deposition will address topics as to which the Receiver—who stands in the shoes of the scheme entities and who has the authority to compel cooperation of the scheme entities' employees—is a fact witness.

II. The Receiver's Other Arguments Have No Merit.

As Associated Bank explained in its opening brief, a party "seeking to prevent a deposition carries a heavy burden to show why discovery should be denied." *Groupion, LLC v. Groupon, Inc.*, No. 11-0870-MEJ, 2012 WL 359699, at *2 (N.D. Cal. Feb. 2, 2012). The party must demonstrate "extraordinary circumstances" based on "specific facts" that would justify denial. *Prozina Shipping Co. v. Thirty-Four Autos.*, 179 F.R.D. 41, 48 (D. Mass. 1998). The Receiver has fallen far short of this demonstration.

The Receiver argues that because he has produced numerous documents and has already provided responses to Associated Bank's

interrogatories and requests for admission (RFAs), only legal strategy would be divulged at a 30(b)(6) deposition. ECF No. 119, at 19-22. But the Receiver's interrogatory and RFA responses themselves reveal additional facts to be probed. For example, in response to Associated Bank's interrogatory request that the Receiver describe his "factual basis for denying [that Lien Sarles received no money from any Employee of any Cook-Kiley Entity]" (*see* Ex. 14 at 8) (quoting Ex. 13 at 4), the Receiver asserts, "It is the Receiver's understanding that Sarles attended poker games with Employees of the Cook-Kiley Entities. Money was exchanged at these events." Ex. 14 at 8. But no document produced in this case—nor any deposition testimony—has shown that Lien Sarles ever played poker with the fraudsters or received money while doing so. Therefore, the Receiver must be relying on other sources of information for his "understanding" of that fact, and Associated Bank is entitled to inquire into the basis of that factual assertion.

Similarly, in response to Associated Bank's interrogatory asking the Receiver for his factual basis for denying that "no Employee of any Cook-Kiley Entity communicated the existence of the Ponzi Scheme to any Employee of Associated Bank," the Receiver answers that "there are numerous expressions and interchanges by Cook-Kiley entity employees to Bank employees that show the existence of the Ponzi scheme." Ex. 14 at 8. But to date, every Cook-Kiley employee deposed has expressly stated that he

or she did *not* inform anyone at Associated Bank of the Ponzi scheme. Thus, this key factual assertion requires follow-up.

Nor may the Receiver hide behind his discovery to date (ECF No. 119, at 26-28) because that discovery has been paltry. The Receiver entirely refused to answer multiple RFAs. *See, e.g.*, Ex. 13 (refusing to respond to RFA Nos. 2-5, 8-9, 11, 13-32, 58-66, and 71-72. Likewise, he refused to answer interrogatories (*e.g.*, Nos. 14-19) on a parts-and-subparts objection, which makes his attempt to deny follow-up by deposition particularly troubling. Of those interrogatories he did answer, the Receiver simply copied and pasted large portions of his Complaint into his responses. *See* Ex. 20 to the Declaration of Alex C. Lakatos (redline of the Receiver's Complaint and his Interrogatory Responses Nos. 5, 8 and 10). In short, the Receiver seeks to collect nearly $100 million in damages without allowing any discovery beyond the face of his Complaint. In striking contrast, in *Buysee*, the Receiver provided interrogatory responses with robust factual content and copious citations to deposition testimony and documents. *See, e.g.*, Ex. 21 to Lakatos Decl. Unlike in *Buysee*, in this case, "most—if not all—of the information sought by [Associated Bank] . . . has" ***not*** "already been disclosed." Ex. 11 at 7-8.

The Receiver also argues that preparing for a 30(b)(6) deposition is inconvenient, burdensome, and expensive. ECF No. 119, at 28-29. But as

Associated Bank explained (ECF No. 116, at 26-27), this is often true of 30(b)(6) depositions and, in this instance, it is *not* a valid ground on which to deny Associated Bank its chosen means of conducting discovery. Associated Bank is currently preparing for its own 30(b)(6) deposition—on no less than 23 topics noticed by the Receiver. This has been inconvenient, burdensome, and expensive for all involved. However, in federal court, "[a]bsent a strong showing of good cause and *extraordinary circumstances*, a court should not prohibit altogether the taking of a deposition." *Motsinger v. Flynt*, 119 F.R.D. 373, 378 (M.D.N.C.1988). Courts have found such extraordinary circumstances exist where, for example, a deponent is medically incapacitated (*Dunford v. Rolly Marine Serv. Co.*, 233 F.R.D. 635, 637 (S.D. Fla. 2005)) or is a high-ranking government official (*Jameson v. Oakland County*, 2011 WL 219555 at *1 (E.D. Mich. Jan. 24, 2011)). No such extraordinary circumstances exist here.[2]

Finally, the Receiver's argument that he cannot be deposed because he came onto the scene *after* all the relevant facts transpired is meritless. Courts do not refuse a party a 30(b)(6) deposition simply because there is new

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[2] In contrast, courts have rejected attempts to block depositions on the grounds that information might be available elsewhere, *see, e.g.*, *Wright v. Patrolmen's Benev. Ass'n*, 72 F.R.D. 161, 164 (S.D.N.Y. 1976), or the deposition is burdensome for a busy deponent, *see, e.g.*, *CBS, Inc. v. Ahern*, 102 F.R.D. 820, 822 (S.D.N.Y. 1984).

management on the scene or because the deponent is a successor company. In this case, the Receiver is equivalent to a new manager or successor company of the Ponzi scheme entities. Not only that, the Receiver has had almost seven years to familiarize himself intimately with the receivership companies and facts in its case. He has obviously done so, and cannot now plausibly claim ignorance.

Conclusion

The Court should grant Associated Bank's motion to compel.

Dated: April 25, 2016

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