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-JM) JANIE S. MAYERON, U.S. Magistrate Judge

RECEIVER'S RESPONSE TO ASSOCIATED BANK'S 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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In this action against Associated Bank ("the Bank") for aiding and abetting a massive Ponzi scheme, the Receiver[1] has produced virtually every piece of non-privileged information in his possession, custody and control responsive to the Bank's requests. He has provided detailed responses to interrogatories and laid out the factual basis for the allegations in a detailed, 47-page Complaint. In response to the Bank's document requests, the Receiver produced virtually every document seized from the Receivership Estates, including both ESI and scanned versions of paper documents. Beyond this, the Receiver has produced documents from third parties that the Receiver has gathered in the course of fulfilling his duties under the Court's Receivership Orders. The Receiver has also produced every transcript of his interviews of the main Ponzi schemer, Trevor Cook. Despite having all of this, the Bank now wants to take a corporate deposition of Oxford Global FX, LLC and Crown Forex, LLC—entities that were tools of the fraud while it was in operation and now defunct under the Receiver's control. Such a request can only mean one of two things: 1) the Bank seeks information that is redundant of already-served and answered discovery; or 2) it seeks to learn the Receiver's mental impressions of the discovery already provided, and to learn his trial strategies. Neither purpose is permissible. As the Court has already ruled in another Receiver's case, written discovery is the proper tool in these circumstances.

[1] For this case, Receiver Zayed recused himself. *See* ECF No. 19. Tara Norgard, Brian Hayes, and Russell Rigby are acting as Receiver for purposes of this case. *Id.* This response simply refers to "the Receiver" to cover any individual acting in that capacity.

[2] There is a disagreement as to what was agreed to in terms of the timing of the objections to the Rule 30(b)(6) topics. As set forth in its own papers, the Bank believed that the Receiver agreed to

The Bank's motion should be denied for several reasons. First, it should be denied because the Rule 30(b)(6) notice seeks to depose trial counsel or his designee without making the necessary showing for deposing an attorney under the Eighth Circuit's decision in *Shelton v. American Motors Corp.*, 805 F.2d 1323 (8th Cir. 1986). Second, beyond the problems under *Shelton*, a Rule 30(b)(6) deposition is improper because the discovery sought is unreasonably cumulative and duplicative of the Bank's interrogatories, and can be obtained from other sources. Finally, discovery by way of deposing trial counsel or his designees is out of proportion to the needs of this case considering the relevant factors. The burden to the Receiver greatly outweighs any marginal benefit of such a deposition to the Bank. For all of these reasons, the Bank's motion to compel should be denied.

I. BACKGROUND

This case arises out of one of the largest Ponzi scheme frauds in Minnesota history, where a cadre of fraudsters bilked over 700 investors of an estimated $190 million. Then-Chief Judge Davis installed the Receiver over the estates of the individuals and entities that perpetrated the fraud (collectively, "Receiver Estates"). *SEC v. Cook*, No. 09-cv-3333 MJD/FLN (D. Minn. Dec. 11, 2009), ECF No. 68 [hereinafter *SEC v. Cook*]; *CFTC v. Cook*, No. 09-cv-3332 MJD/JJK (D. Minn. Dec. 11, 2009), ECF No. 96 [hereinafter *CFTC v. Cook*]; *SEC v. Beckman*, No. 11-cv-574 (D. Minn. Mar. 8, 2011), ECF Nos. 9, 10 [hereinafter *SEC v. Beckman*]. The Court's Receivership Orders authorize the Receiver to, among other things, seize all assets of the Receiver Estates and bring legal actions for the benefit of the defrauded investors. *See id.* When the Receiver was

appointed he immediately seized the properties, files and other assets of the Receiver Estates and began the hard work of tracking, identifying and liquidating assets for the benefit of the defrauded investors.

The Receivership Estates were never engaged in any legitimate business. They were tools of the fraud. Judgments have been entered against all of them in cases brought by the SEC and CFTC. *See SEC v. Cook*, at ECF Nos. 1265-81; *CFTC v. Cook*, at ECF No. 1194; *SEC v. Beckman*, at ECF Nos. 41, 575, 576. The five individuals who were criminally charged with perpetrating the fraud—Trevor Cook, Jason Bo-Alan Beckman, Patrick Kiley, Gerald Durand, and Christopher Pettengill—are now serving lengthy prison terms. *See U.S. v. Cook*, No. 10-cr-75 (D. Minn. Apr. 15, 2011), ECF No. 27; *U.S. v. Pettengill*, No. 11-cr-192, (D. Minn. June 13, 2011), ECF No. 6; *U.S. v. Beckman*, No. 11-cr-228, ECF Nos. 414, 415, 438 (D. Minn.).

On January 29, 2013, the Receiver sued Associated Bank for, among other things, aiding and abetting fraud and breach of fiduciary duty. (ECF No. 1). The Bank moved to dismiss the complaint, which motion this Court granted. The Eighth Circuit reversed on appeal and remanded the case to proceed with discovery. *R.J. Zayed v. Associated Bank, N.A.*, 779 F.3d 727 (8th Cir. 2015).

On October 5, 2015, the Bank served its first set of 19 numbered interrogatories on the Receiver, including numerous, broadly-worded contention interrogatories (Exhibit B to the April 19, 2016 La Porte Decl.) (hereafter "La Porte Decl."(ECF No. 120)). As many of the interrogatories included discrete subparts, however, the total was actually

109 interrogatories. On November 4, 2015, the Receiver served its objections with its responses, totaling 67 pages. (Exhibit C to the La Porte Decl.) After the parties met and conferred about this issue, the Receiver agreed to answer some, but not all of those interrogatories. The Receiver agreed to withdraw certain of his objections to subparts and the Bank agreed to withdraw an interrogatory with 32 subparts. On January 12, 2016, the Receiver supplemented his responses pursuant to this agreement (Exhibit 14 to the Declaration of Stephen Medlock (ECF No. 117)). Then on March 21, 2016, the Receiver again supplemented his responses, providing a 12-page response including a detailed description of electronic evidence seized from certain Receivership Estates as well as paper files scanned to electronic format. (Exhibit D to the La Porte Decl.)

The Bank served its first set of document requests on August 24, 2015. (Exhibit E to the La Porte Decl.). On January 11, 2016, the Receiver produced roughly 3.8TB of electronic files (some ESI and some paper files scanned to electronic format), pursuant to the parties' agreement. These electronic files were produced substantially as they existed when they were seized by the Receiver. In addition to identifying what each of the hard drives was, the Receiver also pointed to third-party discovery that the Bank conducted, to identify the physical location of seizure for each drive.

The Receiver also responded to the Bank's three sets of requests for admission – totaling 75 requests in all. (Exhibits F, G and H, respectively, to the La Porte Decl.). Rather than the standard-worded requests for authenticity of a document or the admission of an uncontroverted fact, many of the Bank's requests asked the Receiver to

admit that he did not possess evidence proving an ultimate issue in the case. For example, Request for Admission 1 asks the Receiver to admit that "[d]uring the relevant time period, no Employee of any Cook-Kiley Entity communicated the existence of the Ponzi Scheme to any Employee of Associated Bank." (Exhibit F to the La Porte Decl.) The Receiver responded to the Bank's requests on September 23, 2015 (Exhibit 17 to the Declaration of Stephen Medlock (ECF No. 117)), December 16, 2015 (Exhibit I to the La Porte Decl.), and February 16, 2016 (Exhibit 16 to the Medlock Decl. (ECF No. 117)). The Bank took issue with the Receiver's responses to its first set of requests, and ultimately moved to compel further responses. This Court denied the Bank's motion to compel and affirmed the sufficiency of the Receiver's answers in an order dated January 8, 2016. (ECF No. 101).

In addition to written and paper discovery, the Bank has taken numerous depositions and noticed several more to take place before the close of fact discovery. Among the deponents questioned by the Bank are former employees of the Receiver Estates as well as other fact witnesses. The Bank has also scheduled depositions of each of the imprisoned fraudsters, including Cook, Beckman, Kiley, Durand, and Pettingill.

On February 23, 2016, the Bank served two notices of deposition under Rule 30(b)(6) to the Receiver, one in his capacity as Receiver for the Estate of Patrick Kiley d/b/a Crown Forex, LLC (Exhibit 1 to the Medlock Decl. (ECF No. 117)) and for Oxford Global FX, LLC (Exhibit 2 to the Medlock Decl. (ECF No. 117)). Each of those two separate notices asked that the Receiver designate a person to testify on 21 topics,

covering a wide range of subjects, including topics on "[y]our rights and duties under the orders appointing the Receiver," (Topic 1), "[y]our understanding of the relevance and authenticity of documents and electronically stored information that you made available for inspection by Associated Bank," (Topic 3), and "[a]ny *litigation that you chose not to initiate* to recover funds on behalf of Crown Forex, LLC or any other Receivership Entity" (Topic 8) (emphasis added), among many others.

The parties discussed these notices first on March 18, 2016, and then again on April 1, 2016. (April 19, 2016, Declaration of Michael La Porte at ¶ 4). In the first call, the Receiver raised the issue of the appropriateness of a Rule 30(b)(6) deposition on the topics listed in light of this Court's ruling in the *Buysse* case. *Id.* at ¶ 4. The Receiver also noted objections to several of the topics listed. *Id.* Among the issues discussed were that the Receiver had been appointed after all of the pertinent events took place, that the Receiver was also trial counsel, and that a more appropriate way to obtain information through discovery was by way of interrogatories, including contention interrogatories. *Id.* at ¶ 5. The Bank's counsel indicated that the only way the Bank could truly test the completeness of its interrogatories was to followup with a deposition. Although the Bank exhausted the limit on the number of interrogatories it had previously requested, the Receiver's counsel expressed willingness to agree to an expansion of the number of interrogatories to allow for areas that the Bank did not consider to have been covered by its already-served interrogatories. *Id.* at ¶ 7. The parties were unable to resolve their differences on that call. Counsel for the Receiver suggested that the Parties meet and

confer again once the Receiver had served objections to the proposed topics.[2] *Id.* at ¶ ¶ 8-9.

On March 30, 2016, the Receiver served his objections on the Bank. *See, e.g.*, Plaintiff R.J. Zayed's Objs. and Resps. to Associated Bank, N.A.'s First Rule 30(b)(6) Dep. Directed to R.J. Zayed in His Capacity As Receiver for the Estate of Patrick Kiley d/b/a Crown Forex, LLC [hereinafter "Objs. to 30(b)(6) Notice"). (Exhibits 4 and 5 to the Declaration of Stephen Medlock (ECF No. 117))"].[3]On April 1, 2016, the parties again met by telephone to discuss the Receiver's objections. The parties were not able to resolve these differences. The Receiver reiterated his position from the first meeting and conference. (La Porte Decl. at ¶10). Additionally, the Receiver noted that three topics were not specifically covered by already-served interrogatories. *Id.* at ¶ 11. As such, the Receiver offered the Bank an additional three interrogatories beyond the 35-interrogatory limit (a limit the Bank had successfully argued for during the scheduling conferences) so as to eliminate any question that the topics in the Rule 30(b)(6) notices were entirely

[2] There is a disagreement as to what was agreed to in terms of the timing of the objections to the Rule 30(b)(6) topics. As set forth in its own papers, the Bank believed that the Receiver agreed to object to the topics before the first of the two scheduled depositions. The understanding of the Receiver's counsel was different, namely, that he had agreed to object later in that week, before the second of the two. Ultimately, the different understandings are immaterial. The Receiver served his objections on March 30, 2016. All parties understood that the depositions would not go forward based on the previously-agreed-upon process of objecting then meeting again to try to resolve these differences.

[3] The topics in the Bank's notice to the Receiver regarding Oxford contained the identical topics and the Receiver made identical objections. For convenience, this response brief refers to both collectively.

redundant of interrogatories and document requests. *Id.* The Bank declined this proposal. *Id.*

The Bank then filed the present motion to compel the Receiver to designate someone to testify on certain topics from its notices. In that motion, the Bank abandons the vast majority of the 21 from its previous notices. Despite this apparent narrowing, however, its 4 remaining topics effectively constitute close to 100 topics. For example, one of the topics on which the Bank moves to compel:

> 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.

(ECF No. 116 at 6.) The Bank's First Set of Interrogatories contains 19 numbered interrogatories. The Bank's three sets of Requests for Admission contain a total of 75 requests. So, the actual number of topics really numbers nearly 100, despite purporting to narrow the number for purposes of this motion.

II. ARGUMENT

The Federal Rules of Civil Procedure allow for liberal discovery – within certain limits. *See, e.g., In re ADC Telcoms, ERISA Litig.*, No. 03-cv-2989, 2005 U.S. Dist. LEXIS 20224, at *18 (D. Minn. Sept. 15, 2005) ("While broad in nature, Rule 26 is not without its limits."). "Mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation" are not discoverable. *See* Fed. R. Civ. P. 26(b)(3)(B). The Court also "must limit the frequency or extent of discovery" if it determines that "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." Fed. R. Civ. P. 26(b)(3)(B)(i). Discovery may also be limited if it is not "proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit." Fed. R. Civ. P. 26(b)(1). The Court may, "for good cause, issue an order to protect a party or person from annoyance, embarrassment [or] oppression or undue burden or expense. . . ." Fed. R. Civ. P. 26(c).[4]

A. The Bank's Notices Impermissibly Seek to Discover the Inferences that the Receiver has Drawn from Certain Facts, the Receiver's Theories Related to those Facts, and How the Receiver Intends to Marshal Facts in Support of His Case at Trial.

The fundamental truth of discovery proceedings in this case is that the Receivership is not a typical party, with ongoing legitimate operations. It is a necessary fictitious entity created under a valid court order. As such an entity, it is run by trial counsel. The Eighth Circuit recognizes the problems inherent in what the Bank seeks to do. In the Eighth Circuit, depositions of attorneys involved with litigation strategy are highly disfavored because they inevitably embroil the court and the parties in time-consuming and distracting disputes regarding what is and what is not privileged

[4] The Bank says that depositions are not usually prohibited absent "extraordinary circumstances" and prohibiting a deposition would "likely be in error." ECF No. 116 at 8. (citations omitted). None of the cases cited, however, involves either a Rule 30(b)(6) deponent, or the proposed deposition of an attorney or attorney designee, as is the case here.

information with little to no legitimate added benefit. *See Shelton*, 805 F.2d at 1327. Further, the practice detracts from the quality of client representation because the relationship is tainted by the fear that counsel will be interrogated. *Id.* Accordingly, the Eighth Circuit allows a party to depose opposing litigation counsel only in the extremely limited circumstance where the information:

i) cannot be obtained through any other means than to depose opposing counsel;
ii) is relevant and non-privileged; and
iii) is crucial to the preparation of the case.

Id. As the party seeking the deposition, it is the Bank's burden to make this showing. *Id.*; *see also West Peninsular Title Co. v. Palm Beach Cnty.*, 132 F.R.D. 301, 302 (S.D. Fla. 1990). The Bank has failed to carry its burden. For the reasons explained below, it cannot meet any of the three tests.

1. The *Shelton* Test Applies Because the Notice to the Receiver is Functionally a Request to Opposing Counsel.

The Receiver functions as litigation counsel in this action. Contrary to the Bank's assertion, (ECF No. 116 at 17), the fact that a non-attorney could theoretically be designated in response to its notice does not resolve this issue. *See, e.g., Securities and Exchange Comm'n v. Buntrock*, 217 F.R.D. 441, 444-45 (N.D. Ill. 2003). Courts in the Eighth Circuit not only apply the *Shelton* rule to attorneys like the Receiver, who are active litigation counsel, but even to attorneys who are not intimately involved in the litigation. *See Desert Orchid Ptnrs, L.L.C. v. Transaction Sys. Architects, Inc.,* 237 F.R.D. 215, 220 (D. Neb. 2006) (applying *Shelton* rule to in-house counsel who was involved with the defense

strategy, even though he was not trial counsel and even though he had some first-hand knowledge of relevant facts). Courts take a practical and functional approach when determining whether a notice asks for the deposition testimony of counsel. *See, e.g.*, *Buntrock*, 217 F.R.D. at 444-45. When attorneys investigate facts or direct others to investigate them in anticipation of bringing suit, a Rule 30(b)(6) notice, which theoretically could be satisfied by a non-attorney designee, is deemed to be directed towards counsel. *Id.*; *see also SEC v. Morelli*, 143 F.R.D. 42 (S.D.N.Y. 1992); *SEC v. Rosenfeld*, No. 97 Civ. 1467 (RPP), 1997 U.S. Dist. LEXIS 13996 (S.D.N.Y. Sept. 12, 1997).

The *Buntrock* case is illustrative. There, the defendant argued that his 30(b)(6) notice did not fall under *Shelton* because the SEC could designate any person under the rule, even a non-attorney. *See Buntrock*, 217 F.R.D. at 444. In rejecting this argument, the court stated "the notice seeks, if not the deposition of opposing counsel, then the *practical equivalent* thereof." *Id.* (emphasis added). The *Buntrock* court explained that SEC attorneys and employees working under the direction of attorneys conducted the investigation. *Id.* Because of this, the Court concluded that the deposition would necessarily involve "the testimony of attorneys assigned to this case, or require those attorneys to prepare other witnesses to testify." *Id.* And even for a non-attorney designee, such a person "would have to have been prepared by those who conducted the investigation, and that preparation would include disclosure of SEC attorneys' legal and factual theories." *Id.*

Similarly, in *RTC. v. Kazimour*, the plaintiff corporation was served with a Rule 30(b)(6) notice seeking a designee to testify as to the facts that supported the contentions contained in its complaint. *See RTC v. Kazimour*, No. C-92-0188, 1993 WL 13009325, *3 (N.D. Iowa Nov. 16, 1993) (unpublished). The Plaintiff had no person that it could designate other than its counsel of record. *Id.* The court quashed the defendant's Rule 30(b)(6) deposition, because "[a] deposition of a person required by the court to be created by counsel under the circumstances of this case would . . . disclose absolutely protected opinion work-product." *Id.* The Receiver here has been actively involved in the factual investigation of the claims against the Bank. Additionally, the Receiver is trial counsel. Thus, the Bank's suggestion that the Receiver could theoretically designate a non-attorney does not remove the *Shelton* problem.

In its brief, the Bank argues that *Shelton* does not apply because it is seeking facts, not privileged or work-product-protected materials. *See* ECF No. 116 at 14-18. In support of this argument, the Bank relies primarily on this Court's decision in *Oehmke v. Medtronic, Inc.*, No. 13-2415 (MJD/JSM), 2015 WL 2242041 (D. Minn. Mar. 26, 2015).[5] The Bank's

[5] The Bank also relies extensively on the Northern District of Florida's decision in *FDIC v. Brudnicki*, 2013 WL 5814494 (N.D. Fla. Oct. 29, 2013). But the Bank vastly overstates the reach of that case, if it applies at all. In *Brudnicki*, the court permitted a deposition to take place on certain topics, but cautioned that questions into work-product protected areas would not be permitted. *See id.* at *4 (warning that certain topics seemed likely to elicit only work product materials, but deferring that ruling until specific questions were asked). Thus, *Brudnicki* also recognizes that questions into the investigation by the FDIC are fraught with privilege issues. To the extent that the court in Florida would defer questions about privilege until after a designee is subject to questioning, though, the decision is at odds with this Court's holding in *Zayed v. Buysse*, No. 11-cv-1042 (SRN/FLN) (ECF No. 186) (Dec. 2, 2011), and its reliance on the Eighth Circuit's *Shelton* decision to prevent such depositions from going forward at all.

argument is wrong and its reliance on *Oehmke* and other cases is misplaced. In *Oehmke*, the plaintiff sued her employer under the Americans with Disabilities Act. Before she was fired and before she filed suit, the plaintiff and her attorney met with counsel for her employer, Medtronic. *Id.* at *1-2. At that meeting, counsel for Medtronic told the plaintiff and her lawyer details that the plaintiff's supervisors had said about her performance. Counsel for Medtronic also purportedly said that the plaintiff's supervisors had lied to him. During discovery, the plaintiff sought to depose Medtronic's counsel, limited to the statements made at that meeting. Medtronic moved for a protective order under *Shelton*. *Id.* at *2.

After noting that "what occurred at the meeting" was relevant and in dispute, the court concluded that what the deposition sought would not seek privileged or work product matter. Medtronic's counsel was a "fact witness regarding statements Oehmke claims he made at [the] meeting." *Id.* The court held that because "Oehmke wants to depose [the opposing party's counsel] as a fact witness . . . [on matters that are] both relevant and non-privileged" *Shelton* did not apply, and the deposition could go forward. *Id.* at *8.[6]

[6] The Bank's citation to *Marvin Lumber & Cedar Co. v. PPG Indus., Inc.* 168 F.R.D. 641, 645-46 (D. Minn. 1996) and *United States v. McDonnell Douglas Corp.*, 961 F. Supp. 1288, 1290 (E.D. Mo. 1997) are beside the point. First, neither of those cases were receiverships. Also, while those cases said that privilege cannot be used to hide facts, that is not the case here as all of the facts have been provided to the Bank. What the Bank seeks is something more – namely, the legal theories of the Receiver, and how he will marshal facts to be presented at trial. These cases do not deal with that scenario.

Unlike the attorney in *Oehmke*, the Receiver here is not a fact witness. The Bank tacitly concedes as much through its failure to rebut the irrefutable position that the Receiver was not appointed until after all operative facts in this matter had taken place. The Bank's tortuous attempt to characterize him as a fact witness eviscerates the very meaning of "fact witness." Calling out the Receiver's "own statements" in his Complaint (*See* ECF No. 116 at 17) does not make the Receiver a fact witness, because the Complaint is not a fact at issue in this case separate from the underlying facts recited therein. And, no one contends the Receiver has personal knowledge of those underlying facts.

In clinging so tightly to the *Oehmke* case, the Bank loses sight of the fact that this Court in *Buysse* noted the applicability of *Shelton* in a nearly identical scenario. *See Zayed v. Buysse*, No. 11-1042 (SRN/FLN) (D. Minn. Dec. 2, 2011) (ECF No. 186 at 12) (citing *Shelton* and *Rosenfield*).[7] This Court in *Buysse* recognized that the deposition of an attorney and trial counsel "would raise numerous objections on grounds of privilege and work product." *Id.* As Judge Nelson concluded in affirming the Magistrate Judge's Order on this issue, the concerns articulated in *Shelton* and *SEC v. Rosenfeld*, "are implicated in this case as well." (*Id.* at 13). Thus, the Bank's reliance on the *Oehmke* case and others like it, is grossly misplaced.

[7] The Bank cites only to the Magistrate Judge's opinion and discusses only that opinion. (ECF No. 116 at 18-25 (citing ECF No. 162 (D. Minn. Oct. 19, 2011))). Nowhere in the Bank's brief is there any acknowledgement of the District Court's opinion affirming and explaining the basis for granting a protective order against a Rule 30(b)(6) deposition.

2. Other Means Exist for the Bank to Obtain the Full Scope of Any Legitimate Discovery the Bank Seeks.

The Bank has not made the showing required by the first part of the *Shelton* test because other means exist to obtain the full scope of any legitimate discovery it seeks. As an initial matter, it should be noted that the bulk of what the Bank says it is looking for is not information about the Receivership Estates, but instead is information about the Bank itself and its own employees. Specifically, the information it seeks is:

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

(ECF No. 116 at 2 (emphasis added)). This is not information that is within the institutional knowledge of Crown Forex, LLC, or Oxford Global, FX, LLC in the first instance, if at all. This is information within the knowledge of Associated Bank and its employees. In addition to the voluminous discovery the Receiver already has provided, the Bank has had every opportunity to obtain facts relevant to this case from first-hand sources – itself and its own employees. *See Newkirk v. Conagra Foods, Inc.*, No. 8:10-cv-22-LSC-FG3, 2010 U.S. Dist. LEXIS 60835, at *17 (D. Neb. May 27, 2010) (applying the *Shelton* rule and prohibiting deposition of a party's attorneys because the party had already produced thousands of pages of relevant documents and made relevant fact witnesses available for deposition). The Bank and its employees and former employees – and not the Receiver – were parties to many of the actions at issue, and therefore have first-hand knowledge of the facts. Further, the Receiver has already produced all of the

information in his custody, possession and control that is rsponsive to the Bank's requests, including a wide-ranging assortment of information that the Receiver collected from his own investigation.[8] Thus, the first portion of the *Shelton* test cannot be met because "other means" exist as primary sources for the facts the Bank says it seeks. That source is Associated Bank itself and its own employees – and not the deposition of the Receiver in any capacity, let alone in his capacity as Receiver for two specific, non-functioning entities.

With respect to interrogatories, the Bank complains in its brief that the Receiver's 66 – page response to the Bank's interrogatories (Exhibit C to the La Porte Decl.), 10 – page supplemental response (Exhibit 14 to the Medlock Decl. (ECF No. 117)), and 12 – page second supplemental response to those interrogatories (Exhibit D to the La Porte Decl.). In sum, there are numerous other, more direct sources for the "facts" that the Bank claims to be seeking.

Regarding interrogatories, the Bank complains in its brief that the Receiver's answers are insufficient; but it has never moved to compel on its Interrogatories.[9] Further, although the Bank complains that it cannot get the information it seeks from contention interrogatories, (ECF 116 at 23-24), it does not ever explain why that is the case. *See Rosenfeld*, 1997 U.S. Dist. LEXIS 13996, at *9 ("Rosenfeld does not provide any reasons why claim contention interrogatories at the close or towards the close of factual discovery

[8] The Bank's implication that the Receiver has "fail[ed] to produce documents" (ECF No. 116 at 9) is false, wholly unsupported. And completely irrelevant.

[9] The Bank did move to compel on its Requests to Admit; this Court denied that motion and found that the Receiver's responses were sufficient under the rules. (*See* ECF No. 101).

. . . will not provide him with the necessary claim contentions the SEC will make at trial."); *Morelli*, 143 F.R.D. at 48 ("Given plaintiff's stated willingness to respond to interrogatories under Fed. R. Civ. P. 33(b), this discovery device represents an appropriate method for Morelli to inquire into the SEC's contentions."). The Bank only argues that the choice among discovery methods should be its own, and not the Receiver's. (*See* ECF No. 116 at 21). What the Bank fails to appreciate, however, is that while this is indeed a preference under the Federal Rules, that preference is not absolute and the Federal Rules provide the Court with the flexibility to ensure that discovery is appropriately tailored to the circumstances of each case. *See, e.g.*, *Zayed v. Buysse*, No. 11-1042 (SRN/FLN) (ECF No. 186) (prohibiting defendant's chosen method of Rule 30(b)(6) deposition in favor of other discovery methods).

The Bank does make a number of claims regarding lack of discovery from the Receiver, which it says makes a Rule 30(b)(6) deposition necessary. These claims are baseless.[10] For example, the Bank claims that it does not have the facts regarding its own employees' knowledge of the Ponzi Scheme, including the knowledge of former Bank Vice President, Lien Sarles, who managed the accounts of the Receiver Estates. The Bank points to its request for Admission No. 33 that asked the Receiver to:

[10] In its brief, the Bank also argues that this Court's decision in *Zayed v. Buysse* is distinguishable because it has not received all that it has requested in discovery. The Bank claims that the Court in *Buysse* issued a protective order barring the deposition because "most – if not all – of the information sought by [the movant] . . . has already been disclosed." ECF No. 116 at 20 (quoting *Zayed v. Buysse* at 7-8). As noted above, the Bank's claim that it has not received all it has requested in discovery is incorrect and unsupported by evidence. Its distinction of *Buysse* on that basis is likewise faulty.

> Admit or deny that You have no evidence that, during the relevant period, [Associated Bank employee Lien Sarles] knew about the Ponzi Scheme.

(ECF No. 116 at 22). The Bank correctly notes that the Receiver denied that request, but then claims that it "doesn't know the factual bases for these denials." *Id.* This ignores the Receiver's response to Interrogatory No. 5, for example, which asked the Receiver to:

> Describe with specificity the factual basis for your claim that Associated Bank had actual knowledge of fraud, a breach of any fiduciary duty, conversion, or false representations or omissions occurring in relation to the Cook-Kiley Accounts and/or Cook- Kiley Entities,

Plaintiff R.J. Zayed's Resp. to Def. Associated Bank, N.A.'s First Set of Interrogatories, at 15-38 (Exhibit C to the La Porte Decl.). In response to this interrogatory, the Receiver provided a 28-page response, including details about Lien Sarles, among others, showing his involvement and knowledge of the fraud and breaches of fiduciary duty.

In this same argument, the Bank also makes the scurrilous charge that the Receiver "dodged many of Associated Bank's prior discovery requests." (ECF No. 116 at 23). The "basis" for this claim is that "the Receiver has not provided Associated Bank with the factual basis for its allegations, including [] the names of any Associated Bank employees who knew about the Cook-Kiley Ponzi scheme," among other things. (*Id.*). This is not true. It should again be noted that the "facts" that the Bank seeks from the Receiver are not facts about the Receivership Estates, but facts about the Bank itself and its own employees. But setting aside that the Bank is in as good or better position to know those facts firsthand, the Receiver has not "dodged" anything. On the contrary, the Receiver denied the Bank's "admit or deny you have no evidence" requests regarding

numerous Bank employees. Denying these "no evidence" requests is the functional equivalent of identifying them as people with actual or constructive knowledge of, or willful blindness to, the fraud and breaches of fiduciary duties. As for the details, those are again set forth at length in response to, among other things, Interrogatory Nos. 5-7. The claim that the Receiver has hidden or "dodged" discovery providing the names of the Bank's own employees with knowledge and how they gained that knowledge is, to put it mildly, inaccurate.

The court in *Buntrock* highlighted a disconnect between the parties that is applicable here as well. In that case, the court addressed the defendant's claim that facts showing his involvement in the fraud had not been produced. This denial, the court said, "sheds some light on why [the defendant] cannot discover the facts he claims to be seeking." *Buntrock*, 217 F.R.D. at 445. Like the defendant in *Buntrock*, the Bank denies any wrongdoing. So, it is unlikely that it would acknowledge any facts that show knowledge by its employees, despite having all the facts and discovery in its possession. This disconnect helps show that the Bank is not seeking facts, but instead is seeking to depose the Receiver to argue the legal significance of facts that it already knows.

The Bank further argues that the Receiver admits that he has not answered "significant portions" of the discovery asked of him. (ECF No. 116 at 23) The Bank points to two things, neither of which support its contention. First, it quotes the Receiver's objections noting that certain Requests for Admission exceeded the scope of Rule 26. (*Id.*). This is true, but beside the point because the Bank does not explain why it thinks

that the Receiver's scope objection is improper (it is not). The Bank also does not say why an improper request (*i.e.*, a request beyond the scope of Rule 26) in the context of a Request for Admission somehow becomes permissible in the context of a Rule 30(b)(6) deposition. Thus, the fact that the Receiver has objected to irrelevant discovery is a red herring, not a basis for even more intrusive means of discovery on the same issue.

Second, the Bank argues that the Receiver's refusal to answer interrogatories beyond the limit embodied in the Court's discovery order (a limit the Bank explicitly sought and received) somehow shows that it does not have all the facts. The Bank essentially acknowledges how feeble an argument this is by failing to point to a single interrogatory to which a response would fill supposed gaps in the facts it has. The reality is that there aren't any and the Bank does not argue otherwise. The reality is that as a result of the parties' meeting and conference, the Bank voluntarily withdrew one interrogatory and the Receiver withdrew its objections and responded to the rest. *See* La Porte Decl. ¶ 3.[11] The Bank fails to make any argument whatsoever regarding this withdrawn interrogatory or how it could possibly be pertinent to this motion. The disconnect is especially stark because the Bank's Rule 30(b)(6) topics do not even relate to the single interrogatory that the Bank withdrew.

The Bank's final argument on this issue exposes this motion for what it is – a naked attempt to discover the strategies of counsel. After criticizing the Receiver for not

[11] The Bank's argument regarding the Receiver's offer of three additional interrogatories is a straw man. The Bank fails to disclose to this Court that it is not moving to compel regarding any of those three topics. *See, e.g.*, Objs. to 30(b)(6) (Exhibits 3 and 4 to the Medlock Decl.)

providing a signature on its original interrogatories,[12] it then maligns the Receiver for providing what it calls a "milquetoast" and a "diluted" oath verifying the responses.[13] The Bank then attempts to draw even more strained inferences, making the spurious claim that the Receiver is "reluctan[t] to stand behind his interrogatory answers" and that they are insufficient on that basis. (ECF No. 116 at 24). The Bank does not cite a single authority to support the accusation that the Receiver's verification is insufficient or improper in any way. The Receiver simply cannot attest to personal knowledge that he does not have.

In its motion and brief the Bank does not point to any particular interrogatory it considers lacking. But even if it had, a motion to compel a Rule 30(b)(6) deposition of an attorney is not the appropriate vehicle for addressing any such deficiencies. The proper approach would be to move to compel regarding the interrogatories. The Bank did not do this, but instead proposes that the solution is to allow the Bank to probe into the "reasonableness" of the Receiver's pre-suit and discovery investigation, including finding what documents the Receiver reviewed, in a deposition. This, however, is the essence of protected work product. These are not "facts." *See, e.g., Rosenfeld,* 1997 U.S. Dist. LEXIS 13996, at *5.

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[12] Rule 26 provides that a "court must strike [an unsigned paper] *unless a signature is promptly supplied after the omission is called for the attorney's or party's attention*." Fed. R. Civ. P. 26(g)(2) (emphasis added). Promptly after the Bank's counsel brought the lack of signature to the Receiver's attention, a signature was provided, as the Bank acknowledges.

[13] Rule 33, however, says that Interrogatories must be "signed" by the party answering them and the qualifying language that the Bank disparages tracks the language of Rule 11 very closely. *See* Fed. R. Civ. P. 11 (a signature is a certification "to the best of the person's knowledge, information, and belief, formed after an inquiry reasonable under the circumstances").

Given the myriad work-product and privilege issues implicated by depositions of attorneys involved in the investigation of financial fraud, interrogatories, including contention interrogatories it already has served, provide the Bank with the optimal way to discover the substantial equivalent of information it seeks. At the same time, contention interrogatories minimize the likelihood that the Receiver or his attorneys will be forced to disclose information protected by the work-product doctrine. The Bank posed numerous contention interrogatories, and indeed served contention document requests. The Receiver has responded to them all. There is simply no basis to require a deposition of the Receiver under the circumstances of this case.

3. Respondents Fail to Meet the Second *Shelton* Factor Because Any Information Beyond the Discoverable Facts Is Privileged.

Any information beyond the facts contained in the above-referenced documents and witnesses is protected by Federal Rule of Civil Procedure 26(b)(3), attorney-client privilege, and/or the work product doctrine. Courts consistently disallow Rule 30(b)(6) depositions in circumstances like those present here for the very reason that such depositions are "an inappropriate attempt to depose opposing counsel and to delve into the theories and opinions of [Receivership] attorneys." *Buntrock*, 217 F.R.D. at 444. In *SEC v. Rosenfeld*, for example, the court issued a protective order precluding the defendant from taking a Rule 30(b)(6) deposition of the SEC. The court concluded that the topics of the noticed 30(b)(6) deposition – which related to the allegations in the SEC's complaint – "clearly call[ed] for the revealing of information gathered by the SEC attorneys in anticipation of bringing the instant enforcement proceedings." 1997 U.S. Dist. LEXIS

13996, at *5; *see also Buntrock*, 217 F.R.D. at 445 (concluding that a 30(b)(6) notice of deposition directed to the SEC and seeking the results of the SEC's investigation was "intended to ascertain how the SEC intends to marshal its facts, documents, and testimonial evidence, and to discover the inferences the SEC believes can be drawn from that evidence," quashing the deposition notice and barring the deposition); *Morelli*, 143 F.R.D. at 47 (prohibiting a 30(b)(6) deposition of the SEC because the deposition "constitutes an impermissible attempt by defendant to inquire into the mental processes and strategies of the SEC").

Here, the Bank seeks testimony about what evidence the Receiver has in support of certain contentions. Accordingly, any such testimony would simply recite the information that has already been detailed in the Receiver's detailed responses to the interrogatories – interrogatories that practically mirror the noticed deposition topics. To the extent that the Bank hopes to elicit information beyond the facts that support the Receiver's contentions, that information impinges on the Receiver's mental impressions, conclusions, opinions, and legal theories. *See Morelli*, 143 F.R.D. at 47.

The Bank has effectively admitted as much in its briefing. (*See* ECF 116 at 13). In arguing that the Receiver is in the best position to answer questions about the topics listed the Bank argues:

> - The Receiver has the full benefit of an extensive investigation into the Cook-Kiley Entities [including the] seiz[ure] and cop[ying] of 21 hard drives found in a property owned by Patrick Kiley . . . and another 41 hard drives . . . seized and copied at the Van Dusen Mansion in Minneapolis;

- The Receiver 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; and
- The Receiver conducted an extensive pre-filing investigation into Associated Bank, including the review of several thousand pages of Associated Bank records . . ..

Id. at 13. What the Bank ignores in this discussion is that all of the discovery mentioned has already been produced to the Bank, or is in the Bank's possession in the first instance. This fact shows that what the Bank seeks is either duplicative or that the Bank is seeking something more than the facts. This "beyond the facts" information is precisely the type of privileged information that the courts in *RTC, Buntrock, Rosenfeld,* and *Morelli* vigorously protected. *Cf. Buysse*, No. 11-1042 (SRN/FLN) (ECF No. 186) ("Because the Receiver is both an attorney, trial counsel, and, in his role as Receiver, 'an agent of the Court,' the legal feasibility of deposing him is questionable in the first instance, and Respondents' attempts to do so generated the very type of motion practice that the parties ostensibly sought to avoid. Any deposition of the Receiver would likely give rise to numerous objections on grounds of privilege and work product.").

4. The Bank Fails to Meet the Third *Shelton* Factor Because Any Information Beyond the Discoverable Facts Is Not Crucial to Its Preparation of the Case.

It is clear that the Bank seeks legal conclusions, mental impressions, and trial strategy of the Receiver. Not only is this protected information, but the Bank does not need it to prepare its case. The Bank has retained competent counsel of its own choosing who likely has developed mental impressions and trial strategy relative to the Bank's defenses in this action. The Bank and its counsel presumably have also had their own

communications relative to this action. The Bank is no more entitled to this information from the Receiver and his counsel than the Receiver is entitled to it from the Bank and its counsel.

Every fact that underlies this action has been made available to the Bank. It does not need, nor is it entitled to, anything beyond that from the Receiver. The Bank simply cannot meet its burden under *Shelton*. The information it seeks could have been (and was) obtained via, *inter alia,* contention interrogatories, depositions of fact witnesses with first – hand knowledge, and review of relevant documents. To the extent the Bank seeks the Receiver's trial strategy, investigative decisions, and mental impressions, such information is privileged and *Shelton* precludes depositions seeking it.

B. Even Beyond the *Shelton* Rule, the Notices Are Also Improper Under Rule 26(b)(2)(C).

Even if the Bank's request to depose the Receiver did not run afoul of *Shelton*, it would be improper under Rule 26(b)(2)(C). The Bank's motion to compel should also be denied for this separate and independently-sufficient basis. Federal Rule of Civil Procedure 26(b)(2)(C) states that upon motion or on its own, "the court must limit the frequency or extent of discovery" if it determines that one of the three enumerated factors cited in the rule applies. Specifically, when:

> (i) 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; [or]
>
> * * * * *

(iii) the proposed discovery is outside the scope permitted by Rule 26(b)(1).

Fed. R. Civ. P. 26(b)(2)(C). Rule 26(b)(1), which is incorporated by reference, provides that the scope of discovery is now limited not just by relevance but also a rule of proportionality, which includes consideration of "whether the burden or expense of the proposed discovery outweighs its likely benefit." *Id.*

1. The Deposition Should Be Prohibited Under Federal Rule of Civil Procedure 26(b)(2)(C)(i) Because It Would be Unreasonably Cumulative or Duplicative and Can Be Obtained From Other Sources that Are More Convenient, Less Burdensome, and Less Expensive.

As explained above, the deposition topics attached to the Bank's notice of 30(b)(6) duplicate the interrogatories that the Receiver has already answered in exhaustive detail. The factual basis for the Receiver's responses to the Bank's interrogatories (Topic 4) are set forth in those interrogatories. The factual basis for the Receiver's damages calculation (Topic 6) is set forth both in the Receiver's Rule 26(a)(1) disclosure and in response to Interrogatory No. 9.[14] The Receiver has also provided all bank records from which the damages calculation is performed, in response to the Bank's Request for Production No. 9.[15] The Receiver's analysis of that information will be provided during expert testimony

[14] Interrogatory No. 9 asked "Describe with specificity any and all damages you claim in this litigation, including (i) the amount of compensatory, monetary, exemplary, and/or punitive damages you claim in this litigation; (ii) the total amount of costs and/or expenses you claim as damages in this litigation; and (iii) the factual basis for your claims regarding compensatory, monetary, exemplary, and/or punitive damages."

[15] Request for Production No. 9 asked for "Any and all documents relating in any way to bank or financial accounts at Associated Bank; Wells Fargo; Crown Forex, S.A.; Citibank; JPMorgan Chase; Peregrine Financial Group, Inc.; and/or the G5 Currency Fund in the name of Cook,

on damages. Finally, the factual basis for the Receiver's claim of the Bank's awareness of the Ponzi scheme and its substantial assistance (Topics 17 and 18) is set forth in his responses to Interrogatory Nos. 5-7 and 10,[16] as well as in documents produced in response to Request No. 7.[17] As a result, each of these topics is unreasonably cumulative and duplicative of already-served and answered interrogatories and document requests.

Moreover, with respect to Topics 17 and 18 (regarding the Bank's awareness and substantial assistance of the fraud), there are other sources that are more convenient, less burdensome, and less expensive to gather. Each of these topics pertains not to any Receivership Entity but instead to Associated Bank and its own employees. If, in fact, the Bank wants the facts regarding its own knowledge of the fraud and its substantial assistance, Associated Bank's employees themselves are a more convenient, less burdensome, and less expensive source than the Receiver. Because each of the four proposed topics is "unreasonably cumulative or duplicative, or can be obtained from

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Kiley, Pettengill, Durand, Beckman, Smith; and/or any Cook-Kiley Entity, including but not limited to account statements, checks, ledger balances, the opening and closing of accounts, suspicious activity reports, withdrawals, deposits, and/or transfers of funds of any sort."

[16] Interrogatory No. 5 asked the Receiver to "[d]escribe with specificity the factual basis for your claim that Associated Bank had actual knowledge of fraud, a breach of any fiduciary duty, conversion, or false representations or omissions occurring in relation to the Cook-Kiley Accounts and/or Cook-Kiley Entities . . ." Interrogatory Nos. 6 and 7 substituted "constructive knowledge" and "willfully blind" for "actual knowledge" in interrogatory No. 5, but were otherwise identically worded. Interrogatory No. 10 asked the Receiver to "[d]escribe with specificity the factual basis for your claim that Associated Bank provided substantial assistance to the Ponzi Scheme or any fraud, a breach of any fiduciary duty, conversion, or false representations or omissions related to the Cook-Kiley accounts . . .."

[17] Document Request No. 6 asked for "Any and all documents that relate in any way to Associated Bank's alleged actual knowledge of the Ponzi Scheme." Request Nos. 7 and 8 substituted "constructive knowledge" and "willful blindness" for actual knowledge but were otherwise identical.

some other source that is more convenient, less burdensome, or less expensive," this Court should deny the Bank's motion to compel.

2. The Depositions the Bank Seeks Should Be Prohibited Under Federal Rule of Civil Procedure 26(b)(2)(C)(iii) Because the Burden and Expense of Those Proceedings Would Outweigh Any Benefit.

The Court must balance the burden of the requested deposition against its benefit. Here though, there is no balance; While the burden is great, the benefit is non-existent.

A deposition of the Receiver or a designee of the Receiver would necessarily raise numerous thorny issues of work product and attorney-client privilege. Sorting through these complex disputes would unnecessarily waste the Court's and the parties' time and resources, while providing the Bank with no new information. *See Rosenfeld*, 1997 U.S. Dist. LEXIS 13996, at *10 ("[T]o proceed by way of the Rule 30(b)(6) deposition sought by defendant Rosenfeld would undoubtedly place an undue burden on the SEC and the court, which would have to make a multitude of otherwise unnecessary decisions about issues of attorney work product . . . privilege."); *see also Zayed v. Buysse*, No. 11-1042 (SRN/FLN) (D. Minn. Oct. 19, 2011) (ECF No. 162) (finding that the burden of preparing a Rule 30(b)(6) designee on topics already covered by other discovery would outweigh any likely benefit); *Id.* at ECF No. 186 (D. Minn. Dec. 2, 2011) (citing *Rosenfield*, affirming over objections and characterizing the burden as "manifest" where contention interrogatories were asked and answered and where the deposition would likely involve extensive issues of privilege and work product).

Educating and preparing a witness to testify under Rule 30(b)(6) would also impose extraordinary burden on the Receiver and the limited resources he has to fulfill his court-ordered mandate to recover whatever assets he can from the worldwide wreckage of this fraud.[18] Insofar as the Bank seeks testimony from the Receiver beyond what is listed in its notice under Rule 30(b)(6), that testimony would be protected – or entirely speculative. The Receivership Estates, including Crown Forex, LLC and Oxford Global FX, LLC were tools used by Cook and his co-conspirators to perpetrate a massive fraud that spanned the globe and robbed over 700 people of their life's savings. The true inner workings of that fraud likely will never be fully known to anyone.

The Bank has failed to show that there is any benefit, let alone a substantial benefit, to be had from the requested depositions. There is simply nothing more that is legitimately discoverable from the Receiver beyond what has already been provided in painstaking detail in response to other discovery devices. Thus, in contrast to the normal weighing of burden and benefit, here the Bank has failed to show that either supports its requested additional discovery.

[18] The Bank's citation to *Sprint Comm'ns Co., LP v. Theglobe.com, Inc.,* 236 F.R.D. 524, 528 (D. Kan. 2006), does not alter this conclusion at all. That case did not involve a Receivership. Moreover, the court rejected the contention that the deposition necessarily would require designation of a lawyer or its proxy. That is not the case here. *See supra* at Sec. II.A.1.

CONCLUSION

For the foregoing reasons, the Bank's motion to compel should be denied in its entirety.

Dated: April 19, 2016

Respectfully submitted,

/s/ Michael R. La Porte

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CERTIFICATE OF SERVICE

The undersigned attorney of record certifies that on April 19, 2016, copies of the foregoing document were served upon counsel for Defendant via e-mail to the following addresses:

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