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's Opposition to the Receiver's Motion to Compel Third-Party Subpoena Respondent Michael Behm to Answer Deposition Questions

The Receiver's opening brief (ECF No. 128) avoids the central question relevant to this motion: Does the Receiver contend that Michael Behm was aware of the Ponzi scheme and conspired with Lien Sarles to aid and abet the scheme? If so, the common-interest privilege applies because Mr. Behm and Associated Bank have a common legal interest in defending themselves against accusations that they aided and abetted the Ponzi scheme together. *Shukh v. Seagate Technology, LLC*, 872 F. Supp. 2d 851, 855 (D. Minn. 2012) (common-interest privilege applies when two individuals "have a common legal, rather than commercial, interest"). And contrary to the Receiver's argument, this privilege does not turn on whether the Receiver has decided to

sue Mr. Behm. *Id.*

But as Associated Bank stated on the record during Mr. Behm's deposition, if the Receiver is now arguing that Mr. Behm did not know about the Ponzi scheme and was not involved in it, Associated Bank will withdraw its common-interest-privilege objection.[1] But in that case, the Receiver should be estopped from arguing later in the litigation that Mr. Behm knew about the Ponzi scheme.

I. If the Receiver Contends that Michael Behm Aided and Abetted the Ponzi Scheme, Associated Bank And Mr. Behm Have A Common Interest.

Although the now Receiver ducks the issue, he has repeatedly argued—indeed, has framed his case around the idea—that Mr. Behm knew about and involved Associated Bank in the Ponzi Scheme, through his step-brother, Lien Sarles. If that remains the Receiver's theory, Associated Bank and Mr. Behm have a common interest that falls within the common-interest doctrine.

Almost six years ago, the Receiver's counsel examined Trevor Cook in *SEC v. Cook*, 09-cv-3333 (D. Minn.), and first laid out the Receiver's theory supposedly connecting Mike Behm and Associated Bank. Counsel spent much

---

[1] *See* Behm Dep. at 67:25-68:9 ("MR. LAKATOS: Keith, maybe I can cut through some of this. Would the Receiver stipulate that they have no belief that Mr. Behm was involved in the fraud and stipulate that he had no knowledge of it? MR. VOGT: We are not going to stipulate to that. MR. LAKATOS: Well, then we are sticking with our common interest [objection].").

of her time in this deposition trying to elicit testimony in support of this theory.[2] In his answers, Mr. Cook consistently rejected counsel's theory.[3] When the Receiver filed his Complaint in 2013 (ECF No. 1), he alleged that "Michael Behm, who was working for Kiley at the time, introduced Sarles to Kiley."[4] He also suggested that Mr. Sarles learned of the fraudulent nature of

---

[2] *See, e.g.*, Cook Dep. Tr. at 1748:11-14 ("And at any point in this relationship, did Mike [Behm] or anybody else say: Yeah. Lien [Sarles at Associated Bank] can help us do some things that we might not otherwise be able to do?"); *id.* at 1757:10-12, 20-23 ("How come you're opening a new account at Associated Bank rather than Wells Fargo? . . . Was it also because Lien was the brother or stepbrother or some relation to Mike, and you had a personal relationship there?"); *id.* at 1761:25 – 1762:1-7 ("[A] lot of things happened at Associated Bank that were out of the ordinary. Lien Sarles accommodated those things happening, and I guess what I'm starting to understand a little bit better is there was a personal relationship there that started because Mike Behm and Lien are related either as brothers or stepbrothers.")

[3] *See, e.g.* Cook Dep. Tr. at 86:25-87:1 ("THE WITNESS: . . . I mean Lien knew nothing about what was going on"); *id.* at 1748:11-16 ("Ms. Norgard: And at any point in this relationship, did Mike [Behm] or anybody else say: Yeah. Lien can help us to do some things that we might not otherwise be able to do? The Witness: No, I never heard anything like that."); *id.* at 1765:21-25 ("MS. NORGARD: Okay. Did you every compensate Lien in any way? Did you ever give him money or anything of value? THE WITNESS: No."); *id.* at 1810:1-7 ("MS. NORGARD: And did you ever ask [Lien Sarles] to cut corners or – or get around certain rules or anything, and say: Hey, listen, if you do this for me now, there's – there are many more accounts coming your way? THE WITNESS: No. I never asked him to do that."); *id.* at 1813:17-1814:9 ("THE WITNESS: . . . I don't believe Lien had any idea what – what was going on with Crown Forex. I certainly never told Lien, you know, there was a problem there but he – he got things done when I asked him to get things done.").

[4] Complaint (ECF No. 1) at ¶ 34.

the scheme through Mr. Behm.[5] And finally, at Mr. Behm's deposition, the Receiver refused to stipulate that Mr. Behm was not involved in the fraud.[6]

Mr. Behm and Associated Bank have a common interest in defending against the Receiver's position. The common-interest doctrine "softens the ordinary requirement that lawyer-client communications must be made in confidence in order to be protected by the privilege." *In re Grand Jury Subpoena Duces Tecum*, 112 F.3d 910, 922 (8th Cir. 1997); *see also Cavallaro v. United States*, 284 F.3d 236, 249-50 (1st Cir. 2002) (common-interest doctrine is "an exception to the general rule that the attorney-client privilege is waived when privileged information is disclosed to a third party"). The doctrine "serves to protect the confidentiality of communications passing from one party to the attorney for another party where a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel." *United States v. Schwimmer*, 892 F.2d 237, 243 (2d Cir.

---

[5] *Id.* at ¶ 35 ("Sarles learned, *if he already did not know it from his brother*, that Kiley's place of business was not located in a business setting at all, but rather, it was located in a suburban home.").

[6] *See* Behm Dep. Tr. 67:25 – 68:1-9 ("MR. LAKATOS: . . . Would the Receiver stipulate that they have no belief that Mr. Behm was involved in the fraud and stipulate that he had no knowledge of it? MR. VOGT: We are not going to stipulate to that. MR. LAKATOS: . . . then we are sticking with our common interest.").

1989).[7] "[A] common interest can exist between entities in a variety of circumstances." *Allendale Mut. Ins. Co. v. Bull Data Sys., Inc.*, 152 F.R.D. 132, 140 (N.D. Ill. 1993). For example, the doctrine applies "where parties are represented by separate counsel but engage in a common legal enterprise." *Denney v. Jenkens & Gilchrist*, 362 F. Supp. 2d 407, 415 (S.D.N.Y. 2004).

Contrary to the Receiver's assumption that he must sue or intend to sue Mr. Behm for the common-interest doctrine to apply, the doctrine requires no such thing: a nonparty in a lawsuit may have a common interest with a party in the lawsuit. *See, e.g., Lugosch v. Congel*, 219 F.R.D. 220, 238 (N.D.N.Y. 2003). Indeed, the doctrine applies when parties have "'a common interest in a litigated *or non-litigated matter*.'" *Grand Jury Subpoena*, 112 F.3d at 922 (emphasis added) (quoting *Restatement (Third) of the Law Governing Lawyers* § 126(1)); *see also Doctor's Associates, Inc. v. QIP Holder LLC*, No. 06-cv-01710, 2009 WL 1683628, at *2 (D. Conn. Feb. 26, 2009), *rep. accepted*, 2009 WL 1668573 (D. Conn. June 15, 2009).

A party claiming common interest must satisfy a two-part test:

---

[7] Minnesota recognizes the common-defense doctrine for attorney-client privilege. *See Schmitt v. Emery*, 2 N.W.2d 413 (Minn. 1942) (overruled on other grounds by *Leer v. Chicago, M., St. P. & P. Ry. Co.*, 308 N.W.2d 305 (Minn. 1981)).

> The doctrine permits disclosure without waiver as long as the party claiming the exception demonstrates that the parties communicating: "(1) have a common legal, rather than commercial, interest; and (2) the disclosures are made in the course of formulating a common legal strategy."

Shukh v. Seagate Technology, LLC, 872 F. Supp. 2d 851, 855 (D. Minn. 2012) (emphasis added) (citation omitted).

As to the first prong, courts have repeatedly held that "[t]he key consideration is that the nature of the interest be identical, not similar, and be *legal*, not solely commercial." *North River Ins. Co. v. Columbia Cas. Co.*, No. 90-cv-2518, 1995 WL 5792 at *3 (S.D.N.Y. Jan. 5, 1995) (citation omitted) (emphasis added). For courts to find a common legal interest, the parties must have come to an agreement "embodying a cooperative and common enterprise towards an identical legal strategy." *Lugosch v. Congel*, 219 F.R.D. 220, 237 (N.D.N.Y. 2003); *see also, e.g., Schwimmer*, 892 F.2d at 243 (examining whether "a joint defense effort or strategy has been decided upon and undertaken by the parties and their respective counsel").

As to the second prong, the parties to the common-interest agreement must establish that any exchange of privileged information was "made in the course of formulating a common legal strategy," *Sokol v. Wyeth, Inc.*, No. 07cv-8442, 2008 WL 3166662, *5 (S.D.N.Y. Aug. 4, 2008), and that both parties understood that the communication at issue would be in furtherance of this shared legal interest, *Fireman's Fund Ins. Co. v. Great Am. Ins. Co. of*

New York, 284 F.R.D. 132, 140 (S.D.N.Y. 2012). A critical element of this inquiry is whether an attorney for either party participated in the exchange of privileged information. *See id.*; *see also HSH Nordbank*, 259 F.R.D. at 72 ("[C]ounsel for one of the parties was actively engaged in the communications at issue. Thus, this is not a situation where the various non part[ies] and [the party] discussed subject matter previously discussed with counsel and now seek to assert privilege for that reason alone.").

Here, Associated Bank and Mr. Behm meet this test. Both have an identical *legal*, as opposed to commercial, interest in defending against the Receiver's position that Mr. Behm knew about—and deliberately involved Associated Bank in—the Ponzi scheme. This is not simply "sharing a desire to succeed in [an action]," *Campinas Found. v. Simoni*, No. 02-cv-3965, 2004 WL 2709850, at *3 (S.D.N.Y. Nov. 23, 2004), but a desire to present a common defense against a liability theory the Receiver is pressing in an active litigation. In addition, Associated Bank and Mr. Behm have both signed a common-defense agreement, *see* Declaration of Stephen Medlock, dated May 13, 2016, at ¶ 3[8], and have worked together to defend against the Receiver's theory. Associated Bank and Mr. Behm exchanged all information and advice pursuant to the common-defense agreement in the presence of

[8] Associated Bank will produce a copy of the common-defense agreement for *in camera* review if the Court wishes.

their respective counsel. And both Associated Bank and Mr. Behm understood that these exchanges were made in the course of formulating a common legal strategy and in furtherance of their shared legal interest. For these reasons, the Court should deny the Receiver's motion to compel.

It also bears noting that Receiver's factual premise—that Mr. Behm and Associated Bank could not be sued for the same torts—is false. The Receiver himself does not say that he will never sue Mr. Behm; rather, he carefully states that he currently "has no plans" to sue Mr. Behm. (ECF No. 128 at 10.) Similarly, were the Receiver to sue Wells Fargo (which had accounts for the Cook-Kiley fraudsters long before Associated Bank), then Wells Fargo could seek contribution from both Mr. Behm and Associated Bank. Thus, Mr. Behm and Associated Bank share a common legal interest in resisting the Receiver's theory of liability.

II. If the Receiver Stipulates that Mr. Behm was not Involved in the Ponzi Scheme and Had No Knowledge of the Scheme, Associated Bank Will Drop Its Common-Interest Objection.

If the Receiver wishes to take the position that there is no common interest because Mr. Behm was not involved in the fraud and did not deliberately involve Associated Bank in the fraud[9], Associated Bank will drop

[9] *See, e.g.*, ECF No. 128 at 1 ("Mr. Behm's . . . has purely factual knowledge that may bear on the Bank's liability."); *id.* ("[T]he Receiver . . . currently has no reason or basis to sue [Mr. Behm]."); *id.* at 10 ("The extent of Mr. Behm's

its common-interest objection, provided that the Receiver is estopped from arguing later that Mr. Behm was involved in the Ponzi scheme and deliberately involved Associated Bank in the fraud.

CONCLUSION

The Court should deny the Receiver's motion to compel.

Dated: May 13, 2016

s/ Charles F. Webber
Charles F. Webber
Bar Number 215247
Attorney for Defendant
Associated Bank, N.A.
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Telephone: (612) 766-7000
chuck.webber@FaegreBD.com

Alex C. Lakatos
Stephen M. Medlock
E. Brantley Webb
Attorneys for Defendant
Associated Bank, N.A.
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
Telephone: (202) 263-3000
alakatos@mayerbrown.com
(*admitted pro hac vice*)

---

involvement in this case is introducing his step-brother and Bank employee Lien Sarles to various principals of the Receivership Entities."); *id.* ("Mr. Behm is not a named defendant, and the Receiver has no plans to bring any action against Mr. Behm; there are no reasonable grounds to believe that Mr. Behm could be made a party in this case.").