

**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

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT OF THE
RECEIVER'S MOTION TO COMPEL THIRD-PARTY SUBPOENA
RESPONDENT MICHAEL BEHM TO ANSWER DEPOSITION QUESTIONS**

The Receiver's motion to compel third-party (and former Receivership Entity employee), Michael Behm should be granted. In its motion and supporting brief, the Receiver set forth the pertinent legal standard and showed that under that standard, Mr. Behm cannot show a common legal interest to support the "common interest" exception to extend the attorney-client privilege. In Mr. Behm's response (which adopts the Bank's response without comment), he does not dispute the applicable legal standard, but instead concocts a non-existent legal theory in an attempt to show some commonality between him and the Bank. His attempt fails.

REPLY

In his response, Mr. Behm¹ does not dispute that the standard for applying the “common interest” extension of the attorney-client privilege is to show a common legal interest as between two parties. *See Resp.* at 4-5 (ECF No. 135). Based on this standard, however, Mr. Behm incorrectly asserts that he has an “identical legal interest” to the Bank. (ECF No. 135 at 7). According to Mr. Behm, this interest is in “defending against the Receiver’s *position* that Mr. Behm knew about—and deliberately involved Associated Bank in—the Ponzi scheme.” *Id.* (emphasis added). This is not, however, a legal interest, nor is it “identical” to the Bank’s.

As an initial matter, Mr. Behm does not dispute that he has not been sued by the Receiver and has never been targeted by federal authorities for criminal prosecution. And, as the Receiver pointed out in his opening brief, there is no tort or legal action of “deliberately involving” someone else in a tort. Mr. Behm goes further than the “deliberate involvement” in his brief, however. He additionally argues that the Receiver is accusing him of “knowing about” the Ponzi scheme. *See Resp.* (ECF No. 135) at 7. But this fails for similar reasons – namely, that there is no cause of action for knowing about other torts. Thus, Mr. Behm’s claim that there is a common “liability theory” applicable to both him and the Bank is simply false.

¹ Mr. Behm did not file his own brief in response to the Receiver’s motion but instead relied on the Bank’s response by adopting it in its entirety. For simplicity, however, the Receiver will refer to only Mr. Behm’s response.

As a last-ditch effort to find some common legal interest, Mr. Behm hypothesizes the existence of a lawsuit that the Receiver brings against Wells Fargo thereby triggering a right of contribution by Wells Fargo against both Associated Bank and Mr. Behm. But beyond the wild speculation that this could even occur, it also suffers from the same infirmities noted above. He is just substituting the implausible Receiver-as-plaintiff scenario with a Wells-Fargo-as-plaintiff scenario, without explaining why this would change anything. This is equally, if not more, speculative, and equally, if not more, baseless. In sum, nothing that Mr. Behm has argued changes the fact that he is not a defendant, and that he completely lacks the common legal interest necessary for the common interest extension to apply.

CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that third-party subpoena respondent, Michael Behm, be compelled to answer questions regarding conversations with and among his own counsel and the Bank's counsel that occurred prior to his deposition.

Dated: May 17, 2016

Respectfully submitted,

/s/ Michael R. La Porte

Tara C. Norgard (MN Bar No. 307,683)

Brian W. Hayes (MN Bar No. 294,585)

Russell J. Rigby (MN Bar No. 323,652)

CARLSON, CASPERS, VANDENBURGH,
LINDQUIST & SCHUMAN, P.A.

225 S. 6th Street, Suite 4200

Minneapolis, MN 55402

Telephone: (612) 436-9600

Fax: (612) 436-9605

Email: bhayes@carlsoncaspers.com

SPECIAL LITIGATION COUNSEL

Keith A. Vogt (*pro hac vice*)

IL Bar No. 6207971

1033 South Blvd, Suite 200

Oak Park, IL 60302

Telephone: (708) 203-4787

Email: keithvogtjd@gmail.com

William W. Flachsbart (*pro hac vice*)

IL Bar No. 6237069

Robert P. Greenspoon (*pro hac vice*)

IL. Bar No. 6229357

Michael R. La Porte (*pro hac vice*)

IL. Bar No. 6237510

FLACHSBART & GREENSPOON, LLC

333 N. Michigan Ave., 27th Floor

Chicago, IL 60601-3901

Telephone: (312) 551-9500

Email: wwf@fg-law.com

Email: rpg@fg-law.com

Email: mrl@fg-law.com

D. Timothy McVey (*pro hac vice*)

IL Bar. No. 6182134

MCVEY & PARSKY, LLC

30 N. LaSalle St., Ste. 2100

Chicago, IL 60602-2575

Telephone: (312) 551-2130

Email: dtm@mcveyparsky-law.com

*Attorneys for Plaintiff R. J. Zayed, in his Capacity as
Court-Appointed Receiver*

CERTIFICATE OF SERVICE

The undersigned attorney of record certifies that on May 17, 2016, copies of the foregoing document were served upon counsel for Defendant via e-mail to the following addresses:

Jeffrey S. Storms
jeff@newmarkstorms.com

Eric L. Newmark
eric@newmarkdefense.com

Alex C. Lakatos
Stephen M. Medlock
E. Brantley Webb
FW-CLIENT-Associated-Bank-Crown-Forex@mayerbrown.com

Charles F. Webber
chuck.webber@FaegreBD.com

/s/ Michael R. La Porte

Michael R. La Porte