**UNITED STATES DISTRICT COURT**
**DISTRICT OF MINNESOTA**

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| R.J. ZAYED, in His Capacity as Court-Appointed Receiver for the Oxford Global Partners, LLC, Universal Brokerage, FX, and Other Receiver Entities,<br><br>Plaintiff,<br>vs.<br><br>ASSOCIATED BANK, N.A.,<br><br>Defendant. | Case No. 13-cv-00232 (DSD-JM)<br><br>JANIE S. MAYERON, U.S. Magistrate Judge |

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

Third-party witness and former Receivership Entity employee Michael Behm should be compelled to answer questions that he refused to answer during his April 26, 2016 deposition concerning discussions he had with Associated Bank's counsel, and conversations he had with his own counsel in the presence of the Bank's counsel.

This motion concerns testimony of Michael Behm, a person who the Receiver has not sued, does not intend to sue, and currently has no reason or basis to sue. He is also a person who the federal investigators never targeted for criminal prosecution. Mr. Behm's role in this case against the Bank is that he was the ex-step-brother of Bank employee, Lien Sarles and that he introduced Sarles to Trevor Cook, one of the principal fraudsters. He has purely factual knowledge that may bear on the Bank's liability.

There is no privilege between Behm and the Bank's attorneys and therefore conversations between them cannot be shielded from discovery. Moreover, Behm's

discussions with his own attorney in the presence of the Bank's attorneys destroyed any privilege that may otherwise have applied. The assertion of privilege was therefore improper and the Receiver moves for an Order allowing the completion of Mr. Behm's deposition without further obstruction.

## BACKGROUND

Prior to working for Patrick Kiley, founder and owner of UBS Diversified and Universal Brokerage FX Management, LLC ("Universal Brokerage", one of the companies involved in the Cook/Kiley Ponzi scheme (a "Scheme Entity")), Michael Behm was working as a general contractor in the construction field. His (now ex) step-brother, Lien Sarles, is a former employee of Defendant Associated Bank. Sometime after he began working for Mr. Kiley, Mr. Behm introduced Trevor Cook to Lien Sarles[1] to establish a business-banking relationship between Cook and Associated Bank. *See, e.g.,* Tr. 37:6-22. Discussions, and eventually a substantial amount of business, then ensued between Mr. Sarles and Cook. Beyond the initial introduction, it does not appear that Mr. Behm had any further contact or involvement with the Bank.

On January 26, 2016, the Receiver began attempts to serve a third-party subpoena on Mr. Behm seeking documents and testimony to obtain facts that he might have concerning the Scheme Entities and Lien Sarles. *See* May 5, 2016, Declaration of Michael La Porte (hereinafter "La Porte Decl.") at ¶ 2. On January 27, 2016, Associated Bank also

[1] Mr. Behm's mother, Mary Sipe, was once married to Lien Sarles' father (also named Lien Sarles). The two were married at the time that Behm introduced Sarles to Cook, but are no longer married. *See* Tr. at 6:24 to 7:14.

began attempts to serve Mr. Behm with a third-party subpoena for documents and testimony. *See* La Porte Decl. at ¶ 3 (citing January 26, 2016, subpoena from Associated Bank to Michael Behm). Initially, neither the Receiver nor the Bank successfully served him. The difficulties appeared to stem from the lack of an accurate address.

In an effort to locate Mr. Behm for service, the Receiver served a third-party subpoena on Mr. Behm's construction company, SBH, LLC. *See* La Porte Decl. ¶ 4. Service on SBH also proved difficult. In an attempt to serve SBH, the Receiver's process server went to the address listed in public filings with the Minnesota Secretary of State. *Id.* at 4. A woman – who the Receiver later learned was Mary Sipe (a/k/a Mary Sarles) – answered the door but denied that the address was for SBH (it is), and denied that Mr. Behm worked there (he does). *Id.* at 5. For whatever reason, Mrs. Sipe lied repeatedly to avoid service on her son.[2] The Receiver's process server left the subpoena wedged in the door jamb at the registered address for SBH. *Id.* Shortly after this occurred, Mr. Behm's attorney contacted Associated Bank's attorney, who in turn informed the Receiver's counsel that Behm would be represented by counsel. *See* La Porte Decl. at ¶ 6.

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[2] Mr. Behm did, in fact, work at the address listed with the Minnesota Secretary of State. In fact, SBH is Mr. Behm's company and he hired Mrs. Sipe – who is his mother. *See* Tr. 7:15-16 (identifying his mother by name); Tr. 7:23 to 8:9.

In earlier attempts to serve SBH, counsel for the Receiver, Travis Campbell, called the number listed in Minnesota filings. A woman answered on behalf of SBH but claimed that she did not know who Michael Behm was. The Receiver's process server had made a video of the exchange he had with SBH employee and Mr. Behm's mother, Mary Sipe. In reviewing the video shortly after ending the phone call with Mrs. Sipe, Mr. Campbell identified Mrs. Sipe's voice as the same voice who answered the telephone on behalf of "SBH."

Upon learning that Mr. Behm would be represented by counsel (Newmark Storms Law Office, LLC, who also represents Lien Sarles), the Receiver's counsel contacted Mr. Behm's counsel to schedule the deposition and to drop the subpoena to SBH as unnecessary. After discussions with Mr. Behm's counsel, April 26, 2016 was agreed upon for the deposition. At the deposition, the Receiver's counsel asked what Mr. Behm did to prepare for his deposition. He said that, among other things, he met with the Bank's attorney. LaPorte Decl. Ex. D, Tr. at 10:5 to 11-3.

When asked follow-up questions, however, his attorney *and* the attorney for the Bank objected. *Id.* at 11:8-10. Counsel for the Bank asserted that the basis for instructing this third party not to answer was the attorney-client privilege and the common interest doctrine. The Bank's attorney claimed that there was a written agreement between the Bank and Mr. Behm to this effect and that they had a common interest – but did not specify what that interest was.[3] Mr. Behm followed his attorney's advice, and the suggestion of the Bank's counsel, and refused to say what he talked about with the Bank's attorneys. *Id. at* 11:6 to 12:8.

Based on these objections, counsel for the Receiver contacted the chambers of Magistrate Judge Mayeron to seek guidance as to how to proceed regarding this invocation and refusal to answer. Judge Mayeron, through her clerk, advised the parties

[3] During the deposition, counsel for Mr. Behm said that he did not have a copy of the written "common interest" agreement with him at the deposition. Counsel for the Bank implied that he would not voluntarily provide a copy but instead would require that the Receiver "serve discovery, *if you think you are entitled to it.*" LaPorte Decl. Ex. D, Tr. at 11:21 to 12:2 (emphasis added). Neither Mr. Behm's attorney nor the Bank's attorney have provided a copy of the supposed "common interest" agreement to date.

to attempt to work out their differences during the deposition if possible. The parties tried, but were unsuccessful. The Receiver's questions remained unanswered.

Counsel for the Receiver and counsel for the Bank then set up a time to meet and confer further regarding the assertion of privilege. The Receiver's counsel sought an explanation regarding the nature of the interest that was supposedly common between Behm and the Bank, and also a copy of the written agreement referenced during the deposition. *See* La Porte Decl. at ¶ 7 (attaching April 29, 2016, email from Keith Vogt to Jeffrey Storms and Alex Lakatos). All three parties agreed to meet by telephone on May 2, 2016. Prior to the call, counsel for the Bank responded to the Receiver's request for an articulation of the common interest and claimed that:

> we entered a written common interest agreement before communicating with Mr. Behm, and that we satisfy the standards for the common interest privilege as set forth in *Shukh v. Seagate Technology, LLC*, 872 F. Supp. 2d 851, 855 (D. Minn. 2012) (emphasis added). Specifically, Receiver appears to be falsely accusing Mr. Behm of being part of the Ponzi scheme, and appears to further be falsely asserting that Mr. Behm deliberately involved Associated Bank in that scheme.

La Porte Decl. ¶ 8 (attaching May 2, 2016, email from Alex Lakatos to Keith Vogt). The message did not attach a copy of the purported common interest agreement.

Later that afternoon, all three parties met by telephone in a further attempt to resolve this issue, but were unable to do so. The Bank and Mr. Behm stood on their objections and assertion of privilege. For the reasons set forth more fully below, Mr. Behm's assertion of privilege and refusal to answer the questions regarding statements he made (and that were made to him in the presence of and by third parties) is improper.

## ARGUMENT

Former Receivership Entity employee and third-party witness Michael Behm should be compelled to answer questions regarding any meetings with his attorney which also included third parties – namely, counsel for an completely unrelated party, Defendant Associated Bank. The Federal Rules of Civil Procedure allow for liberal discovery. *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). Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party and proportional to the needs of the case. *See, e.g., Sandoval v. American Bldg. Maint.,* 267 F.R.D. 257, 261 (D. Minn. 2007); *see also* Fed. R. Civ. P. 26(b) (as amended Dec. 1, 2015).

Privileges, as exceptions to the general rule, "are not lightly created nor expansively construed, for they are in derogation of the search for truth." *United States v Nixon*, 418 U.S. 683, 710 (1974). While confidential communications between individuals and attorneys for the purposes of obtaining or rendering legal advice are privileged, *see Upjohn v. United States*, 449 U.S. 383, 394-95 (1981); *United States v. Horvath*, 731 F.2d 557, 561 (8th Cir. 1984), the privilege protects communications, not facts, and can be waived if not steadfastly protected. The most typical instance of waiver involves the disclosure of attorney client communications or work product materials to third parties. *See, e.g., S&S Forage & Equip. Co, Inc. v. Up North Plastics, Inc.*, No. 98-565 (DWF/RLE), 1999 U.S. Dist. LEXIS 23580 at *14 (D. Minn. Oct. 25, 1999).

There is a narrow exception to the waiver doctrine known as the "common interest" doctrine. *Id.* Under the common interest doctrine, disclosure of privileged work

product or communications in the presence of third parties will not act as a waiver if that person has a "common interest" with the client holding the privilege. *Id.* "[T]he common-interest doctrine . . . expands the coverage of the attorney-client privilege in certain situations:

> If two or more clients with a common interest in a litigated or non-litigated matter are represented by separate lawyers and they agree to exchange information concerning the matter, a communication of any such client that otherwise qualifies as privileged ... that relates to the matter is privileged as against third persons. Any such client may invoke the privilege, unless it has been waived by the client who made the communication.

*In re Grand Jury Proceedings*, 112 F.3d 910, 922 (8th Cir. 1997) (*quoting* Restatement § 126(1)). The doctrine creates an exception to the ordinary requirement that lawyer-client communications must be made in confidence in order to be protected by the privilege. *See Restatement* § 121; *John Morrell & Co. v. Local Union 304A, United Food & Commercial Workers*, 913 F.2d 544, 555-56 (8th Cir. 1990). A common commercial interest alone will not suffice. *See, e.g., Shukh v. Seagate Tech., LLC*, 872 F. Supp. 2d 851, 855 (D. Minn. 2012) ("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.'") (citing *Merck Eprova AG v. ProThera, Inc.*, 670 F. Supp. 2d 201, 211 (S.D.N.Y. 2009); and 24 Charles Alan Wright & Kenneth W. Graham, Jr., *Federal Practice and Procedure* § 5505 (1st ed. 1986)). "The party asserting the attorney-client privilege . . . bears the burden to provide a factual basis for its assertions." *Triple Five of*

*Minnesota, Inc. v. Simon*, 212 F.R.D. 523, 528 (D. Minn. 2002) (*citing Hollins v. Powell*, 773 F.2d 191, 196 (8th Cir. 1985)).

The Eighth Circuit's 1997 *In re Grand Jury* decision is instructive here as to the type of interests that suffice under the doctrine. That case arose in the context of Independent Counsel Kenneth Starr's ("OIC") investigation into former President Clinton. As part of that investigation, the OIC requested "[a]ll documents created during meetings attended by any attorney from the Office of Counsel to the President and Hillary Rodham Clinton (regardless whether any other person was present) pertaining to several Whitewater-related subjects." 112 F.3d at 914. In her individual capacity, then First Lady Hillary Clinton had met with both members of the Office of White House Counsel and her personal counsel on Whitewater-related matters. *Id.* Documents responsive to the grand jury subpoena (mostly notes of people present at the meetings) existed, but the White House asserted privilege over those documents. *Id.* Because Hillary Clinton was not the White House counsel's client, the White House relied on the "common interest" doctrine as an exception to waiver due to the presence of third parties during discussions. *Id.; see also id.* at 922.

In discussing the "common interest" doctrine, the Eighth Circuit identified Hillary Clinton's "interest" in the OIC's investigation "avoiding prosecution, or else minimizing the consequences if the OIC decides to pursue charges against her." *Id.* at 922. But it went on to conclude that "[o]ne searches in vain for any interest of the White House which corresponds to Mrs. Clinton's personal interest." *Id.* The Eighth Circuit considered a number of arguments that the White House advanced, including the need for a full

understanding of the facts known to the OIC, and the need to allocate responsibility among personal and public attorneys, "the desire to determine whether any White House policies need to be altered to prevent future difficulties, the fact that the OIC is investigating 'official misconduct,' and the ongoing Whitewater-related investigations by the RTC, FDIC, and Congress . . .." *Id.* The Court rejected each of these rationales as insufficient under the "common interest" doctrine, found that any privilege had been waived, and ordered production. *Id.* at 926; *see also SEC v. Gupta,* 281 F.R.D. 169, 171 (S.D.N.Y. 2012) (directing third-party witness who was represented by his own attorney to answer questions because he lacked a "common interest" with the party); *Ricoh Co. Ltd. v. Aeroflex, Inc.,* 219 F.R.D. 66, 70 (S.D.N.Y. 2003) ("Defendants waived protection for these e-mails under the work product doctrine *when counsel shared his observations with a third party who was likely to be an independent witness in the case*.") (emphasis added).

There is no common interest between Michael Behm and Associated Bank to justify extending the reach of the attorney-client and work product privileges. Mr. Behm is a former employee of Pat Kiley, who was the owner and founder of Universal Brokerage, which is a Receivership Entity. Mr. Behm does not work for, and never has worked for, Associated Bank.

In trying to come up with a "common interest" between a former Receivership Entity employee and the Bank, the Bank has claimed that the "Receiver appears to be falsely accusing Mr. Behm of being part of Ponzi scheme, and appears to further be falsely asserting that Mr. Behm deliberately involved Associated Bank in that scheme". LaPorte Decl. Ex. C (May 2, 2016 email from Lakatos to Vogt). But this is nothing more

than an *ad hoc* rationale, which really makes no sense at all. The Bank is a named defendant and is alleged to be an aider and abettor of certain torts. The extent of Mr. Behm's involvement in this case is introducing his step-brother and Bank employee Lien Sarles to various principals of the Receivership Entities.

Further, the Bank's tortious conduct alleged by the Receiver all occurred *after* Mr. Behm made his introductions. Mr. Behm has no interest in common with the Bank to avoid tort liability for aiding and abetting fraud, conversion, and breaches of fiduciary duty to the Receivership Entities. To the extent that Mr. Behm is merely hostile to the Receiver for asking questions at a deposition (which hostility is apparent from the transcript, *see, e.g.*, Tr. at 9:19-25) (testifying that he told his friends that having to sit for a deposition was "bullshit"), the Bank's deployment of the "enemy of my enemy is my friend" maxim does not suffice as a "common interest." *See, e.g., Pampered Chef v. Alexanian*, 737 F. Supp. 2d 958, 967-68 (D. Minn. 2010) (discussing with approval *Verigy US, Inc. v. Mayder*, No. C 07-04330 RMW (HRL), 2008 WL 5063873 at *3 (N.D. Cal. Nov. 21, 2008), which noted that "a shared desire to see a party succeed in an action is insufficient to invoke the 'common interest' doctrine.")). 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. If the Bank's expansive position on the common interest doctrine in this matter is allowed, any future defendant accused of tortious conduct could then meet with a third-party witness, including ex-employees of the plaintiff, and subsequently shield these communications

from discovery simply by claiming that there is a chance that the third-party witness might also be accused of the tortious conduct . This is not a logical outcome.

Because Mr. Behm, a former Scheme Entity employee, and the Bank do not share a common interest in the litigation of this case, the Bank's discussions with him – and indeed, his own counsel's discussions in the presence of the Bank – were not "confidential." Thus, those otherwise-privileged communications, as well as the disclosed work product of the Bank, are not protected by any privilege. Mr. Behm should be compelled to respond to all pertinent questions about discussions with his lawyer in the presence of the Bank's attorney and with the Bank's attorney, including answering questions as to what documents were provided to him to prepare for his deposition.

## CONCLUSION

If the Receiver is not permitted to examine Mr. Behm on the extent to which the Bank's counsel shaped his testimony through pre-deposition meetings and preparation, the end result at trial will be a parade of third-party witnesses, who are seemingly neutral and objective, who provide supposedly exculpatory testimony for the Bank, but who have, in reality, been extensively prepared under the cloak of secrecy provided by the attorney-client privilege. The "common interest" doctrine was never intended to stretch so far.

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

Dated: May 6, 2016

Respectfully submitted,

/s/ Michael R. La Porte

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**CERTIFICATE OF SERVICE**

The undersigned attorney of record certifies that on May 6, 2016, copies of the foregoing document were served upon counsel for Defendant via e-mail to the following addresses:

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