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) **FILED UNDER SEAL** **CONFIDENTIAL**

MEMORANDUM OF LAW IN SUPPORT OF RECEIVER'S MOTION TO COMPEL PRODUCTION OF LITIGATION HOLD NOTICES AND INSPECTION OF DOCUMENT REPOSITORIES OF TWO KEY WITNESSES

I. INTRODUCTION

The Receiver respectfully moves to compel Associated Bank ("the Bank") to produce litigation hold notices. The Receiver also respectfully moves to compel inspection of the computer drives, source files and source emails of two key Bank witnesses (Lien Sarles and Stephen Bianchi). The Receiver found indicia of spoliation. The Receiver also located severe deviations from the Bank's document preservation policy, and discrepancies in its document production. Many relevant facts only emerged recently during the meet-and-confer process. These factors militate in favor of further factual development. This can only occur after the Bank produces the hold notices and/or makes the computer sources of its document collection efforts available for inspection.

II. FACTUAL BACKGROUND

As the Court is well aware, this case arose in the wake of the Cook-Kiley Forex Scheme ("the Scheme"). The Receiver seeks recovery from the Bank for its aiding and abetting various torts related to the Scheme, including conversion and breach of fiduciary duty. The Eighth Circuit confirmed that the Complaint sets forth facts that, if true, are sufficient to establish liability on the part of the Bank. *See Zayed v. Associated Bank*, 779 F.3d 727 (8th Cir. 2015). Among those facts, Lien Sarles was the Bank vice president with primary responsibility for interacting with the Scheme's key players. (Dkt. No. 1, at 3-7). His immediate supervisor was Tamara Simon, and Ms. Simon's immediate supervisor, in turn, was Stephen Bianchi. (*Id.* at 26). All three of these players authored or received various documents that have come to light during discovery.

This motion addresses issues of document preservation and collection. Several facts are relevant to the Bank's duty to preserve documents. Several other facts are relevant to insufficient actions it took after that duty arose, and possible spoliation.

To decide this motion, the Court will have to determine the date by which a duty to preserve documents arose within the Bank. At the latest, this date was July 9, 2009. This was the day the Minnesota *Star Tribune* first broke the story of the Scheme to its readership with an article entitled, "Twin Cities advisers accused of fraud, mismanagement." The article reports on litigation that had commenced on behalf of defrauded investors, and discusses Chief Judge Davis's asset freeze. [redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

[redacted]

III. ARGUMENT

A. Production of Hold Notices and Inspection of Computer Sources are Both Warranted Under Relevant Legal Standards

The underlying facts raise sufficient questions about spoliation and production inconsistencies to merit production of litigation hold notices, and inspection of original electronic sources for [redacted]

The duty to preserve material evidence arises "when a party should have known that the evidence may be relevant to future litigation." *Major Tours, Inc. v. Colorel*, No. 05-3091 (JBS/JS), 2009 U.S. Dist. LEXIS 68128, at *12 (D.N.J. Aug. 4, 2009) (*quoting Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998)). In general, litigation hold notices are considered privileged. *Id.* at *7. However, when spoliation (or a "preliminary showing" of spoliation) occurs, the notices are discoverable. *Id.* at *7, *15. Spoliation is "the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Id.* at *8 (*quoting Mitsui O.S.K. Lines v. Continental Shipping Line Inc.*, No. 04-CV-2278 (SDW), 2007 U.S. Dist. LEXIS 48216, at *6 (D.N.J. June 29, 2007)). "As soon as a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy

and put in place a litigation hold to ensure the preservation of relevant documents." *Id.* at *9 (citation omitted).

Here, the Receiver has made at least the required "preliminary showing" of spoliation. After the document preservation duty triggered on July 9, 2009, the following occurred:

[redacted] (the "Oxford mess") (Ex. G), which contradicts the pretextual reason named in termination documents, evidencing a motive to control the "spin" for later litigation.

Beyond the litigation hold notices, the Court should also permit the Receiver to inspect and collect documents from the original computer sources, as they relate to Messrs. Sarles and Bianchi (*e.g.*, local drives, the H-drive and the .pst files). Though once considered unusual, permitting inspection of original production sources is now "neither routine nor extraordinary." *White v. The Graceland College Center for Professional Devpmt. & Lifelong Learning, Inc.*, No. 07-2319-CM, 2009 U.S. Dist. LEXIS 22068, at *23 (D. Kans. Mar. 18, 2009). As the Receiver explained during the meet-and-confer process, the Bank has nothing to fear from such a production, since if it produced documents correctly, what the Receiver finds would essentially overlap with what the Bank produced. (Ex. F). The applicable standard asks whether there are "discrepancies or inconsistencies in response to a discovery request" and whether "the responding party[shows] unwillingness or failure to produce relevant information." *Id.* at *24. Here, the Receiver meets this standard.

The same record supporting a preliminary showing of spoliation also supports the request for inspection. [redacted]

[redacted]

B. The Bank's Various Objections Each Lack Merit

To fend off this motion, the Bank contends that it performed an adequate inspection itself for this litigation. [redacted]

[redacted]

As to objections *per se*, the Bank raised three. (*See generally* Ex. P). First, the Bank contends that three privileges preclude the possibility of a direct inspection (the attorney-client privilege and work product immunity; a "bank examination privilege" belonging to the Office of the Comptroller of the Currency; and the "SAR privilege" related to suspicious activity reports). Second, the Bank contends that the Receiver waited too long to identify a need for relief. And third, the Bank contends that litigation hold notices are privileged. The Court should overrule these objections.

First, the Receiver explained while meeting and conferring that it is open to arranging inspection protocols that accommodate any claim of privilege. For example, the Bank can "mirror" the requested sources, and then perform a sweep through them to remove completely any materials that it contends these privileges protect. Then the Receiver can inspect the "clean" mirrored sources. This process will, of course, require

the Bank to log what it extracts for later evaluation of the merit of such privilege claims.[3] These protocols are commonplace, and with the Bank's cooperation, should not be controversial or burdensome to implement.

Second, timeliness is a red herring. This Court's Scheduling Order has always set a date for final filing of nondispositive motions. This motion is timely under the Court's schedule. In addition, early in the case after it noted to the Receiver which custodians it would search, the Bank agreed that "the Receiver may make requests for additional documents based on a reasonable explanation of why the documents sought are relevant, proportional, and non-duplicative." (Exhibit S, November 13, 2015 Letter from Stephen Medlock to William Flachsbart). The Receiver has done so. [redacted]

Finally, the Bank is correct that litigation hold notices are usually privileged. But the case law cited above shows that particular facts may vitiate this privilege. As shown

[3] The Receiver will shortly file a motion to vitiate the so-called SAR privilege. Also, while the Bank has raised these privilege issues here, it never said that privileges actually cover any materials within the named repositories.

throughout this motion, the Receiver has made a preliminary showing of spoliation. Nothing more is required to render litigation hold notices discoverable.

IV. CONCLUSION

For the foregoing reasons, the Receiver respectfully requests that the Court find that the Receiver has made a preliminary showing of spoliation, and accordingly order the Bank to produce its litigation hold notices. [redacted]

Dated: October 20, 2016

Respectfully submitted,

/s/ William W. Flachsbart

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CERTIFICATE OF SERVICE

The undersigned attorney of record certifies that on October 20, 2016, a copy of the foregoing document was served upon counsel for Defendant via e-mail to the following addresses:

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