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, N.A.'s Memorandum In Support Of Motion For Sanctions or Adverse Inference

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INTRODUCTION

Associated Bank respectfully submits this memorandum in support of its motion for sanctions or an adverse inference, either of which this Court may consider—should it so choose—in resolving Associated Bank's Motion for Summary Judgment.

* * *

Discovery has shown the Receivership Entities[1] engaged in a vast, coordinated, and deliberate scheme to destroy massive amounts of highly relevant evidence regarding the Cook-Kiley Ponzi scheme, with the specific intent of preventing that evidence from being used in subsequent judicial proceedings. Among other things, Receivership Entity employees testified that an entire team assisted with the destruction of hard copy documents, filling multiple garbage bags with freshly shredded papers. This misconduct was so pervasive that on one occasion, a janitor caught Receivership Entity employees red-handed absconding with documents and computers. Upon seeing the janitor, one of the employees said, "Oh sh*t" and ran away. On

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[1] The Receivership Entities are the plaintiffs in this matter. They were operated largely by Trevor Cook, Patrick Kiley, and Christopher Pettengill, as part of the Cook-Kiley Ponzi scheme. On November 24, 2009, R.J. Zayed was appointed by the Court as an equity receiver, and stepped into the shoes of the Receivership Entities. *See, e.g.*, *U.S. Secs. & Exch. Comm'n v. Quan*, 2015 WL 8328050, at *5 (D. Minn. 2015) (finding that a receiver "stands in the shoes of an officer and director of the Receivership Entities.").

another occasion, Receiver's third-party document collection vendor, Waypoint, Inc. ("Waypoint"), caught an employee driving off with a truckload of documents. Waypoint further testified that the Receivership Entity offices were cleaned out—multiple computers were missing, drawers and filing cabinets emptied.

Receiver—upon stepping into the shoes of the Receivership Entities—recklessly failed to take basic, necessary steps to stem the tide of document destruction. Waypoint's testimony reveals that Receiver, in contravention of his duties, failed to (1) collect key evidence, including cell phones and laptops; (2) stop Receivership Entity employees from walking off with documents, and (3) properly record the state of the documents at the Receivership Entities.

Here, the bad faith actions of the Receivership Entities' employees—and the Receiver's own failure to preserve—led to the destruction of specific, critical documents in this case: Trevor Cook's meeting notes and the paper and electronic calendar entries of the fraudsters and their employees. Both of these sets of documents would establish whether the new centerpiece of Receiver's case—a supposed late April or early May 2008 meeting—ever occurred.

Specifically, one of the convicted fraudsters—Christopher Pettengill—claims that he attended a meeting with an Associated Bank employee, Lien Sarles, in late April or early May 2008. Mr. Pettengill's recollection is, to put

it charitably, dubious. Mr. Pettengill is a convicted felon serving 7.5 years in federal prison who *still* refuses to acknowledge his own wrongdoing. Ex. 1 at 126:23-127:7. Despite cooperating with law enforcement and Receiver for years, and despite providing Receiver with a declaration concerning Associated Bank before this case was filed, Mr. Pettengill mysteriously had no recollection of this "meeting" until days before the deadline for fact discovery in this case, when he provided Receiver with a newly minted second declaration that mentioned the meeting for the first time.

All of the evidence, moreover, is contrary to Pettengill's "recollection." For example, Mr. Pettengill is the only person at the alleged meeting who seems to recall it. Mr. Pettengill failed to identify Mr. Sarles in a photo array—twice. Mr. Pettengill claims that the purpose of the meeting was to move certain business from Wells Fargo to Associated Bank, yet the business stayed with Wells Fargo. And unlike every other meeting that Mr. Sarles attended with the Receivership Entities, the meeting Mr. Pettengill "recalls" appears nowhere in Mr. Sarles' records.

There should be a simple way to lay this issue to rest: Trevor Cook, another one of the fraudsters, took notes at all his meetings, and Mr. Pettengill says the meeting at issue here was no exception. Unfortunately, the Receivership Entities destroyed all of Mr. Cook's notes.

To rectify at least a modicum of the prejudice it has suffered, Associated Bank moves for an inference that Mr. Pettengill's self-serving "recollection" is wrong: either the meeting did not occur, or it occurred and nothing substantive was discussed. In the alternative, Associated Bank requests that this Court exclude Receiver's evidence of Pettengill's meeting. These sanctions are narrowly tailored to redress the most crucial of the documents that the Receivership Entities destroyed, and would honor the vast weight of objective evidence in this case. Moreover, should it wish to do so, this Court properly may consider these inferences in deciding Associated Bank's concurrently filed Motion for Summary Judgment.[2]

STATEMENT OF FACTS

I. Receivership Entities' Bad Faith Destruction Of Documents

A. Trevor Cook was held in contempt for destroying documents

Judge Davis specifically held Receivership Entity employee, Trevor Cook, in contempt for destroying documents in his order holding Trevor Cook in contempt of the Court's Asset Freeze Orders. *See* Ex. 2 (*CFTC v. Trevor*

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[2] In the alternative, this Court may dismiss Plaintiffs' case. *See, e.g.*, *Lewis v. Ryan*, 261 F.R.D. 513, 521 (S.D. Cal. 2009) ("Courts may sanction parties responsible for spoliation of evidence in three ways. First, a court can instruct the jury that it may draw an inference adverse to the party or witness responsible for destroying the evidence. Second, a court can exclude witness testimony proffered by the party responsible for destroying the evidence and based on the destroyed evidence. Finally, a court may dismiss the claim of the party responsible for destroying the evidence.").

Cook, No. 09-cv-03332-MJD-FLN, at 18-20 (D. Minn. Jan. 25, 2010) (ECF No. 178)). In its order, the Court credited Julia Gilsrud's testimony that after Trevor Cook and his brother looked at her computer one evening, "[t]he next morning, she noticed that at least one document, and many emails were missing" and, moreover, "many paper documents were missing, such as wire transfers, that were in or around her work area." *Id.* at 18-19. Subsequently, her computer was replaced entirely. *Id.* at 18. The Court found that when "Cook was questioned as to each of [these] items," "[h]is only response was to assert his Fifth Amendment privilege." *Id.* at 20.

The Court held Mr. Cook in contempt and ordered him to "surrender to the Receiver the computer, emails and wire transfer confirmations taken from Julia Gilsrud in July 2009." *Id.* at 29. Mr. Cook never turned over these paper or electronic documents, or the computer. *CFTC v. Trevor Cook, et al.*, No. 09-cv-03332-MJD-FLN, at 4 (D. Minn. Dec. 6, 2010) (ECF No. 577) (noting that Mr. Cook "demonstrated a present inability to comply with all provisions of the January 25, 2010 Order" but because he "provided additional information which has been helpful" and "the SEC, the CFTC and the Receiver no longer oppose the motion to lift the contempt order as long as this Court retain jurisdiction and require [Mr. Cook] to meet and cooperate").

B. Numerous witnesses testified to document destruction at the Receivership Entities

In this litigation, multiple employees admitted that Receivership Entities engaged in a massive document purge at all of their offices, once the principals learned that the government was investigating their conduct.

1. Ruth Sawiers (née Riehm)—who worked for the Receivership Entities as an administrative assistant at the Receivership Entity's Tiffany Court office[3]—testified that "after the – the whole thing that came up [*i.e.*, when Cook and Kiley "were accused of stealing money"] . . . ***they were shredding a lot of things***." Ex. 3 at 91:25 – 92:2-12 (emphasis added). She remembered "garbage bags with shredded paper," and several computers going "missing" one day. *Id.* at 97:4-5, 120:22-24, 120:16-18.

2. John Loebel—who worked for the Receivership Entities in sales—testified that Julia Gilsrud (née Smith), Ruth Riehm, and a "couple of [their] friends" were all assisting with document shredding and that Receivership Entity principal "[Patrick] Kiley . . . was overseeing the process." Ex. 4 at 162:10-16; 162:22-24. Mr. Loebel confirmed that he saw "***bags of shredded papers***, or at least I saw the bags being filled with the papers as they were being shredded." *Id.* at 164:20-22. He testified that "I was immediately nervous after seeing something like that. Because those are the only – only

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[3] Located in Burnsville, Minnesota.

the types of things that you hear going on in movies or really bad situations." *Id.* at 169:22-25 – 170:1-4

3. Leo Domenichetti—who worked for the Receivership Entities in various capacities—testified that Trevor Cook brought in a crew, and a 40-foot Dumpster, which was then filled with "junk" from Tiffany Court. Ex. 5 at 69:13. By the time this "clean up" was done, anything that had once been in the desks or filing cabinets was "cleaned out." *Id.* at 71:19-22. As well, multiple computers "ended up . . . just sitting out in the garage." *Id.* at 73:12-15; *see also* Ex. 6 at 91-94 (testifying that a "friend" of Mr. Cook's took "computers and things of that nature" from Tiffany Court).

4. Bradley Smallfield—a janitor who worked at the Prime Security Bank building[4] where the Receivership Entities had offices—caught Receivership Entity employees as they were destroying documents. He testified that on the evening of July 8, 2009 (*i.e.*, the night after investors sued Mr. Cook), he encountered Mr. Cook's brother removing multiple computers and throwing them roughly into the trunk of a car parked alongside the building. Ex. 7 at 51:23-25 – 53:22. After that, Mr. Smallfield encountered Mr. Kiley, who was carrying away a large suitcase so stuffed with paper documents that he was unable to close it. *Id.* at 54:19-25. When a

[4] Located in Eagan, Minnesota.

paper document fell out, Mr. Cook grabbed it up before Mr. Smallfield could read it. *Id.* at 56:18-23. When Mr. Kiley saw Mr. Smallfield he said, "Oh sh*t," (*id.* at 56:4-8), and Mr. Smallfied testified that both Kiley and Cook "***looked like they had seen a ghost***" (*id.* at 56:24-25 – 57:1-3). After this encounter, Kiley and Cook ran down the stairs and "peeled out." *Id.* at 57:5-10.

C. Testimony from the Receiver's document collection vendor confirms document destruction

In his deposition, Eric Erickson—who worked at the Van Dusen mansion for two years (Ex. 8 at 30:10-16)—explained that the second floor of the mansion housed five offices including his own, those of Receivership Entity principals Jason Beckman and Christopher Pettengill, and Mr. Pettengill's assistant (*id.* at 36:2-20). But the Receiver's document collection vendor, Waypoint, testified that when it arrived at the Van Dusen mansion, it found multiple second floor rooms "***pretty much empty***" (Ex. 9 at 51:8 (emphasis added)), and that it recovered only ***one computer on the entire second floor***—a computer that had been thrown in a closet (*id.* at 51:20-25 (emphasis added)). Similarly, on the third floor, where Receivership Entity principals Trevor Cook and Gerald Durand had offices (Ex. 8 at 45:15-21), Waypoint found only one computer, again, stuffed in a closet. Ex. 9 at 55:22-25.

Multiple witnesses testified that Trevor Cook had "several" filing cabinets "right behind his desk." Ex. 8 at 100:19-25-101:1-4; *see also* Ex. 6 at 55-57; *id.* at 57:9; Ex. 5 at 18:17-20. Yet Waypoint testified that when it arrived to the Van Dusen mansion, there were ***no filing cabinets*** on the third floor, nor were there any files or other documents. Ex. 9 at 53:23-25; 54:8-25 – 55:1-21.

Similarly, Waypoint testified that when it and Receiver arrived at Tiffany Court, they found file drawers empty, rooms without furniture, and work stations with bare monitors, cords dangling in the back, stripped of underlying computers. Ex. 10 at 31:20-25-32:1-21. The 40-foot dumpster Leo Domenichetti testified to was no longer even on the property. *Id.* at 33:8-10.

II. Receiver Failed To Preserve Documents

Receiver recklessly failed to preserve documents in violation of his preservation obligations, and thereby failed to mitigate the document destruction problem at the Receivership Entities.

First, Receiver failed entirely to collect cell phones from the fraudsters or their employees. Receiver gathered no phones at Tiffany Court and only two phones from the Van Dusen mansion, both from the same work area in the basement. Receiver collected no cell phones from the employees themselves, notwithstanding that Receiver had both subpoena power and a court order directing Receivership Entity employees to cooperate. Ex. 10 at

37:8-10; Ex. 9 at 34-35, 43. By failing to collect any cell phones, Receiver lost critical information such as stored electronic calendar information, contact lists, call logs and voice mails, and e-mails.

Second, when Receiver and Waypoint first arrived at the Van Dusen mansion and Tiffany Court, supposedly to secure the premises, they failed to search the persons of any individuals onsite, including those who were "cleaning" the Receivership Entities' offices, as well as other individuals whose names, and reasons for being on the premises, Receiver could not explain. Ex. 10 at 12:2-25 – 13:1-5, 14:7-25 – 15:1-11; Ex. 9 at 31:14-17; 35:14-24. As a result those individuals were able to simply walk off the premises taking with them anything they so desired—including key documents.

Third, Receiver failed to properly record the state of the documents at the Receivership Entities when he and Waypoint first arrived at the Van Dusen mansion. In the *117 pictures* taken of the Van Dusen mansion, not a *single* photo documents the remaining drawers or file cabinets (of course, the items that had already been removed and destroyed could not be photographed). *See* Ex. 11 (all photographs taken by Waypoint of Van Dusen mansion). This failure impedes any effort to reconstruct which documents were destroyed. Indeed, as referenced above, all that can be gleaned from this photos is that the Receivership Entities destroyed a tremendous number of documents in Trevor Cook's office.

III. The Receivership Entities Destroyed Key Documents

The documents that the Receivership Entities destroyed are too vast to fully catalog here. This motion focuses on just one set of particularly crucial documents that the Receivership Entities purged. The destroyed documents relate to a "meeting" that only one of the supposed attendees, convicted-fraudster Christopher Pettengill, can recall. According to Pettengill, he and Mr. Sarles allegedly attended the meeting in "March or April of 2008." Ex. 12 at ¶ 4. Pettengill claims that during this meeting, Trevor Cook discussed, among other things, moving funds from Wells Fargo to Associated Bank. *Id.* at ¶ 4.

Mr. Pettengill testified that Trevor Cook took hard-copy, handwritten notes throughout the entire meeting: "Q. So who was taking notes? A. Well, ***I know Cook was taking notes***." Ex. 1 at 173:24-25-174:1-2. Mr. Pettengill further testified that Cook "kept pretty close tabs on [his notes]." *Id.* at 174:6-9. Indeed, Mr. Pettengill explained, Cook kept his notes under lock and key in his desk. *Id.* at 174:10-12. Unfortunately, the Receivership Entities destroyed all the documents in Cook's office. Accordingly, Receiver did not produce ***any*** of Cook's notes—not from this supposed meeting or any other.

Mr. Pettengill also testified that he might have had a calendar entry for the April or May meeting, on either his phone or his paper calendar. Ex. 1 at 71:9-12 ("Q. So it was on your phone; is that correct? A. I don't know if that

was the particular meeting because I don't have an exact date, but I did have meetings like that marked on my phone."); *see also id.* at 172:10-13 ("Q. Do you know if the meeting in April/May 2008 . . . would be in your paper calendar? A. It may be."). However, Receiver did not collect Mr. Pettengill's cell phone, and the Receivership Entities purged paper documents that would have included Mr. Pettengill's paper calendar. Therefore, Receiver did not produce Mr. Pettengill's phone calendar or his paper calendar.

LEGAL STANDARD

It is well-settled that a "district court is vested with discretion to impose sanctions upon a party under its inherent disciplinary power." *Bass v. Gen. Motors Corp.*, 150 F.3d 842, 851 (8th Cir. 1998). These powers are "governed not by rule or statute but by the control necessarily vested in courts to manage their own affairs so as to achieve the orderly and expeditious disposition of cases." *Chambers v. NASCO*, 501 U.S. 32, 43 (1991). Such inherent powers include the power to impose monetary or other sanctions appropriate "for conduct which abuses the judicial process." *Id.* at 43-45. In assessing what sanction to impose, courts consider the degree of culpability and the extent of the prejudice. *E.I. du Pont de Nemours & Co. v. Kolon Indus., Inc.*, 803 F. Supp. 2d 469, 499-500 (E.D. Va. 2011).

The Court's inherent power to impose sanctions for destruction of evidence includes the power to draw an adverse inference. *Stevenson v.*

Union Pac. R.R., 354 F.3d 739, 745 (8th Cir. 2004). An adverse inference is warranted where the court finds: (1) "intentional destruction indicating a desire to suppress the truth" and (2) "prejudice to the opposing party." *Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 460 (8th Cir. 2013) (quoting *Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739, 746, 748 (8th Cir. 2004)).

The first prong of this test requires that the destruction of documents occur in bad faith. *Stevenson*, 354 F.3d at 747-48. As to the second prong, "[t]he requisite element of prejudice is satisfied by the nature of the evidence destroyed in [the] case." *Id.* at 748. For example, the mere fact that the lost piece of evidence was the *only* copy available may support a showing of prejudice. *Id.* This Court has found prejudice based on the fact that the party seeking an adverse inference could not review a given piece of evidence. *See Lang v. City of Minneapolis, Minn.*, 2014 WL 2808918, at *6 (D. Minn. 2014) ("Plaintiff has arguably shown some prejudice to the development of her case by the inability to review the [lost evidence]").

In addition, other courts have found that so long as the destruction was the result of bad faith, the moving party will not be held to the unobtainable standard of showing exactly what the missing documents would have said; rather, the negative content of the missing evidence may be presumed. *See, e.g.*, *In re Residential Pfizer Inc. Sec. Litig.*, 288 F.R.D. 297, 315 (S.D.N.Y. 2013) ("A court must not 'hold the prejudiced party to too strict

a standard of proof regarding the likely contents of the destroyed or unavailable evidence because doing so would subvert the purpose of the adverse inference,'" and "'[w]here a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to the party.'"); *Process Controls Int'l, Inc. v. Emerson Process Mgmt.*, 2011 WL 5006220, at *6 (E.D. Mo. 2011) (finding prejudice even when the party seeking an adverse inference could not show what information the lost evidence contained in part because "the fact that [the party] cannot show exactly what information was contained in the destroyed pages is 'precisely the problem.'").

In addition, the Court's inherent power to impose sanctions for destruction of evidence includes the power to preclude evidence. *Stevenson*, 354 F.3d at 750; *see also Dillon v. Nissan Motor Co.*, 986 F.2d 263, 266-67 (8th Cir. 1993) (recognizing the district court's "inherent power to exclude . . . evidence").

This Court may consider an adverse inference or may preclude evidence for fact finding purposes at summary judgment. *See, e.g.*, *In re Oracle Corp. Sec. Litig.*, 627 F.3d 376 (9th Cir. 2010) (affirming decision of district court in excluding evidence whose admission was sought by plaintiffs on motion for summary judgment); *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 201

(S.D.N.Y. 2007) ("This Court will consider the adverse inference when issuing its Report and Recommendation on defendant NTL Europe's pending summary judgment motion."), *aff'd sub nom. Gordon Partners v. Blumenthal*, 2007 WL 1518632 (S.D.N.Y 2007).

ARGUMENT

I. Receivership Entities Destroyed Documents In Bad Faith

It is beyond dispute that the document destruction in this case was the result of bad faith on the part of the Receivership Entities that now sue Associated Bank. First, the Receivership Entities began to destroy documents as soon as the government began to inquire into their conduct—timing that is hardly a coincidence. *See, e.g.*, Ex. 13 (identifying "missing" computers on July 9, 2009). Second, the destruction was broad and carefully orchestrated, both of which are hallmarks of bad faith destruction. *See supra*, at 5-12. Third, when the Receivership Entity employees and principals were caught in the act of destroying documents and computers, they evidenced their bad intent by cursing, running away, driving off hastily, and looking as if they had seen a ghost. Ex. 7 at 56:4-8, 56:24-25 – 57:1-10.

II. Receivership Entities' Wanton Document Destruction Has Prejudiced Associated Bank

As a result of the Receivership Entities' concerted, bad-faith effort to destroy documents and Receiver's failure to stem the tide of destruction,

Associated Bank has been deprived of the ability to even review the destroyed documents. *Lang*, 2014 WL 2808918, at *6. Thus, the full extent of what was destroyed in this case cannot be known with certainty. "[T]he fact that [the party] cannot show exactly what information was contained in the destroyed pages is 'precisely the problem.'" *Process Controls*, 2011 WL 5006220, at *6.

What is known with certainty, however, is that the Receivership Entities who now sue Associated Bank destroyed documentary evidence concerning the March or April 2008 "meeting" that Mr. Pettengill alone "recalls." This includes the hand-written contemporaneous notes taken in real time during the meeting by Mr. Cook, as well as Mr. Pettengill's paper and electronic calendars that would show whether this meeting occurred and who actually attended it. *See* Statement of Fact, *supra* at 9-10.

This absence of evidence has allowed Mr. Pettengill to provide a self-serving account of what occurred at this supposed March/April meeting, free from the risk, if not outright certainty, that these documents—which Receivership Entities destroyed—will contradict his testimony.

III. Sanctions Are Warranted

Sanctions are necessary to remedy the prejudice to Associated Bank in this case. One appropriate remedy to redress the prejudice that the Receivership Entities have caused Associated Bank is an adverse inference that either (1) the meeting Mr. Pettengill "recalls" simply did not occur or

(2) it occurred, but nothing substantive was discussed. These inferences are narrowly tailored to what was destroyed, and are fully consistent with all of the objective evidence. In the alternative, the Court should exclude Receiver's evidence of Mr. Pettengill's supposed "memory" of meeting—including paragraph four of Mr. Pettengill's May 23, 2016 Declaration and any further testimony from Mr. Pettengill about the "meeting."

These sanctions are well-supported by the overwhelming weight of other evidence in this case.

1. As an initial matter, Mr. Pettengill, even as he sits in prison, continues to have a tenuous relationship with the truth. Notwithstanding his fraud conviction, he asserted at his deposition that "I never willfully stole people's money," and "the mens rea never came into play." Ex. 1 at 126:24-127:6.

2. Other than Mr. Pettengill, none of the other supposed participants can recall the April/May meeting. According to Mr. Pettengill, "Sarles, Cook, Durand, Beckman, Erickson, Kiley were present." Ex. 12 at ¶ 4. But Lien Sarles and Erik Erickson both testified that they remember no such meeting ever occurring, and Mr. Cook, who was interviewed extensively, never mentioned this supposed meeting.

When asked at his deposition, "do you remember attending a meeting with Trevor Cook and Mr. Pettengill in the spring of 2008 where they

discussed the insolvency of Crown Forex SA?", Lien Sarles had no idea what Receiver was talking about. Ex. 14 at 67:4-10. When counsel for Receiver followed up, asking "you have no recollection of a meeting with Mr. Kiley or Trevor Cook or Mr. Pettengill where all of you discussed the insolvency of Crown Forex, S.A., correct?", Mr. Sarles again confirmed, "Yeah, I'm sorry, I don't remember." *Id.* at 122:11-18.

At Mr. Erickson's deposition, when asked, "Do you recall any occasion where anyone from Associated Bank visited the Van Dusen Mansion?", Erickson responded "Not that I was aware of." Ex. 8 at 132:9-12. Further, Mr. Erickson explained that he did not have "any dealings with" anyone at Associated Bank. *Id.* at 130:9-17.

2. Unsurprisingly, when asked basic questions about this alleged meeting, Mr. Pettengill's story disintegrated. At his deposition, Mr. Pettengill could not identify Mr. Sarles—twice. Even when Receiver offered Mr. Pettengill a second bite at the apple, steering him away from his initial misidentification of a person other than Mr. Sarles, Pettengill still could not pick out the correct photo. Ex. 1 at 160:11-161:5, 242:3-23.

3. Further, according to Mr. Pettengill, the whole purpose of the meeting was to have Associated Bank take charge of sending wires to Switzerland, and to move the wire transfer business away from Wells Fargo. Ex. 1 at 174:3-176:10, 181:10-19. Contrary to Mr. Pettengill's story, Wells

Fargo continued to maintain accounts for the Receivership Entities and continued to process wire transfers to Switzerland—something Associated Bank never did.

4. Mr. Pettengill's alleged meeting also does not appear (1) in Mr. Sarles' business Expense Reports, nor (2) on his electronic calendar. Associated Bank produced all of Mr. Sarles' Expense Reports in this case—which show that Mr. Sarles was highly methodical and consistent in ensuring he got reimbursed for all of his mileage. For example, Mr. Sarles documented 23 business trips and expenses in April 2008; in May 2008, he similarly documented 23 business trips and expenses. *See* Exs. 15-16. But none of these trips was to the Van Dusen mansion, where Pettengill claims he met with Mr. Sarles. *Id.* By contrast, Mr. Sarles notes meetings at the Van Dusen mansion during months ***other*** than April/May 2008, and notes meetings during April/May 2008 at Receivership Entity offices ***other*** than the Van Dusen mansion. *See, e.g.*, Exs. 15, 17, and 18. Thus, it is highly telling that the meeting Mr. Pettengill claims to recall appears nowhere in Mr. Sarles' expense reports. Nor does that supposed meeting appear in any of his calendar entries from 2008, although he routinely calendared his meetings. *See* ECF Nos. 42-17, 42-18, 42-19 (Sarles' calendar entries).

5. Nor is there any email, calendar record or other document, of any type, discussing this meeting, let alone the supposed decision to move

business from Wells Fargo to Associated Bank, nor the complete about-face in which none of the relevant business was transferred to Wells Fargo.

Accordingly, the foregoing adverse inferences are the proper remedy for the level of culpability here and the extent of the prejudice suffered by Associated Bank. *Hallmark Cards, Inc.*, 703 F.3d at 460; *E.I. du Pont de Nemours*, 803 F. Supp. 2d at 500. In the alternative, Receiver's evidence of Pettengill's alleged meeting should be excluded.

IV. Receiver Cannot Excuse Himself From The Spoliation In This Case

A. Receiver stands in the shoes of the Receivership Entities and as such, is responsible for their misconduct

It is a matter of black letter law that the Receiver stands in the shoes of the Receivership Entities. *See Merrill v. Zimmerman*, 188 N.W. 1019, 1022 (Minn. 1922). As such, the Receiver is subject to the same claims and defenses as are applicable to the Receivership entities. *See Wuliger v. Manufacturers Life Ins. Co.*, 567 F.3d 787, 798–99 (6th Cir. 2009) (holding that under the "long-recognized 'stand-in-the-shoes' doctrine, . . . the Receiver's rights as a plaintiff are subject to the same claims and defenses as the received entity he represents"); *Armstrong v. McAlpin*, 699 F.2d 79, 89 (2d Cir. 1983) (same); 16 *Fletcher Cyc. Corp.* § 7801 (1979); 75 C.J.S. *Receivers* § 328 (1952); *Eberhard v. Marcu,* 530 F.3d 122, 132 (2d Cir. 2008)

(holding that the "receiver has no greater rights or powers than [any other plaintiff] would have").

Just as the Receivership Entities would be liable for any counterclaims that Associated Bank filed against them, so too are they responsible for the document destruction and the resultant injury that their misconduct has wrought on Associated Bank. Indeed, we are aware of no case that excuses a Receiver, or any party in comparable position (*i.e.,* a new manager or successor company) from his companies' earlier, rampant document destruction.

B. In light of Receiver's own conduct, he must answer for the spoliation of evidence

Not only long-standing Minnesota law on the rights and obligations of receivers, but also considerations of equity, make the imposition of an adverse inference proper in this case. To begin, after Receiver stepped into the shoes of the Receivership Entities, he failed to stop the document destruction by his employees, he failed to collect key electronically stored information, and he failed even to make a comprehensive record of what was destroyed. *See supra* at 10-12.

Moreover, Receiver chose to make the views of convicted fraudster Christopher Pettengill a centerpiece of his case. Receiver did not distance himself from Pettengill; rather, Receiver sought out Pettengill in prison,

obtained two declarations from him, and now pins his case on Pettengill's words. Ex. 1 at 61-62.

Having made the choice to "team up" with Pettengill, Receiver should not be permitted to walk away from the wrongful document destruction for which Pettengill and his co-conspirators are responsible. In other words, Receiver seeks to use Pettengill as a sword (relying on Pettengill's words) and a shield (relying on document destruction by Pettengill and his compatriots to prevent Associated Bank from offering contradictory evidence). That ought not be permitted. But for Receiver's strategic choice to rely on a fraudster, Associated Bank would not be seeking these inferences. But here, given Receiver's approach, an adverse inference is necessary to prevent what would otherwise be an abuse of judicial process. *Chambers*, 501 U.S. at 43-45.

CONCLUSION

For the reasons explained, this Court should grant an adverse inference against Receiver that Mr. Pettengill's alleged 2008 meeting either ever occurred or that nothing substantive was discussed at Mr. Pettengill's alleged 2008 meeting. In the alternative, Receiver's evidence of this alleged meeting should be excluded, including paragraph four of Mr. Pettengill's May 23, 2016 Declaration and any testimony by Mr. Pettengill about the meeting.

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