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 Brief In Support of Its Motion for Summary Judgment

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There is not a scintilla of evidence that any Associated Bank employee had actual knowledge of the Cook-Kiley Ponzi scheme, much less that any employee provided substantial assistance to the Ponzi scheme or caused any damage to the Receivership Entities. R.J. Zayed, a court-appointed equity receiver ("Receiver"), alleges that Associated Bank aided and abetted four torts: fraud, breach of a fiduciary duty, conversion, and false representations and omissions. Each of these torts relates to the Ponzi scheme operated by Trevor Cook, Patrick Kiley, Christopher Pettengill, and a close-knit ring of fraudsters who stole investors' money from 2006 until July 8, 2009. To show that Associated Bank aided and abetted the Ponzi scheme's torts, Receiver must show that (1) an Associated Bank employee had ***actual knowledge*** of the tortious conduct, (2) an Associated Bank employee provided ***substantial assistance*** to the Ponzi scheme, and (3) this conduct caused ***damages*** to the entities that Receiver represents (the "Receivership Entities"). *See Zayed v. Associated Bank, N.A.*, 779 F.3d 727, 733 (8th Cir. 2015). There is no evidence to support these three elements.

1. **Receiver Has No Evidence of Actual Knowledge.** Receiver's expert, Ms. Catherine Ghiglieri, opined that no one at Associated Bank knew about the Ponzi scheme. Ex. 1 at 239:15-240:8. Exhaustive discovery, including 28 depositions, written discovery, and millions of pages of documents produced, did not reveal ***any*** evidence that any Associated Bank

employee knew about the Ponzi scheme. Receiver also had the benefit of a tremendous amount of pre-litigation discovery, including investigations and litigation conducted by the U.S. Attorney's Office for the District of Minnesota, Securities & Exchange Commission, Commodity Futures Trading Commission, Internal Revenue Service, Federal Bureau of Investigation, and private plaintiffs, but these investigations uncovered no evidence that anyone at Associated Bank knew about the Ponzi scheme or provided substantial assistance to it. Likewise, no bank regulator has banned any current of former Associated Bank employee from the banking sector due to alleged involvement in the Cook-Kiley Ponzi scheme.

Unable to point to any evidence suggesting that any Associated Bank employee had actual knowledge of the Ponzi scheme or provided substantial assistance to it, Receiver can only attempt to cobble together a series of alleged "red flags" or "atypical" conduct from which he claims actual knowledge can be somehow inferred. Receiver's red flag theory suffers from two fatal flaws. First, red flags are not evidence of actual knowledge. Second, as Receiver's expert, Ms. Ghiglieri, concedes, the supposedly atypical banking conduct that Receiver has labeled "red flags" does not support an inference that any Associated Bank employee had actual knowledge of the Ponzi scheme or provided substantial assistance to it.

Receiver's case is built on allegations regarding a former Associated

Bank employee, Lien Sarles. Discovery has shown that these allegations have no factual basis. Mr. Sarles testified that he did not know about the Ponzi scheme. Numerous Associated Bank employees who worked closely with Mr. Sarles corroborated his testimony—they saw nothing that would indicate that Mr. Sarles knew about the Ponzi scheme. Mr. Sarles never took a pay off or gift from the Ponzi schemers. In contrast to the fraudsters, who drove luxury cars, lived in mansions, and made extravagant purchases, Mr. Sarles lived a modest life—living in a [redacted]. What is more, Receiver's original guilty-by-association insinuation against Mr. Sarles—that Mr. Sarles former step-brother, Michael Behm, worked for the fraudsters—now stands on its head because the evidence shows that Mr. Behm was unaware of the Ponzi scheme. What is more, Mr. Sarles was so convinced that Trevor Cook's investment program was legitimate that he suggested to his cousin, a ***federal prosecutor***, that she invest.

2. Associated Bank Did Not Substantially Assist the Ponzi Scheme.

Mr. Sarles' actions are entirely inconsistent with what a "dirty banker" with knowledge of the Ponzi scheme would have done to help the Ponzi scheme to "fly under the radar." Instead, he took actions that would have called ***more*** attention to the Receivership Entities, such as notifying his superiors that one of the Ponzi schemers, Trevor Cook, wanted to make a large cash

withdrawal from one of the Receivership Entity accounts.

3. Receiver Has No Evidence of Damages. Receiver's only supposed evidence of damages is a single attorney-drafted interrogatory response. This interrogatory response fails to establish damages for two reasons: (1) Receiver is seeking damages that he is not entitled to under Minnesota law, and (2) Receiver as no expert witness to calculate damages. First, contrary to Minnesota law, Receiver's interrogatory response assumes that Associated Bank should be liable for damages that it did not cause. Second, calculating damages in this case requires an expert. Receiver has no expert witness; he relies instead on attorney speculation. This is insufficient to meet Receiver's burden. Moreover, the testimony of Associated Bank's damages expert is undisputed, and the Court should enter summary judgment based on this testimony.

Summary judgment should be granted for Associated Bank.

STATEMENT OF UNDISPUTED FACT

I. Lien Sarles Did Not Know About The Cook-Kiley Ponzi Scheme

At the pleading stage, Receiver claimed that an Associated Bank Assistant Vice President, Lien Sarles, knew about the Cook-Kiley Ponzi scheme and deliberately assisted the Ponzi schemers. ECF No. 42 ¶¶ 5-11, 29, 33-35, 45, 53, 55, 58-61, 66, 72. While these naked allegations might have been sufficed at the pleading stage, summary judgment is the "put up or shut

up moment in a lawsuit, when a party must show what evidence it has that would convince a trier of fact to accept its version of the events." *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005). Discovery has shown that there is no evidence to support Receiver's theory.

A. All Witnesses Agree That Lien Sarles Did Not Know About The Ponzi Scheme

All of the witnesses—including all expert witnesses, all Associated Bank employees, and neutral third parties—have reached the same conclusion: Lien Sarles did not know about the Ponzi scheme. Mr. Sarles' testimony was unambiguous:

> Q. During the entire time that you worked at Associated Bank, did you ever know that Mr. Kiley was involved in a Ponzi scheme?
> A. Absolutely not. . . .
>
> Q. During the time that you worked at Associated Bank, what did you know about whether Mr. Cook was involved in a Ponzi scheme?
> A. Zero. Nothing. . . .
>
> Q. Looking back in hindsight, were you deceived by Mr. Kiley?
> A. I was a victim of their scam.
>
> Q. And looking back in hindsight, were you deceived by Mr. Cook?
> A. Absolutely.

Ex. 2 at 181:3-183:13.[1]

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[1] "Ex." refers to Exhibits to the Declaration of Stephen M. Medlock In

Receiver's expert witness, Ms. Ghiglieri, agrees that no one at Associated Bank, including Mr. Sarles, knew about the Ponzi scheme:

> Q. Right. So there's nobody at the bank who put this information together and determined there was a Ponzi scheme going on?
> A. Yes.

Ex. 1 at 239:15-240:8.

Associated Bank's expert, Charles Grice, agrees. Mr. Grice has trained thousands of bankers on Bank Secrecy Act/Anti Money Laundering ("BSA/AML") regulations, served as a chief compliance officer for myriad banks with BSA/AML shortcomings, and analyzed bank conduct in many major Ponzi schemes, including the Madoff Ponzi scheme. Ex 3 at 109:20-110:5. Mr. Grice explains:

> Ms. Ghiglieri and I agree that there is no one at Associated Bank who actually concluded . . . that the Cook-Kiley Receivership Entities were engaged in a Ponzi scheme.

Ex. 4 ¶ 19.

Current and former Associated Bank employees, such as David Martens, agree. Before becoming a Regional Security Officer for Associated Bank, Mr. Martens spent 28 years in law enforcement, including as the Chief of Police in Lakeville, Minnesota. He testified:

> Q. So based on your 28 years in law enforcement, you

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> eyeballed [Mr. Sarles], you assessed the way he responded to the questions that were posed and you came to the conclusion that this must be the result of sloppy banking as opposed to something nefarious[?]
>
> A. Yes.

Ex. 5 at 71:23-72:5.

Mr. Sarles worked very closely with two portfolio specialists, Nataliya Espey and Jenny Cox, who were responsible for opening accounts, taking customer instructions, and executing transactions. Both testified that Mr. Sarles did not know about the Ponzi scheme. Ex. 6 at 128:14-132:10; Ex. 7 at 117:7-118:10.

Likewise, Ryan Rasske, the former head of Associated Bank's BSA/AML and Corporate Security departments, testified:

> Q. Did anyone that worked for you in the BSA/AML department or corporate security department in the 2008/2009 time period uncover any evidence that Lien Sarles knew about the Cook/Kiley Ponzi scheme?
>
> A. No.
>
> . . .
>
> Q. Did anyone that worked for you in the BSA/AML department or corporate security department . . . uncover any evidence that anyone at Associated Bank knew about the Cook/Kiley Ponzi scheme?
>
> A. No.

Ex. 8 at 162:19-163:20.

Former employees of the Receivership Entities agree that Mr. Sarles did not know about the Ponzi scheme. Julia Gilsrud was Mr. Kiley's

assistant. She played a leading role in managing the Receivership Entities' bank accounts at Associated Bank. She testified that she had no reason to believe that Mr. Sarles was aware of the fraud. Ex. 9 at 177:17-19.

Mr. Sarles' former step-brother, Mr. Behm, who worked for the Receivership Entities, testified that he did not know about the Ponzi scheme and that he never told Mr. Sarles about it:

> Q. Did you know that any of the companies that Mr. Cook or Mr. Kiley were affiliated with were committing a fraud during the time that you worked there?
> A. No.
>
> Q. Did you ever tell Mr. Sarles that any company affiliated with Mr. Cook or Mr. Kiley was committing a fraud?
> A. No.

Ex. 10 at 90:3-90:17.

The fraudsters who ran the Cook-Kiley Ponzi scheme agree that Mr. Sarles did not know about the Ponzi scheme. Mr. Pettengill testified that in the summer of 2008, Mr. Sarles was not involved in the scheme. Ex. 11 at 193:12-23. Moreover, Mr. Pettengill has no evidence that Mr. Sarles ever knew about the Ponzi scheme. *Id.* at 195:2-13. In addition, Mr. Cook testified that [redacted] Ex. 12 at 86:25-87:1; *see also* Ex. 13 at 1764:16-17 [redacted]

B. The Facts Show That Mr. Sarles Did Not Know About The Ponzi Scheme

Consistent with the witness testimony, all other facts show that Mr. Sarles was unaware of the Cook-Kiley Ponzi scheme.

To begin, Mr. Sarles earned [redacted] in wages from Associated Bank in 2008. Ex. 14. He lived in a [redacted]. Ex. 2 at 202:8-12. He drove a [redacted]. *Id.* at 200:24-201:10. Moreover, there is no evidence that Mr. Sarles ever accepted a payoff or gifts from any of the fraudsters. Ex. 1 at 64:3-65:10.

Mr. Sarles also did the one thing that no rational Ponzi schemer would do—he called the feds. Based on his belief that it was a legitimate investment opportunity, Mr. Sarles referred his cousin and her husband to the investment program run by the Ponzi schemers. Ex. 2 at 226:10-229:14. Mr. Sarles' cousin is a federal prosecutor who focuses on prosecuting white collar crimes. *Id.* at 228:19-25, 229:2-9.

II. Receiver Presented No Evidence Regarding Damages

A. Receiver Has Withdrawn His Damages Expert

Receiver also has no evidence concerning damages. Receiver repeatedly acknowledged that expert witness testimony is necessary to prove damages. In the parties' Fed. R. Civ. P. 26(f) reports, Receiver stated that he would call a damages expert. Ex. 15; Ex. 16. In Receiver's initial disclosures, he stated that he would "prepar[e] a detailed damages calculation" in a "future

damages expert report." Ex. 17; *see also* Ex. 18 ("incorporat[ing] by reference any future damages expert report to be served in this matter."). In his interrogatory responses, Receiver indicated that he would "provid[e] an expert report on the topic of damages." Ex. 19 at Interrog. 9.

On April 4, 2016, Receiver identified Mr. Scott Hlavacek as a damages expert. Ex. 20. Then, on April 29, 2016, Receiver withdrew Mr. Hlavacek as an expert witness. Ex. 21 ¶ 41. Shortly thereafter Associated Bank deposed Mr. Hlavacek and learned why Receiver felt compelled to abandon him. Mr. Hlavacek testified that ***he did not even know that he had been identified as an expert witness***. Ex. 22 at 118:21-119:1-3. Moreover, Mr. Hlavacek explained that he had no experience calculating damages in a Ponzi scheme case, he made no attempt to do so, and he did not even know what methodologies were necessary to calculate damages in a Ponzi scheme case. *Id.* at 105:5-19, 122:21-24, 220:16-21. After this deposition, Receiver disowned Mr. Hlavacek entirely, representing to Magistrate Judge Mayeron that Mr. Hlavacek was "not the Receiver's witness." Ex. 23.

It was not until September 17, 2016, months after the close of discovery, and after Magistrate Judge Mayeron ruled that Receiver's interrogatory response regarding damages was "woefully inadequate," that Receiver disclosed any methodology underlying his damages calculation. *See* ECF No. 152 at 18. Now, Receiver contends that the proper measure of

damages is [redacted]. Ex. 24 at 3. [redacted] *Id.* at 3.

According to this attorney-drafted interrogatory response, Receiver's damages case rests on a single document—the Third Amended Claims List that Receiver filed in another litigation. After considerable stalling in discovery, Receiver now concedes that the Third Amended Claims List was compiled by ***unidentified student interns***, not anyone with any experience or training calculating damages. Ex. 21 ¶¶ 16(d), 71-72. Receiver has refused to produce any information identifying these interns, or anyone who supervised them, or what methodologies they applied in order to generate the Third Amended Claims List. *Id.* at ¶ 73.

B. The Assumptions in Receiver's Interrogatory Response Regarding Damages

The Receiver's attorney-drafted damages calculation proposed in his interrogatory response makes key assumptions that are contrary to the facts.

For instance, the Cook-Kiley Ponzi scheme lasted from 2005 to July 8, 2009. Ex. 4 at ¶ 25. None of the Receivership Entities had a banking relationship with Associated Bank until January 2, 2008. Ex. 21 ¶ 35. [redacted]. Ex. 24 at 15, 18. Receiver's approach to calculating damages for one of the Ponzi scheme investors, Adrienne Young, is illustrative. Receiver recognized her claim, including:

a. [redacted] Ex. 25 ¶¶ 9-11.

b. [redacted] Ex. 25 ¶ 10.

In addition, the Eighth Circuit described the Cook-Kiley Ponzi scheme as a "partial Ponzi scheme" because certain Receivership Entities made legitimate investments. *United States v. Beckman*, 787 F.3d 466, 474 (8th Cir. 2015). But in his damages calculation, Receiver does not take into account the nature of this "partial Ponzi scheme," or distinguish between

legitimate and illegitimate investments. Ex. 21 ¶ 45.

THE SUMMARY JUDGMENT STANDARD

"The Court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). For a dispute to be "genuine," the non-moving party "must do more than simply show that there is some metaphysical doubt as to the material facts," but must instead "come forward with specific facts showing that there is a genuine issue for trial." *Matsushita Elec. Indus. Co., Ltd. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). Therefore, Rule 56 "mandates the entry of summary judgment . . . against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

ARGUMENT

I. No One At Associated Bank Had Actual Knowledge of the Ponzi Scheme

A. Receiver Must Show That An Associated Bank Employee Had Actual Knowledge Of The Ponzi Scheme

Receiver alleges that Associated Bank aided and abetted the common law torts of fraud, conversion, breaching a fiduciary duty, and false statements and misrepresentations. *See* ECF No. 42 ¶¶ 70-98. In addition to

proving damages, Receiver must prove the three elements of a claim for aiding and abetting: "(1) the primary tort-feasor must commit a tort that causes injury to the plaintiff; (2) the defendant must know that the primary tort-feasor's conduct constitutes a breach of duty; and (3) the defendant must substantially assist or encourage the primary tort-feasor in the achievement of the breach." *Zayed*, 779 F.3d at 733 (quoting *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 188 (Minn. 1999)).

As to the knowledge requirement, "the defendant[] must *know* that the conduct [it is] aiding and abetting is a tort." *Witzman*, 601 N.W.2d at 186; *see also Anderson v. U.S. Bank N.A.*, 2014 WL 502955, at *5 (Minn. Ct. App. 2014). "The burden of demonstrating actual knowledge, although not insurmountable, is nevertheless a heavy one." *Chemtex, LLC v. St. Anthony Enters., Inc.*, 490 F. Supp. 2d 536, 546 (S.D.N.Y. 2007) (quotation omitted). "[W]hile actual knowledge may be shown by circumstantial evidence, the circumstantial evidence must demonstrate that the aider and abettor actually knew of the underlying wrongs committed." *Id.* "[C]onstructive knowledge—the possession of information that would cause a person exercising reasonable care and diligence to become aware of the fraud—is insufficient." *de Abreu v. Bank of Am. Corp.*, 812 F. Supp. 2d 316, 322 (S.D.N.Y. 2011); *see also Camp v. Dema*, 948 F.2d 455, 459 (8th Cir. 1991) ("[A] bare inference that the defendant 'must have had' knowledge of the

primary violation is insufficient.").

B. Receiver Has No Evidence That Lien Sarles, Or Any Other Associated Bank Employee, Had Actual Knowledge of the Ponzi Scheme

When the Eighth Circuit remanded this case, it emphasized that "the key player in this case, Sarles, has not been deposed by anyone, as far as we know." *Zayed*, 779 F.3d at 734. Now, the parties have produced millions of pages of documents, Mr. Sarles and 27 other witnesses have been deposed, and Associated Bank has provided detailed responses to written discovery. This wide-ranging discovery has uncovered no evidence that Lien Sarles, or anyone else at Associated Bank, had actual knowledge of the Ponzi scheme.

There is no dispute that Mr. Sarles and every other current and former employee of Associated Bank testified that they did not know about the Ponzi scheme. *See, e.g.*, Ex. 2 at 181:3-183:13; Ex. 5 at 71:23-72:5; Ex. 7 at 117:7-118:10; Ex. 6 at 128:14-132:10; Ex. 8 at 162:19-163:20. Receiver's expert, Ms. Ghiglieri, testified that no Associated Bank employee knew about the Ponzi scheme. Ex. 1 at 239:15-240:8. Trevor Cook testified that Mr. Sarles [redacted]. Ex. 13 at 1764:16-17. Former employees of the Receivership Entities, also testified that no one at Associated Bank, including Mr. Sarles, knew about the Ponzi scheme. *See, e.g.*, Ex. 9 at 190:11-194:10; Ex. 26 at 92:20-93:8; Ex. 27 at 30:18-25; Ex. 10 at 90:3-90:17.

In response to this mountain of undisputed fact, Receiver points to a

single declaration submitted by a convicted fraudster, Christopher Pettengill.[2] Therein, Mr. Pettengill describes a single meeting that he believes Mr. Sarles attended in "March or April of 2008." Ex. 28 ¶ 4. Even if the meeting happened exactly as Mr. Pettengill claims, Mr. Pettengill's description of events is fully consistent with all of the other testimony that Mr. Sarles was never knew about the Ponzi scheme.[3]

During the meeting, Mr. Pettengill alleges that Mr. Sarles introduced himself, and then some of the other participants discussed transferring investor funds between the Receivership Entities' Swiss trading platform, Crown Forex, S.A., and the United States so that it could be placed into segregated accounts, consistent with what the Receivership Entities' offering documents described. This course of action had been recommended by the Receivership Entities' attorneys, Briggs & Morgan, P.A. Ex. 11 at 180:15-181:19. Notably, Mr. Pettengill did not testify that Mr. Sarles learned of the Ponzi scheme at this meeting. Indeed, Receivership Entity employees who

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[2] Despite pleading guilty, Mr. Pettengill maintains that he "never willfully stole people's money" and that his "mens rea never came into play." Ex. 11 at 126:23-127:7.

[3] In light of the Receivership Entities deliberate destruction of the documents that would show whether this meeting actually occurred, and if so, who attended, this Court should make an adverse inference that meeting did not occur at all. *See* Associated Bank, N.A.'s Motion For Sanctions or Adverse Inference.

Mr. Pettengill claims attended this meeting, including Mr. Pettengill himself, did not learn of the Ponzi scheme until months later. Ex. 11 at 127:22-128:23; Ex. 26 at 125:20-127:18. Accordingly, there is no evidence that Mr. Sarles, or anyone else at Associated Bank, had actual knowledge of the Ponzi scheme.

C. Receiver's "Red Flags" Are Red Herrings

Rather than identifying evidence of actual knowledge or substantial assistance, Receiver points to supposed "red flags" that allegedly include "atypical" banking activity. *See* Ex. 29 at 120-23. But Receiver's "red flag" theory (1) is not the law, and (2) has no evidentiary support.

1. As a Matter of Law, Red Flags Cannot Establish Actual Knowledge

"[M]ere 'suspicions,' even of tortious conduct, are insufficient to satisfy the actual knowledge standard." *El Camino Res., Ltd. v. Huntington Nat'l Bank*, 772 F. Supp. 2d 875, 922 (W.D. Mich. 2010). For this reason, "atypical banking procedures do not raise an inference of actual knowledge." *Litson-Gruenber v. JPMorgan Chase & Co.*, 2009 WL 4884426, at *2 (N.D. Tex. 2009). And "[a]lleging that a bank disregarded 'red flags' such as 'atypical activities' on a customer's account is insufficient to establish knowledge." *Lamm v. State Street Bank & Trust*, 749 F.3d 938, 950 (11th Cir. 2014) (quotation marks omitted).

For example, in *Rosner v. Bank of China*, a court-appointed receiver

sued a bank for aiding and abetting a customer's fraud. 2008 WL 5416380, at *1 (S.D.N.Y. 2008). In order to prove actual knowledge, the receiver claimed that a bank customer made "nearly daily withdrawals of large amounts of cash," resulting in the theft of millions of dollars in investor money. *Id.* at *6. Some of the customer's bank accounts "were used for no purpose other than receiving and distributing funds." *Id.* Bank employees recognized that these transactions "were inconsistent with the [customer's] type of business, currency trading." *Id.* And, in some cases, the customer took large amounts of cash from a bank branch "in a bag or suitcase." *Id.* The *Rosner* court found that these facts "indicate only constructive knowledge of a fraudulent scheme" and rejected the receiver's attempt to rely on evidence of "red flags." *Id.* The district court concluded:

> [A] bank's ignorance of 'red flags' or obvious warning signs of fraudulent activity cannot establish a bank's actual knowledge sufficient to support a claim of aiding and abetting fraud.

Id.

Rosner is nearly on all fours with this case. As in *Rosner*, Receiver points to activities that he claims are "atypical" or "red flags," such as the withdrawal of $600,000 from an Associated Bank account and two bank accounts being opened for entities that were not registered with the Minnesota Secretary of State. *See* ECF No. 42 ¶¶ 6-11. Just as in *Rosner*, these facts, at most, show that Associated Bank should have know about the

Ponzi scheme, not that anyone at Associated Bank had actual knowledge of the Ponzi scheme. *Rosner*, 2008 WL 5416380, at *10. Therefore, Associated Bank's "ignorance of 'red flags' or obvious warning signs of fraudulent activity cannot establish . . . actual knowledge sufficient to support a claim for aiding and abetting." *Id.*

2. Receiver's Expert Concedes That Actual Knowledge Cannot Be Inferred From "Red Flags"

Consistent with this case law, Receiver's expert, Ms. Ghiglieri, explains that, in this case, actual knowledge cannot be inferred from Receiver's alleged "red flags" and "atypical conduct."

> Q. [Y]ou can't tell me why that atypical banking activity occurred? You can't tell if it's because the bank implemented its policies poorly or because someone on the inside at the bank knew about the Ponzi scheme and decided to assist in it?
> A. I think that's correct.

Id. at 276:14-22 (objection omitted). Associated Bank's expert, Mr. Grice, agrees. He concludes that "Ms. Ghiglieri and I agree that even if Associated Bank violated is own BSA/AML policies or engaged in 'atypical' conduct, it is impossible to conclude from such conduct that anyone at Associated Bank actually knew about the Cook-Kiley Ponzi scheme." Ex. 4 ¶ 7. The fact that all experts agree that actual knowledge cannot be inferred from Receiver's alleged "red flags" should end any inquiry into them.

3. Receiver's Alleged "Red Flags" Show That Associated Bank Did Not Know About The Ponzi Scheme

Even if Receiver's "red flags" were somehow relevant to actual knowledge (and they are not), they show that Lien Sarles ***lacked*** actual knowledge of the scheme. Receiver's alleged "red flags" would have called for ***more scrutiny*** of the Receivership Entities' bank accounts, not less. No rational banker who was actually involved in a Ponzi scheme would have risked detection by taking these actions.

For example, in early July 2009, Mr. Cook told Mr. Sarles that he wished to withdraw $600,000 in cash from a Receivership Entity bank account. Ex. 30 ¶ 23. Mr. Sarles ***immediately escalated*** the request to his superiors. *Id.* at ¶ 24. As Mr. Grice explains, the last thing a banker involved in a Ponzi scheme would do is inform his superiors of unusual account activity:

> Q. Let's talk about – one of the things Ms. Ghiglieri faults the bank for is for allowing $600,000 to be withdrawn in cash. If you're a dirty banker, if you're inside and you're helping out Ponzi schemers, what do you do when the Ponzi schemers ask to withdraw $600,000?
>
> A. … [T]he last thing you want to do is for your schemers to try to do a $600,000 cash withdrawal. Again, it's like waving your hand, asking for attention. It's a kind of behavior that will draw scrutiny, as it did draw scrutiny here.

Ex. 3 at 108:15-109:13.

Likewise, Receiver alleges that Mr. Sarles was responsible for various irregularities connected to the opening of a bank account for Crown Forex LLC, one of the Receivership Entities. Receiver claims that Mr. Sarles did not obtain a copy of the articles of incorporation for Crown Forex LLC before the account was opened, and failed to do so afterwards. Ex. 29 at 47-59. However, no rational banker involved in a Ponzi scheme would risk detection by failing to collect such a document:

> Q. Let's say you have a banker, hypothetically, . . . who actually is aware of a Ponzi scheme going on and is working with the Ponzi scheme. What would you expect him to do in terms of collecting articles of incorporation at the opening of an account?
>
> A. . . . I think a common methodology of fraudsters who are trying to work and cooperate with the Ponzi schemer is to not trip up on these minor papering questions that could cause somebody [i]n audit or a supervisor or a bank examiner to catch it. So the last thing I want to do, if I'm the dirty banker trying to help a customer engage in a scheme, is commit . . . some foul that could easily be avoided.

Ex. 3 at 105:5-106:15.

Receiver also argues that "[n]o level of expected [wire] activity, including domestic and foreign wire transfers, was documented at account opening" for Crown Forex LLC. Ex. 29 at 48. However, a banker who was trying to support a Ponzi scheme would never do this:

> Q. Now, one of the things that Ms. Ghiglieri faults the bank for is the fact that . . . in the account opening materials for

> Crown Forex, for example, it wasn't indicated that there would be a lot of wires at the time of account opening. . . . How does that affect the fraudsters and their ability to get away with the fraud?
>
> A. It actually hurts them because the way software works, if I'm the banker, and I'm opening your account, and I say you're going to have no or rare wire traffic out of your account, the software then will consider any wires as a spike in activity. . . . [I]f I'm trying to hide the fraud . . . I'm going to tell the account opening documents and, therefore, the software that you're going to be doing large cash transactions and wires all the time.

Ex. 3 at 107:13-108:14.

Finally, and most significantly, Mr. Sarles ***called a federal prosecutor*** and told her about the investment program offered by the Receivership Entities, so that after conducting her own due diligence, she could make her own investment. Ex. 2 at 226:10-229:14. It defies logic that a banker involved in a Ponzi scheme would call a federal prosecutor to discuss the scheme, and Receiver has no explanation for why Mr. Sarles would do so.

Time after time, Mr. Sarles did the exact opposite of what a banker involved in a Ponzi scheme would do. Consequently, Receiver's alleged "red flags" are not evidence of actual knowledge, because they compel the opposite conclusion—Lien Sarles never knew about the Ponzi scheme.

II. Associated Bank Did Not Provide Substantial Assistance To The Ponzi Scheme

There is no evidence that Associated Bank provided substantial

assistance to the Ponzi scheme. "In addressing aiding and abetting liability in cases involving professionals, most courts have recognized that 'substantial assistance' means something more than the provision of routine professional services." *Zayed*, 779 F.3d at 735 (quoting *Witzman*, 601 N.W.2d at 188-89). This rule "appl[ies] with some force to banks." *Anderson*, 2014 WL 502955, at *5.

There is no evidence of substantial assistance here. Lien Sarles's conduct was routine banking conduct. Even if Mr. Sarles made errors when providing routine banking services, nothing can be inferred from these errors. Receiver's expert, Ms. Ghiglieri, testified that this sort of "atypical" conduct occurs in nearly every bank. Ex. 1 at 129:6-14. Accordingly, Ms. Ghiglieri concedes that she can not infer that anyone at Associated Bank did anything to assist the Ponzi scheme. *Id.* at 276:14-22.

Further, substantial assistance "requires the plaintiff to show that the secondary party proximately caused the violation." *K&S P'ship v. Cont'l Bank, N.A.,* 952 F.2d 971, 979 (8th Cir. 1991). None of the conduct Receiver points to proximately caused the underlying violations. To the contrary, as explained above, the conduct Receiver focuses on was harmful to the Ponzi scheme because it increased the change of detection without affording the scheme any benefit. Consequently, there is no evidence of substantial assistance.

III. Receiver Has No Evidence Of Damages

Receiver has no evidence that the Receivership Entities were damaged in any way. Receiver's sole evidence of damages is a single attorney-drafted interrogatory response. This interrogatory response fails for two reasons: (1) Receiver is seeking damages that he is not legally entitled to, and (2) Receiver has no expert witness who can calculate damages in this case.

A. Receiver Is Seeking Damages That He Cannot Recover Under Minnesota Law

Remarkably, Receiver's interrogatory response assumes that Associated Bank should be liable for investor funds that were never deposited or transferred into an Associated Bank account. This is not the law. Associated Bank's damages are limited to those losses that it proximately caused. *K&S P'ship,* 952 F.2d at 979. In *In re Refco Securities Litig.*, for example, plaintiffs argued that banks were liable even for "act[s] that preceded the wrongdoing of a particular defendant." 2012 WL 8283039, at *8 (S.D.N.Y. 2012). Rejecting this argument, *Refco* explained:

> [t]he Plaintiffs' dramatic theory of retroactive liability is flatly inconsistent with the law on aiding and abetting . . . and the basic premise of proximate causation—that a wrongdoer can be liable only for the injury that it had a part in causing.

Id.

Receiver makes exactly the same error that the *Refco* plaintiffs did.

[redacted]

[redacted] Ex. 24 at 15, 18. In fact, in his interrogatory response, [redacted]. Ex. 25 ¶¶ 9-11; *see also* Ex. 21 ¶¶ 63-100. Consequently, Receiver has no evidence of damages because the damages calculations disclosed in his interrogatory response are inconsistent with settled law.

Moreover, "the general rule [is] that a receiver may sue only on behalf of the entity he represents." *St. Kelley v. Coll. of Benedict*, 901 F. Supp. 2d 1123, 1129 (D. Minn. 2012); *see also Caplin v. Marine Midland Grace Trust Co.,* 406 U.S. 416, 429 (1972) (receiver is limited to "the same claim[s] that the [receivership entity] could have made had it brought suit prior to entering receivership."); *Zayed v. Buysse*, 2011 WL 2160276, at *4 (D. Minn. 2011) (holding that Receiver may bring "suit to recover corporate assets unlawfully dissipated by the scheme's operator") (internal quotation marks omitted). But here, Receiver is seeking damages sustained by ***investors*** whom he has never been appointed to represent. These investors can, and indeed already did, seek damages against Associated Bank through other litigation. *See Grad v. Associated Bank N.A.,* 2011 WL 2184335 (Wis. Ct. App. 2011). Receiver must seek ***his own*** damages. *St. Kelly*, 901 F. Supp. 2d at 1129.

B. Receiver Has No Damages Expert And, Therefore, No Damages

1. A Damages Expert Is Necessary In This Case

An expert is needed to calculate Receiver's alleged damages. Courts have repeatedly held that absent an expert on damages, a case like this one, which requires complex calculations beyond the ken of a layperson, cannot go forward. *See, e.g.*, *Storage Tech. Corp. v. Cisco Sys.*, 395 F.3d 921, 928-929 (8th Cir. 2005) (affirming grant of summary judgment on breach of fiduciary duty claim where plaintiff's damages expert's opinion was excluded and there was no remaining expert testimony on damages); *Grp. Health Plan, Inc. v. Philip Morris USA, Inc.*, 344 F.3d 753 (8th Cir. 2003) (same).

Here, Receiver has no damages expert. Receiver repeatedly acknowledged that he needed a damages expert to prove damages. *See* Exs. 15-19. That is undoubtedly correct. Calculating damages in this case requires analysis that is beyond the ken of the average layperson. For example, an expert is needed to determine (1) which funds that were deposited before the relevant Associated Bank accounts were opened can be traced to Associated Bank, and (2) which payments that were deposited with Associated Bank can be traced to the fraud, as opposed the legitimate portions of the partial Ponzi scheme. Ex. 21 ¶¶ 105-106.

2. Receiver Has No Viable Alternative To A Damages Expert

Proof may not be based on "speculation or guesswork"; rather, the

plaintiff ***must*** provide a "reasonable estimate of damage based on relevant data." *Bigelow v. RKO Radio Pictures*, 327 U.S. 251, 264 (1946); *see also Nat'l Wrestling Alliance v. Myers*, 325 F.2d 768, 777 (8th Cir. 1963) (damages may not be based "on mere speculation, surmise, and conjecture.").

However, the only damages calculation that Receiver offers is nothing more than attorney speculation. Receiver has submitted a single interrogatory response that would ask the jury simply to parrot the summary information contained in his Third Amended Claims List. But this fails. Even were a jury to rely on Receiver's Third Amended Claims List, that list would require the jury to make determinations beyond the ken of the average layperson. For example, the Third Amended Claims List includes (1) claimants whose funds were never deposited with, or transferred to, Associated Bank; (2) claims made by individuals who never invested in Trevor Cook's foreign currency arbitrage program; and (3) claims recognized based on incomplete or ambiguous evidence. Ex. 21 ¶¶ 43-45. Thus, the jury cannot regurgitate Receiver's Third Amended Claims List in this case. Calculating damages requires an expert to ***link*** the amounts recognized in the Third Amended Claims List to Associated Bank and the torts alleged.

Nor can damages be calculated simply by totaling up deposits and withdrawals from Receivership Entity accounts. This is not a "full Ponzi scheme" case where damages might be calculated by reference to investor

claims or by tabulating the amounts that flowed into, and out of, the Receivership Entities' bank accounts. The Eighth Circuit has expressly found that Cook-Kiley Ponzi scheme was a "partial Ponzi scheme" because certain of the Receivership Entities made ***legitimate*** investments. *United States v. Beckman*, 787 F.3d 466, 474 (8th Cir. 2015). Therefore, expert testimony is necessary to determine which deposits and withdrawals were related to legitimate business and which were related to the Ponzi scheme, Ex. 21 ¶ 45. Moreover, a simplistic review of deposits and withdrawals, or even the claims list itself, would leave a jury totally in the dark as to how to account for the mitigating recoveries that the claimants received from third-parties. Ex. 21 ¶¶ 43-45.

Because Receiver has presented no viable way to calculate damages in this case, summary judgment is warranted. *See Benincasa v. Lafayette Life Ins. Co.*, 2011 WL 5967300 (D. Minn. 2011) (granting summary judgment where plaintiffs failed to articulate a viable measure of damages).

C. The Testimony of Associated Bank's Expert is Undisputed

The only expert to review the evidence relevant to damages is Associated Bank's expert, Karl Jarek. Receiver has elected to not even *depose* Mr. Jarek, much less call his methodology or conclusions into question. Therefore, there is no "battle of the experts" concerning damages, and this Court can enter judgment on damages in the amount that Mr. Jarek

provides in his report. *See* Fed. R. Civ. P. 56(g); Ex. 21 ¶¶ 110-137.

CONCLUSION

For the foregoing reasons, this Court should grant Associated Bank's motion for summary judgment.

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