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 to Exclude the Expert Testimony of Catherine Ghiglieri

Table of Contents

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Table of Authorities
(continued)

Page

Table of Authorities
(continued)

Page

Statutes, Rules, Regulations, and Other Authorities

INTRODUCTION

Catherine Ghiglieri's opinions and the testimony she offers in support of her conclusions are not relevant to Receiver's claims in this litigation, unreliable, pose an undue risk of juror confusion, and should be excluded.

1. Ms. Ghiglieri's Testimony Is Irrelevant To Actual Knowledge. Although Ms. Ghiglieri claims that Associated Bank violated the Bank Secrecy Act ("BSA") and its own internal policies, she concedes that any such violations shed no light on the question presented in this case: whether Associated Bank aided and abetted the Ponzi scheme operated by Trevor Cook and Patrick Kiley (the "Cook-Kiley Ponzi scheme"). Ms. Ghiglieri admits that there is no evidence that any Associated Bank employee had ***actual knowledge*** of the Cook-Kiley Ponzi scheme, which is the first element of an aiding-and-abetting claim. *Zayed v. Associated Bank, N.A.*, 779 F.3d 727, 733 (8th Cir. 2015) ("[T]he defendant[] must *know* that the conduct [it is] aiding and abetting is a tort."). As Ms. Ghiglieri testified, while she can flag possible BSA violations and "atypical" banking activity, it is not possible to say why the violations or activities occurred, or whether they had anything to do with the Ponzi scheme.

> 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.

Ex. 1 at 276:14-22 (objection omitted).[1]

In fact, Ms. Ghiglieri's own conclusion, after (1) reviewing nearly all of Associated Bank's documents, (2) reading the deposition transcripts of all of Associated Bank's current and former employees, and (3) bringing to bear decades of experience, ***is that no Associated Bank employee actually knew about the Ponzi scheme***:

> Q. And can you identify any individual at Associated Bank that put those pieces together and concluded that there was actually a Ponzi scheme going on?
> A. Other than Bonnie Skorczewski . . . . She put it together probably the best, the earliest.
>
> Q. But she didn't conclude there was a Ponzi scheme going on?
> A. Right.
>
> 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. Because Ms. Ghiglieri concluded that Associated Bank did not have actual knowledge of the Cook-Kiley Ponzi scheme, her report cannot assist the trier of fact in deciding whether Associated Bank had such knowledge.

---

[1] All references to "Ex." are to the exhibits to the attached Declaration of Brantley Webb in support of this motion.

2. Ms. Ghiglieri's Testimony Is Irrelevant To Substantial Assistance. Ms. Ghiglieri's testimony is also irrelevant to the second element of the aiding-and-abetting claim: whether Associated Bank ***substantially assisted*** the Cook-Kiley Ponzi scheme. *See Zayed*, 779 F.3d at 735. Substantial assistance "means something more than the provision of routine professional services." *Id.* (citation and quotation omitted). In order to create the impression that an Associated Bank employee must have substantially assisted the Coo-Kiley Ponzi scheme, Mr. Ghiglieri resorts to cataloguing what she terms "atypical" banking conduct. However, Ms. Ghiglieri's characterizations of Associated Bank's conduct is irrelevant. Ms. Ghiglieri admits that the Associated Bank conduct she labels as "atypical" is actually routine banking conduct.

> Q. When you were a bank examiner, how often did you find that a bank had engaged in atypical banking conduct?
> A. Almost every examination would have some sort of atypical conduct in it. . . .
>
> Q. So in your experience as a bank examiner, it wouldn't be unusual for you to find that a bank had engaged in atypical conduct?
> A. Well – yes. . . .

Ex. 1 at 129:6-21.

In short, Ms. Ghiglieri's testimony will not assist the jury to understand or determine any fact that is relevant to the questions at issue in this case. Ms. Ghiglieri's opinion answers just one question, and it is a

question that the law does not ask: whether Associated Bank violated the BSA, federal anti-money laundering regulations ("AML"), or its own internal BSA/AML policies. All sides agree that between 2008 and 2009, Associated Bank's BSA/AML compliance showed room for improvement. But that is irrelevant to the Receiver's claim, and requires no proof, expert or otherwise.

3. Ms. Ghiglieri's Testimony Is Unreliable. Receiver cannot salvage Ms. Ghiglieri's testimony by claiming that her testimony is somehow relevant to "circumstantial" evidence of actual knowledge or substantial assistance. To begin, Ms. Ghiglieri's conclusion that certain bank conduct was "atypical" is the result of the outcome-driven technique that she used to determine whether bank activities are "atypical." Ms. Ghiglieri has created a test that ***almost always*** will be satisfied by any bank, regardless of whether the bank has aided-and-abetted any tort. Ms. Ghiglieri concedes that almost every bank examination she has conducted has found "atypical" conduct. Ex. 1 at 129:6-21. Therefore, the fact that Ms. Ghiglieri's review of the record turned up conduct that she finds to be "atypical" is entirely unremarkable.

Further, Ms. Ghiglieri admits that she cannot draw the conclusion that any of the "atypical" conduct that she found at Associated Bank was the result of any Associated Bank employee having actual knowledge of the Ponzi scheme. Ex. 1 at 276:14-22. Because Ms. Ghiglieri's techniques cannot distinguish between routine banking conduct and wrongful conduct

committed by individuals with knowledge of the Cook-Kiley Ponzi scheme, her testimony is unreliable and should be excluded.

4. **Ms. Ghiglieri's Testimony Will Confuse The Jury.** Ms. Ghiglieri's testimony poses an exceedingly high risk of juror confusion. Ms. Ghiglieri's testimony invites the jury to conclude that because Associated Bank allegedly violated BSA/AML regulations (or internal policis), it must have also aided and abetted various torts committed by the principals of the Cook-Kiley Ponzi scheme. But whether Associated Bank violated BSA/AML regulations (or its own internal BSA/AML policies) and whether Associated Bank aided and abetted any tort are separate inquiries that may not be conflated.

FACTUAL BACKGROUND

Ms. Ghiglieri concludes that "Associated Bank engaged in atypical banking conduct regarding the Cook and Kiley accounts, when measured against the requirements of federal banking statutes and regulations, including the [BSA], federal bank regulatory guidance, standards in the banking industry and the Bank's own policies." Ex. 2 at 120. More specifically, Ms. Ghiglieri faults Associated Bank for "improperly monitoring transactions, investigating alerts, [redacted] and approving a $600,000 cash withdrawal." *Id.* at 6. She also claims that Associated Bank processed transactions for entities controlled by Mr. Cook or Mr. Kiley, despite "numerous red flags of fraud." *Id.*

Therefore, Ms. Ghiglieri reaches the same conclusion that Associated Bank's federal banking examiner, the Office of the Comptroller of the Currency (the "OCC"), already reached in 2014: Associated Bank's BSA/AML program was deficient in several respects and needed to be improved. *Id.* at 119-20. Nobody disputes that.

But Ms. Ghiglieri's analysis is more notable for what it does not say than what it does say. Ms. Ghiglieri's report says nothing about ***individual*** Associated Bank employees. For example, although she complains of "atypical" conduct, she does not opine that any individual employed by Associated Bank, himself or herself, engaged in such "atypical" banking conduct. *See, e.g.*, Ex. 2 at 6, 7, 56, 120.

Ms. Ghiglieri does not conclude that Associated Bank (let alone any specifically named current or former bank employee) actually ***knew*** about the Cook-Kiley Ponzi scheme. *See* Ex. 2 at 120-23 (summarizing conclusions). And she does not conclude that there is evidence from which she, or the jury, could even ***infer*** that any Associated Bank employee had actual knowledge of the Ponzi scheme. *See id.* She does not even conclude that the evidence in this case is consistent with any Associated Bank employee knowing about the Ponzi scheme. *See id.* Her conclusion is the opposite, *i.e.*, that no one at Associated Bank had actual knowledge of the Ponzi scheme. *See, e.g.*, Ex. 1 at 239:15-240:8.

Ms. Ghiglieri's report contains no conclusions about whether Associated Bank provided ***substantial assistance*** to the Ponzi scheme, or whether there is evidence from which she, or the trier of fact, could ***infer*** that any Associated Bank employee provided substantial assistance to the Ponzi scheme. *See* Ex. 2 at 120-23. She does not conclude that Associated Bank engaged in conduct beyond routine banking services. Instead, she identifies only what she labels as "atypical" conduct—but she conceded in deposition that her definition of "atypical" bank conduct covers conduct that (1) is identified in "almost every" bank examination, (2) may well be common industry practice as measured by the conduct of other banks, and (3) occurred without the requisite knowledge of the Cook-Kiley Ponzi scheme.

LEGAL STANDARD

Trial courts serve as the gatekeepers for expert testimony, responsible for "ensuring that an expert's testimony both rests on a reliable foundation and is relevant to the task at hand," *i.e.*, that it logically advances a material aspect of the proposing party's case. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993) (internal quotation marks omitted). The proponent of expert testimony bears the burden of proving that the expert's testimony is admissible. *Lauzon v. Senco Prods.*, 270 F.3d 681, 686 (8th Cir. 2001).

"Expert testimony which does not relate to any issue in the case is not relevant and, ergo, non-helpful." *Daubert*, 509 U.S. at 591. This standard,

known as "fit," "is higher than bare relevance." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994); *see also Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1321 n.17 (9th Cir. 1995) ("*Daubert II*") (finding that the relevance test in Fed. R. Evid. 702 is not "merely a reiteration of the general relevancy requirement of Rule 402"). Because expert testimony can be "both powerful and quite misleading," courts should "exclude proffered scientific evidence under Rules 702 and 403 unless they are convinced that it speaks clearly and directly to an issue in dispute in the case, and that it will not mislead the jury." *Id.* (internal quotation marks omitted); *see also Weisgram v. Marley Co.*, 169 F.3d 514, 521-22 (8th Cir. 1999) (finding that district court abused discretion in admitting expert testimony and vacating jury verdict), *aff'd* 528 U.S. 440 (2000); *Robertson v. Norton Co.*, 148 F.3d 905, 907-08 (8th Cir. 1998) (same).

Therefore, under Fed. R. Evid. 702, expert testimony is admissible only if it will assist the trier of fact in determining or understanding the facts at issue. Fed. R. Evid. 702(a); *see also Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055 (8th Cir. 2003) (explaining that *Daubert* tests whether expert testimony "will aid the jury in resolving a factual dispute") (internal quotation marks omitted); *Wheeling Pittsburg Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 715 (8th Cir. 2001) (holding that expert testimony must "assist jurors in deciding the specific issues in the case").

Expert testimony is irrelevant and unhelpful when it "[does] not separate lawful from unlawful conduct." *Concord Boat Corp.*, 207 F.3d at 1057; *see also Polski v. Quigley Corp.*, 538 F.3d 836, 839 (8th Cir. 2008) (finding that *Daubert* factors include "'whether the proposed expert ruled out other alternative explanations'" (quoting *Sappington v. Skyjack, Inc.*, 512 F. 3d 440, 448-49 (8th Cir. 2008)).

An expert's opinion is deemed reliable only when the methodology is based on scientific, technical, or specialized knowledge derived from valid methods. *Daubert*, 509 U.S. at 592-93. To satisfy this threshold, "a litigant has to make more than a prima facie showing that his expert's methodology is reliable." *Pineda v. Ford Motor Co.*, 520 F.3d 237, 247 (3d Cir. 2008). Even if an expert's methodology is generally reliable, exclusion of the evidence is warranted "if the methodology was so altered by a deficient application as to skew the methodology itself." *United States v. Gipson*, 383 F.3d 689, 697 (8th Cir. 2004) (brackets omitted).

Daubert and Rule 702 do not end the inquiry into the relevance of an expert's testimony. Like all evidence, expert testimony may be excluded "if its probative value is substantially outweighed by a danger of . . . confusing the issues [or] misleading the jury." Fed. R. Evid. 403; *see also Langenbau v. Med-trans Corp.*, 167 F. Supp. 3d 983, 1003, 1004 (N.D. Iowa 2016) (excluding expert testimony because its "slender probative value [was] vastly

outweighed by" the fact that it was "misleading or confusing to the jury, improperly distracting the jury from matters actually at issue in [the] case").

ARGUMENT

I. Ms. Ghiglieri's Testimony Is Irrelevant

Daubert closes the gate on Ms. Ghiglieri's testimony because it is not relevant and will not assist the trier of fact. To prevail on its aiding-and-abetting claims, the Receiver must prove that (1) Associated Bank actually knew the primary tortfeasor's conduct constituted a tort, (2) Associated Bank substantially assisted the primary tortfeasor in achievement of the tort, and (3) that the Receiver suffered ascertainable damages. *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 187 (Minn. 1999). Ms. Ghiglieri's testimony sheds no light on these issues.

A. Ms. Ghiglieri's Testimony Is Not Relevant to Actual Knowledge

The Eighth Circuit refers to the second element of the aiding-and-abetting standard as "the actual knowledge aiding and abetting element." *Zayed*, 779 F.3d at 735. Aiding and abetting requires "scienter—the defendants must ***know*** that the conduct they are aiding and abetting is a tort." *Witzman*, 601 N.W.2d at 186 (emphasis added). "While knowledge may be shown by circumstantial evidence, 'courts stress that the requirement is ***actual*** knowledge and the circumstantial evidence must demonstrate that the aider and abettor ***actually knew*** of the underlying wrongs committed.'" *Varga*

v. U.S. Bank Nat'l Ass'n, 952 F. Supp. 2d 850, 857 (D. Minn. 2013) (emphasis added; quoting *Wiand v. Wells Fargo Bank, N.A.*, 938 F. Supp. 2d 1238, 1244 (M.D. Fla. 2013)), *aff'd*, 764 F.3d 833 (8th Cir. 2014)). "Constructive knowledge will not suffice." *Id.* (citing *El Camino Res. Ltd. v. Huntington Nat'l Bank*, 712 F.3d 917, 922 (6th Cir. 2013)). Mere evidence of "awareness of the conduct in question," "red flags," or even "gross negligence," is not sufficient to show actual knowledge. *Id.* at 858 (internal quotation marks omitted). Nor should plaintiffs present "hindsight accusation[s] that they knew of the client's wrongdoing" that are based merely on the theory that a bank with a close professional relationship with a depositor should have known about the depositor's wrongdoing. *Richard P. Anderson, LLC v. U.S. Bank Nat'l Ass'n*, 2014 WL 502955, at *5 (Minn. Ct. App. 2014) (internal quotation marks omitted). Instead, the Receiver must prove that Associated Bank was actually aware "of the ***wrongfulness*** of the challenged conduct." *Varga*, 952 F. Supp. 2d at 858; *see also Anderson*, 2014 WL 502955, at *5 ("[A] professional defendant must have actual knowledge 'that the conduct they are aiding and abetting is a tort' to be held liable for aiding and abetting.").

Ms. Ghiglieri's testimony does not logically advance the actual-knowledge requirement of Receiver's claims. *Daubert*, 509 U.S. at 597. Ms. Ghiglieri concluded, after a review of the facts, that no one at Associated

Bank knew about the Cook-Kiley Ponzi scheme. Ex. 1 at 239:15-240:8.

> Q. And can you identify any individual at Associated Bank that put those pieces together and concluded that there was actually a Ponzi scheme going on?
> A. Other than Bonnie Skorczewski . . . . She put it together probably the best, the earliest.
>
> Q. But she didn't conclude there was a Ponzi scheme going on?
> A. Right.
>
> **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.**

Id. at 239:15-240:8 (emphasis added). As a result, Ms. Ghiglieri's testimony does not "help the trier of fact to understand the evidence or to determine a fact in issue." Fed. R. Evid. 702(a). The holding in *Grp. Health Plan, Inc. v. Philip Morris USA, Inc.,* is particularly apt in this context. 344 F.3d 753 (8th Cir. 2003). There, the Eighth Circuit held that when an expert proposes to offer testimony "inconsistent with one of the main premises underlying the [plaintiff's] theory . . . the disconnect between [the expert's] work and the [plaintiffs'] theory of liability ***weighs heavily*** against the admission of his testimony under *Daubert* because it . . . does not properly 'fit' the [plaintiffs'] case." *Id.* at 760-61 (emphasis added).

B. Ms. Ghighlieri's Testimony Is Not Relevant Because It Does Not Concern Any Individual Associated Bank Employee

In addition, Ms. Ghiglieri's testimony is not relevant because she does not identify the individual Associated Bank employees (if any) who had

actual knowledge of the Ponzi scheme. Corporations, like Associated Bank, "have no state of mind of their own. Instead the scienter of their agents must be imputed to them." *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1254 (11th Cir. 2008). Consequently, when a cause of action requires both "an essentially subjective state of mind" and "some sort of conduct," as with aiding-and-abetting claims, "the required state of mind must actually exist in the individual [responsible for the wrongful conduct]." *Southland Sec. Corp. v. InSpire Ins. Solutions, Inc.,* 365 F.3d 353, 366 (5th Cir. 2004).

But Ms. Ghiglieri's opinion does not address the culpability, if any, of individual Associated Bank employees. As to both conduct and actual knowledge, she directs her opinion to the Bank as a whole.

First, with regard to conduct, although Ms. Ghiglieri enumerates what she deems "atypical" conduct, she does not name any employee to whom such "atypical" conduct can be ascribed. *See, e.g.*, Ex. 2 at 6 ("[T]he Bank . . . engaged in atypical conduct."); *id.* at 7 ("[T]he Bank's conduct was not only atypical conduct, but egregious."); *id.* at 56 ("The Bank, therefore, engaged in atypical banking conduct."); *id.* at 120 ("Associated Bank engaged in atypical banking conduct regarding the Cook and Kiley accounts."); *id.* at 123 ("The

Bank's conduct was not only atypical . . . but egregious.").[2]

Second, with regard to knowledge, Ms. Ghiglieri's opinions relate solely to Associated Bank's corporate state of mind, without reference to what (if anything) its employees actually did or did not know. *See, e.g.*, Ex. 2 at 6 (alleging that "[Associated B]ank knew" that an account was for Trevor Cook's personal use); *id.* at 55 (asserting that "the bank knew the account was holding client investment funds"); *id.* at 60 (claiming that "the Bank knew the account was holding client investment funds"). Pages 90 to 92 of Ms. Ghiglieri's expert report well illustrate this failure. Ms. Ghiglieri states that on October 10, 2008, "[Associated] Bank knew" a laundry list of facts. *Id.* at 90-92. But she makes no effort to attribute knowledge of these facts to any Associated Bank employee, much less show that a single Associated Bank employee knew these facts. *See id.*

Indeed, Ms. Ghiglieri admits that each of the Associated Bank employees that opened bank accounts for the Receivership Entities, reviewed the account opening documents, and investigated potential BSA/AML violations related to those accounts ***did not know*** about the Cook-Kiley Ponzi scheme. Regarding Nataliya Espey, the portfolio assistant who filled out the

---

[2] In other instances, Ms. Ghiglieri uses the passive voice to avoid ascribing knowledge or conduct to a specific Associated Bank employee. *See, e.g.*, Ex. 2 at 59, 60, 62.

forms opening bank accounts for various companies run by Trevor Cook and Patrick Kiley (the "Receivership Entities"), Ms. Ghiglieri testified:

> Q. Do you have any evidence that Nataliya Espey had actual knowledge of the Ponzi scheme?
> A. No.
>
> Q. Do you have any evidence that Nataliya Espey had actual knowledge that there was anything fraudulent going on with the [R]eceivership [E]ntities?
> A. No.

Ex. 1 at 207:11-17. Regarding Associated Bank's CIF department, which reviewed the account opening forms for the Receivership Entities, Ms. Ghiglieri testified:

> Q. [D]o you have any evidence that the CIF department or the back room knew about the Ponzi scheme?
> A. No.

Id. at 195:16-19. Regarding Joanne Alberts, the director of Associated Bank's BSA/AML Department who investigated Crown Forex LLC, Ms. Ghiglieri testified:

> Q. Is there anywhere in Ms. Alberts' documents where she states that she knew there was a Ponzi scheme going on?
> A. No.
>
> . . .
>
> Q. Is there anywhere in Ms. Alberts' deposition where she states that she knew there was a Ponzi scheme going on?
> A. No.

Id. at 229:3-21. Regarding, Bonnie Skorczewski, another BSA/AML

investigator that examined the Crown Forex LLC account, Ms. Ghiglieri testified:

> Q. [S]he didn't conclude that there was Ponzi scheme going on?
> A. Right.

Id. at 240:2-4. Regarding Ryan Rasske, the head of Associated Bank's BSA Officer, who was ultimately in charge of all investigation into the Receivership Entities, Ms. Ghiglieri testified:

> Q. [T]here is nothing in Mr. Rasske's documents that show that at the time he knew there was a Ponzi scheme going on. Correct?
> A. There is nothing that says I know there is a Ponzi scheme going on, no.

Id. at 231:4-8.

Consequently, Ms. Ghiglieri's approach does not shed any light on the question the jury must answer here, *i.e.*, whether an ***identifiable bank employee*** had actual knowledge of the Ponzi scheme. *See Southland Sec. Corp.,* 365 F.3d at 366. And even if Ms. Ghiglieri believes that there is an identifiable individual at Associated Bank who is responsible for the conduct she deems "atypical," she does not say who that employee is. Thus, she cannot assist a juror to determine whether such an individual (if he or she exists) ***also*** had the requisite wrongful state of mind, *i.e.*, actual knowledge of

the Cook-Kiley Ponzi scheme.[3]

Accordingly, Ms. Ghiglieri's testimony is irrelevant to the actual-knowledge requirement and must be excluded.

C. Ms. Ghiglieri's Testimony Is Not Relevant to Substantial Assistance

Even if the Receiver could prove actual knowledge, he must also prove that, after acquiring actual knowledge of the relevant torts, an Associated Bank employee substantially assisted in the commission of the torts. 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). In cases such as this, the assistance must "further the fraud itself, and not merely constitute general aid to the tortfeasor." *Id.* (quoting *Anderson*, 2014 WL 502955, at *7).

Ms. Ghiglieri's testimony will not "aid the jury in resolving a factual

---

[3] *Gutter v. E.I. Dupont De Nemours,* 124 F. Supp. 2d 1291, 1311 (S.D. Fla. 2000) ("The knowledge necessary to form the requisite fraudulent intent must be possessed by at least one agent and cannot be inferred and imputed to a corporation based on disconnected facts known by different agents."); *First Equity Corp. v. Standard & Poor's Corp.,* 690 F. Supp. 256, 260 (S.D.N.Y. 1988), *aff'd,* 869 F.2d 175 (2d Cir.1989) ("While . . . a corporation may be charged with the collective knowledge of its employees, it does not follow that the corporation may be deemed to have a culpable state of mind when that state of mind is possessed by no single employee. A corporation can be held to have a particular state of mind only when that state of mind is possessed by a single individual.").

dispute" related to substantial assistance. *Concord Boat Corp.*, 207 F.3d at 1055 (internal quotation marks omitted). She merely opines that Associated Bank engaged in "atypical" conduct, which she defines as any conduct inconsistent with any law, regulation, or internal policy. Ex. 2 at 120. But a bank's failure "to comply with domestic and international bank secrecy, know-your-customer, and anti-money laundering laws" "do[es] not elevate [its] actions into the realm of 'substantial assistance.'" *Rosner v. Bank of China,* 2008 WL 5416380, at *14 (S.D.N.Y. 2008), *aff'd,* 349 F. App'x 637 (2d Cir. 2009). Ms. Ghiglieri explains why this is true—such shortcomings are routine at any bank. Ex. 1 at 129:9-10 ("Almost every examination would have some sort of atypical conduct in it."). Therefore, Ms. Ghiglieri's identification of such issues sheds no light on whether Associated Bank engaged in substantial assistance of the Ponzi scheme. Accordingly, Ms. Ghiglieri's testimony is irrelevant to substantial assistance, and must be excluded on that subject. *See Rosner*, 2008 WL 5416380, at *14.

II. Ms. Ghiglieri's Testimony Is Unreliable

Ms. Ghiglieri's testimony is based on unreliable, outcome-driven methodology that is in no way probative of whether Associated Bank aided and abetted any tort. In her report, Ms. Ghiglieri catalogues various conduct that she believes is "atypical" for a bank based on her experience as a bank examiner. *See* Ex. 2 at 120-123. However, Ms. Ghiglieri's opinions regarding

"atypical" conduct are the result of an outcome-driven test that will almost always show that a bank has engaged in atypical conduct.

> Q. When you were a bank examiner, how often did you find that a bank had engaged in atypical banking conduct?
> A. Almost every examination would have some sort of atypical conduct in it. . . .
>
> Q. So in your experience as a bank examiner, it wouldn't be unusual for you to find that a bank had engaged in atypical conduct?
> A. Well – yes. . . .

Ex. 1 at 129:6-21. Where, as here, an expert uses a test that will be satisfied nearly 100% of the time, that test is not reliable or probative. *See, e.g.*, *Sorensen v. Shaklee Corp.*, 31 F.3d 638, 649 (8th Cir. 1994) (experts may not use methodology that amounts to "reason[ing] from an end result"); *Blue Dane Simmental Corp. v. Am. Simmental Assoc.*, 178 F.3d 1035, 1040 (8th Cir. 1999) (affirming exclusion of expert who used a test that was too "simplistic").

Ms. Ghiglieri's testimony is also unreliable because she runs afoul of the well-established rule that an expert's opinions should be excluded when they "[do] not separate lawful from unlawful conduct." *Concord Boat Corp.*, 207 F.3d at 1057. Although Ms. Ghiglieri has identified what she believes are instances of "atypical" banking conduct, she conceded that she cannot determine whether the cause of that conduct was in any way related to the Cook-Kiley Ponzi scheme, and therefore cannot rule out the possibility that

Associated Bank's conduct was the result of poorly implemented BSA/AML policies, rather than any aiding-and-abetting 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.

Ex. 1 at 276:14-22 (objection omitted). Where, as here, an expert's testimony affirmatively "*rules in*" other explanations for a defendant's conduct, the testimony is unreliable and should be excluded. *In re Viagra Prods. Liability Litig.*, 572 F. Supp. 2d 1071, 1086 (D. Minn. 2008); *Concord Boat Corp.*, 207 F.3d at 1057. Because Ms. Ghiglieri could not "rule[] out alternative explanations" for Associated Bank's conduct and "[i]n fact . . . admits that the [record] could support other [*i.e.*, innocent] findings," her testimony is unreliable and should be excluded. *Coleman v. Oracle USA, Inc.*, 2011 WL 2746187, at *6 (D. Minn. 2011).

III. There Is a Considerable Danger That Ms. Ghiglieri's Testimony Will Mislead the Jury and Confuse the Issues

Even beyond Rule 702 and *Daubert*, Ms. Ghiglieri's testimony should be excluded because it is likely to confuse the issues and mislead the jury. *See* Fed. R. Evid. 403. Evidence, including expert testimony, should be excluded "if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." *Daubert*,

509 U.S. at 595. "This is of particular concern with expert testimony, which can be 'both powerful and quite misleading because of the difficulty in evaluating it.'" *Werth v. Hill-Rom, Inc.*., 856 F. Supp. 2d 1051, 1067 (D. Minn. 2012) (excluding expert testimony under Rule 403 where "sad facts" of case may lead "a jury [to] blindly accept" an expert's theory "while overlooking the shaky foundation upon which it rests."). Therefore, an expert's testimony should be excluded when its "slender probative value is vastly outweighed by its potential for prejudice—inviting a liability verdict based on an emotional response to essentially unrelated misconduct." *Langenbau*, 167 F. Supp. 3d at 1003. For example, in *Target Corp. v. Greenberg Farrow Architecture, Inc.*, the district court excluded an expert's opinion under Fed. R. Evid. 403 because of its "great potential to mislead the jury." 2012 WL 1963362, at *12 (D. Minn. 2012). Under those circumstances, the court concluded that "the expert 'patina'" might attach to the proffered testimony and give the expert's theory "more credibility than it deserves." *Id.*

This rule applies with considerable force to Ms. Ghiglieri's opinions and conclusions. Ms. Ghiglieri's testimony invites a jury to conclude that Associated Bank must have aided and abetted a tort because it allegedly violated BSA/AML regulations or internal BSA/AML policies. *See* Ex. 2 at 120-123. But these separate inquiries may not be conflated. "[T]he Bank Secrecy Act does not create a private right of action." *In re Agape Litig.*, 681

F. Supp. 2d 352, 360 (E.D.N.Y. 2010); *see also Aiken v. Interglobal Mergers & Acquisitions*, 2006 WL 1878323, at *2 (S.D.N.Y. July 5, 2006) ("[N]either the Bank Secrecy Act nor the Patriot Act affords a private right of action. This Court may not . . . impose a duty of care based upon a statute that does not permit a private right of action."). Likewise, the Bank Secrecy Act does not establish a duty of care. *See, e.g.*, *Armstrong v. Am. Pallet Leasing Inc.*, 678 F. Supp. 2d 827, 874 (N.D. Iowa 2009); *Marlin v. Moody Nat'l Bank, N.A.*, 2006 WL 2382325, at *7 (S.D. Tex. 2006) (holding that under the Bank Secrecy Act "banks do not become guarantors of the integrity of the deals of their customers. It does not create a private right of action, and therefore, does not establish a duty of care.").

Therefore, even if Associated Bank violated BSA/AML rules or its own BSA/AML policies, as Ms. Ghiglieri contends, this fact has no relevance to whether Associated Bank aided and abetted any of the alleged torts. Her conclusion on that point thus has a substantial danger of confusing the issues and misleading the finder of fact. *See Target Corp.*, 2012 WL 1963362, at *12; *Langenbau*, 167 F. Supp. 3d at 1003; *Concord Boat Corp. v. Brunswick Corp.*, 1998 WL 35254137, at *1 (E.D. Ark. 1998) (excluding expert testimony that defendant's conduct was unethical, because jury may incorrectly assume breach of "ethical obligation" equals an antitrust violation).

CONCLUSION

Ms. Ghilgieri's testimony should be excluded in its entirety. Her testimony is entirely irrelevant to the actual-knowledge and substantial-assistance elements of the Receiver's aiding-and-abetting claim, and will not assist the trier of fact in assessing either element. Even if her testimony had any relevance, that marginal relevance is substantially outweighed by the danger that Ms. Ghiglieri's testimony will confuse and mislead the jury.

Dated: October 28, 2016

s/ Charles F. Webber
Charles F. Webber
Bar Number 215247
Attorney for Defendant
Associated Bank, N.A.
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Telephone: (612) 766-7000
chuck.webber@FaegreBD.com

Alex C. Lakatos
Stephen M. Medlock
E. Brantley Webb
Attorneys for Defendant
Associated Bank, N.A.
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
Telephone: (202) 263-3000
Fax: (202) 263-3300
alakatos@mayerbrown.com
(*admitted pro hac vice*)