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) David S. Doty, Sr. U.S. District Judge **FILED UNDER SEAL** **CONFIDENTIAL**

RECEIVER'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO STRIKE THE REPORT AND BAR THE TESTIMONY OF CHARLES H. GRICE

Absent a smoking gun document or an admission, there is one time-honored way that juries determine scienter at trial. They form reasonable inferences based on the circumstantial evidence and its context. That is their job, indeed their primary one. It is not the job of experts.

On August 19, 2016, Associated Bank served the "Expert Report of Charles H. Grice" (attached hereto as Exhibit A).[1] The opinions set forth in Mr. Grice's report go far beyond what is permitted expert testimony. In fact, over one-third of his opinions are devoted to weighing evidence and then providing factual and legal conclusions on a primary element of the Receiver's claim – whether Associated Bank had "knowledge" of the underlying torts. *Zayed v. Associated Bank, N.A.*, 779 F.3d 727, 733 (8th Cir. 2015).

[1] "Exhibit" and "Ex." refer to exhibits to the Declaration of William W. Flachsbart, which is filed concurrently with this Memorandum.

Mr. Grice's opinions on the state of mind of Associated Bank, its employees, and a wide variety of other individuals and entities that were connected to the Ponzi scheme in some manner far exceed any qualifications he may have as an expert in the banking industry. Mr. Grice even opines on the state of mind of a U.S. Senator who has nothing whatsoever to do with Associated Bank, much less its state of mind concerning this Ponzi Scheme.

Associated Bank is attempting to use Mr. Grice as a vehicle to improperly supplant the jury's role in evaluating evidence by having an "expert" tell the jury what to think of the evidence about the intent, motives and knowledge of the various entities and individuals involved. The report is also rife with legal conclusions and legal arguments that are far more a legal brief than an expert's report. As will be demonstrated below, Mr. Grice's opinions telling the fact-finder what outcome to reach must be stricken.

ARGUMENT

The admissibility of opinion testimony is governed by Rule 702 of the Federal Rules of Evidence, which provides:

> A witness who is qualified as an expert by knowledge, skill, experience, training, or education may testify in the form of an opinion or otherwise if:
>
> > (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or to determine a fact in issue;
> >
> > (b) the testimony is based on sufficient facts or data;
> >
> > (c) the testimony is the product of reliable principles and methods; and

> (d) the expert has reliably applied the principles and methods to the facts of the case.
>
> Fed. R. Evid. 702.

Opinion evidence under this rule "must be reliable or trustworthy in an evidentiary sense." *Id.*; *see also* 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 702.02[3] (2001). Also, the requirement of "helpfulness" guarantees against admitting opinions, which, among other things, tell the fact-finder what outcome to reach. *Owen v. Kerr-McGee Corp.*, 698 F.2d 236, 240 (5th Cir. 1983). The Eighth Circuit has characterized the helpfulness requirement as a "basic rule of relevancy," which exists independently of other, so-called *Daubert* questions. *Polski v. Quigley Corp.*, 538 F.3d 836, 839 (8th Cir. 2008) (citations omitted).

Courts will exclude expert testimony that "merely states a legal conclusion, usurps the function of the jury in deciding facts, or interferes with the judge in instructing on the law. Such evidence is not helpful to the jury to understand the evidence or to determine a fact in issue." *Parker v. Wal-Mart Stores, Inc.*, 267 F.R.D. 373, 376 (D. Kan. 2010) (citations omitted). As the Eighth Circuit has stated, expert testimony is "helpful" to a jury "if it concerns matters beyond the knowledge of average individuals; however, it cannot supplant the jury's role in evaluating the evidence." *United States v. Shedlock*, 62 F.3d 214, 219 (8th Cir. 1995) (citing *United States v. French*, 12 F.3d 114, 116 (8th Cir. 1993)); *In re Viagra Prods. Liab. Litig.,* 658 F. Supp. 2d 950, 965 (D. Minn. 2009) (same); *Ritt v. Dingle*, 2001 U.S. Dist. LEXIS 15220, at *32 (D. Minn. Apr. 3, 2001) (same); *United States ex rel. Dyer v. Raytheon Co.,* 2013 U.S. Dist. LEXIS 135691, at *36 (D. Mass. Sep. 23, 2013)

("[Expert witness] Silverstone may not testify or opine on the issue of Raytheon's knowledge or intent."); *Holmes Grp., Inc. v. RPS Prods., Inc.*, 2010 U.S. Dist. LEXIS 102727, 2010 WL 7867756, *5 (D. Mass. June 25, 2010) ("An expert may not testify to another person's intent. No level of experience or expertise will make an expert witness a mind-reader."). Expert testimony is inadmissible if directed to matters that a lay jury is capable of understanding and deciding without the expert's help. *In Re Baycol Products Litig.*, 532 F. Supp. 2d 1029, 1067 (D. Minn. 2007).

I. MR. GRICE IS NOT QUALIFIED TO RENDER OPINIONS REGARDING THE KNOWLEDGE OF ANY INDIVIDUAL OR ENTITY

Mr. Grice's stated expertise is in banking compliance, rules and procedures. (Ex. A, ¶¶ 1-12 and Appendix A). In his report, Mr. Grice states that he was assigned to evaluate all of the evidence and reach a factual and legal conclusion on whether or not any employee of Associated Bank and Associated Bank, as an entity, had **actual knowledge** of the Ponzi scheme. *(Id.* at ¶ 13(a)). The report also advocates in favor of Mr. Grice's client by ending with the factual and legal conclusion that Associated Bank did not have "knowledge" of the Ponzi scheme. (*Id.* at ¶ 215).

None of the banking statutes, regulations, guidelines or policies Mr. Grice reviewed mention, let alone define, what is meant by the terms "actual knowledge" or "knowledge" that he uses throughout his report. (Exhibit B, October 12, 2016 Deposition of Charles H. Grice, at pp. 27-30.) Mr. Grice even avoids using Minnesota law as a guide. Instead, he defined one of the terms himself: "actual knowledge is the awareness and

understanding of the implications of data.[2]" *(Id.* at pp. 29-30.) By his own definition, whether any individual or entity has "knowledge" or "actual knowledge" of anything according to the criteria he applied throughout his report, requires Mr. Grice to be a mind reader—something he does not purport to be. (Ex. A, ¶¶ 1-12 and Appendix A.). Mr. Grice has applied the wrong legal standard in his opinion about knowledge and in any event, is not qualified to render opinions as to what any individual or entity knew or did not know under even his own personal (and non-expert) definition of that term.

A. Mr. Grice Should Not Be Permitted To Opine On Whether Or When Associated Bank, Or Its Employees, Had "Actual Knowledge" Because This Is An Ultimate Fact Question, And He Is Not Qualified As An Expert

Mr. Grice does not hesitate to state that his report is focused on providing testimony as to the state of mind of Associated Bank and its employees. In fact, section VI of the report declares this: "ASSOCIATED BANK HAD NO KNOWLEDGE OF THE PONZI SCHEME." To arrive at this ultimate conclusion of fact and law, Mr. Grice further admits that he evaluated the evidence of record, interviewed witnesses, read deposition testimony and then reached a conclusion – in other words, he acted as a one-man tribunal:

[redacted]

[2] Minnesota law is far less stringent -- knowledge is a question of fact and it may be inferred from circumstantial evidence, including evidence such as conducting business in an atypical manner or lacking in business justification. *K & S P'ship v. Cont'l Bank, N.A.*, 952 F.2d 971, 977-79 (8th Cir. 1991). Even "otherwise unremarkable events viewed together may suggest an unusual pattern of events intimating an illegal scheme." *Id.* at 979-80.

[redacted]

The evidence Mr. Grice evaluated was not complicated. Nor was it related to Mr. Grice's banking expertise. The evidence Mr. Grice evaluated concerned basic human behavior—something that a jury is quintisentially qualified to evaluate. For example, the jury does not need the assistance of Mr. Grice to evaluate whether Mr. Sarles' fellow employees saw him [redacted] According to Mr. Grice, witness testimony on these topics, as well as other evidence from various individuals about what they observed or what was said, allows him to opine that "Mr. Sarles and Associated Bank had no knowledge of the Ponzi scheme." (*Id.* at ¶ 113). The human behavior that Mr. Grice evaluated is the type of evidence that a jury of other ordinary humans is perfectly poised to evaluate, without any special assistance from an expert such as Mr. Grice about what conclusions they should reach.

Mr. Grice also opines as to Mr. Sarles' state of mind based on his own

evaluation of evidence. The evidence Mr. Grice evaluated was not scientific, it was not technical, and a trier of fact would be in no need of Mr. Grice's specialized knowledge in banking to understand it as required by Rule 702. The evidence concerned comments at a holiday party and Mr. Sarles' personal lifestyle [redacted]

[redacted]

[redacted]

It is plain to see from Mr. Grice's own words that Mr. Sarles' state-of-mind, and the evidence related to it, is squarely within the jury's province. It is also far beyond Mr. Grice's area of expertise.

Mr. Grice's state-of-mind evaluation did not stop with Mr. Sarles. He covers all of Associated Bank's employees by rendering an opinion based on the evidence he considered and weighed, plus some measure of omniscience that "no Associated Bank employee had actual knowledge of the Ponzi scheme." (*Id.* at ¶113).

Evaluating evidence is for a jury, and Mr. Grice's alleged expertise is not needed to assist a jury in this task. Moreover, Mr. Grice's conclusions all pertain to a

state of mind on which, as a banking expert, Mr. Grice is not qualified to opine. Accordingly, section VI (¶¶ 113-147) of Mr. Grice's report should be stricken and any opinions based on thereon should be excluded from evidence.

B. Mr. Grice Should Not Be Permitted To Opine On Whether Or When A Third Party Had "Actual Knowledge" Because This Is An Ultimate Fact Question And He Is Not Qualified As An Expert

In Section III(C) of his report, which is entitled "Cook-Kiley Ponzi Scheme Deceived Professionals," Mr. Grice opines on the state of mind of nine financial institutions that worked with the Scheme, a U.S. Senator and various employees of the Scheme:

Whether someone was fooled or deceived concerns his or her state of mind. This is subject matter on which experts such as Mr. Grice are prohibited from providing testimony. Accordingly, section III(C) (¶¶ 33-68) of Mr. Grice's report should be stricken and any opinions based on thereon should be excluded from evidence.

C. Mr. Grice Should Not Be Permitted To Opine On Whether Or When Schemers Had "Actual Knowledge," And Their "Motives" Because This Is An Ultimate Fact Question And He Is Not Qualified As An Expert

Lastly, Mr. Grice then turns his attention to the Schemers themselves and opines on their intent and motives. [redacted]

How a banking expert is qualified to opine on matters as to another person or entity's state of mind, intent or motive (worse, another person's state of mind about a third person's state of mind) is never explained by Mr. Grice. That a significant portion of Mr. Grice's expert report is devoted to supplanting a jury and engages in prohibited mind-reading, all in violation of the requirements of Rule 702, warrants the exclusion sought by the Receiver.

In summary, based on the above, the specific sections of the report that run afoul of Rule 702 are paragraphs 13(a), 19, 20, 26, 28, 30, 31, 33-68, 113-147, 208, 211, 213 and 214-216. Accordingly, these paragraphs of the report should be stricken and any opinions based thereon should be excluded from evidence.

II. MR. GRICE'S REPORT AND OPINIONS CONTAIN IMPROPER LEGAL CONCLUSIONS CONCERNING "KNOWLEDGE"

Legal conclusions are also not admissible. *Peterson v. City of Plymouth*, 60 F.3d 469, 475 (8th Cir. 1995). Expert testimony on legal matters also is not admissible, but rather, "[m]atters of law are for the trial judge, and it is the judge's job to instruct the jury on them." *S. Pine Helicopters, Inc. v. Phoenix Aviation Managers, Inc.*, 320 F.3d 838, 841 (8th Cir. 2003). In determining whether an expert's statement is a legal conclusion, a court must analyze whether the terms used by the witness have a separate, distinct and specialized meaning in the law different from that present in the vernacular. *Hogan v. American Tel. & Tel. Co.*, 812 F. 2d, 409, 411-412 (8th Cir. 1987). If the terms used have a separate, distinct, and special legal meaning, exclusion of the testimony is appropriate. *Id.* "[E]xpert testimony generally will not help the trier of fact when it offers nothing more than what lawyers for the parties can argue in closing arguments." *United States v. Frazier*, 387 F.3d 1244, 1262 (11th Cir. 1995).

Although Mr. Grice's experience is in banking, the opinions stated in his report instead apply legal principles and make legal conclusions about the knowledge element of aiding and abetting.

The term "knowledge" in the context of the Receiver's aiding and abetting claims has a "separate, distinct, and special legal meaning." *Hogan*, 812 F.2d at 411-412. As stated above, "[a]n aider and abettor's knowledge of the wrongful purpose is a crucial element in aiding or abetting cases." *Zayed*, 779 F.3d at 733. Acts that are "atypical" or "lack business justification" tend to prove such knowledge. *See* note 2, above.

Mr. Grice's recurrent use of the term "actual knowledge" throughout his opinions seeks to apply a distinct legal term that is inconsistent with Minnesota law, thereby eliminating the role of a fact-finder. Not only does this improperly supplant the Court's role to articulate the proper legal standards, it supplants the jury's role of applying the facts to the instructed standard. Mr. Grice's opinions are not helpful to the jury because they go beyond the limits of using expert testimony as a tool for understanding by instead applying principles of law.

Based on his assessment of the evidence, Mr. Grice concludes that neither Associated Bank nor its employees had any knowledge of the Ponzi scheme. (Ex. A at ¶ 19.) Because the report proffers opinion testimony on applicable principles of law, it is inadmissible, not helpful to a jury, and the paragraphs which set forth the opinions should be stricken. Indeed, Mr. Grice's report reads like a closing argument on the issue:

The above are just a few of Mr. Grice's improper opinions. In fact, 82 out of the report's 216 paragraphs are devoted to advocating that Associated Bank did not have the requisite legal "knowledge" to render it liable for aiding and abetting the Ponzi scheme. (Ex. A at ¶¶ 13(a), 19, 20, 26, 28, 30, 31, 33-68, 113-147, 208, 211, 213 and 214-216).

Additionally, as shown in Section I above, the Grice report states legal conclusions regarding what *others* believed about Lien Sarles and Associated Bank's actual knowledge of the Ponzi scheme. That the opinions expressed throughout Mr. Grice's report are his own beliefs about yet another person's belief invite the jury to accept that Mr. Grice is an expert on truthfulness. "There is a critical distinction between an expert testifying that a disputed act actually occurred or that one witness is more credible than another and an expert giving an opinion based upon factual assumptions, the validity of which are for the jury to determine. The former is manifestly improper; the latter is not." *Thomas v. Barze*,

57 F. Supp. 3d 1040, 1059 (D. Minn. 2014). The Grice report uses language such as [redacted] Notwithstanding its blatant advocacy, the opinions assume that it is within Mr. Grice's ability to determine what Associated Bank believed. These types of statements are beyond Mr. Grice's stated expertise, and are inadmissible legal conclusions. Because the opinions found throughout the report pose legal conclusions and seek to testify as to the credibility of witnesses, the Court should consider striking the expert report in its entirety and bar related testimony.

The legal conclusions in the Grice report are so widespread that they supplant any value that the report would otherwise provide to a fact finder. The repeated use of the words "knowledge" or "actual knowledge" throughout Mr. Grice's opinions demonstrates an effort in applying principles of law. Moreover, Mr. Grice's opinions sound more like legal arguments that advocate for a legal conclusion based on what the evidence shows rather than an expert's opinion:

[redacted]

The terms used throughout the report have a separate, distinct, and special legal meaning. By applying principles of law to the facts, Mr. Grice is improperly attempting to substitute himself as the trier of fact. Because the opinions contained within the report are based in part on improper legal conclusions, the testimony is inadmissible because Mr. Grice's opinion is not based on "the special knowledge of the expert." *Daubert v. Merrell Dow Pharmaceuticals, Inc.,* 509 U.S. 579, 589-91 (1993). The specific offending sections of the report include paragraphs 13(a), 19, 20, 26, 28, 30, 31, 33-68, 113-147, 208, 211, 213 and 214-216. Accordingly, these paragraphs of the report should be stricken and any opinions based thereon should be excluded from evidence.

III. MR. GRICE SHOULD NOT BE PERMITTED TO OPINE ON HOW THE FACT FINDER SHOULD WEIGH THE EVIDENCE

Another clear example of Mr. Grice acting as a one-man jury is found in his extensive review of a statement made by Christopher Pettengill which implicates Mr. Sarles in the scheme. Mr. Pettengill stated that Mr. Sarles attended a meeting where the Schemers discussed how they were going to use investor funds deposited at Associated Bank in an account opened in the name of the fictitious Crown Forex LLC to defraud investors. Mr. Grice opines that there are "several problems with Mr. Pettengill's statement." (Ex. A at ¶ 61). In detailing his perceived "problems" with Mr. Pettengill's statement, Mr. Grice sheds his neutrality as a banking expert and assumes the role of a juror advocate by evaluating evidence easily grasped by a layperson. The evidence Mr. Grice evaluated includes an alleged lack of notes taken by Trevor Cook

at the meeting (*Id.* at ¶ 62), Mr. Pettengill's alleged inability to pick Mr. Sarles out of a mock photo array (*Id.* at ¶ 63), and the import of Mr. Sarles' expense reports (*Id.* at ¶ 64). Again, a jury may just as easily consider this evidence. There is no need for a banking expert such as Mr. Grice to provide opinions that tell the jury how to evaluate it.

IV. MR. GRICE'S REPORT AND OPINIONS CONTAIN IMPROPER LEGAL CONCLUSIONS CONCERNING "ATYPICAL" ACTS

Mr. Grice also acknowledges that one of his assignments was to provide testimony to the jury as to what atypical actions by Associated Bank or red-flags are probative on the issue of knowledge:

[redacted]

Minnesota law is clear on what is probative of atypical conduct in the banking arena. It includes violations of a bank's own internal policies and procedures. *See, e.g., Am. Bank of St. Paul v. TD Bank*, N.A., No. 09-2240 ADM/TNL, 2011 U.S. Dist. LEXIS 49646, at *24 (D. Minn. May 9, 2011) ("Finally, Mercantile violated many of its own internal policies with respect to Pearlman. Conducting business in an atypical way is evidence of knowledge.") (citing *Metz v. Unizan Bank*, No. 5:05 CV 1510, 2008 U.S. Dist. LEXIS 37270, 2008 WL 2017574, *18 (N.D. Ohio May 7, 2008) (holding that atypical banking procedures, such as disregarding requirements for corporate authorization

statements and valid signature cards, was sufficient to infer knowledge by bank of depositor's fraud)).

Associated Bank will surely chafe under a jury instruction that states that "atypical" behavior includes violations of its own policies and procedures. The reason for this is simple, as Mr. Grice acknowledges: there is a long list of [redacted] To avoid the consequences of its own damning actions, Associated Bank again looked to Mr. Grice as its champion.

Rather than using Minnesota law about what constitutes atypical behavior, Mr. Grice created his own definition – one that is so amorphous and vague and untestable that it could easily be molded to advocate any desired predetermined outcome.

Mr. Grice could not point to any industry standard for "atypical" banking conduct:

[redacted]

Nor could not he otherwise define what is "atypical" conduct other than to say is includes a spectrum of conduct:

[redacted]

[redacted]

But then Mr. Grice went on to describe "atypical" as a relative scale based on the actions of other banks:

[redacted]

And finally, under Mr. Grice's (but not Minnesota's) legal standard, if the "atypical" violation of a policy or procedure is sufficiently common or frequent, it then becomes typical:

[redacted]

[redacted]

In short, the Court should preclude Mr. Grice from providing any testimony on the issues of atypical and red flag behavior by his client Associated Bank. The testimony is improper, as it is not based on any known banking industry standard. It clearly supplants the role of the Court instructing the jury how to evaluate the evidence that will be presented to it. And it purports to overrule Minnesota law by advocating the jury to disregard the probative value of "atypical" acts that prevailing law mandates as implying bank knowledge of primary torts.

V. THE COURT SHOULD EXCLUDE MR. GRICE'S OPINIONS BECAUSE THEIR PROBATIVE VALUE IS SUBSTANTIALLY OUTWEIGHED BY A DANGER OF UNFAIR PREJUDICE AND MISLEADING THE JURY

The Court should also exclude the opinions of Mr. Grice's report as they relate to the "knowledge" of any individual or entity, because the probative value of those opinions is substantially outweighed by a danger of unfair prejudice and misleading the jury. Due to the report's language, tone, and inappropriate legal conclusions, it would be particularly difficult for a layperson to differentiate expert testimony as the work of an independent expert or the work of an attorney for Associated Bank. Accordingly Mr. Grice's opinions would not be helpful to a jury and should be excluded.

Under Federal Rule of Evidence 403, "[t]he court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting

time, or needlessly presenting cumulative evidence." Fed. R. Evid. 403. Under Rule 403, courts have wide discretion to assess unfair prejudice, and are reversed only for an abuse of discretion. *United States v. Henderson*, 416 F.3d 686, 693 (8th Cir. 2005), cert. denied, 546 U.S. 1175 (2006). The rule "does not offer protection against evidence that is merely prejudicial in the sense of being detrimental to a party's case. The rule protects against evidence that is unfairly prejudicial, that is, if it tends to suggest a decision on an improper basis." *Wade v. Haynes*, 663 F.2d 778, 783 (8th Cir. 1981).

Here the opinions of Mr. Grice pose a danger of unfair prejudice because they suggest that the jury should find that Associated Bank did not have actual knowledge of the Ponzi scheme based on improper legal conclusions and Mr. Grice's subjective beliefs about the credibility of several witnesses. Mr. Grice opines that [redacted]

In summary, the Court should exclude all of Mr. Grice's opinions because they pose a danger of unfair prejudice and would mislead a jury. The opinions are plagued with legal argument, legal conclusions, and subjective beliefs about the mental state and credibility of witnesses. "[T]he word *knowledge* connotes more than subjective belief or unsupported speculation." *Daubert*, 509 U.S. at 591 (emphasis added). The report is

substantially similar to an argumentative brief, and presents a real danger of misleading a jury to an unjust result.

VI. THE OPINIONS OF MR. GRICE VIOLATE MINNESOTA LAW

Under Minnesota law, no adverse inference may be drawn from a party's failure to produce evidence equally available to both sides. *State v. Swain*, 269 N.W.2d 707, 717 (Minn. 1978). Yet, Mr. Grice's opinions strive to create an adverse inverse against the Receiver based on an alleged lack of evidence by Wells Fargo:

[redacted]

Neither party sought discovery from Wells Fargo on its investigative or due diligence efforts. Yet, Mr. Grice is now attempting to use his own client's failure to obtain this discovery against the Receiver. This is not permitted under Minnesota law. Accordingly, these paragraphs of Mr. Grice's report should be stricken and any opinions based on thereon should be excluded from evidence.

CONCLUSION

For the foregoing reasons, Plaintiff's Motion to Strike the Expert Report of Charles Grice and Bar Related Testimony should be granted.

Dated: October 28, 2016

Respectfully submitted,

/s/ William W. Flachsbart

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CERTIFICATE OF SERVICE

The undersigned attorney of record certifies that on October 28, 2016, copies of the foregoing document were served upon counsel for Defendant via e-mail to the following addresses:

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