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)

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INTRODUCTION

In his opposition brief, Receiver does not contest that:

- The Receivership Entities engaged in a rampant and systematic effort to destroy large volumes of information related to the Cook-Kiley Ponzi scheme.
- The Receivership Entities destroyed this information in order to suppress the truth.
- Although Receiver took many photos of the Van Dusen Mansion, he failed to take any photos to show the state of the documents when arrived—something he easily could have done and which would have aided Associated Bank to understand what was destroyed and what was preserved.
- Receiver failed to collect cell phones from the Receivership Entities' employees, subpoena the Receivership Employees' cell phones.
- Waypoint, Inc., whose representative went to the Van Dusen Mansion, testified that it "had no idea" whether any of the four people at the mansion had phones on them when Waypoint and Receiver arrived. Ex. 1 at 30:18. When asked whether he knew if these four "had phones on their personal person when they left," he testified, "Let me answer that by saying I didn't see any phones." *Id.* at 35: 16-17.

Instead of disputing these facts, Receiver urges that he must be immune and unanswerable for the spoliation of the Receivership Entities in whose shoes he stands so as not to "hamstring" him "in recovery actions." ECF No. 237 at 19. In other words, Receiver argues that he should not be subject to the same litigation rules that bind every other plaintiff. But every plaintiff, like Receiver, is bringing a "recovery action." What Receiver's position really means is that defendants should be denied the tools to defend

themselves that are set forth in the carefully calibrated Federal Rules of Civil Procedure, simply because of Receiver's status as a court-appointed receiver. By shrugging off his own burden, the Receiver necessarily prejudices defendants in a manner that the Rules of Civil Procedure do not contemplate.

The law expressly rejects Receiver's gambit: "a receiver is subject to all defenses to which the receivership entity is subject." *Kelley v. Coll. of St. Benedict*, 901 F. Supp. 2d 1123, 1129 (D. Minn. 2012). Receiver cites no case that has made the radical departure from established law he advocates or that excuses a receiver from responsibility for spoliation by receivership entities. The cases that Receiver cites for the proposition that he does not stand in the Receivership Entities' shoes actually show the opposite—that deviations from that rule are rare and limited to situations not before the Court. Under Receiver's overreaching position, defendants like Associated Bank could never assert ***any*** affirmative defenses or counterclaims based on the misconduct of the Receivership Entities, simply because, in Receiver's view, he is a different party with no responsibility for mischief that came before his arrival. That is not the law.

Consequently, Receiver fails to rebut Associated Bank's showing than an adverse inference is warranted here. An adverse inference or other sanction for spoliation is appropriate where there was "intentional destruction indicating a desire to suppress the truth" and "prejudice to the

[movant].". *Hallmark Cards, Inc. v. Murley*, 703 F.3d 456, 460 (8th Cir. 2013). Here, Associated Bank has shown, and the Receiver does not dispute, that the Receivership Entities engaged in a vast, deliberate scheme to destroy relevant evidence regarding the Cook-Kiley Ponzi scheme, with the specific intent of preventing that evidence from being used in subsequent judicial proceedings. Receiver, suing on behalf of the Receivership Entities, is subject to the consequences of the Receivership Entities' conduct.

Further, Associated Bank has demonstrated clear prejudice. Receiver has chosen to believe, or at least to offer for the Court's consideration, Mr. Pettengill's testimony about a meeting only he recalls. But Mr. Pettengill, or his co-conspirators, have destroyed the only contemporaneous record of that supposed meeting. This spoliation compromises Associated Bank's ability to defend itself against these particular allegations.

Receiver's argument that he did not act in "bad faith" misses the point. Associated Bank need not show that Receiver acted in "bad faith" because (1) the Receivership Entities undeniably acted in bad faith and (2) Receiver is "subject to liens, priorities, equities, privileges, claims, defenses and estoppels existing at the time of his appointment." 65 Am. Jur. 2d *Receivers* § 165 (2016).[1] Receiver ignores this rule. Rather, he argues that he should be

[1] While Associated Bank notes that Receiver acted recklessly in failing to stem the tide of destruction, this merely highlights that the equities do not

allowed to rely upon the *ex ante* assertions of fraudsters, such as Mr. Pettengill—who Receiver describes as "known pathological liar[s]," ECF No. 204 at 9, whose chances of obtaining parole may well turn on the Receiver's pleasure, and who can say absolutely anything without fear of contradiction because they have destroyed the documents—all without any accountability for the spoliating acts of those fraudsters.

Accordingly, this Court should grant Associated Bank's motion and apply an adverse inference, or other sanctions, against Receiver.

ARGUMENT

I. Receiver Mischaracterizes The Supposed April/May 2008 Meeting That Only Mr. Pettengill Seems To Recall And Of Which There Is No Record

Receiver does not dispute the myriad facts that show that Pettengill's "memory" of the supposed April/May 2008 "meeting" is, at best, dubious. These include, among other things, that (1) Pettengill still does not acknowledge his wrongdoing in connection with the Ponzi scheme, (2) Pettengill just happened to "recall" this "meeting" days before the close of discovery, and years after the first declaration he provided to the Receiver, (3) no one else can recall this "meeting," (4) there are no emails or other documents either from before or after the meeting that refer to anything that was supposedly addressed or decided there, (5) Mr. Pettengill could not pick

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favor abandoning settled law to afford Receiver an unprecedented litigation advantage.

Mr. Sarles out of a photo array, (6) unlike every other meeting Mr. Sarles attended at the Receivership Entities, this supposed meeting appears nowhere in Mr. Sarles' records. ECF No. 237 at 3.

What Receiver does instead of addressing the foregoing points is to compound the problem by mischaracterizing Pettengill's "recollection" of events. As shown below, Receiver's "spin" is simply incorrect.

A. Mr. Pettengill Concluded That Mr. Sarles Was Not A Part Of The Fraud

Mr. Pettengill's ultimate conclusion was that Mr. Sarles was not part of the Cook-Kiley Ponzi scheme. As Receiver notes, Mr. Pettengill left the Receivership Entities in the middle of 2008, and when asked at deposition whether Mr. Sarles was a part of the fraud at that time, Mr. Pettengill said, "Not at that time, no." Ex. 2 at 193:23.

To get around this exculpatory testimony, Receiver cites Pettengill's *ex ante* declaration, rather than his deposition transcript, and what is more, Receiver excerpts the Pettengill declaration in a misleading fashion. To read Receiver's Opposition, one would wrongly think that Mr. Cook said that Mr. Sarles was "our guy," and would do anything, "legal or illegal." But that is not something that Mr. Cook, or anyone else, ever said. Rather, it was Mr. Pettengill's initial "impression," which is both inadmissible (*see* Fed. R. Evid. 404(a)(1)) and more importantly, is not Mr. Pettengill's final conclusion.

B. Mr. Pettengill's Entire Explanation For The Supposed Objective And Outcome Of The "Meeting" Is Contrary To The Documents And His Own Testimony

According to Receiver, the reason for the April/May 2008 "meeting" was that Wells Fargo was "asking a lot of questions," "particularly about wire activity" and therefore "Trevor Cook decided they would not use Wells Fargo." ECF No. 237 at 3. But with regard to these supposed Wells Fargo "questions," Receiver offers no testimony or documents from Wells Fargo (or anyone else) to corroborate Mr. Pettengill's story, despite having four terabytes of emails and documents that Receivership Entities received.

Moreover, what Receiver fails to inform the Court that the Receivership Entities continued to use their Wells Fargo accounts for years after this supposed meeting, both to receive investor money and to wire it out. Ex. 3 at ¶¶ 27, 80. By contrast, Receiver admits that Associated Bank never wired any money to Switzerland. ECF No. 234 at 12. This is glaring hole in Pettengill's story.

Thus, contrary to Receiver's assertion, Mr. Sarles did not open the Crown Forex LLC account at Associated Bank to "implement this plan [to move the banking relationship from Wells Fargo to Associated Bank]" due to Wells Fargo's supposed "questions" about "wire transfers"—because that move never occurred. ECF No. 234 at 12.

Moreover, the fact that the Crown Forex LLC account was opened on

June 16, 2008, around six weeks after the supposed late April/early May "meeting," highlights yet another hole in Pettengill's story: If Wells Fargo was, as Pettengill claims, "asking a lot of questions," and an urgent solution was needed, why was it well over a month before the Crown Forex LLC account was opened? Nor did any witness, including Mr. Pettengill, ever testify that the Crown Forex LLC account was opened because of discussions at the supposed April/May meeting—this is just something Receiver invents.

C. Mr. Pettengill Testified That The Discussion At The April/May 2008 Meeting Was About Maintaining Investor Money In The Bank Accounts That Briggs & Morgan Recommended

Receiver grossly misstates Mr. Pettengill's testimony when he argues that "Sarles was also informed that new, incoming investor funds were going to be used to make up for a multi-million-dollar shortfall at Crown Forex SA so as to make it appear to have larger deposits on hand." ECF No. 237 at 3-4. This is not what Mr. Pettengill said. Mr. Pettengill testified that there was an "issue whether or not the clients were in segregated accounts . . . and they weren't." Ex. 2 at 175:13-14. Therefore, "they had to figure out how to move the money back to the [United] States and then transfer it out again from the pooled account to the individuals' [segregated] accounts [in Switzerland]. *Id.* at 175:15-17. In other words, "how do we structure it so . . it gets disbursed back to Crown [Forex S.A.] immediately in[to] a segregated account to the client." *Id.* at 175:21-23.

According to Pettengill, Mr. Cook explained that such segregation was necessary because "that's what the attorneys from Briggs & Morgan told us we had to do." *Id.* 180:24-181:4. Thus, Receiver is flat wrong to assert that Mr. Sarles was told anything about "new, incoming investor funds," let alone that the funds would be used to "make up for a shortfall." ECF No. 237 at 3-4. The Receiver has fabricated this version of events from whole cloth.

II. Receiver Is Accountable For The Receivership Entities' Document Destruction

A. Receiver's Argument That Document Destruction May Not Be Imputed To The Receivership Entities Is Erroneous

Receiver's argument that under the adverse inference exception "a principal cannot be 'liable for an unauthorized intentional tort of its agent[s]' when those agents act outside the scope of agency, and act on their own interest rather than in furtherance of the interests of their principal" is misplaced. ECF No. 237 at 16.[2] In this case, the document destruction at issue was done by the principals of the Receivership Entities (Mr. Cook and Mr. Kiley) themselves, as well as persons acting under the direct supervision of Mr. Cook and Mr. Kiley. ECF No. 237 at 4-9. While the Receivership Entities may not be responsible for the action of rogue agents, the destruction

[2] This is, at best, disingenuous argument for Receiver to make, because the entire premise of his case is that Associated Bank should be held liable for the actions of a employee who Receiver claims was a rogue, who Receiver claims acted in his own self interest, and who Receiver claims engaged in wrongdoing not within the scope of his job duties at Associated Bank.

here was not committed by rogue agents; the destruction was by the principals. The Receivership Entities are liable for the acts of their principals.

"The adverse-interest exception is inapplicable when all of an organization's relevant decision makers are involved in the wrongful conduct at issue." Restatement (Third) of Agency § 5.04 cmt. c (2006). That is the case here—the decision makers at the Receivership Entities are responsible for the destruction, and as such, their actions are imputed to the Receivership Entities. *See Official Comm. of Unsecured Creditors of Color Tile, Inc. v. Coopers & Lybrand, LLP*, 322 F.3d 147, 165 (2d Cir. 2003) ("where, as here, the persons dominating and controlling the corporation orchestrated the fraudulent conduct, their knowledge is imputed to the corporation as principal under the "sole actor" rule, which negates the adverse interest exception when the principal and agent are one and the same."); *see also Grassmueck v. Am. Shorthorn Ass'n*, 402 F.3d 833, 838-41 (8th Cir. 2005) (affirming imputation of partner's fraud to the partnership where partner committing the fraud "dominated" the partnership).

In addition, the Receivership Entities for whom Receiver is bringing suit include the estates of Mr. Cook and Mr. Kiley—for which there cannot even be an argument on imputation, because Mr. Cook and his estate are one and the same, and Mr. Kiley and his estate are one and the same. Receiver has made no showing that Mr. Cook and Mr. Kiley did not dominate the

remaining purportedly independent Receivership Entities. Nor could he. As Receiver has alleged many times in this litigation, despite seeming legitimate to outsiders, these entities were mere instrumentalities of Mr. Cook and Mr. Kiley's fraud.

Receiver's authority on this point is not to the contrary, because those cases do not involve a situation in which the corporations were dominated and controlled by the wrongdoers. In *American Builders & Contractors Supply Co. v. Roofers Mart, Inc.*, 2012 WL 2992627 (E.D. Mo. Jul. 20 2012), an employee of defendant company had copied data onto his personal laptop, which he then deleted. *Id.* at *2. Both the employee and the defendant company testified that the company had no knowledge of the personal laptop or the deletion of data. In *Remodeling Dimensions, Inc. v. Integrity Mutual Insurance Co.,* 819 N.W.2d 602, 615 (Minn. 2012), the question was whether the actions of the insurance company's outside counsel could be imputed to it. In contrast, in this case, Associated Bank has demonstrated (ECF No. 193 at 6-12) that principals of the Receivership Entities destroyed—and directed to be destroyed—vast quantities of documents. This was not a case of a rogue employee destroying data on his home computer in secret. This was a systematic principal-directed operation to destroy vast quantities of information. *See In re Arbco Capital Mgmt., LLP*, 498 B.R. 32, 47 (Bankr. S.D.N.Y. 2013) ("As [one individual] was the sole executive and manager of

Arbco, the sole actor rule would apply to negate any available adverse interest exception").

B. Receiver's Argument That He Does Not Stand In The Shoes Of The Ponzi Scheme Entities Is Wrong as a Matter of Law

Receiver mistakenly argues that the actions of the Receivership Entities cannot be imputed to ***him*** because, in his view, receivers are excused from the rules that govern all other litigants. But courts have consistently held that receivers are broadly bound by the conduct of the entities that they represent. The rule that "the receiver stands in the shoes of the corporation or person whose property is in receivership, with exactly the same rights and obligations . . . as such person had at the inception of the receivership," 65 Am. Jur. 2d *Receivers* § 165 (2016), is the law in Minnesota. *Kelley*, 901 F. Supp. 2d at 1129.

This rule holds receivers responsible for the conduct of entities that they represent, even when that conduct occurred before the receiver was named. For example, among other things, courts have recognized that defendants have a right to assert counterclaims against a receiver that arose before the receiver was appointed. *See, e.g.*, *United States v. Mansion House Ctr.*, 767 F. Supp. 995 (E.D. Mo. 1991); *Gross v. Weingarten*, 217 F.3d 208 (4th Cir. 2000); *Wuliger v. Mfrs Life Ins. Co.*, 567 F.3d 787, 794 (6th Cir. 2009) (a receiver "is bound by the arbitration agreements" of the receivership

entities). A "receiver was subject to all defenses and rights of setoff" that defendant had against receivership entity prior to appointment of receiver. *SEC v. Bilzerian*, 378 F.3d 1100, 1108 (D.C. Cir. 2004); *see also Polsky v. Vernich*, 2006 WL 6192835 (Wis. Cir. Mar. 30, 2006) (receiver was subject to defenses because "receiver takes property subject to any existing defects and subject to any defenses that were available against the corporation"). For this reason, even a receiver appointed in a Ponzi scheme case cannot "escape the general rule that he stands in the shoes of [receivership entity] and is subject to all defenses that could have been asserted against [it]," including equitable defenses that arose prior to his appointment, *Johnson v. Studholme*, 619 F. Supp. 1347 (D. Colo. 1985); *see also Armstrong v. McAlpin*, 669 F.2d 79, 89 (2d Cir. 1983) (because "receiver stands in the shoes of the person for whom he has been appointed" "defenses such as the statute of limitations, which might have been interposed against persons represented by a receiver may be interposed against the receiver").

Associated Bank's motion falls squarely within this "stands in the shoes" doctrine. The Receivership Entities destroyed documents, and in so doing, they affirmatively harmed Associated Bank. Like any other claim or defense that Associated Bank has with regard to the Receivership Entities, the appointment of Receiver does not extinguish it. If Receiver's position were correct, the cases above would have been decided differently, and defendants

would not be able to defend themselves against Receivers. That is not the law.

The cases Receiver sites on the doctrine of *in pari delicto* do not warrant a different conclusion. ECF No. 237 at 16. To begin, Receiver is wrong when he argues that the Court has already rejected the argument that he "stands in the shoes" of the Receivership Entities. *Id.* at 16-17. This Court specifically reserved judgment on whether the conduct of the Receivership Entities could be attributable to Receiver for purposes of the *in pari delicto* defense. ECF No. 78 at 8. The Court explained that it could not "determine at this time whether the conduct of Cook and Kiley should be imputed to the Receivership Entities for purposes of the *in pari delicto defense*" and that "[t]he appointment of the Receiver . . . though relevant considerations for purposes of the *in pari delicto* doctrine, [is] not yet dispositive." *Id.* Nor did this Court have occasion to address whether receiver should be excused from defenses or obligations other than the *in pari delicto* doctrine. *See id.*

Receiver misplaces his reliance on *Scholes v. Lehmann*, 56 F.3d 750 (7th Cir. 1995), which carved out a narrow exception pursuant to which the receiver was not deemed to stand in the shoes of the receivership entities (1) with regard to one particular defense, *in pari delicto*, (2) in the context of one type of action, namely, an action for fraudulent conveyance. But *Scholes* is not the law in Minnesota. In *Christians v. Grant Thornton, LLP*, 733 N.W.2d 803, 814 (Minn. Ct. App. 2007), the court came to the opposite

conclusion regarding the *in pari delicto* doctrine. There, a company's bankruptcy trustee brought claims against an auditor. *Id.* at 807-808. The trustee asserted that the auditor's erroneous report caused the company injury. But it was the company itself that had failed to disclose material transactions to the auditor. *Id.* at 814. Even assuming the auditor had some liability, the court concluded that *in pari delicto* barred the trustee's claims. *Id.* at 815.

Moreover, in circumstances identical to those here, the Seventh Circuit found that *in pari delicto* barred tort claims brought by a federally appointed receiver against a third party. In *Knauer v. Jonathan Roberts Fin. Grp., Inc.*, 348 F.3d 230, 232 (7th Cir. 2003), a receiver sued broker-dealers, asserting that they had aided the perpetrators. The Seventh Circuit held the action barred by the *in pari delicto* doctrine under Indiana law that (like Minnesota's) generally holds a receiver stands in the shoes of the receivership entities *Id.* at 235-36. The court noted an exception in fraudulent conveyance cases, but held that the exception must be limited to fraudulent conveyance cases. Thus, *Knauer* demonstrates that exceptions to the stand-in-the-shoes doctrine are infrequent and must be narrowly construed.

Receiver's other cases are not to the contrary. *Wolff v. Cash 4 Titles*, 351 F.3d 1348 (11th Cir. 2003), simply holds that the receiver does not automatically become a party to an action already pending against the

receivership entities; it says nothing about whether the newly appointed Receiver can escape responsibility for corporate actions from before he was appointed. *Cont'l W. Ins. Co. v. Opechee Constr. Corp.*, 2016 U.S. Dist. LEXIS 54716 (D.N.H. 2016) similarly held that a newly appointed receiver is not automatically a party to an earlier filed action against the receivership entities, and further recognized "the principle that a receiver 'stands in the shoes' of the entity in receivership and is bound by that entity's obligations." *Id.* at *7.

C. Accordingly, Receiver Cannot Rely On His Status As A Court-Appointed Receiver To Excuse Him From The Ordinary Application Of The Federal Rules of Civil Procedure Governing Documents Destruction

As Associated Bank noted in its opening brief, Receiver has thrown in his lot with Christopher Pettengill, an unrepentant fraudster. Associated Bank's point with regard to symbiotic relationship between Receiver and Mr. Pettengill is that holding Receiver accountable is also the correct result as a matter of equity. No one forced the Receiver to rely upon the word of a fraudster; doing so was Receiver's own tactical decision. Having done so, it is only fair that Receiver answer for the document destruction by the fraudsters that thwarts Associated Bank's efforts to cabin Mr. Pettengill's testimony to the facts.

In his opposition brief, Receiver, who claims to be seeking a recovery for

victims of the Cook-Kiley Ponzi scheme, mounts a remarkable defense of Mr. Pettengill—a man who still refuses to recognize the fact that he stole millions from these investors. While Receiver's vociferous defense of a Ponzi schemer illustrates the extent to which Receiver's case has eroded in discovery, his arguments regarding Mr. Pettengill miss the point.

First, the fact that destruction was chiefly by Mr. Pettengill's co-conspirators (who are liable for one another's misdeeds, 18 U.S.C. § 371) in no way changes the equities: Associated Bank's ability to mount its defense was damaged by fraudsters' destruction, and that damage becomes particularly acute when Receiver relies upon fraudster testimony.

Second, stating that the Receiver relies on a person of an ilk he describes as "known pathological liar[s]" is not a smear; it is factual. ECF No. 237 at 18-19. Mr. Pettengill is serving a lengthy prison sentence for his role in a multi-million dollar Ponzi scheme that lied to investors and stole their money. Although Mr. Pettengill is years into his prison sentence, he has not given up the ghost—he claims that he "never willfully stole people's money." ECF No. 193 at 17.

III. Receiver Fails To Rebut Associated Bank's Showing Of Relevance And Prejudice

A. Mr. Cook's Notes Are Relevant and Associated Bank Was Harmed By Their Destruction

Receiver argues that Associated Bank has not met its burden to show that Mr. Cook's notes would have been "relevant and helpful" to its case. ECF No. 237 at 20-21. He is mistaken on the law and the facts.

First, "[w]here"—as is the case here—"a party destroys evidence in bad faith, that bad faith alone is sufficient circumstantial evidence from which a reasonable fact finder could conclude that the missing evidence was unfavorable to the party." *In re Residential Pfizer Inc. Sec. Litig.*, 288 F.R.D. 297, 315 (S.D.N.Y. 2013); *see also Convolve, Inc. v. Compaq Computer Corp.,* 223 F.R.D. 162, 176 (S.D.N.Y. 2004) ("Where the spoliation occurred as a result of bad faith . . . it may be presumed that the evidence would have been harmful to the spoliator."). If the analysis proceeds past bad faith, the evidence need only be relevant and helpful to the ***jury***, not to Associated Bank. *See DemMEO v. Tucker*, 509 F. App'x 16 (2d Cir. 2013) (instructing jury that adverse inference would be appropriate if missing evidence "would have been relevant and helpful to you").

Mr. Cook's notes would be helpful to Associated Bank. The Cook notes would resolve whether the April/May 2008 meeting that only Mr. Pettengill seems to recall actually happened, who (if anyone) attended, and what (if

anything) was said. In light of the wealth of evidence (*see supra* at 5-9) that casts serious doubt on whether this so-called "meeting" occurred, and if so, whether it occurred as Mr. Pettengill claims to recall it, Mr. Cook's notes laying to rest those questions would be helpful to Associated Bank's case.

Receiver acknowledges that it is highly unlikely that Mr. Cook "would have taken copious notes of meetings at which they planned illicit activities." ECF No. 237 at 21. Associated Bank agrees—had Mr. Cook been doing something illicit at this particular meeting, he likely would not have been memorializing it. But Mr. Cook ***was*** taking notes. Ex. 2 at 173:25. Which, as Receiver notes, suggests that the meeting was not about anything illicit. Given that Receiver and Associated Bank both anticipate that Cook's notes would be exculpatory, their destruction is highly prejudicial to Associated Bank.

Moreover, Receiver is mistaken that the movant is required to show ***exactly*** what the destroyed evidence would have contained—which is an impossibility. In *Stevenson v. Union Pacific Railroad Company*, the defendant destroyed a recording of the accident at issue. The Eighth Circuit held that plaintiff did not have to show what the recording contained or who it would have favored. Rather, defendant's deliberate destruction of the contemporaneous evidence was enough to establish relevance and prejudice:

The requisite element of prejudice is satisfied by the nature of the

> evidence destroyed in this case. While there is no indication that the voice tape destroyed contained evidence that could be classified as a smoking-gun, the very fact that it is the only recording of conversations between the engineer and dispatch ***contemporaneous*** with the accident renders its loss ***prejudicial*** to the plaintiffs.

354 F.3d 739, 746 (8th Cir. 2004). Here too, "the very fact that it is the only [written record] ***contemporaneous*** with the [alleged meeting] renders [the] loss prejudicial to" Associated Bank. *Id.*[3]

Receiver's cases are not to the contrary. In *Sovulj v. United States*, plaintiffs claimed that a destroyed x-ray might have shown a nascent tumor in a deceased inmate. 2005 WL 2290495, at *5 (E.D.N.Y 2005). But plaintiffs' own expert testified that she was "not comfortable to say . . . that the tumor would be visible on the x-ray." *Id.* (internal quotation marks omitted). In contrast, in this case, it is certain that Mr. Cook's notes would have confirmed the existence or non-existence of the alleged meeting, and likely who (if anyone) was in attendance, who (if anyone) made presentations, and what (if anything) was said. Similarly, Mr. Pettengill's calendars could have

[3] *See also Process Controls Int'l, Inc. v. Emerson Process Mgmt.*, 2011 WL 5006220, at *6 (E.D. Mo. 2011) (finding prejudice even though movant could not specify what the destroyed evidence would have said; explaining that "the fact that [the party] cannot show exactly what information was contained in the destroyed pages is 'precisely the problem.'"); *In re Residential Pfizer Inc. Sec. Litig.*, 288 F.R.D. at 315 ("A court must not 'hold the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed or unavailable evidence because doing so would subvert the purpose of the adverse inference.").

confirmed the existence or non-existence of the meeting.

Receiver's other case, *Convolve v. Compaq Comp. Corp.*, held that prejudice may be presumed in cases of willful document destruction, and that, even absent bad faith, an adverse inference is appropriate if the movant is able to support its view about what the evidence would show. 223 F.R.D. at 176. Even under this standard from *Convolve* (which is more strict than what the Eighth Circuit requires, *Stevenson*, 354 F.3d at 746), Associated Bank would prevail. Associated Bank has offered a plethora of evidence to support its understanding that the missing notes would show the meeting, if it occurred, was wholly innocuous. *See supra* at 5-8. That evidence includes, among other things, that: no one other than Mr. Pettengill can recall the supposed "meeting;" although the attendees supposedly resolved to move the Receivership Entities' business from Wells Fargo to Associated Bank, that never happened; and although Wells Fargo's "questions" were supposedly the impetus for the meeting, there are no documents, nor any testimony other than Pettengill's, that Wells Fargo asked questions or that the Receivership Entities were answering them.

B. Associated Bank Has Shown Mr. Pettengill's Calendar Entries Are Relevant

Receiver also asserts—without any support—that (1) Mr. Pettengill's electronic calendar on his phone was never destroyed, (2) and that, in any

event, because Mr. Pettengill did not use his iPhone calendar and the spring 2008 meeting was on short notice, it would not have appeared there. This argument fails for two reasons.

First, Associated Bank's motion was addressed to ***both*** Mr. Pettengill's electronic ***and paper*** calendars.[4] Mr. Pettengill testified that a calendar entry could be on his phone and/or his paper calendar. Ex. 2 at 71:9-12, 172:10-13. Associated Bank showed that Receiver was reckless in failing to collect Mr. Pettengill's phone and that the fraudsters intentionally destroyed Mr. Pettengill's paper calendar.

In addition, Receiver argues that neither an electronic or paper calendar entry would necessarily have shown *who* attended the alleged April/May 2008 meeting, but this argument misses the point. A calendar entry might show "who actually attended" the meeting, but moreover, it ***would*** show whether or not the meeting actually occurred. An absence of any calendar marker for the meeting would be strong evidence that the meeting never actually took place. Thus, Associated Bank has shown that the destroyed evidence would be relevant and helpful in this case.

[4] Receiver focuses on Mr. Pettengill's phone, but apparently concedes that Receivership Entities willfully destroyed Mr. Pettengill's paper calendar. This is consistent with Mr. Pettengill's own testimony. Ex. 2 at 171:22-25, 172:1-5. As Associated Bank showed in its opening brief (at 11, 16), all the fraudsters' paper calendars were destroyed, and none were produced, in the vast scheme of document destruction.

C. Receiver Is Not Saved By "Other Evidence" In This Case.

Receiver additionally argues that Associated Bank "can prove its case through" all the "other evidence" that refutes Mr. Pettengill's story. ECF No. 237 at 22. Certainly, there is a wealth of evidence that Mr. Pettengill's story is bogus. But that evidence is different than what was destroyed, and thus has no bearing on the sanctions analysis.

Where a party has destroyed some evidence, but other evidence preserved ***duplicates*** the content of what was destroyed, the movant is not prejudiced. *See, e.g.*, *Karpenski v. Am. Gen. Life Cos.*, 2013 WL 12071666, at *3 (W.D. Wash. 2013). But that is not this case. Here, at issue is the written record of whether a certain event occurred (Mr. Cook's meeting notes) and what was said at the "meeting," if it occurred. The Receivership Entities destroyed this record and there are ***no other records*** of whether the event occurred, nor of what was said at the "meeting" if it occurred. The absence of other records in this case is not the equivalent of duplicate evidence. As a result, Associated Bank is prejudiced by the destruction of the record here.

Blandin Paper Co. v. J&J Industrial Sales, Inc., 2004 U.S. Dist. Lexis 17550 (D. Minn. 2004), is not to the contrary. There, the court found no prejudice because although the plaintiff's experts would have liked to run tests on the actual chemical residue destroyed, its absence did not hinder their expert opinion on what those tests would have shown. *Id.* at *19. More

fundamentally, in that case, the court also found there was no bad faith—as defendant had destroyed the chemicals in the ordinary course of business years before the litigation began. *Id.* Here, Receiver cannot avoid sanctions pointing to other evidence that demonstrates that Associated Bank's skepticism about the so-called "meeting" is well founded; he must answer for the critical evidence that was destroyed.

IV. An Adverse Inference Or Exclusion Of Testimony Is The Appropriate Sanction

Finally, Receiver contends that even if he is accountable for the Receivership Entities' willful destruction of evidence, the sanctions requested are inappropriate. He is wrong.

Receiver first argues that excluding Mr. Pettengill's testimony is an inappropriate remedy because exclusion would be "inherently contradictory" to the purposes of the requested sanctions. ECF No. 237 at 24. Not so. There is nothing contradictory about precluding testimony that is likely disingenuous on whether a meeting occurred, when it occurred, who the attendees were, and what was discussed, given that there is evidence that most of the supposed attendees to the meeting were involved in destroying the only written record of the meeting.

Moreover, granting the motion to exclude Mr. Pettengill's testimony would not require this Court to take the affirmative position that "no meeting

took place." ECF No. 237 at 24. The Court would simply be holding that given the Receivership Entities intentional, bad-faith destruction of the evidence that *would* have shown whether the meeting took place, Receiver should not be permitted to put on testimony that the meeting occurred.

Receiver next argues that an adverse inference is not permitted here because "inference sanctions are inappropriate on summary judgment," where a court is supposed to draw inferences in the non-movant's favor. ECF No. 237 at 24. But as Associated Bank demonstrated in its opening brief, courts properly consider adverse inferences when deciding summary judgment motions. ECF No. 193 at 14-15 (citing *In re NTL, Inc. Sec. Litig.*, 244 F.R.D. 179, 201 (S.D.N.Y. 2007), *aff'd sub nom. Gordon Partners v. Blumenthal*, 2007 WL 1518632 (S.D.N.Y. 2007)).

Receiver's lone authority on this point, *Stichting Ter Behartiging Van de Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt Int'l B.V. v. Schreiber*, 407 F.3d 34 (2d Cir. 2005), is not to the contrary. The adverse inference that the court in *Schreiber* refused to draw at summary judgment—though Receiver takes pains to conceal this—was an adverse inference from a corporate principal's taking the Fifth Amendment in a deposition, ***not*** a spoliation inference. *Id.* at 54-55. And there is a crucial difference between the two kinds of inference: unlike a spoliation inference, a Fifth Amendment inference is not a sanction. Indeed, the Supreme Court has observed that the

very reason for allowing Fifth Amendment adverse inferences to be drawn in civil cases is that such inferences do not "penalize the exercise of the privilege." *Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976). Given that the Fifth Amendment adverse inference is not a sanction, it makes little sense to apply it against a non-movant on summary judgment. By contrast, a spoliation adverse inference is a sanction and ought to be applied against the spoliator at every stage—including at summary judgment. Indeed, withholding a spoliation inference at summary judgment and allowing a spoliator's claim to proceed undermines the purpose of the sanctions regime. This Court thus can and should impose an adverse inference at the summary judgment stage.

Finally, Receiver argues that the "logical premise" for an adverse spoliation inference is absent here. ECF No. 237 at 25. He claims that adverse inferences are only warranted when the destroyed evidence may have been "adverse" to the spoliator and here, the destroyed meeting notes would not have been "adverse to anyone"—rather, they would have been "beneficial to Associated Bank." *Id.* at 26. He also claims that Trevor Cook and others who destroyed documents would not be "motivated to destroy evidence that would exonerate Associated Bank from wrongdoing." *Id.*

These arguments are misplaced. First, adverse inferences are warranted in a variety of circumstances including when the evidence could

have been "beneficial to the prejudiced party." *SEC v. Mercury Interactive LLC*, 2012 WL 3277165, at *10 (N.D. Cal. 2012). Second, courts do not hold movants to the unobtainable standard of showing *exactly* what was in the destroyed evidence. For example, the mere fact that the lost piece of evidence was the only copy available may support a showing of prejudice. *Stevenson*, 354 F.3d at 748.

Equally erroneous is Receiver's contention that the Court should deny this motion because the spoliators were not "motivated" to exonerate Associated Bank from wrongdoing. As Associated Bank explained in its opening brief, the spoliators could not have foreseen what sort of litigation would arise from their Ponzi scheme at the time they destroyed the meeting notes—their intent was generally to prevent the use of the notes in judicial proceedings.

But in any event, Associated Bank is not required to show that the spoliators specifically intended to destroy the meeting notes because of their content. As Receiver's own authority acknowledges, there are *multiple* rationales for imposing an adverse inference, including deterring wrongful conduct and putting the prejudiced party back in the position it would have been in absent spoliation. *Kronisch v. United States*, 150 F.3d 112, 126 (2d Cir. 1998) (noting the "prophylactic," "punitive," and "remedial" rationales for the adverse inference). Thus, an adverse inference is appropriate whenever a

spoliator's willful conduct and "desire to suppress the truth" warrant punishment. *Hallmark Cards*, 703 F.3d at 460.

That is the case here. The Receivership Entities deliberately destroyed documents—including meeting notes that would have contradicted the testimony of Mr. Pettingill, now a witness on whom they choose to rely. And they did so in an attempt to cover the tracks of the fraudsters and frustrate any later attempts to get at the truth of what happened. Imposing sanctions here would punish that reprehensible conduct and deter others (who, like Mr. Pettengill, might wish to offer testimony unmoored from an evidentiary record) from making similar attempts to suppress the truth. Sanctions would also put Associated Bank in the position it would have been in absent spoliation: if the Receivership Entities had not destroyed the documents, Associated Bank would have had conclusive proof with regards to Mr. Pettingill's testimony. An adverse inference would accomplish the same purpose and serve the remedial ends of spoliation law.

CONCLUSION

The Court should grant Associated Bank's Motion for Sanctions or Adverse Inference.

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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*)