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-SER)

RECEIVER'S RESPONSE IN OPPOSITION TO ASSOCIATED BANK'S MOTION FOR ADVERSE INFERENCE OR OTHER SANCTIONS (ECF NO. 175)

Associated Bank has made the extraordinary claim that the Receiver in this case, an officer of the Court appointed to preserve and collect assets of the Receivership Entities and to sue wrongdoers where necessary, allowed the destruction of evidence in this case. While conceding that bad faith with intent to suppress the truth is a necessary element to support its requested relief, Associated Bank never even suggests that the Receiver acted this way. Associated Bank's motion lacks any proof of bad faith as shown further below.

Eleven pages into its brief, after leveling numerous baseless charges against the Receiver and implying that the acts of convicted criminals are really the acts of the "Receivership Entities," Associated Bank concedes none of that was relevant to its motion, which "focuses on just one set of . . . documents" that it wrongly claims the "Receivership Entities" destroyed. *See* Brf. at 11 (ECF No. 193). Because Associated Bank's motion, by its own concession, does not rely on supposed bad-faith destruction of

other documents, the Receiver does not waste the Court's time correcting the numerous mischaracterizations in the record regarding the activities of the Ponzi schemers.[1]

BACKGROUND

Two different factual backgrounds are relevant to this motion. The first concerns activities of the Ponzi schemers themselves, including Associated Bank's Vice President Lien Sarles' participation in a meeting in the Spring of 2008 ("Spring 2008 Meeting"). These are facts that Associated Bank wants to suppress through this motion. The second set of facts concerns the Receiver's appointment and subsequent lockdown of the Receivership Entities, including all electronic and paper documents identified and secured within 24 hours of his appointment. Both are described below in greater detail.

Spring 2008 Meeting

Christopher Pettengill worked for and with Trevor Cook and the rest of the now-jailed Ponzi schemers. He pled guilty, and is serving a prison sentence of 90 months for his role in the scheme. *See United States v. Pettengill*, 11-cr-192, (ECF Nos. 6, 35). Mr. Pettengill was one of several people responsible for marketing the Ponzi scheme to

[1] As an example of the mischaracterizations and unsupported innuendo, Associated Bank mentions that Ruth Sawiers saw documents being shredded and noticed a computer was not in its usual place. *See* Brf. at 6. Associated Bank fails to mention, however, that Sawiers and other testified that investor files were rountinely shredded if they were duplicates or after being scanned, if they contained personally-identifiable information. *See* Sawiers Dep. at 118:9 to 119:15 (ECF No. 194-3); Domenichetti Dep. at 66:2 to 67:9 (ECF No. 194-5). More importantly, however, Associated Bank utterly fails to identify which documents might have been shredded and why they are relevant to its case. Associated Bank acknowledges that this kitchen-sink approach is pointless, when it concedes that none of it is relevant to its motion. *See* Brf. at 11 (ECF No. 193) (conceding that its motion relates only to "one set . . . of documents").

investor victims, and to that end participated in various "seminars" to potential investor victims. *See* Pettengill Decl. at ¶ 6 (ECF No. 194-12).

Mr. Pettengill first met Associated Bank Vice President Lien Sarles in March 2008. *See* May 23, 2016, Declaration of Christopher Pettengill at ¶ 3 (ECF 194-12). He had seen Mr. Sarles dozens of times at the Van Dusen mansion where Mr. Pettengill worked with Cook. He saw Mr. Sarles there on occasion drinking alcohol and discussing business. *Id.*

In the spring of 2008 a meeting took place at the Van Dusen mansion. Among those in attendance were Mr. Pettengill, Trevor Cook, Patrick Kiley, and Associated Bank Vice President Lien Sarles. *See* Pettengill Decl. ¶ 4 (ECF 194-12). At the meeting, they discussed the insolvency of the Swiss company, Crown Forex, S.A. It was the foreign currency exchange company that the fraudsters marketed to their victims as the trading company used for investments. They also discussed how to handle investor victims' money, which had been passing through Wells Fargo. *Id.*

Trevor Cook decided that they would not use Wells Fargo as the bank to receive investor victim funds because they had started "asking a lot of questions" regarding Crown Forex, SA and the nature of Cook's business, particularly the wire activity. *Id.* Cook indicated that they would shift their business away from Wells Fargo in light of Wells Fargo's questions. They would shift it to Associated Bank, because Vice President Lien Sarles was "our guy" and "he would do whatever we wanted him to do . . . legal or illegal." *Id.*

At the meeting, 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. *See, e.g.,* Aug. 17, 2016, Deposition of Christopher Pettengill at 175-76 (ECF No. 235-14). To implement this plan, Sarles assisted Kiley in opening account #1705 in the name of Crown Forex, LLC, an LLC that was never registered. *See* Affidavit of Lien Edward Sarles at ¶¶ 14-18 (ECF No. 235-5) The #1705 account received tens of millions in investor funds and is the account used by Trevor Cook to transfer millions in investor funds, with the aid of Sarles, to his own personal account even though he had no signatory authority on the account. AB-MIN-0034552-54 and AB-MIN-0051591-94 (ECF Nos. 235-29 and 235-30).

Lien Sarles also solicited signatures from various Receivership Entity employees to open accounts. *See* Pettengill Decl. ¶ 5 (ECF No. 194-12) Mr. Sarles did not fill out complete paperwork or require supporting documentation for the applications he was assembling. *Id.* Subsequent to this, the Receivership Entities opened several deposit accounts with Associated Bank.

Sometime in the middle of 2008, Mr. Pettengill decided that he could no longer work for and with Trevor Cook. He started to work more closely with Gerald Durand, attempting to lure investor-victims who had put money into the Ponzi scheme, to invest with him. By late 2008, Mr. Pettengill had largely distanced himself from the business.

Receiver's Appointment and Freeze of Assets and Documents

This Court appointed R.J. Zayed on November 23, 2009 as the Receiver of certain entities that had been used by Trevor Cook, Pat Kiley, and their accomplices, aiders, and abettors who ran one of the largest Ponzi schemes in Minnesota history. *See SEC v. Cook*, 09-sm-3333 (D. Minn. Nov. 23, 2009) (ECF No. 13) ("Appointment Order"). The

Appointment Order empowered the Receiver to "use reasonable efforts to determine the location and value of all assets and property which the Receiver Estates own, possess, have a beneficial interest in, or control" and to "take custody . . . of all the funds, property [and] premises" of the Receivership entities. *Id.* at 2-3.

The very next day (November 24, 2009) the Receiver took possession of the property located at 12644 Tiffany Court, Burnsville, MN 55437. When the Receiver arrived with the United States Marshals and the retained security consultant, Waypoint, Inc. (an organization founded and run by former FBI agents), there were two people still on the premises: (1) Leo Domenichetti, who was Trevor Cook's handyman at the Van Dusen Mansion; and (2) Mike Rivers, Mr. Domenichetti's assistant. *See* October 19, 2016, Deposition of Richard Ostrom at 10:20 25 to 11:1-3, 12:3-16 (ECF No. 194-10); *see also United States v. Beckman, et al.*, No. 11-CR-228 (MJD/JJK), Tr. of Proceedings on April 25, 2012, Testimony of Richard Ostrom at 1052:12-15 (ECF No. 518) ("Ostrom Criminal Testimony"). The two individuals were not permitted to go anywhere, do anything, or take anything from the Tiffany Court Property. *See* Ostrom Dep. at 10:20-25, 11:1-3 (ECF No. 194-10). Mr. Domenichetti, who was there with his truck, was asked to unload everything in it and was asked to leave. *Id.* All exterior locks were changed and security guards were posted to safeguard the property, including documents, and computers found at that location. Numerous computers, including 21 hard drives, and other media taken from the property, and were forensically copied. *See* Ostrom Dep. at 11:15-25 (ECF No. 194-10); Ostrom Criminal Testimony at 1050:17-22, 1051:1-4 (ECF No. 518 in 11-CR-228 (MJD/JJK)); *see also* First Status Report of Receiver R.J. Zayed in CFTC v. Cook, et.

al. (09-cv-3332) and SEC v. Cook, et. al. (09-cv-3333) at 6, (ECF No. 100 in *SEC v. Cook*) ("First Status Report").

Also that day, and also with the assistance of the U.S. Marshals and the Minneapolis Police Department, the Receiver took possession of the property at 1900 LaSalle Ave, Minneapolis, MN 55403 (the "Van Dusen Mansion"). This was a property out of which Trevor Cook and Christopher Pettengill, among others, principally worked. Trevor Cook, Patrick Kiley, Graham Cook and Marc Trimble were found on the premises. *See* Sackreiter Dep. at 31:9-17 (ECF No. 194-9); First Status Report at 7. Although the Receiver attempted to interview these individuals, they refused and invoked their constitutional right to counsel. *See* Sackreiter Dep. at 32:14-23, 33:6-11 (ECF No. 194-9). They were escorted off the premises without being allowed to remove any property with the exception of Patrick Kiley, who had been living at the mansion and was allowed to take his personal clothing and toiletries with him. *See id.* at 34:5-14. These individuals were not permitted to take any documents or other non-personal items with them – no other electronics, iPads, *etc*. *See id.* at 35:4-7. The U.S. Marshals searched them before letting them go, and seized a gun belonging to Patrick Kiley. *See id.* at 35:21-24. Two cell phones were found in the mansion. No personal cell phones were found or seen on the people there. *Id.*

All exterior locks were changed, and 24-hour armed security guards were posted to safeguard the property, including the documents and computers that were found at that location. Numerous computers, including 41 hard drives, and other media were forensically copied and then, along with the paper documents that were found on the

premises, moved to the ballroom adjoining the Van Dusen Mansion. *Id.* All paper documents found on the Tiffany Court premises also were eventually moved to the Van Dusen ballroom. *See, e.g.,* Sackreiter Dep. at 20:11-21; First Report at 6. The documents collected from the Van Dusen Mansion and the Tiffany Court property were turned over to federal law enforcement. *See* Ostrom Criminal Testimony at 1057:10-12 (ECF No. 518 in 11-CR-228 (MJD/JJK)). Eventually, they were returned to the Receiver. All of them have been produced to Associated Bank.

ARGUMENT

Sanctions motions requesting an adverse inference are extremely serious matters. As the Eighth Circuit has stated, high standards of proof are required because of the "gravity of an adverse inference instruction, which 'brands one party as a bad actor.'" *Hallmark Cards, Inc. v. Murley,* 703 F.3d 456, 461 (8th Cir. 2013) (quoting *Morris v. Union Pac. R.R.,* 373 F.3d 896, 900 (8th Cir. 2004)). Spoliation sanctions "can take varying forms that range in harshness . . . [adverse inference instructions] are properly viewed as among the most severe sanctions a court can administer." *Rimkus Consulting Group, Inc. v. Cammarata*, 688 F.Supp.2d 598, 619 (S.D. Tex. 2010) (citing cases).

To support an adverse inference, this Court would be required to make two findings explicitly. First, "there must be a finding of intentional destruction *indicating a desire to suppress the truth.*" *Id.* (*quoting Stevenson v. Union Pac. R.R. Co.*, 354 F.3d 739) (emphasis added); *see also Lewy v. Remington Arms Co.*, 836 F.2d 1104, 111-12 (8th Cir. 1988) ("adverse inference instruction is appropriate only where the spoliation or destruction of evidence is intentional and indicates a fraud or desire to suppress the truth"). Second, "[t]here must

be a finding of prejudice to the opposing party." *Id.* Associated Bank has failed to show either of these things. As a result, this Court should deny its motion.

I. ASSOCIATED BANK HAS FAILED TO SHOW EITHER THAT THE RECEIVER DESTROYED ANY EVIDENCE OR THAT IT ACTED IN BAD FAITH WITH A DESIRE TO SUPRESS THE TRUTH.

Sanctions are not appropriate here because Associated Bank has not shown that the Receiver destroyed any evidence. Associated Bank has also failed to show that the Receiver acted in bad faith in any way, or with a desire to suppress the truth. The Receivership Entities are victims in this case, victimized and used by Trevor Cook and his fellow schemers, who were assisted by aiders and abettors like Associated Bank. The Receiver was tasked with collecting and preserving assets for the benefit of the Receivership Entities and for investors in those entities. In carrying out his duties, the Receiver did not destroy any evidence, let alone destroy any evidence in bad faith or with intent to suppress the truth. Associated Bank does not even claim otherwise. Further, Associated Bank has not even attempted to show how the alleged actions of the schemers can be imputed to the Receivership Entities, which are also victims of their wrongdoing. For both reasons, as more fully explained below, Associated Bank's motion should be denied.

A. Associated Bank Concedes that the Receiver Did Not Destroy Any Evidence and Did Not Act in Bad Faith.

Associated Bank's motion fails because it does not show any destruction of evidence by the Receiver. Beyond this, Associated Bank does not even allege bad faith or intentional destruction, but mere negligence with regard to any Receivership conduct. *See,* Brf. at 21

(ECF No. 193). This failure to even allege bad faith or intentional destruction is fatal to its request for sanctions.

In its brief, Associated Bank does not show that the Receiver destroyed any evidence. Instead it claims that the Receiver "failed to preserve documents," "failed to mitigate" destruction by others, "failed . . . to collect cell phones," "failed to search" people on site of the Receivership Entities, "failed to record the state of documents" document destruction, "failed to collect" ESI and "failed to make" a record of documents. *Id.* at 9-10. Even if all of those allegations were true (which they are not), they do not suffice for an adverse inference sanction under well-settled Eighth Circuit law. *See, e.g., Stevenson*, 354 F.3d at 746-47. As the Eighth Circuit has held, "[w]e have never approved of giving an adverse inference instruction . . . on the basis of negligence alone." *Id.* at 747 (footnote omitted).

Moreover, although conceding that a showing of bad faith is necessary, *see* Brf. at 13 (ECF 193) (citing *Stevenson*, 354 F.3d at 747-48), Associated Bank does not ever claim that the Receiver acted in bad faith. Although Associated Bank claims that it is "beyond dispute" (it isn't) that the *schemers* destroyed things in bad faith, it never claims that the Receiver acted in bad faith. *See generally* Brf (ECF No. 193). This lack of an allegation of bad faith against the Receiver pervades Associated Bank's brief, and is exemplified best in one quote where it claims that:

> the bad faith actions of the Receivership Entities employees – and the Receiver's own *failure to preserve* – led to the destruction of . . . documents in this case.

Brf. at 2 (ECF No. 193) (emphasis added). Whereas Associated Bank claims that "employees" of the Receivership Entities (*i.e.*, the schemers who victimized the Receivership Entities and the investors) allegedly acted in bad faith, it only claims (wrongly) that the Receiver was negligent. This does not suffice under controlling law, *Stevenson*, 354 F.3d at 747, and Associated Bank does not claim otherwise, either by arguing for an extension of existing law or good faith reversal of such law. Because no bad faith is even claimed, Associated Bank's motion should be denied.

B. The Receiver Acted with the Utmost Diligence in Securing the Tiffany Court and Van Dusen Mansion Properties and Suggestions of Negligence to the Contrary are Baseless.

Although Associated Bank concedes that "bad faith" is required, and although it does not allege that the Receiver acted in bad faith, it presses the issue, accusing the Receiver not just of negligence, but also of "reckless" negligence. *See* Brf. at 9 (the "Receiver recklessly failed to preserve documents in violation of his preservation obligation.") (ECF No. 193). Associated Bank does not cite any authority that equates negligence or even recklessness with "bad faith."

Beyond this lack of legal authority for its position, Associated Bank is also dead wrong that the Receiver was in any way negligent in its seizure and control of the properties owned by the Receivership Entities. To suggest, as Associated Bank does, that the Receiver, his security consultant, and the United States Marshals allowed evidence to "walk out" of the Tiffany Court and Van Dusen mansion properties, is to traffic in the most baseless of conspiracy theories. Although the legal standard noted above does not

require the Receiver to *disprove* negligence to defeat Associated Bank's motion, the Receiver does so anyway to correct the record and to clear his name.

As noted above, the day after this Court appointed the Receiver, he seized the Receivership Entity properties at Tiffany Court and the Van Dusen mansion, along with the contents. With the assistance of its security consultant and the United States Marshals, the Receiver froze these properties in place and literally put the properties under lock and key – changing the locks and setting up around-the-clock security to prevent anyone from coming in and removing anything. The handful of people found on the premises the day of the seizure were detained but eventually released with only their personal belongings – no portable electronic devices, no computers and no documents were permitted to leave these properties with these people. *See* supra, at 5. Notwithstanding this, Associated Bank levels numerous baseless and misleading charges, each of which are addressed below.

Associated Bank falsely suggests that the Receiver "failed entirely to collect cell phones from the fraudsters or their employees." Brf. at 9 (ECF No. 193).[2] In fact, as Associated Bank concedes, two cell phones were collected from the Van Dusen mansion. *See* Brf. at 9 (ECF No. 193). Moreover, the uncontroverted testimony is that there were no other phones to be "confiscated." *See* Sackreiter Dep. at 35:4-7 (people at the seized properties

[2] Associated Bank's related claim, that the "Receiver lost critical information such as stored electronic calendar information, contact lists, call logs and voicemails and e-mails" is rank speculation, particularly given Mr. Pettengill's uncontroverted testimony regarding his phone calendar use and the fact that his phone was not destroyed. Mr. Pettengill was not on the premises on November 24, 2009. He testified, though, that his cell phone was taken either by the United States Attorney or the FBI. *See* Pettengill Dep. at 71:17-20. His phone was not destroyed.

were not permitted to leave with any electronics or documents, and were searched by the U.S. Marshals) (ECF No. 194-9).

Associated Bank next falsely suggests that the people found at Tiffany Court and the Van Dusen mansion were not searched, and thus were "able to simply walk off the premises taking with them anything they so desired—including key documents." Brf. at 10 (ECF No. 193). Associated Bank also claims that the Receiver did not know the names of people who were there, or why they were there. *Id.* These claims are false.

Initially, it is nonsensical to suggest, as Associated Bank does, that the Receiver did not know who anyone on the premises was or what they were doing there. As noted above, at the Tiffany Court property the Receiver and his security consultant and the U.S. Marshals found two people – Leo Domenichetti and his assistant. *See* Ostrom Dep. at 10-11 (ECF No. 194-10). Mr. Domenichetti was there with his truck, which was loaded with tools and painting supplies.[3] After questioning and after having the Marshals completely

[3] Associated Bank's use of scare quotes to describe Mr. Domenichetti as "cleaning" (Brf. at 10), among numerous other scare quotes (*see, e.g.*,. Brf. at 7, scare quoting "junk," "clean up," and "friend") illustrates the level of conspiracy-theory thinking and desperation of its motion. Mr. Domenichetti was Trevor Cook's handyman who literally helped clean, among other things. *See* July 7, 2016, Deposition of Leo Domenichetti at 14:21-23 ("I polished the brass door knobs and cleaned the toilets."); *see also* 65:14-18 (Now, you're the guy who cleaned the trash cans, ... Am I getting that right? A. Yeah. Dumped the trash cans, yeah.")189:5-9 ("the last time I was there, it was the day the U.S. Marshals rolled in with the FBI and treasury agents and everything and kicked me out. *I was in the process of cleaning* and getting ready to do some paint.") (emphasis added). If Associated Bank did not believe he was there to clean or believed he actually took Receivership Entity documents out from under the noses of the United States Marshals, then it had the opportunity to ask him when it deposed him. Not surprisingly, it never asked him whether he snuck anything out that day, nor did it ask the Receiver's security consultant Waypoint Inc. when it deposed them.

unload his vehicle, he and his assistant were permitted to leave. The Receiver knew who these individuals were and why they were there.

At the Van Dusen property, the Receiver, his security consultant and the United States Marshals found four people: Trevor Cook, Pat Kiley, Graham Cook and Marc Trimble. *See* Sackreiter Dep. at 31:9-21 (identifying all but Marc Trimble and characterizing him as "an insignificant person to us.") (ECF No. 194-9); *see also* First Status Report at 7 (identifying all four individuals, including Marc Trimble). Although the Receiver attempted to question these individuals, they refused to speak and invoked their rights to an attorney. At the property, they were monitored and permitted to collect some personal belongings – medications, a toothbrush, *etc.* – and then were escorted off the property. *See* Sackreiter Dep. at 34:4-21 (ECF No. 194). Associated Bank's implication that the Receiver did not know who was on the premises or what they were doing there is baseless and directly contrary to the uncontroverted evidence.

Most importantly, no one found on the premises was able to "simply walk off . . . [with] anything they so desired." Brf. at 10 (ECF No. 193). It is uncontroverted that everyone found on the premises was frozen in place. *See, e.g.,* Ostrom Dep. at 10:20-25 to 11:3 ("there were the U.S. Marshals and there were several other individuals at the location. So those individuals were identified and – and I don't want to say held, but at the point they were on the property they were just frozen in place. We didn't allow them to go anywhere, do anything.") (ECF No. 194-10). None of the three individuals at the Tiffany Court property were permitted to take anything belonging to the Receivership Entities with them – no documents, no computers, no electronics. *See* November 18,

2016, Declaration of Richard Ostrom, at ¶¶ 7-8 (Exhibit 1)[4] Likewise, the United States Marshals escorted the four people found at the Van Dusen mansion off the property. No one was permitted to leave with anything other than their personal belongings. *See* Sackreiter Dep. at 34-35. And after the Receiver, his security contractor and the United States Marshals secured these properties, around-the-clock security guards were posted to ensure ongoing security. *Id.* at 6. Associated Bank's claim that any of these people were "able to simply walk off the premises . . . with anything they so desired—including key documents" is not only baseless, but flies in the face of the only uncontroverted evidence in this case.

C. Associated Bank cannot Impute any of the Ponzi Schemers' Conduct to the Receiver.

Moreover, rogue employees' supposed bad faith cannot compensate for the lack of bad faith by the Receiver. In support of its argument, Associated Bank does not cite a single case where a Receiver was held to account for the destruction of evidence by a scheming former receivership employee, let alone a case where the destruction took place before the Receivership was established. Presumably as cover for its own failure to support its argument with authority, it claims to be "[un]aware of [any] case that *excuses* a Receiver . . . from his companies' earlier, rampant document destruction." *See* Brf. at 21 (ECF No. 193) (emphasis added). But it is Associated Bank's burden to support its own

[4] Associated Bank is also wrong that no one on premises was searched. The United States Marshals searched individuals and, in one case, found a weapon, which was confiscated. *See* Sackreiter Dep. at 35:18-20.

arguments on its motion. It is not the Receiver's burden to shut down unsupported arguments.

In the absence of any supporting authority, Associated Bank retreats to the general principle that the Receiver "steps into the shoes" of the Receivership Entities, and claims this principle warrants imposing sanctions on the Receiver. Associated Bank, again without any supporting authority whatsoever, also claims that the Receiver should be sanctioned for relying on testimony of the schemers – who are under a court order to cooperate. These arguments, however, are unavailing for three reasons. First, Associated Bank ignores well-settled spoliation law that a principal is not accountable for the conduct of its agents who destroy evidence outside of the scope of their agency. Second, Associated Bank is essentially trying to resuscitate a version of its *in pari delicto* argument despite the fact that this Court has already rejected it. Associated Bank's attempt at an end run around that decision should also be rejected. Finally, Associated Bank's assertion that reliance on a schemer's testimony warrants sanctions is baseless.

1. Neither the Receiver Nor the Receivership Entities Is Vicariously Responsible for the Acts of the Scheming Agents.

The alleged destruction of documents mentioned in Associated Bank's brief cannot be imputed to the Receivership Entities (let alone to the Receiver). Even assuming for sake of argument that any spoliation happened, it would not have been carried out within the scope of the destroying agent's authority. An agent's acts of spoliation are not automatically imputed to the employer. To determine whether to impute such conduct, this Court applies general agency principles. *See American Builders & Contractors Supply Co.,*

Inc. v. Roofers Mart, Inc., No. 1:11-cv-19 (CEJ), 2012 U.S. Dist. Lexis 101842 at *17-19 (E.D. Mo. Jul. 20 2012). "Generally speaking, a principal is liable for the act of an agent committed in the course and within the scope of the agency and not for a purpose personal to the agent." *Semrad v. Edina Realty, Inc.*, 493 N.W.2d 528, 535 (Minn. 1992). 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. *Remodeling Dimensions, Inc. v. Integrity Mut. Ins. Co.*, 819 N.W.2d 602, 615 (Minn. 2012).

All of the alleged acts of spoliation that Associated Bank describes are acts committed by agents of the various Receivership Entities, which are outside of the scope of their agency. Assuming for purposes of argument that all of the acts that Associated Bank describes actually took place, that conduct was carried out by agents acting their own self-interest – namely (assuming it happened) to cover up criminal wrongdoing. Such criminal wrongdoing is not within the scope of their agency, nor is any act of destroying evidence to cover up such conduct. Thus any such conduct cannot be imputed to the Receivership Entities, let alone to the Receiver.

2. The Receiver Does not "Stand in the Shoes" of the Wrongdoers.

To try to avoid the fact that the Receiver did not destroy any evidence, Associated Bank claims that the Receiver "stands in the shoes" of the Receivership Entities and is thus accountable for the alleged spoliation of the schemers. *See* Brf. at 20-21 (ECF No.

193). Associated Bank's argument rehashes principles that this Court has previously rejected. *See* Order (ECF No. 78) (Aug. 4, 2015) at 6-7.

Courts have long recognized that the appointment of a receiver over the business affairs of a wrongdoer does not mean that the receiver stands in the shoes of the wrongdoer for all purposes, as if it possessed the same legal identity. The opposite is true. "[R]eceivers have legal identities distinct from the entities whose assets they are charged with marshaling." *Wolff v. Cash 4 Titles*, 351 F.3d 1348, 1355 n.19 (11th Cir. 2003) (citing authorities); *see also Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995) ("The appointment of the receiver removed the wrongdoer from the scene. The corporations were no more Douglas's evil zombies. Freed from his spell they became entitled to the return of the moneys . . . that Douglas had made the corporations divert to unauthorized purposes."); *Continental West. Ins. Co. v. Opechee Constr. Corp.*, 2016 DNH 088, 2016 U.S. Dist. LEXIS 54716, at * (D.N.H. Apr. 25, 2016) (denying discovery against non-joined receiver of defendant company because receiver has distinct legal identity and was not itself a party); *see also Zayed v. Peregrine Fin. Grp., Inc.*, Civ. No. 12-269, 2012 U.S. Dist. LEXIS 86468, 2012 WL 2373423, at *2 (D. Minn. June 22, 2012) ("[b]ecause this case involves a Ponzi scheme, the Receivership Entities are considered victims of the fraud and thus creditors of the Ponzi scheme.")

As this Court noted in a prior order on a motion to dismiss, Associated Bank "argues that this action is barred by the doctrine of *in pari delicto*." *Id.* at 6. This Court noted the same general legal principle that Associated Bank relies on here – namely that "a receiver typically has the same rights and is subject to the same defenses as the entity that the

receiver represents." *Id.* at 6-7 (citations omitted); *see also* Brf. at 20 ("the Receiver's rights as a plaintiff are subject to the same claims and defenses as the received entity he represents.") (citations omitted). But whereas Associated Bank's brief stops with this general principle, this Court continued that "[w]hen an equity receiver is appointed for a corporation, however, 'the wrongdoer (the corporation) is removed from the picture and, hence, *in pari delicto* does not apply.'" *Id.* at 7. "Indeed, an equity receiver is permitted to bring claims that would otherwise be barred by a corporations own fraud had the corporation brought the claims on its own behalf." *Id.* (citations and internal marks omitted). This rejected principle, which Associated Bank has ignored, also does not provide any basis for the sanctions that Associated Bank seeks here.

3. The Receiver's Reliance on Pettengill's Testimony Does not Taint the Receiver.

In a last-ditch effort to smear the Receiver, Associated Bank complains that spoliation should apply to the Receiver because he may rely on Pettengill's testimony to prove his case against Associated Bank. *See* Brf. at 21-22 (ECF No. 193).[5] Associated Bank does not cite a single case or any other authority in support of this specious argument. *Id.* Instead, it makes the naked claim that the "Receiver should not be permitted to walk away from the wrongful document destruction for which Pettengill and his co-conspirators are

[5] Associated Bank's claim that using Pettengill's testimony "prevent[s] Associated Bank from offering contradictory evidence" Brf. at 22 (ECF No. 193), is utter nonsense. Associated Bank is free to elicit testimony from Mr. Sarles, who might deny that any such meeting took place or deny what Mr. Pettengill says took place at that meeting, assuming Mr. Sarles is able to do so truthfully under oath. Associated Bank could also offer Mr. Sarles's own calendar, unless he destroyed the calendar or that calendar entry to protect himself.

responsible." *Id.* at 22. This claim not only has no basis in fact – Associated Bank does not even claim that Mr. Pettengill destroyed anything[6] – but it is also unsupported by any authority. Moreover, Associated Bank's appeal to fairness ring hollow, as such a rule would amount to an end run around the *in pari delicto* and agency law cited above, and would also hamstring any receiver in recovery actions he is duty-bound to pursue. Associated Bank provides no reason for such a result other than its own self-interest, and no authority for such a far-reaching claim.

II. NO PREJUDICE/RELEVANCE SHOWING

Associated Bank has also failed to show prejudice sufficient to warrant any sanction. This Court's prejudice inquiry should look at whether the evidence was relevant and would have been helpful to the movant, and whether the movant has been deprived of a point of proof. Associated Bank has not shown either.

A. Associated Bank Has Not Shown that the Supposedly-Destroyed Evidence Would Be Relevant or Helpful to its Case.

An adverse inference instruction is improper if the movant cannot show that the evidence in question would have been relevant and helpful. *See, e.g., Condrey v. SunTrust Bank of Ga.,* 431 F.3d 191, 203 & n. 8 (5th Cir. 2005) (adverse inference improper because relevance was not shown); *Escobar v. City of Houston,* No. 04-1945, 2007 WL 2900581, at *17-18 (S.D.Tex. Sept. 29, 2007) (denying an adverse inference instruction because the plaintiffs failed to show relevance). A showing of relevance must be concrete and not merely speculative. *Sovulj v. United States,* No. 98 CV 5550, 2005 WL 2290495, at *5

[6] Likewise, it does not cite any case suggesting that a co-conspirator is tainted with spoliation carried out by other conspirators.

(E.D.N.Y Sept. 20, 2005) (denying an adverse inference instruction when there was only "pure speculation" that the missing evidence was relevant); *Convolve, Inc. v. Compaq Computer Corp.*, 223 F.R.D. 162, 176 (S.D.N.Y. 2004) (denying an adverse inference instruction when the substance of the deleted communication was only described in the most general terms), *clarified on other grounds,* 2005 WL 1514284 (S.D.N.Y. June 24, 2005). "Courts have held that speculative or generalize assertions that the missing evidence would have been favorable to the party seeking sanctions are insufficient." *Rimkus,* 688 F.Supp.2d at 617.

Associated Bank claims that the absence of "hand-written contemporaneous notes taken in real time during the meeting by Mr. Cook, as well as Mr. Pettengill's paper and electronic calendars that would show whether this meeting occurred and who actually attended it." Brf. at 16 (ECF No. 193) There are several problems with this argument. First, although Mr. Pettengill testified that Trevor Cook took notes at a spring 2008 meeting, there is no evidence of what those meeting notes show. Mr. Pettengill also testified that he had no idea what the notes were because he never saw them. *See* Pettengill Dep. at 174:6-8. Associated Bank's claim that the mastermind of the Ponzi scheme, Trevor Cook, would have taken copious notes of meetings at which they planned illicit activities is rank speculation.

Second, Associated Bank's argument as to what Mr. Pettengill's calendars would show is deeply problematic. Among the problems with this argument: (1) Mr. Pettengill's phone was not destroyed, and Associated Bank has made no showing that any electronic calendar on it does not still exist since he testified that he had it when he was taken into

custody of the Bureau of Prisons; (2) Mr. Pettengill's computer calendar from the time working with Trevor Cook was not destroyed as Associated Bank claims; (3) Mr. Pettengill testified, without any contradictory evidence, that he did not use his computer calendar, so no meeting would ever have been recorded on it; (*see* Pettengill Dep. at 171:8-11); (4) Mr. Pettengill described meetings like the Spring 2008 Meeting as impromptu, and unlikely to have appeared in any calendar, *Id.* at 70:14-15 to 71:1-3; and (5) Associated Bank failed to point to any evidence whatsoever that any calendar entry – even assuming that it existed – would show "who actually attended" (Brf. at 16) the meeting.[7] Associated Bank's claim of what this evidence "would show," is at best wild speculation, and at worst a gross misrepresentation to this Court of at least some of the record evidence in this case. Associated Bank has failed to show that the supposedly-destroyed evidence that it points to would be relevant and helpful to its case. The failure in this regard is fatal to its requested relief.

B. Associated Bank Is Able to Make Its Case Through Other Direct Evidence.

In addition to relevance, movants like Associated Bank need to show harm from the lack of the supposedly-destroyed evidence. So, even when evidence has been destroyed, there is no prejudice where the movant is able to prove its case through other evidence. *See, e.g., Blandin Paper Co. v. J&J Industrial Sales, Inc.*, No. 02-4858 ADM/RLE, 2004 U.S. Dist. Lexis 17550 at *19 (D. Minn. Sept. 2, 2004) (rejecting an adverse instruction where the movant was "able to use other evidence to support their theories"). While prejudice

[7] Mr. Pettengill allowed for the possibility that the meeting "might have been" recorded on his phone, but he did not know. *See* Pettengill Dep. at 70:25 to 71:12.

might sometimes be presumed, *see, e.g., Lang v. Minneapolis*, No. 13-cv-3008 DWF/TNL (D. Minn. Jun. 20, 2014) (unpublished) (ECF No. 37), such a presumption is typically limited to cases where destruction is the result of bad faith and not mere negligence. *Process Controls, Int'l, Inc. v. Automation Serv.*, 4:10CV645 CDP, No. 2011 U.S. Dist. Lexis 121369 at *23 (E.D. Mo. Oct. 20, 2011) (bad faith shown); *see also Rimkus*, 688 F.Supp.2d at 617. Associated Bank has not shown bad faith by the Receiver, and thus cannot rely on any presumption that evidence would have been adverse to the Receiver.

Beyond its heavy reliance on this presumption, which is unavailable, Associated Bank only claims that Mr. Pettengill would be "free from the risk" of adverse testimony and able to present "self-serving" testimony in the absence of the relief it seeks. Associated Bank is wrong on both counts. Contrary to Associated Bank's claim, Mr. Pettengill is not "free from the risk" of adverse testimony in the absence of the requested sanction. Rather, any other witness who Mr. Pettengill says was at the meeting is free to testify that the meeting never took place. Also, Associated Bank could present evidence that Mr. Pettengill's account of the meeting did not in fact happen. As one example, while Mr. Sarles has not specifically contradicted him by saying that no meeting took place, he has testified that he does not recall any such meeting. *See* May 27, 2016, Deposition of Lien Sarles at 67:4-10. Mr. Pettengill testified that Trevor Cook and Patrick Kiley also attended. Both could testify regarding the Spring 2008 Meeting.

Finally, Associated Bank's claim that Mr. Pettengill's testimony regarding the meeting is "self-serving" is wildly off the mark. Mr. Pettengill's description of the meeting includes discussion of how to handle investor funds in light of the Crown Forex, S.A. insolvency.

Additionally, they talked of shifting business away from Wells Fargo which was "asking a lot of questions." They decided to shift that business to Associated Bank *via* Lien Sarles because "Lien was our guy" and would do "whatever Cook wanted, even if it was legal or illegal." *See* May 23, 2016 Decl. of Christopher Pettengill at ¶ 4. Associated Bank does not explain how Mr. Pettengill's telling of a meeting in which he helped plan, agreed to, or allowed breaches of duties to occur, can possibly be "self-serving" rather than expressly implicating himself in wrongdoing. If anything, Mr. Pettengill is testifying against his own interest. It certainly does not provide a basis for an adverse inference contrary to his testimony.

III. EVEN ASSUMING ANY EVIDENCE WAS DESTROYED, NO REMEDY IS WARRANTED

The evidentiary remedies that Associated Bank seeks are inappropriate even assuming that some documents have been destroyed. Associated Bank proposes two alternate sanctions in its motion. First, it seeks exclusion of Mr. Pettengill's testimony. Second, it seeks one or more adverse inferences, including: either that a meeting attended by Mr. Pettengill and Mr. Sarles, among others, never occurred; or that if such a meeting occurred, nothing illicit was discussed. Brf. at 4, 16-17, and 22. (ECF No. 193).[8] These proposed sanctions are inappropriate even if any documents were destroyed in this case. As noted above, Associated Bank's motion should be denied because it has failed to show

[8] In passing, Associated Bank also mentions that Courts *may* dismiss cases based on spoliation findings, but it never actually addresses this argument in its brief. That Associated Bank has failed to show that the least harsh sanctions are appropriate, it should go without saying that dismissal, which Associated Bank does not even seriously argue for, is even more inappropriate.

bad faith. But beyond this, the motion should also be denied because the remedies it seeks are inappropriate.

A. Exclusion of Mr. Pettengill's Testimony Is Unwarranted.

As shown earlier, Courts have described giving adverse-inference instructions as both drastic and harsh even in cases of spoliation of evidence. Excluding other evidence as a remedy is even more drastic. The sanction that Associated Bank requests is inappropriate because it is inherently contradictory to the rationale that Associated Bank puts forth. The basis for requesting exclusion of Mr. Pettengill's testimony about a meeting is the supposed destruction of notes taken at that meeting. The remedy that Associated Bank suggests, however, would negate any evidence that the meeting took place at all. This proposed remedy destroys the rationale for giving it. If no meeting took place, no notes could exist. In this context Associated Bank's remedy – to prevent Mr. Pettengill from testifying about a meeting – makes no sense.

B. It Would be Inappropriate to Give Associated Bank, the Summary Judgment Movant, An Inference From Supposedly-Missing Evidence.

Adverse inference sanctions would also be inappropriate here because these inference sanctions are inappropriate on summary on summary judgment. Moreover, the logical basis for an adverse inference in some spoliation cases is lacking here. Summary judgment is only appropriate if there are no genuine issues of material fact. *See* Fed. R. Civ. P. 56. When ruling on a motion for summary judgment, this Court construes all underlying facts *and inferences* in the light most favorable to the non-movant. *See Anderson v. Liberty*

Lobby, 477 U.S. 242, 255 (1986); *Anchor Wall Sys. v. Rockwood Retaining Walls*, 252 F. Supp. 2d 838, 842 (D. Minn. 2002) (Doty, J.).

An adverse inference in the movant's favor flies in the face of the Supreme Court's holding in *Anderson* and thus cannot be used to support a movant's own motion. *See, e.g., See Stichting Ter Behartiging Van De Belangen Van Oudaandeelhouders In Het Kapitaal Van Saybolt International B.V. v. Schreiber*, 407 F.3d 34, 55 (2d Cir. 2005). As the Second Circuit held, "[e]ven assuming that a *jury* might draw such [spoliation] inferences, however, *we* are required at summary judgment to draw all reasonable inferences in favor of the non-moving party[]." *Id.* Thus, this Court should deny Associated Bank's motion because an adverse inference is inappropriate for a movant on a motion for summary judgment.

Moreover, an adverse inference would be inappropriate at trial as well, for the further reason that the logical premise for such an inference is lacking. In spoliation cases, jurors are sometimes instructed that if they find that a party destroyed evidence, they may, but are not required to draw an inference that the evidence destroyed was adverse to the party destroying it. *Stevenson,* 354 F.3d at 743. The logical rationale is that parties do not typically destroy evidence that is exculpatory to the person destroying it but do sometimes destroy harmful evidence. *See, e.g., Kronisch v. United States,* 150 F. 3d 112, 126 (2d Cir. 1998) (rule "derives from the common sense notion that a party's destruction of evidence which it has reason to believe may be used against it in litigation suggests that the evidence was harmful to the party responsible for its destruction"). Therefore, it is not unreasonable in the case of a party who destroys evidence in bad faith to bear the brunt of an inference that destroyed evidence would have been harmful to the party destroying

it. *Id.* (citing prophylactic and punitive aspects of the rule).

The rationale for an adverse inference instruction is missing here. Associated Bank's argument does not fit this pattern at all. Specifically, although Associated Bank argues that schemers like Trevor Cook destroyed evidence, it does not argue that the result should be for a jury to infer that such evidence would be adverse to Trevor Cook. *Cf. Stevenson*, 354 F.3d at 743 (jury permitted to infer that evidence destroyed by the defendant was adverse to the defendant). Associated Bank also does not argue that Trevor Cook's supposed destruction of evidence should lead a jury to conclude that such evidence would be adverse to the Receivership Entities. Associated Bank does not even argue that Trevor Cook's supposed destruction of evidence permits a jury to infer that such evidence would be adverse to the Receiver. What Associated Bank argues is that Trevor Cook's supposed destruction of evidence should permit a jury to infer that destroyed evidence would not be adverse to anyone, but instead would be beneficial to Associated Bank.

In appropriate circumstances, an adverse inference instruction might permit a jury to infer that destroyed evidence was harmful to Trevor Cook. *See, e.g., Stevenson*, 354 F.3d at 743. But Associated Bank has not cited to any case or given any logical explanation as to why Trevor Cook, for example, would be motivated to destroy evidence that would exonerate Associated Bank from wrongdoing. This is simply not how the adverse inference instruction works. *See, e.g., Kronisch v. US,* 150 F. 3d at 126.

CONCLUSION

The Receiver respectfully requests that this Court deny Associated Bank's motion for sanctions or adverse inference. Associated Bank has not met the minimum criteria for imposing sanctions in this case. Indeed, its efforts to show spoliation or any wrongful conduct by the Receiver is riddled with baseless charges and misrepresentations of fact, and are devoid of any legal authority to support the drastic sanctions it seeks.

Dated: November 18, 2016

Respectfully submitted,

/s/ William W. Flachsbart

Tara C. Norgard (MN Bar No. 307,683)
Brian W. Hayes (MN Bar No. 294,585)
CARLSON, CASPERS, VANDENBURGH, LINDQUIST & SCHUMAN, P.A.
225 S. 6th Street, Suite 4200
Minneapolis, MN 55402
Telephone: (612) 436-9600
Fax: (612) 436-9605
Email: bhayes@carlsoncaspers.com

SPECIAL LITIGATION COUNSEL

Keith A. Vogt (*pro hac vice*)
IL Bar No. 6207971
1033 South Blvd, Suite 200
Oak Park, IL 60302
Telephone: (708) 203-4787
Email: keithvogtjd@gmail.com

William W. Flachsbart (*pro hac vice*)
IL Bar No. 6237069
Robert P. Greenspoon (*pro hac vice*)
IL. Bar No. 6229357
Michael R. La Porte (*pro hac vice*)
IL. Bar No. 6237510

FLACHSBART & GREENSPOON, LLC
333 N. Michigan Ave., 27th Floor
Chicago, IL 60601-3901
Telephone: (312) 551-9500
Email: wwf@fg-law.com
Email: rpg@fg-law.com
Email: mrl@fg-law.com

D. Timothy McVey (*pro hac vice*)
IL Bar. No. 6182134
MCVEY & PARSKY, LLC
30 N. LaSalle St., Ste. 2100
Chicago, IL 60602-2575
Telephone: (312) 551-2130
Email: dtm@mcveyparsky-law.com

Attorneys for Plaintiff R.J. Zayed, in His Capacity as Court-Appointed Receiver

CERTIFICATE OF SERVICE

The undersigned attorney of record certifies that on November 18, 2016, copies of the foregoing document were served upon counsel for Defendant via e-mail to the following addresses:

Alex C. Lakatos
Stephen M. Medlock
E. Brantley Webb
FW-CLIENT-Associated-Bank-Crown-Forex@mayerbrown.com

Charles F. Webber
chuck.webber@FaegreBD.com

/s/ William W. Flachsbart
William W. Flachsbart