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) CONFIDENTIAL FILED UNDER SEAL

Defendant Associated Bank, N.A.'s Brief In Opposition to Receiver's Motion to Strike and Bar the Testimony of Charles H. Grice

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INTRODUCTION

Receiver's arguments regarding Mr. Grice's expert report and testimony are the height of hypocrisy. Receiver's own expert, Ms. Ghiglieri, testified extensively regarding Associated Bank's knowledge. She explained at her deposition that bank examiners, like her and Mr. Grice, have unique expertise in assessing whether a bank has knowledge of a Ponzi scheme, and that this expertise can be applied to determine whether Associated Bank knew about the Cook-Kiley Ponzi scheme. Receiver ignores these facts and seeks a general ban on experts testifying regarding knowledge because Ms. Ghiglieri's testimony on the subject back-fired.

Faced with overwhelming and uncontradicted evidence, Ms. Ghiglieri confessed her opinion that no one at Associated Bank actually knew about the Cook-Kiley Ponzi scheme.

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

Ex. 4 at 239:15-240:8. Receiver offers no reason why Ms. Ghiglieri should be allowed to opine on knowledge, but Mr. Grice should not be allowed to address these opinions.

Doubling down, Receiver wrongly labels Mr. Grice's opinions on "atypical" banking conduct as "legal conclusions," notwithstanding that Ms.

Ghiglieri's report is replete with opinions on alleged "atypical" banking conduct. Receiver's change of heart about such opinions comes on the heels of Ms. Ghiglieri's admission that she could not infer anything from this alleged "atypical" conduct.

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

Ex. 4 at 276:14-22 (objection omitted). To avoid Ms. Ghiglieri's concession—which is fatal to Receiver's argument that wrongdoing can be inferred from so-called "atypical" banking conduct—Receiver seeks a sweeping ban on Mr. Grice discussing "atypical" conduct. But again, Receiver offers no reason why Mr. Grice should be prohibited from addressing Ms. Ghiglieri's opinions.

As a rebuttal expert, Mr. Grice properly addresses Ms. Ghiglieri's assertions regarding Associated Bank's knowledge and supposedly atypical conduct. Mr. Grice is an expert on bank regulations, bank examination, and depositor-run Ponzi schemes. Mr. Grice has testified in several major aiding and abetting cases concerning Ponzi schemes, including testifying on behalf of Bernie Madoff victims. Applying the same methodology as Ms. Ghiglieri, Mr. Grice agreed with Ms. Ghiglieri's concessions that no one at Associated Bank knew about the Ponzi scheme and that no conclusions can be drawn

from Associated Bank's alleged conduct.

Understandably, Receiver wishes that Ms. Ghiglieri had never given her damning testimony regarding Associated Bank's lack of knowledge and the everyday nature of "atypical conduct." Unfortunately for Receiver, Ms. Ghiglieri's concessions cannot be wiped away and Mr. Grice is entitled to rely upon them. Mr. Grice used the same methodology as Ms. Ghiglieri. He offered opinions that Ms. Ghiglieri testified are entirely proper for a bank examination expert to offer. Receiver never explains why a different set of rules should apply to Mr. Grice's opinions that were derived via the same method and examining the same evidence as Ms. Ghiglieri. Receiver cannot exclude Mr. Grice's testimony simply because he reaches the same dispositive conclusions that Ms. Ghiglieri's did.

FACTUAL BACKGROUND

I. Mr. Grice Is A Renowned Expert on Ponzi Schemes And Courts Have Repeatedly Admitted His Testimony Regarding Knowledge

Mr. Grice has extensive experience evaluating Ponzi schemes, including whether banks knew of depositor-run Ponzi schemes. In making such determinations, Mr. Grice draws on three areas of expertise.

First, Mr. Grice is an expert in how account activity is monitored and evaluated by banks and bank regulators, such as the Office of Comptroller of the Currency ("OCC"), the Federal Reserve Board ("FRB"), and the Federal

Deposit Insurance Corporation ("FDIC"). Ex. 1 ¶¶ 3-10. Between 2006 and 2009, he served as the chief compliance officer for six banks and served as a compliance consultant to over 100 banks. *Id.* at ¶ 5. He has also testified before the U.S. Senate Banking Committee, OCC, FRB, FDIC, and California State Legislature on bank regulatory compliance. *Id.* at ¶ 6

Second, Mr. Grice is an expert on the Bank Secrecy Act and federal anti-money laundering ("BSA/AML") regulations, Know Your Customer ("KYC") rules, and regulations pertaining to opening bank accounts and deposits, withdrawals, and transfers to and from accounts. Ex. 1 ¶ 3.

Third, Mr. Grice is an expert on Ponzi schemes, especially the alleged depositor-run Ponzi schemes, a subject that he has investigated on numerous occasions. Ex. 1 ¶ 8; Ex. 2 at 47:14-49:6, 109:20-25. In 2009, Mr. Grice became a member of the Madoff Alliance, an international task force that represented investors and financial institutions in the aftermath of the Madoff Ponzi scheme. Ex. 1 ¶ 8. As a part of his investigation into the Madoff Ponzi scheme, Mr. Grice testified on behalf of investors in a BNP Paribas-managed investment fund regarding what the fund knew about the Ponzi scheme. *Id.*; *see also* Ex. 2 at 125:6-128:12. Likewise, in *Perlman v. Bank of America, N.A.*, 2:11-cv-14386 (S.D. Fla.), Mr. Grice analyzed "the knowledge possessed by individuals inside Bank of America" about a Ponzi scheme operated by an depositor. Ex. 2 at 73:7-9.

II. Receiver's Expert Testified Regarding Associated Bank's Knowledge

Receiver's expert, Ms. Ghiglieri, described her analysis as: "what I'm doing is looking at the documents from the standpoint of what the bank ***knew*** at the time." Ex. 4 at 24:18-20 (emphasis added). Ms. Ghiglieri testified that the methodology she used was "to look to see ***what the bank knew at the time***." *Id.* at 59:17-19 (emphasis added); *see also id.* at 60:3-4 ("I . . . confine myself to what the bank knew at the time."); *id.* at 107:15-16 ("my report does go into what the bank knew.").

Ms. Ghiglieri testified that determining what Associated Bank knew is exactly what a bank examiner does:

> So the – the methodology that I use[d] . . . is what I used when I was a bank examiner, and that is ***I looked at what the bank knew at the time***. I did that by looking at the documents that were produced from the time period. I looked at the deposition testimony that was taken, plus any exhibits that were given to the deponents. And I looked at, you know, the policies and procedures, the alerts, the account opening documents, things like that.

Id. at 185:22-186:9 (emphasis added).

Based on this methodology, Ms. Ghiglieri, offered extensive testimony regarding Associated Bank's supposed knowledge:

- "The Bank . . . facilitated transfers of investor funds from the Crown Forex LLC #1705 account into accounts that the bank ***knew*** were for Cook's personal use." Ex. 3 at 6 (emphasis added); *see also id.* at 113-114 (same).
- "The Bank . . . ***knew*** the funds came from the Crown Forex LLC #1705 account." *Id.* at 6 (emphasis added).

- "Associated Bank opened the Kiley and Cook account ***knowing*** that proper documentation was missing." *Id.* at 47 (emphasis added).

- "[T]he bank ***knew*** the account was holding client investment funds." *Id.* at 60 (emphasis added); *see also id.* at 62 (same); *id.* at 66 (same).

- Associated Bank "***knew*** of suspicious activity taking place in the accounts." *Id.* at 83 (emphasis added).

- "The Bank ***knew*** at least as of October 10, 2008 . . . the following. . ." *Id.* at 90 (emphasis added).

- "The Bank ***knew***, at least by July 2009, the following information. . . " *Id.* at 96 (emphasis added).

- "At least as of April 13, 2009, the Bank ***knew*** the following. . ." *Id.* at 102 (emphasis added).

- "In my experience and training, the fact that Associated Bank ***knew*** the following should be sending alarm bells off all around the Bank. . ." *Id.* at 104 (emphasis added).

- "The Bank also ***knew*** on April 30, 2009 that Trevor Cook was directing transactions in the Kiley accounts as noted below. . ." *Id.* at 112 (emphasis added).

- "[A]t least by October 10, 2008, . . . [Associated Bank] ***knew*** that . . ." *Id.* at 121 (emphasis added).

- "[redacted]." *Id.* at 122 (emphasis added).

- "[B]y approving a $600,000 cash withdrawal when it ***knew*** that . . ." *Id.* at 123 (emphasis added).

- "$2 million telephone transfer [f]rom Crown Forex #1705 account (Kiley) to Oxford Global FX LLC #2331 account (Cook) which Sarles ***knew*** was for Cook's personal use." *Id.* at App'x E, 1 (emphasis added).

- "[redacted]" *Id.* at App'x E, 2 (emphasis added).

Ms. Ghiglieri also offered opinions regarding what particular Associated Bank employees knew. For example, Ms. Ghiglieri claims: "Mr. Sarles ***knew*** that he had not obtained the registration documents with the Secretary of State." Ex. 3 at 50-51 (emphasis added); *see also id.* at 52 (opining "[redacted]"); *id.* at 53 ("[redacted]").

Ms. Ghiglieri did not stop there. She actually testified regarding what Associated Bank would have known in alternate realities with different facts. For example, Ms. Ghiglieri testified, with no factual foundation whatsoever, that if Associated Bank had followed its internal policies perfectly it "would know that a fraud was taking place." Ex. 3 at 68.

Ms. Ghiglieri testified that her opinions regarding knowledge, which she reached using bank examination principles, are not legal conclusions. Ex. 4 at 227:5-9 ("I'm not trying to render a legal opinion. But what I'm saying is she had knowledge of – and there are certain things she had knowledge of.").

III. Receiver's Expert Testimony Sounds the Death Knell for Receiver's Case

At her deposition, Ms. Ghiglieri admitted that that (1) no one at Associated Bank knew about the Ponzi scheme, and (2) nothing negative can be inferred from Associated Bank's allegedly "atypical" banking activity. Both of these concessions are dispositive.

First, undermining her initial views about what Associated Bank supposedly "knew," Ms. Ghiglieri admitted that no one at Associated Bank knew about the Cook-Kiley Ponzi scheme:

> Q. Do you have any evidence that anyone in the back room . . . had actual knowledge that there was any fraudulent conduct going on with any of the receivership entities at the time the Crown Forex, LLC account was opened?
> . . .
> A. No.

Ex. 4 at 197:5-12.

> Q. Do you have any evidence that Nataliya Espsey had actual knowledge of the Ponzi scheme?
> A. No.

Id. at 207:11-208:9.

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

Ex. 4 at 239:15-240:8.

Second, Ms. Ghiglieri admitted that the conduct she labeled "atypical" is conduct that can be found at "almost every [bank]," regardless of whether one of its depositors is running a Ponzi scheme. Ex. 4 at 129:9-10.

> Q. So in your experience as a bank examiner, it wouldn't be unusual for you to find that a bank had engaged in atypical banking conduct?
> A. Well—yes. . . .

Id. at 129:15-18. Moreover, Ms. Ghiglieri conceded that the so-called

"atypical" conduct she identified in this case has no relevance to the issues in this case:

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

Id. at 276:14-22 (objection omitted).

IV. Mr. Grice's Rebuttal Report Addresses Ms. Ghiglieri's Opinions Regarding Knowledge And "Atypical" Conduct

In his rebuttal report, Mr. Grice responded to Ms. Ghiglieri's opinions regarding knowledge and "atypical" conduct. He used the same methodology as Ms. Ghiglieri. Drawing on his experience and training as a bank examiner who has investigated multiple Ponzi schemes, he reviewed evidence that would be relevant to a bank examiner, including deposition testimony, contemporaneous documents and policies, and witness interviews. *Compare* Ex. 1 ¶ 17 (summarizing Mr. Grice's methodology), *and* Ex. 2 at 96:3-18 (same), *with* Ex. 4 at 185:22-186:9 (Ms. Ghiglieri used same methodology). Like Ms. Ghiglieri, Mr. Grice concluded that no one at Associated Bank knew about the Cook-Kiley Ponzi scheme and that the "atypical" conduct listed in Ms. Ghiglieri's report does not shed any light on whether Associated Bank knew of, or substantially assisted, the Ponzi scheme. Ex. 1 ¶ 19.

Mr. Grice was clear that he was testifying regarding knowledge as a

banking expert, not offering legal conclusions:

> Q. In your report you reference the term "actual knowledge," I believe. Can you define that term for me, please.
> A. I can give you my understanding of actual knowledge as a banking expert. I don't know if there's a legal issue here, but as a banker, it's – in order for actual knowledge to exist, I, the banker, would have to be aware of something, whatever the knowledge is about, so I would have to be actually aware.

Ex. 2 at 27:9-18.

As he is required to do by Federal Rules of Evidence 702 and 703, Mr. Grice offered the factual foundation for his opinions. He described how the Ponzi scheme operated. Ex. 1 ¶¶ 26, 28. He offered an expert's perspective on how the Ponzi schemers took steps to make themselves seem legitimate, such as purchasing a large, historic mansion in Minneapolis, known as the Van Dusen Mansion, to use as their headquarters. *Id.* at ¶¶ 30-31. He explained how the deposition testimony and documents shows that many investors, former Receivership Entity employees, and financial institutions were not aware of the Ponzi scheme. *Id.* at ¶¶ 33-68. At his deposition, Mr. Grice explained how Lien Sarles' banking conduct was inconsistent with Mr. Sarles knowing about the Ponzi scheme. Ex. 2 at 105:5-112:21. As a result, there are good grounds for the opinions that Mr. Grice shares with Ms. Ghiglieri—no one at Associated Bank knew about the Cook-Kiley Ponzi scheme and the "atypical" conduct listed in Ms. Ghiglieri's report is meaningless. *Id.* at ¶ 215.

LEGAL STANDARD

> An expert's opinion is admissible
>
> if (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or 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. District courts have an obligation to ensure that all testimony offered under Fed. R. Evid. 702 satisfies these prerequisites. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 589 (1993).

ARGUMENT

I. Mr. Grice May Testify About Associated Bank's Knowledge

Receiver claims that it is improper for *any* expert to offer testimony regarding knowledge. Receiver is wrong. Nothing in Federal Rule of Evidence 702 excludes testimony regarding knowledge. Like any opinion offered under Fed. R. Evid. 702, an expert may testify regarding knowledge if the expert is qualified to do so, uses reliable methodologies, the opinions regarding knowledge are based on a sufficient factual foundation, and the testimony will assist the jury. *See* Fed. R. Evid. 702. Mr. Grice's testimony meets these criteria.

A. Mr. Grice Is Qualified To Testify Regarding Knowledge

It is perfectly permissible for an expert to offer an opinion based on evidence of a defendant's knowledge, if the expert is qualified to do so. *See* 29

Charles Alan Wright & Arthur Miller, *Federal Practice and Procedure* § 6284 (2016) ("the courts have permitted witnesses to give opinion testimony on a wide array of matters that might be considered 'ultimate issues.' These include opinions as to . . . state of mind"). If an expert is qualified, his report may "include[] opinions regarding the knowledge, state of mind, motive or intent of defendant which consequently equates to an opinion of the ultimate issue." *Bouygues Telecom S.A. v. Tekelec*, 472 F. Supp. 2d 722, 726 (E.D.N.C. 2007); *see also* Fed. R. Evid. 704(a) ("An opinion is not objectionable just because it embraces an ultimate issue.").

For this reason, courts routinely hold that an expert may be qualified to testify regarding knowledge. *See, e.g.*, *Dunn v. HOVIC*, 1 F.3d 1362, 1368 (3d Cir. 1993) (holding that it was not error for plaintiff's expert to testify that defendant "knew of the risks associated with exposure to asbestos"); *Corey Airport Servs., Inc. v. City of Atlanta*, 632 F. Supp. 2d 1246, 1265-66 (N.D. Ga. 2008) (allowing expert to testify regarding "intent and motivation of some defendants" because "at least with regard to civil cases, [a]n expert may testify as to his opinion on an ultimate issue of fact" including knowledge) (citations, quotation marks, and alterations omitted), *rev'd on other grounds* 587 F.3d 1280 (11th Cir. 2009); *Greyhound Fin. Corp. v. Willyard*, 1989 WL 201094, at *68 (D. Utah 1989) (in an aiding and abetting case, expert could offer opinions "embracing 'ultimate issues' such as knowledge and specific

intent . . . if they (1) assist the trier of fact in understanding the evidence, and (2) are otherwise admissible.").

District courts in the Eighth Circuit permit an expert to offer opinions on "intent, motives, or state of mind" if those opinions have a basis "in [a] relevant body of knowledge or expertise." *Kruszka v. Novartis Pharm. Corp.*, 28 F. Supp. 3d 920, 937 (D. Minn. 2014). In *Kruszka,* the plaintiff relied on the testimony of an expert in oncology and hematology concerning side effects of a new drug used to treat a particular type of blood cancer. *Id.* at 936. In addition to testifying regarding matters related to oncology and hematology, the expert testified that the defendant "knew and failed to communicate" certain information about its new drug. *Id.* at 937. The district court excluded the medical expert's opinion, finding that it "ha[d] no basis in any relevant body of knowledge or expertise." *Id.* at 937; *see also Deutsch v. Novartis Pharms. Corp.*, 768 F. Supp. 2d 420, 442 (E.D.N.Y. 2011) (finding that same expert was not qualified to testify regarding corporate intent).

However, the district court held that the expert was not precluded from testifying about whether the defendant's documents showed that it knew about certain health risks associated with the new drug. *Kruszka*, 28 F. Supp. 3d at 937-38; *see also Deutsch*, 768 F. Supp. 2d at 443 (same). In addition, the district court found that testimony about what the defendant knew based on the expert's medical expertise "may be helpful [to a jury] in . .

. drawing inferences that may not be apparent without specialized knowledge." *Kruszka*, 28 F. Supp. 3d at 937; *Deutsch*, 768 F. Supp. 2d at 443 (holding that although some of defendant's documents were "capable of interpretation by a layperson," medical expert's testimony was admissible because he was "informed by the evidence as a whole").

Consistent with *Kruszka*, it is only when such testimony is "based on speculation and conjecture rather than fact and informed expert opinion," that it should be excluded. *Lafarge N. Am., Inc. v. Discovery Grp., LLC*, 2010 WL 3025120, at *7 (W.D. Mo. 2010); *see also Langenbau v. Med-trans Corp.*, 167 F. Supp. 3d 983, 1002 (N.D. Iowa 2016) (excluding testimony of regulatory expert and air crash investigation experts regarding air craft operator's "conscious disregard for safety" was inadmissible because it was not based on "any relevant body of knowledge or expertise."); *In re Baycol Prods. Litig.*, 532 F. Supp. 2d 1029, 1053 (D. Minn. 2007) (expert could not offer speculative "[p]ersonal views on corporate ethics and morality."); *Neuharth v. NACCO Materials Handling Grp., Inc.*, 2002 WL 34700601, at *5 (D.S.D. 2002) (product liability expert "should not be allowed to speculate regarding a manufacturer's motives or purposes.").

Bouygues Telecom S.A. v. Tekelec illustrates when an expert is qualified to testify regarding knowledge. 472 F. Supp. 2d at 726-727. In that case, the defendant argued that the plaintiff's telecommunications expert

"offer[ed] opinion regarding defendant's motive or intent, and that both types of opinion are inadmissible." *Id.* at 726. The court held that this motion "with regard to the knowledge of the defendant and others [could] only succeed if such opinions are wholly unhelpful to a jury in determining a question of knowledge." *Id.* The court concluded "[t]hat [was] clearly not the case" because the plaintiff's telecommunications expert had 30 years of experience and could assist the jury by offering "reasonable interpretations of what a person within the telecom field would know." *Id.* (emphasis omitted). Accordingly, the court found that the expert had ample expertise to testify about knowledge from the perspective of someone with experience in the telecommunications industry, and denied the defendant's *Daubert* motion. *Id.* at 727.

Mr. Grice's testimony regarding a bank's knowledge, viewed through the lens of a bank examination expert who has investigated multiple Ponzi schemes, is exactly the sort of expert testimony regarding knowledge that should be admitted. *Bouygues Telecom S.A.*, 472 F. Supp. 2d at 726-727. Contrary to Receiver's accusations, Mr. Grice is not engaged in speculative "mind-reading," ECF No. 204 at 9. Instead, he is testifying about knowledge from the perspective of his area of expertise. Mr. Grice is an expert in the fields of bank regulation, bank examination, and depositor-run Ponzi schemes. *See* Ex. 1 ¶¶ 3-10. Bank examiners with Mr. Grice's credentials are

regularly called upon to determine whether bank employees are involved in improper conduct. *See* Ex. 1 ¶ 17; Ex. 3 at 9-10; Ex. 4 at 129:6-21. Calling upon exactly that expertise, and bringing to bear the methodology of bank examiners, Mr. Grice offers insight into Associated Bank's knowledge, or lack thereof, that is beyond the ken of a layperson. *See, e.g.*, Ex. 1 ¶¶ 17, 19. His opinions are akin to those offered in *Bouygues Telecom S.A.*, 472 F. Supp. 2d at 726-727.

None of the out of circuit authority cited by Receiver compels a different conclusion. Those cases stand for the uncontroversial proposition that an expert cannot provide uninformed speculation regarding knowledge. For example, in *Holmes Group, Inc. v. RPS Prods., Inc.*, the district court held that an expert who had no qualifications to do so could not "testify as to the subjective state of mind of plaintiff or its representatives." 2010 WL 7867756, at *5 (D. Mass. 2010).

B. Mr. Grice's Conclusions Regarding Knowledge Are Based On Reliable Methods

Mr. Grice used the same methodology as Ms. Ghiglieri—indeed, the same methodology that all bank examiners use to determine knowledge. *See* Ex. 1 ¶ 17. As Ms. Ghiglieri testified, this methodology—which "is the same that [she] use[s] when [she] examine[s] banks"—includes

> look[ing] at what the bank knew at the time . . . by looking at the documents that were produced from the time period . . . [and]

> look[ing] at the deposition testimony that was taken, plus any exhibits that were given to the deponents.

Ex. 4 at 186:2-9; *see also id.* at 24:18-20, 59:17-19, 60:3-4, 107:15-16. Mr. Grice reviewed many of the same materials as Ms. Ghiglieri. Ex. 1 ¶¶ 14-16; *Compare* Ex. 1 at App'x C *with* Ex. 3 at App'x C. Receiver offers no reason why it was permissible for Ms. Ghiglieri to use this methodology, but impermissible for Mr. Grice to use the same methodology to review many of the same materials.

Moreover, the fact that Mr. Grice has "testified as an expert in numerous other cases involving" on alleged depositor-run Ponzi schemes—precisely what is at issue here—"weighs heavily in favor of admitting the testimony of [Mr. Grice] as an expert witness," as far as the reliability of his methodology is concerned. *Lauzon v. Senco Prods., Inc.*, 270 F.3d 681, 689 (8th Cir. 2001).

C. There Are Sound Factual Grounds For Mr. Grice's Opinion On Knowledge

Mr. Grice did not engage in baseless "mindreading," as Receiver claims. ECF No. 204 at 9. Mr. Grice properly relied on the deposition testimony of Associated Bank and Receivership Entity witnesses regarding their state of mind. As Mr. Grice noted, these witnesses uniformly testified that they had no knowledge of the Ponzi scheme. Ex. 1 ¶¶ 46-54, 114-123. For instance, [redacted]

[redacted] *Id.* at ¶ 124.[1] Moreover, Mr. Grice did not "jump[] inside the mind of Trevor Cook." ECF No. 204 at 9. Mr. Grice relied upon the 2010 testimony of Mr. Cook. As Mr. Grice explained, Mr. Cook testified that "Lien [Sarles] knew nothing about what was going on." Ex. 1 ¶ 113, n. 319.[2]

Mr. Grice also offered additional factual bases for his opinion that, from the perspective of a bank examination expert, no Associated Bank employee knew about the Ponzi scheme. For example, Mr. Sarles' conduct was the opposite of what an expert would expect a Ponzi scheme insider to do. Among other things, Mr. Sarles:

- failed to collect certain documents when the Crown Forex LLC was account was opened, whereas "a dirty banker trying to assist somebody in a scheme the last thing . . . [he] would want to do is commit some foul [like opening an account with certain documents missing] that could cause somebody else to [notice] the accounts and . . . ask questions;"
- failed to note, at account opening, that there would be a lot of wire activity in the Crown Forex LLC account, which "hurts" the "fraudsters and their ability to get away with the fraud" because it

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[1] Mr. Grice was perfectly entitled to state that, from the perspective of a banking expert, this information would solidify a banker's belief that a depositor was legitimate. *Bouygues Telecom S.A.*, 472 F. Supp. 2d at 726-727.

[2] Without explanation, Receiver omits this citation from his quotation of paragraph 113. *See* ECF No. 204 at 5-6.

made it more likely that Associated Bank's software would, upon the start of wire activity, flag the Crown Forex LLC account for additional diligence;

- told others at Associated Bank that Mr. Cook wish to withdraw $600,000 in cash, which is something a "dirty" banker would not do because "it's like waving your hand, asking for attention;"

- relied on his portfolio assistant Nataliya Espey to work on the Receivership Entities accounts, whereas if a banker were a fraud insider "what you want is no colleagues, no supervisors" involved in the account relationship.

Ex. 2 at 105:5-111:4. Also inconsistent with what Mr. Grice, as a veteran of numerous Ponzi scheme investigations, would expect of a Ponzi scheme insider, [redacted] Ex. 1 ¶ 123. He lived a modest life in a 1,100 square foot apartment and drove a used Nissan Maxima. *Id.*

Mr. Grice also observed that other financial institutions with which the Receivership Entities had depository or investment relationships did not appear to know about the Ponzi scheme. Mr. Grice did not conjure this evidence from whole cloth, as Receiver claims. ECF No. 204 at 8. The documents produced by other financial intuitions, including Bank of America, Wells Fargo, Bear Stearns, J.P. Morgan Chase, Saxo Bank, UBS, and Voyager Bank show that they continued to do business with the Receivership Entities, without detecting the Ponzi scheme. Ex. 1 ¶¶ 33-43.

Finally, Mr. Grice noted that prominent community members took

actions that they would not have taken had they known that Trevor Cook and his confederates were con-men. For example, [redacted] *See* Ex. 1 ¶ 42. Receiver offers no reason why Mr. Grice should not have taken these materials into account when Ms. Ghiglieri relied on many of the same materials. *See* Ex. 3 at App'x C.

Instead, Receiver mischaracterizes Mr. Grice's citations to these and other facts as Mr. Grice offering additional opinions regarding knowledge. Mr. Grice did nothing of the sort. He merely provided the factual basis for his opinions—something that he is require to do by Rule 702. *See* Fed. R. Evid. 702 (expert testimony must be "based on sufficient facts or data"); *Reach Music Publ'g., Inc. v. Warner Chappell Music, Inc.*, 988 F. Supp. 2d 395, 404 (S.D.N.Y. 2013) (declining to strike expert report where "the [challenged] factual assertions contained in [the expert's] report simply provide the foundation for [the expert's] opinion").

D. Mr. Grice's Opinions Regarding Knowledge Are Helpful To The Jury

Mr. Grice's opinions about what Associated Bank knew and "atypical" banking conduct, based on his experience with bank examination and depositor-run Ponzi schemes, will be helpful to the jury. Far from evaluating

"basic human behavior," ECF No. 204 at 6, the bank examination methodology used by Mr. Grice and Ms. Ghiglieri is far more complicated than Receiver suggests. Bank examinations take place in a "complex regulatory environment" that is beyond the ken of a lay jury. *Sinclair v. Hawke*, 314 F.3d 934, 942 (8th Cir. 2003); *see also Johnson v. Cmty. Bank, N.A.*, 2013 WL 6185607, at *7 (M.D. Pa. 2013) ("issues of banking and financial regulation are naturally complex").

For example, in *FDIC v. First Interstate Bank of Des Moines, N.A.*, the FDIC called an expert witness to testify "as to the way in which experienced bank personnel would view [a fraudster's] transactions." 885 F.2d 423, 435 (8th Cir. 1989). The defendant bank argued that an expert witness could not testify as to which events were "significan[t]" to particular bank employees. *Id.* The Eighth Circuit held that the expert's testimony was properly admitted because it "assisted the jurors in understanding the function of a bank's investment department, the role of investment officers, and in gauging the importance of various information to these officers in handling investment accounts." *Id.*

Like the expert in *First Interstate Bank*, Mr. Grice can explain the facts that would be relevant to a bank employee regarding the Receivership Entities and explain, based on bank examination principles, what Associated Bank knew. Mr. Grice is uniquely qualified to do so—he is intimately familiar

with bank examinations and depositor-run Ponzi schemes. Ex. 1 ¶¶ 2-10.

Mr. Grice does just that. He "offer[s] opinion[s] within [his] relative areas of expertise as to what [Associated Bank], or its employees were aware of based on documents and evidence reviewed." *Bouygues Telecom, S.A.*, 472 F. Supp. 2d at 726. His testimony on what conduct is typical of a banker-turned-Ponzi-scheme-insider, and what can be learned from Lien Sarles' failure to engage in such conduct, is the epitome of how an expert can add value for a jury. Otherwise, the jury would have no way to know what conduct is typical of Ponzi scheme insiders, let alone how Associate Bank's employees behaved in comparison. Likewise, Mr. Grice's testimony about what can, and cannot, be inferred from alleged "red flags" and "atypical" banking conduct is essential to a jury, which otherwise would have no way to know when and if such "atypical" conduct is indicative of actual knowledge.

II. Mr. Grice's Rebuttal Opinions Regarding Knowledge And "Atypical" Conduct Are Proper

Receiver argues that although Ms. Ghiglieri testified extensively regarding what Associated Bank knew, Mr. Grice should be precluded from responding to Ms. Ghiglieri's opinions regarding knowledge. *See* ECF No. 204 at 4-9. Logic, the Federal Rules of Civil Procedure, and well-established case law all say otherwise. Mr. Grice's opinions regarding knowledge are permissible rebuttal opinions.

"Rebuttal evidence is properly admissible when it will 'explain, repel, counteract or disprove the evidence of the adverse party.'" *Sci. Components Corp. v. Sirenza Microdevices, Inc.*, 2008 WL 4911440, at *2 (E.D.N.Y. 2008) (quoting *Crowley v. Chait*, 322 F. Supp. 2d 530, 551 (D.N.J. 2004)); *see also Marmo v. Tyson Fresh Meats, Inc.*, 457 F.3d 748, 759 (8th Cir. 2006) ("The function of rebuttal testimony is to explain, repel, counteract or disprove evidence of the adverse party.") (citation omitted). "It is the proper role of rebuttal experts to critique plaintiffs' expert's methodologies and point out potential flaws in the plaintiff's experts' reports." *Aviva Sports, Inc. v. Fingerhut Direct Mktg.*, 829 F. Supp. 2d 802, 835 (D. Minn. 2011). "[A] district court has wide discretion in determining whether to permit evidence on rebuttal." *United States v. Tejada*, 956 F.2d 1256, 1266 (2d Cir. 1992).

Here, Ms. Ghiglieri's expert report offered numerous opinions regarding what Associated Bank supposedly "knew." *See* Ex. 3 at 6, 47, 50-51, 52, 60, 62, 66, 68, 83, 90-92, 96, 102-103, 104, 110, 112, 113-114, 121, 122, 123, App'x E at 1-2. As explained above, based on his experience, Mr. Grice is qualified to rebut these opinions. Mr. Grice does so using reliable methods, ample factual support, and helpful testimony. His rebuttal opinions should therefore be admitted. *See supra* at 11-22.

Receiver criticizes Mr. Grice at length for offering opinions regarding Associated Bank's knowledge. *See* ECF No. 204 at 4-9. He fails to inform the

court that these opinions were offered for the purpose of rebutting Ms. Ghiglieri's testimony. Ms. Ghiglieri's report is built around what Associated Bank knew. *See* Ex. 4 at 185:22-186:9; *see also id.* at 24:18-20, 59:17-19, 60:3-4, 107:15-16. Her report and deposition testimony are replete with her opinions regarding what Associated Bank knew. *See* Ex. 3 at 6, 47, 50-51, 52, 60, 62, 66, 68, 83, 90-92, 96, 102-103, 104, 110, 112, 113-114, 121, 122, 123, App'x E at 1-2; Ex. 4 at 197:5-12, 207:11-208:9, 239:15-240:8, 276:14-22.

Mr. Grice rebutted these opinions by highlighting two case-ending admissions that Ms. Ghiglieri made during her deposition. First, Mr. Grice explains that Ms. Ghiglieri ***admitted that no one at Associated Bank ever determined that the Receivership Entities were operating a Ponzi scheme.*** *See* Ex. 1 ¶ 19; Ex. 4 at 239:15-240:8. Second, Mr. Grice notes that Ms. Ghiglieri cannot determine that any "atypical" banking conduct or "red flags" noted in her report were caused by an Associated Bank employee knowing about the Ponzi scheme and taking steps to assist the schemers. *See* Ex. 1 ¶ 19; Ex. 4 at 276:14-22.

Given that Ms. Ghiglieri has testified and opined on knowledge, Mr. Grice should be allowed to use the same methodology to offer opinions rebutting her testimony. Fed. R. Civ. P. 26(a)(2)(D)(ii); *Aviva Sports, Inc.*, 829 F. Supp. 2d at 835 (admitting rebuttal testimony).

III. Mr. Grice Is Not Offering Opinions On Legal Matters

Receiver is wrong that Mr. Grice may not provide testimony concerning knowledge because it is a "legal conclusion." Receiver cites no cases holding that knowledge is a legal conclusion. Nor could he. It is well established that knowledge is a factual issue. *See, e.g.*, *Krout v. Goemmer*, 583 F.3d 557, 567 (8th Cir. 2009) ("The showing of actual knowledge is a 'question of fact subject to determination in the usual ways'"); *Am. Bank of St. Paul v. TD Bank, N.A.*, 2011 WL 1810643, at *8 (D. Minn. 2011) ("Actual knowledge is usually a question of fact").

Consistent with this case law, Mr. Grice testified that he is opining on "actual knowledge" as a bank examiner understands the term, and expressly stated that he was not offering a legal conclusion:

> Q. In your report you reference the term "actual knowledge," I believe. Can you define that form me, please.
> A. I can give you my understanding of actual knowledge as a banking expert. I don't know if there's a legal issue here, but as a banker, it's – in order for actual knowledge to exist, I, the banker, would have to be aware of something, whatever the knowledge is about, so I would have to be actually aware.

Ex. 2 at 27:9-18. Tellingly, Receiver fails to cite this testimony anywhere in his motion papers.

Receiver's expert, Ms. Ghiglieri, adopts the same language repeatedly in her testimony:

> Q. Do you have any evidence that anyone in the back room knew – had ***actual knowledge*** that there was any fraudulent conduct going on with any of the receivership entities at the time the Crown Forex, LLC account was opened?
>
> . . .
>
> A. No.

Ex. 4 at 197:5-12 (emphasis added); *see also supra* at 5-7.

> Q. Do you have any evidence that Nataliya Espsey had ***actual knowledge*** of the Ponzi scheme?
>
> A. No.
>
> Q. Do you have any evidence that Nataliya Espey had ***actual knowledge*** that there was anything fraudulent going on with the receivership entities?
>
> A. No.
>
> Q. Do you have any evidence that Nataliya Espey had ***actual knowledge*** that Trevor Cook or Patrick Kiley were breaching any fiduciary duties that they owed to the . . . receivership entities?
>
> A. . . . I'll say no for now. . .
>
> Q. Do you have any evidence that Nataliya Espey had ***actual knowledge*** that there was conversion going on with respect to the receivership entities?
>
> A. . . . I will say no. . . .

Id. at 207:11-208:9 (emphasis added).[3] Ms. Ghiglieri also testified that her opinions regarding what Associated Bank personnel knew were not legal conclusions. *Id.* at 227:5-9 ("I'm not trying to render a legal opinion. But what

[3] Contrary to his position here, Receiver did not object to any of these questions during the deposition on the ground that they called for a legal conclusion.

I'm saying is she had knowledge of – and there are certain things she had knowledge of.").

It is, at best, disingenuous for Receiver to argue that Ms. Ghiglieri may offer testimony regarding knowledge and actual knowledge, but Mr. Grice may not offer rebuttal opinions on the same subject. *See Shuck v. CNH Am., LLC*, 498 F.3d 868, 874 (8th Cir. 2007) (holding that it was "disingenuous" for a litigant to argue that opponent's expert should be excluded for using improper methodology when that litigant's own expert used the same methodology).

IV. Mr. Grice's Testimony Is Fully Consistent With Minnesota Law

Receiver misstates both controlling law and the facts when he argues that any conduct Receiver labels as "atypical" is sufficient to impute actual knowledge to Associated Bank. Specifically, Receiver claims that "knowledge . . . may be inferred from . . . evidence such as conducting business in an atypical manner." ECF No. 204 at 5 n.2; *see also id.* at 15.

A. Receiver Misrepresents Minnesota's Aiding and Abetting Case Law

Receiver is wrong that (1) Minnesota law allows for actual knowledge to be automatically "inferred" from "atypical" behavior and that (2) Minnesota law establishes that certain conduct is always deemed "atypical." ECF No. 204 at 15, 16.

To begin, Receiver's approach effectively reads "actual knowledge" out of the law, and seeks to substitute a set of *ipse dixit* presumptions that no court has ever embraced. Bewilderingly, Receiver effectively argues that a showing of "actual knowledge" does not require evidence that Associated Bank actually knew about the Ponzi scheme. This is not the law. Receiver fails to cite *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179 (Minn. 1999), the most recent Minnesota Supreme Court to address actual knowledge, which holds that "the defendants must *know* that the conduct they are aiding and abetting is a tort." *Id.* at 186. In other words, a defendant will not be held liable for "anything less than ***actual knowledge*** of the primary tortfeasors' conduct was wrongful." *Id.* at 188 (emphasis added). In particular, courts scrupulously guard against the establishment of actual knowledge through loose use of inferences. *Camp v. Dema*, 948 F.2d 455, 463 (8th Cir. 1991) (declining to infer actual knowledge based on evidence of "atypical" conduct that was merely "grossly negligent," as doing improperly "would risk bringing simple malpractice" in the realm of aiding and abetting).

The Eighth Circuit's opinion in *American Bank of St. Paul v. TD Bank, N.A.*, illustrates the high standard set in *Witzman*. In *American Bank*, a fraudster told the bank that he was committing a fraud, the bank understood that his collateral for bank loans was "a house of cards," and the bank "concede[d] that sufficient evidence existed for a reasonable jury to find it had

actual knowledge of [the] fraud." 713 F.3d 455, 461, 466 n.5 (8th Cir. 2013) (emphasis added). But the defendant bank nevertheless participated in a new loan facility in order to secure participation from other banks. *Id.* at 461. From that loan facility, the defendant bank obtained $10 million that it was owed by the fraudster. *Id.* at 463. The Eighth Circuit held that there were facts sufficient to establish actual knowledge where (1) the bank actually knew a fraud was ongoing, (2) the bank participated in a loan facility to ensure cooperation of other banks who were unaware of the fraud, and (3) the closing of the facility provided the defendant bank with $10 million from defrauded parties, which the defendant bank previously had been trying, unsuccessfully, to collect from the fraudster. *Id.* at 463-64.

Minnesota law requires the court to consider the particular facts of the case; often, evidence of "atypical" conduct will not support an inference of knowledge. *K&S Partnership v. Continental Bank, N.A.*, 952 F.2d 971, 977 (8th Cir. 1991)—the only case decided by the Eight Circuit Court of Appeals that the Receiver cites on this issue—illustrates the point. In *K&S*, there was a wide variety of evidence that defendant Continental Bank had engaged in "atypical" conduct, including (1) "Continental's practice of lending money . . . before doing a credit analysis"; (2) Continental "purchased, increased, or renewed [certain loans] after" its executive vice president had directed the bank to stop doing so; (3) Continental generated internal reports that its

loans "exceeded what . . . evaluations indicated were justified"; (4) the "Continental engineer who questioned the wisdom of drilling fund loans was repeatedly told that letter-of-credit loans were 'lucrative'"; and (5) the court found "that the alleged acts were contrary to Continental's policies." Yet in *K&S*, the Eighth Circuit ***reversed*** a jury verdict entered against a bank, holding that there was "not enough to support an inference that [the bank] knew of a scheme . . . to defraud." *Id.* at 979-80.

Receiver misplaces reliance on *Metz v. Union Bank*, 2008 WL 2017574 (N.D. Ohio 2008)—a case deciding an aiding and abetting claim under Ohio law—for the proposition that "Minnesota law" establishes "what is probative of atypical conduct in the banking arena." ECF No. 204 at 16. In fact, *Metz* makes clear that the analysis of (1) what is atypical, and (2) whether such conduct will support an inference of knowledge, is not pre-ordained, but rather must be assessed based on the unique facts of each case: "The Sixth Circuit has stated that . . . the ***details*** of a ***particular*** transaction ***may be*** sufficient to allow an inference of knowledge on the part of a bank. Id. at *18.

B. Mr. Grice's Testimony Is Proper In Light of Minnesota Aiding And Abetting Case Law

Because Receiver is wrong—*i.e.*, because Minnesota does not establish as a matter of law whether certain banking conduct is "atypical," and if so, whether knowledge can be inferred from that conduct—expert testimony on

the subject is necessary and appropriate. Explaining complex banking conduct, and what can be understood based on that conduct, is a classic use of expert testimony. As explained in one of the cases cited by Receiver, expert testimony is appropriate to "assure[] against any tendency to over- or underestimate the value of [a particular] factual finding," such as alleged violations of internal policies. *United States v. Frazier*, 387 F.3d 1244, 1295 (11th Cir. 1987).

Here Receiver does just that; he overestimates the value of supposedly atypical banking conduct. Receiver supposes that if he has found some banking conduct that be believes is "atypical," he has found evidence from which knowledge should be inferred. Unfortunately for Receiver, his expert explains that this is not the case. At her deposition, Ms. Ghiglieri testified that what she labels "atypical" conduct or "red flags," is actually conduct that can be found at any bank, regardless of whether any of its clients are operating a Ponzi scheme:

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

Ex. 4 at 129:6-21. Furthermore, Ms. Ghiglieri cannot draw the inference that Receiver attempts to draw—she cannot say that any "atypical" conduct that she believes occurred is the result of any Associated Bank employee knowing about the Ponzi scheme and trying to assist it:

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

Id. at 276:14-22 (objection omitted). Accordingly, Receiver's interpretation of Minnesota law is not supported by the evidence. Absent clarification by Mr. Grice and Ms. Ghiglieri, there is a material risk that the jury will make the same mistake as Receiver.

V. Mr. Grice Is Not Weighing Evidence

Receiver asserts that Mr. Grice is telling the jury how to weigh an affidavit submitted by Christopher Pettengill, a convicted felon—and, to quote Receiver, a "known pathological liar," ECF No. 204 at 9—who helped run the Ponzi scheme.[4] According to Receiver, Mr. Grice should not be allowed to reference inconsistencies between Mr. Pettengill's affidavit and

[4] Mr. Pettengill maintains that his "mens rea never came into play," and that he "never willfully stole people's money," when he is serving a lengthy prison sentence for doing exactly that. Ex. 5 at 126:23-127:7.

the rest of the factual record. *See* ECF No. 204 at 14-15. Receiver is mistaken.

To begin with, at his deposition Mr. Grice was clear that his report was not the product of weighing evidence or making credibility determinations; instead, he took everyone's testimony as truthful.

> Q. You also said something previously – as a banking expert retained by attorneys to render testimony in a case, do you believe that it's your job to weigh the evidence?
> A. Let me make sure I understand your question. Do I feel it's my job to weigh evidence?
>
> Q. Correct. As a banking expert.
> A. No, I think that my job is to carefully study it and evaluate all the evidence that I can – that I can possess. . . . [W]hat I'm not doing is evaluating or opining on people's truth telling or credibility. So, I'm taking sworn testimony as sworn testimony. . . . ***I'm assuming the credibility by the witnesses***. . . .
> Q. Fair enough.

Ex. 2 at 62:6-63:6 (emphasis added).

Furthermore, as a rebuttal expert, Mr. Grice is perfectly entitled to explain the factual context of Mr. Pettengill's affidavit, and other facts that Ms. Ghiglieri relies upon. Fed. R. Civ. P. 26(a)(2)(D)(ii); *see also Marmo*, 457 F.3d at 759; Ex. 3 at App'x C (relying upon Pettengill affidavit). Accordingly, Mr. Grice references "several problems" with Mr. Pettengill's affidavit. Ex. 1 ¶ 61. He notes that there are no documents referencing the April or May 2008 meeting described in Mr. Pettengill's affidavit, *see id.* at ¶¶ 62, 64, other

Receivership Entity employees did not recall this meeting, *id.* at ¶ 65, the activities supposedly discussed at the meeting never occurred, *id.* at ¶ 66, and Mr. Pettengill failed—twice—to pick Mr. Sarles out of a photo lineup. *Id.* at ¶ 63.[5] As a rebuttal expert, Mr. Grice is perfectly entitled to explain the factual context of Mr. Pettengill's affidavit, and other facts that Ms. Ghiglieri relies upon. Fed. R. Civ. P. 26(a)(2)(D)(ii); *see also Marmo*, 457 F.3d at 759; Ex. 3 at App'x C (relying upon Pettengill affidavit).

Moreover, Mr. Grice may raise the issues with Mr. Pettengill's affidavit as part of the factual bases for his opinion that Associated Bank lacked knowledge of the Ponzi scheme. Mr. Grice is allowed to provide the factual basis and assumptions for his opinion that Associated Bank did not know about the Ponzi scheme. *Thomas v. Barze* holds that it is perfectly permissible for Mr. Grice to "giv[e] an opinion based upon factual assumptions, the validity of which are for the jury to determine." 57 F. Supp.

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[5] Receiver attempts to minimize the import of Mr. Pettengill's testimony regarding this photo array by referring to it as "Mr. Pettengill's alleged inability to pick Mr. Sarles out of a mock photo array." ECF No. 204 at 15. There is nothing "alleged" about this testimony. Mr. Pettengill plainly failed to identify Mr. Sarles twice, including once under rehabilitative questioning by Receiver. *See* Ex. 1 ¶ 63. Receiver is also wrong to refer to the photo array is a "mock" array. ECF No. 204 at 15. Receiver has submitted no expert testimony calling the legitimacy of this photo array into question, and Receiver used the same photo array when questioning Mr. Pettengill. *See* Ex. 1 ¶ 63.

3d 1040, 1059 (D. Minn. 2014). Here, Mr. Grice ***assumed*** that the Pettengill declaration (and other testimony) was true, and he reached his conclusion based on that assumption. His discussion of the Pettengill affidavit appears amongst the facts discussed in the "bases for opinions" section of his report. *See* Ex. 1 ¶¶ 21-68. There is nothing improper about Mr. Grice providing the context surrounding his assumptions; here, the context being the issues with Mr. Pettengill's declaration.

Apparently, Receiver has decided to bind himself to the word of a convicted felon. Receiver thus disagrees with Mr. Grice, a respected banking expert. That is Receiver's right. If Receiver wishes to illustrate why the jury should trust the word of a convicted felon, and disregard the factual context Mr. Grice discusses in his report, Receiver may cross-examine Mr. Grice on the issue.

VI. Mr. Grice's Opinions Are Highly Relevant And Not At All Prejudicial

Receiver argues that "the Court should exclude all of Mr. Grice's opinion because they pose a danger of unfair prejudice and would mislead the jury," ECF No. 204 at 19, but the only support Receiver offers is a regurgitation of his prior failed arguments. Consequently, Receiver's Federal Rule of Evidence 403 argument fails for the same reasons that his Federal Rule of Evidence 702 arguments fail.

Moreover, Mr. Grice's testimony is highly relevant and not prejudicial.

Federal Rule of Evidence 403 provides that otherwise relevant evidence may be excluded "if its probative value is *substantially outweighed by* a danger of . . . unfair prejudice." (Emphasis added). Evidence is relevant if it has any tendency to make a fact more or less probable than it would be without the evidence. Fed. R. Evid. 401. "Evidence is not unfairly prejudicial merely because it hurts a party's case." *United States v. Emeron Taken Alive*, 262 F.3d 711, 714 (8th Cir. 2001). Instead, Rule 403 is concerned with "unfair prejudice," that is, evidence that has an "undue tendency to suggest [a] decision on an improper basis." *Id.*

In this case, it is difficult to conceive of evidence more relevant than that offered by Mr. Grice. Mr. Grice is an expert in bank examination and depositor-run Ponzi schemes. *See* Ex 1 ¶¶ 2-10. He applied the same methodology as Receiver's expert, Ms. Ghiglieri. *See supra* at 9; *see also* Ex. 1 ¶ 17. Using this methodology, based on the uniform testimony of all witnesses (including Ms. Ghiglieri), Mr. Grice agreed with Ms. Ghiglieri and concludes that no Associated Bank employee knew about the Cook-Kiley Ponzi scheme. Ex. 1 ¶ 19.

Receiver argues that Mr. Grice's conclusions are unduly prejudicial because they are speculative. ECF No. 204 at 19. Not so. Like Ms. Ghiglieri, Mr. Grice applied principles generally accepted amongst bank examiners. *See supra* at 9. He did not guess at the knowledge of others. He cited testimony

and documents showing what these individuals believed and then testified on knowledge from the perspective of a bank examiner. *See supra* at 9-10.

In addition, although Receiver seeks to exclude ***all*** of Mr. Grice's report under Rule 403, Receiver offers no reason why ***all*** of Mr. Grice's opinions should be excluded. Receiver makes no challenge whatsoever to the opinions expressed in sections IV, V, VII, VIII, or IX of Mr. Grice's report. Consequently, Receiver's broad-brush rhetoric finds no support in Rule 403 or Receiver's own arguments.

VII. Receiver Cannot Rely On State Evidentiary Rules

Receiver argues that Mr. Grice's opinions should be excluded from evidence based on Minnesota evidentiary rules. *See* ECF No. 204 at 20. Receiver is wrong on two counts.

First, Receiver forgets black letter federal procedure case law—under the *Erie* doctrine, federal evidentiary rules apply in this diversity action. "Under the *Erie* doctrine, federal courts sitting in diversity apply state law to substantive matters and federal law to procedural matters." *Fakhro v. Mayo Clinic Rochester*, 2004 WL 909740, at *2 (D. Minn. 2004); *see also Erie R.R. Co. v. Tomkins*, 304 U.S. 64, 80 (1938). In diversity actions, it is well established that evidentiary issues are governed by the Federal Rules of Evidence. *See Potts v. Benjamin,* 882 F.2d 1320, 1324 (8th Cir. 1989) ("[I]n a diversity case in federal court state law governs substantive issues and the

Federal Rules of Evidence govern the admissibility of evidence."). The same rule applies to issues concerning expert testimony. *U.S. Salt, Inc. v. Broken Arrow, Inc.*, 563 F.3d 687, 691 (8th Cir. 2009) ("In diversity cases the admissibility of expert testimony is governed by federal law.").

Receiver's argument—under state law—that "no adverse inference may be drawn from a party's failure to produce evidence equally available to both sides" violates the basic tenants of the *Erie* doctrine. ECF No. 204 at 20. Such evidentiary inferences "are procedural matters because they concern evidentiary matters" and must be governed by federal law. *Fakhro,* 2004 WL 909740, at *2; s*ee also King v. Ill. Cent. R.R.*, 337 F.3d 550, 556 (5th Cir. 2003) ("Evidentiary 'presumptions' which merely permit an adverse inference based on unproduced evidence are, likewise, controlled by federal law."). No such federal rule exists, and therefore, the Minnesota rule does not apply. *See Adams v. Fuqua Indus., Inc*, 820 F.2d 271, 273 (8th Cir. 1987) ("Where a state and federal evidentiary rule conflict, the proponent is entitled 'to the benefit of the more favorable rule.'") (quotation omitted).

Second, Receiver misunderstands Minnesota law. Relying on *State v. Swain*, 269 N.W.2d 707 (Minn. 1978), Receiver argues that no inference can be drawn from the fact that certain evidence regarding Wells Fargo's banking conduct was not produced in this litigation. *See* ECF No. 204 at 20. In *Swain*, the Minnesota Supreme Court prohibited a defense lawyer from commenting

on the prosecution's failure to call a particular witness. 269 N.W. at 716 ("Defendant was not precluded from arguing that Diane Swain was the killer, but only that the state's failure to call her somehow raises a reasonable doubt about defendant's guilt."). The court held that, in a criminal case, an inference regarding reasonable doubt could not be drawn from the State's failure to call a witness. *Id.* at 717. Here, Mr. Grice is not in any way faulting the Receiver for failing to produce evidence. He is merely commenting on conclusions that he can draw from the evidence as a banking expert with significant experience investigating Ponzi schemes. Thus, *Swain* is inapposite.

CONCLUSION

For the foregoing reasons, Receiver's Motion to Strike the Report and Bar the Testimony of Charles H. Grice should be denied.

Dated: November 18, 2016

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