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)

CORRECTED RECEIVER'S REPLY IN SUPPORT OF HIS MOTION TO STRIKE AND BAR THE TESTIMONY OF CHARLES H. GRICE

In its response to the Receiver's motion, the Bank confuses what is a straightforward matter regarding the admissibility of expert testimony. The Receiver does not seek to diminish the Bank's opportunity to offer rebuttal expert testimony. However, when that testimony exceeds the scope of what is admissible, the Court should intervene. The Receiver objects to Mr. Grice's testimony because it goes beyond rebutting what Ms. Ghiglieri wrote in her report and testified to at her deposition. Mr. Grice's rebuttal testimony bypasses Ms. Ghiglieri's analysis which was limited to opining on Associated Bank's compliance with the relevant standards, and impermissibly advocates that the jury conclude that the Bank had no knowledge of the torts being committed by the schemers. For the reasons set forth below, the Court should grant the Receiver's motion to strike and bar the testimony of Mr. Grice.

ARGUMENT

I. MR. GRICE CANNOT TESTIFY ABOUT ASSOCIATED BANK'S ACTUAL KNOWLEDGE

The Bank's argument that nothing within Rule 702 prohibits testimony regarding knowledge ignores every requirement of the Rule. By the Bank's logic, an expert could testify to anything so long as the text of Rule 702 does not specifically prohibit it. To that end, Mr. Grice could testify as to how the jury should interpret fact, how to apply the law, or what conclusion the jury should reach, because the text of Rule 702 does not prohibit it. The Bank's interpretation of Rule 702 is an invitation to a breathtaking expansion of what courts allow as expert testimony.

A. Mr. Grice is Not Qualified to Testify Regarding Associated Bank's Actual Knowledge

The Bank argues that an expert may testify as to a defendant's knowledge, and cites a non-binding practice manual in support of its argument. ECF No. 228 at 11-12. The Bank also attempts to use Rule 704(a) ("an opinion is not objectionable just because it embraces an ultimate issue") as a shield for the deficiencies in its expert's opinions. But that does not bypass the requirement that an expert must be "qualified to do so." ECF No. 228 at 11. Stated otherwise, Rule 704 does not overrule the requirement of Rule 702 that an expert may only testify to opinions for which he is a qualified expert.

The Bank cites *Dunn v. HOVIC*, 1 F.3d 1362, 1368 (3d Cir. 1993), an asbestos case, for the proposition that it was not error for an expert to testify that a defendant knew of the risks associated with exposure to asbestos. *Dunn* does not stand for this proposition. In that case, the court's holding was that the expert's testimony was not

inappropriate because "[the expert's] testimony expressed his own belief that [the defendant's] conduct with respect to [the insulation] did not meet its own self-imposed standard." *Dunn*, 1 F.3d at 1368. The expert in *Dunn* did not testify to a defendant's state of mind. Nor did the expert testify as to the actual knowledge element of the tort of aiding and abetting. Rather, the expert testified that because the defendant had imposed a standard with respect to insulation products, its failure to meet its own standard was sufficient to conclude that it was aware that it failed to follow its own standards.

The Bank also cites *Greyhound v. Willyard*, 1989 U.S. Dist. LEXIS 16040, at *113 (D. Utah, Dec. 23, 1989) for the proposition that "in an aiding and abetting case, experts could offer opinions embracing ultimate issues such as knowledge and specific intent . . . if they assist the trier of fact in understanding the evidence, and are otherwise admissible." ECF No. 228 at 12-13. First, *Greyhound* is not binding on this Court. Second, *Greyhound* is mainly a RICO case involving securities violations. Third, the Bank's citation of *Greyhound* works against it, considering the following text:

> While an expert witness may opine on the ultimate issue, he may do so only insofar as the witness aids the jury in the interpretation of technical facts or to assist in understanding the material in evidence. When the normal experience and qualifications of laymen jurors are sufficient for them to draw a proper conclusion from given facts and circumstances, an expert witness is not necessary and is improper.

Id. at 189. Thus, the Bank's own citation to unrelated nonbinding authority is actually in line with the Receiver's argument: that an expert may only testify so long as the expert aids the jury in interpreting technical facts, or assists in understanding the material in

evidence. *Id*. Telling the jury how an expert would apply the law as a juror is not one of those functions.

The Bank's citation of *Kruszka v. Novartis Pharm Corp.*, 28 F. Supp. 3d 920 (D. Minn. 2014) is also unpersuasive. This case concerned the use of the drug bisphosphonate, used to treat myeloma, and thus does not relate to banking or Ponzi schemes. While the expert in *Kruszka* rendered an opinion that a corporate defendant "knew and failed to communicate… a decrease in the duration, dose and/or frequency" as it related to a drug, the Court stated the following:

> The Court agrees with the parties that Dr. Vogel may not proffer an opinion relating to what individuals at Novartis thought about information found in certain internal documents or about their motivations regarding those documents. Expert testimony on "the intent, motives, or state of mind of corporations, regulatory agencies and others have no basis in any relevant body of knowledge or expertise." *Deutsch v. Novartis Pharms. Corp*., 768 F. Supp. 2d 440, 442 (citing *In re Rezulin*, 309 F. Supp. 2d at 546).

Kruszka, 28 F. Supp. 3d at 931. The Bank fails to address the full context of this portion of *Kruszka*, as it succinctly undermines the Bank's arguments.

Bouygeus Telecome S.A.v. Tekelec, 472 F. Supp. 2d 722 (E.D.N.C. 2007) also fails the Bank. In that telecommunications dispute, the court's ruling, as it pertained to testimony about knowledge, was within the context of Rule 704(a). Moreover, the court there held that it was permissible for an expert to testify as to knowledge within the scope of "documents and evidence reviewed," and that it was only appropriate "within the scope of relevant expertise." *Bouygues*, 472 F. Supp. 2d at 726. Actual knowledge in the present case is different from the type of knowledge that *Bourgeus* discusses. Here, knowledge of a primary tort and its wrongfulness (either actual or constructive) is a legal

element of the tort of aiding and abetting. Thus, testimony on actual knowledge is improper by an expert, because it is not within the expertise of Mr. Grice to verify the truthfulness of deposition testimony, or to weigh how lifestyle choices impact the probability of actual knowledge. Mr. Grice is limited to discussion of technical knowledge of bank examining, and is free to try to contradict Ms. Ghiglieri's testimony within that limited scope.

B. Mr. Grice's Opinions Regarding Actual Knowledge are Inadmissible Regardless of Methodology

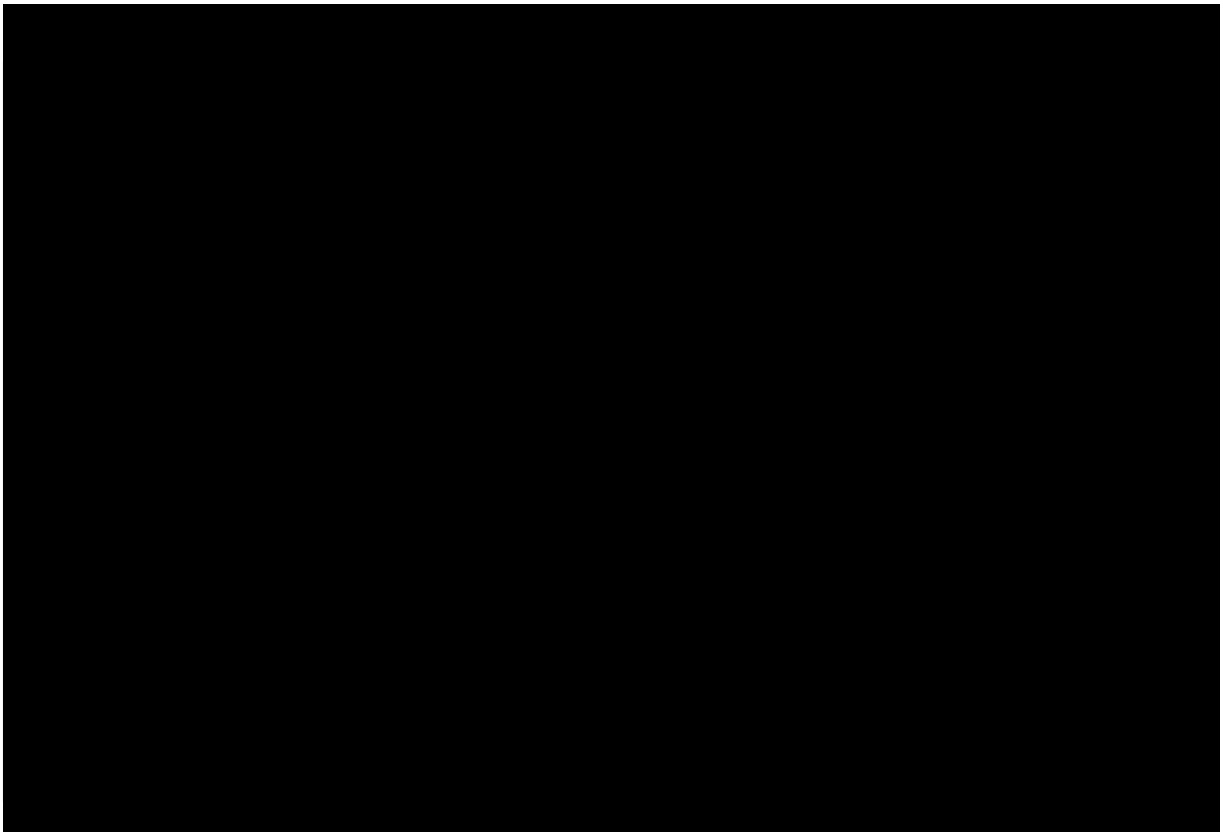
The Bank's response states that "Mr. Grice used the same methodology as Ms. Ghiglieri," including "looking at what the bank knew at the time . . . by looking at the documents that were produced from the time period . . . [and] look[ing] at the deposition testimony that was taken, plus any exhibits that were given to the deponents." ECF No. 228 at 16-17. This argument does not save the day.

First, neither party has a quarrel with the qualifications of the experts. Neither party has a quarrel with the experts testifying as to banking practices and procedures. Nor is it disputed that an expert may render an opinion on compliance with banking practices and procedures. However, the Receiver does take issue with Mr. Grice opining on the state of mind of the Bank and other individuals[1]. There is no known methodology for reading the mind of another. To justify Mr. Grice's "knowledge" opinions, the Bank argues that the Receiver's expert report contains 19 instances where the word "knew" was used. First, another expert's use of the word "knew" has no impact on whether the

[1] This is particularly true where there is evidence which flies in the face of the offered "knowledge" opinion. [redacted]

opinions rendered by Mr. Grice are in compliance with Rule 702. Each expert's opinions must be independently examined.

Ms. Ghiglieri's use of the word "knew' does not support the propriety of Mr. Grice's opinions. Ms. Ghiglieri used the word "knew" to establish what information was in the possession of the Bank, such as the existence of a document, the contents of the document, the import of the content, and the relationship of the document to the Bank's policies and procedures and banking regulations in effect at the time. The following demonstrates the difference between Ms. Ghiglieri's use of the word "knew" or "knowing," and Mr. Grice's opinions on actual knowledge:



(Ghiglieri Report, ECF No. 196-2 , at 110.)

The Bank argues that Mr. Grice's methodology is reliable by comparing it to the methodology used by the Receiver's expert. This ignores the recognized principle that an expert's testimony is limited to subject matters on which he is a qualified expert. The comparisons do not save the day. Testimony as to the existence of facts is not the same as Mr. Grice opining on the legal conclusion to be drawn from those facts by the jury.

C. Mr. Grice's "Factual Grounds" for an Opinion on Actual Knowledge is Nothing More Than Speculation and Conjecture, and Ignores the Inadmissibility of Opinions on Actual Knowledge

The Bank offers that Mr. Grice's recitation of witnesses' denials of knowledge of the Ponzi scheme is appropriate evidence for an expert to consider. The Bank is incorrect. Considering witness testimony assigns credibility determinations to the expert. Credibility determinations are in the jury's province, and do not belong in an expert's opinion.

Mr. Grice proffers his own suspicions on how he believes Mr. Sarles would have acted if he was a scheme participant. The Bank launches into Mr. Grice's hypotheticals concerning the absence of certain behaviors by Mr. Sarles, such as failing to collect certain documents, failing to make certain notes, telling other employees about large withdrawals, and using an assistant to work on the Ponzi scheme accounts. The Bank also highlights Mr. Grice's focus on the type of car that Lien Sarles drove, and what type of apartment he lived in. The absence of conduct or lifestyle choices that Mr. Grice offers as his subjective suspicions is not reliable methodology. There is no expert testimony required to interpret lifestyle choices, or whether to assign an assistant. There is no educational gap that Mr. Grice's opinions would bridge by offering his opinion on the

meaning of conduct. A trier of fact is capable of drawing its own conclusions from behavior, and the Bank's closing argument should not come in the guise of expert opinion.

D. Mr. Grice's Opinions Regarding Knowledge Are Not Helpful to a Jury, and Assumes the Jurors' Role

The Receiver agrees with the Bank's assertion that bank examinations are complex, and are "beyond the ken of a lay jury." ECF No. 228 at 20-21. The knowledge necessary to understand the issues requires expert testimony; the issue is whether Mr. Grice's testimony exceeds the function of an expert witness.

The Bank cites *FDIC v. First Interstate Bank of Des Moines, N.A.*, 885 F.2d 423, 435 (8th Cir. 1989), where an expert testified "as to the way in which experienced bank personal would view [a fraudster's] transactions." ECF No. 228 at 21. In that case, the Court held that it was appropriate for the expert witness to testify as to which events held "significance" to particular employees, because it would assist the jurors in understanding the bank's departments and offers. *First Interstate Bank*, 885 F.2d at 435.

The Receiver does not take issue with Mr. Grice's explanation of banking standards, rules, or applicable regulations, nor does the Receiver object to explaining the significance of the violations of standards. The Bank misunderstands the Receiver's position. Mr. Grice will be able to discuss his reviews of transactions, and try to rebut Ms. Ghiglieri's reviews of transactions accordingly. But, when Mr. Grice goes beyond his role as an expert witness, and begins to opine in areas beyond his expertise, the Court should appropriately strike that testimony as inadmissible under Rule 702.

II. MR. GRICE'S REBUTTAL OPINIONS REGARDING KNOWLEDGE AND ATYPICAL CONDUCT ARE NOT PROPER REBUTTAL TESTIMONY

Knowing that Mr. Grice's opinions on knowledge go far beyond the parameters of admissible expert testimony, the Bank attempts to trick the Court into believing Grice's "actual knowledge" testimony is needed to rebut Ms. Ghiglieri's opinions. Ms. Ghiglieri's report contains no opinions on the actual knowledge of Bank employees; her report makes clear that was never her assignment. In response to a question posed by the Bank's attorneys, Ms. Ghiglieri merely posited that she had no such opinion. The Bank's attempt to set up a straw man to justify Mr. Grice's opinions must fail.

While rebuttal evidence is admissible, there are no opinions about aiding and abetting knowledge to rebut. Ms. Ghiglieri never opined that Associated Bank had knowledge of the Ponzi scheme. Ms. Ghiglieri's use of the word "knew" refers to facts in possession of the bank, such as documents and their contents, relevant to the bank's policies and procedures and other banking regulations and guidelines. She never rendered an opinion on Associated Bank's knowledge of the Ponzi scheme. Such an opinion would exceed the scope of her expertise and assignment.

As for the Bank's argument that Ms. Ghiglieri rendered an opinion in her deposition that Associated Bank had no actual knowledge of the Ponzi scheme, Ms. Ghiglieri simply indicated that she did not have an opinion posited by the question. The absence of any opinion is not akin to rendering an opinion. Therefore, the Bank's argument that the opinion should be allowed as rebuttal testimony is nothing more than a slight of hand attempt to justify what the Bank knows is impermissible expert testimony.

III. MR. GRICE IS IN FACT OFFERING OPINIONS ON LEGAL MATTERS, AS CONSTRUCTIVE OR ACTUAL KNOWLEDGE IS AN ELEMENT OF AIDING AND ABETTING

The Bank's own citation to *Am. Bank of St. Paul v. TD Bank*, 2011 U.S. Dist. LEXIS 49646 (D. Minn., May 9, 2011), displays precisely why it is inappropriate for Mr. Grice to render an opinion regarding actual knowledge. First, Bank fails to mention that *Am. Bank of St. Paul* ultimately proceeded to a jury trial, where a jury found that the defendant bank aided and abetted and conspired with a customer to commit a fraud. *Am. Bank of St. Paul v. TD Bank*, *N.A.*, 713 F.3d 455 (8th Cir. 2013). In that decision, the Eighth Circuit affirmed the district court's denial of the defendant's Rule 50 motion for a judgement as a matter of law. The Eighth Circuit held that "aiding and abetting is a question for the jury. Because of this court's deference to the verdict, [the defendant] invites this court to rule that, as a matter of law, this type of participation is not substantial assistance. This court declines." *Id*. at 463-464.

While *Am. Bank of St. Paul v. TD Bank*, 2011 U.S. Dist. LEXIS 49646 (D. Minn., May 9, 2011) holds that "actual knowledge is usually a question of fact," the case also holds that "[actual knowledge] must be inferred from circumstantial evidence." *Am. Bank of St. Paul v. TD Bank*, 2011 U.S. Dist. LEXIS 49646 at *22. The Bank's own cited authority displays why it is inappropriate for Mr. Grice to render an opinion on actual knowledge – such an opinion exceeds his role as an expert witness, as he would assume the role of trier of fact by drawing inferences about state of mind from circumstantial evidence. Weighing scienter evidence is not the role of the expert.

The Bank's citation of Mr. Grice's deposition, where he testified as to his definition of actual knowledge "as a banking expert," does not save the Bank. Regardless of how Mr. Grice defines actual knowledge, his opinion on Associated Bank's actual knowledge is still inadmissible under Rule 702. Mr. Grice is not an expert on witness credibility or mind-reading; he is only an expert on bank examining. Mr. Grice's wanderings into witness credibility and subjects on which he is not an expert taints all of his opinions. Because the opinions are the result of the commingling of subjects where he has expertise, and subjects where he has none, all of his opinions should be stricken.

IV. MR. GRICE'S INTERPRETATION OF MINNESOTA LAW DOES NOT WEIGH IN FAVOR OF ADMITTING HIS TESTIMONY

The Bank argues that because Mr. Grice's testimony is consistent with Minnesota law, the Receiver's motion should be denied. Mr. Grice's testimony, as it pertains to Minnesota law, has nothing to do with the admissibility of his testimony as an expert witness. The Bank's admission in its brief that its expert testified in accordance with Minnesota law shows just how far the Bank has deviated from permissible expert testimony.

The Receiver agrees that the Eighth Circuit's holding in *Zayed v. Associated Bank, N.A.*, 779 F.3d 727 (8th Cir. 2015), states an appropriate interpretation of Minnesota Law for aiding and abetting cases. The Eighth Circuit's opinion, which interpreted Minnesota law, is consistent with the Receiver's arguments that "the primary tortfeasor must commit a tort that causes an injury to the plaintiff; the defendant must know that the primary tortfeasor's conduct constitutes a breach of duty; and that the defendant must

substantially assist or encourage the primary tortfeasor in the achievement of the breach." *Zayed*, 779 F.3d at 733.

The Bank's accusation that the Receiver is reading actual knowledge "out of the law" misses the point. ECF No. 228 at 28. The issue is what is necessary to establish actual knowledge (one of two ways of proving knowledge, the other being constructive knowledge). The Eighth Circuit has already addressed this issue, when it held that a court considers factors such as the relationship between the defendant and the primary tortfeasor, the nature of the primary tortfeasor's activity, the nature of the assistance by the defendant, and the defendant's state of mind. *Zayed*, 779 F.3d at 733. Stated otherwise, circumstantial evidence can be used to infer, or prove, actual knowledge. The Bank admits that *Am. Bank of St. Paul*, holds that "actual knowledge is usually a question of fact" that is "inferred from circumstantial evidence," a position the Receiver agrees is the law. *Am. Bank of St. Paul v. TD Bank*, 2011 U.S. Dist. LEXIS 49646 at *22.

The Bank's attack on the Receiver's citation of *K & S. Partnership v. Continental Bank, N.A.*, 952 F.2d 971 (8th Cir. 1991) is erroneous. *K&S Partnership* applies precisely the principle for which the Bank cites *Am. Bank of St. Paul*, when the Court stated that "otherwise unremarkable events viewed together may suggest an unusual pattern of events intimating an illegal scheme." *Id*. at 979-80. The rule in *Am. Bank of St. Paul*, that knowledge can be inferred from circumstantial evidence, is applied in *K&S Partnership*, and is also consistent with the Eighth Circuit's holding in *Zayed v. Associated Bank*.

Simply put, the trio of cases that the Bank accuses the Receiver of misrepresenting all stand for the same principle: actual knowledge may be inferred from circumstantial

evidence. *K & S. Partnership*, 952 F.2d at 979-980; *Am. Bank of St. Paul,* 2011 U.S. Dist. LEXIS 49646 at *22; *Zayed*, 779 F.3d at 733. Although the *Zayed* decision does not use the words circumstantial evidence, it does hold it is appropriate to consider the relationships, the nature of activity, and the nature of the assistance provided by the defendant, confirming circumstantial evidence may be considered in establishing actual knowledge. *Id.* Precisely how the Eighth Circuit applied the law when indicating that a particular constellation of facts rendered plausible the Receiver's pleading of actual knowledge.

V. MR. GRICE IMPROPERLY WEIGHS EVIDENCE

Mr. Grice must explain how the assessment of credibility is within his expertise. Whether or not Mr. Grice is assuming credibility is irrelevant. It does not overcome the fact that he cannot weight evidence as an expert. One assumes the role of trier of fact when one chooses what testimony or fact to accept as true. Only the trier of fact determines credibility. The Bank's definition of the role of the expert, if accepted, would permit experts to instruct the jury on the applicable law; that function belongs exclusively to the Court.

VI. MR. GRICE'S OPINIONS ARE PLAGUED WITH SO MANY IMPROPRIETIES THAT ADMISSION OF HIS TESTIMONY WOULD RESULT IN UNFAIR PREJUDICE

The Bank accuses the Receiver of deeming Mr. Grice's testimony as irrelevant. Mr. Grice's testimony is relevant in some aspects, but should nonetheless be excluded because its probative value is substantially outweighed by a danger of unfair prejudice. The testimony proposed by Mr. Grice is not unfairly prejudicial because it would hurt the

Receiver's case, but because it would gut the function of an expert witness. Lending inappropriate testimony the veneer of expert opinion endangers the truth-finding process. Because Mr. Grice has based his opinions in part on his own subjective credibility determinations, and because his opinions would apply the law to the facts, the Receiver would suffer unfair prejudice.

By permitting Mr. Grice to testify about Associated Bank's knowledge, the Court would expand the reach of expert testimony – that an expert may testify on subject matters in which he does not have expertise. As the Bank states "[Mr. Grice] cites testimony and documents showing what these individuals believed and then testified. . . ." ECF No. 228 at 37. If this argument is accepted, any bank in an aiding and abetting case could rely on its own employees' bare denials of knowledge, then amplify those bare denials with the legitimacy of an expert's "opinion," making it possible to manufacture facts with no foundation in an expert's field of knowledge. This is the prejudice the Receiver seeks to abate. Mr. Grice is not an expert in credibility, and therefore his consideration of witnesses' credibility cannot dictate his opinions. Because his opinions are composed of improper considerations on matters in which he is not an expert, the Court should bar Mr. Grice from rendering the opinion that Associated Bank did not have actual knowledge of the Ponzi scheme.

VII. THE RECEIVER DOES NOT RELY ON STATE EVIDENTIARY RULES

Mr. Grice discusses the relationship between the Ponzi scheme and Wells Fargo, as well as Deutsche Bank, Bear Sterns, J.P. Morgan Chase, Saxo Bank, UBS, and Voyager Bank. See Grice Report, Exhibit 1-A to Memorandum in Support of Motion to

Exclude (ECF 204), at 15-19. The Receiver's motion explained that because neither party sought discovery from Wells Fargo or any of the other entities, it would be a violation of Minnesota law for Mr. Grice to draw an adverse inference from a party's failure to produce evidence equally available to both sides. *State v. Swain*, 269 N.W. 2d 707, 717 (Minn. 1978).

In its response, the Bank muddies the argument, accusing the Receiver of wanting to apply Minnesota evidentiary rules in lieu of the Federal Rules of Evidence. ECF No. 228 at 37-38. Yet the Bank does not plausibly suggest that the federal rule is any different. See, e.g., *Jenkins v. Bierschenk,* 333 F.2d 421, 425 (8th Cir. 1969). The Bank also responds that Mr. Grice was "merely commenting on conclusions that he can draw from the evidence as a banking expert. . . ." ECF No. 228 at 39. That does not absolve Mr. Grice from inappropriately opining that the Receiver ignored evidence that the Bank itself never sought, but could have. Thus, the use of Mr. Grice's report as a vehicle to chide the Receiver for not considering information that the Bank did not obtain about other financial institutions runs afoul of the uniformly-applicable rule noted in the Receiver's motion.

CONCLUSION

The Bank's response does not establish any meritorious reasons for the Court to deny the Receiver's motion. The Bank uses misdirection, out-of-context citations, and unhelpful case law in an attempt to normalize an unprecedented expansion of the role of the expert. For the foregoing reasons, Plaintiff's Motion to Strike the Expert Report of Charles Grice and Bar Related Testimony should be granted.

Dated: November 30, 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: keith@vogtip.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
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

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 30, 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