UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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| R.J. ZAYED, In His Capacity As Court-Appointed Receiver For The Oxford Global Partners, LLC, Universal Brokerage, FX, and Other Receiver Entities,<br><br>Plaintiff,<br><br>vs.<br><br>ASSOCIATED BANK, N.A.,<br><br>Defendant. | Case No. 13-cv-00232 (DSD-SER)<br><br>CONFIDENTIAL<br><br>FILED UNDER SEAL |

**Defendant Associated Bank, N.A.'s Reply Brief In Support of Its Motion for Summary Judgment**

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# TABLE OF AUTHORITIES

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Cases[1]



[1] All cases previously cited in Associated Bank's motion or Receiver's opposition are short-cited herein.

**Statutes, Rules and Regulations**

## CITATION FORM

"Br." refers to Associated Bank's Brief in Support of Its Motion for Summary Judgment (ECF No. 197).

"Ex." refers to the exhibits to this reply brief.

"Opp." refers to Receiver's Response in Opposition to Defendant Associated Bank's Motion for Summary Judgment (ECF No. 234).

"Opp. Ex." refers to the exhibits to the Declaration of Robert P. Greenspoon in Support of Receiver's Response in Opposition to Defendant Associated Bank's Motion for Summary Judgment (ECF No. 235).

"Jarek Br." refers to Receiver's Memorandum of Law in Support of His Motion to Strike Portions of the Report of and Bar Testimony of Karl Jarek (ECF No. 200).

## INTRODUCTION

Receiver does not contest the fact that:

- No Associated Bank employees testified that they knew about the Cook-Kiley Ponzi scheme.
- No former Receivership Entity employees testified that anyone at Associated Bank knew about the Ponzi scheme.
- None of the fraudsters who operated the Ponzi scheme testified that any Associated Bank employee knew about the Ponzi scheme.
- Receiver's expert, Ms. Ghiglieri, admitted that no one at Associated Bank knew about the Ponzi scheme.
- Ms. Ghiglieri conceded that she could not draw the inference that anyone at Associated Bank knew about the Ponzi scheme or tried to assist the Ponzi scheme.
- No law enforcement authority or bank regulator ever alleged that anyone at Associated Bank knew about the Cook-Kiley Ponzi scheme.
- Receiver's damages calculations are not supported by expert testimony and fail to account for the fact that the Cook-Kiley Ponzi scheme was a partial Ponzi scheme.

These undisputed facts establish that Associated Bank did not have actual knowledge of the Ponzi scheme, did not provide substantial assistance to the Ponzi scheme, and that Receiver's damages claims are speculative—all of which require summary judgment.[2]

Because the law does not favor him, Receiver mischaracterizes it. Receiver's ***leading*** legal argument is frivolous. He claims that the Eighth

[2] In violation of Local Rule 7.1(f)(3), Receiver's opposition brief contains 12,378 words.

Circuit's opinion in this matter, which was based on the *Twombly* pleading standard, is the "law of the case" and precludes summary judgment. Receiver cites no case law supporting his argument and the Eighth Circuit precedent is expressly to the contrary.

Receiver ignores the Minnesota Supreme Court's holding that aiding and abetting liability should not be based on "anything less than ***actual knowledge*** that the primary tortfeasors' conduct was wrongful," and he offers no reason to depart from this established standard. *Witzman*, 601 N.W.2d at 188.

Receiver attempts to minimize the concessions made by his own expert, Ms. Ghiglieri, which gut his case. He suggests that Ms. Ghiglieri's opinions are merely one person's comments regarding actual knowledge and substantial assistance. Receiver is wrong. Ms. Ghiglieri's testimony is a party admission, and Receiver cannot create a material issue of fact merely by disagreeing with his own admissions.

Receiver mischaracterizes the facts and, in some cases, concocts entirely new facts. As explained below, each and every accusation Receiver makes against Associated Bank is, at best, irrelevant, and more often, untrue. Therefore, summary judgment should be granted.

## ARGUMENT

### I. Receiver Cannot Create A Material Issue Of Fact By Disagreeing With His Own Admissions

Receiver's expert, Ms. Ghiglieri, made admissions that gutted Receiver's case. She admitted that there is no evidence that anyone at Associated Bank knew about the Ponzi scheme:

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

Ex. 1 at 240:5-8. She conceded that no inferences can be drawn from the supposedly "atypical" conduct cited in her report and Receiver's brief:

> Q. [Y]ou can't tell my why that atypical banking activity 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 it?
> A. I think that's correct.

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

Receiver attempts to wish these admissions away by claiming that Ms. Ghiglieri was testifying for "herself" only. Opp. 42. Not true. Ms. Ghiglieri is Receiver's expert; her statements are party admissions. *See* Fed. R. Evid. 801(d)(2)(D). Nor, contrary to Receiver's assertion, was her testimony beyond the scope of her expertise; her report opined on issues of knowledge throughout. Ex. 2 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; *see also* Ex. 1 at 25:4-16, 59:17-19, 60:3-4, 107:15-16, 186:2-9. Receiver cannot create a factual dispute merely by suggesting that his own party admissions regarding actual knowledge and substantial assistance are wrong. *See Roberts v. Park Nicollet Health Servs.*, 528 F.3d 1123, 1126-27 (8th Cir. 2008) (contradicting prior testimony cannot be used to create a "sham issue of fact").

Moreover, Ms. Ghiglieri's admissions demonstrate how different this case is from *Simi Management*. In *Simi*, the plaintiff's expert testified that the defendant-bank engaged in atypical conduct from which actual knowledge ***could*** be inferred. 930 F. Supp. 2d 1082, 1088-89 (N.D. Cal. 2013). The court credited this testimony and held that there was a factual dispute regarding actual knowledge. *Id.* at 1100. The opposite is true here. Ms. Ghiglieri conceded that there is no evidence that anyone at Associated Bank knew about the Ponzi scheme and that nothing can be inferred from Associated Bank's supposedly "atypical" conduct. Ex. 1 at 239:15-240:8, 276:14-22. Receiver has not explained how a lay jury could come to the conclusion that Associated Bank had actual knowledge of the Ponzi scheme when an expert with 40 years of experience stated there is no evidence to support that conclusion. Ms. Ghiglieri's admissions warrant summary judgment.

## II. Receiver's Law-Of-The-Case Argument Is Frivolous

Receiver assertion—that an appellate decision regarding the sufficiency of Receiver's complaint precludes summary judgment—defies belief. Receiver does not cite a single case regarding the law-of-the-case doctrine, and fails to inform the Court that in *Burton v. Richmond*, the Eighth Circuit held that appellate decisions at the pleading stage are not the law of the case and must be reassessed in light of the evidence at summary judgment. 370 F.3d 723, 728 (8th Cir. 2004); *see also McKenzie v. BellSouth Telecomms., Inc.*, 219 F.3d 508, 513 (6th Cir. 2000) (a "holding on a motion to dismiss does not establish the law of the case for purposes of summary judgment").[3]

Moreover, Receiver's case has steadily eroded since the Eighth Circuit's decision. Among other things, ***Receiver has abandoned key arguments that animated his complaint***. For example, one of Receiver's central allegations was that Associated Bank opened and maintained accounts for "fictitious entit[ies]." *Zayed*, 779 F.3d at 730, 731. However, Receiver now concedes that those entities were not fictitious; they were perfectly legal partnerships. Jarek Br. 16. Another allegation was that Mr. Sarles former step-brother, Michael Behm, was a Ponzi scheme insider, but Receiver has abandoned that

[3] Receiver's serial reliance on motion to dismiss decisions does nothing to inform the summary judgment analysis. *See, e.g.*, *Bank of Montreal*, 2012 WL 1110691, at *9; *Arreola*, 2012 U.S. Dist. LEXIS 144765, at *8-9; *Wight*, 219 F.3d at 91-92; *Mosier*, 2011 WL 5075551, at *7-8; *Anwar*, 728 F. Supp. 2d at 443.

too. *See* ECF No. 128 at 1.

## III. Receiver Misrepresents The Facts

To avoid summary judgment, Receiver "must substantiate his allegations with sufficient probative evidence that would permit a finding in [his] favor based on more than mere speculation, conjecture, or fantasy." *Clay v. Credit Bureau Enters., Inc.*, 754 F.3d 535, 539 (8th Cir. 2014). Here, Receiver's "statement of fact" is based on conjecture and fantasy.

### A. Receiver Relies On Unsubstantiated Hearsay

Receiver has no evidence that Mr. Sarles took a payoff from the Ponzi schemers. To overcome this, Receiver alleges that Leo Domenichetti, a Receivership Entity employee, testified that Mr. Sarles was part of a "community of Schemers," was "tight" with Trevor Cook, and "paid by Cook as well." Opp. 14. Receiver fails to inform the Court that that this was hearsay that Mr. Domenichetti learned from Trevor Cook's brother, Graham, when Graham "was drunk":

> Q. And were you able to verify any of those things?
> A. No. . . .
>
> Q. Do you know whether or not . . . these things that Graham said about Associated Bank were true?
> A. No.

Ex. 3 at 198:2-10.

### B. Receiver's Claims About Mr. Sarles' Conduct Are Not Supported By The Evidence

Receiver claims that Mr. Sarles asked Domenichetti to sign blank forms. Opp. 19. However, at his deposition, Domenichetti clarified that he could not remember whether the bank form he signed was blank or filled out. Ex. 3 at 179:20-181:18. Moreover, Domenichetti explained that his testimony was coached by Receiver's counsel—specifically, he agreed that statements that appear in his affidavit regarding these forms, which Receiver tellingly does not cite, are "crazy" and "just something the [Receiver's] lawyer put down." *Id.* at 175:6-12; *see also* Ex. 4.

Receiver claims that Mr. Sarles "helped in the Scheme's recruiting efforts," Opp. 8, but the testimony Receiver relies upon makes clear that Mr. Sarles "was just an observer" at a single investment seminar. Ex. 5 at 224:21-24. And Mr. Pettengill testified that this seminar might have fooled Mr. Sarles into believing that the Receivership Entities were legitimate. *Id.* at 226:7-17.

Receiver maintains that Mr. Sarles "lied on the account opening documents" and "completed account opening documents" for Crown Forex LLC. Opp. 9-10, 12. But Receiver cites no evidence that Mr. Sarles drafted any portion of the account opening documents. The account opening documents state on their face that they were created by Nataliya Espey, a

portfolio specialist at Associated Bank. Ex 6.

Nor was Ms. Espey dishonest. She testified that she completed the portions of the forms that Receiver claims were false—*i.e.,* labeling the Crown Forex LLC account as a "checking/money market account" and describing certain documentation as a "Report from state registration information website"—by selecting the pre-populated choices that she thought were most accurate. Ex. 7 at 142:23-143:18, 149:16-150:7, 152:18-153-4; Ex. 8 at 71:5-13; 199:15-200:7.

Receiver argues that Mr. Sarles allowed Crown Forex LLC to open a bank account using a P.O. Box address. Opp. 20. However, [redacted]. Ex. 6.

Receiver further claims Mr. Sarles permitted withdrawals without signatory authority, specifically that Mr. Sarles "allowe[d] Cook to withdraw $600,000 cash from the Crown Forex 1705 account," an account over which Cook had no signatory authority. Opp. 22. This is untrue. [redacted]. Opp. Ex. 28; Ex. 9.

Receiver alleges that Mr. Sarles executed internal transfers without signatory authority. Opp. 18. But the documents that Receiver cites show

only that Mr. Sarles approved transfers, not that the transfers occurred without the authorization of account signatories. *See* Opp. Exs. 27, 28. Nor did any of the signatories testify that transfers occurred without their approval.

Receiver falsely asserts that Mr. Sarles deleted emails. Opp. 6. Associated Bank debunked this assertion in response to Receiver's Motion to Compel:[4]

ECF No. 214 at 2 (citations omitted). Receiver addresses none of this, nor does he acknowledge that the text that Mr. Sarles decided not to forward was the customer's earlier request to "send me the current balances for [two accounts]." Ex. 12. Receiver asserts that the material Mr. Sarles declined to forward involved "Cook's favorite pastime: gambling," Opp. 6, but Receiver does not cite the emails, neither of which mentions gambling. Ex. 10 at 171:13-16, Ex. 11, Ex. 12.

Receiver argues that Associated Bank used cashier's checks with false remitter information to "further the central falsehood of the Scheme." Opp.

[4] Magistrate Judge Rau denied Receiver's motion. *See* ECF No. 239.

24. Receiver ignores the fact that these cashier's checks were drafted by Tammy Sotebeer. Ex. 13 at Interrog. 1. Receiver has admitted that Ms. Sotebeer did not know about the Ponzi scheme. Ex. 14 at Req. 46. Receiver never explains how someone that he admits had no knowledge of the Ponzi scheme could "further the central falsehood of the Scheme." Opp. 24.

Receiver claims that the "atypical" conduct listed in his opposition "led to a $500,000 civil money penalty." Opp. 25. Not so. Receiver does not even cite the civil money penalty order. *Id.* at 25-26. The order says nothing about the Cook-Kiley Ponzi scheme and is explicitly limited to "deficiencies [that] occurred primarily during . . . 2010-2012," well after the Cook-Kiley Ponzi scheme was discovered. Ex. 15 at 1.

### C. Receiver Misstates The Record To Impugn Mr. Sarles' Integrity

In his affidavit, Ms. Sarles stated that "[w]hen I opened the Crown Forex LLC account, I was not provided with Secretary of State registration documentation;" therefore Mr. Sarles "told Kiley he must send me the documentation after he completed [it];" but Mr. Sarles "did not remember to follow-up with Kiley to obtain the missing Secretary of State registration documentation." Ex. 16 ¶¶ 14, 17. To twist this into something sinister, Receiver argues that "[t]o cover up the lack of proper registration documents, Sarles falsified that account application." Opp. 25. But Mr. Sarles did not complete the account application for Crown Forex LLC, and the employee

who did so, Ms. Espey, acted in good faith. *Supra* at 8. Nor does Receiver address Mr. Grice's expert testimony that making this type of error is exactly the opposite of what a "dirty banker" would do, because it could draw unwanted attention. Ex. 17 at 105:5-107:12.

Mr. Sarles testified truthfully that he referred the Receivership Entities to his cousin's husband. Ex. 10 at 227:3-10. Mr. Sarles also testified truthfully that his cousin, Ms. Kastenek, is now a federal prosecutor. *Id.* at 228:16-229:3. The undersigned counsel erred in assuming that Ms. Kasteneck was already a prosecutor when Mr. Sarles made the referral, whereas Mr. Sarles testified only that she is currently a prosecutor. *Id.* Counsel apologizes to the Court for this error. But nothing Mr. Sarles said was false. Moreover, Ms. Sarles' testimony remains exculpatory. As Mr. Sarles explains, his cousin's husband was a sophisticated high-speed trader, hardly the referral of choice for someone who knows of a Ponzi scheme and wants to keep it hidden. *Id.* at 228:3-14.

Mr. Sarles testified truthfully that he once had drinks at the Van Dusen Mansion Ex. 10 at 175:3-11, that he attended a Christmas party there, *id.* at 173:25-174:9, and that he went there for business reasons "maybe ten times," *id.* at 64:16-20. Although Receiver tries to spin this as "Mr. Sarles fully impeaching himself," Receiver is wrong. Opp. 7. Mr. Sarles' recollection is consistent with Mr. Pettengill's testimony that Mr. Sarles came to the

mansion "perhaps a dozen times," and that "six times" these visits involved drinking Ex. 5 at 155:9-15.

Receiver claims that Mr. Sarles was present when Receivership Entity employees "made jokes about stealing investor money." Opp. 6-7. But there was no mention whatsoever of theft; rather, the employees quoted movies such as *Wall Street* and *Boiler Room*. Ex. 5 at 124:21-125:10. Moreover, Mr. Pettengill conceded that he does not know what Mr. Sarles took these events to mean. *Id.* at 125:11-20.

Mr. Sarles testified frankly that he twice went to strip clubs with Mr. Cook, both times after attending a sporting event with him. Ex. 10 at 174:10-175:2. Receiver tries to spin these outings—two over an 18 month period—as a "deep, close, long-term relationship," Opp. 5, but the record shows otherwise. Mr. Sarles treated the Receivership Entities like other customers: Associated Bank gave its bankers hockey tickets for client outings, Ex. 10 at 219:15-25, and (regardless of what one might think of venue) Mr. Sarles accompanied other clients to strip clubs. *Id.* at 220:2-16.

Mr. Sarles truthfully told his BSA/AML department, immediately upon being asked, [redacted]" Opp. Ex. 22 at AB-MIN-0034830. Contrary to Receiver's argument that Mr. Sarles could not possibly have known this, Opp. 11, Mr. Sarles testified that he understood the volume

of wires based on activity in another Receivership Entity account that opened months earlier. Ex. 10 at 124:4-18.

Mr. Sarles testified truthfully that he discussed with Mr. Cook the "guidelines . . . to open [an account for] a domestically owned entity." Ex. 10 at 67:12-20. Receiver's argument that this discussion was meant to "reduce scrutiny" applicable to "foreign owned entities" is wrong. Opp. 9. Associated Bank's policy was that accounts must be held by domestic entities. *Id.* at 69:6-13. Receiver does not explain how Mr. Sarles acted improperly by ***following*** bank policy. Moreover, the exhibit Receiver cites shows that during a court-ordered examination, Trevor Cook disagreed with Receiver's characterization of these facts, testifying "I don't know if I'd say [Mr. Sarles] is saying let's get around that." Opp. Ex. 19.

Receiver claims that Mr. Sarles ducked questions addressed to him and two other employees by Ryan Rasske. Opp. 15-16, 22. That is not the case. Mr. Sarles testified that he could not recall whether he spoke to Mr. Rasske in response to these questions. Ex. 10 at 138:17-140:6. Mr. Rasske [redacted] Ex. 18 at 130:18-23.

Receiver does not dispute that the Receivership Entities told Mr. Sarles that they had an address on Nicollete Avenue, *see* Ex. 10 at 114:13-19, that Mr. Sarles was not responsible for researching this address, *id.* at 112:21-113:12, 114:13-19; and that the Receivership Entities subsequently moved

into the Van Dusen Mansion in late 2008. *See id.* at 173:25-174:9 (noting that 2008 Christmas party was held at Van Dusen mansion). Receiver's reliance on an email in which another bank employee said, that Mr. Sarles said, that Nicollet was an "old address," Opp. 15, does not suggest that Mr. Sarles was dissembling; it shows he reported the facts as he understood them.

Mr. Sarles testified accurately that it was not his job to monitor wire transfers in and out of the Receivership Entities' accounts. He did not know the source of the funds deposited into the account, or the destination of money transferred out of the account. Ex. 10 at 67:2-3. Receiver's argument that Mr. Sarles "knew" that there was "domestic only wiring," Opp. at 13, is therefore contrary to the evidence, and notably does not cite the record.

Receiver claims that Mr. Sarles overrode ID check results for various Receivership Entity bank accounts, including the Universal Brokerage FX Management LLC account. Opp. 16-17. But no one disputes that [redacted] Ex. 8 at 121:11-122:9.

### D. Receiver Mischaracterizes Testimony Showing That Mr. Sarles Is Innocent

Receiver cites statements that Associated Bank's Regional Security Officer, David Martens, made about his ***initial*** concerns about Mr. Sarles'

relationship with the Receivership Entities, before Mr. Martens had the opportunity to investigate. Opp. 21-22. But Receiver ignores Mr. Martens ultimate conclusion—based on his 28 years of law enforcement experience—that Mr. Sarles was not involved in anything nefarious. Ex. 19; Ex. 20 at 71:23-72:5.

Next, Receiver references a single meeting that Mr. Sarles allegedly attended in April or May 2008. Opp. 17. However, Receiver does not dispute the facts about this meeting discussed in Associated Bank's opening brief—*i.e.*, the matters discussed during this meeting were advice that came from the Receivership Entities' attorneys, Briggs & Morgan; even Ponzi scheme insiders, like Pettengill, did not learn about the Ponzi scheme during this meeting; and Mr. Pettengill concluded that Mr. Sarles was not involved in the fraud. *See* Br. 15-17. Receiver incorrectly claims that Mr. Sarles denied that this meeting occurred; Mr. Sarles did no such thing—he testified that he could not recall whether the meeting occurred. Ex. 10 at 67:4-10, 122:3-18. Receiver also claims that Mr. Sarles never told Associated Bank's BSA/AML department about this meeting, but the deposition testimony Receiver cites does not discuss this issue at all. *See id.* at 122:1-25.

Finally, Receiver's description of this meeting does not match Pettengill's testimony. Mr. Pettengill said nothing about making Crown Forex SA appear to have larger deposits, Opp. 17; he says the issue was how

to "transfer it [money] out again from the pooled account to the individuals' [segregated] account[s]." Ex. 5 at 175:3-25.

### E. Receiver's Alleged Conduct Shows That Associated Bank Did Not Know About The Ponzi Scheme

Not only does Receiver accuse Mr. Sarles of things he never did, Receiver ignores that Mr. Sarles' alleged conduct shows that he ***lacked*** actual knowledge of the scheme. Receiver offers no response to Mr. Grice's opinion that this conduct would have called for ***more scrutiny*** of the Receivership Entities' bank accounts, not less. As Mr. Grice explains, no rational banker who was actually involved in a Ponzi scheme would have risked detection by informing his superiors of a $600,000 withdrawal request or opening accounts without proper documentation. Ex. 17 at 105:5-106:1, 107:13-109:13.

## IV. Receiver Misstates The Law

### A. Receiver's Cases Show That Summary Judgment Is Appropriate

Receiver's cases illustrate that he has not come forward with a material issue of fact regarding actual knowledge. *Lyles* was a Section 1983 action challenging an illegal search of the plaintiff's home. 181 F.3d at 915. Two of the police officers that performed the search disagreed about whether they had reason to believe that the plaintiff was home before searching his home. *Id.* at 917-18. Therefore, the court found that there was a material issue of fact regarding whether the officers had an objectively reasonable basis for the search. *Id.*

In *Gonzalez*, there was no dispute that a naturalization applicant stated that he had no children during an immigration interview, despite having fathered two children. 678 F.3d at 261-62. Therefore, the Third Circuit ruled that the applicant's declaration to the contrary was not sufficient to preclude summary judgment. *Id.* at 263.

Here, there is no evidence that contradicts Mr. Sarles' testimony that he did not know about the Cook-Kiley Ponzi scheme. This is not a case where there is conflicting witness testimony, like *Lyles*, or where the defendant does not dispute that he lied, like *Gonzalez*. Every witness, including Receiver's own expert, Receivership Entity employees, and Ponzi schemers testified that no one at Associated Bank knew about the Ponzi scheme. Br. 5-8.

Receiver's citation to cases raising the "innocent owner" defense to civil forfeiture cases is, at best, disingenuous. As Receiver's own authority notes, "[t]he procedure used in civil forfeiture is different from that used in a standard civil action." *United States v. Leak*, 123 F.3d 787, 792 (4th Cir. 1997). Indeed, all of Receiver's cases pre-date the Civil Asset Forfeiture Reform Act of 2000, which changed the burdens placed on a defendant asserting the "innocent owner" defense. *See United States v. One Lincoln Navigator 1998*, 328 F.3d 1011, 1012 n.1 (8th Cir. 2003); 18 U.S.C. § 983(d).

### B. Receiver Misrepresents Minnesota's Aiding-And-Abetting Law

Minnesota law is clear—Receiver must come forward with evidence

that Associated Bank had actual knowledge of the Ponzi scheme. *See Witzman*, 601 N.W.2d at 188. Associated Bank cited several cases materially indistinguishable from this one, where a bank was sued for aiding and abetting because it was allegedly aware of atypical conduct or red flags, supposedly failed to adhere to internal policies, and continued to provide banking services to individuals that were later revealed to be fraudsters. These cases routinely hold that "red flags" and "atypical" conduct are not evidence of actual knowledge. *See* Br.17-19. Receiver does not cite, let along distinguish, most of these cases, leaving the holdings of *de Abreu*, *El Camino*, *Lamn*, and *Litson-Gruender* undistinguished and dispositive. *See Satcher v. Univ. of Ark. at Pinebluff Bd. of Trs.*, 558 F.3d 731, 735 (8th Cir. 2009) ("failure to oppose a basis for summary judgment constitutes waiver of that argument.").

Receiver attempts to distinguish one of Associated Bank's cases, *Chemtex*, 490 F. Supp. 2d at 546, because it was decided under New York and other state law, not Minnesota law. Opp. 33 n.3. But the Eighth Circuit has noted that this distinction "is weak" because "New York and Minnesota both follow the Second Restatement approach to aiding and abetting." *Am. Bank of St. Paul*, 713 F.3d at 464 n.4.

Receiver's attempt to distinguish *Witzman* also fails. *Witzman* noted that "some courts" have recognized constructive knowledge, but *Witzman* did

not purport to adopt that rule. *See Zayed*, 779 F.3d at 733. Moreover, *Witzman* explained that even those courts that allow constructive knowledge do so only where "the primary tortfeasor's conduct [was] clearly tortious or illegal" and the "defendant [had] a long-term or in-depth relationship with that tortfeasor." *Witzman*, 601 N.W.2d at 188. These tests were not satisfied in *Witzman* notwithstanding that the defendant, an accounting firm, had served a fraudster "for over three decades" and arguably knew that the fraudster had failed to provide accounting required by probate law. Nor did these facts allow the court to "infer that [the accounting firm] had actual knowledge that [the fraudster] was engaging in tortious conduct." *Id.* at 188.

Receiver's case against Associated Bank is far weaker than that presented in *Witzman*. Associated Bank had a depository relationship with the Receivership Entities for less than two years, Ex. 21 at App'x D, and banks, unlike accounting firms, do not review their depositors' books. This case fits squarely within *Witzman*'s holding that courts will not "impose liability on an alleged aider and abettor for anything less than actual knowledge that the primary tortfeasor's conduct was wrongful." *Id.* at 188.

*American Bank of St. Paul* demonstrates the high bar that the actual knowledge requirement represents. In that case, the defendant investigated the fraudster's business and uncovered evidence that his business was illegitimate, including: (1) the fraudster's financial records were not prepared

by a licensed accounting firm, (2) the fraudster's financial statements omitted millions of dollars of liabilities, and (3) there was no evidence that the fraudster was engaged in his stated business. 2011 WL 1810643, at *1-2. In contrast here, Associated Bank did not have the Receivership Entities' books and all witnesses, including Receiver's own expert, testified that no one at Associated Bank determined that the Receivership Entities were engaged in a fraud. *See* Br. 1-3, 4-9.

*Christopher v. Hanson*, like *Witzman*, did not adopt a "constructive knowledge" standard. 2011 WL 2183286, at *11. Rather, it held that even if that standard were available, plaintiffs failed to meet the requisites for its use. *Id. Hanson* shows how difficult it is for a plaintiff to demonstrate a defendant has a long-term, close, and in-depth relationship. There, the primary tortfeasor allegedly breached fiduciary duties owed to employee stockholders. 2011 WL 2183286, at *6-7. However, the court held that it could not impute constructive knowledge to the tortfeasor's family, who sat on the board of their closely held business and approved all of the tortfeasor's actions. *Id.* at *11. Therefore, the court granted summary judgment finding that the plaintiff had shown, at most, a mere "failure to monitor" a business partner. *Id.*

In this case, Mr. Sarles did not sit on the board of any of the Receivership Entities, let alone have a role in approving their actions. *See*

Ex. 1 at 239:15-240:8. Therefore, it is even less appropriate to impute constructive knowledge to Mr. Sarles or anyone at Associated Bank.

This case is precisely like *Rosner v. Bank of China*, where the district court held that facts that "at most indicate only constructive knowledge of a fraudulent scheme" and held that "ignorance of 'red flags' or obvious warning signs of fraudulent activity cannot establish actual knowledge." 2008 WL 5416380, at *6, *10.

### C. Actual Knowledge Cannot Be Inferred From "Atypical" Banking Conduct

The supposedly "atypical" conduct cited by Receiver does not support an inference of actual knowledge. *K&S P'ship*, 952 F.2d at 979—the only Eighth Circuit case that the Receiver cites on this issue—illustrates the point. In *K&S*, there was a wide variety of evidence that the defendant had engaged in "atypical" conduct, including (1) defendant's "practice of lending money . . . before doing a credit analysis"; (2) defendant "purchased, increased, or renewed [certain loans] after" its executive vice president had directed the bank to stop doing so; (3) defendant generated internal reports that its loans "exceeded what . . . evaluations indicated were justified"; (4) one of defendants "engineers . . . 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 [defendant's]

policies." *Id.* at 974, 976. 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 978-79.

### D. Associated Bank Did Not Substantially Assist The Ponzi Scheme

Receiver's substantial assistance argument relies on the same misrepresentations of fact as his actual knowledge argument, and therefore fails for the same reasons. In addition, Receiver entirely ignores Ms. Ghiglieri's concession that substantial assistance cannot be inferred from Associated Bank's supposedly "atypical" conduct or "red flags." Ex. 1 at 276:14-22. Finally, Receiver is wrong to claim that proximate cause is not an element of an aiding-and-abetting claim. Receiver cites no case law supporting his theory that *Witzman* read this element of all common law torts out of aiding-and-abetting law. Opp. 35-36. Indeed, since *Witzman*, Minnesota courts have routinely considered proximate cause in connection with their analysis of substantial assistance. *See Anderson v. U.S. Bank, N.A.*, 2013 Minn. Dist. LEXIS 41, at *20-21 (Minn. Dist. Ct. 2013); *Varga v. U.S. Bank, N.A.*, 952 F. Supp. 2d 850, 861 (D. Minn. 2013).

### E. Receiver's Damages Are Speculative

Receiver does not dispute that proof of damages may not be based on "speculation or guesswork," and that he must provide a "reasonable estimate of damage based on relevant data." *Bigelow v. RKO Radio Pictures*, 327 U.S.

251, 264 (1946). Yet speculation is all he offers. Receiver's opposition entirely ignores the Eighth Circuit's prior statement based on an SEC accountant's testimony that the Cook-Kiley Ponzi scheme was a "partial Ponzi scheme" that contained both legitimate and illegitimate investments. *Beckman*, 787 F.3d at 474. Expert testimony is necessary to determine what is, and is not, a legitimate investment—a lay juror cannot make this determination. Br. 27-28. Receiver's joint and several liability argument does excuse the need for this analysis, because for joint and several liability to apply, Receiver must first demonstrate liability, which requires a showing that Associated Bank proximately caused the losses at issue.

This is not, as Receiver suggests, a case where a high school student with a calculator and copious amounts of free time could measure damages. Opp. 45. The very deposition that Receiver cites illustrates this point. Even Mr. Hlavacek, a seasoned SEC investigator, conceded that he has never calculated damages in a Ponzi scheme case and has no idea how to do so. Ex. 22 at 105:5-19, 122:21-24, 220:16-21. If someone with Mr. Hlavacek's level of experience has no idea how to calculate damages, a lay juror certainly cannot do so. This is a case that demands expert testimony; Receiver's failure to find a damages expert who could support his theory of the case is dispositive.

## V. Receiver Fails To Carry His Burden Under Rule 56(d)

Receiver provides no basis for granting relief under Rule 56(d).

Receiver's Rule 56(d) affidavit is based entirely on his then-pending motions to compel. ECF No. 236 ¶¶ 4-10. Magistrate Judge Rau has denied both of these motions, calling them a "Hail Mary." *See* ECF No. 239. Moreover, Associated Bank demonstrated in detail why those motions were without merit. *See* ECF Nos. 212 & 214. Accordingly, Receiver has not provided any "specified reasons [why] it cannot present facts essential to justify its opposition." Fed. R. Civ. P. 56(d).

Moreover, all Receiver offers in his Rule 56(d) affidavit is speculation that some additional favorable facts might exist. ECF No. 236 at ¶¶ 7, 9. Eighth Circuit courts have routinely rejected Rule 56(d) affidavits based on such speculation. *See, e.g.*, *Nat'l Sur. Corp. v. Dustex Corp.*, 291 F.R.D. 321, 328 (N.D. Iowa 2013) ("A party moving for a continuance under Federal Rule of Civil Procedure 56(d) must do more than speculate as to what additional facts the party might uncover through further discovery."). Receiver's Rule 56(d) affidavit should be no different.

## CONCLUSION

For the foregoing reasons, this Court should grant Associated Bank's motion for summary judgment.

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