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) **FILED UNDER SEAL** **CONFIDENTIAL**

CORRECTED
Receiver's Response in Opposition to Defendant Associated Bank's Motion for Summary Judgment

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I. INTRODUCTION

The central and most repeated "fact" of Associated Bank's ("the Bank") summary judgment motion is false. (Bank Mem., at 3, 9, 22.) The Bank argues: "[i]t defies logic that a banker involved in a Ponzi scheme would call a federal prosecutor to discuss the scheme, and Receiver has no explanation for why Mr. Sarles would do so." (*Id.* at 22.) The "explanation" is that it did not happen. Eye catching as a rhetorical flourish, this centerpiece of the Bank's motion is so obviously unsupported that it highlights the serious flaws in the Bank's credibility – and the reason that this case must be decided by a jury.

First, the federal prosecutor (Andrianna "Annie" Kastanek and Lien Sarles' cousin) was not the subject of Sarles' communications. Her husband, Chris Buzachero, was. (Exhibit 1[1], at 226-28, Exhibit 2, Exhibit 3.) ***Second,*** Ms. Kastanek was not even a federal prosecutor at the time. She was an associate at a private law firm. (Compare underlying Exhibit 2, dated December 2008, with Exhibit 3, LinkedIn page showing Sidley employment until 2010; and Exhibit 4, withdrawal as Sidley attorney in 2010 in a civil case). ***Third,*** the Bank's own record shows a vastly different occurrence. Sarles goaded a Scheme employee to use Buzachero's name to pave the way for a cold call to a high-ranking executive of the financial firm where Buzachero worked. (Exhibit 1, at 226-27.) Sarles did not call "the feds," the FBI, or any other law enforcement agency. (Bank Mem., at 9.) He never "called a federal prosecutor and told her about the investment program offered by the Receivership Entities, so that after conducting her own due

[1] "Exhibit" refers to exhibits to the Declaration of Robert P. Greenspoon, which is filed concurrently with this Memorandum.

diligence, she could make her own investment." (Bank Mem., at 22.) Nor was Sarles "so convinced that Trevor Cook's investment program was legitimate that he suggested to his cousin, a federal prosecutor, that she invest." (Bank Mem., at 3 and 9.) Instead, Sarles used family connections in an effort to ***expand*** the Scheme's reach. The Bank's rhetorical flourish collapses under the weight of uncontested facts to the contrary.

If what the Bank says now were suddenly true (which is impossible), it is completely at odds with Sarles' prior deposition testimony:

[redacted]

(Exhibit 1, at 223.)

Sarles' lie about going to "the feds" is not his only departure from credibility. He also lied elsewhere under oath. Contrary to sworn denials in a 2010 affidavit, he socialized with the Schemers at strip clubs, sporting events and cocktail parties; he attended Scheme planning meetings and at least one investor presentation; and he made personal contact with the Schemers more often than once per week. (Exhibit 1, at 174, Exhibit 5, at ¶ 21.) That does not even begin to count the acts he performed for the Scheme in his capacity as a Bank Vice President, involving a staggering number of violations of Bank policies and banking laws. Others at the Bank suspiciously turned a blind eye to Sarles' known violations, yet simultaneously heaped praise on him [redacted] in which the Crown Forex account alone brought in over $79 million in investor funds as deposits to the Bank.

(Exhibit 6.) Under any reasonable view of the facts and the law, Sarles and the Bank knew about the Scheme and gave substantial assistance to help it thrive.

The Court should deny summary judgment because the facts will permit the jury to find self-serving denials of knowledge incredible, to draw a reasonable inference of aiding and abetting liability, and to calculate damages. But there is an even more direct reason to deny summary judgment: the law of the case from the Eighth Circuit (analyzed in Section III, below) already means that facts established in discovery permit this case to go to the jury.

II. STATEMENT OF FACTS

The Bank's factual presentation in its memorandum omits nearly all of the material facts. The Bank argues as if nothing unusual occurred at its suburban branch in Eagan, Minnesota in 2008-2009, except that systems needed improvement and one or two red flags should have been caught. The reality is far different. The Bank also argues as if naked denials of knowledge foreclose any possibility of the jury inferring knowledge from circumstantial evidence.

The record shows that Lien Sarles held a deep, close and long-term involvement with the Scheme, the Schemers, and the accounts through which he helped the Scheme operate. He was uniquely positioned to know exactly what was going on—and to assist the fraudulent activity. Indeed, Sarles was even closer to the inner workings of the Scheme, such as secret banking transactions, than the several "innocent" employees of the Scheme itself. A jury would easily conclude that Sarles knew everything. And the

Bank's own extraordinary and repeated cessation of its internal investigations shows that the Bank itself did not just exhibit sloppy red flag detection, but actively stonewalled its own investigations any time something suspicious came up.

A. "Elephant Hunter" Lien Sarles Builds Close Ties to the Criminal Scheme—Strip Clubs, Ball Games, Drinking at the Mansion, and at Regular Contact with the Schemers

From the beginning, Sarles knew that obtaining the business of the Schemers would be a significant portion of his book of business and enhance his career and promotion opportunities. The Eagan branch where he worked was small. (Exhibit 7, at 31.) [redacted] The Crown Forex account was completely outsized for him, as were other Scheme accounts, which totaled over $90 million in investor funds deposited at the bank. (*Id.* at 35, Exhibit 6, Exhibit 8, at 184-86, Exhibit 9.) [redacted]

The Bank smiled on Sarles' capture of Scheme business. [redacted] Then suddenly, a mere six months later, the Bank fired Sarles, [redacted]

[redacted] The Bank quietly discarded its "elephant hunter" when public knowledge of his role would have been a potential public relations catastrophe.

Before this litigation, Sarles got away with giving false testimony to deflect and whitewash the depth of his involvement with the Schemers. In a January 15, 2010 affidavit in a separate civil case, Sarles stated: "Once the accounts were set up for online banking, I had limited contact with Kiley, Cook and Smith, with the exception of occasional conversations and emails with Smith and Cook about account balances, statements and wire information. At that point, my primary responsibility was to provide customer service for these accounts. I was not responsible for monitoring these accounts for suspicious account activity, withdrawals over $10,000, and irregularities and inconsistencies in check endorsements and payees." (Exhibit 5, at ¶ 21.) Discovery revealed numerous falsehoods in this statement.

In reality, Sarles had a deep, close, long-term relationship with Cook. First, he attended strip clubs and sporting events with Cook:

[redacted]

[redacted]

(Exhibit 1, at 174.) Second, Sarles curried favor with Cook by pandering to one of Cook's favorite pastimes: [redacted]

[redacted]

(Exhibit 11, at 102; Exhibit 12.)

[redacted]

[redacted] Fourth, Sarles repeatedly drank at the mansion and spent social time with Cook, while Scheme employees made jokes about stealing investor money:

> Q. Were you were aware of Mr. Sarles having heard someone make a quote from Wall Street or otherwise exhibiting a game-like attitude towards getting money?
>
> A. That would be in April or May. March, April or May of '08. Many times we would just hang out in Cook's office and we, you know, we would be

> drinking and he would spout off on, you know, "Greed is good," and then what was the other one? Boiler Room they had one where they were actually quoting Wall Street in Boiler Room. And so they would say it or Cook would do it mostly. And then Durand would, too. But, you know, Sarles would be there and Garman would be there, and I would be there. And there would be several people there.

(Exhibit 13, at 124-26.)

> Q. [Reading from declaration:] During my time at Oxford I saw Lien at the Van Dusen mansion perhaps a dozen times. He was with Michael Behm when I saw him with Cook around six times surrounding drinking. The drinking would usually take place in Cook's office and would usually migrate to the basement at the Van Dusen. Am I getting that right?
>
> A. Yes.

(*Id.* at 155.) When questioned in this litigation, [redacted]

(Exhibit 1, at 175.) In fact, Kyle Garman, an employee of the Scheme, corroborated others on this point, having seen Sarles at cocktail parties at the mansion. (Exhibit 14, at 61.)

Sarles' relationship was indeed close with the Schemers since he testified [redacted]

[redacted] And though Sarles claimed that Cook did not pay for anything, Leo Domenichetti (another Scheme employee) testified otherwise about Sarles' reputation among the community of Schemers. Namely, Sarles was known to be "tight" with Cook, and paid by Cook as well. (Exhibit 15, at 193-95.) Sarles was the Schemer's man at the Bank because of the "trust" they had built in him. (Exhibit 16, at 41.) "They [Schemers] didn't do anything through anybody else because they felt that he [Sarles] was the only one that they could trust." (*Id.*)

Sarles even helped in the Scheme's recruiting efforts, attending at least one investment seminar. (Exhibit 17 at ¶ 6, Exhibit 13, at 224-26.) His mere presence at a seminar would have made him aware of the wrongfulness of the Scheme. A seminar promising guaranteed returns of 10 to 15 percent generated by depositing funds in Swiss based accounts and leveraging Sharia-compliant banks that charged no interest would have been facially ridiculous and immediately appeared nefarious to a sophisticated banker like Sarles.

The Scheme accounts [redacted]

B. Sarles Acts Suspiciously Throughout His Relationship with the Scheme, Trying to Cover Up His Involvement with Non-Answers to Internal Investigators and False Sworn Declarations

The Bank's own banking expert, Charles H. Grice, a person with decades of experience in banking practices and compliance requirements, testified that a bank employee who takes steps to allow a fraudulent scheme to avoid detection is a "dirty banker." (Exhibit 18, at 106.) Sarles fits Grice's "dirty banker" description. Sarles responded to direct inquiries about Scheme accounts from the department of the Bank set up to comply with the requirements of the Bank Secrecy and Anti-Money Laundering Act (the "BSA AML Department"). Rather than give responses that would have revealed the Ponzi Scheme, Sarles did what was necessary to enable the Scheme to avoid detection and flourish.

1. Detection-Avoidance Account-Opening Strategies

From the beginning, Sarles suggested the Scheme open accounts as a local (not foreign) company to reduce scrutiny. (Exhibit 19, at 1763-64.) As Joanne Alberts, a Bank department team leader responsible for Bank compliance with anti-money laundering laws testified, [redacted] As part of these account opening activities, Sarles lied on the account opening documents about having first received a state LLC certification for "Crown Forex LLC." (Exhibit

21.)

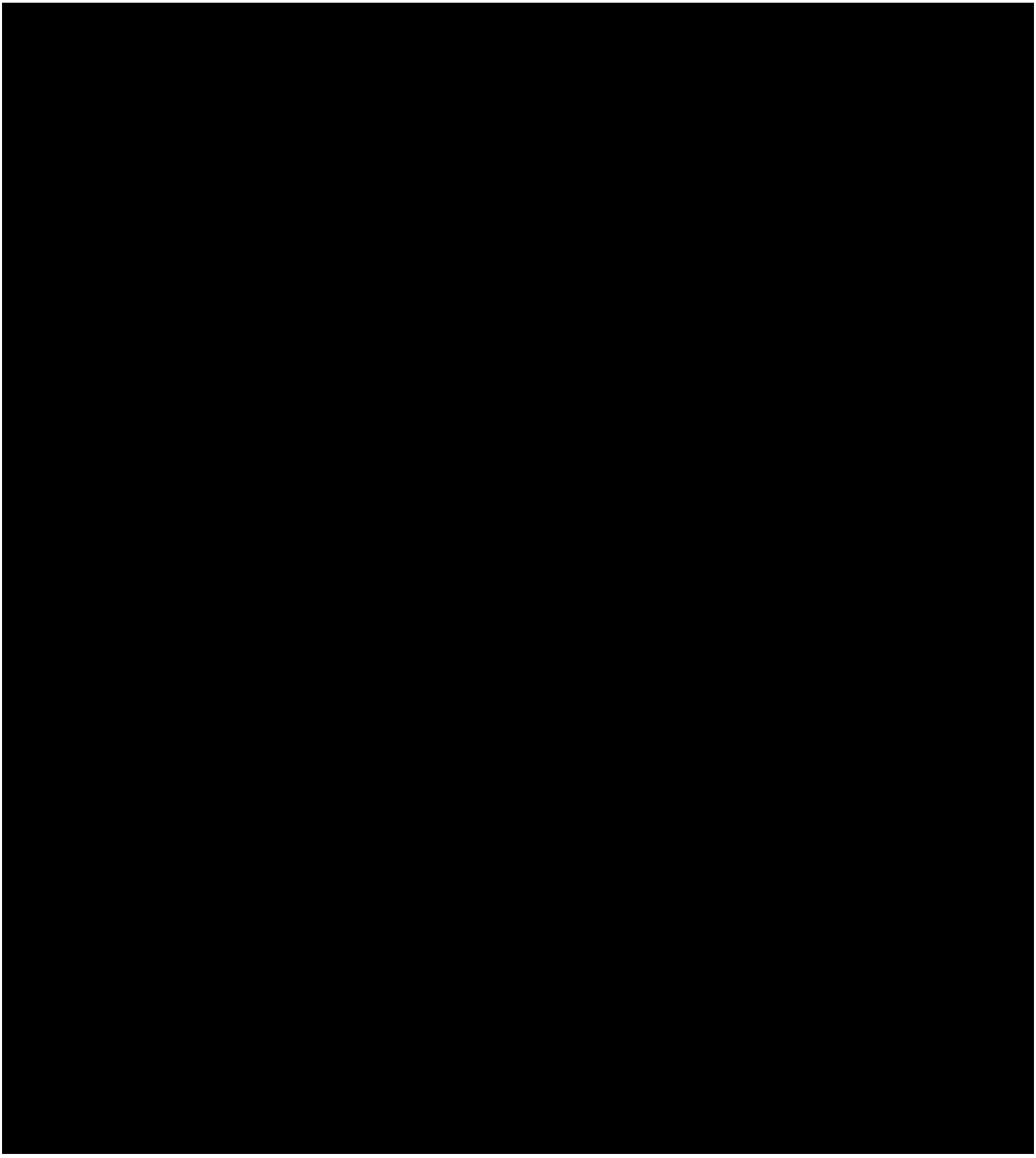
2. Investigation Deflection

The Schemers first came under scrutiny of the BSA AML Department

(Exhibit 22 at AB-MIN-34832.)

[redacted]

[redacted]



[redacted]

[redacted]

[redacted] This is not to say that Sarles left a clean trail. But the Bank followed Sarles' lead in taking active steps to hold on to an "elephant" of a client.

3. Sarles Attends Meetings in Furtherance of the Scheme

[redacted] At a meeting in April or May 2008 that Sarles attended, the Schemers discussed propping up the insolvent Crown Forex SA using investor funds and wanting to use the Bank to do so since they were coming under scrutiny by Wells Fargo. (Exhibit 13, at 175-76.) Again, Sarles failed to tell the BSA AML Department about this as well, [redacted] (Exhibit 1, at 122.) At the meeting (which the jury may conclude occurred despite the Bank's current denials), Sarles was informed by the Schemers of two important matters: (1) that new, incoming investor funds were going to be used to make up for a multi-million-dollar shortfall at Crown Forex SA so as to make it appear to have larger deposits on hand, and (2) that Wells Fargo was questioning the absence of segregated investor accounts. (Exhibit 13, at 175-76.)

4. Wrongful Fund Withdrawals to Non-Owners

In the civil case affidavit, Sarles stated that he was not responsible for withdrawals over $10,000. (Exhibit 5, at ¶ 21.) Yet Sarles acknowledged [redacted] Sarles approved cash transactions that diverted money from the #1705 account to Cook's personal accounts at Cook's direction, even though Cook had no authority to do so. One example of this is shown in Exhibit 27:

[redacted]

[redacted]

[redacted]

5. Duping Individuals to Sign Blank Forms

In another instance, even though [redacted] (Exhibit 1, at 179), Sarles had him sign blank Bank documents that falsely identified Mr. Domenichetti as an "Admin. Assistant" for Oxford Global Investments Inc. (Exhibit 15, at 150, 153-55; Exhibit 30.) He masked the nature of the document being signed by the signer – obviously not something an honest banker would do. Consistently, Sarles testified that he took documents to customer locations for signature, corroborating Sarles as the Bank employee with whom both Mr. Domenichetti and Mr. Pettengill dealt. (Exhibit 1, at 42.)

C. In a Bow to the Scheme Accounts' "Elephant" Status, The Bank Violates Internal Investigation Policies and Disregards Outside Banking Inquiries to Keep the Schemers as Clients

Though the Bank might try to scapegoat Sarles at trial, it cannot so easily disclaim that others at the Bank had knowledge of tortious acts and their wrongfulness. From beginning to end, [redacted] Such lack of interest in following through raises a reasonable inference that the Bank knew of Sarles' deflections, but embraced them to nurture the "elephant" client that a competent investigation would require it to let go.

[redacted]

[redacted]

[redacted]

D. Sarles and the Bank Assist Primary Torts—Creation and not Mere Detection of "Red Flags"

Whether scrutiny falls on Sarles alone, or expands to others in the Bank, the facts show multiple acts of assistance to the specific primary torts that the Receiver alleges in this case. The Bank repeatedly sidesteps the relevant inquiry by casting the question as whether the Bank aided and abetted "the Ponzi Scheme." But that is not the right

question. This case instead concerns aiding and abetting the specific primary torts of conversion, breach of fiduciary duty, fraud and negligent misrepresentation.

The Receivership Entities had a legitimate purpose, at least in theory, to have all funds under their dominion and control devoted to investments. This included maintenance of the funds as promised to investors – in segregated accounts with 100% liquidity without loss of principal. The criminal actors managing the Receivership Entities performed conversion against their organizations. Every dollar managed inconsistently with (1) investment purposes, (2) segregated accounts and/or (3) 100% liquidity without loss of principal constituted a conversion of that dollar away from the rightful dominion and control of the respective Receivership Entity. *See, e.g.*, *Impulse Trading, Inc. v. Norwest Bank Minnesota, N.A.*, 870 F. Supp. 954, 960-61 (D. Minn. 1994) (reciting Minnesota conversion law concerning actions inconsistent with rightful dominion over funds). Even transfers out for "investment" (what leads the Bank to call the Scheme a "partial Ponzi scheme") could not have been according to the rightful dominion and control of the Receivership Entities, when no such "investments" could (or did) guarantee liquidity and principal preservation. Each dollar lost because of that conversion created a liability on the part of the Receivership Entities to the investors. These liabilities are shown in the Receiver's Third Amended Claims List. (Exhibit 40.)

The Bank provided substantial assistance to the tortious acts of conversion, breach of fiduciary duty, fraud and negligent misrepresentation. For example, Sarles knew of the investment parameters, yet opened the Crown Forex 1705 account as a "Checking/Money Market" (rather than investment/fiduciary) account. (Exhibit 21.)

Sarles let Cook (a non-signatory) transfer millions of dollars of investment funds into his personal accounts. (Exhibit 27, Exhibit 37.) And Sarles engaged in numerous atypical banking acts with no legitimate purpose, including the detection avoidance strategies mentioned before, plus failing to open accounts that were actually segregated for investors, as he knew they should have been. (*See* Statement of Facts in Section II(A) and II(B), above.)

A primary illustration of the Bank's substantial assistance is a set of fourteen cashiers' checks totaling $3.2 million that falsely convey the impression that they are payouts from segregated accounts. (Exhibit 38.) Though each reflects funds remitted from the Crown Forex 1705 account, each contains a false remitter line in the name of the check recipient. (*Id.*) In other words, the Bank used its own house checks (whose remitter line entries are completely within Bank control) to further the central falsehood of the Scheme (segregated accounts).

The very existence and origin of the Crown Forex 1705 account constitutes substantial assistance to the primary tortfeasors. Crown Forex LLC was never registered with the State of Minnesota or any other governmental authority. (Exhibit 5, ¶¶14-18.) This is a requirement of the United States Patriot Act. (Exhibit 21.) Sarles knew this and still opened the account:

> 14. I had previously opened accounts for Kiley and Cook and had been provided by them all necessary account opening documents and information. When I opened the Crown Forex LLC account, I was not provided with Secretary of State registration documentation. I told Kiley that he must send the documentation to me after he completed a Secretary of State filing for Crown Forex LLC. At the time I was opening the Crown Forex LLC account, I was aware that the account would hold client investment funds.

(Exhibit 5.) To cover up the lack of proper registration documents, Sarles falsified the account application to indicate that registration documents had been provided in compliance with the Patriot Act:

Required: For Patriot Act compliance: **(Complete one of the following sections)**
If Organization/Non-profit (required for individual opening this account, not required for authorized signers):
Individual's Name: _____ Birth Date: _____ Taxpayer I.D. No. _____
Address (if different from Acct Addr): _____
ID1: DL/National ID _____ Phone: _____
ID1: DL/National Issuer _____ Issue Date _____ Expiration Date _____
ID2: DL/National No. _____ Issue Date _____ Expiration Date _____
ID3: DL/National No. _____ Issue Date _____ Expiration Date _____
If Corporate/Partnership/LLC/LLP (Please describe type of documentation provided (e.g. Articles of Incorporation, etc.) All documentation must be forwarded to the CIF Dept. MS 7012.
Report from a state registration information website

(Exhibit 21.) Even warnings that the account would be closed or frozen for lack of proper documentation by the Bank's Monitoring Department were brushed aside. (Exhibit 5, ¶¶17-19; Exhibit 36, at 125-28)

The expert report of Catherine Ghiglieri (ratified in her sworn testimony) supplies additional exhaustive examples of the Bank's numerous policy and law violations of the Bank in support of the Scheme, which led to [redacted]

[redacted] The authentic documents attached to the Complaint supply even more. (*E.g.*, Exhibits 15, 21, 25, and 30 (showing misuse of banking "ODM" machines, fabrication of account addresses to give them legitimizing suite numbers, continued high volume operation of accounts after Bank awareness of a February 2009 liquidation of the ostensible Swiss investment vehicle, generation of a second account through falsifying that state registration information was obtained, etc.).) In the aggregate, these acts of substantial assistance helped the criminal Scheme masterminds control the Receivership Entities in a self-dealing manner, for their own personal gain.

E. Compilation Data Supporting Damages and the Underlying Factual Record on Which it is Based

Part of the Bank's motion asks for summary judgment of no damages, arguing that no evidence of damage appears in the record. (Bank Mem., at 24-26.) To the contrary, the Third Amended Claims List is a Court Order finding the liabilities owed by the Receivership Entities to the victims of this fraud. (Exhibit 39, Exhibit 40.) If this were the

only document in the record, this Court Order would by itself constitute evidence of what harm the Receivership Entities have incurred as a result of primary torts inflicted upon them by their former criminal mastermind management. But there is more.

The Bank, like the Court, is well-advised about the compilation methodologies used to generate the Third Amended Claims List. (Exhibit 39.) The Receiver produced the data underlying the compilations, including summaries of transactions (backed by sworn testimony) of the SEC's own forensic accountant, the documents supporting those summaries, and additional information that was obtained by the Receiver and vetted by the Court after the SEC completed its work. (*Id.*) With all of these underlying materials, the Receiver assessed the legitimate amounts of numerous investor claims, resulting in the Third Amended Claims List. (*Id.*) This was a Court-approved process, transparent to all participants, and resulting in a binding Court order establishing the current balance sheet liabilities.

F. Contested Discovery Might Still Reveal More Facts Supporting Liability

The Receiver succeeded in building its evidentiary record mentioned above despite significant gaps in the Bank's discovery production. Presently pending are two motions that would, if granted, respectively reveal the content of Suspicious Activity Reports (SARs), complete the record on likely Bank spoliation, and permit inspection of source repositories belonging to Sarles and one of his supervisors, Stephen Bianchi. (*See* Dkt. Nos. 160, 168-1.) To the extent the Court believes the present summary judgment record supports only circumstantial evidence of the Bank's culpable "actual knowledge,"

and/or direct evidence of the Bank's "constructive knowledge" (a standard that fully applies, as discussed below), favorable discovery rulings would likely yield even more. Although not necessary to defeat the Bank's motion for summary judgment, these sources would likely yield additional direct evidence of "actual knowledge" —admissions and smoking guns.

For these reasons, the Receiver has supplemented its response to this motion with a declaration under Federal Rule of Civil Procedure 56(d), as a further reason for the Court to recognize that summary judgment is not appropriated.

III. LAW OF THE CASE PRECLUDES SUMMARY JUDGMENT

Under the law of this case recited by the Eighth Circuit in *Zayed v. Associated Bank*, 779 F.3d 727, 733-34 (8th Cir. 2015), facts already established permit the jury to make a reasonable inference of knowledge and substantial assistance, and find the Bank liable for aiding and abetting. Under the heading "Actual Knowledge," the Eighth Circuit zeroed in on several well-established facts about the knowledge of Bank officer Lien Sarles:

> Sarles was introduced to Kiley by Sarles's step-brother, who worked for Kiley, and Sarles visited Kiley at his home, which doubled as Kiley's place of business, before Kiley appeared at the bank to open an account. Sarles knew the Crown Forex LLC account was ostensibly created as a vehicle for investors to be able to take part in the schemers' so-called investment plan, and Sarles knew the money in the Crown Forex LLC account was to be transferred to a Crown Forex, SA account in order to accomplish the planned investment. Yet none of the transfers of investors' funds Sarles facilitated were from Crown Forex LLC to Crown Forex, SA.
>
> Sarles actually knew Crown Forex LLC was not registered with the Secretary of State of Minnesota when Associated Bank accepted the account application stating registration documentation was gleaned from

> the secretary's website. Sarles stated in his affidavit, "I told Kiley that he must send the documentation to me after he completed a Secretary of State filing for Crown Forex LLC." (Emphasis added). But this fact did not stop Sarles from personally helping Kiley and Smith open the account and signing a document on behalf of Associated Bank stating Crown Forex LLC was organized under the laws of Minnesota. Sarles knew Associated Bank's monitoring department would freeze or close accounts without proper documentation, and he knew Crown Forex LLC did not submit the documentation. Sarles admits he never contacted Kiley about the missing documentation to prevent Kiley's account from being frozen or closed.
>
> Finally, even though Sarles actually knew Kiley and Smith were the signatories on the Crown Forex LLC account, Sarles knowingly authorized Cook, a non-signatory, to withdraw millions of dollars of investor money and deposit much of it in Cook's personal accounts.

Zayed, 779 F.3d at 733-34. This core set of facts regarding Sarles' shady dealings alone defeats summary judgment on the "knowledge" prong. As to substantial assistance, the Eighth Circuit also held that now-established facts sufficed:

> Sarles knowingly opened a bank account for a non-registered entity to hold investors' money and then authorized Cook, a non-signatory, to withdraw millions of dollars of investor money and deposit much of it into Cook's personal accounts. These were not routine transfers, nor "quintessential banking activities," as Associated Bank describes them.

Id. at 735 (citation omitted). Though the Eighth Circuit ruled under a procedural posture that required it to assume the truth of these foundational facts, discovery has confirmed them all to be true.[2] The Bank's motion for summary judgment improperly seeks to overturn this law of the case.

[2] The following record citations show that every relevant pleaded fact is now an established fact, particularly when inferences must be drawn in favor of the non-moving party. Sarles was introduced to Kiley, as pleaded (Exhibit 1, at 60-62); Sarles knew the account was for an investment plan, as pleaded (*id.* at 63-65); Sarles knew the funds were to be transferred to Crown Forex S.A., as pleaded: (Exhibit 1, at 71 and 123); no investor funds were directly transferred from the Crown Forex LLC account, as pleaded (Exhibit

The Court should deny the Bank's motion for summary judgment on law of the case grounds alone. Any analysis of the full factual record beyond that only bolsters this necessary result.

IV. ARGUMENT IN ADDITION TO LAW OF THE CASE

Given the record of the Bank's deep involvement with, and help to, the Scheme, the Court should deny summary judgment. The Bank ignores or sidesteps nearly every material fact, as well as every instance of a Bank employee's material omission or dishonesty. The Bank instead relies on bare, self-serving denials of knowledge and a fabricated tale that Sarles' heart was pure because he told his federal prosecutor cousin about the Scheme. As shown above, the Bank's main rhetorical flourish is not true. Thus, even if the law of the case did not alone foreclose summary judgment (which it should), the record amply supports the jury's ultimate finding of knowledge, substantial assistance, and damages.

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6); Sarles knew none of the funds were so transferred, as pleaded (Exhibit 5); Sarles knew of no state registration when account-opening documents stated otherwise, as pleaded (Exhibit 1, at 108-09; Exhibit 5 at ¶ 14); Sarles knew improper documentation would lead to an account freeze, as pleaded (Exhibit 5, at ¶¶ 18-19); Sarles never contacted Kiley for proper documentation, as pleaded (*Id.*); and Sarles authorized Cook's transfers while aware that only Kiley and Smith had authorization, as pleaded (Exhibit 5, at ¶¶ 9-10).

A. Summary Judgment and Aiding and Abetting Liability Standards

1. Knowledge Over Self-Serving Denials is a Credibility Issue Not Decidable on Summary Judgment

When state of mind is at issue, summary judgment is improper when circumstantial evidence is inconsistent with a movant's showing of what a witness supposedly knew at a particular time. *See Lyles v. City of Barling*, 181 F.3d 914, 917-18 (8th Cir. 1999) (vacating summary judgment of qualified immunity because record conflicted with what police officers testified knowing at time of warrantless search). A party's mental state is inherently a question of fact that turns on credibility. *United States v. Leak*, 123 F.3d 787, 794 (4th Cir. 1997). "When the state of mind of a person is at issue and the record contains direct evidence of that state of mind in the form of that person's sworn statement, conflicting circumstantial evidence normally creates only an issue of credibility for trial and summary judgment is inappropriate." *United States v. 717 S. Woodward St.*, 2 F.3d 529, 534 (3d Cir. 1993). In fact, summary judgment for a movant who shoulders the burden of proof to show a particular state of mind may be granted over the self-serving denials of the non-movant, if the denial is impeached by a well-supported showing to the contrary. *Gonzalez v. Sec'y of Dept. of Homeland Sec.*, 678 F.3d 254, 263 (3d Cir. 2012).

More generally, the familiar summary judgment standards apply to the Bank's motion. If the movant makes an initial showing that there is an absence of any genuine factual dispute over an essential element of a claim, the burden shifts to the nonmovant to show the presence of a genuine issue of material fact that, if resolved for the nonmovant, would entitle the nonmovant to judgment as a matter of law. *Jackson v. Riebold*, 815 F.3d

1114, 1119 (8th Cir. 2016). In the process, the Court does not weigh the evidence or assess credibility. *Morgan v. UPS*, 380 F.3d 459, 468 (8th Cir. 2004) Instead, all reasonable inferences must be made in favor of the nonmovant. *Id.* at 463.

2. Constructive Knowledge Also Counts Toward Aiding and Abetting Liability under Minnesota Law

On the elements of aiding and abetting, the Bank wrongly dismisses constructive knowledge as a permissible standard. In general, to establish common law aiding and abetting, the Receiver must show that (1) a tort was committed causing injury, (2) the Bank knew of the wrongdoing, and (3) the Bank substantially assisted the wrongful acts. *Am. Bank v. TD Bank, N.A.*, No. 09-cv-2240, 2011 U.S. Dist. LEXIS 49646, at *21 (D. Minn. May 9, 2011); *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 187 (Minn. 1999). The first element is not in dispute in this case. For the second element, the Bank argues that constructive knowledge does not suffice, and "actual knowledge" must be proven. (Bank Mem. 14.)

The opposite is true. In *Witzman*, the Minnesota Supreme Court resolved previous uncertainty by holding that professionals have no immunity from, and are not wholesale excluded from, aiding and abetting liability. *Witzman*, 601 N.W.2d at 187. In remarks that apply to both professionals and non-professionals, the Supreme Court explained the "knowledge" element. It first observed the general principle under which courts have typically allowed "constructive knowledge" to be presumed:

> In cases where the primary tortfeasor's conduct is clearly tortious or illegal, some courts have held that a defendant with a long-term or in-depth relationship with that tortfeasor may be deemed to have constructive

> knowledge that the conduct was indeed tortious. However, where the conduct is not a facial breach of duty, courts have been reluctant to impose liability on an alleged aider and abettor for anything less than actual knowledge that the primary tortfeasor's conduct was wrongful.

Witzman, 601 N.W.2d at 188 (citations omitted). After describing these "constructive knowledge" standards, the Supreme Court then proceeded to analyze whether, in the case at bar, the primary tortfeasor's breach of a duty was "clear." *Id.* (finding it was not, and thus moving on to "actual knowledge" analysis).

It would have served no purpose for the Supreme Court to analyze the constructive knowledge question unless it was applying that as a component of Minnesota aiding and abetting law. Subsequent lower courts have cited *Witzman* while recognizing that "knowledge" under Minnesota aiding and abetting law may include "constructive knowledge," if the underlying conduct was illegal or clearly tortious. *E.g.*, *Bank of Montreal v. Avalon Capital Grp., Inc.*, No. 10-cv-591, 2012 U.S. Dist. LEXIS 46935, at *21 (D. Minn. Apr. 3, 2012) (holding facts pleaded are "sufficient to create a plausible implication of constructive knowledge of clearly tortious or illegal conduct," citing *Witzman*); *Christopher v. Hanson*, No. 09-cv-3703, 2011 U.S. Dist. LEXIS 60201, at *34 (D. Minn. June 6, 2011) (holding primary tortfeasor's conduct "not so clearly illegal or unlawful so as to justify imputing constructive knowledge," citing *Witzman*); *see also Chem-Age Indus. v. Glover*, 652 N.W.2d 756, 775 (S.D. 2002) (recognizing Minnesota's adoption of "constructive knowledge," citing *Witzman*).[3]

[3] On page 14 of its memorandum, the Bank cites a Southern District of New York decision to argue that constructive knowledge is insufficient. But that case did not apply Minnesota law, nor address the controlling *Witzman* decision. The Bank also cites an

Even if the higher standard of "actual knowledge" were required, a "defendant's general awareness of its overall role in the primary violator's illegal scheme is sufficient knowledge for aiding and abetting liability." *K&S P'ship v. Cont'l Bank, N.A.*, 952 F.2d 971, 977 (8th Cir. 1991) (citation omitted). Knowledge is a question of fact and may be inferred from circumstantial evidence, including evidence such as conducting business in a manner that is atypical or lacking in business justification. *Id.* at 977-79; *Am. Bank*, 2011 U.S. Dist. LEXIS 49646, at *22-24. Even "otherwise unremarkable events viewed together may suggest an unusual pattern of events intimating an illegal scheme." *K&S P'ship*, 952 F.2d at 979-80; *Metge v. Baehler*, 762 F.2d 621, 626 (8th Cir. 1985) ("Although the facts we have recounted here at length are unremarkable taken in isolation, we find that taken together, they present what should have been a jury issue on the question of aiding-and-abetting liability"); *see also Arreola v. Bank of Am., N.A.,* No. 11-cv-6237, 2012 U.S. Dist. LEXIS 144765, at *8-9 (C.D. Cal. Oct. 5, 2012) (ignoring red flags may, with other factors, evidence knowledge resulting in denial of motion to dismiss).

Regardless of whether the knowledge is "constructive" or "actual," such knowledge is evaluated in tandem with the element of "substantial assistance." *Witzman*, 601 N.W.2d at 188. Where there is a minimal showing of substantial assistance, a greater showing of scienter is required. *Id.* The converse is also true. *Camp v. Dema*, 948 F.2d 455, 459 (8th Cir. 1991) (liability for aiding and abetting may be established by a strong showing of substantial assistance coupled with a minimal showing of knowledge). Factors

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Eighth Circuit decision from 1991 on the same page. To the extent in conflict with *Witzman*, which the Minnesota Supreme Court decided in 1999, *Witzman* supersedes and controls.

to consider include "the relationship between the defendant and the primary tortfeasor, the nature of the primary tortfeasor's activity, the nature of the assistance provided by the defendant, and the defendant's state of mind." *Witzman*, 601 N.W.2d at 188. In a case involving professional services, "'substantial assistance' means something more than the provision of routine professional services." *Id.* at 189; *see also Wight v. BankAmerica Corp.*, 219 F.3d 79, 92 (2d Cir. 2000) (permitting pleading where substantial assistance included "arranging for and indeed supervising the transfer of money through the various accounts," in the context of "personal relationships" – such as that which existed between Bank Vice President Sarles and the Scheme).

3. A "Proximate Cause" Requirement is Not Part of Minnesota Law's "Substantial Assistance" Element

The Bank misstates the applicable legal standards in another way to make them appear more difficult to satisfy than they are. The Bank relies on the 1991 *K&S P'Ship* decision from the Eighth Circuit to argue that the Receiver must prove an extra element to establish aiding and abetting liability. (Bank Mem. 23.) The Bank argues, "substantial assistance 'requires the plaintiff to show that the secondary party proximately caused the violation.'" (*Id.*, purportedly quoting *K&S P'Ship*, 952 F.2d at 979). But this Eighth Circuit pronouncement has been superseded by the Minnesota *Witzman* decision. Minnesota law does not mention or require "proximate cause."

First, the Bank crops the quotation. After stating that federal common law for the substantial assistance prong "requires the plaintiff to show that the secondary party proximately caused the violation," the *K&S P'Ship* sentence goes further: "or, in other

words, that the encouragement or assistance was a substantial factor in causing the tort." *Id.* at 979. Put another way, the Eighth Circuit merely equated "proximate cause" with the notion of the aid being a "substantial factor" in causing the tort. This appears to be a somewhat circular way of saying that aiders and abetters are liable for giving substantial assistance to a primary tortfeasor (the "substantial factor")—in practice making proof of substantial assistance already carry with it the Eighth Circuit's notion of proximate causation.

Second, the Minnesota Supreme Court's more recent 1999 statements foreclose any additional proximate cause requirement. In *Witzman*, the Minnesota Supreme Court explained more broadly, without specifying a proximate causation requirement, that in a professional services context a joint tortfeasor substantially assists the primary tortfeasor when it provides nonroutine professional services. *Witzman*, 601 N.W. 2d at 189. *Witzman* also handed down that knowledge and substantial assistance must be evaluated in tandem, *i.e.*, on a sliding scale. *Id.* Such sliding scale treatment means that only a "minimal" showing of substantial assistance suffices to establish liability if a greater showing of scienter is present. Allowing such a sliding scale (as Minnesota does) is inconsistent with always requiring a showing of proximate cause (*i.e.*, something more than "minimal" assistance) to prove substantial assistance.

4. Damages Need Not be Established with Precision, and Need Not Rely on Experts

Finally, the Bank suggests several incorrect legal standards governing how the Court may permit the jury to assess damages. Contrary to the Bank's arguments, the law does not compel the Receiver to establish damages with ultimate precision, or to use an expert in the process.

The Eighth Circuit applies Minnesota law to hold that any difficulty in proving the amount of damages does not, of itself, stand as a reason to preclude all recovery. "Once the fact of loss has been shown, the difficulty of proving its amount will not preclude recovery so long as there is proof of a reasonable basis upon which to approximate the amount." *Children's Broadcasting Corp. v. The Walt Disney Co.*, 245 F.3d 1008, 1016 (8th Cir. 2001) (citing Minnesota law). A "reasonable basis" may include "exhibits in the record before the jury" that contain foundational financial data relevant to the loss. *Id.* at 1016-17. When the record contains such financial data, the "jury's award does not have to match any particular figure in the evidence as long as the award 'is within the mathematical limitations established by the various witnesses and is otherwise reasonably supported by the evidence as a whole.'" *Id.* at 1017 (quoting Minnesota law). In sum, a jury is "entitled to sort through the evidence presented at trial and to arrive at what it consider[s] to be the damages caused by the conduct it [finds] to be wrongful." *Id.* (reversing JMOL of no damages).

Likewise, Minnesota law does not require that a plaintiff in a fraud, breach of fiduciary duty, conversion, and/or false representations or omissions case must present an

expert to be entitled to collect damages. While there are certain types of cases and issues where Minnesota courts have suggested that such testimony is required, *e.g.*, *Jerry's Enters. v. Larkin & Lindgren*, 711 N.W.2d 811, 817 (Minn. 2006) (*citing Admiral Merchs. Motor Freight, Inc. v. O'Connor & Hannan*, 494 N.W.2d 261, 266 (Minn. 1993)), this is not such a case. Typically, courts require expert testimony in two types of cases: first, for professional negligence or malpractice, *see id.*, to prove the appropriate standard of care; and second, to prove the amount of stock value that has been lost because of tortious acts. *See, e.g.*, *Dietz v. Spangenberg*, No. 11-2600 ADM/JJG 2014 U.S. Dist. LEXIS 17046, at *9 (D. Minn. Feb. 11, 2014); cf. *Wisconsin Alumni Research Foundation v. Xenon Pharm., Inc.*, 591 F.3d 876 (7th Cir. 2010) (rejecting argument that complexity of underlying facts required an expert to prove damages under Wisconsin law). In contrast, Minnesota courts have not required an expert to perform arithmetic that any person with a high school education can perform. (Exhibit 8 at 107.)

Federal courts have also addressed the question of whether an expert is required, and have found that some instances—for example, the fair market value of stock prices at a given point in time or the amount of price fluctuation attributable to wrongdoing – can require expert testimony. *See, e.g.*, *In re Warner Commc'ns Sec. Litig.*, 618 F. Supp. 735, 744 (S.D.N.Y. 1985). In other cases, courts have rejected arguments for requiring experts, finding them potentially helpful, but not required. *See, e.g.*, *Boyer v. Gildea*, 475 B.R. 647, 673 n.11 (N.D. Ind. 2012); *see also Seymore v. Union Pac. R.R. Co.*, No. 4:10-cv-239 BSM, 2011 U.S. Dist. LEXIS 100071, at *12 (E.D. Ark. Sept. 6, 2011) ("[E]xpert testimony is not required to prove that the value of plaintiffs' property has been diminished."). No

federal court has required a damages expert to help a jury perform high school arithmetic.

B. Sarles and Others at The Bank Had Both Actual and Constructive Knowledge of the Primary Torts Committed by the Criminals Against the Receivership Entities

Ignoring that the law of the case forecloses the argument, the Bank asserts four grounds for seeking a finding of insufficient "knowledge" for aiding and abetting liability. First, the Bank relies on bare denials of Bank employees (particularly Sarles) asserting lack of knowledge of "the Ponzi scheme." (Bank Mem., at 15-17.) Second, the Bank recharacterizes its atypical banking activities as inadequate "red flag" detection, and relies on non-Minnesota case law that downplays the significance of failure to act on red flags. (*Id.* at 17-19.) Third, the Bank contends that the Receiver's expert admitted that "in this case, actual knowledge cannot be inferred from Receiver's alleged 'red flags' and 'atypical conduct.'" (*Id.* at 19.) Finally, the Bank contends that Sarles' actions during the relevant time earned "more scrutiny" and were thus inconsistent with "actual knowledge." (*Id.* at 20-22.) The Bank's four grounds each lack merit.

First, the Bank studiously avoids discussion of most of the material facts. *See* above at Section II. As a whole, these material facts place Sarles at the Scheme a multitude of times, deepening his close relationship with the Schemers at strip clubs, drinking parties and ball games. (*E.g.*, Exhibit 1, at 174, Exhibit 5, at ¶21.) These material facts show that Sarles was aware of what the accounts were for and how the accounts were inconsistently used. (Exhibit 22, at AB-MIN-34830.) The material facts include Sarles acting dishonestly

multiple times, and violating banking policy to keep his "elephant" of a client. (Exhibit 1, at 63, 109, 114-17, 132-33, 139-40.) For example, Sarles opened accounts with false documentation calculated to deflect or delay scrutiny, and then deflected internal investigations with additional falsehoods. (*Id.*) Sarles also acted in violation of internal policy [redacted] (Exhibit 1, at 139-40, Exhibit 27, Exhibit 28.) The record is void of any innocent explanation for why the Bank suspiciously ceased all investigative activities once it had sufficient information to know either that Sarles was lying about the fraud accounts, or was stonewalling to keep the elephant happy. The Bank wanted to keep the benefits of the "elephant hunting" that Sarles had achieved. Bare denials do not earn summary judgment for the Bank against this record.

Second, the Bank's attempt to recharacterize ***its own atypical actions*** as mere failures to detect red flags cannot withstand scrutiny. Nor can the Bank's invocation of non-Minnesota authorities. Namely, knowledge may be inferred from evidence of the aider and abetter conducting business in a manner that is atypical or lacking in business justification. *K&S P'ship*, 952 F.2d at 977-79; *Am. Bank*, 2011 U.S. Dist. LEXIS 49646, at *22-24. Even "otherwise unremarkable events viewed together may suggest an unusual pattern of events intimating an illegal scheme." *K&S P'ship*, 952 F.2d at 979-80; *Metge*, 762 F.2d at 626. The jury evaluates such "atypical" conduct independent of the presence or absence of "red flags."

Again, the fact section above catalogues much of that atypical activity – including falsifying internal documentation, deflecting / delaying scrutiny with lies and half-truths, as well as the Bank somehow always ceasing its own investigations. (See supra Section II.) The Receiver's expert collected numerous additional examples of atypical conduct—violation of internal policies and federal banking law—and concluded that the Bank's quantity and nature of atypical actions were "egregious." (Exhibit 28, at 138.) But even if the Court were to accept the "red flag" recharacterization, that would still not demonstrate the Bank's lack of knowledge as a matter of law. *See, e.g.*, *Simi Management Corp. v. Bank of America, N.A.*, 930 F. Supp. 2d 1082, 1100 (N.D. Cal. 2013) (concluding that "a reasonable jury could find that [the Bank] had actual knowledge that [defendant] was committing embezzlement and conversion," where the Bank's "fraudulent transactions could support a reasonable jury finding [the Bank's] actual knowledge."); *Arreola.*, 2012 U.S. Dist. LEXIS 144765, at *8-9 (ignoring red flags may, with other factors, evidence knowledge for aiding and abetting liability); *see also Mosier v. Stonefield Josephson, Inc.*, No. 11-cv-2666, 2011 U.S. Dist. LEXIS 124058, at *20-26 (C.D. Cal. Oct. 25, 2011) (denying motion to dismiss, holding that a professional's failure to comply with official standards allowed an inference of sufficient knowledge for Ponzi scheme "aiding and abetting" liability); *Anwar v. Fairfield Greenwich, Ltd.*, 728 F. Supp. 2d 372, 443 (S.D.N.Y. 2011) (denying motion to dismiss aiding and abetting claim because red flags related to the Bernie Madoff scheme supplied enough facts to raise a strong inference of knowledge); and *SEC v. Treadway*, 430 Supp. 2d 293, 324 (S.D.N.Y. 2006) (denying summary judgment because material issues of fact existed to each claim, including

whether defendants had knowledge of an anti-market timing stance of a prospectus and that a hedge fund's trading could violate policy).

Third, the Bank misconstrues the Receiver's expert's testimony. Even the quoted testimony from Ms. Ghiglieri does not say what the Bank contends it to say. Namely, Ms. Ghiglieri did not testify that "actual knowledge cannot be inferred." (Bank Mem., at 19.) Instead, she merely answered "I think that's correct" to a question asking whether she ***herself*** can tell, in sworn testimony, which of two hypothetical reasons for the atypical conduct held true—implementation of policies poorly, versus internal knowledge about the Ponzi scheme with an intent to assist it. Ms. Ghiglieri is not a "knowledge" expert or a mind reader; she is a banking expert who catalogued the "egregious" set of atypical acts, leaving it for the jury to determine, in light of all of the other evidence in the case, the reasons for the Bank's extraordinary conduct. (Exhibit 27, at 138, Exhibit 28.) As such, and unlike the Bank's expert, she comported with the rule that experts ***must not*** testify about state of mind. *United States ex rel. Dyer v. Raytheon Co.*, No. 08-10341-DPW, 2013 U.S. Dist. LEXIS 135691, at *36 (D. Mass. Sep. 23, 2013) ("[Expert witness] Silverstone may not testify or opine on the issue of Raytheon's knowledge or intent."); *Holmes Grp., Inc. v. RPS Prods., Inc.*, No. 03-40146-FDS, 2010 U.S. Dist. LEXIS 102727, at *16 (D. Mass. June 25, 2010) ("An expert may not testify to another person's intent. No level of experience or expertise will make an expert witness a mind-reader.").

Finally, the Bank seeks improper favorable inferences as a movant when arguing that the actions Sarles took invited more scrutiny, and supposedly show lack of actual knowledge as a result. First, that Sarles "escalated" a July 2009 request by Cook for cash

to a superior means nothing (*see* Bank Mem., at 20), since the Bank would not execute the request unless he did so. He had no choice—it was the largest purchase of cash that branch had ever seen. (Exhibit 48.) Second, the Bank notes that Sarles' failure to obtain a copy of the Crown Forex LLC articles of incorporation also risked detection, and thus was inconsistent with knowledge. (Bank Mem., at 21.) Even if true, this does not explain away Sarles' active falsification of information on account opening documents, affirmatively lying about having obtained that document. Third, the Bank argues that the initial indication that there would be no wire activity also increased risk of detection, and was also inconsistent with knowledge. (Bank Mem., at 21-22.) But the Bank's testimony relies on a banking expert who knows how monitoring software works. (Bank Mem., at 22.) The Bank does not tie such knowledge of intricate details of monitoring software to Sarles. Finally, Sarles did not "risk detection" by "call[ing] a federal prosecutor" as the Bank contends. (*Id.* at 22.)

Ironically, in trying to disavow knowledge, the Bank only embraces it. As stated above, Minnesota law permits constructive knowledge to suffice. A jury may find constructive knowledge when the primary torts are criminal or clearly tortious, and where the relationship is long-term or in-depth. *Witzman*, 601 N.W. at 188. This is clearly true here, as the Bank admits by relying on *Rosner v. Bank of China,* No. 06 CV 13562, 2008 U.S. Dist. LEXIS 105984 (S.D.N.Y. Dec. 18, 2008). As the Bank contends, Rosner involved certain facts that make it "nearly on all fours with this case." (Bank Mem., at 18.) The Rosner court found such facts to indicate "constructive knowledge of a fraudulent scheme." (*Id.*, quoting Rosner.) Therefore, the Bank does not contest that the present facts

involve constructive knowledge on the part of the Bank. Indeed, it has not moved for summary judgment on the alleged ground of lack of constructive knowledge.

C. Sarles and Others at The Bank Substantially Assisted the Criminals in their Primary Torts

Again ignoring that the law of the case forecloses the argument, the Bank alleges that the record lacks evidence of substantial assistance. The Bank's arguments are misplaced. And the Court cannot grant the Bank the inferences that it seeks as a movant for summary judgment.

First, the Bank recharacterizes all of its numerous "egregious" atypical banking acts with one innocent gloss—that "Mr. Sarles made errors when providing routine banking services." (Bank Mem., at 23.) This recharacterization borders on the absurd. The very existence of the central account of the Scheme—Crown Forex 1705—constitutes substantial assistance to the primary torts. This account would not have existed absent atypical banking activities, such as the Bank's falsification of account opening documents, false indications of no expected wire activity and (significantly) false indications of it being a checking/operating account rather than a fiduciary account for holding investor funds. (Exhibit 46.) Sarles then lied repeatedly when acting for the benefit of the Scheme. He did everything a "dirty banker" would do to help it avoid detection, including supplying false information to internal investigators, or ignoring those investigators entirely. (Exhibit 22, Exhibit 23, Exhibit 24.) Sarles personally authorized conversions of investor funds from the Crown Forex 1705 account to Cook's personal accounts at Cook's direction, knowing that Cook was not authorized on the account.

(Exhibit 5, at ¶¶9-10, Exhibit 6, Exhibit 27, Exhibit 37.) The Bank further advanced the Scheme by generating fourteen cashier's checks with falsified remitters, all in support of lending the veneer of segregated accounts. (Exhibit 38.) *See Simi,* 930 F. Supp. 2d at 1100 (false remitters factored in denial of aiding and abetting summary judgment).

Second, the Bank makes a conclusory assertion that no conduct of the Bank proximately caused the underlying primary torts. (Bank Mem., at 23.) This, too, borders on the absurd. As reflected throughout this memorandum, had Sarles or the Bank chosen to act appropriately on facts that they knew, all of the Scheme's activities at the Bank would either never have begun, or would have been shut down promptly. More to the point, proximate cause is not the standard under Minnesota law, as discussed in detail above.

D. Voluminous Evidence Supports the Receiver's Damages Calculations, Which Rely on Sound Principles of Minnesota Damages Law

The Bank argues for a finding of zero damages on the grounds that the Receiver has no witness, and the Receiver supposedly seeks damages to which he is not legally entitled. The Bank is wrong on both grounds.

First, as discussed before, this is not the type of case in which a damages expert is required. Indeed, the SEC accountant who testified as to his data compilations explained that anyone with a high school background and knowledge of what a checking account is could do the required calculations—money into the Scheme minus money back to investors. (Exhibit 8, at 106-108.) *See Children's*, 245 F.3d at 1016.

Nor is the Receiver's damages theory out of line. This model reflects the loss to the Receivership Entities caused by the criminal masterminds in committing the primary torts against the Receivership Entities—balance sheet debts to defrauded investors. The Bank misunderstands the damages theory of this case when it argues incorrectly that "Receiver is seeking damages sustained by ***investors*** whom he has never been appointed to represent." (Bank Mem., at 25.) To the contrary, while investor harm lies in the background, the losses addressed in this case are losses to the Receivership Entities: liabilities that it owes to investors as a result of the torts that the Bank helped to perpetrate.

Nor is there any basis for carving, subdividing or apportioning. Under Minnesota law, an aider and abetter is jointly liable with the primary tortfeasor for the entirety of the loss. *Am. Bank of St. Paul*, 2011 U.S. Dist. LEXIS 49646, at *29 ("Under [civil aiding and abetting] theories of recovery, the underlying tortfeasor is jointly liable with his accomplice . . . .") (citing *Witzman*); *see also Soo Line R.R. Co. v. Overton*, 992 F.2d 640, 651 (7th Cir. 1993) ("Minnesota makes each co-defendant initially liable, as a joint tortfeasor, for the entire amount of the plaintiff's injury . . . ."). Contrary to the Bank's arguments, "retroactive" liability based on acts preceding the Bank's involvement is also proper. (Bank Mem., at 24, citing non-Minnesota authority to criticize "retroactive" liability); *but see Tolbert v. Gerber Indus., Inc.*, 255 N.W.2d 362, 366 (Minn. 1977) ("As we use the term 'joint tortfeasors' it includes all cases where there is joint liability for a tort, whether the acts of those jointly liable were concerted, merely concurrent, or even successive in point of time.") (citation and internal quotation omitted).

The Receiver has made available all of the evidence supporting each of its two alternative damages calculations. The lower amount ($63,681,646.87) gives full credit to the Bank's current "proximate cause" argument (Bank Mem., at 27) that posits that it can only be responsible for damages tied to specific accounts at the Bank. The higher amount ($160,597,075.32) is proper under Minnesota tort law, since aiders and abettors are jointly liable for the full amount of damage caused by the primary tortfeasors.

V. CONCLUSION

The egregious record of Bank and Bank officer lies, deflections, deep knowledge and deep involvement in the Scheme does not support summary judgment for the Bank. The jury will have more than enough facts to calculate damages. The Receiver therefore respectfully requests that the Court deny the Bank's motion for summary judgment on both liability and damages.

Dated: November 21, 2016

Respectfully submitted,

/s/ William W. Flachsbart

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CERTIFICATE OF SERVICE

The undersigned attorney of record certifies that on November 21, 2016, copies of the foregoing document were served upon counsel for Defendant via e-mail to the following addresses:

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