UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

R.J. ZAYED, In His Capacity as Court-Appointed Receiver for the Oxford Global Partners, LLC, Universal Brokerage, FX, and Other Receiver Entities, Plaintiff, vs. ASSOCIATED BANK, N.A., Defendant.	Case No. 13-cv-00232 (DSD-SER)

RECEIVER'S REPLY IN FURTHER SUPPORT OF HIS MOTION TO STRIKE PORTIONS OF THE REPORT OF AND BAR TESTIMONY OF KARL JAREK

INTRODUCTION

Associated Bank's brief attempting to defend its expert Karl Jarek opens with a claim that is immediately and provably false. It is also a claim that is entirely beside the point of the Receiver's motion, which is to challenge certain aspects of Mr. Jarek's Report and potential trial testimony and has nothing to do with the Receiver's own damages evidence. It is one of the many attempts to distract this Court from the shortcomings of its own expert witness. Neither these baseless attempted diversions, nor any of the substantive responses and concessions, preclude the relief that the Receiver seeks in its motion – namely, to strike portions of the expert report of Mr. Jarek and to bar him from testifying as to certain topics at trial.

ARGUMENT

The first section of this Reply will debunk this and other diversions. The remaining sections confirm the merits of the Receiver's motion to strike, despite a blizzard of irrelevant or unsupportable arguments Associated Bank makes.

I. Associated Bank's Numerous Diversions Have No Bearing on the Substance of the Receiver's Motion.

A. Associated Bank's Focus on Volunteers who Helped the Receiver is Based on a Demonstrably False Premise.

Associated Bank contends that the Receiver's motion to strike Mr. Jarek presents the question of whether "the jury [will] pick between damages calculated by a highly qualified expert using commonly accepted accounting principles [or] damages *calculated by unidentified student interns with no discernible qualifications using an unknown methodology*." Resp. at 4 (emphasis added) (ECF No. 230). But this is not true, as is abundantly clear from even a quick review of the record.

The Receiver did not use "student interns" to calculate damages or individual investor claims. Associated Bank's support for this implausible contention refers solely back to its own summary judgment memorandum (ECF No. 197, at 11-12), which in turn refers back to Mr. Jarek's own report at ¶¶ 16(d) and 71-72 (Expert Report of Karl A. Jarek, CPA, ABV, CFF, August 19, 2016 (ECF No. 201-1)), which in turn refers back to a Receivership letter to Magistrate Judge Mayeron from July 2016, which finally refers to the source of the contention (ECF Nos. 494 and 495 in the underlying CFTC action in this Court (No. 09-cv-3332)). These are a brief and supporting declaration seeking the Court's approval for the Receiver's interim claim resolution methodology. Within these

documents, the Receiver explained the role of the voluntary student interns. The brief (ECF No. 494 in 09-cv-3332) at page 6 states:

> The Receiver engaged volunteer MBA students from the University of St. Thomas to analyze key financial records for investor information. (*Id.* ¶ 12.) These students, also working free of charge, created a list of individuals and entities appearing in bank records and cash flow statements tracing all funds coming into and going out of key bank accounts controlled by the Receiver Estates. (*Id.*) For the UBS Diversified account at Wells Fargo alone, the students reviewed almost 2,500 wire transfers and canceled checks. (*Id.*)

And the declaration (ECF No. 495 in 09-cv-3332) at pages 2-3 states:

> 8. The Receiver engaged volunteer students from Century College to review seized hard copy files for investor data. These students provided their services at no charge to the Receiver. The students reviewed thousands of files over the course of several weeks and compiled a list of 1,389 possible investor names and contact information found therein.

These record citations debunk Associated Bank's claims. The volunteer students created lists of individuals' and entities' names appearing in hard copy files, bank records and certain kinds of cash flow statements. They did not perform calculations. The Receiver used the names and contact information culled by these volunteers to create a comprehensive list of potential victims of this fraud. Only those with verified losses ultimately were included on the Third Amended Claims List, which Judge Davis has entered as an order of the Court. (ECF No. 1063 in 09-cv-03332). Associated Bank has had access to the same underlying materials throughout discovery in this case. Yet nowhere does Associated Bank contend that an identified individual or entity that the Receiver eventually named in his Third Amended Final Claims List should not have been named.

B. The Receiver Did not Need to Depose Mr. Jarek to See the Report's Shortcomings and Inadmissibility of Certain Supposedly Expert Opinions.

Other inflammatory remarks Associated Bank makes to set up its theme and to further distract, equally lack justification, much less any relevancy to the question the Receiver's motion actually presents – whether Mr. Jarek's testimony is admissible. For instance, Associated Bank calls the Receiver to task for not deposing Mr. Jarek. *See* Resp. at 1. But this is how the rules about expert reports are supposed to work. As the 1993 Advisory Committee Notes set forth, the expert report must stand on its own as the content of Associated Bank's direct testimony, and the report itself "may eliminate the need for a deposition." Fed. R. Civ. P. 26 (Advisory Committee Notes). Here, the report alone made it clear to the Receiver the shortcomings without need for a deposition. The Receiver did not waste time or resources on a deposition that no one needed in order to perceive the flaws in Mr. Jarek's methodologies.

C. Mr. Hlavacek Role in Reviewing Bank Documents for the SEC and Any Role He Would Play in This Case is Completely Irrelevant to Mr. Jarek's Report or Testimony.

Contrary to another attempted distraction, it is neither correct (much less pertinent for the present motion) that the Receiver either "dumped" the SEC's Scott Hlavacek as an expert, nor that he "could not even find" an expert for damages. *See* Resp. at 3. Although, out of an abundance of caution, the Receiver initially designated Mr. Hlavacek as an "expert" on the issue of damages, Associated Bank balked at that characterization and objected to him (as a federal employee) testifying on behalf of the Receiver. After discussions among the parties, it was agreed that Mr. Hlavacek would testify as a

summary fact witness, familiar with the bank records of the Receivership Entities and not as the Receiver's expert.

D. Associated Bank's Reference to Mr. Jarek's Involvement in the *Perlman* Ponzi Case Bolsters Rather than Undermines the Receiver's Motion.

Also unrelated to any argument that the Receiver made in his own supporting brief, Associated Bank makes reference to the similarities between the Receiver's brief in this case and a brief filed by a different receiver in a Florida Ponzi-scheme case. *See* Resp. at 8-9. It says the Receiver:

> fail[ed] to inform the Court of the source of these portions of his brief. He also ignores the fact that these arguments were rejected in *Perlman*. *See Perlman*, ECF No. 232 (denying motion without prejudice to renew at trial).

Id. at 9. While the court in *Perlman* denied the motion to strike Mr. Jarek, Associated Bank concedes that the motion in question was denied *without prejudice* and with leave to re-file the same motion, not denied on the merits. *See* Resp. at 9 Further, Associated Bank fails to notify this Court that Mr. Jarek's opinion in that case was that damages attributable to the defendant's tortious conduct were supposedly less than $600,000. *See Perlman v. Wells Fargo Bank*, No. 10-cv-81612-DTKH (ECF No. 186) at 1 ("Plaintiff Receiver's *Daubert* Motion To Exclude Expert Report And Testimony Of Karl A. Jarek And Supporting Memorandum Of Law"). It also fails to inform this Court that the reason the motion to strike his report was never re-filed is that the defendants settled that case, voluntarily paying over five times the amount set forth in Mr. Jarek's opinion. *See, e.g.*, Nicholas Nehamas, *Wells Fargo Settles Ponzi Scheme Lawsuit For More Than $3 Million,* Miami Herald (May 8, 2015) (available at http://hrld.us/2gbhUhp) (last visited November 22, 2016).

This, and the numerous other responses noted above are baseless, incorrect, and simply attempts to divert this Court's attention from the issues actually raised in the Receiver's motion, the substantive responses to which are addressed below.

II. Associated Bank Concedes that Mr. Jarek May Not Give an Expert Opinion Regarding Associated Bank's Knowledge.

Associated Bank concedes that Mr. Jarek may not opine as to its knowledge of the tortious conduct, as nowhere in its brief does it claim that he can. Instead, Associated Bank sidesteps the issue and says that Mr. Jarek is simply reciting a background factual assumption. *See* Resp. at 14 ("is not opining on the question of whether Associated Bank had actual knowledge"). Since Associated Bank does not contest this portion of the Receiver's motion, it should be granted.

III. Mr. Jarek Should Be Barred for Opining that a Damages Expert is Necessary.

Mr. Jarek should not be permitted to give a legal opinion that a damages expert is required in this case. In the Receiver's opening brief, he showed that Mr. Jarek cannot give legal opinions as to whether a damages expert is needed because that is a question of law for this Court. The Receiver also showed that as a matter of law, Mr. Jarek's legal opinion that an expert is needed in this case is wrong. In response, Associated Bank makes two arguments. First, it argues that experts like Mr. Jarek actually are permitted to give expert testimony as to the need for expert testimony. Second, Associated Bank argues that the opinion Mr. Jarek provides is legally correct.

A. Experts May Not Testify As to Whether Experts are Necessary.

In its response brief, Associated Bank ignores all of the authorities that the Receiver cited on this issue (Brf. at 10-11 and n.6) (ECF No. 200)[1] and instead cites two different cases, neither of which refutes the point that this is a question of law. These cases did not involve an expert testifying as to the need for an expert, but instead involved experts testifying as to the plaintiff's ability to perform other jobs. That is not at issue here.

For example, in *Eldridge v. City of St. Paul*, 809 F. Supp. 2d 1011, 1040 (D. Minn. 2011), this Court held that three doctors (an ophthalmologist and two occupational health specialists) were qualified and could give expert opinions as to whether the plaintiff could be a firefighter in light of his eye injury. *Id.* at 1039-40. The other case also involved an occupational expert, opining on the ability of an injured plaintiff to do various jobs. *See Wilson v. O'Gorman High School*, CIV. 05-4158-KES**,** 2008 U.S. Dist. LEXIS 49455 (D.S.D. Jan. 26, 2008). It is inapposite for the same reasons noted with respect to *Eldridge*. Associated Bank cited no case in which an expert was permitted to provide an expert opinion as to the need for an expert.

B. The Supposed "Expert" Opinion that Mr. Jarek Gives is Wrong.

In its response, Associated Bank first denies that Mr. Jarek is offering a legal opinion and accuses the Receiver of "falsely" characterizing Mr. Jarek's report as offering a legal conclusion. Nevertheless, it argues that Mr. Jarek's report is correct that an expert is required to show damages. Associated Bank is wrong on both counts.

[1] Portions of the brief in support of the Receiver's motion contained or referred to material marked "confidential." The Receiver, therefore, filed it under seal. The unreacted version of has been served on opposing counsel and provided to the Court.

Associated Bank's argument regarding the proper characterization of Mr. Jarek's legal opinion is quickly dispatched. In its response, Associated Bank says that the Receiver has "falsely asserted" that Mr. Jarek opines that an expert is required to prove damages. *See* Resp. at 18. The Receiver's characterization of Mr. Jarek's argument is accurate and is conceded in Associated Bank's response in the very next lines, where it admits that Mr. Jarek's opinion is that "Receiver *needs* an accounting expert to 'properly evaluate his losses, if any." Resp. at 19 (emphasis added); *see also id.* at 19 ("loss calculation in this case *needs* the benefit of scientific, specialized, or technical expertise") (emphasis added). In sum, Associated Bank repeatedly concedes what it initially denies – namely, that it is its position that Mr. Jarek is opining that an expert is necessary to prove damages. If Mr. Jarek's or Associated Bank's view was otherwise, there would be no reason to oppose the Receiver's motion on this point. If it has conceded this point, the Receiver's motion should be granted.

Regardless of how Mr. Jarek's opinions are characterized, they are inconsistent with controlling law as the Receiver showed in his opening brief. In response, Associated Bank cites to a number of cases including a case that the Receiver cited and distinguished in his opening brief. *See* Resp. at 19 (citing *Deitz v. Spangenberg*, No. 11-2600 ADM/JJG, 2014 U.S. Dist. LEXIS 17046 at *9-10 (D. Minn. Feb. 11, 2014). Associated Bank does not address the distinction that the Receiver made, that this is not a case where an expert might be required "to determine whether the change in a corporation's stock price was attributable to a defendants' wrongdoing or, instead, to unrelated market forces." *Deitz*,

supra at *9.[2] Associated Bank also fails to acknowledge that in *Deitz*, this Court *rejected* the argument that an expert was required as a matter of law. *Id.* at *10 ("an expert witness is not required"). The *dicta* in *Deitz* cited by Associated Bank is simply unhelpful to its flawed argument.

The other case that Associated Bank cites, *Unicom Monitoring, LLC v. Cencom, Inc.*, No. 06-1166, 2013 U.S. Dist LEXIS 56351 (D.N.J. Apr. 19, 2013), is also inapposite here and does not support its argument. This was a patent infringement case, where the measure of damages was a "reasonable royalty" for use of the infringed patent. *Id. at* *8. Under patent law, a reasonable royalty is often calculated by constructing a "hypothetical negotiation" between the patentee and the infringer. *Id.* at *9. This framework was set forth in the seminal case *Georgia-Pacific Corp. v. U.S. Plywood Corp.*, 318 F.Supp. 1116 (S.D.N.Y. 1970). The defendant in *Unicom* moved for summary judgment, arguing that the plaintiff could not prove damages because it has not identified an expert witness. While the court granted summary judgment, it expressly rejected the defendant's argument that a damages expert was necessary. *See Unicom*, *supra* at *18. Rather, it examined the record evidence and concluded that the plaintiff's proofs failed for the absence of raw evidence. *Id.* ("evidence of damages for a reasonable royalty rate does not necessarily require expert testimony . . . ."); *see also Dow Chem. Co. v. Mee Indus. Inc.*, 341 F.3d 1370, 1382 (Fed. Cir. 2003) (holding that the "district court erred in concluding that

[2] Associated Bank also fails to address any of the other authorities the Receiver cited in support of its motion. *See* Brf. at 10-11 (citing *Wisconsin Alumni Research Found. v. Xenon Pharm., Inc.*, 591 F.3d 876 (7th Cir. 2010); *Boyer v. Gildea,* 475 B.R. 647, 673 n.11 (N.D. Ind. 2012); *Seymore v. Union Pac. R.R. Co.*, No. 4:10-c-v-239 BSM, 2011 U.S. Dist. LEXIS 100071 at *12 (E.D. Ark. Sept. 6, 2011)).

Dow did not carry its burden to establish damages because it failed to provide expert testimony on the damages issue" and stating that "[S]ection 284 [of the Patent Act] is clear that *expert testimony is not necessary to the award of damages*, but rather may be received as an aid." *Id.* at 1382").[3] Contrary to Associated Bank's suggestion, it was the "the dearth of evidence in the record," rather than the lack of an expert, that doomed the plaintiff in that case. *Id.* at *19. Nothing in Associated Bank's brief alters the fact that damages experts are not required in cases like the present action, where all the relevant bank statements, including underlying investor data, and wrongful fund diversions exist in the discovery and trial record.

C. Unable to Provide Case Support for Its Position, Associated Bank Tries to Argue (Unsuccessfully) that Damages In This Case is More Complicated than Straightforward Math.

As shown in his opening brief, the Receiver does not need an expert to prove damages. As the Eighth Circuit has stated, a jury is "entitled to sort through the evidence presented at trial and to arrive what it consider[s] to be the damages caused by the

[3] If this quote from the *Unicom* case seems to be at odds with a quote in Associated Bank's brief, also from the *Unicom* case, it is because Associated Bank deceptively truncated the court's language when it quoted the case in its brief. The full quote from *Unicom* is as follows (with the portions Associated Bank omitted in bold):

> A factfinder cannot be asked to speculate from numbers unsupported by law and divorced from expert guidance, but rather the factfinder needs **either** clear guidance from an expert about how to apply complex calculations **or simple factual proofs about what this patentee has previously accepted in factually analogous licensing situations**.

Unicom, supra at *26. The full quote above does not require expert testimony to prove damages and is fully consistent with the other portions quoted by the Receiver from the case.

conduct it [finds] to be wrongful." *Children's Broadcasting Corp. v. Walt Disney Co.*, 245 F.3d 1008, 1015 (8th Cir. 2001). Here, computation is a matter of straightforward arithmetic.

Associated Bank tries to dispute this with three different lines of attack. First, it says that the arithmetic cannot be straightforward because the Receiver's theory of damages is wrong. Second, it argues that the arithmetic is not straightforward because Mr. Jarek says so. Finally, it claims that the Mr. Hlavacek concedes that the arithmetic is not straightforward. None of these arguments holds up to scrutiny.

First, whether the Receiver's theory of damages is correct is beside the point of this motion, which attacks Mr. Jarek's report and *his* opinions. Moreover, even if the appropriate measure of damages was as Associated Bank said (it is not), it failed to explain how computations under his theory are not simple arithmetic. Finally, Associated Bank is also wrong about the appropriate damages theory and the cases it cites do not support its claim.[4]

[4] As noted above, the proper measure of damages is a question of law for this Court to decide and has no place in response to the Receiver's motion because even correct legal opinions are not proper subjects of expert testimony. Nevertheless, the cases that Associated Bank cited would not be instructive in determining that measure. Both are bankruptcy cases. *See* Resp. at 21-22 (citing *Plaza Mortgage and Finance Corp. v. Basroon*, 187 B.R. 37 (N.D. Ga. 1995); *In re Latin Invest. Corp. v. L&L Constr. Assoc.*, 168 B.R. 1 (D.D.C. 1993). Both involved challenges to standing but did not involve the challenge to experts at all. What's more, in both cases, the Court rejected standing arguments based on claims that the Bankruptcy Trustee was "really" asserting claims for creditors in the same way that this Court previously rejected Associated Bank's similar claims. *See* Order at 12-13 (Denying Renewed Motion to Dismiss), (ECF No. 78). Associated Bank's reliance on *dicta* from the *Plaza Mortgage* case (there isn't even *dicta* from the *Latin Investment* case regarding the measure of damages) regarding what the Bankruptcy Trustee "should consider" in re-writing an interrogatory is not helpful in resolving the issue of whether Mr. Jarek may opine at trial that an expert in damages is necessary.

Second, Associated Bank argues that the math cannot be straightforward because Mr. Jarek – the expert being challenged by this motion – says so. Associated Bank quotes from Mr. Jarek's report as follows:

> Evaluating banking transactions that may relate to alleged damages requires significant *effort* and application of methodologies and professional judgment based on experience and training that is *not necessarily* within the realm of expertise of a typical accountant, and certainly not of a lay person.

Resp. at 22 (emphasis added). Not only does this fail to support Associated Bank's absolute assertion, but it also provides no reason why this Court should accept Mr. Jarek's self-serving statement. The quoted statement from Mr. Jarek is a naked assertion that an expert like him must be retained to provide an opinion. There is no explanation of the "professional judgment" supposedly needed, and no articulation of why "prior experience and training" is mandatory. Members of lay juries will understand bank account inflows and outflows.

Finally, Associated Bank mischaracterizes Mr. Hlavacek's deposition testimony, arguing that these mischaracterizations refute that the arithmetic involved is straightforward. It argues "whereas Mr. Hlavacek's own work might have been done with simple arithmetic, the same is not true for a proper damages calculation." Resp. at 22. It then refers to Mr. Hlavacek's testimony regarding the fact that a body of damages law exists. But like so many other things, Associated Bank never explains how the existing body of damages law makes the math hard or cites any cases in support of its argument. It is apparent from Mr. Hlavacek's testimony that he is distinguishing between damages law on the one hand, and the mathematic computations that result in the calculation of

damages on the other hand – a distinction that Associated Bank fails to appreciate throughout its response.

As the Receiver noted in its opening brief, there are instances in which courts sometimes require an expert to prove damages, but this is not one of those cases. Nothing that Associated Bank has argued for or cited changes that conclusion. Because Mr. Jarek may not opine on a question of law as to whether an expert is needed, and certainly may not opine as to an incorrect legal proposition, his report should be stricken in this regard and he should be precluded from offering such testimony.

IV. Mr. Jarek Should be Precluded from Opining on the Proper "Degree of Care" and "Educational Background" Needed to Review Bank Records.

As the Receiver showed in its opening brief, Mr. Jarek's report is peppered with denigrating innuendo about the mathematical abilities of people who assisted the Receiver in the fact-gathering process related to the identification of claims by investor victims. *See* Brf. at 12. Because Mr. Jarek failed to tie his critique to any calculations performed, the Receiver moved to strike these portions of his report and to preclude him from providing baseless and disparaging testimony. In its response, Associated Bank claims that Mr. Jarek does not offer such opinions, but claims that these are just "factual recitals . . . . They are not opinions; they do not reference the 'degree of care.'" Resp. at 17. Associated Bank also claims that Mr. Jarek does actually critique the work of the interns because he critiques the "numerous methodological problems and calculation deficiencies in the calculations (which were performed by student interns)." *Id. at* 18.

This brief demonstrated at 2-3, *supra*, that Associated Bank is not correct that interns performed "calculations." They culled names and contact information from documents. In addition, Associated Bank's claim that Mr. Jarek's report does "not reference the 'degree of care'" does not hold up to scrutiny in light of what he actually says. In his Report, Mr. Jarek opines:

> the Receiver['s filings] . . . raise additional issues regarding the *degree of care* that the Receiver exercised in compiling the so-called "outstanding" claims by investors.

Jarek Report at 25. Either Associated Bank is conceding that Mr. Jarek may not make such statements as expert opinions, in which case the Receiver's motion should be granted because it concedes the point, or these "degree of care" opinions should be rejected for the same reasons noted above regarding his opinion that an expert is necessary.

The Receiver noted in his brief that these statements were also pointless because they did not link "degree of care" critiques with any hypothetical error in the Receiver's ultimate damages calculations (even if the Receiver's calculations or methods were at issue, which they are not). Associated Bank responds claiming that it does tie these opinions to supposed deficiencies in the Receiver's damages calculations. Specifically, it says that Mr. Jarek "identifies numerous methodological problems and calculation deficiencies in the calculations [sic] (which were performed by student interns)." Resp. at 18. There are at least two problems with this response as well. First, as a factual matter, Mr. Jarek is not correct that any student interns developed methodologies or performed calculations. Second, despite claiming to do so, neither Mr. Jarek nor Associated Bank

point to anything that was the result of the exercise of an insufficient "degree of care." In essence, Associated Bank is just re-hashing its argument above that an expert is needed or, at the very least, that anyone performing a damages calculation must adhere to an unstated "degree of care," even if no complaint exists that sloppiness affected the result. For the reasons stated above, Mr. Jarek should not be permitted to offer such opinion testimony.

V. Mr. Jarek Should Be Precluded from Opining that Losses Due to Foreign Currency Trading Should be Excluded.

In its opening brief, the Receiver showed that as a matter of law, damages related to "legitimate" trading in foreign currency were improperly excluded in Mr. Jarek's report. In its response, Associated Bank sidesteps the issue and argues "Mr. Jarek is perfectly entitled to make the factual assumption that the Cook-Kiley Ponzi scheme was a partial Ponzi scheme." *See* Resp. at 15 Associated Bank misses the point. It does not matter that Mr. Jarek assumes as a "fact" that the scheme was "partial." It matters that what he does with this assumption is improper as a matter of law. Mr. Jarek uses this "background fact" to improperly provide a legal opinion that foreign currency trading should not be counted as part of damages.

Also, Mr. Jarek's legal opinion is wrong. Losses due to the schemer's torts are still losses even when the way that the schemers lost the money was through foreign currency trading. In its response, Associated Bank tries to bolster Mr. Jarek's improper legal opinion with the Eighth Circuit's decision in one of the criminal matters related to the

Receivership. The Eighth Circuit's opinion, however, does not support its argument but in fact undermines it.

Referring to the appellate decision in the criminal case against schemer Bo Beckman, Associated Bank says the "Receiver never explains why the Eighth Circuit's opinion is an unreliable foundation for Mr. Jarek's assumption that the Cook-Kiley Ponzi scheme was a partial Ponzi scheme." Resp. at 15 Associated Bank's reference to the Eighth Circuit's opinion does not make its argument any less beside the point.

Initially, Associated Bank quoted a portion of the opinion is not a holding of the Eighth Circuit; it was the court's restatement what Mr. Hlavacek said. But more importantly, notwithstanding the Eighth Circuit's quoting Mr. Hlavacek, Chief Judge Michael Davis of this Court subsequently ordered Mr. Beckman to pay over $155m in criminal restitution for the damage that he caused victims of the scheme. *See United States v. Beckman*, No. 11-cr-228, Sentencing, (ECF No. 380); *see also* Browning, Dan and Channen, David, *Scam Artists Get 57 Years In Prison For $195 Million Scheme*, Minneapolis Star Tribune (Jan. 4, 2013) (available at http://strib.mn/2g96z3n) (last visited Nov. 22, 2016). In this number, the Court did not discount the amounts that Mr. Jarek claims were part of the "legitimate" business.

In response, Associated Bank also attempts to distinguish the *Porous Media Corp. v. Midland Brake, Inc.*, 220 F.3d 954 (8th Cir. 2000), case that the Receiver cited. But its attempted distinction – that *Pourous Media* is not a *Daubert* case – makes no sense. It makes no difference whether it was a *Daubert* case or not. It held, as even Associated Bank acknowledges, that whether certain types of loss may be counted as damages is a question

of law – namely, in that case, of Minnesota statutory law. *See Porous Media*, 220 F.3d at 961-62.[5]

Associated Bank makes no attempt whatsoever in its brief to address any other argument or authorities the Receiver made and cited. It does not contest that the causes of action are for fraud, breach of fiduciary duty, conversion and false statements rather than for a "Ponzi scheme." It also does not argue that the torts in question are not "partial" torts. It specifically does not argue that the fact that some money may have been traded in foreign currency markets makes any of the fraudulent acts non-tortious, or not breaches of fiduciary duties. Most glaringly absent from Associated Bank's brief is any response at all to the Receiver's citation to the *Nicholson v. United States* case and the criticism of the same misguided arguments that Associated Bank advances here. *See* Brf. at 14-15 n.8.

VI. Mr. Jarek Should Not Be Permitted to Opine that Crown Forex, LLC Cannot be Damaged Because it was Not a Legal Entity.

Mr. Jarek should not be permitted to opine that damages should be limited because of the supposed "[in]ability of Crown Forex, LLC to be damaged." Brf. at 16 (citing Jarek Report). In response, Associated Bank concedes that Mr. Jarek cannot offer such opinions but denies that he is offering such opinions. Instead, as with many of its other responses, it claims "Mr. Jarek makes *assumptions* regarding . . . whether an alleged 'fictitious entity' can bring a claim for breach of fiduciary duty." Resp. at 11 (emphasis added). Since

[5] Associated Bank's suggestion that categories of damages might only be deemed determined "as a matter of law" when a statute is at issue is baseless and unsupported in its brief. *See* Resp. at 15.

Associated Bank does not dispute this portion of the Receiver's motion, the Court should grant it.

Associated Bank goes further, however, and claims the "Receiver drop[ped] the key argument that animated his complaint," (Resp. at 4) and the "Receiver has now abandoned his theory of the case." *See id.* at 16-17. Suffice it to say that Associated Bank has fundamentally misunderstood the significance of Crown Forex, LLC. This was a sham entity created by the schemers at Associated Bank Vice President Lien Sarles' suggestion to avoid detection. The fact that it was a sham and created to deflect detection, while important for purposes of the wrongdoing the schemers carried out with Associated Bank's assistance, has no bearing on whether the law treats it as a legal entity capable of being damaged in tort (Brf. at 16), despite its improper formation. Nothing that Associated Bank says in its response refutes that.

VII. Mr. Jarek Should Be Precluded from Offering Opinions Regarding His Flawed Mitigation Methodologies.

Finally, Mr. Jarek should not be permitted to offer expert opinions on mitigation because his methodology is fundamentally flawed. In its response, Associated Bank makes two arguments. First, Associated Bank makes the astonishing claim that the "Receiver does [not] contend that Mr. Jarek's methodology is fundamentally unreliable . . . therefore, Mr. Jarek's testimony is admissible." Resp. at 23 Second, it contends that Mr. Jarek's fundamentally flawed approach goes to the weight of evidence, not to its admissibility. On both scores, it is wrong.

The Receiver explicitly challenged Mr. Jarek's flawed mitigation methodology. He did not, as contended, concede this point. This challenge was hard to miss. The heading on this point in the Receiver's brief asserted that "Mr. Jarek's *Method* . . . is Not Based on Reliable Principles . . . ." Brf. at 16 (emphasis added). In the succeeding several pages of argument, the point is made repeatedly and explicitly:

- noting Mr. Jarek's "flawed mitigation theory," (Brf. at 16) ;
- calling his approach "methodologically unsound" and citing *Daubert* (*Id.*);
- challenging his approach as having "no sound methodological basis" (*Id.* at 18); and
- concluding that "Mr. Jarek's methodology . . . is fundamentally flawed" (*Id.* at 19).

Contrary to Associated Bank's argument for concession, it is difficult to envision a more stark or explicit challenge to Mr. Jarek's methodology as "fundamentally unreliable."

Ironically, because Associated Bank got this point wrong, it also fails to defend Mr. Jarek's approach in its response, thus waiving argument to the contrary. *See, e.g.*, *Banks v. Gulbrandson,* No. 15-3822 (SRN/JSM), 2016 U.S. Dist. LEXIS 148412 (D. Minn. Oct. 5, 2016) (citing *Mark v. Ault*, 498 F.3d 775, 786 (8th Cir. 2007)) (holding that a party's "failure to raise or discuss an issue in his brief [would] be deemed an abandonment of that issue.") (quoting *Hacker v. Barnhart*, 459 F.3d 934, 937 n.2 (8th Cir. 2006)); *Christensen v. PennyMac Loan Servs., Inc.*, 988 F. Supp. 2d 1036, 1042 (D. Minn. 2013) ("Plaintiff's failure to respond amounts to a waiver, and on that basis alone, defendants' motion to dismiss should be granted."). Associated Bank's reliance comes as a surprise. It is fundamentally illogical and unfair to use a narrow baseline to calculate damages, but then a wide one to reduce it with set offs.

Associated Bank's fallback argument – that the problems with Mr. Jarek's application of mitigation calculation methods go to the weight, not the admissibility of this evidence – is also wrong. *E.g., Glastetter v. Novartis Pharm. Corp.*, 252 F. 3d 986 (8th Cir. 2001) (improper application of accepted method is excludable under *Daubert*). Here, Mr. Jarek's approach of mitigating damages without regard for the supposed source of the injury[6] is such a fundamentally flawed application of an otherwise sound principle (mitigation or set off of damages) that it should not be admitted at all.

The *McCullock* case cited by Associated Bank is not to the contrary. That was a product liability action. One issue was whether the defendant's product caused the plaintiff's injuries. Plaintiff's expert medical doctor based his causation opinion on a method known as "differential etiology." In describing this method, the Eighth Circuit in a different case stated:

> A differential diagnosis determines all of the possible causes for the patient's symptoms and then eliminates each of these potential causes until reaching one that cannot be ruled out, or deduces which of those that cannot be excluded is the most likely. On the other hand, "differential etiology" is a term used to describe the similar process by which the cause of an injury is determined.

Johnson v. Mead Johnson & Co., LLC, 754 F.3d 557, 560 (8th Cir. Minn. 2014) (citations omitted). The Eighth Circuit has permitted experts to testify using differential etiology. *Id.* (citing *Glastetter v. Novartis Pharm. Corp.*, 252 F. 3d 986 (8th Cir. 2001)). Nevertheless, while

[6] It should be noted that the Receiver does not believe that Mr. Jarek's approach to limiting damages to a specific period of time and to only accounts connected to Associated Bank is a proper approach. But that is not an issue to be decided on this motion. Rather, having taken that approach with respect to damages, it is fundamentally flawed to abandon that approach with respect to mitigation and set off.

some courts approved the methodology, courts may still exclude an expert improperly applying differential etiology. *Glasstetter*, 252 F.3d at 989 (excluding expert mis-applying differential etiology).

The Second Circuit, in the *McCullock* case cited by Associated Bank, applied this same principle. Namely, it did not find that differential etiology was an improper method for determining causation. While acknowledging challenges to the expert's application of that method, it concluded that the application there was not so flawed so as to make the district court's decision to permit the testimony to be an abuse of discretion. *McCullock*, 61 F.3d at 1044.

Associated Bank relied completely on the incorrect legal premise that any question as to the application of an accepted method goes to weight and not admissibility. Thus, it failed to respond to the Receiver's motion and brief in which he showed that Mr. Jarek's application of mitigation and set off methods was so fundamentally flawed that it warrants barring such testimony. Because Associated Bank has not attempted in any way to defend Mr. Jarek's flawed application of the mitigation doctrine, the Court should grant the Receiver's motion in this respect because the Receiver's arguments stand un-rebutted.

CONCLUSION

Hyperbole, deflection and misinformation will never justify the admissibility of expert testimony. Nothing in Associated Bank's response refutes the merits of the arguments the Receiver made showing that Mr. Jarek repeatedly attempts to opine on legal issues and uses unsound methodologies, and applies them in an unsound manner. To the extent that these are even within the purview of expert testimony, these are not matters of weight,

but admissibility. The Receiver therefore respectfully requests that this Court grant the Receiver's motion to strike portions of the expert report of Karl Jarek and to bar any related testimony.

Dated: November 28, 2016

Respectfully submitted,

/s/ William W. Flachsbart

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CERTIFICATE OF SERVICE

The undersigned attorney of record certifies that on November 28, 2016, copies of the foregoing document were served upon counsel for Defendant via e-mail to the following addresses:

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