UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

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

Defendant Associated Bank, N.A.'s Brief In Opposition to Receiver's Motion to Strike Portions of the Report and Bar Testimony of Karl Jarek

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INTRODUCTION

Like any other damages expert, Associated Bank's damages expert, Karl Jarek, is entitled to rely on particular facts, make certain assumptions and then calculate damages based on those facts and assumptions. Like any other litigant, Receiver is entitled to disagree with the facts and assumptions cited in Mr. Jarek's expert report. But the law prescribes one remedy for litigants who disagree with facts and assumptions that form the foundation of an expert's testimony—Rules 702 and 703 place the full burden of exploring these facts and assumptions on the shoulders of opposing counsel's cross-examination. *See Daubert v. Merrell Dow Pharms., Inc.*, 509 U.S. 579, 596 (1993) ("[v]igorous cross-examination" is the "traditional and appropriate means of attacking" expert testimony).

Receiver's motion is an improper and inadequate substitute for cross-examination. Indeed, Receiver did not even bother to depose Mr. Jarek. Rather than examining Mr. Jarek about the foundation for his damages calculation, Receiver takes a short cut that is not permitted by *Daubert* or the Federal Rules of Evidence—he brands the assumptions and facts underlying Mr. Jarek's testimony as "legal conclusions" and "opinions regarding knowledge" and then moves to exclude Mr. Jarek based on this supposition. This simply will not do. If Receiver actually disagrees with the factual basis or assumptions for Mr. Jarek's opinions, he should do what he has so far

failed to do—question Mr. Jarek about them. *See Margolies v. McCleary, Inc.*, 447 F.3d 1115, 1121 (8th Cir. 2006) ("Unless the factual or methodological basis for the opinion is fundamentally unreliable, its admission is not an abuse of discretion.").

Mr. Jarek's testimony easily passes the test prescribed by *Daubert*. As numerous other courts have found, Mr. Jarek is qualified by his training and experience as a certified public accountant, certification in financial forensics, and 25 years of professional experience as an accountant to calculate damages. He has calculated damages in other cases where a court-appointed Receiver alleged that a bank aided and abetted a depositor-run Ponzi scheme. Mr. Jarek uses methods and principles that are commonly accepted in his profession. Using his professional judgment and expertise, he meticulously reviewed every deposit, withdrawal, transfer, and account statement related to each bank account that the Receivership Entities held at Associated Bank. He reviewed all publicly-disclosed recoveries that the Receivership Entities and their investors have made since news of the Cook-Kiley Ponzi scheme broke. He compiled all of this information into a database that he used to calculate the damages due under each of the Receiver's legal theories for different periods of time. This is the sort of damages testimony that is routinely admitted under Rule 702; Receiver cannot change this fact by

mischaracterizing the bases for Mr. Jarek's opinions as legal conclusions and opinions regarding knowledge.

Receiver has no basis to critique Mr. Jarek's testimony. Despite repeatedly acknowledging at the outset of the case that a damages expert was necessary, Receiver could not even find an expert who would support his damages theory. *See* ECF No. 197 at 26, ECF No. 198-20 at 8, ECF No. 198-21 at 2, ECF No. 198-22 at 3, ECF No. 198-23 at 3, ECF No. 198-24 at 50. For a moment, it appeared that Receiver had found an expert that could support his damages theory. On April 4, 2016, Receiver designated Scott Hlavacek, an SEC employee, to serve as his damages expert. *See* ECF No. 198-25. But by April 29, 2016, Receiver had dumped Mr. Hlavacek. In June 2016, Associated Bank deposed Mr. Hlavacek and learned the reason why—Mr. Hlavacek had no experience calculating damages in a Ponzi scheme case, he did not know what methodology to use to calculate damages, and, in a bizarre twist, he did not even know that he had been designated as Receiver's damages expert. *See* ECF No. 197 at 9-10.

At bottom, Receiver's *Daubert* arguments against Mr. Jarek are little more than a diversion from the dispositive flaws in Receiver's speculative damages theory. Without a damages expert, Receiver has been forced to fallback on allegations regarding damages that are threadbare at best. Receiver only recently admitted—after Magistrate Judge Mayeron found that

Receiver's prior discovery responses regarding damages were "woefully inadequate," ECF No. 152 at 18—that his damages calculations are the product of unidentified student interns. *See* ECF No. 197 at 11-12. Receiver still refuses to produce any information about the qualifications of these student interns, or the methodologies that they used. Thus, Receiver appeared content to leave the jury to pick between damages calculated by a highly qualified expert using commonly accepted accounting principles and damages calculated by unidentified student interns with no discernible qualifications using an unknown methodology.

Unsurprisingly, ***Receiver now appears to have abandoned his damages calculation***. In his expert report, Mr. Jarek opined that "[t]he Receiver's calculations of alleged losses in the amounts of $160,597,075 and $63,696,523 based on the purported outstanding claims by investors are not reliable." Expert Report of Karl A. Jarek (Ex. 1) ¶ 20. In his *Daubert* motion, Receiver does not challenge this conclusion, nor has Receiver retained any expert to rebut it.

Furthermore, in his opening brief, ***Receiver drops the key argument that animated his complaint.*** In his Complaint, Receiver argued at length that one of the Receivership Entities, Crown Forex LLC was a "fictitious entity" and that Associated Bank aided-and-abetted the Cook-Kiley Ponzi scheme by allowing a bank account to be opened for such a "fictitious entity."

See, e.g., ECF No. 42 ¶¶ 4, 6, 61, 80. Receiver's argument that Crown Forex LLC was a "fictional entity" figured prominently in the Eighth Circuit's remanding this case for discovery. *See Zayed v. Associated Bank, N.A.*, 779 F.3d 727, 730-31 (8th Cir. 2015). Amazingly, Receiver flip-flops and drops this argument entirely. Now Receiver argues that the fraudsters "intended to form" Crown Forex LLC, but failed to do so. ECF No. 200 at 16. Moreover, Receiver now concedes that Crown Forex LLC was, and always has been, a perfectly legal partnership under Minnesota law. *Id.* Accordingly, Receiver has now gutted his own case.

Receiver's failure to defend his own damages theory and admission that his complaint was based on, at best, a mischaracterization of Minnesota law is where the Court's review of this motion, and this case, should end.

STATEMENT OF FACT

I. Mr. Jarek Is A Highly Qualified Expert.

Receiver does not challenge Mr. Jarek's qualifications as an accountant or damages expert. Mr. Jarek has a master's degree in business administration with a concentration in finance from the University of Pittsburg. Ex. 1 ¶ 5. He has been licensed as a CPA for the past 28 years. *Id.* at ¶ 1. He is Certified in Financial Forensics and Accredited in Business Valuation. *Id.* at ¶ 2. He has specialized in the field of forensic accounting for the last 25 years. *Id.* at ¶ 5. In addition to his education, training, and

professional accreditations, Mr. Jarek has extensive professional experience in accounting. *See id.* at ¶¶ 3-4. He has worked as an auditor at an international accounting consultancy, implemented accounting controls at a bank, and run his own accounting consulting company. *See id.* at ¶¶ 3-4.

Mr. Jarek has testified regarding the proper calculation of damages in two cases where a court-appointed receiver accused a bank of aiding and abetting a depositor-run Ponzi scheme—*Perlman v. Bank of America*, No. 9:11-cv-80331 (S.D. Fla.) and *Perlman v. Wells Fargo Bank, N.A.*, No. 9:10-cv-81612 (S.D. Fla.). *See* Ex. 1 at ¶6. *Lauzon v. Senco Products, Inc.*, 270 F.3d 681 (8th Cir. 2001) (admission of an expert's prior testimony in numerous other cases "weighs heavily in favor of admitting the testimony" of the expert).

II. Mr. Jarek Applied Commonly Accepted Accounting Principles.

Receiver does not challenge the accounting methods that Mr. Jarek used. This is not at all surprising. Mr. Jarek applied accounting techniques and methods that are widely accepted and used by nearly all forensic accountants. He reviewed all of Receiver's interrogatory responses and initial disclosures regarding damages and determined whether the damages calculated in those discovery responses were reliable. *See* Ex. 1 ¶ 18.

Not content to simply critique the Receiver's statements regarding damages, Mr. Jarek also calculated alternative damages figures for each of

Receiver's causes of action. To do this, Mr. Jarek began by collecting and reviewing all information that, in his professional judgment, was relevant to the flow of funds into and out of bank accounts held by the Receivership Entities, including withdrawals, deposits, checks, transfers, and account statements. Ex. 1 ¶ 18. Mr. Jarek then built a database that included all of these transactions. *Id.* Mr. Jarek then calculated the amount of damages for each of Receiver's causes of action during particular time periods, subtracting out any mitigating recoveries. *Id.*

III. Receiver Does Not Challenge Mr. Jarek's Key Conclusions.

Applying these methodologies, Mr. Jarek identifies numerous flaws in Receiver's damages computations including:

- "Receiver's calculations of alleged losses in the amounts of $160,597,075 and $63,696,523 based on the purported outstanding claims by investors are not reliable." *Id.* ¶ 20.
- [redacted]. Declaration of Karl A. Jarek In Support of Associated Bank, N.A.'s Motion for Summary Judgment (Ex. 2) ¶ 8.
- [redacted]. *Id.* at ¶ 10.
- [redacted]. *Id.* at ¶ 11.

- [redacted]. *Id.* at ¶¶ 12-14.

Receiver's motion does not take issue with any of these opinions.

IV. Portions of Receiver's Brief Were Cribbed From Another Failed *Daubert* Challenge to Mr. Jarek's Testimony.

Portions of Receiver's challenge to Mr. Jarek's testimony are cribbed from a failed *Daubert* challenge to Mr. Jarek's testimony in *Perlman v. Wells Fargo Bank, N.A.*, No. 9:10-cv-81612 (S.D. Fla.). Receiver's arguments are virtually identical to those made in *Perlman*:

Receiver's Motion	*Perlman* Motion
"A damages expert may properly testify (as an expert) only as to what damages may be recoverable under the applicable legal measure of damages that the Court determines governs the claims" ECF No. 200 at 8.	"A damages expert may properly testify (as an expert) only as to what damages may be recoverable under the applicable legal measure of damages *that the Court determines governs the claims*." *Perlman*, ECF No. 186 at 7.
"The applicable measure of damages (as opposed to the calculation of damages under the appropriate legal standard) is a legal issue, and is not a fact question about which an expert may opine." ECF No. 200 at 7.	"The applicable measure of damages (as opposed to the calculation of damages under the appropriate legal standard) is a legal issue. It is not a fact question about which an expert may opine." *Perlman*, ECF No. 186 at 2.
"Moreover '[e]xpert opinions that are contrary to law are inadmissible.' *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 806 (N.D. Ill. 2005) (citations omitted). Such opinions 'cannot be	"But, '[e]xpert opinions that are contrary to law are inadmissible.' *Loeffel Steel Prods., Inc. v. Delta Brands, Inc.*, 387 F. Supp. 2d 794, 806 (N.D. Ill. 2005) (citing *Bailey v. Allgas, Inc.*, 148 F.Supp.2d 1222,

said to be scientific, to be reliable, or to be helpful to the trier of fact.' *Id.* Accordingly, damages expert testimony that 'does not comport with a recognized measure of damages' is unreliable as a matter of law, and must be excluded. *Coquina Invs. v. Rothstein*, No. 10-60786-Civ-COOKE/BANDSTRA, 2011 WL 4949191, at *7 (S.D. Fla. Oct. 18, 2011)." ECF No. 200 at 8.	1245-46 (N.D. Ala. 2000)). 'They cannot be said to be scientific, to be reliable, or to be helpful to the trier of fact.' *Id.* And damages expert testimony that 'does not comport with a recognized measure of damages' is unreliable as a matter of law and must be excluded. *Coquina Invs. v. Rothstein*, 2011 WL 4949191, at *7 (S.D. Fla. Oct. 18, 2011)." *Perlman*, ECF No. 186 at 3.

Receiver fails 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).

LEGAL STANDARD

> An expert's opinion is admissible
>
> > if (a) the expert's scientific, technical, or other specialized knowledge will help the trier of fact to understand the evidence or determine a fact in issue; (b) the testimony is based on sufficient facts or data; (c) the testimony is the product of reliable principles and methods; and (d) the expert has reliably applied the principles and methods to the facts of the case.

Fed. R. Evid. 702. District courts have an obligation to ensure that all testimony offered under Fed. R. Evid. 702 satisfies these prerequisites. *Daubert*, 509 U.S. at 589.

ARGUMENT

I. Mr. Jarek's Testimony Easily Meets The *Daubert* Requirements.

An expert may testify regarding a subject if he is qualified to do so, he uses reliable methodologies to reach his conclusions, his opinions are based on a sufficient factual foundation, and his testimony will assist the jury. *See* Fed. R. Evid. 702. Mr. Jarek's testimony meets each of these requirements.

First, Mr. Jarek is imminently qualified to offer accounting expertise in this case. *See supra* at 4-5. He has specialized in the field of forensic accounting for the past 25 years and has specific experience preparing loss calculations in Ponzi scheme cases. *See id.* Indeed, Receiver does not challenge Mr. Jarek's qualifications as a forensic accounting expert.

Second, Mr. Jarek's expert analysis in this case is also based on commonly accepted, reliable accounting methods. Mr. Jarek's loss "calculation is something CPAs routinely do." *Cromeans v. Morgan Keegan & Co.*, 2014 WL 5351193, at *2 (W.D. Mo. 2014). It is well established that an accountant may appropriately offer an expert opinion critiquing a plaintiff's damages calculation. *See, e.g.*, *Margolies*, 447 F.3d at 1121–22 (finding no error in admission of CPA's expert testimony on damages).

Third, Mr. Jarek's calculations are helpful to the fact finder. *Id.* Mr. Jarek undertook an exhaustive analysis of the facts in this case and applied his accounting expertise to make a factual calculation of the losses suffered

by the Receivership Entities based on the allegations in the Complaint. *See supra* at 5-6.

Receiver does not argue that Mr. Jarek is unqualified or that his testimony should be entirely stricken. Rather, Receiver takes issue with a few specific portions of Mr. Jarek's report that are among the factual assumptions supporting Mr. Jarek's alternative damages calculations, and which Receiver erroneously characterizes as "legal conclusions" or "common questions for the jury." Receiver also challenges Mr. Jarek's mitigation methodology. None of these challenges is well-taken.

II. Receiver Wrongly Attacks Mr. Jarek's Factual Assumptions.

Receiver fundamentally misunderstands the work Mr. Jarek has done in his Report. Mr. Jarek draws no legal conclusions in his Report. *See* Ex. 1 ¶ 12 ("I express no legal opinion on the rights and liabilities of the parties."). Rather, Mr. Jarek makes certain factual assumptions—something that is perfectly permissible for a damages expert to do. For example, Mr. Jarek makes assumptions regarding Associated Bank's knowledge of the Ponzi scheme, the scope of the Cook-Kiley Ponzi scheme, and whether an alleged "fictitious entity" can bring a claim for breach of fiduciary duty.

"Experts may offer opinions based on factual assumptions" and routinely do so. *Permacel Auto., Inc. v. Kohler Co.*, 2009 WL 3075568, at *1 (W.D. Mo. 2009); *see also MediaTek inc. v. Freescale Semiconductor, Inc.*,

2014 WL 971765, at *2 (N.D. Cal. 2014). Courts recognize that absent such reasonable factual assumptions, it would be all but impossible for experts to offer meaningful testimony:

> If an expert could not base his opinion on [factual] assumptions – which in turn are based on testimony – there could be little meaningful and informative expert testimony in any case in which there was a divergence of testimony. The question is not whether the opinion is based on assumptions, but whether there is some factual support for them. If there is not, they are by hypothesis unreliable and inadmissible. If there is, it is for the jury, properly instructed, to determine the credibility of the witnesses and thus the weight to be given to the expert opinion.

Richman v. Sheahan, 415 F. Supp. 2d 929, 942 (N.D. Ill. 2006) (citation and footnote omitted).

The Eighth Circuit has explained that the proper way to test an expert's assumptions is through cross-examination, not a motion to strike. "Time and again, we have noted that the factual basis of an expert's opinion generally relates to the ***weight*** a jury ought to accord that opinion." *Margolies*, 447 F.3d at 1120–21 (emphasis added); *see also Daubert*, 509 U.S. 596 ("Vigorous cross-examination, presentation of contrary evidence, and careful instruction on the burden of proof are the traditional and appropriate means of attacking" expert testimony); *Bonner v. ISP Techs., Inc.,* 259 F.3d 924, 929 (8th Cir. 2001) ("As a general rule, the factual basis of an expert opinion goes to the credibility of the testimony, not the admissibility."); *Wilbern v. Culver Franchising Sys., Inc.*, 2015 WL 5722825, at *11 (N.D. Ill.

2015) ("The soundness of the factual underpinnings of the expert's analysis" is a "factual matter[] to be determined by the trier of fact.") (citation omitted).

Thus, "it is up to the opposing party to examine the factual basis for the opinion in cross-examination." *Bonner,* 259 F.3d at 929. "Only if the expert's opinion is so fundamentally unsupported that it can offer no assistance to the jury must such testimony be excluded." *Id.* at 929-30; *Margolies*, 447 F.3d at 1121 ("Unless the factual or methodological basis for the testimony is fundamentally unreliable, its admission is not an abuse of discretion.").

By choosing not to depose Mr. Jarek, Receiver has foregone his opportunity to challenge Mr. Jarek's factual assumptions prior to trial (in the event that this case reaches that stage). Receiver may not now attempt to mischaracterize those assumptions he dislikes as "legal conclusions" or "opinions" so as to attack them in a *Daubert* motion.

A. Receiver Mischaracterizes Mr. Jarek's Factual Assumptions About Knowledge As Expert "Opinion."

Receiver argues that "***to the extent that*** Mr. Jarek's report opines on the issue of whether Associated Bank knew of the torts alleged in Receiver's complaint, he is not qualified to render such opinions." ECF No. 200 at 7 (emphasis added). Had Receiver deposed Mr. Jarek, Receiver could have easily clarified whether Mr. Jarek is offering an opinion regarding knowledge, rather than burden the court with unnecessary motion practice.

In any event, Mr. Jarek's Report makes clear that he is not opining on the question of whether the Bank had actual knowledge, but rather is making certain factual assumptions about the bank's knowledge, based on the evidence in the record. Indeed, Mr. Jarek states, in his "Primary Opinions and Conclusions" section at the opening of his Report: "***I understand that*** no one at Associated Bank had actual knowledge of the Cook/Kiley Scheme." Ex. 1 ¶ 21 (emphasis added). He cites the factual bases for this assumption (including the Report of Associated Bank's expert Charles Grice and the deposition testimony of Receiver's expert Cathy Ghiglieri). He goes on to also calculate losses to the Receivership Entities in the alternative, "[as] if Associated Bank did have actual knowledge of the Ponzi scheme and took steps to substantially assist the scheme." *Id.* at ¶ 22. These alternate loss calculations are fully set out in his report. They make it clear that Mr. Jarek is not opining on knowledge or lack thereof, but calculating losses based on legitimate, alternative factual assumptions.

B. Receiver Mischaracterizes Mr. Jarek's Factual Assumption That This Case Involves A Partial Ponzi Scheme As A "Legal Conclusion."

Receiver argues that Mr. Jarek's assumption that this case involves a partial Ponzi scheme that made some legitimate investments, and calculations that flow from this assumption are "legal opinions." ECF No. 200 at 10. Receiver is wrong.

As noted above, Mr. Jarek is perfectly entitled to make the factual assumption that the Cook-Kiley Ponzi scheme was a partial Ponzi scheme. In fact, there is ample support in the record for this assumption. The Eighth Circuit explained in the context of *this* Ponzi scheme that

> In a true Ponzi scheme[,] the money . . . is just used for the benefit of the people raising the money and then to make payments to older investors with new investors' money.' In contrast, '[i]n a partial Ponzi scheme[,] some of the money might be . . . use[d] for something close to what [the schemers are] saying, but the rest of the money is used to pay old investors with new investors' money and to benefit the individuals raising the money.'

United States v. Beckman, 787 F.3d 466, 474 n.3 (8th Cir. 2015). 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.

Second, the methodology underlying Mr. Jarek's alternative calculation of damages—in which he excluded losses from the legitimate investments in the partial Ponzi scheme—is not a "legal conclusion." The one case that Receiver cites in support of his argument that "[w]hat is counted as part of damages . . . is a question of law," ECF No. 200 at 12, *Porous Media Corp. v. Midland Brake, Inc.*, 220 F.3d 954 (8th Cir. 2000), is not a *Daubert* case at all. And *Midland Brake* does not hold that what is counted a part of damages is a question of law, as Receiver contends. Instead, *Midland Brake* held that

only a certain type of damages, "post-contractual lost profits," could not be presented to a jury because they were barred by Minnesota law. *Id.* at 962, 961 (citing Minn. Stat. § 332.2–715(2)). In this case, Receiver does not argue that Mr. Jarek's damages calculates damages are prohibited by Minnesota statute. Accordingly, Mr. Jarek's methodology is reliable and admissible.

C. Receiver Mischaracterizes Mr. Jarek's Factual Assumptions Regarding Crown Forex LLC As An "Opinion."

Receiver also argues, in error, that Mr. Jarek opined on "the ability of Crown Forex, LLC to be damaged." ECF No. 200 at 15. This is similarly mistaken. In his report, Mr. Jarek stated:

> [C]ounsel for Associated Bank ***instructed me*** to exclude funds that transacted through the Crown Forex, LLC Account 1705. I understand that the basis for excluding Account 1705 is that no legal entity named Crown Forex, LLC exists; therefore, none of the Cook/Kiley Scheme principals, nor anyone else, could owe fiduciary duties to a non-existent entity.

Ex. 1 ¶ 127. It is crystal clear that Mr. Jarek is not opining on the legal status of Crown Forex, LLC, but making an assumption that he utilized when calculating damages. This was permissible under well-established law. *MediaTek inc.*, 2014 WL 971765, at *2 ("Experts . . . routinely opine based upon . . . factual assumptions given to them.").

Moreover, Mr. Jarek's assumption is grounded in Receiver's own theory of the case. Receiver has repeatedly labeled Crown Forex LLC as a "fictitious entity." *See, e.g.*, ECF No. 42 ¶¶ 4, 6, 61, 80. Amazingly, ***Receiver has now***

abandoned his theory of the case. In his opening brief, Receiver now flip-flops, recants his position that Crown Forex LLC was "fictional," and instead argues that the fraudsters "intended to" form Crown Forex LLC, and that under state law, a lawful and perfectly valid partnership was formed. ECF No. 200 at 16. Certainly this is Receiver's prerogative, but his decision to abandon his theory of the case in his opening brief in no respect undercuts the validity of Mr. Jarek's factual assumption for the purpose of the opinion he renders.

D. Receiver Mischaracterizes Mr. Jarek's Factual Narrative as "Legal Conclusion."

Receiver next wrongly argues that Mr. Jarek impermissibly offered a legal opinion on "the proper degree of care" and "educational background needed to review bank records." ECF No. 200 at 11. Receiver's argument is baseless. The portion of Mr. Jarek's report Receiver takes issue with is simple, factual narrative. Mr. Jarek points out that "Receiver refused to identify the unpaid interns that he used in his claims approval process" or "any of the procedures that these unpaid interns performed" or "how they were supervised, if at all." Ex. 1 ¶ 16. Receiver does not (and could not) dispute the truth of these basic factual recitals. They are not opinions; they do not reference the "degree of care." They simply provide context for Mr. Jarek's expert opinions. *See Reach Music Publ'g., Inc. v. Warner Chappell*

Music, Inc., 988 F. Supp. 2d 395, 404 (S.D.N.Y. 2013) (factual narrative contained in expert's report simply provided context for his opinion).

Receiver also argues that Mr. Jarek may not criticize Receiver's use of unidentified interns and methodologies because "[n]owhere . . . does Mr. Jarek point out any methodological or calculation deficiencies or other problems related to the outcome" of the student interns' work. ECF No. 200 at 12. But this is not correct, Mr. Jarek identifies numerous methodological problems and calculation deficiencies in the calculations (which were performed by student interns). Ex. 1 ¶¶ 18-19, 46-100.[1]

E. Mr. Jarek Properly Offered Testimony That Expertise Is Needed to Calculate Losses In This Case.

Receiver errs when he argues that Mr. Jarek has offered an impermissible "legal opinion" on the need for expert testimony on damages. Receiver begins by falsely asserting that Mr. Jarek's testimony is merely that "an expert is required to prove damages." ECF No. 200 at 9. Not so. Mr. Jarek' opinion is that Ponzi schemes are "complex" and that calculation of losses to entities like the Receivership Entities requires "a process of reasoning which can be mastered only by [a] specialist[]." Ex. 1 ¶ 43. Further,

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[1] Nor should Receiver, having declined to provide information on names, qualifications or instructions provided to his student interns, be heard to complain that Mr. Jarek's criticisms were not sufficiently specific.

he testifies that Receiver's methodologies and calculations are improper, inaccurate, overstated and speculative (conclusions that Receiver's *Daubert* motion does not challenge), and that as a result of these deficiencies, Receiver needs an accounting expert to "properly evaluate his losses, if any." *Id.* at ¶ 102; *see also id.* at ¶¶ 46-62.

Thus, Mr. Jarek does not offer legal conclusions; he provides an expert evaluation of why a loss calculation in this case needs the benefit of scientific, specialized, or technical expertise. Experts frequently opine on what skills are necessary to complete certain tasks, and who can perform certain jobs. *See, e.g., Eldredge v. City of St. Paul*, 809 F. Supp. 2d 1011, 1040 (D. Minn. 2011) (accepting expert testimony on ability of party to work as a firefighter); *Wilson v. O'Gorman High Sch.*, 2008 WL 2571855, at *1 (D.S.D. 2008) (accepting expert testimony on ability of party work in certain medical fields). Mr. Jarek's views on this matter are not controversial, let alone wrong. Courts have recognized that accounting or economic expertise in particular may be needed when "cases require a more complex calculation." *See, e.g., Deitz v. Spangenberg*, 2014 WL 537753, at *3 (D. Minn. 2014); *Unicom Monitoring, LLC v. Cencom, Inc.*, 2013 WL 1704300, at *8 (D.N.J. 2013) ("A factfinder cannot be asked to speculate from numbers unsupported by law and divorced from expert guidance, but rather the factfinder needs . . . clear guidance from an expert about how to apply complex calculations."). Because

Mr. Jarek is not offering a legal conclusion, his testimony on this point should be admitted.

F. Receiver's Theory That Computing Damages Is a Matter of "Straightforward Arithmetic" Is Wrong.

To challenge Mr. Jarek's expert opinion, Receiver advances the mistaken theory that damages can be calculated merely by "[c]omputing the difference between what the investor victims of the Ponzi scheme put into the Receivership entities and the amount returned," a matter of "straightforward arithmetic." ECF No. 200 at 11. Receiver is wrong.

First, Receiver's assertion that calculating damages is a matter of "simple arithmetic" is based on a fatally flawed legal theory. The foundation of Receiver's damages theory is that "[d]amages to the Receivership Entities are properly measured by claims against the Receivership Entities by investor victims for the losses that they suffered as a result of the fraud." ECF No. 200 at 3. But as Associated Bank explained in its Summary Judgment Motion, this is wrong. It is black letter law in Minnesota that the Receiver must sue for the damages (if any) of the Receivership entities. *See St. Kelley v. Coll. of St. Benedict*, 901 F. Supp. 2d 1123, 1129 (D. Minn. 2012) (Receiver may sue only for entities he represents); *Zayed v. Buysse*, 2011 WL 2160276, at *4 (D. Minn. 2011) (holding that Receiver may bring "suit to

recover ***corporate assets unlawfully dissipated*** by [the scheme's operator]") (emphasis added, internal quotation marks omitted).

The damages to the Receivership Entities are not the same as the damages to investors, and may not be calculated in the same manner. *Plaza Mortgage and Finance Corp. v. Basroon*, 187 B.R. 37 (N.D. Ga. 1995) is on all fours with this case. There, as here, plaintiff stepped into the shoes of a company that had been used to commit a Ponzi scheme. *Id.* at 39. Plaintiff brought suit against an accounting firm, for its alleged role in supporting the fraud. *Id.* The *Basroon* plaintiff, much like Receiver here, sought to measure damages "based on the difference between the amount invested and the assets on hand." *Id.* at 44. Rejecting this theory, the district court held that damages must be measured "by reference to monies improperly used by [the corporate officer responsible for the Ponzi scheme], accounting fees paid, and other accepted methods of measuring damages suffered ***by debtors***." *Id.* (emphasis added). The district court stressed that it is important to "[m]easur[e] the injury to the debtor by the money going out (looting, embezzlement, waste, etc.) rather than by the money coming in (funds raised by defrauding investors)." *Id.* at 43.

Similarly, in *In re Latin Investment Corp. v. L&L Construction Assoc.*, 168 B.R. 1 (D.D.C. 1993), the plaintiff stepped into the shoes of a company, Latin Investment Corporation, that had stolen money from its depositors. *Id.*

at 2. Plaintiff then sued third parties, alleging that they aided and abetted the fraud and conversion. *Id.* The court explained that the plaintiff must measure his damages by the amount taken from Latin Investment Corporation, not the amount that investors lost:

> To the extent these allegations [that defendants "aided and abetted the debtor's principals, in defrauding the depositors into depositing their monies in the debtor"] are made in the hope of recovering for any damages defendants may have caused depositors, the court agrees that the trustee is without standing to sue. But to the extent these allegations relate to how defendants and the debtor's principals acted in concert to loot the debtor, the trustee has standing to seek redress for any damages the debtor suffered from this fraudulent scheme.

Id.

Second, Receiver's assertion that calculating damages is a matter of "simple arithmetic" is refuted by Mr. Jarek's Report. A lay witness's assertion that he can do expert work does not make it so. As Mr. Jarek explains:

> 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.

Ex. 1 ¶ 45.

Third, Mr. Hlavacek's testimony makes clear that calculating damages in this case is beyond that of a layperson. Whereas Mr. Hlavacek's own work might have been done with simple arithmetic, the same is not true for a proper damages determination; in Mr. Hlavacek's words: "[t]here's a whole

set of law that's been litigated and determined on how to do damages calculations and what's required and I'm not doing that and I don't do that." Deposition Transcript of Scott Hlavacek (Ex. 3) at 220:2-5; *see also id.* 160:6-10 ("I don't calculate damages, I calculate what happened in the accounts.").

III. Receiver's Critique Of Mr. Jarek's Mitigation Methodology Goes To The Weight, Not Admissibility Of His Testimony.

Finally, Receiver argues that "the approach that Mr. Jarek applies is methodologically unsound and should therefore be excluded." ECF No. 200 at 17. Specifically, he takes issue with Mr. Jarek's inclusion of all of Receiver's recoveries as mitigation of damages. *Id.* Receiver's challenge is, again, not well-taken in a motion to strike.

"Disputes as to . . . faults in his use of [a particular] methodology. . . go to the weight, not the admissibility of his testimony." *McCullock v. H.B. Fuller Co.*, 61 F.3d 1038, 1044 (2d Cir. 1995). The Eighth Circuit has explained that "[u]nless the factual or methodological basis for the opinion is fundamentally unreliable, its admission is not an abuse of discretion." *Margolies*, 447 F.3d at 1121. Receiver does contend that Mr. Jarek's methodology is fundamentally unreliable—and it certainly is not—therefore, Mr. Jarek's testimony is admissible.

CONCLUSION

For the foregoing reasons, Receiver's Motion to Strike Portions of the

Report and Bar Testimony of Karl Jarek should be denied.

Dated: November 18, 2016

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