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 Reply Brief In Support of Its Motion to Exclude the Expert Testimony of Catherine Ghiglieri

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INTRODUCTION

Associated Bank's motion is not about what Ms. Ghiglieri failed to say. Contrary to Receiver's argument, Associated Bank does not criticize Ms. Ghiglieri's testimony because she "does not render an opinion on . . . actual knowledge." ECF No. 233 at 2. It is about what Ms. Ghiglieri admitted. Ms. Ghiglieri's admissions entirely undermine the relevance and reliability of her testimony and Receiver's case.

Ms. Ghiglieri conceded that there is no evidence that anyone at Associated Bank knew about the Ponzi scheme:

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

Ex. 1 at 240:5-8. Receiver does not contest that Ms. Ghiglieri made this admission. *See* ECF No. 233 at 12. In fact, Receiver explains why this admission may not be taken lightly:

> [Ms.] Ghiglieri's experience includes 40 years in the banking industry, including 25 years of regulatory experience, as the Texas Banking Commissioner, and in various capacities at the Comptroller of the Currency.

Id. at 1.

Receiver tries to avoid the damage caused by Ms. Ghiglieri's concession in two ways. First, he claims that Ms. Ghiglieri's admission should be ignored because she never intended to testify about what Associated Bank knew.

Second, Receiver argues that Ms. Ghiglieri should be allowed to testify regarding conduct that she believes is "atypical" in the hope that the jury will infer actual knowledge and substantial assistance from such conduct.

Receiver's arguments suffer from two fatal flaws. First, Receiver cannot undo Ms. Ghiglieri's admission that no one at Associated Bank knew about the Ponzi scheme by arguing that she did not mean what she said. Ms. Ghiglieri has testified at deposition and trial numerous times. *See* Ex. 2 at App'x B. If the answer to the question "So there's nobody at the bank who . . . determined that there was actually a Ponzi scheme going on?," was "I have no opinion," or "I do not know," then Ms. Ghiglieri would have said that, instead of "yes."

Moreover, Receiver's notion that Ms. Ghiglieri's opinion on knowledge was somehow beyond the scope of her report flies in the face of the record. Ms. Ghiglieri testified extensively about what she concluded that Associated Bank knew. She testified that the purpose of her methodology was to determine what Associated Bank knew. Receiver cannot simply wipe her testimony away because now he disagrees with her admissions.

Second, Receiver ignores Ms. Ghiglieri's equally damning concessions regarding the supposedly "atypical" conduct listed in her report. Ms. Ghiglieri admitted the conduct that she characterizes as "atypical" occurs at nearly every bank, regardless of whether one of its depositors was running a Ponzi

scheme:

> Q. When you were a bank examiner, how often did you find that a bank had engaged in atypical banking conduct?
> A. Almost every examination would have some sort of atypical conduct in it. . . .
>
> Q. So in your experience as a bank examiner, it wouldn't be unusual for you to find that a bank had engaged in atypical conduct?
> A. Well—yes. . . .

Ex. 1 at 129:6-21. Furthermore, Ms. Ghiglieri testified that the "atypical" conduct listed in her report does not allow her, as a banking expert, to draw any conclusions that these supposed violations had anything to do with the Cook-Kiley Ponzi scheme:

> Q. [Y]ou can't tell me why that atypical banking conduct occurred? You can't tell me if it's because the bank implemented its policies poorly or because someone on the inside at the bank knew about the Ponzi scheme and decided to assist in it?
> A. I think that's correct.

Ex. 1 at 276:14-22 (objection omitted).

These concessions are fatal. Receiver essentially argues that although a bank examination expert with 40 years of experience and access to the entire discovery record concluded that no one at Associated Bank knew about the Ponzi scheme, and further concluded that nothing in the record would even support the inference that anyone at Associated Bank knew about the scheme, a lay jury should be able to come to the ***opposite*** conclusion. More

concretely, Receiver wishes to offer Ms. Ghiglieri's report in the hope that the jury will use it to reach a conclusion Ms. Ghiglieri has opined is wrong.

This beggars belief. Receiver does not cite, let alone distinguish, the Eighth Circuit's holding that when an expert, like Ms. Ghiglieri, offers testimony that is "inconsistent with one of the main premises underlying the [plaintiff's] theory . . . the disconnect between [the expert's] work and the [plaintiff's] theory of liability ***weighs heavily*** against the admission of [the expert's] testimony under *Daubert* because it . . . does not properly 'fit' the [plaintiff's] case." *Grp. Health Plan, Inc. v. Philip Morris USA, Inc.*, 344 F.3d 753, 760-61 (8th Cir. 2003). As explained below and in Associated Bank's opening brief, this rule applies with particular force here.

Finally, Receiver mistakenly contends that the proper and only mechanism for challenging the relevance and reliability of Ms. Ghiglieri's testimony, regardless of how fundamental the flaws in her testimony are, is cross-examination at trial. Receiver's logic effectively eliminates the Court's role as the gatekeeper and renders Rule 702 and *Daubert* meaningless. Simply branding these defects as "trial issues" or fodder for cross-examination cannot salvage Ms. Ghiglieri's testimony.

ARGUMENT

I. Receiver's Defense Of Ms. Ghiglieri's Report Fails Because It Attacks A "Straw Man" And Does Not Address The Key Failings Of Her Report

Receiver argues repeatedly that "[t]he most plausible reading of defendant's arguments is that Ghiglieri's testimony is irrelevant because it does not render an opinion on [Associated] Bank['s] or its employees' actual knowledge of the Cook-Kiley Ponzi scheme." ECF No. 233 at 2; *see also id.* at 1, 3, 8, 10, 11, 12, 13. This is a straw man argument. Nowhere does Associated Bank argue that the problem with Ms. Ghiglieri's testimony is that she did ***not*** opine on Associated Bank's knowledge. To the contrary, Ms. Ghiglieri ***did*** opine on Associated Bank's and its employees' knowledge. She concluded that no one at Associated Bank knew about the Ponzi scheme. Ex. 1 at 240:5-8. Instead of engaging with Associated Bank's argument, Receiver sidesteps, and fails to address, the dispositive question that Associated Bank's motion actually poses: Why should Receiver be allowed to rely upon Ms. Ghiglieri's testimony to ask the jury to reach conclusions that Ms. Ghiglieri has testified are wrong?

II. Receiver Cannot Salvage Ms. Ghiglieri's Report By Disavowing Her Deposition Testimony

A. Ms. Ghiglieri Opined Regarding Associated Bank's Supposed Knowledge

Rather than address the issues that Associated Bank's motion raises, Receiver improperly urges the Court to disregard Ms. Ghiglieri's deposition

testimony (which he does not even cite in his opposition brief) by arguing that Ms. Ghiglieri did not opine on actual knowledge. *See* ECF No. 233 at 8. This is revisionist history. As noted in Associated Bank's opening brief, Ms. Ghiglieri's report delves extensively into the supposed collective knowledge of Associated Bank. ECF No. 195 at 12-17.

Until Ms. Ghiglieri provided an opinion on actual knowledge that was fatal to Receiver's case, Receiver wanted Ms. Ghiglieri to address knowledge and retained her do so. As she explained: "[M]y report does go into what the bank ***knew***." Ex. 1 at 107:15-16 (emphasis added). Ms. Ghiglieri's methodology is grounded in what Associated Bank knew:

> So the – the methodology that I use[d] . . . is what I used when I was a bank examiner, and that is ***I looked at what the bank knew at the time***. I did that by looking at the documents that were produced from the time period. I looked at the deposition testimony that was taken, plus any exhibits that were given to the deponents. And I looked at, you know, the policies and procedures, the alerts, the account opening documents, things like that.

Id. at 185:22-186:9 (emphasis added); *see also id.* at 24:18-20 ("what I'm doing is looking at the documents from the standpoint of what the bank ***knew*** at the time.") (emphasis added); *id.* at 59:17-19 (describing methodology as "to look to see ***what the bank knew at the time***." (emphasis added); *id.* at 60:3-4 ("I . . . confine myself to what the bank ***knew*** at the time.") (emphasis added).

Based on this methodology, Ms. Ghiglieri, offered extensive testimony

regarding Associated Bank's supposed knowledge:

- "The Bank . . . facilitated transfers of investor funds from the Crown Forex LLC #1705 account into accounts that the bank ***knew*** were for Cook's personal use." Ex. 2 at 6 (emphasis added); *see also id.* at 113-114 (same).

- "The Bank . . . ***knew*** the funds came from the Crown Forex LLC #1705 account." *Id.* at 6 (emphasis added).

- "Associated Bank opened the Kiley and Cook account ***knowing*** that proper documentation was missing." *Id.* at 47 (emphasis added).

- "[T]he bank ***knew*** the account was holding client investment funds." *Id.* at 60 (emphasis added); *see also id.* at 62 (same); *id.* at 66 (same).

- Associated Bank "***knew*** of suspicious activity taking place in the accounts." *Id.* at 83 (emphasis added).

- "The Bank ***knew*** at least as of October 10, 2008 . . . the following. . ." *Id.* at 90 (emphasis added).

- "The Bank ***knew***, at least by July 2009, the following information. . . " *Id.* at 96 (emphasis added).

- "At least as of April 13, 2009, the Bank ***knew*** the following. . ." *Id.* at 102 (emphasis added).

- "In my experience and training, the fact that Associated Bank ***knew*** the following should be sending alarm bells off all around the Bank. . ." *Id.* at 104 (emphasis added).

- "The Bank also ***knew*** on April 30, 2009 that Trevor Cook was directing transactions in the Kiley accounts as noted below. . ." *Id.* at 112 (emphasis added).

- "[A]t least by October 10, 2008, . . . [Associated Bank] ***knew*** that . . ." *Id.* at 121 (emphasis added).

- "[redacted]" *Id.* at 122 (emphasis added).

- "[B]y approving a $600,000 cash withdrawal when it ***knew*** that . . ." *Id.*

at 123 (emphasis added).

- "$2 million telephone transfer [f]rom Crown Forex #1705 account (Kiley) to Oxford Global FX LLC #2331 account (Cook) which Sarles ***knew*** was for Cook's personal use." *Id.* at App'x E, 1 (emphasis added).
- "[redacted]" *Id.* at App'x E, 2 (emphasis added).

Ms. Ghiglieri also offered opinions regarding what particular Associated Bank employees supposedly knew. For example, Ms. Ghiglieri claims "Mr. Sarles ***knew*** that he had not obtained the registration documents with the Secretary of State." Ex. 2 at 50-51 (emphasis added); *see also id.* at 52 (opining "[redacted]."); *id.* at 53 ("[redacted]").

During her deposition, Ms. Ghiglieri did not disclaim any opinions regarding Associated Bank's knowledge, nor did she embrace the view that only a "mind read[er]" can testify or reach conclusions about knowledge. *See* ECF No. 233 at 12. To the contrary, she embraced the concept of "actual knowledge" repeatedly:

> Q. Do you have any evidence that anyone in the back room knew – had ***actual knowledge*** that there was any fraudulent conduct going on with any of the receivership entities at the time the Crown Forex, LLC account was opened?
>
> . . .
>
> A. No.

Ex. 1 at 197:5-12 (emphasis added).

> Q. Do you have any evidence that Nataliya Espey had ***actual knowledge*** of the Ponzi scheme?
> A. No.
>
> Q. Do you have any evidence that Nataliya Espey had ***actual knowledge*** that there was anything fraudulent going on with the receivership entities?
> A. No.
>
> Q. Do you have any evidence that Nataliya Espey had ***actual knowledge*** that Trevor Cook or Patrick Kiley were breaching any fiduciary duties that they owed to the . . . receivership entities?
> A. . . . I'll say no for now. . .
>
> Q. Do you have any evidence that Nataliya Espey had ***actual knowledge*** that there was conversion going on with respect to the receivership entities?
> A. . . . I will say no. . . .

Id. at 207:11-208:9 (emphasis added). In sharp contrast, when Ms. Ghiglieri felt that she lacked sufficient information to offer an opinion on knowledge in response to a question, she expressly said so. *See e.g., id.* at 142:13-16 (declining to address "what the OCC knew or didn't know.").[1]

Thus, Ms. Ghiglieri's testimony demonstrates that her opinions on Associated Bank's lack of knowledge were not beyond the scope of her

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[1] Ms. Ghiglieri also testified that her opinions regarding what Associated Bank personnel knew were not legal conclusions. Ex. 1 at 227:5-9 ("I'm not trying to render a legal opinion. But what I'm saying is she had knowledge of – and there are certain things she had knowledge of.").

expertise, nor beyond what she could determine from the evidence she reviewed. Having submitted Ms. Ghiglieri's report on Associated Bank's supposed knowledge, Receiver must accept the consequences of her admissions on the same subject—he must take the bitter with the sweet.

III. Ms. Ghiglieri's Testimony Should Be Excluded Because It Is Irrelevant To Actual Knowledge and Substantial Assistance

A. Receiver Misstates The Relevance Threshold For Expert Testimony

Receiver's argument that "Ghiglieri's testimony is relevant because it relates to the issues in this case" does not pass muster. ECF No. 233 at 10. The relevance of expert testimony is governed exclusively by Federal Rules of Evidence 401 and 402 as Receiver suggests. *See* ECF No. 233 at 9. Federal Rule of Evidence 702 contains a separate relevance standard for expert testimony. *See* Fed. R. Evid. 702(a) (requiring that an expert's testimony "help the trier of fact to understand the evidence or to determine a fact in issue.").

This relevance standard, known as "fit," "is higher than bare relevance." *In re Paoli R.R. Yard PCB Litig.*, 35 F.3d 717, 745 (3d Cir. 1994); *see also Daubert v. Merrell Dow Pharm., Inc.*, 43 F.3d 1311, 1321 n.17 (9th Cir. 1995) (finding that the relevance test in Fed. R. Evid. 702 is not "merely a recitation of the general relevance requirement of Federal Rule 402"). Because expert testimony can be "both powerful and quite misleading," courts

should "exclude proffered [testimony] under Rules 702 and 403 unless they are convinced that it speaks clearly and directly to an issue in dispute in the case, and that it will not mislead the jury." *Daubert*, 43 F.3d at 1321 n.17; *see also Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1055 (8th Cir. 2003) (explaining that *Daubert* tests whether expert testimony "will aid the jury in resolving a factual dispute) (internal quotation marks omitted); *Wheeling Pittsburg Steel Corp. v. Beelman River Terminals, Inc.*, 254 F.3d 706, 715 (8th Cir. 2001) (holding that expert testimony must "assist jurors in deciding the specific issues in the case").

B. Receiver's Argument That Ms. Ghiglieri's Report Is Relevant Cannot Stand In Light Of Ms. Ghiglieri's Testimony

Under any standard of relevance, Receiver's argument that"[w]hether the Bank engaged in atypical conduct and ignored red flags is . . . relevant to whether the Bank had knowledge of or substantially assisted the Ponzi scheme" is wrong. ECF No. 233 at 9.

To begin with, Receiver's argument ignores the record: Ms. Ghiglieri opined that the "atypical conduct" and "red flags" she enumerated shed no light on whether the Bank had knowledge of or substantially assisted the Ponzi scheme. Ex. 1 at 276:14-22.

Further, Receiver's argument ignores the law. To prove the actual knowledge element, Receiver must show that "the aider and abettor *actually*

knew of the underlying wrongs committed." *Varga v. U.S. Bank N.A.*, 952 F. Supp. 2d 850, 857 (D. Minn. 2013). Ms. Ghiglieri concedes that her testimony does not logically advance the actual knowledge requirement. After reviewing almost every document produced by Associated Bank and all the deposition testimony of current and former Associated Bank employees, Ms. Ghiglieri testified that no one at Associated Bank knew about the Cook-Kiley Ponzi scheme. Ex. 1 at 239:15-240:8. As a result, her testimony does not "help the trier of fact to understand the evidence or determine a fact in issue." Fed. R. Evid. 702(a).

C. Receiver Does Not Dispute That Ms. Ghiglieri's Improperly Opines On Collective Knowledge

Receiver fails to respond to the argument in Associated Bank's opening brief that Ms. Ghiglieri's Report—by flagging so-called "atypical" conduct by attributing only to "the Bank" as a whole—"does not shed any light on the question the jury must answer here, *i.e.*, whether an ***identifiable bank employee*** had actual knowledge of the Ponzi scheme." ECF No. 195 at 16.

As Associated Bank's opening brief explained, Ms. Ghiglieri offered numerous opinions regarding Associated Bank's supposed ***collective*** state of mind. *See* ECF Ho. 195 at 12-17. Receiver does not contest the legal principle that corporations, like Associated Bank, "have no state of mind of their own." *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1254 (11th Cir. 2008).

Accordingly—and Receiver does not contest this point, either—one of the corporation's individual agents must have the requisite state of mind to establish corporate liability. *Southland Sec. Corp. v. InSpire Ins. Solutions, Inc.*, 365 F.3d 353, 366 (5th Cir. 2004) (when a cause of action requires both "an essentially subjective state of mind" and "some sort of conduct," as with aiding-and-abetting claims, "the required state of mind must actually exist in the individual" responsible for the wrongful conduct). Actual knowledge may not be cobbled together by pulling disparate bits of information from the minds of employees who acted innocently, and aggregating the information to attribute knowledge to a non-existent hive mind. *Id.*

Receiver, however, does not account for Ms. Ghiglieri's multiple improper opinions concerning collective scienter. Accordingly, Ms. Ghiglieri's opinions are contrary to settled law, lack fit, and should be excluded.

D. Ms. Ghiglieri's Testimony Is Not Relevant To Substantial Assistance

To prove substantial assistance Receiver must show "something more than the provision of routine professional services." *Zayed v. Associated Bank, N.A.,*, 779 F.3d 727, 735 (8th Cir. 2015) (quoting *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 188-89 (Minn. 1999). Ms. Ghiglieri's testimony does not speak to substantial assistance at all. Ms. Ghiglieri admits that the purported shortcomings that she identifies at Associated

Bank occur at nearly every bank, regardless of whether the bank has fallen victim to a depositor-run Ponzi scheme. *See* Ex. 1 at 129:9-10 ("Almost every examination would have some sort of atypical conduct in it."). Moreover , Ms. Ghiglieri cannot conclude that the supposedly atypical conduct listed in her report sheds any light on whether anyone at Associated Bank substantially assisted the Cook-Kiley Ponzi scheme. *See id.* at 276:14-22. As a result, Ms. Ghiglieri's claim that Associated Bank engaged in "atypical" banking conduct is irrelevant to substantial assistance. *See Rosner v. Bank of China*, 2008 WL 5416380, at *14 (S.D.N.Y. 2008), *aff'd,* 349 F. App'x 637 (2d Cir. 2009).

Further, expert testimony should be excluded where it is contrary to law. *See Anderson v. Dairy Farmers of Am., Inc.*, 2010 WL 3893601, at *12 (D. Minn. 2010) (excluding expert opinion that was "directly contrary to the law, and . . . therefore not helpful to a fact-finder at trial."); *In re Levaquin Prods. Liability Litig.*, 2010 WL 8399949, at *4 (D. Minn. 2010) ("Expert opinions that are contrary to law are excludable as unreliable."). Here, Ms. Ghiglieri's opinion that Associated Bank engaged in "atypical" conduct is achieved by defining broadly "atypical" to mean any infraction, large or small, concerning any internal bank policies or regulations. *See* Ex. 2 at 120-123. This approach is contrary to settled aiding-and-abetting law. A bank's failure "to comply with domestic and international bank secrecy, know-your-customer, and anti-money laundering laws" "do[es] not elevate [its] actions

into the realm of 'substantial assistance.'" *Rosner*, 2008 WL 5416380, at *14. Receiver does not cite this case law, much less attempt to distinguish it.

IV. Receiver Fails to Show That Ms. Ghiglieri's Testimony Is Reliable In Light Of Her Rigged Test For Whether Conduct Is "Atypical"

In Associated Bank's opening brief, the Bank demonstrated that Ms. Ghiglieri's conclusion that Associated Bank engaged in "atypical" conduct was based on a rigged test—one that banks would nearly always, if not always, fail, sweeping innocent banks into its net indiscriminately. ECF No. 195 at 18-20. As before, Receiver does not engage these arguments. Instead, Receiver creates his familiar straw man. He mischaracterizes Associated Bank's argument regarding reliability as "based on a flawed belief that [Ms.] Ghiglieri must opine as to whether the Bank had actual knowledge in order for any of her testimony to be reliable." ECF No. 233 at 11. A repeated mischaracterization is still a mischaracterization. That is not Associated Bank's argument. Associated Bank's reliability argument has to do with the flawed and outcome-driven methodology that Ms. Ghiglieri applied. *See* ECF No. 195 at 4, 18-20.

Next, Receiver incorrectly argues that Associated Bank does not rely on any reliability standard articulated in *Daubert*. Not so. Applying *Daubert*, the Eighth Circuit has held that an expert may not "reason[] from an end result." *Sorensen v. Shaklee Corp.*, 31 F.3d 638, 649 (8th Cir. 1994). That is

exactly what Ms. Ghiglieri does here. She uses a test for "atypical" conduct weighted to ensure that banks will seldom, if ever, pass. As Ms. Ghiglieri conceded at her deposition, there is "atypical" conduct at nearly every bank, regardless of whether it is aware of a depositor-run Ponzi scheme:

> Q. When you were a bank examiner, how often did you find that a bank had engaged in atypical banking conduct?
> A. ***Almost every examination*** would have some sort of atypical conduct in it. . . .

Ex. 1 at 129:6-21 (emphasis added).

Ms. Ghiglieri's report is also unreliable because her methodology does not allow her to "separate lawful from unlawful conduct." *Concord Boat Corp.*, 207 F.3d at 1057. Receiver's attempt to distinguish *Concord Boat* falls flat. In *Concord Boat*, the Eighth Circuit considered the reliability of the plaintiffs' liability expert in an antitrust case. 207 F.3d at 1055. The Eighth Circuit found that the expert's model could not distinguish between business conduct that was harsh, but competitive, and conduct that violated the antitrust laws. *Id.* at 1056. Therefore, the Eighth Circuit reversed a jury verdict for the plaintiffs, reasoning that the expert's "opinion should not have been admitted . . . because it did not separate lawful from unlawful conduct." *Id.* at 1057.

Ms. Ghiglieri's report suffers from the same fatal flaw. Although Ms. Ghiglieri has identified several instances of supposedly "atypical" conduct,

her methodology does not allow her to determine whether this "atypical" conduct was caused by Associated Bank's poor compliance with its internal policies or aiding-and-abetting conduct.

> Q. [Y]ou can't tell me why that atypical banking activity occurred? You can't tell me if it's because the bank implemented its policies poorly or because someone on the inside at the bank knew about the Ponzi scheme and decided to assist in it?
> A. I think that's correct.

Ex. 1 at 276:14-22 (objection omitted). Because Ms. Ghiglieri affirmatively "rules in" innocuous explanations for Associated Bank's conduct, her testimony is unreliable and should be excluded. *In re Viagra Prods. Liability Litig.*, 572 F. Supp. 2d 1071, 1086 (D. Minn. 2008); *see also Coleman v. Oracle USA, Inc.*, 2011 WL 2746187, at *6 (D. Minn. 2011) (where an expert cannot "rule[] out alternative explanations" for a defendant's conduct and "[i]n fact . . . admits that the [record] could support other [*i.e.*, innocent] findings" her testimony is unreliable and should be excluded).

V. Ms. Ghiglieri's Testimony Will Mislead The Jury And Confuse The Issues

Receiver falsely claims that Associated Bank did not "state how [Ms.] Ghiglieri's report would mislead a jury." ECF No. 233 at 15. This is not the case. As Associated Bank explained in its opening brief, Ms. Ghiglieri is engaged in bait-and-switch. On the front end, she purports to present evidence of "atypical" conduct and "red flags," *see* Ex. 2 at 120-123, but on the

back end she concedes that nothing about actual knowledge or substantial assistance can be inferred from such conduct. Ex. 1 at 276:14-22. Accordingly, Ms. Ghiglieri's testimony is an open invitation to the jury to conclude that Associated Bank must have engaged in aiding-and-abetting conduct simply because it allegedly violated certain regulations and internal policies.

Ms. Ghiglieri herself has admitted that this false equivalence (*i.e.*, equating alleged BSA/AML infractions, on one hand, with evidence of aiding and abetting, on the other) is not appropriate in this case. Ex. 1 at 276:14-22. Therefore, Ms. Ghiglieri's testimony has a "great potential to mislead the jury" and should be excluded under Rule 403. *Target Corp. v. Greenberg Farrow Architecture, Inc.*, 2012 WL 1963362, at *12 (D. Minn. 2012) (excluding expert opinion under Fed. R. Evid. 403 because "the expert 'patina'" might attach to the proffered testimony and give the expert's theory "more credibility than it deserves."); *Concord Boat Corp. v. Brunswick Corp.*, 1998 WL 35254137, at *1 (E.D. Ark. 1998) (excluding expert testimony that confused poor business ethics with an antitrust violation).

Receiver incorrectly claims that under Associated Bank's logic, "any discussion of federal banking statutes or regulations" would be inadmissible. ECF No. 233 at 15. As explained in Associated Bank's opening brief, expert testimony on these matters should only be excluded when it sets up an admittedly false equivalence between violations of banking norms and aiding-

and-abetting conduct. *See* ECF No. 195 at 20-21. In this case, Ms. Ghiglieri sets up precisely this sort of false equivalence: she concedes that there is no way to infer that anyone at Associated Bank knew about the Ponzi scheme or substantially assisted it based on the allegedly "atypical" conduct listed in her report. But Receiver plans to use her testimony to call upon the jury to make exactly the inference that Ms. Ghiglieri rejects. This is just the sort of misleading testimony that Rule 403 was meant to exclude.

CONCLUSION

For the foregoing reasons, Associated Bank's motion to exclude Ms. Ghiglieri's testimony should be granted.

Dated: November 28, 2016

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