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-JSM)

Defendant Associated Bank, N.A.'s Memorandum of Law In Support of Its Motion for Attorneys' Fees Pursuant to Rule 37(c)(2)

Associated Bank asked the Receiver to admit under Fed. R. Civ. P. 36 that there was no evidence that Associated Bank's employees had knowledge of the Ponzi scheme, and no evidence that any of the Ponzi scheme perpetrators ever told Associated Bank about the scheme. Those matters went to the heart of the Receiver's claims against Associated Bank. And the requests for admissions forced the Receiver to make a choice: either admit that there was no evidence that Associated Bank personnel had knowledge of the Ponzi scheme, or deny the requests for admission and run the risk that Associated Bank could seek its attorneys' fees if Associated Bank demonstrated that none of its employees knew about the Ponzi scheme.

The Receiver made his choice: he refused to admit key facts that proved to be true, and that he had every reason to know would prove to be true. Thus, he forced Associated Bank to prove the truth of the matters. And Associated Bank did so. Yet even ***after*** sitting through multiple depositions where Lien Sarles, current and former Associated Bank employees, employees of the Receivership Entities, and Receiver's own expert unanimously agreed that there was no evidence that anyone at Associated Bank knew about the Ponzi scheme, Receiver never once amended any of his responses to Associated Bank's requests for admissions. *See* Fed. R. Civ. P. 26(e). It became apparent that Receiver's denials were based on expedience, not evidence. Receiver's utter lack of evidence that any Associated Bank employee knew about the Ponzi scheme was so apparent that his own expert admitted it during her deposition:

> Q. Right. So there's nobody at the bank who put this information together and determined there was a Ponzi scheme going on?
>
> A. Yes.[1]

[1] ECF No. 197 at 6.

Receiver's strategy of denying Associated Bank's requests for admission backfired. At summary judgment, this Court concluded that the Receiver's allegations concerning knowledge were "either unsupported or contradicted by the record, and no reasonable jury could infer that Sarles or anyone else at the Bank had actual knowledge of the Ponzi scheme." *Zayed v. Associated Bank, N.A.*, 2017 WL 424855, at *4 (D. Minn. 2017). Contrary to Receiver's accusations that Mr. Sarles had a furtive and nefarious relationship with the Ponzi schemers, the undisputed record showed "nothing more than a normal client relationship." *Id.* Therefore, the Court held that "[the] evidence, viewed in context, does not support a finding that Sarles actually knew about the fraudulent scheme, nor is it sufficient to create a genuine issue of material fact." *Id.* at *6 ("there is no genuine issue of material fact as to the Bank's actual knowledge.").

Rule 37(c)(2) specifically covers this situation. It provides that when "a party fails to admit what is requested under Rule 36 and … the requesting party later proves … the matter true," the Court must award the requesting party its "reasonable expenses, including attorney's fees, incurred in making that proof," unless one of four enumerated exceptions applies. Fed. R. Civ. P. 37(c)(2). None of those exceptions applies here, so an award of the reasonable expenses and attorneys' fees that Associated Bank incurred in proving the

truth of matters that the Receiver refused to admit is mandatory. Associated Bank respectfully asks the Court to order that Associated Bank is entitled to recover the reasonable expenses and attorneys' fees it incurred in proving the truth of those matters, with Associated Bank to provide sworn evidence of those fees and expenses within 30 days of the Court's order to that effect.

Associated Bank hastens to add that this motion is not intended to be a heavy-handed effort to exploit the Court's recent summary-judgment ruling in Associated Bank's favor. *Zayed v. Associated Bank, N.A.*, 2016 WL 424855, at *3 (D. Minn. 2017). Associated Bank could not make this motion until it succeeded in proving the truth of the matters at issue, which did not happen until the Court granted Associated Bank's summary-judgment motion. And Associated Bank incurred a great deal of expense in proving the matters that the Receiver refused to admit. While Associated Bank has no interest in being vindictive or cruel in victory, neither can it turn its back on the recovery that Rule 37(c)(2) provides as the price of being "polite." The Receiver was not being "polite" when he chose to force Associated Bank to prove facts that he should have admitted were true. That choice has a consequence under Rule 37(c)(2).

Background

I. The requests and denials at issue

An alleged "aider and abettor's knowledge of the wrongful purpose is a crucial element in aiding and abetting cases." *Zayed*, 2016 WL 424855, at *3. Thus, Associated Bank served several requests for admission on the Receiver that specifically asked him to admit or deny whether there was any evidence that particular Associated Bank personnel had knowledge of the Cook-Kiley Ponzi scheme. The most important such requests related to Associated Bank Vice President Lien Sarles. The Receiver's theory of this case from the outset was that Sarles knew about the Cook-Kiley Ponzi scheme.[2] Going straight to the heart of these allegations, Associated Bank requested that Receiver admit that he had no evidence that Mr. Sarles knew about the Ponzi scheme:

> REQUEST NO. 33:
>
> Admit or deny that You have no evidence that, during the relevant period, Lien Sarles knew about the Ponzi Scheme.
>
> ANSWER:
>
> Denied.

[2] *See, e.g.,* ECF No. 42 ¶¶ 5-11, 29, 33-35, 45, 53, 55, 58-61, 66, 72.

(Ex. 1 at Req. 33.)[3]

Associated Bank also requested that Receiver admit or deny whether he had evidence that other employees of Associated Bank knew of the Ponzi scheme. Specifically, Associated Bank requested admissions that Receiver had no evidence that any of the following Bank employees knew about the Ponzi scheme: (1) Tammy Simon, who was Mr. Sarles's supervisor; (2) Stephen Bianchi, who was Ms. Simon's supervisor; (3) Natalya Espey, a portfolio specialist (an administrative support function) in Mr. Sarles's department; (4) Jennifer Cox, another portfolio specialist in Mr. Sarles's department; (5) Ryan Rasske, the Bank's BSA/AML officer (responsible for the Bank's compliance with its regulatory obligations under the Bank Secrecy Act and for the Bank's anti-money laundering program); (6) Bonnie Skorczewski, an employee in Mr. Rasske's department; (7) Eileen Paulson, a regional security officer at the Bank; (8) David Martens, another regional security officer; (9) Ceclia Jaap, a branch manager; and (10) Barbara Regan, another branch manager. Receiver denied each request.

REQUEST NO. 34:

Admit or deny that You have no evidence that, during the

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[3] All citations to Exhibits are to the exhibits filed and served in conjunction with this motion.

relevant period, Stephen Bianchi knew about the Ponzi Scheme.

ANSWER:

Denied.

REQUEST NO. 35:

Admit or deny that You have no evidence that, during the relevant period, Nataliya Espey knew about the Ponzi Scheme.

ANSWER:

Denied.

REQUEST NO. 36:

Admit or deny that You have no evidence that, during the relevant period, Ryan Rasske knew about the Ponzi Scheme.

ANSWER:

Denied.

REQUEST NO. 37:

Admit or deny that You have no evidence that, during the relevant period, Bonnie Skorczewski knew about the Ponzi Scheme.

ANSWER:

Denied.

REQUEST NO. 39:

Admit or deny that You have no evidence that, during the

relevant period, Eileen Paulson knew about the Ponzi Scheme.

ANSWER:

Denied.

REQUEST NO. 40:

Admit or deny that You have no evidence that, during the relevant period, Tamara Simon knew about the Ponzi Scheme.

ANSWER:

Denied.

REQUEST NO. 41:

Admit or deny that You have no evidence that, during the relevant period, David Martens knew about the Ponzi Scheme.

ANSWER:

Denied.

REQUEST NO. 42:

Admit or deny that You have no evidence that, during the relevant period, Jennifer Cox knew about the Ponzi Scheme.

ANSWER:

Denied.

REQUEST NO. 44:

Admit or deny that You have no evidence that, during the relevant period, Cecilia Jaap knew about the Ponzi Scheme.

ANSWER:

Denied.

REQUEST NO. 45:

Admit or deny that You have no evidence that, during the relevant period, Barbara Regan knew about the Ponzi Scheme.

ANSWER:

Denied.

(Ex. 1 at Reqs. 34-37, 39-42, 44-45.)

Associated Bank also asked Receiver to admit that the fraudsters never actually *told* anyone at the Bank they were running a Ponzi scheme. Again, Receiver denied each request.

REQUEST NO. 1:

During the relevant time period, no Employee of any Cook-Kiley Entity communicated the existence of the Ponzi Scheme to any Employee of Associated Bank.

ANSWER:

Denied.

REQUEST NO. 47:

Admit or deny that You have no evidence that, during the relevant period, any Employee of any Cook-Kiley Entity communicated the existence of the Ponzi Scheme to any Employee of Associated Bank.

ANSWER:

Denied.

REQUEST NO. 48:

Admit or deny that You have no evidence that, during the relevant period, any Employee of any Cook-Kiley Entity communicated to any Employee of Associated Bank that Trevor Cook was perpetrating a fraud.

ANSWER:

Denied.

REQUEST NO. 49:

Admit or deny that You have no evidence that, during the relevant period, any Employee of any Cook-Kiley Entity communicated to any Employee of Associated Bank that Patrick Kiley was perpetrating a fraud.

ANSWER:

Denied.

(Ex. 1 at Reqs. 47-39; Ex. 2 at Req. 1.)

II. Associated Bank has proven the truth of the matters that the Receiver denied.

As Associated Bank explained in its motion for summary judgment, despite the Receiver's denials, "[t]here is not a scintilla of evidence that any Associated Bank employee had actual knowledge of the Cook-Kiley Ponzi scheme, much less that any employee provided substantial assistance to the

Ponzi scheme or caused any damage to the Receivership Entities."[4] This Court agreed, and granted Associated Bank's motion for summary judgment. *Zayed v. Associated Bank, N.A.*, 2016 WL 424855, at *3 (D. Minn. 2017).

Specifically, Receiver had no evidence that Mr. Sarles was aware of the Ponzi scheme.[5] Among the witnesses who unanimously agreed that Mr. Sarles had no knowledge of the Ponzi scheme is Receiver's own expert, Catherine Ghiglieri. Ms. Ghiglieri is a former Texas Banking Commissioner with over 25 years of bank regulatory experience, including 18 years with the Comptroller of the Currency (the "OCC"), the primary federal regulator that supervises Associated Bank. Ms. Ghiglieri, as Receiver's expert, speaks for Receiver: her admissions are party admissions. *See* Fed. R. Evid. 801(d)(2)(C); *Bianco v. Hultsteg AB*, 2009 WL 347002, at *12 (N.D. Ill. 2009) ("We agree that [the expert's] sworn [deposition] testimony constitutes admissions by a party opponent within the meaning of Federal Rule of Evidence 801(d)(2)."). She testified that no one at Associated Bank, including Mr. Sarles, knew about the Ponzi scheme:

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[4] ECF No. 197 at 1.

[5] *See* ECF No. 197 at 5-9 (setting forth undisputed material facts that Lien Sarles had no knowledge of the Ponzi scheme, including that all witnesses agreed that Mr. Sarles did not know about the Ponzi scheme).

> Q. Right. So there's nobody at the bank who put this information together and determined there was a Ponzi scheme going on?
>
> A. Yes.[6]

Based on the undisputed record, this Court found the Receiver's characterizations of Mr. Sarles' activities to be "a stretch." *Zayed*, 2017 WL 424855, at *4. There was no "unusually close bond between" Mr. Sarles and the Ponzi schemers. *Id.* In fact, "the record demonstrate[d] nothing more than a normal client relationship that included occasional socializing." *Id.* Therefore, the Court concluded that:

> Viewing all the evidence in the light most favorable to the [R]eceiver, the evidence, at most, shows that Sarles occasionally socialized with Cook, that he failed to obtain the necessary documentation in opening one account, and that he may have failed to answer one internal inquiry. ***This evidence, viewed in context, does not support a finding that Sarles knew about the fraudulent scheme***, nor is it sufficient to create a genuine issue of material fact.

Id. at *6 (emphasis added).

The evidence also shows that none of the other Bank employees knew about the Ponzi scheme. Receiver's own expert admitted that no Associated

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[6] ECF No. 197 at 6.

Bank employees had knowledge the Ponzi scheme.[7] When asked about the employees discussed in the Bank's requests for admission, Ms. Ghiglieri was clear in her conclusions that those employees were ***not*** aware of the Ponzi scheme:

> 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.
>
> * * *
>
> Q. Do you have any evidence that Nataliya Espey had actual knowledge of the Ponzi scheme?
> A. No.
>
> * * *
>
> Q. And can you identify any individual at Associated Bank that put those pieces together and concluded that there was actually a Ponzi scheme going on?
> A. Other than Bonnie Skorczewski – did I say it right? . . . She put it together probably the best, the earliest.
>
> Q. But she didn't conclude there was a Ponzi scheme going on?
> A. Right.[8]

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[7] ECF No. 197 at 6.

[8] Ex. 3 at 197:5-12, 207:11-13, 239:15-240:4.

Indeed, at the summary judgment stage, Receiver never even mentioned most of the employees who were the subjects of the Bank's requests for admission. *Zayed*, 2017 WL 424855, at *6 ("The Receiver argues that, even if Sarles did not know about the fraud, other employees at the Bank did. Yet, other than Rasske, the Receiver does not identify any other employees and merely relies on the same arguments rejected above."). As the Court correctly concluded, these additional Associated Bank employees also lacked knowledge of the Ponzi scheme. *Id.* at *4 ("these allegations are either unsupported or contradicted by the record, and no reasonable jury could infer that Sarles or anyone else at the Bank had actual knowledge of the Ponzi scheme.").

And Associated Bank has proven the truth of the statements that there was no evidence that the fraudsters never actually ***told*** anyone at the Bank they were running a Ponzi scheme. Indeed, Receiver's opposition to Associated Bank's motion for summary judgment offered no evidence that anyone employed by the Cook-Kiley Ponzi scheme told any at Associated Bank about the fraud. Only one section of the Receiver's opposition even addressed communications between the Ponzi schemers and Associated Bank. ECF No. 234 at 17 (titled "Sarles Attends Meetings in Furtherance of

the Scheme"). There, the Receiver listed what he characterized as the "important" facts that one of the Ponzi schemers (Christopher Pettengill) supposedly told Mr. Sarles at a meeting. *Id.* But as the Court explained, "the testimony does not support the Receiver's characterization of the meeting," and further, "[t]he court has carefully reviewed and considered in full Pettengill's testimony, and it does not believe that a jury could reasonably infer that Sarles actually knew about the Ponzi scheme based on the alleged meeting." *Zayed*, 2017 WL 424855, at *5. In short, contrary to his denials, the Receiver had "no evidence that, during the relevant period, any Employee of any Cook-Kiley Entity communicated the existence of the Ponzi Scheme to any Employee of Associated Bank."[9]

Argument

"If a party fails to admit what is requested under Rule 36 and if the requesting party later proves a document to be genuine or the matter true, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof." Fed. R. Civ. P 37(c)(2). The rule makes an award of reasonable expenses and fees *mandatory* unless one of four narrow exceptions applies:

[9] Ex. 2 at Req. 47.

(a) "the request [was] held objectionable under Rule 36(a)," (b) "the admission sought was of no substantial importance," (c) "the party failing to admit had a reasonable ground to believe that it might prevail on the matter," or (d) "there was other good reason for the failure to admit." Fed. R. Civ. P. 37(c)(2)(A)-(D). "Enforcement [of Rule 37(c)(2)] encourages attorneys and parties to identify undisputed issues early to avoid unnecessary costs. Failure to identify those issues wastes the resources of parties and courts." *Marchand v. Mercy Med. Ctr.*, 22 F.3d 933, 936 (9th Cir. 1994) (emphasis added).

None of the four exceptions applies here, so the Court "must" award Associated Bank its reasonable expenses and attorneys' fees. *Id.*; *see also In re Stauffer Seeds Inc.*, 817 F.2d 47, 49 (8th Cir. 1987) (reversing decision denying award of attorneys' fees in favor of party who had proven truth of matters not admitted pursuant to request for admission).

I. Associated Bank is Entitled to Recover Attorneys' Fees and Expenses Under Fed. R. Civ. P. 37(c)(2)

A. Request For Admission Concerning Lien Sarles

As set forth above, Associated Bank requested that Receiver admit he had "no evidence that, during the relevant period, Lien Sarles knew about the Ponzi Scheme," Ex. 2 at Req. 33, Receiver denied the request, and Associated Bank has proven the statement to be true. Accordingly, Associated Bank is entitled to an award of fees.

None of the exceptions in Rule 37(c)(2) applies. First, the request was not "held objectionable under Rule 36(a)." Fed. R. Civ. P. 37(c)(2)(A). The Receiver did not interpose a specific objection to this request, and the Court did not hold the request objectionable.

Second, this admission was not "of no substantial importance," because Mr. Sarles' alleged complicity was the centerpiece of Receiver's case. *See* Fed. R. Civ. P. 37(c)(2)(B).

Third, Receiver did not have a "reasonable ground to believe that [he] might prevail on the matter." *See* Fed. R. Civ. P. 37(c)(2)(C). This request for admission addressed only what evidence the Receiver had ("Admit or deny that You have no evidence . . . ") concerning Mr. Sarles. Receiver is the master of the evidence in his possession, and he should have known that he did not yet possess any evidence that Mr. Sarles knew of the Ponzi scheme. When these requests for admission were propounded, Receiver had considerable evidence regarding the Cook-Kiley Ponzi scheme, including investigations and litigation conducted by the U.S. Attorney's Office for the District of Minnesota, the SEC, the CFTC, the IRS, the FBI, and private plaintiffs.[10] Moreover, Receiver had access to terabytes of emails and other

[10] *See* ECF No. 197 at 2.

electronic evidence seized from the Ponzi schemers and multiple days of interviews with the mastermind of the Cook-Kiley Ponzi scheme, Trevor Cook.[11] Despite having access to this exhaustive record, Receiver had no evidence that Mr. Sarles knew about the Ponzi scheme. Receiver might have hoped that he would eventually find such evidence, but this admission addressed actual evidence, not the evidence that Receiver hoped would one day materialize.

Fourth, no "other good reason for the failure to admit" appears in the record. *See* Fed. R. Civ. P. 26(c)(2)(C). The Receiver simply refused to admit matters that he should have admitted.

B. Requests for admissions concerning all Associated Bank employees

i. None of the Associated Bank employees were aware of the fraud.

As set forth above, Associated Bank served 10 requests for admission asking that, as to each of ten Associated Bank employee, Receiver admit that "You [Receiver] have no evidence that, during the relevant period, [the Associated Bank employee] knew about the Ponzi Scheme."[12] Receiver denied

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[11] *See id.*

[12] *See* Ex. 1 at Reqs. 34-37, 39-42, 44-45.

each of these requests. Associated Bank has proven the statements therein to be true.

Receiver's decision to deny these ten requests was a deliberate litigation strategy. Receiver could have limited his denials to Mr. Sarles, admitted that the other employees were in the dark about the Ponzi scheme, and focused on the theory that Lien Sarles was a rogue employee. Instead, Receiver chose to take the position that these employees (most with a lifetime of impeccable records in the banking industry) were all "dirty," all knew there was Ponzi scheme, and all decided to keep doing business with the Ponzi schemers anyway. Among the employees that Receiver refused to admit were unawares is Ryan Rasske, who at the relevant time was Associated Bank's BSA/AML officer, and who is now the Senior VP, Risk and Compliance Markets at American Bankers Association.[13] Another employee as to whom Receiver purported to have evidence of knowledge of the Ponzi scheme was David Martens, a 28-year police veteran with 10 years of experience as the Chief of Police in Lakeville, Minnesota.[14]

In short, Receiver staked out a tenuous position that denigrated the

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[13] *See* ECF No. 197 at 7.

[14] *Id.* at 6-7.

reputations of many honorable employees by refusing to admit that these Associated Bank employees were not aware of the fraud. Moreover, it was a position that he must have known was untenable from the outset. At the time he denied these requests, he already had assiduously collected a vast cache of evidence from the Ponzi scheme entities.[15] The requests that Receiver denied focused only on what was in those materials the Receiver had gathered (admit "You have no evidence . . ."). Despite his denials, Receiver never actually identified any evidence showing that these employees were aware of the fraud. To the contrary, he did not even mention nine of these employees in his summary judgment opposition. *See Zayed*, 2017 WL 424855, at *6 ("other than Rasske, the Receiver does not identify any other employees" that allegedly knew of the Ponzi scheme). He did not even seek to depose two of them (Cecilia Jaap and Barbara Regan), which belies his position that he had evidence that they knew of the fraud. And lest there remain any doubt, Receiver's own expert, Ms. Ghiglieri, said none of the Associated Bank employees had knowledge of the fraud.[16] Ms. Ghiglieri was even asked about several of these employees by name (e.g., Natalya Espey, Bonnie

[15] *See* ECF No. 197 at 2.

[16] *See* ECF No. 197 at 6.

Skorczewski), and specifically conceded that she was aware of no evidence that these employees were aware of the fraud.[17]

ii. The Ponzi schemers never told anyone at Associated Bank that they were committing a fraud.

As set forth above, Associated Bank requested that Receiver admit that "no Employee of any Cook-Kiley Entity communicated the existence of the Ponzi Scheme to any Employee of Associated Bank," then Receiver denied the request, and then Associated Bank proved the statement to be true.[18] Accordingly, Associated is entitled to its fees under Rule 37(c)(2).

With regard to the exceptions to Rule 37(c)(2), requests 1, 47, 48 and 49 are not requests that the Receiver could reasonably have expected to prevail upon. He already had all of the written communications in the Ponzi schemers' seized files and computers that were directed to Associated Bank. He already had access to the Ponzi schemers and their employees (who were under court order to cooperate with him, and certain of whom he chose to interview).[19] None of those documents or witnesses suggested that such a communication occurred.

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[17] Ex. 3 at 197:5-12, 207:11-13, 239:15-240:8.

[18] *See* Ex. 1 at Reqs. 47-49; Ex. 2 at Req. 1.

[19] *See* ECF No. 197 at 2.

II. The Court should order Associated Bank to submit sworn proof of its reasonable expenses and fees within 30 days of the Court's order.

In light of the size and complexity of the fees Associated Bank incurred as a result of Receiver's denials, Associated Bank respectfully requests 30 days from the resolution of this motion to provide proof of its fees and expenses.

Conclusion

The Court should order under Rule 37(c)(2) that the Receiver must pay Associated Bank's reasonable expenses, including attorneys' fees, in proving the truth of the matters that the Receiver failed to admit. The Court should give Associated Bank 30 days to submit sworn proof of the expenses and fees that it incurred.

Dated: February 15, 2017

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