

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)

**Defendant Associated Bank, N.A.'s Response
In Support Of Its Bill Of Costs**

Receiver's opposition to Associated Bank's bill of costs is premised on two fictions: (1) his status as a Ponzi scheme receiver immunizes him from taxation of costs; and (2) Associated Bank is seeking to tax obviously non-taxable costs. Common sense, applicable law, and a cursory review of the invoices supporting Associated Bank's bill of costs easily dispel those fictions.

First, Receiver's status does not excuse him from taxation of costs. Neither Fed. R. Civ. P. 54(d) nor 28 U.S.C. § 1920 provides that court-appointed receivers are immune from taxation of costs. Receiver has not cited any case where a court-appointed Receiver was excused from paying costs that are normally taxed against a non-prevailing litigant. Indeed, courts have

taxed costs against court-appointed receivers where a bank prevails on summary judgment on allegations of fraud and breach of fiduciary duty. *See Wiand v. Wells Fargo Bank, N.A.*, 2015 WL 12839237, at *7 (M.D. Fla. 2015) (“Although the Receiver contends that he brought this action in good faith in an effort to recover money for defrauded investors, an award of costs in this case is appropriate as a denial of costs would penalize the Bank as a prevailing party. In bringing this action, the Receiver was aware that he could be responsible for an assessment of costs in the event he did not prevail, despite any good faith in the merits of his claims. Therefore, the Bank is entitled to an award of costs as the prevailing party.”), *adopted by* 2016 WL 355490 (M.D. Fla. 2016).

Nor can Receiver avoid paying taxable costs based on his insinuation that he is indigent. *See* ECF No. 281 at 1-2. In his January 12, 2017 Status Report to Judge Davis, Receiver acknowledged that he “has a cash balance of ***\$928,601.23***” in his bank account. *See* Ex. 1 at 11 (emphasis added). It defies logic and common sense to assert that an individual with \$900,000 in cash is indigent. This fact alone easily distinguishes each of the cases cited in Receiver’s opposition. *See, e.g., Washburn v. Fagan*, 2008 WL 361048, at *2 n.5 (N.D. Cal. 2008) (refusing to tax costs where “Plaintiff testified that . . . he made \$600 a month . . . and had \$1300 in the bank.”).

Second, Receiver argues that the Court should not tax costs for “lunch, document shredding, expedited delivery, rough transcripts, compressed transcripts, scanning services, and shipping and handling fees,” “extra copies for the convenience of counsel,” and “copying supplies such as binders, tabs, and folders.” ECF No. 281 at 3, 5. Associated Bank *agrees*. That is why *Associated Bank did not ask the Court to tax any of those costs*. In each of Associated Bank’s invoices submitted in support of its bill of costs, Associated Bank highlighted the specific costs that it requested that the Court tax. *See* ECF No. 278-4, ECF No. 278-5. Even a cursory reading of these invoices shows that Associated Bank did not seek to tax any of the non-taxable costs that Receiver lists in his opposition. Accordingly, this strawman argument should be rejected and the Court should tax the costs that Associated Bank actually requested, the amount of which the Receiver does not contest.

I. Receiver Can, And Should, Pay All Taxable Costs

A. Receiver’s Status Does Not Excuse His From Paying Costs

Receiver’s argument that his status as a court-appointed receiver should excuse him from paying taxable costs has been rejected by other courts, and this Court should reject it as well.

In *Wiand v. Wells Fargo Bank, N.A.*, a court-appointed receiver was named to recover the millions of dollars lost by investors in a decade-long Ponzi scheme. 2015 WL 12839237, at *1. The receiver sued Wells Fargo for

breach of fiduciary duty, conversion, negligence, fraudulent transfer, and unjust enrichment. *Id.* The Bank prevailed on summary judgment, and sought taxable costs. *Id.* The receiver argued that the court should deny all costs because the receiver brought “[the] action in good faith in an effort to recover money for defrauded investors.” *Id.* at *7. The court rejected this argument and awarded Wells Fargo \$40,312,94 in taxable costs. *Id.* at *7, *11. The court explained:

Although the Receiver contends that he brought this action in good faith in an effort to recover money for defrauded investors, an award of costs in this case is appropriate as a denial of costs would penalize the Bank as a prevailing party. In bringing this action, the Receiver was aware that he could be responsible for an assessment of costs in the event he did not prevail, despite any good faith in the merits of his claims. Therefore, the Bank is entitled to an award of costs as the prevailing party.

Id. at *7.

The same result is warranted here. Receiver asserted nearly identical claims of secondary liability for Ponzi scheme losses against Associated Bank. Receiver alleged that Associated Bank aided and abetted fraud, conversion, breaches of fiduciary duties, and false representations and omissions. *See Zayed v. Associated Bank, N.A.*, 2017 WL 424855, at *2 (D. Minn. 2017). Like Wells Fargo in *Wiand*, Associated Bank prevailed on summary judgment. While Receiver contends that it would be unfair to tax costs against him when he was merely seeking to recover funds on behalf of victims of the Cook-

Kiley Ponzi scheme, *see* ECF No. 281 at 2, he was undoubtedly “aware that he could be responsible for an assessment of costs in the event he did not prevail, despite any good faith in the merits of his claims.” *Wiand*, 2015 WL 12839237, at *7. As a result, Associated Bank is entitled to an award of costs as the prevailing party. *See Wiand*, 2015 WL 12839237, at *7.

Receiver’s insistence that he asserted claims against Associated Bank in good faith to seek a recovery on behalf of the victims of the Cook-Kiley Ponzi scheme (*see* ECF No. 281 at 1-2) misses the mark. Neither 28 U.S.C. § 1920 nor Fed. R. Civ. P. 54(d) requires proof of bad faith to recover costs, or provide that good faith excuses a non-prevailing party from paying costs. Costs are awarded not to punish bad faith (that is the office of rules such as Rule 11), but to reimburse the prevailing party. Thus, the Eighth Circuit holds that “[a] general statement of fairness is insufficient, without more, to rebut the Rule 54(d)(1) presumption for an award of costs to the prevailing party.” *Thompson v. Wal-Mart Stores*, 472 F.3d 515, 517 (8th Cir. 2005).

B. Receiver Is Not Indigent; He Has \$900,000 In The Bank

Receiver’s newly-minted claim that he is indigent is particularly galling. Receiver has nearly a million dollars in the bank, can easily pay Associated Bank’s costs, and should not be allowed to plead poverty. “Rule 54(d)(1) codifies a venerable presumption that prevailing parties are entitled to costs.” *Marx v. Gen. Revenue Corp.*, 133 S. Ct. 1166, 1172 (2013); *see also*

168th & Dodge, LP v. Rave Reviews Cinemas, LLC, 501 F.3d 945, 958 (8th Cir. 2007) (“A prevailing party is presumptively entitled to recover all of its costs.”). “To overcome the presumption of taxation, the losing party must give the Court ‘specific reasons explaining why . . . it would be in appropriate or inequitable to award costs.’” *Kaplan v. Mayo Clinic*, 2011 WL 3837095, at *1 (D. Minn. 2011) (quoting *Jack Russell Terrier Network of N. Cal. v. Am. Kennel Club, Inc.*, 407 F.3d 1027, 1038 (9th Cir. 2005)).

While indigence is recognized as an appropriate justification for the denial of costs, “[a] losing party must establish indigence through affidavits or other evidence of income, assets, and schedules of expenses.” *Kaplan*, 2011 WL 3837095, at *2; *see also Wagner v. City of Pine Lawn, Mo.*, 2008 WL 2323486, at *2 (E.D. Mo. 2008) (“the losing party should provide the Court with ‘sufficient documentation to support a finding’” of indigence).

Receiver has provided no such evidence. This omission is hardly surprising, because as of January 11, 2016, Receiver told Judge Davis that he had “a cash balance of approximately \$928,601.23 in the Receiver’s bank account.” Ex. 1 at 11. Receiver never explains how an individual with nearly \$1 million in the bank is indigent, let alone cites any case for the proposition.

To distract from the fact he can afford to pay taxable costs, Receiver points to the fact that the investors in the Cook-Kiley Ponzi scheme have suffered financial losses. *See* ECF No. 181 at 2. But this is red herring, as the

investors are not parties to this action. Receiver cites no case holding that costs can be excused based on the interest of a non-party (*e.g.*, that a corporation can avoid costs based on the financial status of its shareholders), and Associated Bank is aware of none. Moreover, upending Rule 54(d) whenever a losing party suffers financial losses would render it toothless.

II. Associated Bank Did Not Seek To Tax The Costs That Receiver Opposes

Receiver's claim that Associated Bank is seeking thousands of dollars in costs that are not taxable is equally untrue. It is readily apparent from the face of Associated Bank's bill of costs that Associated Bank is not seeking the costs of which Receiver complains. In each invoice attached to Associated Bank's Bill of Costs, Associated Bank highlighted each of the specific line items that it was seeking to tax. Receiver simply ignores that.

Receiver does not object to Associated Bank's taxation of costs for fees of the Clerk and docket fees, but objects to Associated Bank's taxation of costs for depositions and making copies. *See* ECF No. 281 at 2-17. Receiver's objections to these costs are baseless. As shown below, Receiver simply invents costs that Associated Bank never sought to tax and then objects to those costs. This is a strawman tactic that the Court should reject. All costs that Associated Bank actually sought to tax are appropriate and should be taxed.

A. Associated Bank Properly Taxed Its Deposition Costs

Receiver's objections to Associated Bank's deposition costs rely on half-truths and untruths. Receiver objects to costs that Associated Bank never attempted to tax. Associated Bank seeks to tax \$22,532.50 in costs related to deposition transcripts necessarily obtained for use in the case. *See* ECF No. 278. These costs include the following depositions:

Deposition	Taxable Costs
Christopher Pettengill	\$2,382.45
Catherine Ghiglieri	\$2,480.20
Leo Domenichetti	\$2,296.50
Scott Hlavacek	\$2,041.80
Kyle Garman	\$1,170.90
John Loebel	\$2,749.80
Julia Gilsrud	\$3,718.95
Nataliya Espey	\$633.55
David Martens	\$329.10
Jenny Cox	\$436.30
Michael Behm	\$489.50
Nicole Kitowski	\$892.30
Ryan Rasske	\$574.35
Joanne Alberts	\$524.30
Lien Sarles	\$1,196.80
Charles Grice	\$555.75

Instead of opposing these costs on the merits, Receiver invents another \$12,351 in costs that Associated Bank *never claimed* and then opposes those fictitious costs.

In his opposition, Receiver opposes taxing the cost of reproducing the exhibits to the depositions, but offers no basis for excluding those costs. *See* ECF No. 281 at 4. "Although the costs of deposition exhibit copies . . . are not

explicitly mentioned in [28 U.S.C.] § 1920(2), reproduction of deposition exhibits . . . are inextricably related to and necessary in order to provide a complete deposition transcript.” *Doe v. Cargol*, 2006 U.S. Dist. LEXIS 90162, at *7-8 (D. Ariz. 2006); *see also Cowden v. BNSF Ry. Co.*, 991 F. Supp. 2d 1084, 1088 (E.D. Mo. 2014) (taxing costs for deposition exhibits and noting that non-prevailing party “failed to cite any case supporting its blanket proposition that copies of deposition exhibits constitute unrecoverable costs”).

Accordingly, Associated Bank is seeking only taxable deposition costs.

1. Pettengill Deposition

Associated Bank seeks to tax \$2,382.45 in costs for the deposition of Mr. Pettengill. *See* ECF No. 278-4 at 2-3. As the highlighted invoices show, these costs consist of:

Original Transcript:	\$1,107 ¹
Reporter Appearance Fee:	\$420
Deposition Exhibits:	\$45.45
Videographer:	\$900 ²

See id. Receiver falsely claims that Associated Bank sought to tax costs for a rough transcript and shipping and handling. *See* ECF No. 281 at 3. Not so.

¹ As a courtesy to Receiver, Associated Bank included the \$1,017 cost of a two-day expedited transcript in its Bill of Costs, rather than the \$1,217.70 cost of the original, certified transcript. *See* ECF No. 278-4 at 2. Remarkably, Receiver *objects* to Associated Bank taxing this lower amount. *See* ECF No. 281 at 3.

² Receiver does not object to Associated Bank taxing videographer fees for videotaped depositions.

2. Ghiglieri Deposition

Associated Bank seeks \$2,480.20 in costs for the deposition of Ms. Ghiglieri. *See* ECF No. 278-4 at 4-5. As the highlighted invoices show, these costs consist of:

Original Transcript:	\$1,273.50
Reporter Appearance Fee:	\$140
Deposition Exhibits:	\$71.70
Videographer:	\$995

See id. Receiver falsely claims that Associated Bank seeks costs for rough transcripts, real time transcription service, a catered lunch, and shredding. *See* ECF No. 281 at 3. Again, Associated Bank did no such thing.

3. Domenichetti Deposition

Associated Bank seeks to tax \$2,296.50 in costs from the deposition of Mr. Domenichetti. *See* ECF No. 278-4 at 6-7. As the highlighted invoices show, these costs consist of:

Original Transcript:	\$1,143.45
Reporter Appearance Fee:	\$359
Deposition Exhibits:	\$4.05
Videographer:	\$790

See id. Receiver falsely claims that Associated Bank is taxing costs for rough transcripts and shipping and handling. *See* ECF No. 281 at 3. It does not.

4. Hlavacek Deposition

Associated Bank seeks \$2,041.80 in costs for the deposition of Mr. Hlavacek. *See* ECF No. 278-4 at 8-9. As the highlighted invoices show, these

costs consist of:

Original Transcript:	\$916.40
Reporter Appearance Fee:	\$240
Deposition Exhibits:	\$35.40
Videographer:	\$850

See id. Receiver falsely claims that Associated Bank seeks to tax costs for rough transcripts, real time transcription service, and shipping and handling.

See ECF No. 281 at 3. Again, not so.

5. Garman Deposition

Associated Bank seeks \$1,170.90 in costs for the deposition of Mr. Garman. *See* ECF No. 278-4 at 10-11. As the highlighted invoices show, these costs consist of:

Original Transcript:	\$480.15
Reporter Appearance Fee:	\$175
Deposition Exhibits:	\$0.75
Videographer:	\$515

See id. Receiver falsely claims that Associated Bank sought to tax costs for rough transcripts and shipping and handling. *See* ECF No. 281 at 3. That is simply untrue.

6. Loebel Deposition

Associated Bank seeks to tax \$2,749.80 in costs from the deposition of Mr. Loebel. *See* ECF No. 278-4 at 12-13. As the highlighted invoices show, these costs consist of:

Original Transcript:	\$1,158.30
Reporter Appearance Fee:	\$525

Deposition Exhibits:	\$1.50
Videographer:	\$1,065

See id. Receiver falsely claims that Associated Bank seeks costs for rough transcripts, real time transcription service, and shipping and handling. *See* ECF No. 281 at 3. Again untrue.

7. Gilsrud Deposition

Associated Bank seeks \$3,718.95 in costs for the deposition of Ms. Gilsrud. *See* ECF No. 278-4 at 14-15. As the highlighted invoices show, these costs consist of:

Original Transcript:	\$1,767.15
Reporter Appearance Fee:	\$647.50
Deposition Exhibits:	\$46.80
Videographer:	\$1,257.50

See id. Receiver falsely claims that Associated Bank seeks costs for rough transcripts, real time transcription service, and shipping and handling. *See* ECF No. 281 at 3. Not true.

8. Espey Deposition

Associated Bank seeks to tax \$633.55 in costs from the deposition of Ms. Espey. *See* ECF No. 278-4 at 16. As the highlighted invoices show, these costs consist of:

Original Transcript:	\$599.65
Deposition Exhibits:	\$33.90

See id. Receiver falsely claims that Associated Bank sought to tax costs for rough transcripts, real time transcription service, and shipping and handling.

See ECF No. 281 at 3. Again, that is not the case.

9. Martens Deposition

Associated Bank seeks \$329.10 in costs for the deposition of Mr. Martens. *See* ECF No. 278-4 at 17. As the highlighted invoices show, these costs consist of:

Original Transcript:	\$321.60
Deposition Exhibits:	\$7.50

See id. Receiver falsely claims that Associated Bank seeks costs for rough transcripts, real time transcription service, and shipping and handling. *See* ECF No. 281 at 3. Associated Bank does nothing of the sort.

10. Cox Deposition

Associated Bank seeks to tax \$436.30 in costs for the deposition of Ms. Cox. *See* ECF No. 278-4 at 18. As the highlighted invoices show, these costs consist of:

Original Transcript:	\$428.80
Deposition Exhibits:	\$7.50

See id. Receiver falsely claims that Associated Bank seeks costs for rough transcripts, real time transcription service, and shipping and handling. *See* ECF No. 281 at 3. This is not true.

11. Behm Depositions

Associated Bank seeks to tax \$489.50 in costs for the two depositions of Mr. Behm. *See* ECF No. 278-4 at 19, 25. As the highlighted invoices show,

these costs consist of:

First Original Transcript:	\$361.75
Second Original Transcript:	\$127.30
Deposition Exhibits:	\$0.45

See id. Receiver falsely claims that Associated Bank seeks costs for rough transcripts and shipping and handling. *See* ECF No. 281 at 3. It does not.

12. Kitowski Deposition

Associated Bank seeks \$892.30 in costs for the deposition of Ms. Kitowksi. *See* ECF No. 278-4 at 20. As the highlighted invoices show, these costs consist of:

First Original Transcript:	\$850.90
Deposition Exhibits:	\$41.40

See id. Receiver falsely claims that Associated Bank seeks costs for rough transcripts, real time transcription service, and shipping and handling. *See* ECF No. 281 at 3. This is untrue.

13. Rasske Deposition

Associated Bank seeks to tax \$574.35 in costs from the deposition of Mr. Rasske. *See* ECF No. 278-4 at 21. As the highlighted invoices show, these costs consist of:

First Original Transcript:	\$572.85
Deposition Exhibits:	\$1.50

See id. Receiver falsely claims that Associated Bank seeks to tax costs for rough transcripts, real time transcription service, a compressed transcript,

and shipping and handling. *See* ECF No. 281 at 3. This is not the case.

14. Alberts Deposition

Associated Bank seeks \$524.30 in costs for the deposition of Ms. Alberts. *See* ECF No. 278-4 at 22. As the highlighted invoices show, these costs consist of:

First Original Transcript:	\$495.80
Deposition Exhibits:	\$28.50

See id. Receiver falsely claims that Associated Bank seeks costs for rough transcripts, a compressed transcript, and shipping and handling. *See* ECF No. 281 at 3. Again, untrue.

15. Sarles Deposition

Associated Bank seeks to tax \$1,196.80 in costs from the deposition of Mr. Sarles. *See* ECF No. 278-4 at 23. As the highlighted invoices show, these costs consist of:

First Original Transcript:	\$810.70
Deposition Exhibits:	\$386.10

See id. Receiver falsely claims that Associated Bank seeks to tax costs for rough transcripts, real time transcription service, a compressed transcript, and shipping and handling. *See* ECF No. 281 at 3. Associated Bank did nothing of the sort.

16. Grice Deposition

Associated Bank seeks \$555.75 in costs for the deposition of Mr. Grice. *See* ECF No. 278-4 at 24. As the highlighted invoices show, these costs consist of:

First Original Transcript:	\$497.25 ³
Deposition Exhibits:	\$58.50

See id. Receiver falsely claims that Associated Bank seeks to tax costs for rough transcripts, real time transcription service, and shipping and handling.

See ECF No. 281 at 3. Not true.

B. Associated Bank Properly Taxed Its Duplication and Exemplification Costs

Receiver’s opposition to Associated Bank’s taxation of duplication and exemplification costs suffers from the same flaw: Receiver objects to the taxation of costs that Associated Bank simply is not seeking to tax. Associated Bank seeks to tax \$10,979.49 in exemplification and copying costs. *See* ECF No. 278. As the table below shows, Receiver invents \$4,642.75 in exemplification costs that Associated Bank does *not* seek, and then opposes those fictitious costs:

³ As a courtesy to Receiver, Associated Bank included the \$497.25 cost of a two-day expedited transcript in its Bill of Costs, rather than the \$512.55 cost of the original, certified transcript. *See* ECF No. 278-4 at 24. Remarkably, Receiver *objects* to Associated Bank taxing this lower cost. *See* ECF No. 281 at 3.

Invoice	Amount That Receiver Claims Is Being Taxed	Amount That Associated Bank Actually Seeks
1602110	\$567.523	\$389.07
1603041	\$218.90	\$124.50
1603054	\$281.03	\$201.00
1603022	\$80.15	\$41.04
1603012	\$260.65	\$103.38
1602219	\$592.94	\$482.70
1602211	\$76.90	\$32.65
1602158	\$469.90	\$260.60
1604037	\$267.37	\$140.88
1604026	\$2,320.68	\$1,974.00
1603240	\$375.18	\$281.28
1603127	\$203.46	\$137.60
1603126	\$213.66	\$154.24
1605181	\$42.03	\$18.64
1605077	\$135.87	\$85.28
1605123	\$101.90	\$48.96
1605124	\$265.52	\$185.28
1604168	\$141.37	\$67.68
1605020	\$132.57	\$22.56
1604238	\$137.31	\$87.84
1604197	\$1,142.57	\$731.04
1604136	\$128.49	\$72.00
1603126	\$213.66	\$154.24
30936	\$1,073.67	\$972.52
1605257	\$21.15	\$20.00
1605197	\$495.29	\$288.76
1605191	\$292.55	\$236.64
1607004	\$304.26	\$245.52
1607142	\$94.65	\$55.20
1607144	\$116.30	\$78.48
1608076	\$1,807.00	\$1,512.60
1608169	\$116.66	\$87.52
1608179	\$85.35	\$53.76
3395	\$960.25	\$538.55
1607180	\$160.17	\$118.56
1607158	\$335.82	\$297.26
1609120	\$43.84	\$24.96
1609030	\$161.99	\$92.88

1608184	\$421.94	\$399.00
1608171	\$63.20	\$29.96
1612007	\$234.28	\$54.24
TOTAL	\$15,622.24	\$10,979.49

The reason for Receiver's error is simple: he mistakenly claims that Associated Bank seeks to tax "costs for copying supplies, such as binders, tabs, and folders." ECF No. 281 at 5. This is not true. Again, Associated Bank plainly highlighted the portion of its invoices that it is seeking to tax. Receiver incorrectly assumes that Associated Bank is attempting to tax *the entirety* of each invoice. This alone invalidates Receiver's objections.

Receiver also claims that Associated Bank has not explained why its copying and exemplification invoices are taxable costs. ECF No. 281 at 4-5. Not so. The invoices that Associated Bank attached to its bill of costs state on their face that they concern copies that were made for use in taking depositions. *See, e.g.*, ECF No. 278-5 at 2 (charges for printing outline for deposition of Julia Gilsrud); *id.* at 4 (charges for printing outline for deposition of Michael Behm); *id.* at 7 (charges for printing outline for deposition of Nataliya Espey). These discovery-related copying expenses fall within 28 U.S.C. § 1920(4) and should be taxed. *See Jo Ann Howard & Assocs, P.C. v. Cassity*, 146 F. Supp. 3d 1071, 1083-84 (E.D. Mo. 2015) (taxing discovery-related exemplification expenses); *Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 674 F.3d 158, 165 (3d Cir. 2012) (noting that Congress

changed the language of § 1920(4) from “for use at trial” to “for use in the case,” and taxing discovery-related copying fees); *Little Rock Cardiology Clinic v. Baptist Health*, 591 F.3d 591, 602 (8th Cir. 2009) (noting the Eighth Circuit has upheld awards of costs for discovery-related expenses).

CONCLUSION

For the foregoing reasons, the Court should tax all of the costs sought in Associated Bank’s bill of costs.

Dated: March 21, 2017

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