No. 17-1250

In the United States Court of Appeals for the Eighth Circuit

R.J. ZAYED, in his Capacity as Court-Appointed Receiver
For The Oxford Global Partners, LLC, Universal Brokerage FX,
and Other Receivership Entities,

Plaintiff-Appellant,

v.

ASSOCIATED BANK, N.A.,

Defendant-Appellee.

Appeal from the United States District Court
for the District of Minnesota – Minneapolis, No. 0:13-cv-00232-DSD.
The Honorable **David S. Doty**, Judge Presiding.

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The district court erred in granting summary judgment on the Receiver's aiding and abetting claims against Associated Bank ("the Bank"). It improperly assumed the role of the trier of fact and wrongly drew inferences for the movant on summary judgment, making numerous mistakes about the record along the way. The decision reads as if nothing unusual occurred when the Bank's suburban branch in Eagan, Minnesota hosted multiple Cook/Kiley Ponzi scheme accounts, except that one or two instances of negligent banking hampered efforts to catch a fraud. The record shows a starkly different reality: documented lies, deflections, policy violations, regulatory violations, and cozy relations with criminal schemers that included strip clubs, sporting events, alcohol and gambling. Expert testimony established that the quality and quantity of Bank policy and regulatory violations were egregious. The Bank continued to assist in tortious acts even after it knew that Swiss authorities had shut down Crown Forex, S.A., the Swiss counterpart of Crown Forex, LLC (one of the entities holding accounts at the Bank).

Viewed through the proper standard of review, the Receiver as non-movant must get all reasonable inferences drawn in his favor. Factual disputes about atypical banking practices resolve in the Receiver's favor, not the Bank's. This Court should therefore reverse.

The Receiver proposes 15 minutes of oral argument for each side.

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JURISDICTIONAL STATEMENT

A. Federal and Appellate Jurisdiction

The lower court had jurisdiction under 28 U.S.C. § 1332 (diversity) as well as under 28 U.S.C. §§ 754, 1367 and 1692. The Court of Appeals has jurisdiction over this appeal because this is an appeal from a final judgment under 28 U.S.C. § 1291, entered on February 1, 2017. (JAPX3882-3883). The Notice of Appeal was timely filed on January 31, 2017 (ripening as a matter of law upon the next day's entry of final judgment). (JAPX3884).

B. Authority of the Receivership

The United States District Court for the District of Minnesota, Chief Judge Michael J. Davis presiding, appointed Plaintiff as Receiver for the estates of, among others, Trevor G. Cook, Patrick J. Kiley and various other entities controlled by them ("Receivership Entities"). *SEC v. Cook et al.*, 09-cv-3333, Dkt. Nos. 13, 68 (D. Minn.); *CFTC v. Cook et al.*, 09-cv-3332, Dkt. No. 10 (D. Minn.); *SEC v. Beckman et al.*, 11-cv-574, Dkt. Nos. 21, 96 (D. Minn.) (collectively, "Receivership Orders").

Under the Receivership Orders, the Receiver stands in the place of and is authorized to pursue all suits that may be brought by the Receivership Entities. *Second Amended Order Appointing Receiver*, No. 09-cv-3333, Dkt. No. 68 at 3 (D. Minn. Dec. 11, 2009); *Order Continuing Appointment of the Temporary Receiver*,

No. 09-cv-3332, Dkt. No. 96, at 4 (D. Minn. Dec. 11, 2009); *Order Appointing Receiver*, No. 11-cv-574, Dkt. No. 10, at 3 (D. Minn. Mar. 8, 2011). The Receivership Entities include "every other corporation, partnership, trust and/or entity (regardless of form) which is directly or indirectly owned by or under the direct or indirect control of Cook or Kiley, or any individual working in concert with any of the Defendants . . . ." *Second Amended Order Appointing Receiver*, No. 09-cv-3333, Dkt. No. 68, at 2 (D. Minn. Dec. 11, 2009); *SEC v. Cook*, Complaint, No. 09-cv-3333, Dkt. No. 1, at 1; *see also* Ex Parte *Statutory Restraining Order*, No. 09-cv-3332, Dkt. No. 21, at 7 (D. Minn. Nov. 23, 2009). This Court previously acknowledged the Receiver's standing in the present case. *Zayed*, 779 F.3d at 729 n.1.

The primary perpetrators of the underlying investor fraud (Bo Beckman, Trevor Cook, Jerry Durand, Pat Kiley and Chris Pettingill) (generally referred to here as the "schemers" or "criminal schemers") were convicted or pleaded guilty, and now serve lengthy prison sentences.

On April 5, 2013, R.J. Zayed recused himself from this matter (No. 13-cv-232 (D. Minn.), Dkt. No. 34, at 1). Chief Judge Davis authorized Tara Norgard, Brian Hayes and Russell Rigby "to act on behalf of the Receiver and in his capacity as the Receiver, with all powers appertaining thereto" and are referred to herein collectively as the Receiver. (*Id*. at 3). Subsequently, Russell Rigby

withdrew from his position as co-Receiver, leaving Ms. Norgard and Mr. Hayes as co-Receivers for this matter.

STATEMENT OF THE ISSUE

Whether the district court erred in granting summary judgment of no aiding and abetting liability by the Bank, despite substantial evidence of record that its Vice President, Lien Sarles, knew of and substantially assisted undisputed acts of conversion, breach of fiduciary duty, fraud and negligent misrepresentation by the primary tortfeasors who were his customers.

Most Apposite Cases: *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179 (Minn. 1999); *Zayed v. Associated Bank*, 779 F.3d 727 (8th Cir. 2015).

STATEMENT OF THE CASE

This Court previously explained the criminal backdrop of the present case. *See United States v. Beckman*, 787 F.3d 466, 474-77 (8th Cir. 2015). A group of criminal Ponzi schemers took over $193 million from hundreds of people, returning only $49 million to a few of them as lulling payments along the way. *Id.* at 474. The program purported to take advantage of arbitrage on the foreign exchange markets in partnership with a Swiss trading outfit, called Crown Forex, S.A. Investors were told their money would be sent to Switzerland and that they would earn annual returns of between ten and twelve percent along with liquidity and complete safety of investments ("no risk"). *Id.* at 475-77. The scheme also

promised that investor funds would be held in segregated accounts. *Id.* The criminal schemers lured their victims to the scheme through radio shows, investment seminars and brochures. *Id.*

The following chronological summary of the record reveals the knowledge and substantial assistance of at least one Bank officer, Lien Sarles, in aiding and abetting the torts committed by the scheme. Following that, the next Statement of the Case subsection addresses the depth of the relationship that the Bank formed with the scheme. The Statement of the Case concludes with an overview of misstatements about the record and inferences wrongly drawn by the district court in favor of the Bank movant in granting summary judgment.

A. Chronology of Associated Bank's Involvement

As discussed in this section, evidence and inferences that the district court should have credited on summary judgment show knowledge and substantial assistance from the Bank's introduction to the scheme through its ultimate collapse.

1. January through June 2008

Associated Bank first became involved in hosting scheme accounts through one of its vice presidents, Lien Sarles, and his family. Sarles' stepbrother, Michael Behm, was a salesman for the Ponzi scheme. (JAPX2397, JAPX4057,

JAPX5066).[1] In December 2007 or January 2008, Behm introduced Lien Sarles to Kiley. (JAPX5066). That introduction quickly brought the fraud into the Bank, where it flourished with the assistance of Sarles and other Bank employees. Chris Pettengill, one of the schemers who pleaded guilty, recalled that Behm was not a central player, but may have known about the fraud and was on the floor "a lot" where the schemers attended meetings. (JAPX2397). Pettengill is now serving a 90 month sentence and gave his testimony while incarcerated, without inducements or incentives.

On January 2, 2008, Sarles helped Kiley and another fraud employee, Julia (Gilsrud) Smith, open the first scheme account at the Bank, in the name of Universal Brokerage FX Management, LLC (#5601). (JAPX5587-5588). Sarles personally delivered the account opening papers to Kiley and Smith at a house in Burnsville, Minnesota, where Kiley broadcast his radio show, ran a boiler room in the basement, and that he called home. (JAPX2606, JAPX2608, JAPX2612, JAPX5066). The location was known within the scheme as "Tiffany Court" because of the street where it was located. When he opened the Universal

[1] On remand, the jury would also learn a fact upon which the Receiver does not currently rely, since it is not in the present record: Sarles' mother Mary was a consultant to Mesa Holdings, a company that received a large cash deposit from the criminal scheme in a transaction that yielded Behm a large finder's fee. *See Zayed v. Arch Ins. Co.*, Case no. 11-cv-1319-MJD-FLN (D. Minn.), ECF No. 39, at 3, 11.

Brokerage FX Management, LLC account, Sarles understood it was to hold investor funds. (JAPX2274, JAPX5071).

Kiley then introduced Sarles to Trevor Cook. (JAPX2274). By April or May 2008, Sarles came to recognize Cook as the leader of the investment program. (JAPX5068). Sarles understood that Cook controlled Kiley's operations. (*Id.*). Sarles routinely visited Cook at his headquarters at 1900 LaSalle Avenue in Minneapolis, known as the "Van Dusen Mansion" due to its prominent history in the city. (JAPX2419, JAPX5068).

Cook brought Sarles into the fold. Sarles and his stepbrother, Mike Behm, held drinking parties and socialized at the Van Dusen Mansion in the spring of 2008, while the schemers would parrot lines from well-known movies glorifying financial schemes and fraud, like *Wall Street* and *Boiler Room*:

> Q. Were you were aware of Mr. Sarles having heard someone make a quote from Wall Street or otherwise exhibiting a game-like attitude towards getting money?
>
> A. That would be in April or May. March, April or May of '08. Many times we would just hang out in Cook's office and we, you know, we would be drinking and he would spout off on, you know, "Greed is good," and then what was the other one? Boiler Room they had one where they were actually quoting Wall Street in Boiler Room. And so they would say it or Cook would do it mostly. And then Durand would, too. But, you know, Sarles would be there and Garman would be there, and I would be there. And there would be several people there.

(JAPX2411).

> Q. [Reading from declaration:] During my time at Oxford I saw Lien at the Van Dusen mansion perhaps a dozen times. He was with Michael Behm when I saw him with Cook around six times surrounding drinking. The drinking would usually take place in Cook's office and would usually migrate to the basement at the Van Dusen. Am I getting that right?
>
> A. Yes.

(JAPX2419, *see also* JAPX2486, JAPX2492).

Around the same time (April 2008), Sarles learned about how the schemers marketed their investment program when he attended at least one investment seminar at the Van Dusen Mansion. (JAPX2436, JAPX2688). A seminar boasting no-risk guaranteed returns within high-liquidity segregated accounts, generated by investor deposits into segregated accounts that fund a foreign exchange strategy based in Switzerland using Sharia-compliant banks that charged no interest (*see* JAPX6288), would have been ridiculous to a sophisticated banker like Sarles. In fact, unlike the lay investors at the seminar, Sarles had taken courses in bank secrecy, anti-money laundering, and federal "Know Your Customer" requirements (sometimes called "KYC"). (JAPX5058, JAPX5073). Sarles also knew that many of the things promised to investors at these seminars were demonstrably and verifiably false. For example, shortly thereafter, he learned that investor funds were not held in segregated accounts anywhere – including at the Bank.

Sarles quickly became a trusted banker to the fraud. In April or May 2008, Sarles attended a meeting at the Van Dusen Mansion that was called to address the

insolvency of Crown Forex, S.A., where the schemers discussed troubles with their bank at the time, Wells Fargo. (JAPX2398, JAPX2422-2426, JAPX2685). The schemers discussed propping up the insolvent Crown Forex S.A. using investor funds and wanting to use Associated Bank to do so since they were coming under scrutiny by Wells Fargo. (JAPX2422-2426). The schemers revealed to Sarles two important matters: (1) that new, incoming investor funds were going to be used to make up for a multi-million-dollar shortfall at Crown Forex S.A. so as to make a $2 million account balance appear as $15 million using a "repapering" technique that sent the money between accounts "back and forth and back and forth," (JAPX2426) and (2) that Wells Fargo was questioning the absence of segregated investor accounts. (JAPX2424). Pettengill testified that the schemers "knew it was fraudulent" to conduct "repapering the accounts," and accordingly did not "leave a paper trail" documenting that they brought Sarles into this "repapering effort," because "I'm sure we would never leave a – a paper trail for a fraudulent event." (JAPX2425). The fraudulent nature of this repapering effort was obvious to Pettengill and others involved and Pettengill was confident that "by agreeing to the process," Sarles "would imply that he did" understand what this movement of money had to mean. (JAPX2426).

Thus by May 2008, Sarles had personally opened accounts for Kiley on site at Tiffany Court, was a familiar face at the Van Dusen Mansion social scene,

learned of Cook's cavalier and predatory attitude about investor funds, gained exposure to the way Cook was marketing the investment program to investors, knew that Crown Forex, S.A. was insolvent, and understood the purpose of the "repapering" project and how Cook asked the Bank to help.

2. June 2008

In June 2008, at Cook's request, Sarles opened what became the central account of the scheme: "Crown Forex LLC," otherwise known as the #1705 account. (JAPX84). Cook's original directive to Sarles had been to open the account in the name of "Crown Forex S.A.," the Swiss entity that supposedly was to hold and invest the funds. (JAPX2693-2694). [redacted] (JAPX5328-5329). [redacted] (JAPX5329). Sarles accordingly advised Cook to open the account in the name of a local LLC, to be created for this purpose, rather than the Swiss company. (JAPX2693-2694). Creating a shell Crown Forex, LLC that mirrored the name of the Swiss Crown Forex, S.A. also would lead investors to believe that they were actually sending their money to Switzerland, where they were told their accounts would be held and invested.

Although Cook asked for the account to be set up, Kiley and Smith were the only signatories. (JAPX84, JAPX96, JAPX5587). Sarles knew that Kiley and Smith worked at the Tiffany Court location in Burnsville and he personally visited them there to set up this new account. Yet he listed the company at "suite" (really a post office box) at Green Dog Sports on Nicollet Avenue in Minneapolis. (JAPX51, JAPX84, JAPX5494). As a result, "Universal Brokerage FX Management" and "Crown Forex LLC" incorrectly would not have appeared in Bank records as located at the same address.

Sarles knew that the Crown Forex LLC account #1705 was to hold investor funds, with Crown Forex LLC serving as the fiduciary. (JAPX2274, JAPX5071). He also knew that investors were promised that their funds would be held in segregated accounts. (JAPX2610, JAPX2688; *see also*, *Beckman* 787 F.3d at 475-77). [redacted] (JAPX84, JAPX5680). Sarles also knew that significant wire activity was to occur in Crown Forex LLC account #1705. (JAPX5070, JAPX5083). Yet, he left the papers blank where expected wire levels were to be noted. (JAPX5357, JAPX5693-5694).

As part of his account opening activities, Sarles also falsely noted that he had received a state LLC certification for Crown Forex LLC, when he had, in fact,

received no such certification. When shown this falsehood while he was under oath at his deposition, Sarles tried to justify his actions based on the "rapport and trust" he had established with the schemers, and based on "above and beyond customer service:"

> I recall receiving the application that was to be completed that was en route to be filed with the Secretary of State, therefore, the rapport and trust that I believed I had, I was providing above and beyond customer service to execute the client's request by opening up the account with the assumption I'd be receiving the state certificate within that two-week period or so it takes to generate from the Secretary of State.

(JAPX5079). Sarles never received the certification. And he never followed up. The Bank threatened to close the account in 2009 for lack of state certification papers, though it inexplicably never did so. (JAPX2276). Separately, on June 16, 2008, when Bank systems indicated that the new Crown Forex LLC account #1705 account failed identity checks, Sarles overrode the failures to enable use of the account in violation of Bank policy. (JAPX5404-5409, JAPX5510).

The net effect of Sarles' account opening strategy was to deflect scrutiny and assist the criminal schemers in concealing their aims. Sarles would have been aware that (1) indicating fiduciary / investment account status, (2) indicating frequent wiring expectations, (3) indicating a residential address of an account owner of a fiduciary account (the same one as a similarly functioning commonly managed account), and (4) indicating foreign account ownership, would have individually or collectively sparked more internal scrutiny on the account. Of

course, [redacted] (JAPX5474-5476, JAPX5490).

With the aid of Sarles, profligate use of Crown Forex LLC account #1705 by the scheme began immediately. Account statements show the scheme began collecting victim funds within days, eventually adding up to $90 million in the Crown Forex LLC account #1705 alone. (JAPX5944-5991).

3. September 2008

In September 2008, Sarles completed the opening of three more scheme accounts, each using a variant of the name "Oxford," each finalized the same day, and each having the same address – the Van Dusen Mansion. (JAPX5760, JAPX5997, JAPX5999). Unlike the Crown Forex LLC #1705 account, Cook was a signatory on these new accounts. Though janitors do not ordinarily control high dollar investment company accounts, for one of these accounts, Sarles had the Van Dusen janitor/handyman, Leo Domenichetti, sign a blank account opening document to make him an account signatory. (JAPX5760). Sarles covered up most of the document when Mr. Domenichetti signed so that he could not see what he was signing. (JAPX2519, JAPX2528-2529, JAPX2547-2548, JAPX2554-2555). Though the final version of the document lists Domenichetti as "Admin. Assistant," this falsehood was added later, without Mr. Domenichetti's knowledge or consent. (JAPX2529, JAPX2556, "But the part about being an administrative

assistant and all this other stuff is baloney."). And while the final version includes four signatories on the document, lines for the other three were completely blank at the time Sarles presented it to Mr. Domenichetti for signature. (JAPX2554). Sarles thus masked the nature of the document being signed by the signer.

(JAPX5164).

4. October 2008

Crown Forex LLC account #1705 first came under scrutiny of the Bank Secrecy Act/Anti Money-Laundering Act ("BSA/AML") Department in October 2008 because of a large amount of domestic wire activity, contrary to the account

opening forms. (JAPX5357). Sarles deflected this inquiry by saying that a lot of "global fund" wire activity was anticipated (a lulling statement), creating the appearance that there was nothing unusual about the account. (JAPX5355).

In this litigation, Sarles initially tried to avoid answering questions about the "global fund" aspect of the Scheme:

> Q. Were you aware that they were involved in wiring money to foreign banks? . . . Meaning Trevor Cook or Kiley or any of the businesses.
>
> A. I wasn't involved with researching where that end user or wire went to.

(JAPX5069). But Sarles changed his answers when confronted with the lulling statement above, admitting to having known about Crown Forex S.A. being a foreign entity:

> Q. So was there a discussion with you about Crown Forex, S.A. not being able to open up an account here?
>
> A. What I recall is telling him I cannot open up an account, that is a foreign entity, you would have to follow protocol and open up an account that's a domestic-filed entity.

(JAPX5070). Sarles in the end admitted to having known that the ostensible business purpose of the accounts he was opening was for global wire transfers to an investment vehicle:

> Q. You put down here, "That wires out local clients' money to the fund." What fund are you talking about?
>
> A. The foreign—the Swiss bank fund or account.

> Q. So it was your understanding that the money that they were getting, they would be wiring that money to a foreign company or bank in Switzerland?
>
> A. That they'd be wiring the money to a Swiss bank account.

(JAPX5083). This is crucial because, while there were indeed "a lot" of wires, none ever left the Bank to go to any foreign company in Switzerland to hold investor funds. (JAPX5741-5758, JAPX5944-5991).

Sarles had therefore completed account opening documents for the Crown Forex, LLC account #1705 in a way that made the account (at first) seem as bland as possible (*i.e.*, no foreign ownership and no expected wires), consistent with an attempt to delay or avoid enhanced due diligence. Then when a Bank investigator asked for clarification in October 2008 in view of high levels of domestic wires, Sarles came around full circle by portraying observed account activity as consistent with an enterprise of the highest level of sophistication and complexity: a "global fund" expected to have "a lot" of wires. (JAPX5355). This statement, in turn, omitted another fact Sarles knew that would have helped investigators: that domestic-only wires were at odds with the purpose of the account, which was to send funds to Switzerland for investment at Crown Forex S.A.

5. December 2008

In December 2008, the scheme welcomed Sarles at its Christmas party at the Van Dusen Mansion. (JAPX5095-5096). Shortly thereafter, Sarles approved many

domestic transfers from Crown Forex LLC #1705 to the schemers. Several instances are particularly relevant. They involve Sarles authorizing transfers at Cook's behest (*e.g.,* "per Trevor") from the account for which Cook was not a signatory (*e.g.*, Crown Forex #1705) to accounts for which Cook was a signatory (*e.g.*, "Market Shot" and "Oxford Global" accounts). (JAPX5829-5834 transfers of $2,000,000, $1,000,000, $40,000 and $40,000).

These transfers were tortious conversions of investor funds by Cook. The scheme entities had a legitimate purpose, at least in theory, to have all funds under their dominion and control devoted to investments. This included maintenance of the funds as promised to investors – in segregated accounts with 100% liquidity with no risk of losing principal. The criminal actors managing the entities performed conversion against their organizations. Every dollar managed inconsistently with (1) investment purposes, (2) segregated accounts and/or (3) 100% liquidity without loss of principal, constituted a conversion of that dollar away from the rightful dominion and control of the respective entity. *See, e.g., Impulse Trading, Inc. v. Norwest Bank Minnesota, N.A.*, 870 F. Supp. 954, 960-61 (D. Minn. 1994) (reciting Minnesota conversion law concerning actions

inconsistent with rightful dominion over funds). In this litigation, the Bank has not contested the fact that such activities embody the tort of conversion.[2]

The December 2008 transfers to Cook, like the rest, embodied torts of conversion. They show movement of funds under Cook's control from an investment account to different accounts with Sarles' explicit authorization. Yet these stand out as particularly atypical, since they also embody transfers at Cook's behest from accounts where he was a non-signatory to accounts where he was a signatory.

Also in December 2008, Sarles helped the scheme by using his family ties to expand the scheme's reach. Sarles had a cousin whose husband worked for a financial firm. (JAPX5109). Sarles encouraged a scheme employee to use the name of that family contact to pave the way for a cold call to a high-ranking executive of the financial firm where he worked. (*Id.*). Ironically, in briefing to the district court, the Bank mistakenly argued at great length, and with strong emphasis, that this occurrence reflected Sarles' supposed good faith recommending investment in the scheme to his cousin, whom the Bank misidentified as a federal prosecutor at the time. (JAPX523 (using bold and italics), JAPX529, JAPX542 (using bold and

[2] Some scheme monies did leave at least Wells Fargo scheme accounts for "investment" in Crown Forex S.A. But even this could not have been according to the rightful dominion and control of the entities. No such "investments" could (or did) guarantee liquidity and principal preservation.

italics)). In response to the Receiver pointing out the falsity of the Bank's statements to this effect, it abandoned this argument. (JAPX6016).

At the same time Sarles was assisting specific tortious transfers and offering family contacts to help the scheme, the Bank was lavishing him with praise. [redacted] (JAPX5181). [redacted] (*Id.*). Sarles had outdone himself compared to his pre-scheme book of business. [redacted] (JAPX5150). Sarles was a "two-to-ten man." (JAPX5061) This means that his accounts usually did two to ten million in annual revenue. (*Id.*). The Crown Forex account #1705 was completely outsized for him, as were other scheme accounts, with over $90 million in investor funds deposited at the Bank in account #1705. (JAPX2329-2330, JAPX2368-2370, JAPX5061, JAPX5944-5991). The Crown Forex #1705 account was Sarles' largest account by far. (JAPX5064).

6. February 2009

February 2009 saw increased Crown Forex, S.A. regulatory troubles and a number of telephone conferences between Sarles and the scheme principals on this

very subject (summarized succinctly in this Court's own prior opinion, *Zayed*, 779 F.3d at 731):

- February 2, 2009: Google Alert saying Crown Forex, S.A. is under investigation (JAPX5584)
- February 3, 2009: Sarles calls Cook (JAPX168)
- February 9, 2009: One of the Ponzi scheme investors receives an e-mail from FINMA saying Crown Forex, S.A. is not authorized to conduct business (JAPX5584)
- February 9, 2009: Sarles has a call concerning Crown Forex (JAPX170)
- February 23, 2009: FINMA announces the liquidation of Crown Forex, S.A. (5535-5536, 5584)
- February 26, 2009: Sarles has an "important" call with Cook (JAPX172).

Despite all of this, in the first half of 2009, tens of millions more in investor funds, ostensibly bound for a shuttered Swiss company, continued to flow into and out of the Crown Forex LLC account #1705 at the Bank. (JAPX5971-5991). Most of these transfers occurred after Sarles had learned that Swiss authorities had shut down Crown Forex, S.A., rendering the sole investment vehicle of the scheme obviously impossible. As Sarles knew, by February 23, 2009, the Swiss company (Crown Forex S.A.) that was to be the ostensible recipient of "global fund" transfers was in liquidation.

7. March 2009

Scheme accounts continued to flourish at Associated Bank, despite the liquidation of Crown Forex, S.A., which was the company at the heart of the investment program that Sarles knew the Crown Forex LLC account #1705 was to facilitate. By March 2009, the scheme's accounts had drawn further internal scrutiny at the Bank, again deflected by Sarles. That month, the BSA/AML Department of the Bank received a 314(b) request from another bank that was sending wires to the Crown Forex #1705 account. A 314(b) request is a permitted voluntary exchange of otherwise-secret information among financial institutions to permit them to comply with the BSA AML. The inquiring bank was suspicious that the domestic Crown Forex #1705 account's Nicollet address at Green Dog Sports appeared to be "a sporting goods shop, a bus company and a deli or something." (JAPX5395). The request again put the account under scrutiny.

To assist Cook, Sarles told the BSA/AML Department investigator that the Nicollet address was "an old address," and that Crown Forex had "moved" from it to the Van Dusen Mansion at 1900 LaSalle. (*Id.*). Yet his testimony in this lawsuit was quite different:

> Q. Did -- were you ever aware that Mr. Kiley or Julia Smith was ever at a Nicollet address?
>
> A. I have no idea.

(JAPX5081).

> Q. Not Mr. Kiley and Ms. Smith, their offices was -- were above the bank in Eagan, correct?
>
> A. They had -- they had office space that I've visited above the bank in Eagan, the Burnsville address, and I couldn't tell you if they also had a desk within the Van Dusen mansion or not, that I don't know.

(JAPX5085). Sarles in fact knew that Crown Forex was always located at the Tiffany Court address (Kiley's residence) and that the only move was to an Eagan location just before the Scheme imploded. (JAPX5068).

8. April 2009

When the Scheme came under scrutiny for a third time by the BSA/AML Department in April 2009, the Bank and Sarles yet again assisted Cook by letting questions go unanswered. A high-ranking Bank officer, Ryan Rasske, the Director of Risk & Financial Crime, received information about an incoming wire to account #1705 of almost $1 million Canadian dollars. (JAPX5398). He then questioned Sarles as to why "a major international FX company[] would hold accounts with Associated Bank instead of a larger bank." (JAPX5397). Rasske also asked Sarles numerous detailed questions about the nature and controlling interests of the business, sought clarity about its presence at the Van Dusen Mansion, and sought out particular documents from Sarles that would shed light on "one of the biggest questions" of Rasske's: Kiley and Smith's relationship with Crown Forex.

(*Id.*). Sarles did not respond, even though he had the answers to Rasske's questions:

> Q. Did you ever discuss with Trevor Cook or Mr. Kiley or Julia Smith the inquiries that were being made by Ryan Rasske in Exhibit Number 93?
>
> A. No.
>
> Q. Did you ever attempt to correct that Crown Forex was actually not located at 1900 LaSalle Avenue?
>
> THE WITNESS: Not to my knowledge.

(JAPX5087).

At the end of that same month, the Bank aided and abetted yet another specific conversion through its Vice President, Lien Sarles. On April 30, Sarles approved a transfer of $1.7 million from the Crown Forex #1705 account to one of Cook's "Oxford" accounts. (JAPX5830, "authorized by Lien Sarles"). The Bank correctly noted during oral argument in the district court that this one transfer (uniquely among those discussed here) seemed to have come into the Bank from an actual account signatory – Julia Smith. (JAPX3815, JAPX6610). [redacted] (JAPX6610). Regardless of how Cook might have laundered the request to give it a veneer of legitimacy, the Bank presented no evidence or argument contradicting that the [redacted] and Sarles-authorized transfer was a conversion. Namely, this $1.7 million transfer did not embody use of the funds in a manner that comported with

control and dominion of the funds to advance a no-risk high liquidity / high return foreign exchange investment program for the benefit of investors.

9. June 2009

On June 25, 2009, just before the scheme unraveled, Cook asked Sarles to facilitate a $600,000 cash withdrawal from one of the Oxford accounts, supposedly to buy a yacht. (JAPX5665-5668, JAPX5397). The request caused a widespread investigation by numerous individuals at the Bank, including Senior Vice President Steven Bianchi, Jenny Cox, and Eileen Paulson of the Security and Crime Prevention department. The transaction triggered numerous red flags, as well as the Banks realization that the April 30 transfer of $1.7 million of investor funds it had facilitated for Cook from Crown Forex account #1705 to Cook's own account was improper, and the Bank had effected it despite incompatible account signatories. (*Id*.). Rather than investigate the transaction further, the Bank helped the criminal schemers "correct" it. As a result, the Bank put $600,000 cash of converted investor funds into a box and watched Cook walk out the front door with it. (*Id*.).

10. July 2009 and After

At 10:06 am on July 9, 2009, Sarles received a copy of that day's Minneapolis Star Tribune article describing the federal lawsuit investors filed against scheme principals who were his clients and signatories on the accounts he serviced for the fraud. (JAPX3903-3905). Sarles immediately forwarded it on to

his fiancé with the comment, "**Not good**…." (JAPX3903, emphasis in original). Yet, despite this article, and the realization that it was "not good" (emphatically so, bolded text and all), just days later the Bank aided and abetted yet another specific conversion of investor funds by the schemers: a $101,000 transfer of investor funds to another fraudulent account at the Bank that had been opened in contravention of Bank policies and procedures: Basel Group LLC account #5214. (JAPX202-203). Like the Crown Forex, LLC account #1705, the Bank opened Basel Group LLC's account with a paper trail of irregularities akin to those of Crown Forex, LLC account #1705 (*e.g.*, no Secretary of State certification, override of identity check failure by Sarles to allow account use). (JAPX5588).

[redacted] (JAPX 3912, JAPX5152). Sarles recalled in deposition testimony that the only reason given for his termination was that his customers were closing accounts. (JAPX5065). But an internal Bank document states that Sarles knew the truth: the Bank wanted to "cut ties" with him "due to the 'Oxford mess.'" (JAPX5183). The Bank quietly discarded its "elephant hunter" when public knowledge of his role would have been a potential public relations catastrophe.

On July 15, 2009 – a few days before his termination but after the newspaper article about the scheme – Sarles was undeterred in cozying up to his client who,

until that point, had made him a star at the Bank: he requested casino names in Panama from Cook, supposedly for a trip with his fiancé. (JAPX5091, JAPX5095). In an attempt to cover up this exchange of gambling-related information, particularly Sarles' awareness of Cook's involvement in gambling, Sarles tried to delete his relevant email conversation. (JAPX5212, JAPX5236).

Meanwhile, on July 18, 2009, the Bank itself [redacted]

The record not only lacks any explanation for [redacted] it also also lacks any explanation for why the Bank did not [redacted]

[redacted]

B. Strip Clubs, Ball Games, Alcohol and Lies

Throughout the Bank's servicing of the accounts of the criminal scheme, Sarles was abnormally close to, and protective of, scheme principals. Before this litigation, Sarles gave false testimony to deflect and whitewash the depth of his involvement with the schemers. In a January 15, 2010 affidavit in a separate civil case, Sarles stated:

> Once the accounts were set up for online banking, I had limited contact with Kiley, Cook and Smith, with the exception of occasional conversations and emails with Smith and Cook about account balances, statements and wire information. At that point, my primary responsibility was to provide customer service for these accounts. I was not responsible for monitoring these accounts for suspicious account activity, withdrawals over $10,000, and irregularities and inconsistencies in check endorsements and payees.

(JAPX2276). Discovery revealed numerous falsehoods in this statement. For example, Sarles in fact did authorize numerous conversion transfers that exceeded $10,000. (JAPX5829-5834). As for his sworn 2010 testimony about "limited

contact," Sarles could not have been more dishonest. First, he attended strip clubs and sporting events with Cook:

> Q. Did you ever go to a strip club with Trevor?
>
> A. Yes.
>
> Q. Was that after the Twins game?
>
> A. I believe so.
>
> Q. Did you do that on more than one occasion?
>
> A. And then I've been after the Wild game as well.

(JAPX5096). Sarles also repeatedly caroused at the Van Dusen Mansion with the criminal schemers (parties that moved from the third floor offices to the basement) while they glorified greed and theft. (JAPX2411, JAPX2419, JAPX2685-2688). When questioned in this litigation, Sarles both denied and admitted social ties with the scheme, fully impeaching himself within a single answer:

> Q. Would you go over to the Van Dusen mansion and have drinks with Mr. Cook and others?
>
> A. Would I go over there to have drinks? No. I've had a drink there before when we were going to the Twins game. There was a movie being shot at the Van Dusen mansion by the Coen brothers, so we were on stage, onset, had a beer, watched some of the film and then went to the Twins game.

(JAPX5096). Pettengill (JAPX2411, JAPX2419) and Kyle Garman, an employee of the scheme (JAPX2486), independently corroborated this point, having seen Sarles at cocktail parties at the mansion.

Sarles even testified that his close "rapport and trust" with the schemers led him to ignore Bank requirements for account openings. (JAPX5079). Sarles himself admitted being at the Van Dusen Mansion "maybe ten times." (JAPX5068). He spoke with Cook at least as often as "once a week," but usually more than that. (JAPX5089). And though Sarles claimed that Cook did not pay for anything, Trevor Cook's handyman testified otherwise about Sarles' reputation among the community of schemers. Namely, Sarles was known to be "tight" with Cook, and paid by Cook as well. (JAPX2557-2558). Sarles was the schemers' man at the Bank because of the "trust" they had built in him. (JAPX2605). "They [schemers] didn't do anything through anybody else because they felt that he [Sarles] was the only one that they could trust." (*Id*.).

Sarles' dishonesty pervaded his activities to protect the scheme from scrutiny while employed at the Bank, as well as his sworn 2010 declaration and his deposition testimony in this case. As mentioned before, an internal Bank document [redacted] (JAPX5183). In addition, the Bank originally claimed entitlement to summary judgment because Sarles supposedly recommended investment in the scheme to his cousin who was a federal prosecutor at the time. (JAPX523 (using bold and italics), JAPX529, JAPX542 (using bold and italics)). In fact, the Bank used this "federal prosecutor recommendation" story as a central theme of its summary judgment motion.

Though the Bank retracted this false argument (JAPX6016, "Counsel apologizes to the Court for this error"), the fact remains that Sarles endorsed it during his deposition. (JAPX5109). He falsely testified to the proposition that his cousin was a federal prosecutor at the time (she was not) and that he got her "into the mix" (he never did):

> Q. [Bank counsel:] So, again, I go back to not getting it. If you're in on this Ponzi scheme, why are you getting your cousin, who is a professional fraud prosecutor, into the mix?
>
> A. I had no idea it was a fraud.

(*Id.*; *see also* Receivership briefing that caused the Bank to admit the error at JAPX5892-5893).

C. The Summary Judgment Decision

The district court's decision overlooks many of the facts mentioned above, instead reciting a factual background that fails to address the record of events that actually occurred.

Fundamentally, the district court declined to treat individual specific primary torts, or analyze the case through that necessary framework. (JAPX3868, n.5). The district court stated it was "a distinction without a difference" whether to analyze aiding and abetting liability through the framework of specific primary torts named in the Complaint of conversion, breach of fiduciary duty, fraud and negligent misrepresentation. (*Id.*). Instead, the district court used an amorphous construct of

"the Ponzi scheme" as the touchstone for all further analyses of knowledge and substantial assistance. (*Id.*). In short, the district court addressed the inapposite question of whether Sarles knew that the scheme was characterizable as a Ponzi scheme. The district court brushed aside as irrelevant whether Sarles knew more fundamental building blocks of that scheme, such as whether Cook was using funds inconsistently with the rightful dominion or control of the investment entities charged with managing them, and whether Sarles knew about and assisted in that conduct.

1. The Decision's "Knowledge" Analysis

Concerning its "knowledge" analysis, the district court minimized Sarles' extracurricular interactions with the scheme by calling them "normal" and stating merely that "Sarles occasionally socialized with Cook." (JAPX3861-3862, JAPX3869). No evidence of record supported that "normal" banker-client relationships encompass this conduct. And in calling the interactions occasional and social, the district court ignored their character: strip clubs, ball games, gambling, and drinking at his client's business offices. The district court instead held, without explanation, that such conduct was "nothing more than a normal client relationship that included occasional socializing" as a matter of law. (JAPX3869).

Likewise, regarding Sarles' deletion of gambling related information from an internal email, the district court inferred that other parts of the email that Sarles did ***not*** delete revealed that "the email as a whole is innocuous, and does not establish an unusually close bond between Cook and Sarles." (*Id.*). Left untreated by the district court is the significance of Sarles deleting the ***gambling-related*** part of the email, showing Sarles' awareness of Cook's habits that were inconsistent with those of an investment fiduciary.

On Sarles' detection avoidance strategies, the district court brushed them aside as well, with the inference favorable to the Bank that "it does not ***necessarily*** follow that he was trying to avoid scrutiny" in lying about having obtained Crown Forex LLC's Secretary of State papers. (JAPX3869-3870, emphasis added). The district court also credited Sarles' explanation that he expected Kiley to provide proper documents in due time, even though the record showed that that never happened, and even though this explanation sidesteps the fact that Sarles lied about having ***already*** obtained such documents. (JAPX84).

The district court also mistakenly stated that "Espey [Sarles' assistant], not Sarles, completed the account opening documents" with respect to how they masked Crown Forex account #1705 as a checking money market account rather than an investment fiduciary account. (JAPX3870). The district court stated that no evidence showed "[t]hat Sarles directed Espey to fill out the form in a certain way"

(*id.*), when the record shows that Sarles did, in fact, [redacted] (JAPX5680). Nor did the district court opinion acknowledge that Sarles signed the document, thus adopting its contents as his own, and hand-delivered it to the schemers. (JAPX84, JAPX5081).

The district court likewise inferred that Sarles "was following bank policy by opening the [Crown Forex] account in the name of a domestic entity" rather than Crown Forex S.A., and in this way did not understand "how opening the account in the name of a domestic entity subjected the account to less scrutiny." (JAPX3870-3871). Again, the district court ignored the evidence that Sarles knew that foreign accounts would be subject to enhanced due diligence, and [redacted] (JAPX5329). The district court likewise drew inferences against the Receiver in determining that Sarles' conduct in using overrides after account identification check failures in violation of Bank policy was innocent, on the basis that such violations "were common at the bank." (JAPX3871). The district court thus inferred favorably for the Bank (the movant) that atypical (indeed, prohibited) conduct could never reflect culpable knowledge.

The district court next brushed aside evidence of Sarles' lulling statements that deflected internal investigations, forming the illogical conclusion that there

was "no evidence that the compliance department was unsatisfied with Sarles's response." (JAPX3872). This is exactly the point – the Bank readily embraced Sarles' excuses and lulling statements. The district court also weighed the evidence to conclude that Sarles' deflecting statements were not false because there was some basis for the statement that there would be a lot of wires. (*Id.*). This conclusion fails to reconcile two important facts: that Sarles' statements did represent falsely that outbound "global" wires would happen (when in Associated Bank scheme accounts they did not), and that Sarles had swung 180 degrees from how he labeled the account when opening it (no wiring expectations) to proclaiming its highly active global wire expectations when investigators inconveniently took an interest. (JAPX5355). In context, each representation constituted a deflection at the time and under the circumstances it was made.

The district court further improperly weighed the evidence against the Receiver to conclude that "no evidence" showed that Sarles lied in calling Green Dog Sports' Nicollet address an "old address" for Crown Forex LLC. (JAPX3872). The district court's weighing of evidence overlooked that Sarles had visited its true address – Tiffany Court – when getting account opening papers signed, thus making the Nicollet representation a knowing lie. (JAPX5081). The district court in the process also revealed a complete misapprehension of the facts when it stated that "Cook submitted the account opening forms" for Crown Forex LLC

(JAPX3872). Rather, Kiley and Smith owned the account and submitted its forms, not Cook. (JAPX84).

The district court also drew inferences favorable to the Bank and against the Receiver to excuse Sarles' failure to answer direct questions about the scheme from the Bank's highest ranking security officer in April 2009, stating that "the record does not reflect whether Sarles responded," and concluding that "it is not reasonable to infer that Sarles attempted to deflect 'investigations' into Crown Forex." (JAPX3873). In fact, the record does reflect this – Sarles did not respond. (JAPX5087). The Bank, which bore the burden of production as movant, did not provide any evidence to the contrary.

The district court also declined to draw inferences about what Sarles understood by "banter about financial industry greed" (actually, banter about the schemers' own greed) in spring 2008 meetings at the Van Dusen Mansion, including specific references to films about fraudulent financial schemes. (JAPX3873). It simultaneously overlooked schemer testimony that they understood that Sarles was their guy (JAPX2605), as well as the natural inferences that ensue when purported investment fiduciaries boast and brag about their own contempt for the investing public. The district court also discounted Sarles' attendance at an investment seminar (JAPX3873), failing to appreciate (or infer) that what Sarles

must have heard about no-risk investments would have sounded bogus and fraudulent to a sophisticated and trained banker.

The district court further declined to draw inferences about Sarles' knowledge from his having attended the spring 2008 meeting discussing the scheme's troubles with Wells Fargo. Here, the district court stated that it "carefully considered" the testimony about re-papering and segregating, concluding that it only supported a "weak inference that Sarles should have inquired further into the Crown Forex account." (JAPX3874). This reveals more district court misunderstandings, as that meeting occurred before Sarles helped the Crown Forex account come into existence in June 2008. Nor did the district court appreciate that even a "weak inference" signifies one that should be drawn for the Receiver when considering a motion for summary judgment. The district court also inferred (in the Bank's favor) that somehow Sarles' knowledge from the meeting was sanitized of any aura of misconduct because the meeting had, in part, been triggered by "Cook's lawyers." (*Id.*). But in fact Pettengill testified that Sarles would not have known anything about lawyers having spurred this scheme meeting. (JAPX2426). Nor did the district court explain how a lawyer's assessment that the program was problematic could have purified any of the meeting's stink. The Bank, as movant, did not provide any positive evidence that Sarles supposedly relied on representations from Cook's lawyers.

The district court showed further misunderstandings about Sarles' authorizations of fund withdrawals. First, it misconstrued the one transaction in which Cook laundered the transfer through an actual signatory as two transfers. (Compare JAPX3875 "Julia Smith . . . requested at least two of the transfers", with JAPX5830, cited evidence showing only a single transfer occurred, only both with a credit slip and charge slip). The district court also stated that no evidence "show[s] that those transfers were requested by non-signatories," but the record actually shows that non-signatory Cook requested them. (JAPX5831, JAPX5833 "per Trevor"). More fundamentally, whether laundered or not, the district court did not acknowledge that [redacted] and that Sarles knew that such transfers constituted conversions. (*E.g.*, JAPX6610). The district court concluded that "there is simply no evidence that Sarles wrongfully authorized transfers from the Crown Forex account" (JAPX3876), but the record amply showed that all transfers but one had been "approved by Lien Sarles" and "per Trevor," absent any signatory's involvement. (JAPX5829-5834). And "wrongful authorization" by Sarles was not the point anyway, since the tort of conversion by Cook occurred regardless of his signatory status.

Concerning Sarles having tricked Mr. Domenichetti with blank forms, the district court misapprehended the record in stating that "he did not testify that the

forms were blank." (JAPX3876). To the contrary, even under heated cross-examination, Mr. Domenichetti was insistent and constant in his testimony that the forms were either blank or covered by Sarles, except to the extent that his own printed name appeared below the line he was to sign. (JAPX2519, JAPX2528-2529, JAPX2547-2548, JAPX2554-2555).

2. The Decision's "Substantial Assistance" Analysis

The district court also built on its misapprehensions noted above to conclude the absence of "substantial assistance." First, it stated that there was "no evidence" of non-signatories withdrawing Crown Forex funds (JAPX3879), when in fact the record shows otherwise. (JAPX5829-5834). In this regard, the district court did not appreciate that the ultimate question of conversion did not turn on whether the removal of funds from the control or dominion of its rightful owner was by a signatory or non-signatory. Indeed, most embezzlers are account signatories, but that does not make their actions lawful. The district court also weighed the evidence to conclude that there was "no indication" that Sarles, in violating procedures to allow Crown Forex to come into existence, "did so in furtherance of the scheme." (JAPX3879). In this regard, the district court inferred that Sarles' improper actions "made exposure of the scheme more likely" (*id.*), thus failing to appreciate the evidence that any Crown Forex account that Sarles had hypothetically opened in the correct way would have been subject to *enhanced* due

diligence and [redacted]

3. The Decision's Failure to Analyze Material Facts

Missing entirely from the district court's treatment of the issues were numerous additional material facts that tended to show knowledge of and substantial assistance to the primary torts:

- Sarles' motive [redacted] and the outsized nature of the scheme accounts compared to the rest of Sarles' book (JAPX5061, JAPX5181)
- Sarles' training in account due diligence and anti-money laundering that gave him the background to know how to craft accounts to avoid or delay diligence review (JAPX5058, JAPX5073)
- The fact that Sarles opened the Crown Forex account #1705 shortly after attending a scheme meeting discussing problems with Wells Fargo scrutiny and the need for a new bank (JAPX84, JAPX2398, JAPX2422-2426, JAPX2685)
- Sarles' knowledge that Crown Forex #1705 was not segregated like it should have been according to the scheme's investor marketing, which Sarles knew (JAPX2610, JAPX2688)

- Sarles' completing all of "Oxford" account openings on the same date with the same address, [redacted] (JAPX5760, JAPX5997, JAPX5999, JAPX5163-5164)
- Sarles' awareness of the FINRA liquidation of the Swiss Crown Forex S.A. entity in February 2009 – rendering impossible any legitimate purpose behind any scheme account (JAPX172)
- Sarles' lies in his 2010 litigation affidavit (compare JAPX2276 with JAPX5829-5834)
- Sarles' lies in this litigation about his cousin the federal prosecutor (JAPX5109)
- [redacted] (JAPX5065, JAPX5152, JAPX5183)
- [redacted] (JAPX3927, JAPX3929, JAPX3930, JAPX3937 [redacted] JAPX3939 [redacted]

* * *

SUMMARY OF THE ARGUMENT

The district court held the Receiver to the near-impossible standard of proving that the Bank aided and abetted "the Ponzi Scheme" – an amorphous concept that can mean whatever its proponent wants it to mean. The law is not so imprecise. Had the district court framed its analysis using the proper legal standards, evaluating the Bank's "knowledge" and "substantial assistance" in the context of the criminal masterminds using the Bank to commit specific primary torts against their corporate entities (conversion, breach of fiduciary duty, fraud and negligent misrepresentations), summary judgment would not have been granted.

ARGUMENT

The district court's decision shows that it improperly assumed the role of the trier of fact, and made numerous mistakes about the record along the way. The decision reads as if nothing unusual occurred at Associated Bank's suburban branch in Eagan, Minnesota in 2008-2009, except that systems needed improvement and one or two "red flags" should have been caught. The reality is far different. Viewed through the proper standard of review and under the proper primary tort framework, the Receiver as non-movant must get all reasonable inferences drawn in his favor. Disputes over these facts are not credited to the Bank as movant. On the contrary, the existence of genuine factual disputes is the very basis for denying the summary judgment motion and sending the case to the jury. Under this standard, sufficient evidence of knowledge and substantial assistance existed in the record to establish at least genuine issues of material fact on the Bank's aiding and abetting liability. This should have precluded summary judgment as a matter of law. This Court should reverse.

A. Standard of Review

Review of the district court's decision is *de novo*. If the Bank as the movant made an initial showing that there was an absence of any genuine factual dispute over an essential element of any of the aiding and abetting claims, the burden would have shifted to the Receiver as nonmovant to show the presence of a

genuine issue of material fact that, if resolved in its favor, would preclude judgment for the Bank as a matter of law. *Jackson v. Riebold*, 815 F.3d 1114, 1119 (8th Cir. 2016). In the process, the Court does not weigh the evidence or assess credibility. *Morgan v. UPS*, 380 F.3d 459, 468 (8th Cir. 2004). Instead, all reasonable inferences must be made in favor of the nonmovant; here, the Receiver. *Id.* at 463.

When state of mind is at issue, as it is here, summary judgment is improper when circumstantial evidence is inconsistent with a movant's contention about what a witness supposedly knew at a particular time. *Best Buy Stores, L.P. v. Benderson-Wainberg Assocs., L.P.*, 668 F.3d 1019, 1030-31 (8th Cir. 2012) (citing numerous cases) (finding that the lower court erred in resolving a fact issue regarding knowledge in favor of the non-movant), *rev'g Best Buy Stores, L.P. v. Developers Diversified Realty Corp.*, 715 F.Supp. 2d 871 (D. Minn. 2010) (Doty, J.); *see also Lyles v. City of Barling*, 181 F.3d 914, 917-18 (8th Cir. 1999) (vacating summary judgment of qualified immunity because record conflicted with what police officers testified knowing at time of warrantless search). A party's mental state is inherently a question of fact that turns on credibility. *United States v. Leak*, 123 F.3d 787, 794 (4th Cir. 1997). "When the state of mind of a person is at issue and the record contains direct evidence of that state of mind in the form of that person's sworn statement, conflicting circumstantial evidence normally creates

only an issue of credibility for trial and summary judgment is inappropriate." *United States v. 717 S. Woodward St.*, 2 F.3d 529, 534 (3d Cir. 1993).

B. The Grant of Summary Judgment Was Wrong

1. Aiding and Abetting Legal Standards

This Court evaluates the district court's decision in the context of Minnesota aiding and abetting law. A claim for common law aiding and abetting requires the Receiver to show that (1) a tort was committed causing injury, (2) the Bank knew of the wrongdoing, and (3) the Bank substantially assisted the wrongful acts. *Am. Bank v. TD Bank, N.A.*, No. 09-cv-2240, 2011 U.S. Dist. LEXIS 49646, at *21 (D. Minn. May 9, 2011); *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 187 (Minn. 1999); *see also Zayed*, 779 F.3d at 733 (citing *Witzman*). The first element is not in dispute in this case.

Under Minnesota law, knowledge may be "actual" or "constructive." *See* Section B.3, below. Regarding the higher "actual knowledge" standard, a "defendant's general awareness of its overall role in the primary violator's illegal scheme is sufficient knowledge for aiding and abetting liability." *K&S P'ship v. Cont'l Bank, N.A.*, 952 F.2d 971, 977 (8th Cir. 1991) (citation omitted). Knowledge is a question of fact and may be inferred from circumstantial evidence, including evidence such as conducting business in a manner that is atypical or lacking in business justification. *Id.* at 977-79; *Am. Bank*, 2011 U.S. Dist. LEXIS

49646, at *22-24. Even "otherwise unremarkable events viewed together may suggest an unusual pattern of events intimating an illegal scheme." *K&S P'ship*, 952 F.2d at 979-80; *Metge v. Baehler*, 762 F.2d 621, 626 (8th Cir. 1985) ("Although the facts we have recounted here at length are unremarkable taken in isolation, we find that taken together, they present what should have been a jury issue on the question of aiding-and-abetting liability"); *see also Arreola v. Bank of Am., N.A.,* No. 11-cv-6237, 2012 U.S. Dist. LEXIS 144765, at *8-9 (C.D. Cal. Oct. 5, 2012) (ignoring red flags may, with other factors, evidence knowledge).

Regardless of whether it is "actual" or "constructive," knowledge is evaluated in tandem with the element of "substantial assistance." *Witzman*, 601 N.W.2d at 188. Where there is a minimal showing of substantial assistance, a greater showing of scienter is required. *Id.* The converse is also true. *Camp v. Dema*, 948 F.2d 455, 459 (8th Cir. 1991) (liability for aiding and abetting may be established by a strong showing of substantial assistance coupled with a minimal showing of knowledge). Factors to consider include "the relationship between the defendant and the primary tortfeasor, the nature of the primary tortfeasor's activity, the nature of the assistance provided by the defendant, and the defendant's state of mind." *Witzman*, 601 N.W.2d at 188. In a case involving professional services, "'substantial assistance' means something more than the provision of routine professional services." *Id.* at 189; *see also Wight v. BankAmerica Corp.*, 219 F.3d

79, 92 (2d Cir. 2000) (permitting pleading where substantial assistance included "arranging for and indeed supervising the transfer of money through the various accounts," in the context of "personal relationships" – such as that which existed between Sarles and the scheme).

2. The District Court Misapprehended the Factual Record, Improperly Weighed the Evidence, and Improperly Drew Inferences in the Bank's Favor

As reflected above, the district court's decision suffered from the pervasive flaw of using the wrong framework to evaluate the aiding and abetting claims at bar. The district court ignored the primary torts. This erroneous starting point led to avoidable errors. The Bank conceded element one of aiding and abetting liability in not moving for summary judgment on that ground – the element that torts were committed causing injury. The district court should have started from the analytical framework that primary tortfeasors (such as Cook) committed specific acts of conversion, breach of fiduciary duty, *etc.* against the Receivership Entities. The district court did the opposite. It fashioned an inapposite primary tort that does not exist in the counts of the Complaint (much less in the common law) – the tort of "Ponzi scheming."

Working from this erroneous premise, the district court decision came to page after page of erroneous conclusions and improper inferences. For example, the district court should have appreciated that every single transfer out of the

Crown Forex LLC account #1705 constituted a wrongful conversion. This was true regardless of who had signatory authority over the account. Thus for aiding and abetting liability, the proper questions to ask were whether sufficient evidence existed to conclude that Sarles knew of the transfers and their wrongfulness, and substantially assisted them. *See Witzman*, 601 N.W.2d at 187. That many of those transfers went through with improper authorizations in violation of Bank policy only underscored their atypical nature – other transfers are also relevant as additional circumstantial evidence of knowledge under authorities such as *K&S P'Ship*, but are not sanitized by any transfers that happened to occur with apparently proper authorization.

The Bank's knowledge of such conversion is repeatedly evidenced in the record. At the outset, Sarles understood how Cook marketed the investment program before the scheme first opened account Crown Forex LLC account #1705. (JAPX2436, JAPX2688). Sarles understood the purpose of account #1705 was to hold investor funds for outbound global wires (though its only outbound wires were domestic). (JAPX5083, JAPX5355). And Sarles understood the schemers' love of greed, contempt for the investing public, and the absurdity of scheme promises to investors that a professional bank officer would never have believed could be true. (JAPX2411, JAPX5058, JAPX5073). Sarles also realized that the scheme approached him specifically to solve problems with another bank's attempt

at due diligence and legal compliance – Wells Fargo scrutinizing the lack of segregated accounts. (JAPX2398, JAPX2422-2426, JAPX2685). Sarles knew that the scheme needed a compliant banker to do things like "repapering" to make $2 million look like $15 million. (*Id.*). Only after gaining all of this knowledge did Sarles help open account #1705 (JAPX84). As events unfolded, Sarles also knew that Swiss authorities made the scheme's ostensible public purpose impossible, given the liquidation of Crown Forex, S.A. in February 2009, but knew that account #1705 was still active and subject to heavy use (and schemer withdrawals) until the very end. (JAPX172, JAPX5971-5991).

Augmenting the above factors, the district court should also have credited the atypical business practices as circumstantial evidence of knowledge. *See K&S P'Ship*, 952 F.2d at 977-79. This included many additional facts of record that support a reasonable inference of knowledge, such as Sarles' numerous account opening irregularities and falsehoods (summarized in expert testimony at JAPX5490-5511), Sarles' falsehoods and omissions given to internal investigators (summarized in expert testimony at JAPX5511-5553), Sarles' opening of multiple "Oxford" accounts [redacted] (*i.e.*, common names, addresses and signatories in multiple accounts opened the same day) (JAPX5760, JAPX5997, JAPX5999, JAPX5163-5164), Sarles having the janitor/handyman sign a covered and blank account opening

paper (JAPX2519, JAPX2528-2529, JAPX2547-2548, JAPX2554-2555), Sarles' improper overrides of account identity check failures (JAPX5404-5409, JAPX5510), and Sarles' authorization of non-signatories to take withdrawals (JAPX5829-5834).

The district court's treatment of atypical banking activities is particularly emblematic of how it formed improper conclusions: since the policy violation was "common," the district court gave it no weight. (JAPX3871). That turns the law upside down. Atypical conduct does not become typical, or outside the scope of aiding and abetting, just because it happens more than it should.

The district court also ignored Sarles' motive [redacted] and the pervasive lies he told in furtherance of that motive. (JAPX5061, JAPX5181). Sarles' lies alone should have generated a genuine issue of material fact over whether his naked denials might even receive credit from the jury. This included the falsehoods at account opening (JAPX84, JAPX2274, JAPX5071, JAPX5079, JAPX5680), falsehoods and deflections to internal investigators (JAPX5355, JAPX5395), email deletions (JAPX3927, JAPX3929, JAPX3930, JAPX5212, JAPX5236), and – perhaps most damning of all – lies under oath both in unrelated 2010 civil litigation (*Compare* JAPX2276 *with* JAPX2411, JAPX2419, JAPX2486, JAPX2605, JAPX2685-2688, JAPX5096,

JAPX5829-5834), and in the case at bar (*Compare* JAPX5065, JAPX5109 *with* JAPX5183, JAPX6016).

And finally, Sarles' close relationship with the schemers is the clincher that should have locked down the reasonableness to the district court of any inference of knowledge. Family ties first brought Sarles into the criminal schemers' fold. (JAPX2397, JAPX4057, JAPX5066). What ensued included frequent alcohol consumption, visits to strip clubs and ball games, and bandying about gambling recommendations and movie quotes extolling greed. (JAPX2411, JAPX2419, JAPX2486, JAPX2492, JAPX5095-5096). The district court drew a perplexing inference in the Bank's favor by calling the relationship "normal socializing." It was not. Sarles did these things with a band of criminals and fraudsters. No evidence supported that bank officers normally go to strip clubs and ball games with their legitimate clients, while also attending frequent drinking parties at their places of business, while also trading information on casinos in Panama. To any ordinary observer, Sarles' conduct was professionally questionable, but at the very least was extremely tight-knit in a social way. Either way, the district court's "normal" label improperly draws inferences in favor of the Bank as the movant on summary judgment.

Each of the factors mentioned above also supports the "substantial assistance" prong, which is evaluated in tandem with knowledge. The district court

simply refused to draw reasonable inferences in the Receiver's favor, as it was required to do, that atypical banking practices constitute substantial assistance to the primary torts.

For example, Sarles opened accounts with false documentation calculated to deflect or delay scrutiny (summarized in expert testimony at JAPX5490-5511), and then deflected internal investigations with additional falsehoods (summarized in expert testimony at JAPX5511-5553). Sarles also acted in violation of internal policy by not responding to security department inquiries (JAPX5087, JAPX5794), and by lending his authorization to Cook's numerous depletions of investor funds into his own accounts from an account over which Cook had no authority (JAPX5829-5834). Opening the accounts at the Bank at all depended on Sarles' identity-check overrides. (JAPX5404-5409, JAPX5510).

The Receiver's expert collected numerous additional examples of atypical conduct—violation of internal policies and federal banking law—and concluded that the Bank's quantity and nature of atypical actions were "egregious."[4]

[4] During oral argument, the Bank argued that the Receiver's banking expert admitted that no one knew of the Ponzi scheme at the Bank. (JAPX3809). The district court correctly refrained from relying on this argument. The question cited by the Bank asked the expert which of two inferences she herself would draw from the facts – Bank employee knowledge that the criminals were running a Ponzi scheme, or no such knowledge they were running a Ponzi scheme. (JAPX3102). Her answer that she would not herself draw either inference assumed that both

(JAPX5490-5567, particularly JAPX5566, "The Bank's conduct was not only atypical, when measured against the standards in the banking industry as noted in this Expert Report, but egregious."). The very existence of the central account of the Scheme—Crown Forex account #1705—constitutes substantial assistance to the primary torts. This account would not have existed absent atypical banking activities, such as the Bank's falsification of account opening documents, improper identity check overrides, false indications of no expected wire activity, lying about the true address of the account and (significantly) false indications of it being a checking/operating account rather than a fiduciary account for holding investor funds. (*See generally id.*).

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inferences were available, and thus cannot possibly signify that inferences of Bank knowledge were unreasonable. This exchange also lacked probative value because it addressed knowledge of "the Ponzi scheme," but not the primary torts themselves. Bank knowledge of the Ponzi scheme was not even a topic within the scope of the expert report; atypical banking activities were its subject. The Receiver's expert correctly refrained from forming any opinion on the ultimate scienter question – a forbidden zone for experts who are not supposed to arrogate to themselves the role of the jury. *Holmes Grp., Inc. v. RPS Prods., Inc.*, 2010 U.S. Dist. LEXIS 102727, *5 (D. Mass. June 25, 2010) ("An expert may not testify to another person's intent. No level of experience or expertise will make an expert witness a mind-reader.").

3. The District Court Also Erred as a Matter of Law in Granting Summary Judgment on Constructive Knowledge – an Issue on Which the Bank Did Not Move for Summary Judgment

The district court also wrongly rejected the Receiver's alternative showing of constructive knowledge. In this section of the decision, the district court inexplicably failed to acknowledge that the Receiver bore no shifted summary judgment burden in the first place, since the Bank's motion had not addressed this element of the aiding and abetting claims. In addition, the district court incorrectly stated Minnesota law. It held that constructive knowledge requires a showing that the primary tort was "clearly tortious or illegal ***to those not directly involved***." (JAPX3867, emphasis added). To the contrary, this part of the standard holds that the primary tort must be "clearly tortious or illegal," without further limitation. *Witzman*, 601 N.W.2d at 188. The district court's expression of the legal standard makes it indistinguishable from circumstantial evidence of actual knowledge. This interpretation of the law would defeat the purpose of having a constructive knowledge standard at all.

In *Witzman*, the Minnesota Supreme Court resolved previous uncertainty by holding that professionals have no immunity from, and are not wholesale excluded from, aiding and abetting liability. *Witzman*, 601 N.W.2d at 187. In remarks that apply to both professionals and non-professionals, the Supreme Court explained

the "knowledge" element. It first observed the general principle under which courts have typically allowed constructive knowledge to be presumed:

> In cases where the primary tortfeasor's conduct is clearly tortious or illegal, some courts have held that a defendant with a long-term or in-depth relationship with that tortfeasor may be deemed to have constructive knowledge that the conduct was indeed tortious. *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 283-84 (2d Cir. 1992). However, where the conduct is not a facial breach of duty, courts have been reluctant to impose liability on an alleged aider and abettor for anything less than actual knowledge that the primary tortfeasor's conduct was wrongful.

Witzman, 601 N.W.2d at 188. After describing these constructive knowledge standards, the Supreme Court then proceeded to analyze whether, in the case at bar, the primary tortfeasor's breach of a duty was "clear." *Id.* (finding it was not, and thus moving on to "actual knowledge" analysis).

It would have served no purpose for the Supreme Court to analyze the constructive knowledge question unless it was applying that as a component of Minnesota aiding and abetting law. Subsequent lower courts have cited *Witzman* while recognizing that "knowledge" under Minnesota aiding and abetting law may include "constructive knowledge," if the underlying conduct was illegal or clearly tortious. *E.g.*, *Bank of Montreal v. Avalon Capital Grp., Inc.*, No. 10-cv-591, 2012 U.S. Dist. LEXIS 46935, at *21 (D. Minn. Apr. 3, 2012) (holding facts pleaded are "sufficient to create a plausible implication of constructive knowledge of clearly tortious or illegal conduct," citing *Witzman*); *Christopher v. Hanson*, No. 09-cv-

3703, 2011 U.S. Dist. LEXIS 60201, at *34 (D. Minn. June 6, 2011) (holding primary tortfeasor's conduct "not so clearly illegal or unlawful so as to justify imputing constructive knowledge," citing *Witzman*); *see also Chem-Age Indus. v. Glover*, 652 N.W.2d 756, 775 (S.D. 2002) (recognizing Minnesota's adoption of "constructive knowledge," citing *Witzman*).

The Second Circuit *Diduck* case cited in *Witzman* provides the exemplar of what Minnesota law would treat as "clearly tortious or illegal" conduct within the context of a "long-term or in-depth relationship," sufficient to amount to "constructive knowledge." *Diduck* involved primary torts committed by a union boss in charge of demolishing the site where Trump Tower in New York City was built. The union trustee hired non-union workers under the table, thus shorting the union pension fund. Union members alleged that a Trump employee (Macari) aided and assisted this primary tort by making inadequate contributions to a union fund, calculated based on the union trustee's contract-breaching reports that left out non-union worker wages. *Diduck*, 974 F.2d at 281-84.

Macari barely knew this union trustee. Instead, Macari's "in-depth" relationship that led to a conclusion of "constructive knowledge" had to do Macari's oversight of finances, knowledge of the non-union workers performing work on site, knowledge that the trustee was the president of the local, and experience in construction. *Id.* at 283.

Here, the facts are far more compelling than in *Diduck*, and in turn qualify as showing that Sarles had constructive knowledge. First, Sarles knew and socialized frequently with the primary tortfeasors – a relationship much more "in-depth" than Macari's mere receipt of written reports. Even Sarles admitted to the in-depth nature of his relationship, since he intentionally violated regulations based upon his "rapport and trust" with the criminal schemers. (JAPX5079). Second, whereas conduct in *Diduck* was "clearly tortious" from mere paper reports that the aider and abetter happened to read, here the primary tortfeasors acted illegally, and did so in the course of direct personal interactions with Sarles. If *Diduck* involved facts showing a "long-term or in-depth relationship" in which the conduct of the primary tortfeasor was "clearly tortious or illegal," as the Minnesota Supreme Court suggested that it does, then this case does only more so. At least a genuine issue of material fact existed that Sarles had constructive knowledge of the wrongfulness of the primary torts.

CONCLUSION AND STATEMENT OF RELIEF SOUGHT

Under the heading "Actual Knowledge," this Court's prior opinion zeroed in on several well-established facts about Sarles' knowledge:

> Sarles was introduced to Kiley by Sarles's step-brother, who worked for Kiley, and Sarles visited Kiley at his home, which doubled as Kiley's place of business, before Kiley appeared at the bank to open an account. Sarles knew the Crown Forex LLC account was ostensibly created as a vehicle for investors to be able to take part in the schemers' so-called investment plan, and Sarles knew the money

> in the Crown Forex LLC account was to be transferred to a Crown Forex, SA account in order to accomplish the planned investment. Yet none of the transfers of investors' funds Sarles facilitated were from Crown Forex LLC to Crown Forex, SA.
>
> Sarles actually knew Crown Forex LLC was not registered with the Secretary of State of Minnesota when Associated Bank accepted the account application stating registration documentation was gleaned from the secretary's website. Sarles stated in his affidavit, "I told Kiley that he must send the documentation to me after he completed a Secretary of State filing for Crown Forex LLC." (Emphasis added). But this fact did not stop Sarles from personally helping Kiley and Smith open the account and signing a document on behalf of Associated Bank stating Crown Forex LLC was organized under the laws of Minnesota. Sarles knew Associated Bank's monitoring department would freeze or close accounts without proper documentation, and he knew Crown Forex LLC did not submit the documentation. Sarles admits he never contacted Kiley about the missing documentation to prevent Kiley's account from being frozen or closed.
>
> Finally, even though Sarles actually knew Kiley and Smith were the signatories on the Crown Forex LLC account, Sarles knowingly authorized Cook, a non-signatory, to withdraw millions of dollars of investor money and deposit much of it in Cook's personal accounts.

Zayed, 779 F.3d at 733-34. This core set of facts regarding Sarles' shady dealings, established in discovery, maps exactly onto what this Court stated would be sufficient proof of "knowledge" to put that issue properly before the jury.

As to substantial assistance, this Court also held that just a few facts established in the record sufficed to create a properly triable issue:

> Sarles knowingly opened a bank account for a non-registered entity to hold investors' money and then authorized Cook, a non-signatory, to withdraw millions of dollars of investor money and deposit much of it

> into Cook's personal accounts. These were not routine transfers, nor "quintessential banking activities," as Associated Bank describes them.

Id. at 735 (citation omitted). Though this Court ruled under a procedural posture that required it to assume the truth of these foundational facts, discovery has confirmed them all to be true.

If it were not clear enough already, the following record citations show that every relevant pleaded fact has evidentiary support upon which a jury could find in the Receiver's favor. Sarles was introduced to Kiley, as pleaded (JAPX5066); Sarles knew the account was for an investment plan, as pleaded (JAPX2274, JAPX5071); Sarles knew the funds were to be transferred to Crown Forex S.A., as pleaded (JAPX5083); no investor funds were directly transferred from the Crown Forex LLC account, as pleaded (JAPX5741-5758, JAPX5944-5991); Sarles knew none of the funds were so transferred, as pleaded (*id.*, JAPX5357); Sarles knew of no state registration when account-opening documents stated otherwise, as pleaded (JAPX2275-2276); Sarles knew improper documentation would lead to an account freeze, as pleaded (JAPX2276); Sarles never contacted Kiley for proper documentation, as pleaded (*id.*); and Sarles authorized Cook's transfers while aware that only Kiley and Smith had authorization, as pleaded (JAPX84, JAPX5829-5834).

This Court should reverse the grant of summary judgment for all of the reasons discussed above, and remand for trial.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 32(a). This brief contains 12,889 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f). This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6). This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in fourteen (14) point Times New Roman font.

Dated: March 24, 2017

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CIRCUIT RULE 28A(h) CERTIFICATION

The undersigned hereby certifies that I have filed electronically, pursuant to Circuit Rule 28A(h), a redacted version of the brief and addendum in non-scanned PDF format. I hereby certify that the file has been scanned for viruses and that it is virus-free.

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