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)

MEMORANDUM OF LAW IN OPPOSITION TO ASSOCIATED BANK'S MOTION FOR ATTORNEYS' FEES PURSUANT TO RULE 37(c)(2) AND THE RECEIVER'S REQUEST FOR SANCTIONS UNDER RULE 37(a)(5)(B)

Associated Bank, N.A. ("Associated Bank" or "the Bank") has filed a motion under Federal Rule of Civil Procedure 37 (ECF No. 268) that makes false representations to the Court. Associated Bank's motion is frivolous and sanctionable. Associated Bank chose to use enormously broad definitions of key terms in its Requests for Admission, including broadly defining the term "Ponzi Scheme" and the term "communicated." The Receiver read each of the seventy-five requests using the terms as Associated Bank defined them, and provided accurate and truthful responses.

In its request for fees under Federal Rule of Civil Procedure 37, Associated Bank ignores the definitions it chose for key terms in its Requests for Admission, conceals those definitions altogether from its moving papers, and actively misleads this Court by falsely implying that the Receiver was obligated to respond based on a lay understanding of those key terms. Broadly defining terms in discovery requests is within the Bank's prerogative. Hiding those definitions from the Court—especially in a motion to sanction the Receiver for his responses to those

requests—is not. For the reasons more fully stated below, this Court should not only deny that motion, but should also sanction Associated Bank under Rule 37(a)(5)(B).

BACKGROUND

On February 15, 2017, Associated Bank moved for sanctions, including attorneys' fees against the plaintiff,[1] a court-appointed receiver in this matter. *See Defendant Associated Bank, N.A.'s Motion for Attorneys' Fees Pursuant to Rule 37(c)(2)* (ECF No. 268) (hereinafter "Rule 37 Motion"). The motion relates to fifteen of the seventy-five requests for admission that the Bank served during the course of discovery. *See Defendant Associated Bank, N.A.'s Memorandum of Law In Support of Its Motion for Attorneys' Fees Pursuant to Rule 37(c)(2)* (ECF No. 269) (hereinafter "Rule 37 Brief"). Based on the evidence and knowledge available to him at the time, the Receiver accurately and truthfully answered all of them, and denied each of these fifteen requests at issue. Nothing in the Bank's Rule 37 Motion shows otherwise.

Associated Bank's Requests for Admission

In three sets of Requests for Admission, Associated Bank made seventy-five total requests. The fifteen requests that are the subject of Associated Bank's motion are set forth below:

> 1. During the relevant time period, no Employee of any Cook-Kiley Entity communicated the existence of the Ponzi Scheme to any Employee of Associated Bank.
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> * * * * *
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> 33. Admit or deny that You have no evidence that, during the relevant period, Lien Sarles knew about the Ponzi Scheme.
> 34. Admit or deny that You have no evidence that, during the relevant period, Stephen Bianchi knew about the Ponzi Scheme.
> 35. Admit or deny that You have no evidence that, during the relevant period, Nataliya Espey knew about the Ponzi Scheme.
> 36. Admit or deny that You have no evidence that, during the relevant period, Ryan Rasske knew about the Ponzi Scheme.

[1] The Bank has not given any indication of the total it seeks, despite supposedly having already incurred those fees to "prove" what it claims it has proved.

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

* * * * *

39. Admit or deny that You have no evidence that, during the relevant period, Eileen Paulson knew about the Ponzi Scheme.
40. Admit or deny that You have no evidence that, during the relevant period, Tamara Simon knew about the Ponzi Scheme.
41. Admit or deny that You have no evidence that, during the relevant period, David Martens knew about the Ponzi Scheme.
42. Admit or deny that You have no evidence that, during the relevant period, Jennifer Cox knew about the Ponzi Scheme.
44. Admit or deny that You have no evidence that, during the relevant period, Cecilia Jaap knew about the Ponzi Scheme.
45. Admit or deny that You have no evidence that, during the relevant period, Barbara Regan knew about the Ponzi Scheme.

* * * * *

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

(Declaration of Michael La Porte ("La Porte Decl.") at Exs. A, B (*Defendant Associated Bank, N.A.'S First and Third Sets of Requests for Admission*).

With the exception of the first, each request propounded by Associated Bank is in the form "admit or deny *that You have no evidence* . . ." of various things. Although fifteen individual requests are the subject of Associated Bank's motion, they can be grouped into three categories for analysis. First, eleven requests ask the Receiver to admit that he has no evidence that various people "knew" about the "Ponzi Scheme." *See Request Nos.* 33-37, 39-42, and 44-45. Second, two requests ask the Receiver to admit that no one connected to the Receivership Entities

"communicated" the existence of the "Ponzi Scheme" to anyone connected to the Bank. One asks the question directly, and the other asks indirectly, about what evidence the Receiver has or lacks on that point. *Compare Request Nos.* 1 and 47. Finally, two requests ask the Receiver to admit that he has no evidence that anyone connected to the Receivership Entities "communicated" to anyone connected to the Bank that Trevor Cook and Patrick Kiley were perpetrating a fraud. *See Request Nos.* 48 and 49.

Associated Bank's Definitions

Associated Bank crafted custom definitions for key terms in its requests, including "Communicated" and "Ponzi Scheme." These definitions are integral to understanding the requests themselves, the Receiver's responses, and the resulting Rule 37 motion brought by Associated Bank. Associated Bank was required to provide that information to the Court pursuant to Local Rule 37.1. Yet those definitions are nowhere to be found in Associated Bank's motion (ECF No. 268) or brief (ECF No. 269).

The definitions that Associated Bank crafted for its Requests for Admission (and accordingly, which the Receiver applied for his responses), were notably excluded from its motion papers. They are as follows:

> 2. The term "communicated" means any oral, written, or symbolic expression or interchange of any type, and includes without limitation letters, memoranda, facsimile transmission, facsimile cover pages, teletypes, telegraphs, telephone conversations, telephone logs, telephone records, electronic mail messages, voicemail messages, and any and all "cc" or "bcc" copies of any of the above.
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> * * * *
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> 5. The term "Ponzi Scheme" means the conduct referenced in:
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> a. Indictment, *United States v. Jason Bo-Alan Beckman*, Case No. 11-cr-00228-MJD-JJK (D. Minn. July 19, 2011) (ECF No.17);
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> b. Superseding Indictment, *United States v. Jason Bo-Alan Beckman*, Case No. 11-cr-00228-MJD-JJK (D. Minn. Nov. 22, 2011) (ECF No. 134);

c. Second Superseding Indictment, *United States v. Jason Bo-Alan Beckman*, Case No. 11-cr-00228-MJD-JJK (D. Minn. Feb. 22, 2012) (ECF No. 162);
d. Information, *United States v. Christopher Pettengill*, Case No. 11- cr-00192-DSD (D. Minn. Jun. 13, 2011) (ECF No. 1);
e. Plea Agreement and Sentencing Stipulations, *United States v. Christopher Pettengill*, Case No. 11-cr-00192-MJD (D. Minn. Jun. 21, 2011) (ECF No. 6);
f. Information, *United States v. Jon Jason Greco*, Case No. 11-cr- 00112-PAM-JJK (D. Minn. Mar. 22, 2011) (ECF No. 1);
g. Plea Agreement and Sentencing Stipulations, *United States v. Jon Jason Greco*, Case No. 11-cr-00112-PAM-JJK (D. Minn. Mar. 22, 2011) (ECF No. 41);
h. Complaint, *United States Securities & Exchange Commission v. Trevor G. Cook, et al.*, Case No. 09-cv-03333-MJD-FLN (D. Minn. Nov. 23, 2009) (ECF No. 1);
i. Complaint, *United States Commodity Futures Trading Commission v. Trevor Cook d/b/a Crown Forex, LLC, et al.*, Case No. 09- cv-03332-MJD-FLN (D. Minn. Nov. 23, 2009) (ECF No. 1);
j. Third Amended Verified Complaint, *Phillips, et al. v. Trevor Cook, et al.*, Case No. 09-cv-01732-MJD-FLN (D. Minn. Nov. 4, 2009) (ECF No. 197);
k. Second Amended Verified Complaint, *Phillips, et al. v. Trevor Cook, et al.*, Case No. 09-cv-01732-MJD-FLN (D. Minn. Sept. 11, 2009) (ECF No. 122);
l. Amended Complaint, *Phillips, et al. v. Trevor Cook, et al.*, Case No. 09-cv-01732-MJD-FLN (D. Minn. July 15, 2009) (ECF No. 24); and/or
m. Complaint, *Phillips, et al. v. Trevor Cook, et al.*, Case No. 09-cv-01732-MJD-FLN (D. Minn. July 7, 2009) (ECF No. 1).

(La Porte Decl., Ex. A at 1-5; *id.*, Ex. B at 1-5.) These Associated Bank-created definitions are extremely broad, and go well beyond any lay understanding of those terms. For example, "communications" are not limited to written or oral communications, but also include "symbolic expression or interchange of any type." When it came to the term "Ponzi Scheme" the Bank did not limit it to one specific type of fraudulent conduct. The term is not even used as shorthand for the tortious conduct alleged in this case (*i.e.*, as a shorthand for the specific underlying torts that

the Receiver alleged the Bank aided and abetted: namely, for fraud; breach of fiduciary duty; conversion; and false representations and omissions). Instead, Associated Bank chose to define "Ponzi Scheme" as "the conduct described in" thirteen separate pleadings in six separate civil and criminal actions.

The documents incorporated by reference in the Bank's definition of "Ponzi Scheme" are hundreds of pages long. The Third Amended Complaint in the *Phillips* case alone is over 350 pages, and contains more than 1600 numbered paragraphs. *See* Third Amended Verified Complaint, *Phillips, et al. v. Trevor Cook, et al.*, Case No. 09-cv-01732-MJD-FLN (D. Minn. Nov. 4, 2009) (ECF No. 197) (hereinafter "Phillips Complaint"). The Phillips Complaint, which names Associated Bank as a defendant, also incorporates by reference over 200 exhibits. *Id.* at ¶ 622 (incorporating Exhibit 217 by reference).

One of the incorporated documents, the Phillips Complaint, alleges "conduct" by Associated Bank itself, which is incorporated as included within the definition of "Ponzi Scheme." Specifically, it alleges:

> 125. Defendant Associated Bank N.A./Associated Banc-Corp (collectively, "Associated Bank") offers banking and financial services throughout Wisconsin, Illinois, and Minnesota. Defendants held multiple accounts at Associated Bank in which Plaintiffs' funds were deposited. Associated Bank is a corporation organized and existing under the laws of Wisconsin, with its principal place of business and headquarters at 200 North Adams Street, Green Bay, Wisconsin 54301.

Id. ¶ 125. The Phillips Complaint also details conduct related to investor funds that went not to "Crown Forex, SA," the Swiss foreign exchange entity, but instead to an account held by Crown Forex, LLC, at Associated Bank. *See, e.g., id.* at ¶¶ 318, 331, 349, 413. In other words, by incorporating the Phillips Complaint, Associated Bank went so far as to incorporate its own conduct in the definition of "Ponzi Scheme."

The "conduct" described in the SEC's civil action against Trevor Cook and others is equally, if not more broad. It includes descriptions as sweeping as follows:

> 3. From at least July 2006 through July 2009, [Trevor] Cook and [Patrick] Kiley, directly and indirectly through the Defendant Shell Companies, raised at least $190 million from at least 1,000 investors by selling investments in a purported currency trading venture.

(Complaint, *United States Securities & Exchange Commission v. Trevor G. Cook, et al.*, Case No. 09-cv-03333-MJD-FLN (D. Minn. Nov. 23, 2009) (hereinafter "the SEC Complaint") (ECF No. 1). The SEC Complaint also describes various background conduct communicated to and known to, among others, Associated Bank Vice President, Lien Sarles:

> 40. Cook and Kiley consistently represented that they would use the investors' fund to engage in foreign currency trading which would generate annual returns of 10% or more for the investors.
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> 48. Cook and Kiley represented to investors that their money would be placed in a segregated account in each investor's name.
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> 101. Cook and Kiley raised a total of $79 million from investors whom they told that the investors' funds would be invested at Crown Forex, S.A., including $32.7 million that Cook and Kiley took in during 2009.
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> * * * *
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> 107. In fact, Cook and Kiley, directly and acting through others, deposited checks from many investors, into a U.S. bank account in the name of a domestic shell company, with a name—Crown Forex, LLC—that was misleadingly similar to the Swiss firm Crown Forex, S.A.
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> 108. Cook and Kiley owned and/or controlled Crown Forex, LLC, which was unrelated to Crown Forex, S.A. In the domestic bank account of the shell company Crown Forex, LLC, investors' funds were commingled with funds of other investors and money received from other sources.
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> 109. Kiley and his office assistant were the signatories on the Crown Forex, LLC domestic bank account.
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> 110. Although he was not a signatory on the bank accounts described above, Cook made most decisions regarding the disposition of the funds in those accounts.

(*Id.* at 10, ¶ 40, 11, ¶ 48, 19 ¶ 101, 20, 107-108.) Likewise, the complaint filed by the Commodity Futures Trading Commission against Cook and others has equally broad allegations of "conduct." It includes, for example, the allegation that:

> 20. Cook and Kiley have done business under the name Crown Forex, LLC from at least November 2008 to the present. Cook and Kiley established at least one U.S. domiciled bank account in the name of Crown Forex, LLC where they caused U.S. customer funds to be deposited.
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> * * * *

(*United States Commodity Futures Trading Commission v. Trevor Cook d/b/a Crown Forex, LLC, et al.*, Case No. 09- cv-03332-MJD-FLN (D. Minn. Nov. 23, 2009) (ECF No. 1) (hereinafter "the CFTC Complaint" at 7, ¶ 20.) These are but a few examples of the "conduct" that Associated Bank deliberately chose to include in the definition of the "Ponzi Scheme" at issue in its Requests for Admission. The broad definition included conduct not just of wrongdoing by Cook and Kiley, but more mundane and undisputed facts and activities related to the background of their scheme.

Associated Bank's Summary Judgment Motion

On January 31, 2017, this Court granted Associated Bank's motion for summary judgment. (ECF No. 262.) Final judgment was entered on February 1, 2017. (ECF No. 264.) Based on this Court's Order, the Bank argued that it had "proven" the things that the Receiver denied, and moved for sanctions against the Receiver, including attorneys' fees. *See* Rule 37 Brief at 10-11. The Bank did not, however, indicate the amounts it supposedly expended in "proving" the things it claimed it had proven.

For the reasons stated below, Associated Bank's motion for sanctions, including attorneys' fees should be denied and this Court should award the Receiver its fees and costs associated with opposing this motion and making its own request for sanctions.

ARGUMENT

The Bank's motion is devoid of merit. Not only is it not based in fact, but its arguments rely on repeated and material misrepresentations and concealments. As a result, upon denial the Bank's motion, Rule 37 requires this Court to award the Receiver his fees and costs in responding to this motion, as there is no substantial justification for bringing it and "justice," far from relieving Associated Bank of this sanction, strongly supports imposing it.[2]

I. ASSOCIATED BANK'S MOTION SHOULD BE DENIED BECAUSE IT LACKS FACTUAL SUPPORT, AND INSTEAD RELIES ON OMISSIONS AND MISREPRESENTATIONS TO THIS COURT.

Associated Bank improperly seeks fees on frivolous grounds related to fifteen requests for admission. Although the text of each request is set forth in its motion, as noted above Associated Bank omitted the definitions it chose for the key terms, and instead only attached the Receiver's responses, which did not repeat the lengthy definitions. The definitions, however, are the foundation for understanding the requests themselves, and the frivolousness of Associated Bank's current motion.

A. Associated Bank's Arguments in Support of its Request for Rule 37 Sanctions are Frivolous.

Rule 37(c)(2) provides:

> If a party fails to admit what is requested under Rule 36 and if the requesting party *later proves . . . the matter true*, the requesting party may move that the party who failed to admit pay the reasonable expenses, including attorney's fees, incurred in making that proof.

Id. (emphasis added). Associated Bank argues that it "proved" all of the "matters" in its fifteen requests to be true because it prevailed on its motion for summary judgment. Rule 37 Brief at

[2] In contrast to Rule 11, there is no safe-harbor period where the Receiver is required to provide the Bank an opportunity to withdraw its motion to avoid the imposition of costs and fees. *See generally* Fed. R. Civ. P. 37.

10–11. Notwithstanding this Court's summary judgment ruling (and setting aside that this ruling is now the subject of an appeal to the Eighth Circuit), nothing at summary judgment "proved" what the Receiver denied in response to those requests. The Bank's argument is not simply wrong but frivolous, as it equates this Court's use of the term "Ponzi Scheme" with its own extremely broad definition of "Ponzi Scheme," when nothing could be further from the truth.[3]

1. The Receiver had Evidence that Various People Knew About the "Ponzi Scheme" (Request Nos. 33-37, 39-42, and 44-45), and Associated Bank Did not Prove Otherwise.

Associated Bank did not prove that the Receiver lacked evidence that Lien Sarles or anyone else knew of the "Ponzi Scheme" as the Bank defined that term. Eleven Requests for Admission are worded like this one, with just the names changing:

> Admit or deny that You have no evidence that, during the relevant period, [Lien Sarles] knew about the Ponzi Scheme.

(La Porte Decl, Exhibit B (Request Nos. 33-37, 39-42, and 44-45).) In its brief, Associated Bank simply states, "Associated Bank has proven the statement to be true." Rule 37 Brief at 16. Associated Bank's motion treats "Ponzi Scheme" either as a generally fraudulent act or in terms of the four causes of action that the Receiver asserts in this action. But in its Requests for Admission, Associated Bank chose to define "Ponzi Scheme" in much different and far broader terms. Nothing that the Bank points to in its motion or supporting papers proves that the Receiver does not have evidence that, during the relevant period, Lien Sarles or his colleagues

[3] Over the Receiver's objection, in its recent Order this Court substituted the term "Ponzi Scheme" for the four counts in the Receiver's complaint: (1) fraud; (2) breach of fiduciary duty; (3) conversion; and (4) false representations and omissions. *See* Order at 9 n.5 (ECF No. 262). This is not, however, how Associated Bank defined "Ponzi Scheme," as noted above. Not only did Associated Bank not "prove" the matters it asked the Receiver to admit, the Receiver's denials were proper because he did have evidence of the "Ponzi Scheme" as Associated Bank chose to define that term.

knew about the "Ponzi Scheme" as that term is defined the Requests for Admission that Associated Bank served on the Receiver.

With the definitions incorporated, Request No. 33 and all those that share nearly identical language asked the Receiver to:

> Admit or deny that You have no evidence that, during the relevant period, [Lien Sarles] knew about the ["conduct referenced in" thirteen separate documents, encompassing hundreds of pages, thousands of allegations, and hundreds of exhibits].

(La Porte Decl., Exhibit B (Request Nos. 33-37, 39-42, and 44-45).) As just one example, the definition that Associated Bank chose in its Rule 36 requests would require it to prove (for purposes of this motion) that the Receiver had no evidence that Lien Sarles knew that "Cook and Kiley represented to investors that their money would be placed in a segregated account in each investor's name," which is but one minute aspect of the "conduct" that the Bank's Requests broadly defined as "the Ponzi Scheme." *See, e.g.,* SEC Complaint at ¶ 43 (incorporated by reference into the Bank's definition). Associated Bank did not prove this, nor has it tried, nor could it. And it is frivolous to suggest otherwise. But the Receiver had evidence that Lien Sarles attended at least one of the schemer's seminars to investors where such promises were routinely made to investors. *See* Order at 14 (ECF No. 262) (citing Pettengill Dep.).

As yet another example, the definition that the Bank chose to use would require the Bank to prove that the Receiver had no evidence that any of the other Bank employees listed knew:

- "Cook and Kiley, directly and acting through others, deposited checks from many investors, into a U.S. bank account in the name of . . . Crown Forex, LLC . . ."
- ". . . the domestic bank account of the shell company Crown Forex, LLC, investors' funds were commingled with funds of other investors and money received from other sources." and
- " . . . Kiley and his office assistant were the signatories on the Crown Forex, LLC domestic bank account."

The Bank did not prove the Receiver lacked evidence on these points, nor could it.

The undisputed evidence is that Lien Sarles opened the scheme's Crown Forex, LLC account at Associated Bank with Kiley, and his assistant Julia Smith as signatories. *See, e.g.,* Jan. 15, 2010 Aff. of Lien Sarles at ¶ 9 (ECF No. 235-5). Mr. Sarles also knew that the Crown Forex, LLC account # 1705 was to hold investor funds, with Crown Forex LLC serving as the fiduciary. *Id.; see also* May 27, 2016 Dep. of Lien Sarles at 75:18-25 (ECF No. 216-6). There was also evidence that he also knew that investors were promised their funds would be held in segregated accounts from Christopher Pettengil and John Loebel. *See, e.g.,* May 23, 2016, Decl. of Christopher Pettengil at ¶ 6 (ECF No. 235-18); Mar. 2, 2016, Dep. of John W. Loebel at 59-60 (ECF No. 235-17); *see also United States v. Beckman*, 787 F.3d 466, 475-77 (8th Cir. 2015). And, documents produced by Associated Bank itself show deposits from hundreds of investors and other sources into the Crown Forex, LLC account. *See, e.g.,* Financial Statement of Accounts (06/17/2008-06/30/2008) for Account #1705 (hereinafter "June 2008 Statement") (previously filed under seal as part of the Exhibit represented by ECF No. 241-1).

Moreover, the fact of working at Associated Bank and having some degree of contact with the #1705 account that Lien Sarles helped open for Trevor Cook and his fellow schemers (as every person mentioned in these eleven Requests did), is circumstantial evidence that they knew about these instances of conduct, which are included in the definition of "Ponzi Scheme" as the Bank defined that term. Regarding Sarles, he admitted knowing that these accounts held investor funds. *See* Exhibit 5 of Receiver's Response in Opp. to Mtn. Strike Ghiglieri (ECF No. 235-5). *See also* Sarles Dep. at 75:16-21. With such evidence, the Receiver had only one option for responding to requests to admit that it lacked such evidence – namely, to deny these requests.

These are but a handful of the allegations of "conduct" contained in the hundreds of pages, thousands of paragraphs, and hundreds of exhibits, that Associated Bank's own definition incorporates by reference. The Bank did not even attempt to prove that the Receiver did not have evidence that Associated Bank employees know of one, many, or all of those instances of conduct. Instead, it relied exclusively on this Court's summary judgment ruling, which, unlike Associated Bank's Requests for Admission, used the term "Ponzi Scheme" as a shorthand for the wrongful actions aided and abetted by the Bank. The summary judgment Order did not define "Ponzi Scheme" as broadly as Associated Bank did in its Requests, and it is frivolous to suggest otherwise.

2. **The Receiver Had Evidence that People Connected to the Receivership Entities "Communicated" the Existence of the "Ponzi Scheme" to Some People Connected to the Bank (Request Nos. 1 and 47) and the Bank has Not Proven Otherwise.**

Associated Bank's motion with regard to Request Nos. 1 and 47 is at least as frivolous if not more than the arguments noted above. In these Requests, the Bank sought admissions that the Receiver had no evidence that anyone from the Receivership Entities "communicated" the existence of the "Ponzi Scheme" to anyone at the Bank. *See* La Porte Decl., Exs. A and B (Request Nos. 1 and 47). As with the above-noted requests, the frivolousness here also stems from the Bank's broad definition of "Ponzi Scheme." The addition of the term "communicated" does not change this analysis to the Bank's favor. On the contrary, adding a second extremely broad definition only broadened the scope of evidence within the Request.

Although the Bank in its Rule 37 Motion repeatedly uses the term "told," while making absurd claims about what it proved, the relevant Requests do not use that term. The Requests use the defined term "communicated." *Id.* Contrary to what the Bank has represented to this Court, the Bank's definition of "communicated" is not limited to telling – either oral or written

telling. It includes any form of "communication" including "symbolic expression." The Bank makes the naked assertion that it has "proven" the matter sought to be admitted in Nos. 1 and 47, but it has not, nor has it even tried to.

Using one of the examples from above, the definitions that the Bank chose to use would require the Bank to prove that the Receiver had no evidence that any employee of a Receivership Entity made any "oral, written, *or symbolic expression or interchange of any type*" with any Bank employees regarding:

- "Cook and Kiley, directly and acting through others, deposited checks from many investors, into a U.S. bank account in the name of . . . Crown Forex, LLC . . ."
- " . . . Kiley and his office assistant were the signatories on the Crown Forex, LLC domestic bank account."

The Bank did not prove this, nor has it tried, nor could it.

As but one example, the evidence is undisputed that Receivership Entity employees provided deposit slips and instructions to employees to deposit investor checks into the Crown Forex, LLC #1705 account. *See, e.g.,* June 2008 Statement (ECF No. 241-1) (reflecting numerous customer deposits). These are "communications" under the Bank's definitions, of the first bullet-point fact above. Moreover, the undisputed evidence is that that Lien Sarles communicated with Receivership Entity employees to set up the #1705 account with Kiley and his assistant as signatories—including Sarles' own testimony. *See, e.g.,* Sarles Aff. at ¶ 9 (ECF No. 235-5). With such evidence, the Receiver had only one option for responding to requests to admit that it lacked such evidence – namely, to deny these requests.

3. The Receiver Had Evidence that People Connected to the Receivership Entities "Communicated" to People connected to the Bank that Trevor Cook and Patrick Kiley were Perpetrating a Fraud. (Request Nos. 48 and 49) and the Bank has not Proven Otherwise.

Contrary to its unsupported assertions, *see* Rule 37 Brief at 21 ("Associated Bank proved the statement to be true"), Associated Bank also has not proven that the Receiver had "no evidence" that anyone connected to the Receivership Entities "communicated" that Cook and Kiley were committing a fraud. In fact, the Receiver had evidence that frauds were "communicated" at least to Lien Sarles. As the Receiver noted in its response to summary judgment:

> At a meeting in April or May 2008 that Sarles attended, Cook, Kiley and Sarles, among others, met to discuss propping up the insolvent Crown Forex SA using investor funds and wanting to use the Bank to do so since they were coming under scrutiny by Wells Fargo. (MSJ Exhibit 13, at 175- 76.)

Resp. in Opp. to Mot. for Sum. Jud. at 17 (ECF No. 240). The illegal re-papering of these accounts was, if not itself fraudulent, then at the very least circumstantial evidence of the underlying fraudulent conduct concerning false promises to segregate accounts in the first place. That no one at this meeting expressly stated "Trevor Cook and Patrick Kiley are committing a fraud" to Lien Sarles is beside the point. The Bank's own definition of "communicated" in its Requests is not so narrow.

Associated Bank's misplaced reliance on this Court's summary judgment opinion is frivolous for another reason. Contrary to the Bank's assertion, this Court never said that there was "no evidence" that anyone "communicated" to Sarles that Cook and Kiley were perpetrating a fraud. Despite granting the Bank's motion for summary judgment, the Court expressly acknowledged that there was evidence that the fraud was conveyed by implication. *See* Order at 15 ("Pettengill testified that the illegality of the strategy was implied."). This implication

would certainly fall within the Bank's broad definition of "communicated", which includes "oral, written, *or symbolic expression or interchange[s] of any type.*" Thus, Associated Bank's bald assertion that it "proved the statement to be true" (Rule 37 Brief at 21), is frivolous. Because the Receiver had evidence, he was required to deny the request to admit.

II. THIS COURT SHOULD SANCTION THE BANK UNDER RULE 37(a)(5)(B) FOR ITS FRIVOLOUS RULE 37 MOTION.

This Court should not only deny the Bank's Rule 37 motion, but should also sanction the Bank. In pertinent part, Rule 37 provides that:

> If [a Rule 37] motion is denied, the court must, after giving an opportunity to be heard, require the movant, the attorney filing the motion, or both to pay the party . . . who opposed the motion its reasonable expenses incurred in opposing the motion, including attorney's fees. But the court must not order this payment if the motion was substantially justified or other circumstances make an award of expenses unjust.

Fed. R. Civ. P. 37(a)(5)(B). The award of sanctions is mandatory with two exceptions not applicable here. The Receiver above detailed the reasons for denying the Bank's motion, which is so devoid of merit that there could be no substantial justification for bringing it. Thus, the "substantial justification" exception does not apply. Furthermore, the justice exception does not favor the Bank here, which has – as detailed further below – withheld information from this Court in a Rule 37 motion in an attempt to deceive this Court materially and repeatedly.

A. Associated Bank Repeatedly Misled this Court by Arguing a Meaning of "Communicated" that is At Odds with its Own Definition.

It would not be unjust to impose sanctions on the Bank. On the contrary, it would be unjust to condone the Bank's egregious conduct before this Court. Beyond Associated Bank's frivolous arguments about what it supposedly "proved," Rule 37's "unjust" exception should not bar sanctions here because of the Bank's repeated material misrepresentations to this Court in furtherance of its frivolous arguments. The most egregious instances of repeatedly and actively

misleading this Court concern the definitions that it used in its Requests to admit. Not only does the Bank misleadingly fail to include those definitions, instead fraudulently concealing them from this Court, but it also actively and aggressively argued for treatment of these defined terms in ways that are at odds with the definitions that it actually used.

As noted above, several of the Bank's requests for admission use the term "communicated" when asking about what information may have passed between Receivership employees and Bank employees. The Bank defined this term specifically and broadly to include not just written and oral communications, but also to include any "symbolic expression or interchange of any type." Associated Bank did not inform this Court that it had defined this term, instead concealing that fact from this Court. Despite being required to include the Requests with its motion, *see* Local Rule 37.1, the Bank did not comply. Instead, it provided only the Receiver's responses, which did not include the Bank's definitions. This concealment might have been regarded as an oversight had the Bank argued consistently with that definition. But it did not. Instead, the Bank exploited its own material concealment, misleading this Court repeatedly about what the definition of "communication" required.

The Bank's brief also repeatedly misled this Court by falsely equating things being "told" with its own definition of "communicated," thus narrowing significantly the scope of the requests from what they actually said. For example, just four lines into its brief the Bank argued that "[there is] no evidence that any of the Ponzi scheme perpetrators ever *told* Associated Bank about the scheme." (Rule 37 Brief at 1) (emphasis added). Describing Request No. 1, the Bank claimed that it "asked Receiver to admit that the fraudsters never actually *told* anyone at the Bank they were running a Ponzi scheme." *Id.* at 9 (emphasis added). Three times in the course of two pages, the Bank misled this Court by conflating the Bank-defined term "communication" with the lay meaning of the term "told." *Id.* at 14-15 ("no evidence that the fraudsters ever actually told

anyone at the Bank they were running a Ponzi scheme"); ("offered no evidence that anyone employed by the Cook-Kiley Ponzi scheme told any at Associated Bank about the fraud"); and ("Receiver listed what he characterized as the "important" facts that one of the Ponzi schemers (Christopher Pettengill) supposedly told Mr. Sarles at a meeting"). Finally, the Bank heads an entire argument section with the misleading, narrower word "told" instead of "communicated." *See id.* at 21, Sec. I.B.ii.

Time and again, the Bank falsely suggested that if there was no evidence that anyone "told" a Bank employee about the torts, then the Receiver should have admitted these requests. It is misleading in the extreme to suggest, as the Bank did, that expressive conduct and implication do not fall into the Bank's own definition of "communicated." Actively and repeatedly misleading this Court in this way has been found to violate Rule 11 in non-discovery contexts. *See, e.g., Gurman v. Metro Hous. & Redevelopment Auth.*, 842 F. Supp. 2d 1151, 1154 (D. Minn. 2011); *see also Williamson v. Recovery Ltd. P'ship*, 542 F.3d 43, 51 (2d Cir. 2008); *New V & J Produce Corp. v. NYCCaterers Inc.*, 2014 U.S. Dist. LEXIS 137465 at *13 (S.D.N.Y. Sept. 29, 2014). *Ochs v. Log Star Homes of Am., Inc.*, Case No. 6:14-cv-01273-JTM, 2016 U.S. Dist. LEXIS 173803, 5-7 (D. Kan. Dec. 15, 2016).

B. Associated Bank Repeatedly Misleads this Court in its Motion by Arguing a Meaning of "Ponzi Scheme" that is Completely Different From its Own Definition.

As noted above, nearly all of Associated Bank's requests for admission use the broadly defined term "Ponzi Scheme" when asking about Bank employees' knowledge and communications. Associated Bank defined this term specifically and broadly to include not just what is known colloquially as a "Ponzi Scheme," or more generic wrongful investment scheming, or even as a shorthand term to refer to each of the four torts pleaded in the Receiver's complaint,

as this Court did in its recent Order. Instead, the Bank defined the term "Ponzi Scheme" in extremely broad terms, incorporating thirteen legal documents, including indictments, plea agreements, and numerous civil complaints all related to Trevor Cook's enterprise. Those documents spanned hundreds and hundreds of pages, included thousands of numbered paragraphs of allegations of various conduct and incorporated by reference hundreds of exhibits. The definition did not focus on the criminal, tortious or otherwise wrongful aspects of the schemers' conduct. Instead, it defined it to include "conduct referenced" in those documents.

As discussed above, Associated Bank did not tell this Court that it had defined this term in such a manner, instead concealing that fact from this Court. The concealment might have been regarded as an oversight had the Bank argued consistently with that definition, but it did not. Instead, it exploited its own material concealment, and attempts to mislead this Court repeatedly about what the definition of "communication" required. In numerous instances, the Bank also went further than suggesting that "Ponzi Scheme" was undefined and thus given a lay meaning. In several instances, it falsely and misleadingly equated the term "Ponzi Scheme" with only one of the underlying torts – namely, fraud. *See, e.g.*, Rule 37 Brief at 20 ("refusing to admit that these Associated Bank employees were not aware of "*the fraud*;" "Receiver never actually identified any evidence showing that these employees were aware of *the fraud*;" ". . . belies his position that he had evidence that they knew of *the fraud*; and ". . . said that none of the Associated Bank employees had knowledge of *the fraud*.") (emphasis added).

But as noted above, evidence of knowledge of any of the conduct described in the hundreds of pages of allegations is sufficient to deny the Bank's requests. Associated Bank's argument in the current motion relies on active concealment of its extremely broad definitions, such as misleading this Court over and over again by disingenuously arguing a definition of "Ponzi Scheme" that is nothing like its own definition. Actively and repeatedly misleading this

Court in this way has been found to violate Rule 11. *See, e.g., Gurman*, 842 F. Supp. 2d at 1154; *see also Williamson*, 542 F.3d at 51; *New V & J Produce Corp.*, 2014 U.S. Dist. LEXIS 137465 at *13 *Ochs*, Case 2016 U.S. Dist. LEXIS 173803, at *5-7. In light of such misconduct, it can hardly be said that awarding fees to the Receiver for having to respond to this frivolous motion is "unjust."

CONCLUSION

Associated Bank's motion should be denied. It moved under Rule 37 for sanctions, including attorneys' fees, for the Receiver's supposed failures to admit things that the Bank later supposedly proved. Associated Bank claims in its motion that it did prove these things at great expense. The arguments in support of its motion, however, are so lacking in merit as to be legally frivolous, relying on spurious arguments equating the lay understanding of words and phrases to the enormously broad definitions that the Bank itself defined in its requests for admission. Faced with this logical disconnect, Associated Bank concealed its own definitions, the key facts for determination of this motion, in its moving papers. By so doing, Associated Bank actively mislead this Court throughout its motion. Not only should Associated Bank's motion be denied, but this Court should award the Receiver his costs and fees for having to defend against the Bank's frivolous motion.

Dated: April 6, 2017

Respectfully submitted,

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CERTIFICATE OF SERVICE

The undersigned attorney of record certifies that on April 6, 2017, copies of the foregoing document were served upon counsel for Defendant via e-mail to the following addresses:

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