UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

R.J. ZAYED, In His Capacity As Court-Appointed Receiver For The Oxford Global Partners, LLC, Universal Brokerage, FX, and Other Receiver Entities, Plaintiff, vs. ASSOCIATED BANK, N.A., Defendant.	Case No. 13-cv-00232 (DSD-SER)

Defendant Associated Bank, N.A.'s
Reply In Support Of Its Motion For Attorneys' Fees

Receiver apparently has decided that his best defense is a strong offense, and thus he devotes almost all of his opposition to Associated Bank's motion for attorneys' fees under Rule 37(c)(2) on invective, *ad hominem* attacks, and the accusation—both false and irrelevant—that Associated Bank has "conceal[ed] definitions" and violated Rule 11. (*See* ECF Nos. 268 & 269.) But stripped of these distractions, what remains is that Receiver refused to admit that Associated Bank employees were unaware of the Cook-Kiley fraud, and that Associated Bank debunked the Receiver's factual theory in its summary-judgment briefing. Moreover, Receiver does not cite, let alone address, this Court's

conclusion that "no reasonable jury could infer that [Lien] Sarles or anyone else at the Bank had actual knowledge of the Ponzi scheme." *Zayed v. Associated Bank, N.A.*, 2017 WL 424855, at *4 (D. Minn. 2017).

The Receiver relies heavily on the technical definitions of "Ponzi scheme" and "communicated," but they do not save him. To begin, Receiver is wrong that Associated Bank "concealed" definitions from the Court. Receiver never objected to these definitions as they were used in Associated Bank's requests for admission. (*See* ECF No. 270-1 at 1-2; ECF No. 270-2 at 1-2.) And the definitions are irrelevant in any event. Receiver refused to admit that he lacked evidence against a slew of innocent Associated Bank employees—*e.g.*, Mr. Bianchi, Ms. Espey, Ms. Skorczewski, Ms. Paulson, Ms. Simon, Mr. Martens, Ms. Cox, Ms. Jaap, and Ms. Regan—none of whom had an inkling of the Cook-Kiley Ponzi scheme. Despite his denials, Receiver never presented *any* evidence that these employees knew of the Ponzi scheme—indeed, his own expert admitted that they had no knowledge. No matter how broadly "Ponzi scheme" is defined, these employees still did not know about it, and Receiver points to no evidence to the contrary. Similarly, no matter how

broadly "communicate" is defined, no one communicated the existence of the Ponzi scheme to these employees, and Receiver points to no evidence otherwise.

I. Receiver Does Not Contest The Requests For Admission Concerning Bank Employees Other than Lien Sarles, And The Motion Should Be Granted On This Basis Alone

The Receiver does not deny that:

- This Court should impose sanctions if, in response to a request for admission, Receiver failed to admit a fact that Associated Bank later proved to be true. (*See* ECF No. 286 at 9.)
- Associated Bank propounded requests for admission asking the Receiver to admit or deny whether he had any evidence that Associated Bank employees other than Lien Sarles, such as Bianchi, Espey, Skorczewski, Paulson, Simon, Martens, Cox, Jaap, and Regan knew about the Cook-Kiley Ponzi scheme. (ECF No. 269 at 3.)
- Receiver's own expert—who is Receiver's agent and whose statements are binding on Receiver—admitted that "nobody at the bank . . . determined that there was a Ponzi Scheme going on." (ECF No. 196-1 at 239:15-240:8.)
- Nowhere in his summary-judgment opposition papers did Receiver even allege that Bianchi, Espey, Skorczewski, Paulson, Simon, Martens, Cox, Jaap, or Regan knew about the Cook-Kiley Ponzi scheme, much less disclose any evidence that they knew of the Ponzi scheme. (*See* ECF No. 234.)
- Nowhere in his recently filed Eighth Circuit brief did Receiver cite any evidence that Bianchi, Espey, Skorczewski, Paulson, Simon, Martens, Cox, Jaap, or Regan knew about the Ponzi scheme. (*See* Redacted Appellant Brief, *Zayed v. Associated Bank, N.A.*, No. 17-1250 (8th Cir. Mar. 29, 2017).)

- Nowhere in his summary-judgment opposition brief did Receiver state that he had evidence that Bianchi, Espey, Skorczewski, Paulson, Simon, Martens, Cox, Jaap, or Regan knew about the Ponzi scheme, or cite such evidence. (*See* ECF No. 286 at 9-16.)

- The Court concluded at summary judgment "no reasonable jury could infer that [Lien] Sarles or anyone else at the Bank had actual knowledge of the Ponzi scheme." *Zayed v. Associated Bank, N.A.*, 2017 WL 424855, at *4 (D. Minn. 2017).

Indeed, besides quoting Associated Bank's requests for admission, Receiver does not mention Bianchi, Espey, Skorczewski, Paulson, Simon, Martens, Cox, Jaap, or Regan by name. Instead, Receiver spends a considerable amount of time restating his failed summary-judgment arguments concerning Lien Sarles. (*See* ECF No. 286 at 9-16.) Accordingly, there is no dispute that (1) the Receiver denied that he had lacked evidence that Bianchi, Espey, Skorczewski, Paulson, Simon, Martens, Cox, Jaap, or Regan knew about the Cook-Kiley Ponzi; (2) the Court found that there was no evidence to infer that these individuals knew about the Ponzi scheme; (3) the Receiver's expert admitted that none of these persons knew of the Ponzi Scheme; and (4) Receiver did not contest any of the foregoing in opposition to the Bank's current Rule 37 motion.

Receiver improperly assumes that if this Court does not award attorneys' fees based on the sole request for admission regarding Mr.

Sarles, it should not award any attorneys fees' to Associated Bank. But because Receiver failed to contest Associated Bank's motion with respect to the other employees as well, the motion should be granted.

II. Receiver's Arguments Regarding Lien Sarles Ignore The Court's Summary-Judgment Ruling

Receiver's arguments regarding Lien Sarles also miss the mark. Receiver simply ignores the fact that he presented each of the same arguments to this Court at summary judgment and that the Court concluded that none of this supposed evidence even raised an inference that Mr. Sarles knew about the Ponzi scheme. *See Zayed*, 2017 WL 424855, at *4. Receiver cannot stand on the same arguments that have been rejected by this Court.

III. Receiver's Newly Minted Objections To Associated Bank's Requests For Admission Do Not Justify His Denials

In an effort to muddy the waters, Receiver argues that his denials of Associated Bank's requests for admission were justified because the definitions of the terms "Ponzi scheme" and "communicate" were unduly broad. (*See* ECF No. 286 at 16-20.) This argument fails for two independent reasons.

First, Receiver simply ignores the fact that he never objected to the definitions of these terms, much less stated that he could not

respond to Associated Bank's requests for admission based on the alleged breadth of these requests. Having denied the Requests for Admission as written, Receiver cannot now rewrite the record to interpose new objections.

Second, beyond noting that the definitions were broad, Receiver never actually explains *how* the breadth justifies his denials. For example, Receiver notes that "communicate" is defined broadly enough to cover "symbolic" expressions (*see* ECF No. 286 at 14) and that "Ponzi scheme" is defined broadly enough to cover Cook and Kiley's false representations to investors that "their money would be placed in a segregated account in each investor's name," (*see id.* at 11), but that does not solve Receiver's problem: he still has no evidence that any wrongdoing (however broadly defined) was known by, or communicated (however broadly defined) to Mr. Bianchi, Ms. Espey, Ms. Skorczewski, Ms. Paulson, Ms. Simon, Mr. Martens, Ms. Cox, Ms. Jaap, or Ms. Regan. Receiver's discussion of definitions is thus a red herring.

Finally, Receiver's suggestion that Associated Bank made "false representations," "conceal[ed] definitions," and violated Rule 11 is needless invective. (*See* ECF No. 286 at 20.) Receiver does not deny that

he failed to object to the breadth of Associated Bank's requests for admission. Indeed, the parties exchanged numerous letters concerning the requests for admission, yet Receiver does not point to a single letter where he so much as suggested that these definitions were overbroad. And, as shown above, the definitions simply are not relevant to Associated Bank's motion, because Receiver's utter lack of evidence against the listed bank employees transcends even the broadest of definitions.

Receiver's invocation of Rule 11 and *ad hominem* attacks should be discounted, and the Court should grant Associated Bank's motion.

IV. The Court Should Deny Receiver's Request For Fees and Costs.

Receiver ends his opposition to Associated Bank's motion for fees under Rule 37(c)(2) with his own request for an award of fees under Rule 37(a)(5)(B). (ECF No. 286 at 16-20.) There are at least two problems with this request for fees. First, Rule 37(a)(5)(B) provides for an award of costs and fees if the court denies a motion *for a protective order*. Because Associated Bank did not move for a protective order, Rule 37(a)(5)(B) does not apply.

Second, Receiver did not file an actual motion for relief. If he had,

Associated Bank would have been entitled to respond under LR 7.1. Thus, Associated Bank will not further respond to Receiver's request for fees unless and until Receiver files a proper motion for such relief. To the extent the Court decides to take up the Receiver's request without a formal motion, Associated Bank respectfully requests leave to file a responsive brief as allowed by LR 7.1(b)(2) at a time to be set by the Court. (To the extent the Court decides to take up the Receiver's request without a formal motion and without allowing further response from Associated Bank, Associated Bank obviously opposes the Receiver's request, largely for the reasons set forth in its opening brief on the current motion and this reply brief.)

CONCLUSION

The Court should grant Associated Bank's motion for attorneys' fees under Rule 37.

Dated: April 10, 2017

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