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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I. The Bank Leaves Untouched the Facts Entitling the Receiver to Present This Case to the Jury

The Bank asks this Court to affirm a summary judgment that was replete with fact disputes, and based on inferences favoring it as the moving party. But the Bank has failed to overcome, much less address, the facts that reasonably imply the Bank's knowledge of and substantial assistance to the torts at issue in this action: conversion, breach of fiduciary duty, fraud and negligent misrepresentation. The Receiver need not prove the Bank's aiding and abetting using direct evidence, since even "otherwise unremarkable events viewed together may suggest an unusual pattern of events intimating an illegal scheme." *K&S P'ship v. Cont'l Bank, N.A.*, 952 F.2d 971, 979-80 (8th Cir. 1991) (citation omitted). "[K]nowledge [for an aiding and abetting claim] may be proved by and inferred from circumstantial evidence, including facts available to the defendant's employees." *Id*. at 977.

This Court has already ruled that the Receiver's well-pleaded allegations stated a plausible claim. *Zayed v. Associated Bank*, 779 F.3d 727, 735 (8th Cir. 2015) (noting the jury may permissibly make inferences of knowledge and substantial assistance based on certain pleaded facts). At the summary judgment stage, the Receiver has come forth with evidence either proving those facts, or at a minimum showing that they are in genuine dispute. (*See* Rcvr. Br. 55-57). The Bank never confronts (much less

explains away) the facts showing knowledge and substantial assistance. Nor does it contest the applicability of this Court's prior rulings.

Among the facts previously addressed by this Court that the Bank tries to ignore (but cannot avoid):

- Bank Vice President Lien Sarles knew that Crown Forex LLC account #1705 was for investor funds (JAPX2274, JAPX5071), that the funds were supposed to be transferred to Crown Forex S.A. (JAPX5083), and that none ever were (JAPX5741-5758, JAPX5944-5991);
- Sarles knew that Crown Forex LLC was not registered with the Secretary of State, but he submitted account-opening documents stating otherwise (JAPX2275-2276); he knew that Bank policy would not permit accounts to be opened without proper documentation (JAPX2276); he never contacted account owners Pat Kiley or Julia Smith about the missing documentation (*id.*); and he authorized Trevor Cook's transfers while aware that only Kiley and Smith had authorization (JAPX84, JAPX5829-5834); and
- Sarles authorized transfers of millions of investor dollars from Crown Forex LLC account #1705 to Cook's own accounts (JAPX5944-5991, JAPX5829-5834).

See Zayed, 779 F.3d at 733-35.

Discovery yielded even more facts supporting knowledge and substantial assistance, all but ignored by the Bank on appeal:

- One month ***before*** helping form account #1705 with account opening forms rife with misinformation,[1] Sarles attended a Scheme meeting where he learned that the main investment vehicle, Crown Forex S.A., was insolvent (by a shortfall of $13 million), yet he proceeded to open what was supposed to be a conduit for investor funds to that company anyway – account #1705 (JAPX2422-2426);
- At the same April/May 2008 meeting before forming account #1705, Sarles became aware of the Scheme's plan to mollify Wells Fargo's concerns about pooling, by sending the same $1.5 million "back and forth and back and forth" to make it appear (falsely) that the company had $15 million in investor funds and that those non-existent funds were actually being segregated (JAPX2422-2426); and
- Sarles went forward to give "above and beyond customer service" (JAPX5079) to this known-dishonest group, including opening account #1705 for a fictitious entity using information even the Bank

[1] The district court incorrectly believed Crown Forex LLC account #1705 already existed at the time of this meeting. (Rcvr. Br. 35). The Bank does not dispute the correct timing.

concedes was incorrect,[2] and despite having been trained in federal and company procedures on bank security and anti-money laundering (BSA/AML) (JAPX5058, JAPX5073).

These additional facts elicited during discovery only reinforce how reasonable it is to infer that Sarles knew that the masterminds were dishonest and rapacious. The Bank even admits on appeal that the Schemers committed the primary torts. (Bank Br. i). It is not just reasonable, but unavoidable, to infer that the Bank's many atypical activities (Rcvr. Br. 45-51) helped the Scheme thrive.

II. The Bank's Isolated Attacks on Particular Pieces of Evidence Fail to Show the Absence of a Genuine Issue of Material Fact on Knowledge or Substantial Assistance

Even where the Bank acknowledges facts, it improperly asks for inferences to be made in its own favor. That is improper under summary judgment standards. This is yet another reason why this Court should reverse and remand for trial.

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[2] The Bank states (as did the district court) that Sarles did not direct his assistant Espey on how certain parts of the account opening form should be constructed (*i.e.*, did not direct her to choose "Checking/Money Market" from a dropdown selection). (Bank Br. 39-40). The Receiver proved the district court obviously mistaken on this point. (Rcvr. Br. 31-32, citing JAPX5680). It is unclear why the Bank would still rely on this mistaken fact in briefing on appeal. Nor is it clear why it believes its incorrect version of the facts might absolve Sarles in any way, since it is undisputed that Sarles personally delivered the account opening forms for signature containing the many falsehoods. (JAPX5081).

A. Inferences Supporting What Sarles Knew and Did

First, the Bank argues that it makes "no sense" that Sarles saw through the lies that he would have seen at a Scheme seminar that marketed the Scheme to ordinary consumers. (Bank Br. 45-46). Sarles attended a seminar about the "investment program" specifically designed to lure ordinary investors into the Scheme. Sarles would have known from attending that the entire Scheme was a fraud. Armed with such knowledge, Sarles knew from the first days of the banking relationship that Cook's banking activities were wrongful. At a minimum, this is a reasonable inference to be drawn from the facts. The Bank nonetheless seeks an inference that Sarles was fooled, too, arguing that these seminars were specifically designed to recruit and dupe new investors. (Bank Br. 46). Two problems foreclose the Bank's arguments.

First, all reasonable inferences from the facts must be drawn in favor of the Receiver, not the Bank. *See Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 248 (1986). The Bank is free to argue to the jury that Sarles was too dim to appreciate the facial implausibility of an investment scheme that literally promised total liquidity, was supposedly "risk-free," while also

producing double-digit returns.[3] *See Beckman*, 787 F.3d at 474-77 (this Court recounting how the Cook-Kiley Scheme was marketed to investors). But Rule 56 and Supreme Court precedent do not permit those inferences here.

Second, the Bank is incorrect in its jury argument. The Bank ignores that unlike duped investors, Sarles was a Bank Vice President with years of experience, who had training and experience in bank security, "Know Your Customer" (KYC) policies and anti-money laundering. (JAPX5058, JAPX5073). It is at least reasonable to infer that Sarles, a skilled and experienced banker, knew that any totally liquid, risk-free investment system with lucrative returns must be bogus. The Bank also raises the inapposite point that [redacted] (Bank Br. 46). This argument overlooks that there is no evidence that any [redacted] attended a Scheme marketing seminar.

Next, the Bank argues that even Chris Pettengill did not "know" about tortious conversion until months afterward, so how could Sarles? (Bank Br. 5). This is yet again an argument that the Bank is free to make to the jury,

[3] This Court has previously noted testimony regarding this Scheme, including testimony that a "risk free investment is ridiculous." *United States v. Beckman*, 787 F.3d 466, 485 (8th Cir. 2015).

but is improper on summary judgment because it relies on inferences drawn in the Bank's favor, not in the Receiver's favor. *See Anderson,* 477 U.S. at 248; *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 158-59 (1970).

Moreover, the Bank is wrong in its conclusion. The Bank misstates Pettengill's testimony. He actually stated that he lacked "concrete evidence" of conversion until later, but confirmed that he certainly knew what was going on by the April/May meeting 2008. (JAPX2412). *See also Beckman*, 787 F.3d at 485-86 (rejecting fellow Schemer Bo Beckman's claim that he did not know of the illegality of the scheme until it hit the papers in July 2009, concluding that a "reasonable jury could have believed evidence to the contrary . . . .").

The Bank's point is actually inapposite anyway. Sarles learned at the April/May 2008 meeting that (1) Crown Forex S.A. was insolvent, yet he deepened his involvement by forming account #1705 for the fictitious Crown Forex LLC, and (2) the Scheme principals planned to use deceptive bank transfers to fool Wells Fargo into believing that the missing $13 million was actually present and segregated by investor. Thus he learned ***before*** deepening his involvement by forming account #1705 that his customers were dishonest, and their business a sham. The Bank lacks record support for its argument that the discussion centered on implementing a

"plan . . . in a manner approved by legal counsel." (Bank Br. 47). Pettengill testified that the deceptive aspects were not part of the legal advice they had received. (JAPX2425, "Q: And those attorneys recommended that the accounts be repapered in this way; is that correct? A. Not in this way."). Pettengill also confirmed that Sarles would have been unaware of concerns from legal counsel triggering the meeting anyway. (JAPX2426, "Tell him [Sarles] directly? I don't think it was brought up that Briggs told us, you know, at that meeting.").

Even the district court noted that Pettengill's testimony regarding this meeting implied the illegality of the scheme. (JAPX3874). Nevertheless, the district court ignored this evidence in its conclusion that there was no jury question as to Sarles' knowledge. (*Id.,* "Pettengill testified that the illegality of the strategy was implied. *Id.* The court has carefully reviewed and considered in full Pettengill's testimony, and it does not believe that a jury could reasonably infer that Sarles actually knew about the Ponzi scheme based on the alleged meeting."). It was error for the district court to draw these types of inferences in the Bank's favor on the Bank's Rule 56 Motion. *See Anderson,* 477 U.S. at 248 (1986) ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge, whether he is ruling on a

motion for summary judgment or for a directed verdict. The evidence of the nonmovant is to be believed, and all justifiable inferences are to be drawn in his favor. *Adickes*, 398 U.S. at 158-159.").

The Bank also repeats the refrain of the district court that Sarles' drinking at the Scheme's office and patronizing strip clubs with Cook, was "normal socializing" in the banking industry. (Bank Br. 8, 33-34). But the Bank's sole evidentiary support for this remarkable commentary on the 9-to-5 banking industry is that Sarles himself took clients to strip clubs when he worked at two other banking jobs. (Bank Br. 8, citing JAPX5107). Pointing to Sarles' own aberrant conduct is not a sound methodology for establishing the baseline for what is "normal" in the banking industry. This is yet another example of the district court drawing inferences in the Bank's favor. While the Bank would be entitled to argue to the jury that the commercial banking industry's normal mode of operation is to drink with clients at their office and frequent strip clubs together, the Bank is not entitled to such an inference on summary judgment.

Even if "normal" were a fair descriptor, such evidence (along with attendance at sporting events) demonstrates that Sarles spent significant social time with the Schemers—including time spent engaged in activities of questionable character—leading to the reasonable inference of a close

relationship. The closeness of the relationship is a factor to be considered when drawing inferences in the Receiver's favor regarding circumstantial evidence of knowledge.[4] Likewise, the Bank ignores another crucial fact undermining the district court's inference that Sarles was not close to the Scheme: Sarles spoke with Cook at least as often as "once a week," but usually more than that. (JAPX5089). This is yet another fact probative of the closeness of the relationship.

The Bank also tries to dismiss any significance of his family ties to the Schemers by citing the transcript from a hearing before a magistrate judge where the Receiver's counsel stated the Receiver did not have any assertable claim against Sarles' step brother, Michael Behm. (Bank Br. 5-6, 36). The Bank overlooks the relevant timeline. All parties learned that Behm "may have known about the fraud" from Pettengill's testimony (taken August 17, 2016), months after the Receiver's stated understandings to the district court at JAPX2073 (which occurred on June 2, 2016). Importantly, the Receiver is charged with collecting assets, not pursuing every hypothetical tort. Regardless, the fact remains that Behm had possible

[4] Pettengill's alleged failure to pick Sarles out of a photo array lineup (Bank Br. 34) does not disprove Sarles' closeness with the Scheme, as Pettengill last saw Sarles in July or August 2008, eight years before his deposition. (JAPX2420). Moreover, the "photo array" test by counsel has multiple evidentiary problems, and is likely not admissible at trial. Sarles' admitted conduct is enough by itself to support the "close" characterization.

knowledge of the criminality of the Scheme and brought Sarles into the fold. This leads to natural and reasonable inferences that Sarles knew of its true nature from the earliest days of his involvement. *See Zayed*, 779 F.3d at 733-35.

B. Sarles' Deceptive Acts During the Scheme

The Bank next argues that Sarles did not deflect important and urgent questions about the Scheme and account #1705 in April 2009 from high-ranking security officer Ryan Rasske, by pointing to Rasske's testimony that [redacted] (Bank Br. 43, citing JAPX5794-95). This is again an issue that the Bank is free to argue to the jury but not an argument that it is legally permitted to "win" on its own summary judgment motion. The Bank also points to no confirming documentation that [redacted]. The record shows instead that [redacted]

(JAPX5795, objection omitted). Though Rasske "speculated" that [redacted].

The Bank also argues that Sarles did not deflect Joanne Alberts's investigations into account #1705 with a lie in March 2009 that the Nicollet address was an "old address" of Crown Forex LLC, and with a lie that it had "moved" to the Van Dusen Mansion. (Bank Br. 13, 43-44). The Bank points to testimony that supposedly shows that Sarles told Alberts that the address on the account opening documents was out of date. (*Id*., citing JAPX3386-3387, JAPX3390-3391). But this argument only highlights Sarles' lack of credibility. He had hand-delivered account-opening papers for the Crown Forex LLC account to Tiffany Court, where he understood the signatories had a functioning operation. (JAPX5066, JAPX5081). The Bank does not point to anything in the record to show that anyone ever told Sarles that Crown Forex LLC had operations at Green Dog Sports (the business located at the Nicollet address), much less at the post office box identified on the form that Sarles had Kiley and Smith sign. Nor does the record show Sarles ever knowing or being informed that Crown Forex LLC actually "moved" from Tiffany Court to the Van Dusen Mansion. To the contrary, Sarles

testified that he only knew of one move of the Crown Forex LLC business: from Tiffany Court to a location in Eagan, Minnesota. (JAPX5068). In short, the March 2009 statements from Sarles are inferable as lies to lull a Bank investigator.

The Bank also argues that Sarles did not deflect Bonnie Skorczewski's October 2008 investigations into account #1705 when he lulled her concerns with statements that there was nothing unusual about "a lot" of wire activity on the account because it was formed to wire out money to a "global fund" (*i.e.*, in Switzerland). (Bank Br. 39, 44). The facts show otherwise. It is undisputed that Sarles' statement to Skorczewski is different from account opening due diligence papers for the Crown Forex LLC account, which indicated that no wire activity was expected. (JAPX5355). The Bank advocates for an inference in its favor, based on hypothetical testimony offered by Sarles' assistant Espey, as to [redacted] (Bank Br. 39, 44). Yet the Bank does not contest that a jury could reasonably infer that a relationship manager, and Sarles in particular, was the interface between the client and the Bank for all of the information appearing on—or omitted from—these account opening due diligence papers. Based on these facts, even if other possibilities exist, the jury may easily conclude that Sarles caused the

account opening due diligence questionnaire to indicate that no wire activity was expected so that the account would receive less scrutiny.

Nor does the Bank's argument foreclose the possibility that a jury could reasonably infer that a relationship manager in Sarles' position, in the course of managing the relationship for the biggest account in his portfolio (indeed, a completely outsized one), would be continually aware of its account activity. How else could Sarles give "above and beyond customer service" unless he knows the client's business at the Bank? (JAPX5079). That awareness here would have meant that Sarles knew that no outgoing wires went to foreign entities, including no Swiss counterparts, confirming his lulling statement to Ms. Skorczewski about wires to a "global" fund as dishonest.

Thus, when considering the inferences that reasonably arise from the facts, each and every interaction Sarles had with an internal Bank investigator (whether in October 2008 or March/April 2009) constituted a lie or a deflection – a probative indicator that Sarles knew about his clients' primary torts. *See, e.g., K&S*, 952 F.2d at 979-80 ("atypical" acts count toward ascertaining scienter).

The Bank also asserts that Sarles was "simply following bank policy by opening account #1705 in the name of a domestic entity" (rather than as

the Swiss entity) (Bank Br. 37, *citing* JAPX3385). According to the Bank, simply following Bank policy is not evidence of knowledge of wrongdoing. (*Id*.). With this argument, the Bank diverts attention from the issue the Receiver actually raised. As the Receiver pointed out, the trigger for enhanced due diligence (which Sarles would have known from his training) was that an entity was foreign-***owned***, not necessarily that it was foreign ***formed***. (Rcvr. Br. 9). Under the facts Sarles knew at the time, Crown Forex LLC was to be foreign owned. (JAPX2693-2694). Sarles acknowledged that foreign-owned domestic entities may open accounts within Bank policies. (JAPX3385). [redacted]. (JAPX5328). But Sarles did not indicate foreign ownership of Crown Forex LLC. The Bank offers no record support for its suggestion that Sarles' omission of information that would trigger enhanced due diligence (foreign ownership) constitutes Sarles "simply following bank policy." (Bank Br. 37, *citing* JAPX3385).

The Bank also tries to divorce Sarles from any involvement in creating the Crown Forex LLC account opening documents. (Bank Br. 38). But Sarles [redacted] (Rcvr. Br. 31-32, citing JAPX5680). It is thus reasonable to infer he helped

create all of it. In addition, the Bank contends that the final document at JAPX84 does not contain Sarles' signature (Bank Br. 38), but that is far from clear and the Bank does not indicate whose it might otherwise be. Regardless, Sarles undisputedly ***delivered*** documents such as JAPX84 to Kiley and Smith, got their signatures, and delivered them back to the Bank, with knowledge of the false entry that the Bank had already received LLC documents from a state registration website. (JAPX5079, JAPX5081). Raising speculation that Sarles did not sign the document cannot deprive these deceptive acts of their significance.

C. Sarles' Lies Under Oath

On Sarles' personal integrity, the Bank contends that Sarles did not lie under oath in this or previous litigation. (Bank Br. 53-54). The Bank again argues for a jury question to be resolved in its favor on summary judgment. This is not permissible under well-settled law. *Anderson*, 477 U.S. at 248 ("Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge . . . .").

But even on the substance of its jury argument the Bank is wrong. Tellingly, the Bank does not even contest the most important example: that Sarles lied at his deposition about his understanding of why he was fired,

conveniently supporting the Bank's current narrative. As the Receiver showed (and the Bank studiously avoids), a contemporaneous internal Bank document reveals Sarles' real understanding – that he was fired for his role in "the Oxford mess." (Rcvr. Br. 24, citing JAPX5183).

The Bank fares little better when it addresses the second instance of Sarles's false testimony. Citing Sarles' deposition testimony, the Bank argued at summary judgment that Sarles recommended investment in the Scheme to his cousin, a federal prosecutor at the relevant time, and that he never would have done so if he knew the program was a fraud. (JAPX523, JAPX529, JAPX542). In response, the Receiver pointed out that Sarles' testimony was false: his cousin was not a federal prosecutor then, and he did not speak to her about the Scheme. The Bank apologized to the district court for the error and now interprets that same testimony differently. (Bank Br. 54; *see* Rcvr. Br. 28-29). If the Bank in good faith believed that Sarles' deposition testimony meant what it told the district court—that Sarles told a federal prosecutor about the Scheme—the jury could reasonably have the same understanding of that testimony. Given the undisputed fact that Sarles' cousin was ***not*** a federal prosecutor at the relevant time, the jury may reasonably conclude that this was another instance of Sarles' dishonesty under oath.

Concerning the 2010 declaration testimony, the Bank also makes only half-hearted attempts to support Sarles' statements under oath. In particular, the Bank asserts that Sarles testified that he was not responsible for "monitoring" withdrawals over $10,000. (Bank Br. 53-54). That is not Sarles' testimony. Rather, he stated under oath that he was not responsible at all for withdrawals over $10,000. (JAPX2276, "I was not responsible for . . . withdrawals over $10,000"). Yet numerous Bank documents show Sarles authorizing or supervising transfers well into the million-dollar range – proving the 2010 statements to be lies. (JAPX5829-5834).

The Bank also ignores the second part of the 2010 declaration that the Receiver showed to be a lie – Sarles' testimony about having "limited contact" with the Scheme and its principals after account opening. (Rcvr. Br. 26-28). The reality proven through discovery in this case is that Sarles partied with the Schemers, both at their place of business and elsewhere, including strip clubs. (JAPX5096). He also had regular contact more than once per week (sometimes multiple times in a single day). (JAPX5089).

The Bank has thus left untouched the Receiver's showing that Sarles has a pattern and practice to give dishonest testimony under oath about material underlying facts of this case – a fact alone that permits the jury to disbelieve all of his bare denials of knowledge and substantial assistance,

and instead find the opposite. *Deville v. Marcantel*, 567 F.3d 156, 165-166 (5th Cir. 2009); *Haggard v. Town of Fishers*, No. 1:12-cv-744-WTL-DKL, 2013 U.S. Dist. LEXIS 138266, at *6 (S.D. Ind. Sept. 26, 2013) ("If the jury were to credit the Plaintiff's testimony about those facts over that of the officers, it could then find the remainder of the officers' testimony incredible as well, although it certainly would not be required to do so.").

For all these reasons, and the many others shown in the Receiver's opening brief, the Receiver presents a triable case of aiding and abetting liability – not only with respect to the facts that the Bank ignores, but also with respect to the facts that the Bank bothers to attack in its appellate brief. Given the Bank's faulty efforts to defend the judgment below, nothing stands in the way of this Court reversing.

III. The Bank's Reliance on Ms. Ghiglieri is Irrelevant and Incorrect

The Bank often repeats that the Receiver's own expert admitted that no one in the Bank had knowledge of the Ponzi scheme. (Bank Br. 3, 16, 19-20, 29-36, 55). The Bank advances an incorrect view of Ms. Ghiglieri's testimony. The district court was correct not to rely on the Bank's argument.

The Bank's most repeated question and answer is reproduced here:

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

A. Yes.

(JAPX560). This answer, whether in isolation or in the context of the broader examination, does not say what the Bank argues it says.

First, Ms. Ghighlieri addressed a question about people who "put this information together." On its own terms, the question did not reach as far as someone like Sarles, who had no need to "put together" information in his mind about things he had already done. It remains consistent that no one at the Bank might have "put together" information that was already known to Sarles.

Second, the context of the examination was an inquiry about Ms. Ghiglieri's opinions concerning three [redacted] (JAPX560). The terminology "this information" in the question referred to the information Ms. Ghighlieri had been discussing in prior answers – [redacted] The antecedent for the phrase "this information" is a question on the immediately preceding deposition page [redacted]

[redacted]

(JAPX560). This context excluded Sarles already, since [redacted]

Third, the previous page's testimony (quoted above) shows that the excerpt cited by the Bank was, in effect, the second time the Bank's counsel asked essentially the same question. The first time Ms. Ghiglieri answered it, she confirmed that her answer was limited to not having seen direct evidence (*e.g.*, [redacted]). Thus, her answer the second time must be understood in this context. At no point did Ms. Ghighlieri repudiate that sufficient circumstantial evidence of knowledge exists in the record. She specifically preserved this point: [redacted] (JAPX560). Testimony that the Bank does not cite thus supports (rather than refutes) that circumstantial evidence of actual knowledge exists. (*See also* JAPX3132, [redacted]

[redacted]

Fourth, the excerpt cited by the Bank asks a legally inapposite question: whether certain Bank individuals in April 2009 had "put together" knowledge that the Schemers were running a "Ponzi scheme." As discussed at length in the opening brief (Rcvr. Br. 44-45), the Receiver does not allege a Ponzi scheming claim as the primary tort. The question does not ask Ms. Ghiglieri her opinion about the claims that the Receiver ***has*** alleged: whether there was sufficient evidence to conclude that the Bank had knowledge of primary torts of conversion, breach of fiduciary duty, fraud, and negligent misrepresentation against the Receivership Entities. The testimony is thus disjointed from the actual aiding and abetting liability issues of this case.[5]

[5] For the first time on appeal, the Bank now suggests that a Minnesota conversion claim does not lie against identifiable money siphoned from bank accounts. (Bank Br. 49). This contention is waived since it was not raised at the trial court. Regardless, the Bank admits at page i that the primary tort of conversion did occur. Also, the Bank's cited case did not decide whether "money in an intangible form" is property subject to a conversion claim in the context of a wire being sent from a financial company to one of its customers. *TCI Bus. Capital, Inc. v. Five Star Am. Die Castings, LLC*, 890 N.W.2d 423 (Minn. Ct. App. 2017) ("we need not resolve TCI's first contention"). Minnesota and foreign cases do recognize a conversion property interest in identifiable bank account funds. *ADP Investor Commun. Servs. v. In House Atty. Servs.*, 390 F. Supp. 2d 212, 224-25 (E.D.N.Y. 2005); *Impulse Trading, Inc. v. Norwest Bank Minnesota, N.A.*, 870 F. Supp. 954, 960-61 (D. Minn. 1994); *see also Insoftvision, LLC v. MB Fin. Bank,*

Fifth, the answer itself is not admissible. Experts do not properly testify on issues of scienter beyond what documentary or testimonial evidence directly shows them. *Holmes Grp., Inc. v. RPS Prods., Inc*., No. 03-cv-401460-FDS, 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."). While the Bank is correct that Ms. Ghiglieri in other respects testified to specific points that the Bank affirmatively "knew" (Bank Br. 31-32), in each such instance her answer referred to knowledge directly revealed in a document from the Bank or a deposition answer (*i.e.*, direct, not circumstantial, evidence of knowledge on a point within the scope of banking operations). (JAPX 3131, equating her analysis of [redacted] *see also* JAPX3573, confirming that her methodology for ascertaining what the Bank "knew" involved assessing [redacted]

N.A., No. 10 C 3377, 2011 U.S. Dist. LEXIS 38443 (N.D. Ill. Apr. 8, 2011) (construing bank wire as property subject to conversion claim).

[redacted]

Finally, even if the Bank's proffer passes all of the above-mentioned hurdles, it cannot get past the final one. Testimony from an independent expert does not bind the party who retains her, as a party admission or otherwise. *See Kirk v. Raymark Indus., Inc.*, 61 F.3d 147, 162-64 n.20 (3d Cir. 1995) ("To the extent that *Collins* holds that an expert witness who is hired to testify on behalf of a party is automatically an agent of that party who called him and consequently his testimony can be admitted as non-hearsay in future proceedings, we reject this rule."); *American Auto. Co. v. Omega Flex, Inc.*, Case No. 4:11CV00305, 2013 U.S. Dist. LEXIS 197281, at *4 (D. Mo. July 5, 2013) (following *Kirk*, noting that treating an expert as ***not*** the agent of the party is the view of "the majority of cases"). "Since an expert witness is not subject to the control of the party opponent with respect to consultation and testimony he or she is hired to give, the expert witness cannot be deemed an agent." *Kirk*, 61 F.3d at 164.

The case law that the Bank cites to the contrary (Bank Br. 30) either reflects a minority view, or otherwise reflects an exception not applicable here. Under the exception, expert testimony at a first trial, ratified and relied upon by the proponent, will be construed as a party admission in a later

second proceeding. *E.g., In re Hanford Nuclear Resvn. Litig.*, 534 F.3d 986, 1016 (9th Cir. 2007). That is not the case here. But even if somehow Ms. Ghiglieri's testimony carried some weight as an "admission," the Bank's argument still fails. The Bank's own primary case supporting its minority view notes that an "expert admission" is not "binding." *See Collins v. Wayne Corp.*, 621 F.2d 777, 782 (5th Cir. 1980) (expert testimony "was not, of course, a binding judicial admission . . . ."). At worst, all of the other facts mentioned above and in the opening brief still exist in this record to demonstrate knowledge on the part of the Bank.

IV. Constructive Knowledge is the Standard in Minnesota, and Exists Here

The Bank did not move for summary judgment of no constructive knowledge. (Rcvr. Br. 52-55). The district court therefore erred in granting summary judgment on that basis. The Bank's response brief is silent on this point. Thus it remains uncontroverted that the Bank failed to trigger any burden-shifting under the summary judgment burden-shifting framework. Reversal on this ground is appropriate. *Hibernia Nat'l Bank v. Administracion Central Sociedad Anonima*, 776 F.2d 1277, 1279 (5th Cir. 1985); *School-Link Techs., Inc. v. Applied Res., Inc.*, 471 F. Supp. 2d 1101, 1111 (D. Kan. 2007).

The Bank's arguments on the merits fail anyway. The Bank insists that constructive knowledge plays no role in aiding and abetting claims under Minnesota law. But the Bank misstates the facts and holding from the seminal case on point, *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179 (Minn. 1999).

The Bank argues that *Witzman* did not reach or decide the constructive knowledge question on the facts before it. (Bank Br. 22-23). Both sides agree that *Witzman* describes a constructive knowledge standard: (a) underlying conduct is illegal or clearly tortious, (b) in the context of a close or long-term relationship. *Id.* at 188.[6] However, the Bank is wrong that "[i]n *Witzman*, there *was* a facial breach" (Bank Br. 22, emphasis by the Bank), suggesting that all of the factual pieces were in place for a constructive knowledge finding if the Minnesota Supreme Court were inclined to apply that standard.

On the contrary, *Witzman* observed that the facts at bar "were ***not*** clear violations of the broad discretionary authority he held as trustee. Thus, LL & F/Flom may have reasonably believed that these allegedly tortious

[6] The Bank does not defend the district court's misstatement of the standard criticized in the Receiver's opening brief, that supposedly it requires the "clarity" of tortiousness or illegality to be apparent "to those not directly involved." (Rcvr. Br. 52). The Bank thus concedes that the District Court got the standard wrong.

dealings were legitimate exercises of Wolfson's discretion as trustee." *Id.* (emphasis added). In *Witzman*, the trustee breached one particular ***duty*** (namely, a duty to file a periodic report), but this breached duty was not the pleaded tort. *Id.* Hence, *Witzman* rejected constructive knowledge on the facts (*i.e.*, applied constructive knowledge as the law) because it found no clearly tortious conduct in the context of that case.

The Bank cites *Anderson v. U.S. Bank, N.A.*, 2014 WL 502955 (Minn. Ct. App. 2014), to seek a contrary result. (Bank Br. 23). But *Anderson* is "UNPUBLISHED," and such decisions under Minn. Stat. § 480A.08, Subd. 3 (2012), "are not precedential." Likewise, the Bank's reliance on *American Bank of St. Paul v. TD Bank, N.A.*, 713 F.3d 455 (8th Cir. 2013), is equally unavailing. In *American Bank*, the plaintiff did not seek a constructive knowledge jury instruction, but rather defended an "actual knowledge" jury verdict against additional limitations urged by the defendant. *Id.* at 468.

The Bank's backup argument seeks to brush aside the *Witzman* court's exemplar of what constitutes a clear tort in the context of a long term or close relationship. The Receiver pointed out that this exemplar is the case *Witzman* itself cites – *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270 (2d Cir. 1992). (Rcvr. Br. 54-55). Unable to refute that the present case presents constructive knowledge facts that are even more compelling than

those in *Diduck*, the Bank instead tries to discredit it. (Bank Br. 27-28). But whether or not courts in the Second Circuit have limited *Diduck* to its facts, the facts of *Diduck* have been incorporated into the *Witzman* holding. Further developments in the Second Circuit do not undermine that those facts stand as the touchstone of constructive knowledge in Minnesota.

The Bank's last effort to fend off reversal on constructive knowledge grounds contradicts its own argument just pages earlier. Here, the Bank argues that *Witzman* did apply the standard, but found that the 30-year accounting relationship within its facts did not qualify as long-term enough. (Bank Br. 26). Based on this, the Bank argues that the 18-month relationship between the Bank and the Scheme cannot count. But when *Witzman* applied constructive knowledge (and found the facts wanting), it resolved the question entirely based on the "clearly tortious" prong, never reaching the "long term or close relationship" prong. As stated above and in the Receiver's opening brief, the facts here exceed the *Diduck* facts in terms of the clarity of the tort and the closeness of the relationship. The Bank's relationship with the Scheme more than qualified as "close or long term." (Rcvr. Br. 54-55).

In sum, constructive knowledge is the law under Minnesota aiding and abetting standards, and the facts at bar should have precluded summary judgment for the Bank.

V. Conclusion

In this circuit, even "otherwise unremarkable events viewed together may suggest an unusual pattern of events intimating an illegal scheme." *K&S*, 952 F.2d at 979-80 (citation omitted). A jury could reasonably infer that the Bank had knowledge of the four pleaded primary torts, substantially assisted, and is therefore liable. The Receiver respectfully requests that this Court reverse 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 6,490 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: June 23, 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 in non-scanned PDF format. I hereby certify that the file has been scanned for viruses and that it is virus-free.

/s/ Robert P. Greenspoon
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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on June 23, 2017, an electronic copy of the Redacted Reply Brief of Appellant was filed with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. The undersigned also certifies that the following participants in this case are registered CM/ECF users and that service of the Redacted Reply Brief will be accomplished by the CM/ECF system:

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