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-JSM)

REPLY IN SUPPORT OF DEFENDANT'S MOTION TO DISMISS

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The Receiver's opposition urges this Court to accept the implausible premise that Associated had actual knowledge of an ongoing, multi-million dollar fraud, and then deliberately chose to assist it. To be clear, the Receiver does not allege that Associated was negligent or reckless, but instead asserts "high-scienter torts." Opp. 7. And Associated allegedly did this not for payments from the Ponzi schemers but merely to attract new deposits. Opp. 1-2.

The Receiver's theory is belied by the Complaint itself, where the Receiver admits that if Associated had known about the fraud, Associated would have acted to prevent it. Compl. ¶ 74. Moreover, the Receiver's allegations of actual knowledge and substantial assistance—that Associated ignored "red flags" or took internal shortcuts—are the same kind of allegations that courts repeatedly have rejected as insufficient to plead that a bank aided and abetted fraudsters.

The previous aiding-and-abetting suit against Associated is particularly instructive. The investors there, just like the Receiver here, alleged that, if Associated had known about this fraud, Associated would have prevented it. The trial court dismissed the lawsuit, and the Wisconsin Court of Appeals affirmed. Tellingly, the Receiver focuses on the *dissent* in *Grad*, and then only that portion of the dissent that discussed *negligence*. Opp. 6. The Receiver disregards that the dissenting judge agreed with the majority's dismissal of

the *aiding-and-abetting* claim. *Grad*, 801 N.W.2d 349, at *9 (Brunner, J., concurring in part; dissenting in part).

There is no need, however, for this Court to reach those issues, as the Receiver is not the proper party to bring this suit. Under the most analogous Minnesota precedent, the *in pari delicto* doctrine bars his claims. As for *res judicata*, the Receiver seems to think that an investor can sue, lose, and then sue again through the proxy of a receiver. But that would turn *res judicata* on its head. And, because of prudential standing, the Receiver cannot displace the investors from pursuing their own claims.

Finally, given the volume of the Receiver's rhetoric, a few words about Associated's position are warranted. Contrary to the Receiver's suggestion that Associated is trying to have it "both ways" (Opp. 3), there is nothing inconsistent about arguing (1) that the Receiver is an improper litigant and (2) that he, like the proper litigants before him, has failed to state a claim against Associated. And, although defrauded investors are deserving of sympathy, that does not justify imposing liability on a party not legally responsible. The Receiver's repeated criticism of Associated's decision to defend itself is misplaced.

I. The Receiver May Not Pursue These Claims.

A. The *in pari delicto* doctrine bars this action.

The parties agree that Minnesota law controls the application of *in pari delicto*. Every indication demonstrates that a Minnesota court would dismiss this suit. But, to the extent there is any doubt about Minnesota law, certification to the Minnesota Supreme Court is warranted. *See* Mot. 13 n.3. The Receiver does not oppose this suggestion.

1. Equity and public policy do not foreclose the in pari delicto *defense.*

The Receiver cites *State by Head v. AAMCO Automatic Transmissions*, 199 N.W.2d 444, 448 (Minn. 1972), for the proposition that, in certain circumstances, the *in pari delicto* doctrine may bend to public policy considerations. Opp. 8. But *Head* did not hold that public policy concerns always trump the *in pari delicto* doctrine. Rather, *Head* noted that when a cause of action is brought under a particular statutory scheme, such as anti-trust, public policy concerns animating the cause of action might alter the common law rule. Notably, *Head* affirmed the dismissal of the common law claims before it on *in pari delicto* grounds.

Similarly, *Christians v. Grant Thornton, LLP*, 733 N.W.2d 803, 814 (Minn. Ct. App. 2007), affirmed an *in pari delicto* bar to common-law claims brought by a bankruptcy trustee, declining to restrict the doctrine based upon

arguments that applying "it would harm innocent creditors." Instead, the court held that "in pari delicto" may bar a claim "despite the inevitable harm to creditors." *Id*. That *Christians* arose in the context of a bankruptcy is not a distinction that matters. *Christians* looked to fundamental principles of *in pari delicto* under Minnesota law, not to plaintiff's status as a bankruptcy trustee.

2. Precedent requires application of in pari delicto.

No Minnesota court has resolved whether *in pari delicto* applies to a federal receiver pursuing a third-party tort claim. There is, however, clear Minnesota law barring a bankruptcy trustee from doing so. *Christians*, 733 N.W.2d at 814. And while a receiver's duties are defined by state law (Opp. 9), Minnesota law makes clear that a receiver's rights are no greater than the receivership entities. *Dickson v. Baker*, 77 N.W. 820, 821 (Minn. 1899);[1] *see also Merrill v. Zimmerman*, 188 N.W. 1019, 1022 (Minn. 1922) ("by virtue of his appointment" a "receiver stands" in the "shoes" of the receivership entity). The same is true of a bankruptcy trustee. Opp. 9. Accordingly, under Minne-

[1] It is the Receiver who misreads *Dickson*. Opp. 12. There were two relationships at issue there: (1) a creditor had assigned rights to an assignee, and then (2) the receiver "stood in the shoes" of the assignee. 77 N.W. at 821. A defense against a creditor applied to the receiver because it survived both (1) the assignor-assignee relationship *and* (2) the receiver-receivership relationship. The second point, which the Receiver overlooks, is at issue here.

sota law, there is no distinction between a bankruptcy trustee and a receiver for purposes of *in pari delicto*. *Christians* thus provides substantial guidance.

The best the Receiver can do in Minnesota is point to a pair of fraudulent conveyance cases—*German-Am. Fin. Corp. v. Merchs.' & Mfrs.' State Bank*, 225 N.W. 891 (Minn. 1929),[2] and *Kelley v. Coll. of St. Benedict*, 2012 WL 5309501, at *4 (D. Minn. 2012). (As well as a Seventh Circuit fraudulent conveyance case, *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995)). But *in pari delicto* applies to fraudulent conveyance claims very differently than it does to third-party tort claims.[3] In *Knauer v. Jonathon Roberts Financial Group*, 348 F.3d 230, 236 (7th Cir. 2003), the Seventh Circuit explained that third-party tort claims "present[] a different equitable alignment" than fraudulent conveyance actions, because the receiver "is not seeking to recover the diverted funds from the beneficiaries of the diversions." It thus distinguished *Scholes* because "this is a claim for tort damages from entities that derived no benefit from the embezzlements, but that were allegedly partly to blame for their occurrence." *Id.* The same is true here: Associated derived no

[2] The Receiver's argument that *German-American* is not a fraudulent conveyance case, is wrong. Opp. 10 n.2. The claim by the receiver in *German-American* was that the bank inappropriately held collateral that the corporation had conveyed to it. 225 N.W. at 892-93. There was no tort claim against the bank.

[3] The Receiver did not respond to this argument from our opening brief. Mot. 11 n.2.

benefit from the wrongdoing; it is simply accused of being partly to blame. In these circumstances, *in pari delicto* applies to the Receiver.

As *Knauer* reveals, law outside Minnesota is relatively clear: *in pari delicto* applies to a federal receiver pursuing third-party tort claims. *Myatt*, for example, is *identical* to the circumstances here. There, a fraudster used accounts at the bank in conducting an illegal scheme, and a federal receiver brought aiding-and-abetting claims. 635 S.E.2d at 546. The court, following *Knauer*, concluded that *in pari delicto* applied. *Id*. *See also Hays v. Pearlman*, 2010 WL 4510956, at *5-7 (D.S.C. 2010).

The Receiver attempts to distinguish *Knauer* on the facts by arguing that Associated "benefited from" the Ponzi scheme. Opp. 11. But under *Knauer*, a party "benefits from" the fraud, and hence loses the *in pari delicto* defense, only when the party receives a share of the criminal proceeds, something the Receiver does not allege against Associated. In *Knauer*, the defendants were not deemed to have "benefited from" the fraud merely because, as broker-dealers for the Ponzi schemers, they were paid for their services. 348 F.3d at 231-32. Similarly, in *Myatt*, claims against the Bank were dismissed notwithstanding the fees the Bank received—which is exactly what the Receiver alleges here. 635 S.E.2d at 546.

Finally, the Receiver points to *Jones v. Wells Fargo Bank*, 666 F.3d 955 (5th Cir. 2012). But *Jones* turned on the "adverse interest" exception to the *in*

pari delicto doctrine, which the Receiver does not argue applies here, and it does not. The adverse interest exception is inapplicable where, as here, fraudsters and the corporation they controlled are one and the same. *Grassmueck v. Am. Shorthorn Ass'n*, 402 F.3d 833, 840 (8th Cir. 2005).

3. It is appropriate to resolve this issue now.

As in *Knauer* and *Hays*, it is appropriate to resolve *in pari delicto* now because it can be resolved as a matter of law based on the allegations in the Complaint. The Receiver does not contest that *in pari delicto* applies so long as the plaintiff is at equal or greater fault than the defendant. Mot. 9.

The Receiver's cases deferred resolving the issue only because factual questions remained. In *In re Student Finance Corp.*, 2006 WL 2346373, at *3 (Bankr. D. Del. 2006), the defendant himself was alleged to be a fraudster; not so here. In *In re Phoenix Diversified Inv.*, 439 B.R. 231, 244 (Bankr. S.D. Fla. 2010), it was unclear whether the plaintiff was a wrongdoer at all. Both *Marwil v. Ent & Imler*, 2004 WL 2750255, at *10 (S.D. Ind. 2004), and *Baker O'Neal Holdings v. Ernst & Young LLP*, 2004 WL 771230 (S.D. Ind. 2004), involved allegations that the defendant was potentially more responsible for the wrongful conduct than the plaintiff.

By contrast, in this case, the Complaint demonstrates that the Receivership Entities—who orchestrated and perpetuated the fraud—are principal-

ly at fault. It certainly cannot support a claim that Associated's wrongdoing was *greater* than that of the fraudsters.

B. *Res judicata* bars this action.

A party may not sue, lose, and then sue again. And a litigant cannot circumvent this fundamental rule by bringing a second lawsuit through a privy. Yet that is precisely what the Receiver hopes to do.

Associated's argument is neither "illogical[]" (Opp. 16) nor a "heads I win, tails you lose" trick (Opp. 14); it is commonsense and it is the law. To be clear, investors who did not join the Wisconsin suit are not barred by *res judicata*; it is only the *Grad* plaintiffs and their privies who are barred—but that includes the Receiver.

The Receiver makes several implicit concessions: (1) that many investors sued Associated in Wisconsin and lost on the merits (the *Grad* suit); (2) that, if he succeeds in his claims here, those same investors would obtain the very relief they sought in *Grad*; and (3) that, if *res judicata* applies, his entire lawsuit is barred.

The Receiver's two arguments—that he is not in privity with the *Grad* plaintiffs and that he brings different claims—are meritless.

First, *Lamson v. Towle-Jamieson Investment Co.*, 245 N.W. 627, 628 (Minn. 1932), establishes that the Receiver is in privity with the investors as a matter of Minnesota law. There, the Minnesota Supreme Court held that a

"creditor of the corporation" is "in privity with the plaintiff receiver, who represented and acted for all the creditors." *Id.* That is *exactly* the situation here. According to the Receiver, the Receivership Entities owe the investors money (Compl. ¶ 83); the investors are thus creditors of those entities.

The Receiver is correct that, in *Lamson*, the receiver sued first, so *res judicata* barred a subsequent claim by an investor. Opp. 14-16. But it makes no difference that the investors sued first here. What matters is the legal conclusion that the parties were in privity. Indeed, *Javitch v. Gottfried*, 2007 WL 81857 (N.D. Ohio 2007), applied *res judicata* to a receiver's action that followed a claim brought first by the investor. The Receiver ignores this authority entirely.

Reil v. Benjamin, 584 N.W.2d 442 (Minn. App. 1998), strongly supports application of *res judicata*. As the Receiver points out, that case holds that "privity requires that the estopped party's interests have been sufficiently represented in the first action so that the application of collateral estoppel is not inequitable." *Id.* at 445. Because the Wisconsin action was prosecuted by individual investors themselves—the very people the Receiver seeks to benefit—the parties there were *best* positioned to advance these claims.

The Receiver's contention that he "had no control over, no right to be heard in, and no participation in the prior investor lawsuit" is of no consequence. Opp. 15. What the Receiver ignores is that his appointment—and his

prosecution of this suit—is for the benefit of those investors. When, like here, investors have already sued in their own name, there is nothing left for the Receiver to do. That is why the receiver-creditor relationship is alone sufficient for privity (and *res judicata*) to attach. In *Lamson*, the creditor's claim was barred despite his complete lack of participation in the receiver's earlier action. 245 N.W. 2d at 628.

Commodity Futures Trading Commission v. Chilcott Portfolio Management, 713 F.2d 1477, 1486 (10th Cir. 1983), is inapposite. Privity is a question of state law and *Lamson* is dispositive in Minnesota. Nor does *Chilcott* discuss whether a receiver *is* a privy—but *Lamson*, *Javitch*, and *Britt* do. *Chilcott* is correct that a claim by one investor cannot preclude a claim by another. Mot. 15. But a suit by one investor *does* bar the same suit by a receiver who acts for his benefit.

The Receiver's second argument is more far-fetched. He asserts that there is no "complete identity of legal theories" because the *Grad* investor's aiding-and-abetting claim was "based on intentional conduct," whereas his claim is supposedly based on "'knowing' conduct." Opp. 15-16. But *res judicata* attaches "if the same operative nucleus of facts is alleged." *Anderson v. Werner Cont'l*, 363 N.W.2d 332, 335 (Minn. Ct. App. 1985). "For purposes of res judicata a basic factual situation gives rise to one cause of action, no matter how many different theories of relief may apply." *A.B.C.G. Enters. v. First*

Bank Se., 504 N.W.2d 382, 385 (Wis. App. 1993). Whether Wisconsin law is slightly different than Minnesota has absolutely no bearing on whether the *Grad* plaintiffs already sued on the same facts and lost.[4]

C. The Receiver lacks standing.

The Receiver offers no response to the substance of Associated's standing argument. The Receiver cites cases establishing that he has Article III standing to pursue his claims. Opp. 17-18. Associated does not disagree. But this has nothing to do with *prudential* standing. And while it is true that Associated does not cite any case dismissing a receiver's third-party tort claims on prudential standing grounds, it is equally true that the Receiver does not cite any case rejecting the argument, nor is Associated aware of any. The fact that our argument is novel does not make it wrong.

The Receiver does not dispute that his action would pose serious constitutional concerns if it bars investors from their own day in court. The presence of an opt-out mechanism has been held a necessary requirement for a class action seeking damages. Mot. 17-18. The Receiver's only response is that his action would not have preclusive effect on investors, but that assertion is belied by *Lamson*, 245 N.W. at 628.

[4] Under the Receiver's theory, the *Grad* investors themselves could, despite having lost once in Wisconsin, sue again in Minnesota on a new legal theory. That is incorrect.

These are claims that the investors can—and must—bring. The Receiver lacks standing to do it for them.

II. The Complaint Fails To State A Claim For Relief.

The Receiver cannot plead that Associated *substantially assisted* the fraudsters and did so with *actual knowledge*. And he certainly cannot do it with the particularly that Rule 9(b) requires. His opposition turns on the fiction that Minnesota law is so drastically different from the law of other states—where courts have dismissed nearly identical lawsuits with frequency—that a different result is warranted here. Moreover, the Receiver flatly ignores that his own allegations are incompatible with an aiding-and-abetting theory for precisely the same reason that the Wisconsin suit was dismissed. Nor does his laundry list of allegedly suspicious activity demonstrate substantial assistance.

Associated provided several cases materially indistinguishable from this action, where a bank was sued for aiding and abetting Ponzi fraudsters because it was allegedly aware of red flags and other suspicious signs, failed to adhere to certain internal controls or policies, and continued to provide banking services to the fraudsters. Time and again, these claims are dismissed. Mot. 20-31. The Receiver addresses not one of the more than a dozen such cases that Associated discussed in its opening brief, each with allegations similar to—if not more extensive than—those here. *E.g.*, *Agape*, *In re*

Consolidated Meridian Funds, *El Camino Resources*, *Go-Best Assets*, *Groom*, *Lawrence*, *Palm Beach Finance Partners*, *Perlman*, *Ryan*, *Section 1031 Exch. Litig.*, *Stern*, *Weshnak*.

Instead, the Receiver asserts that the cases are "unsupportive" because they were decided under New York and other state law, not Minnesota. Opp. 23.[5] But the Receiver does not point to any material difference in law of the various states with respect to aiding and abetting. In fact, as the Eighth Circuit pointed out just the other day, "New York and Minnesota both follow the Second Restatement approach to aiding and abetting." *American Bank v. TD Bank*, 2013 WL 1776423, at *4 n.4 (8th Cir. 2013). Florida, under which *Lawrence* and *Groom* were decided, does as well. *See Kilgus v. Kilgus*, 496 So.2d 1230, 1231 (Fla. Ct. App. 1986). And the district court's decision in *El Camino Resources*, decided under the Restatement, was recently affirmed by the Sixth Circuit, which held that the fact that a fraudster's "account exhibited odd and suspicious behavior," among other warning signs, "speak[s] volumes to [the bank's] suspicion of wrongdoing, but say[s] nothing of its actual knowledge of [the fraudster's] wrongdoing." *El Camino Res. v. Huntington Nat'l Bank*, 2013 WL 1397200, at *6 (6th Cir. 2013).

[5] While criticizing Associated for looking outside Minnesota, the Receiver cites cases applying Nebraska law (*K&S*), California law (*Arreola*), and federal common law (*Metge*). Opp. 22.

The Receiver's failure to engage Associated's argument is revealing. His claim cannot get past either the actual-knowledge or substantial-assistance requirements.

1. Actual Knowledge.

The Receiver makes an implicit concession regarding actual knowledge that is fatal to his claim. As Associated discussed (Mot. 25-26), the Receiver's complaint alleges that "[h]ad Associated Bank investigated any of the numerous red flags it had before it …, Associated Bank *would have uncovered* and *prevented* the Ponzi scheme from flourishing." Compl. ¶ 74 (emphasis added). Even the Receiver does not think that Associated actually knew about the fraud but then substantially aided it. For this reason, the Wisconsin court dismissed an aiding-and-abetting claim. Mot. 26. The Receiver says nothing in response.

In fact, the Receiver does not point to *any* plausible allegation in his Complaint that Associated had actual knowledge of the fraud, much less any allegation that satisfies the particularity requirement of Rule 9(b). Instead, the Receiver offers a hodgepodge of arguments that it need not plead actual knowledge; each argument fails.

First, the Receiver tries to dilute the actual knowledge requirement, contending that actual knowledge and substantial assistance are evaluated "in tandem." Opp. 21. Although true, this does not alter the Receiver's obliga-

tion to plead *both* elements. *See Witzman*, 601 N.W.2d at 188-89. Absent a plausible allegation of actual knowledge, his claim cannot proceed.

Second, invoking *K&S Partnership v. Continental Bank*, 952 F.2d 971, 977 (8th Cir. 1991), the Receiver asserts that "general awareness" of wrongdoing could be enough to state a claim. Opp. 21. While "general awareness" may have a different ring, it is nonetheless a synonym for "actual knowledge." *See Metz v. Unizan Bank*, 2008 WL 2017574 (N.D. Ohio 2008). And while *K&S* was decided under Nebraska law, *Witzman*, 601 N.W.2d at 188-89—which is dispositive of aiding and abetting in Minnesota—holds that nothing less than "actual knowledge" will do. Moreover, the Receiver ignores *K&S*'s holding that "[a] plaintiff's case against an aider, abetter, or conspirator may not rest on a bare inference that the defendant 'must have had' knowledge of the facts." 952 F.2d at 977 (quotation omitted).[6]

Even more striking, the Receiver overlooks that, in *K&S*, the Eighth Circuit ***reversed*** a jury verdict entered against a bank, concluding that there was *insufficient* evidence of actual knowledge. Plaintiffs alleged that a bank aided and abetted securities fraud and showed that the bank knew that its loans exceeded what evaluations of the assets indicated were justified. 952 F.2d at 974. But the bank did nothing, according to the plaintiffs, because the

[6] *Metge v. Baehler*, 762 F.2d 621 (8th Cir. 1985), decided under federal common law, likewise requires a plaintiff to allege (and then prove) "actual knowledge." *Id*. at 625, 628, 629.

loans were "lucrative." *Id*. The Eighth Circuit nonetheless concluded that this was "not enough to support an inference that [the bank] knew of a scheme … to defraud." *Id*. at 979-80.

Third, the Receiver suggests knowledge can be inferred from Associated's interest in generating fees. Opp. 27. But "such a generalized motive, one which could be imputed to any publicly-owned, for-profit endeavor, is not sufficiently concrete for purposes of inferring scienter." *Chill v. Gen. Elec.*, 101 F.3d 263, 268 (2d Cir. 1996). An "alleged profit motive does not provide a strong inference of fraudulent intent, and thus does not imply actual knowledge of the underlying fraud." *de Abreu v. Bank of Am.*, 525 F. Supp. 2d 381, 389 (S.D.N.Y. 2007).

Fourth, pointing to a single opinion, *Arreola*, 2012 WL 4757904 (C.D. Cal. 2012), the Receiver argues that knowledge can be inferred from allegations that the bank ignored Bank Secrecy Act/Anti-Money Laundering red flags. Opp. 27 & n.5.

But an overwhelming number of courts have expressly rejected this argument. *See*, *e.g.*, *Lerner v. Fleet Bank*, 459 F.3d 273, 294 (2d Cir. 2006); *Wiand v. Wells Fargo Bank*, 2013 WL 1401414, at *3-4 (M.D. Fla. 2013); *de Abreu v. Bank of Am.*, 812 F. Supp. 2d 316, 325 (S.D.N.Y. 2011); *In re Agape Litig.*, 773 F. Supp. 2d 298, 318 (E.D.N.Y. 2011); *Nathel v. Siegal*, 592 F. Supp. 2d 452, 468-69 (S.D.N.Y. 2008); *Ryan v. Hunton & Williams*, 2000 WL

1375265, at *9 (E.D.N.Y. 2000); *Nigerian Nat'l. Petroleum v. Citibank*, 1999 WL 558141, at *8 (S.D.N.Y. 1999).

The conclusion is clear: "a plaintiff does not satisfy Rule 9(b) by alleging a bank's actual knowledge of a fraud based on allegations of the bank's suspicions or ignorance of obvious 'red flags' or warning signs indicating the fraud's existence." *Rosner v. Bank of China*, 2008 WL 5416380, at *6 (S.D.N.Y. 2008). These cases all hold, accordingly, whatever a bank's duty may be to investigate customer, it has no bearing on whether a bank has *actual knowledge* of fraudulent activity. It is *Arreola*—not the scores of other courts—that got it wrong.

Fifth, the Receiver looks to *Neilson v. Union Bank, N.A.*, 290 F. Supp. 2d 1101, 1121 (C.D. Cal. 2003), for the contention that the complaint need not "contain allegations that the Bank actually knew the principals were committing tortious acts." Opp. 28. But that is flatly inconsistent with the law of most states, including Minnesota. *Neilson* has been criticized even within California. *See*, *e.g.*, *Chance World Trading v. Heritage Bank of Commerce*, 438 F. Supp. 2d 1081, 1086 (N.D. Cal. 2005).

Sixth, the Receiver argues that constructive knowledge (aka "willful blindness") can substitute for actual knowledge. Opp. 28-29. But *Witzman* did not adopt a constructive-knowledge standard. Rather "[t]he overwhelming weight of authority holds that actual knowledge is required, rather than a

lower standard such as recklessness or willful blindness." *Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am.*, 446 F. Supp. 2d 163, 202 n.279 (S.D.N.Y. 2006). The Sixth Circuit recently concluded that "actual knowledge," not "constructive knowledge" is the proper standard. *El Camino Res.*, 2013 WL 1397200 at *5. *See also de Abreu*, 812 F. Supp. 2d at 322.

And even if that theory were available, the Receiver has not plausibly alleged any fact that shows Associated deliberated avoided confirming a high probability of wrongdoing. To the contrary, the Receiver's allegation that, *if* Associated *had* known, it would have done something, undercuts entirely this theory of knowledge.

2. Substantial Assistance.

The Receiver's arguments on substantial assistance also fall short. The Receiver simply couples alleged red flags with normal banking activities. But hindsight cannot show that the bank was substantially assisting fraud. (Nor can the Receiver's embellishment of what his Complaint actually alleges.) If a bank could be liable for performing typical banking services whenever a customer acts suspiciously, the nation's banking system would grind to a halt.

Specifically, the Receiver argues:

- **Private residence as office:** Associated allegedly knew that Kiley operated out of a house and was claiming to represent investors funds (possible red flag), but allowed an account to open and operate (normal banking activity). Nos.

1, 2, 3, 7, 8, 9, 11, 21.[7] Legitimate businesses—particularly in today's startup economy—regularly are run from residences.

- **Allowing account transfers:** Associated allegedly approved withdrawals or account transfers (normal banking activity) although some accounts could have been for personal use (possible red flag). Nos. 12, 13, 14, 24. The Receiver later amps up his rhetoric, pointing to these same allegations to claim that Associated "actively participated in the embezzlement." Opp. 27. But investment advisors are often entitled to compensate themselves from client funds. It is thus no surprise that "approving transfers"—including "personal payments" to the accountholder—"even where there is a suspicion of fraudulent activity, does not amount to substantial assistance." *In re Agape Litig.*, 681 F. Supp. 2d 352, 365 (E.D.N.Y. 2010).

- **Commingling investor funds:** The fraudsters allegedly wrote checks (normal banking activity) with notations that the funds were from individual remitters or client disbursement accounts or the issuer was Associated (possible red flag). Nos. 15, 16, 17, 20, 22, 23. But such allegations show, at best, "commingling of investor funds," which is insufficient to show a fraud. *Agape*, 773 F. Supp. 2d at 310.

- **Advising fraudsters "how to avoid detection":** Associated allegedly advised clients as to regulatory requirements, but nothing pleaded suggests that Associated helped the fraudsters "avoid detection." No. 4.

- **Failure to obtain documentation prior to account opening:** In opening an account (normal banking activity), Associated failed to acquire certain documents (alleged violation of internal policy). Nos. 5, 6, 10, 18, 19. But "violation of an organization's internal policy with respect to financial transactions does not in and of itself constitute substantial assistance." *Agape*, 773 F. Supp. 2d at 325.

[7] Associated numbers his bullets (Opp. 24-26) as 1 through 24.

Despite providing a laundry list of allegations, the Receiver offers no authority that any of them amounts to substantial assistance.

The Eighth Circuit's decision in *American Bank*, 2013 WL 1776423, illustrates the high bar of substantial assistance. There, evidence indicated that the fraudster *admitted* to the defendant bank's president that he was committing fraud and the bank "concede[d] that sufficient evidence existed for a reasonable jury to find it had *actual knowledge* of Pearlman's fraud." *Id.* at *1, *6 n.5 (emphasis added). But the defendant bank nevertheless participated in a new loan facility in order to secure participation from other banks. *Id.* at *4. From that facility, the defendant bank obtained $10 million that it was owed by the fraudster. *Id.* The Eighth Circuit held that there were facts sufficient to establish substantial assistance where (1) the bank actually knew a fraud was ongoing, (2) the bank participated in a loan facility to ensure cooperation of other banks who were unaware of the fraud, and (3) the closing of the facility provided the defendant bank with a substantial return, which it knew to be funded by defrauded parties. The allegations here could not be more different.[8]

CONCLUSION

The Court should dismiss the Complaint.

[8] The Receiver does not address that Count IV duplicates Count I, and thus must be dismissed.

Dated: May 3, 2013

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