No. 13-3388

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 RECEIVER 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.

BRIEF OF PLAINTIFF-APPELLANT

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SUMMARY OF THE CASE AND REQUEST FOR ORAL ARGUMENT

The lower court erred in dismissing the Receiver's detailed Complaint against Associated Bank (the "Bank"). The Complaint details how the Bank provided non-routine banking services to one of the largest Minnesota Ponzi schemes ever (the "Scheme"). The principals were all convicted or pleaded guilty, and now serve lengthy prison sentences. The Bank caused hundreds of innocent investors to lose their life savings by lying in documents, violating federal regulations, and pumping investor funds from the victims to the Scheme. The Bank continued to assist even after it knew that Swiss authorities had liquidated the sole "investment" of the Scheme.

While Minnesota law provides several ways to prove the "knowledge" and "substantial assistance" elements of "aiding and abetting" liability, the minimum showing requires as little as demonstrating (1) that the primary tortfeasor committed acts that were illegal or clearly in breach of a duty, and (2) the services defendant provided to that tortfeasor went beyond "routine." *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 187 (Minn. 1999). The first prong goes to the element of "knowledge," and the second goes to the element of "substantial assistance." The Receiver's Complaint met both prongs. The lower court was wrong to dismiss it.

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

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CORPORATE DISCLOSURE STATEMENT

Not applicable.

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I. JURISDICTIONAL STATEMENT

A. Federal and Appellate Jurisdiction

The lower court had jurisdiction under 28 U.S.C. § 1332 (diversity) as well as under 28 U.S.C. §§ 754, 1367 and 1692. The Court of Appeals has jurisdiction over this appeal as an appeal from a final judgment under 28 U.S.C. § 1291, entered on September 30, 2013. (ADD-1-12, A0001-12). The Notice of Appeal was timely filed on October 29, 2013. (A0223-24).

B. Authority of the Receivership

Plaintiff was appointed as Receiver for the estates of, among others, Trevor G. Cook, Patrick J. Kiley and various other entities controlled by them ("Receivership Entities") by the United States District Court for the District of Minnesota, Chief Judge Michael J. Davis presiding, on November 23, 2009 in the cases of *SEC v. Cook et al.*, 09-cv-3333, and *CFTC v. Cook et al.*, 09-cv-3332, and on March 8, 2011 in the case of *SEC v. Beckman et al.*, 11-cv-574. *Order Appointing Receiver*, No. 09-cv-3333, Dkt. No. 13 (D. Minn. Nov. 23, 2009); Ex Parte *Statutory Restraining Order*, No. 09-cv-3332, Dkt. No. 21 (D. Minn. Nov. 23, 2009); *Second Amended Order Appointing Receiver*, No. 09-cv-3333, Dkt. No. 68 (D. Minn. Dec. 11, 2009); *Order Continuing Appointment of the Temporary Receiver*, No. 09-

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cv-3332, Dkt. No. 96 (D. Minn. Dec. 11, 2009); *Order Appointing Receiver*, No. 11-cv-574, Dkt. No. 10 (D. Minn. Mar. 8, 2011).

Under the lower court's Receivership Orders, the Receiver stands in the place of the Receivership Entities and is authorized to pursue all suits that may be brought by the Receivership Entities. *Second Amended Order Appointing Receiver*, No. 09-cv-3333, Dkt. No. 68 at 3 (D. Minn. Dec. 11, 2009); *Order Continuing Appointment of the Temporary Receiver*, No. 09-cv-3332, Dkt. No. 96, at 4 (D. Minn. Dec. 11, 2009); *Order Appointing Receiver*, No. 11-cv-574, Dkt. No. 10, at 3 (D. Minn. Mar. 8, 2011). The Receivership Entities include "every other corporation, partnership, trust and/or entity (regardless of form) which is directly or indirectly owned by or under the direct or indirect control of Cook or Kiley, or any individual working in concert with any of the Defendants . . . ." *Second Amended Order Appointing Receiver*, No. 09-cv-3333, Dkt. No. 68, at 2 (D. Minn. Dec. 11, 2009); *SEC v. Cook*, Complaint, No. 09-cv-3333, Dkt. No. 1, at 1; *see also* Ex Parte *Statutory Restraining Order*, No. 09-cv-3332, Dkt. No. 21, at 7 (D. Minn. Nov. 23, 2009).

The Receiver Entities include but are not limited to "Universal Brokerage FX Management, LLC;" "UBS Diversified;" "UBS Diversified, LLC;" "UBS Diversified Growth, LLC;" "UBS Global Advisors;" and

"United Brokerage Services;" "Oxford Global Advisors, LLC;" "Oxford Global Holdings;" "Oxford FX Advisors;" "Oxford FX Management, LLC;" "Oxford Institutional Growth LP;" "Oxford Global Partners, LLC;" "Oxford Global Partners;" "Oxford Capital Investments;" "Oxford Capital Holdings, LLC;" "Oxford Global FX LLC;" and all others fitting the definition of the Receivership Orders. (A0051 ¶¶20-21). As pleaded in the Complaint, these are among the entities who were harmed by the primary tortfeasors' criminal and clearly tortious acts described below. (A0081 ¶83; A0082-83 ¶¶87-88; A0085 ¶94; A0086 ¶98).

On April 4, 2013, R.J. Zayed recused himself from this matter (No. 13-cv-232 (D. Minn.), Dkt. No. 34, at 1). Chief Judge Davis authorized Tara Norgard, Brian Hayes and Russell Rigby "to act on behalf of the Receiver and in his capacity as the Receiver, with all powers appertaining thereto" and are referred to herein collectively as the Receiver. (*Id*. at 3).

II. STATEMENT OF THE ISSUES

1. Whether a complaint sufficiently pleads under Fed. R. Civ. P. 8 and 12 the "knowledge" prong of a claim under Minnesota law that a bank aided-and-abetted the torts of a proven Ponzi scheme, by reciting allegations that the bank "had actual knowledge of the fraud," and by reciting particularized allegations of actions and statements of the bank probative of

knowledge of the fraud — including falsifying account-opening records, falsifying cashier's check remitter information in a manner that lent credibility to the scheme, giving detection-avoidance advice to the fraudsters, and other acts where the bank created (not just "ignored") red flags — and further in view of Fed. R. Civ. P. 9, under which allegations of knowledge may be averred generally.

Most Apposite Cases: *Lustgraaf v. Behrens*, 619 F.3d 867 (8th Cir. 2010); *Braden v. Wal-Mart Stores, Inc.*, 588 F. 3d 585 (8th Cir. 2009); *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179 (Minn. 1999).

2. Whether a complaint sufficiently pleads under Fed. R. Civ. P. 8 and 12 the "substantial assistance" prong of a claim under Minnesota law that a bank aided-and-abetted the torts of a proven Ponzi scheme, by reciting allegations that the bank did more than just ignore red flags and suspicious activity, but also took affirmative actions to enable the fraud — including opening accounts with known-false information in violation of banking regulations, falsifying cashier's checks in a way that lent credibility to the scheme, advising the fraudsters on how to avoid detection of the fraud, allowing one fraudster to access and withdraw from an account that he did not own or have permission to access, allowing one fraudster to walk out of a branch with a box filled with $600,000 in cash proceeds of the fraud after

such withdrawal had already been flagged as suspicious, and several dozen other particularized allegations of bank actions but for which the fraud could not have occurred.

Most Apposite Cases: *Braden v. Wal-Mart Stores, Inc.*, 588 F. 3d 585 (8th Cir. 2009); *Wight v. BankAmerica Corp.*, 219 F.3d 79 (2nd Cir. 2000); *Arreola v. Bank of Am., N.A.*, No. 11-cv-6237, 2012 U.S. Dist. LEXIS 144765 (C.D. Cal. Oct. 5, 2012); *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179 (Minn. 1999).

3. Whether the district court erred in dismissing an aiding-and-abetting complaint with prejudice without first allowing leave to amend to address the perceived pleading insufficiencies and to allow added counts unaffected by the dismissal's reasoning.

Most Apposite Cases: *Foman v. Davis***,** 371 U.S. 178 (1962); *Public Pension Fund Grp. v. KV Pharm. Co.*, 679 F.3d 972 (8th Cir. 2012); *Michaelis v. Nebraska State Bar Ass'n*, 717 F.2d 437 (8th Cir. 1983).

III. STATEMENT OF THE CASE

The Receiver filed this action on January 29, 2013. The Receiver originally filed the Complaint (Dkt. No. 1) under seal. It attaches thirty-eight evidentiary exhibits, most of which were internal Bank documents gathered prior to suit under the Receiver's powers of appointment and in

furtherance of its investigative duties. The Complaint cites to these exhibits extensively. On April 15, 2013, the lower court granted most of the Receiver's motion (vigorously opposed by the Bank) to unseal the Complaint. (Dkt. No. 36). The record discussed in this Principal Brief and included in the Appendix includes the parts of the Complaint and its Exhibits made public through this Order. Of course, this Court and its staff have access to the complete under-seal Complaint at Dkt. No. 1.

The Complaint pleaded four aiding-and-abetting counts. (A0075-86). These counts relied on primary tortfeasor acts of fraud, breach of fiduciary duty, conversion and false representations and omissions, all in service of the Ponzi Scheme. (*Id*.).

Associated Bank moved to dismiss on February 22, 2013. (Dkt. No. 15). The motion contested the sufficiency of the pleading, and also advanced the defenses of *in pari delicto*, *res judicata* and the absence of prudential standing. After a response by the Receiver (Dkt. No. 43, April 26, 2013) and a reply by the Bank (Dkt. No. 44, May 3, 2013), the lower court held a May 17, 2013 hearing to receive oral argument on the motion (Dkt. No. 60, Transcript).

Over four months later, on September 30, 2013, the lower court issued an Order granting the Bank's motion to dismiss with prejudice. (ADD-1-12,

A0001-12). The Order did not reach the *in pari delicto*, *res judicata* or standing defenses (ADD-7-8, A0007-8 n.6), instead holding that the Complaint failed to plead the elements of aiding and abetting liability under Minnesota law. (ADD-8-12, A0008-12). The lower court based this decision on its observation (contradicted below) that "[n]owhere in the complaint does the Receiver allege that Associated Bank had actual knowledge of the Ponzi scheme." (ADD-8, A0008). The lower court also based its decision on the observation (also contradicted below) that the "substantial assistance" allegations in the Complaint solely alleged "that Associated Bank approved fraudulent transfers after ignoring red flag and suspicious activity." (ADD-11, A0011).

After the Order, on October 10, 2013, the Receiver filed a letter-request, the only mechanism allowed at that point for seeking leave to amend. *See* D. Minn. LR 7.1(j) (two-page letter-request required before motions to reconsider permitted). The Receiver's letter-request sought leave to file a motion to reconsider the "with prejudice" dismissal, and convert it to "without prejudice," thereby allowing the filing of a First Amended Complaint. (Dkt. No. 52). Without mentioning the permissive standards under Fed. R. Civ. P. 15(a)(2) for leave to amend, the lower court denied the

request on the grounds that it was not "compelling." (ADD-14, A0221-22). The lower court offered no specific reasons. This appeal followed.

IV. STATEMENT OF FACTS

This case centers on the Bank's tortious assistance of a Ponzi Scheme that took in an estimated $190 million from investors over the course of more than three years. (A0041 ¶1). The primary tortfeasors of the Ponzi Scheme were Trevor Cook ("Cook"), Patrick Kiley ("Kiley"), Chris Pettengill ("Pettengill"), Gerald Durand ("Durand"), and Jason Bo-Alan Beckman ("Beckman"). (*Id.*). Cook is currently serving a twenty-five year prison sentence for pleading guilty to his role in the massive fraud. (*Id.*). Pettengill was sentenced to a seven and a half year prison term. (*Id.*). Beckman, Durand, and Kiley were convicted by jury on numerous counts of fraud for their roles in the Ponzi Scheme. (*Id.*). Beckman received a thirty-year prison sentence, Durand received a twenty-year prison sentence, and as of the time of the Complaint, Kiley awaited sentencing (but has now been sentenced to 20 years). (*Id.*).[1]

The Ponzi Scheme promoted a purported currency-trading program to its victims (the "Currency Program"). (A0042 ¶3). The Currency Program evolved according to the designs of Cook, Kiley and Shadi Swais of Crown

[1] *See also* www.justice.gov/usao/mn/beckman.html (last accessed December 16, 2013).

Forex, SA, a Swiss Forex trader. (*Id*.). Cook and Kiley used the Receiver Estates to promote investing with Crown Forex, SA. (*Id*.). The Scheme held out Crown Forex, SA as having the foreign currency trading expertise to generate a guaranteed return in excess of 10% per year with total liquidity 24 hours a day, seven days a week. (*Id*.). In addition, the Scheme promised investors that their funds would be held in individual, segregated accounts. (*Id*.). These promises were made in radio shows hosted by Kiley and Durand, and in seminars run by the remaining fraudsters, and were all false. (*Id*.; A0053 ¶¶24, 27).

For the Currency Program to succeed, Cook, Kiley and Shadi Swais (and others) needed a cooperative bank that would allow sham accounts to be opened in the name of fictitious entities, create account documentation containing false information designed to avoid scrutiny, ignore federal money laundering regulations, ignore internal procedures, provide false and misleading information to investors and assist in the transfer of investor money to their own accounts, among other things. (A0043 ¶4). They turned to Associated Bank (primarily through its Vice President Lien Sarles ("Sarles")) and with the Bank's substantial assistance, the Currency Program took in over $79 million in investor funds. (*Id*.). Sarles's brother was one of the employees of the Ponzi Scheme. (A0056-57 ¶¶34-35).

From the outset, the Bank's interactions with the Ponzi Scheme did not embody typical banking services. (A0048 ¶13; A0065-66 ¶50; A0075-78 ¶72; A0078 ¶73; A0079 ¶74). For example, the principal tortfeasors made the Bank aware of the role that Crown Forex, SA (the Swiss company) was to play in the Currency Program. (A0043 ¶5). When Cook, Kiley and Shadi Swais first discussed the Currency Program with the Bank, they told Vice President Sarles that the plan was to have Crown Forex, SA open an account at Associated Bank to directly receive investor funds. (*Id*.). But the Bank advised that opening an account for the foreign domiciled Crown Forex, SA would create regulatory difficulties. (*Id*.). Instead, the Bank recommended opening an account for a similarly named domestic LLC to receive investor funds for Crown Forex, SA in Switzerland. (*Id*.).

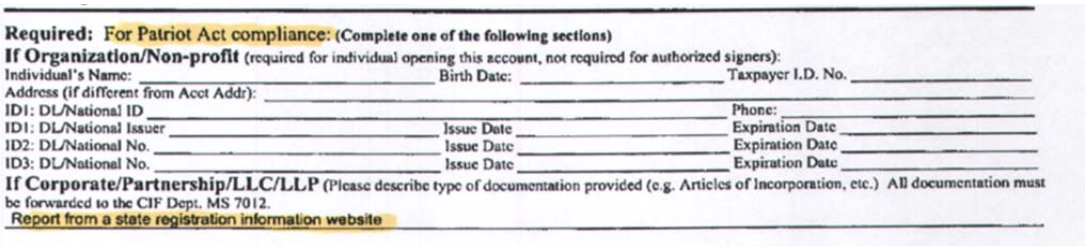
The account that was opened to accomplish this at Associated Bank was the Crown Forex LLC account #1705. (*Id*.). Account #1705 served a central role in the Scheme. To outsiders and innocent parties, account #1705 appeared to be the intermediary account between investors and the Currency Program's Swiss trading/investment company, Crown Forex, SA. (*Id*.). But in fact, account #1705 was a funnel through which victims' funds and life savings were poured into the fraudsters' personal accounts. Bank Vice

President Sarles personally participated in gathering victim/investor funds to place into account #1705. (A0061 ¶45).

As with the Currency Program, Crown Forex LLC and Associated Bank account #1705 were a fraud. (A0043 ¶6). Crown Forex LLC was never registered with the State of Minnesota or any other governmental authority. (*Id.*). Associated Bank knew this and still opened the account:

> 14. I had previously opened accounts for Kiley and Cook and had been provided by them all necessary account opening documents and information. When I opened the Crown Forex LLC account, I was not provided with Secretary of State registration documentation. I told Kiley that he must send the documentation to me after he completed a Secretary of State filing for Crown Forex LLC. At the time I was opening the Crown Forex LLC account, I was aware that the account would hold client investment funds.

(*Id.*). To cover up the lack of proper registration documents, Associated Bank falsified the account application to indicate that registration documents had been provided in compliance with the Patriot Act:



Required: For Patriot Act compliance: **(Complete one of the following sections)**
If Organization/Non-profit (required for individual opening this account, not required for authorized signers):
Individual's Name: _____ Birth Date: _____ Taxpayer I.D. No. _____
Address (if different from Acct Addr): _____
ID1: DL/National ID _____ Phone: _____
ID1: DL/National Issuer _____ Issue Date _____ Expiration Date _____
ID2: DL/National No. _____ Issue Date _____ Expiration Date _____
ID3: DL/National No. _____ Issue Date _____ Expiration Date _____
If Corporate/Partnership/LLC/LLP (Please describe type of documentation provided (e.g. Articles of Incorporation, etc.) All documentation must be forwarded to the CIF Dept. MS 7012.
Report from a state registration information website

(A0044 ¶7). Even warnings that the account would be closed or frozen for lack of proper documentation by the Bank's Monitoring Department were brushed aside by the Associated Bank employees working at the branch

where millions had already been deposited into the Crown Forex LLC account #1705. (A0044 ¶8).

Despite the Scheme-stated and Bank-known purpose of the account, no investor funds ever left Crown Forex LLC account #1705 to go to Crown Forex, SA in Switzerland. (A0055 ¶31). No investment or trading returns (for the Currency Program or otherwise) ever came back to account #1705 from Crown Forex, SA in Switzerland. (*Id*.). Instead, account #1705 was a one-way revolving door between victim/investor deposits, and accounts belonging to the Ponzi Scheme principals personally, or accounts otherwise involved with the Scheme. (*Id*.). The Bank paid no interest on the millions continually held in account #1705, or any others in the Scheme, a highly desirable and profitable scenario for the Bank. (A0066-67 ¶52).

The Complaint contains detailed lists of account transfers through account #1705, among others, to the fraudsters, approved by the Bank. (A0062-63 ¶47; A0066 ¶51; A0071 ¶59). These lists come from the Complaint's Exhibit 16, a detail of account transactions. (A0113-158). In particular, Vice President Sarles knew that Cook was transferring millions out of the Crown Forex LLC account #1705 into his personal accounts and for purposes other than to hold customer funds for foreign currency arbitrage at Crown Forex, SA in Switzerland. (A0046 ¶10; A0055-56 ¶31; A0061

¶45; A0080 ¶76; A0083 ¶87). The Bank allowed Cook to do so even though he did not have ownership or signatory authority on account #1705. (A0046 ¶10; A0067-68 ¶54; A0069 ¶56; A0077-78 ¶¶72 (O, EE)).

A bank acting without knowledge that Crown Forex LLC account #1705 and the related Currency Program were a fraud, or without substantially assisting such fraud, would have suspended or closed account #1705 upon the eventuality of the Swiss Crown Forex, SA being shut down. (A0055-56 ¶31). Shutting down Crown Forex, SA would frustrate the purpose of account #1705, if it were legitimate. By the first quarter of 2009, the Monitoring Department of the Bank was indeed threatening to freeze account #1705 for lack of proper documentation – a poignant demonstration of the obvious fact that the Bank always had the power (unasserted until it was too late) to withdraw its assistance to the Scheme. (A0070 ¶57). These freeze threats were not acted upon. (*Id*.). Instead, around the same time that the Bank chose not to freeze accounts, Crown Forex, SA's regulatory troubles became public. (A0070 ¶58).

On December 24, 2008, the Swiss Financial Market Supervisory Authority ("FINMA") announced that Crown Forex, SA's accounts had been frozen. (*Id*.). February 2009 saw increased publicity on Crown Forex, SA's regulatory troubles and a number of telephone conferences between

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Bank Vice President Sarles and the Ponzi Scheme principals on this very subject (listed at A0070-71 ¶58):

- February 2, 2009: Google Alert saying Crown Forex, SA is under investigation
- February 3, 2009: Sarles calls Trevor Cook
- February 9, 2009: One of the Ponzi scheme investors receives an e-mail from FINMA saying Crown Forex, SA is not authorized to conduct business.
- February 9, 2009: Sarles has a call concerning Crown Forex
- February 23, 2009: FINMA announces the liquidation of Crown Forex, SA
- February 26, 2009: Sarles has an "important" call with Cook.

Despite all of this, in the first half of 2009, millions more in investor funds continued to flow into and out of the Crown Forex LLC account #1705. (A0071 ¶59). Certain transactions are set forth in the chart below:

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January 16, 2009	$1,000,000 transferred to Citibank account #5400.
January 20, 2009	$3,000,000 transferred to Citibank account #5400.
January 21, 2009	$500,000 transferred to Associated Bank account #2331
January 21, 2009	$2,995,133.95 transferred to Citibank account #5400.
February 11, 2009	$2,200,000 transferred to Beckman (co-conspirator in this fraud; convicted in 2012).
February 17, 2009	$200,000 transferred to Associated Bank account #5601
February 25, 2009	$2,000,000 transferred to Wells Fargo account #2710
March 10, 2009	$2,200,000 transferred to Beckman.
March 19, 2009	$750,000 transferred to Wells Fargo account #2710
March 23, 2008	$400,000 transferred to Associated Bank account #5601
March 31, 2008	$700,000 transferred to Wells Fargo account #2710
April 14, 2009	$300,000 transferred to Associated Bank account #5601
April 30, 2009	$300,000 transferred to Associated Bank account #5601
April 30, 2009	$1,700,000 transferred to Associated Bank account #2331
May 19, 2009	$500,000 transferred to Wells Fargo account #2710
May 21, 2009	$1,000,000 transferred to Wells Fargo account #2710

(*Id*.). As mentioned, the Bank permitted most of these transfers after learning that Swiss authorities had rendered the Currency Program obviously impossible. (A0070 ¶58). Thus the Bank helped transfer at least $19,745,133.95 out of account #1705 in the first five months of 2009, after learning that the Swiss entity the Bank knew to be behind the account had been shut down by authorities and was in liquidation.

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The April 30, 2009, transfer of $1.7 million in particular was another transfer approved by Bank Vice President Sarles that moved money from account #1705, which he knew was holding investor funds to be traded with Crown Forex, SA, to an account he knew was for Cook's own use, account #2331. (A0072 ¶60)

On June 8, 2009, the Scheme asked Vice President Sarles to open another account for Kiley to an entity called Basel Group LLC, which was given account #5214. (A0072 ¶61). Associated Bank complied and, as with Crown Forex LLC, it was a fraud. (*Id*.). It too was a fictitious entity that the Bank knew never had any legal existence. (*Id*.). Nonetheless, the Bank, again, falsely indicated on the account documentation that the legitimacy of the LLC was verified from a "Report from a state registration information website." (*Id*.). Yet, as with Crown Forex LLC, no such verification was ever obtained. (*Id*.). Nor could verification have even been obtained from any website since Associated Bank knew Kiley had not registered the LLC in the first instance. (*Id*.).

Many of the Bank's activities in support of the Ponzi Scheme were calculated to avoid or delay the scrutiny and detection of banking regulators. (A0057-58 ¶¶36-37; A0075-76 ¶72; A0083 ¶87; A0084 ¶93). The fraudulent Crown Forex LLC account #1705 had been falsely identified as a

"Checking/Money Market" account on the documentation prepared by the Bank, even though it was known to and did hold investor funds. (A0057-58 ¶¶36-37; A0059 ¶39). This was against internal and federal policies. Likewise, the Basel Group LLC account #5214 was identified as a "Checking/Money Market" account on the documentation prepared by the Bank. (A0072 ¶¶61-62). Yet, as with Kiley's other accounts, the Associated Bank employees involved with Kiley knew he was a financial advisor and that the account was intended to hold investor funds. (*Id.*; A0057 ¶36). Likewise, the Bank doctored the addresses for various accounts, for example by fabricating phony "suite" numbers to lend legitimacy to places of business that were actually just converted residential bedrooms. (A0056-58 ¶¶34-37; A0059 ¶40).

Notifying other departments in the Bank that Kiley was a financial advisor, operating a business from his home, and opening accounts labeled as holding investor funds, risked subjecting the accounts to scrutiny under the implementing regulations of the Bank Secrecy Act/Anti-money-laundering ("BSA/AML") guidelines. (A0057-58 ¶37). The BSA/AML requires a bank to "Know Your Customer" and implement a Customer Identification Program to enable the bank to "form a reasonable belief that it knows the true identity of each customer." (*Id.*). This would include

whether an LLC is properly registered with the Secretary of State and whether the person opening the account had the proper authority. (*Id*.). Associated Bank was also required to obtain information at account opening in order to understand the type of activity to expect for the customer's business operations. (*Id*.). For high risk customers, such as investment advisors like Cook and Kiley, Associated Bank was required to conduct enhanced due diligence ("EDD") which required a more extensive review both at account opening and more frequently throughout the relationship with the bank. (*Id*.). The Bank's falsifications (LLC-status, account-type, omission of financial advisor control, and doctoring of home-office addresses) succeeded in avoiding EDD scrutiny, allowing the Ponzi Scheme to thrive.[2]

The BSA/AML and its implementing regulations required Associated Bank to monitor these transfers and deposit account transactions, among

[2] Other nonroutine banking activities included delivering a high-volume check deposit ("ODM") machine to a home office belonging to the Ponzi Scheme, rather than to the address listed for the account, violating the Bank's internal policies and rules that require such machines only to be used at the address listed on the account. (A0060-61 ¶43). Another nonroutine banking practice was to list as the address for an account an office "suite" which was actually the inside of a rented mailbox at a sporting goods store. (A0059-61 ¶¶39-43). This lent a veneer of legitimacy to the account. Sarles was aware of (and in fact generated) these irregularities, having visited the true residential address from which the Ponzi Scheme operated and having a familial relationship with one of the Ponzi Scheme insiders. (A0056 ¶34).

other things, to file suspicious activity reports ("SAR") where suspicious activity is identified. (A0063-64 ¶48). Monitoring systems include manual systems, automated systems, and employee identification and referral systems. (*Id*.). Under the BSA/AML, the previously-mentioned high dollar transfers would have been flagged by Associated Bank's monitoring systems for suspicious activity. (*Id*.). The transfers contain "red flags" of potentially suspicious activities for money laundering, terrorist financing or other financial crimes, such as transfers of large or round dollar amounts; transfer activity is repetitive or shows unusual patterns; and unusual transfers of funds occurring among related accounts or among accounts involving the same or related principals. (*Id*.). A bank employee would have reviewed all of these alerted transactions and made a determination whether or not to file a SAR as required under the BSA/AML. (*Id*.). Despite these red flags generated by both the Bank and the Scheme, Associated Bank ignored the above telltale signs and its legal duties to report suspicious activity, and thereby allowed the Ponzi Scheme to continue. (*Id*.).

On June 25, 2009, just before the Scheme unraveled, Cook requested $600,000 in cash for the alleged purchase of a yacht. (A0072 ¶63). The request caused a widespread investigation by numerous individuals at the bank, including Senior Vice President Steven Bianchi, Jenny Cox, and

Eileen Paulson of the Security and Crime Prevention department that raised several red flags, including the improper transfer of $1.7 million of investor funds from account #1705 to Cook's own account. (*Id.*). These suspicions were brushed aside, and the Bank even "corrected" the improper $1.7 million transfer so as to allow Cook to put $600,000 in cash into a box and walk out the front door. (*Id.*).

Despite the initial concerns over a large and strange cash withdrawal, the Bank continued to allow and approve the Crown Forex LLC account #1705 to be drained of millions more in investor funds. (A0073 ¶64). Just days before Cook walked off with the $600,000 in cash, on June 29, 2009, Associated Bank falsified 14 cashier's checks totaling over $3.2 million. (*Id.*). Despite knowing that the remitter for each check was Crown Forex LLC, Associated Bank prepared each check to identify the remitter as either the individual who was identified as the payee or as coming from an IRA or some other account in the name of the payee. (*Id.*). These created the false impression of segregated accounts. Not only did Associated Bank include false remitter information on each check, the fact that it was even requested to do so would have raised suspicions, which were brushed aside. (*Id.*). Copies of those false-remitter cashier's checks along with the withdrawal slip linking the true remitter to account #1705 – a documentary smoking gun

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of deep bank involvement – are in the Appendix at A0192-207, and have been included in the Addendum at the end of this Principal Brief.

June and July of 2009 saw even more transfers. (A0073-74 ¶65). Again, Associated Bank's monitoring systems would have detected the red flags in the transactions below:

June 8, 2009	$50,000 transferred to Associated Bank account #2356
June 8, 2009	$1,000,000 transferred to Wells Fargo account #2710
June 25, 2009	$1,112,000 transferred to Wells Fargo account #2710
June 26, 2009	Nearly $1,000,000 transferred to "G5 Currency Fund" in a series of 4 odd amount wire transfers
July 1, 2009	$200,000 transferred to Associated Bank account #2356
July 6, 2009	$706,902 transferred to Wells Fargo account #4194

At 11:06 AM on July 9, 2009, Vice President Sarles received a copy of a newspaper article describing the federal lawsuit filed earlier in the week against some of the Ponzi Scheme principals. (A0074 ¶66). At that time, Vice President Sarles took no action. (*Id*.). An hour later, Vice President Simon did take action, by distributing a copy of the same article to Sarles and Senior Vice President Bianchi. (*Id*.). Yet, despite this knowledge, the Bank still assisted the Ponzi Scheme principals in transferring $101,000 of investor funds to a beneficiary identified as "Basel Institutional" which the Bank deposited into the fictitious Basel Group LLC account #5214 a week later. (*Id*.).

In addition to all of the above, during the life of the Scheme, Associated Bank knew that the Ponzi Scheme principals were attempting to deposit checks made payable to entities using the term "Crown" or "Basel" but not to the specific account holders at Associated Bank. (A0074 ¶67). For example, the Bank knew that the Ponzi Scheme principals were attempting to deposit a $75,000 check made payable to "Basel Institutional" and a $17,000 check made out to "Crown Bank." (*Id.*). Again, the suspicious activity raised by these red flags was brushed aside. (*Id.*).

Associated Bank also permitted itself to be used to accept wire transfers for the Crown Forex LLC account #1705 that specifically listed "Crown Forex, SA" with a Swiss address as the recipient of the wire without any inquiry. (A0074 ¶68). Bank personnel would have identified these discrepancies during a review of the alerts generated by the Bank's monitoring systems for these transactions. (*Id.*).

On February 23, 2012, Associated Bank entered into a Consent Order for its failure to comply with the requirements of the BSA/AML with the Comptroller of the Currency of the United States of America. (A0075 ¶69). The compliance failures concerned the Ponzi Scheme accounts at issue in this Complaint. (*Id.*).

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Within the specific Counts, the Complaint summarizes these facts and many more that are pleaded throughout the Complaint. The Counts also expressly and unambiguously plead the Bank's actual knowledge of the Ponzi Scheme fraud and other torts, and substantial assistance to the fraudsters. (For the words "actual knowledge" themselves, *see* A0048 ¶13, A0075 ¶72, A0078 ¶73, A0082 ¶87, A0084 ¶93; for the words "substantial assistance" themselves, *see* A0043 ¶4, A0079 ¶¶75-76, A0080 ¶79, A0081 ¶80, A0082 ¶87 and A0084 ¶93.). From the outset, by design and by operation, Associated Bank established and ran accounts for the Ponzi Scheme using atypical and nonroutine banking practices to enable a massive fraud to thrive and ruin lives. The Receiver urges the Court to review the Complaint in its entirety, including the exhibits.

V. SUMMARY OF THE ARGUMENT

How the lower court characterized the Complaint in its dismissal Order bears little resemblance to what the Complaint actually pleads.

The lower court held that "[n]owhere in the complaint does the Receiver allege that Associated Bank had actual knowledge of the Ponzi scheme." (ADD-8, A0008). This statement is impossible to reconcile with the well-pleaded facts. These include: (1) explicitly pleaded facts (*e.g.*, "Associated Bank had actual knowledge of the fraud," (A0048 ¶13; A0075

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¶72; A0078 ¶73) and (2) particularly pleaded facts from which actual knowledge can reasonably be inferred. For example, when Swiss authorities shut down Crown Forex, SA in February 2009 with the Bank's knowledge, any claim of belief in the legitimacy of account #1705 became impossible. Nor is "actual knowledge" the standard. Minnesota law does not require "actual knowledge," since "constructive knowledge" may be inferred from the illegality and clear tortious nature of the Scheme.

Bootstrapping the supposed absence of the "knowledge" prong, the lower court also erred in holding that the Receiver's allegations of "substantial assistance" merely amounted to the Bank "approv[ing] fraudulent transfers after ignoring red flag and suspicious activity." (ADD-11, A0011). The lower court's conclusion is impossible to reconcile with the dozens of pleaded affirmative acts (all overlooked in the Order), including (among many others) orchestrating or approving transfers through account #1705 from victims to fraudsters with knowledge of the fraudulent and criminal nature of the Currency Program and Ponzi Scheme, falsifying account-opening documentation to avoid or delay scrutiny under the BSA/AML and the Patriot Act, falsifying cashiers' checks to lend legitimacy to fraudsters' lies that their victims owned segregated investment accounts, and allowing one fraudster to walk out of a branch with $600,000 of

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currency in a box sourced from an account that he did not own and should not have been allowed to control. The Bank did not just ignore red flags – it created them.

VI. ARGUMENT

A. Standard of Review

This Court reviews *de novo* a dismissal under Fed. R. Civ. P. 12(b)(6), giving no deference to the lower court's ruling. *In re Baycol Prods. Litig.*, 732 F.3d 869, 874 (8th Cir. 2013) (reversing-in-part dismissal of complaint); *Lustgraaf v. Behrens*, 619 F.3d 867, 872 (8th Cir. 2010) (reversing-in-part dismissal of complaint because it adequately supported heightened scienter standard for securities fraud claim).

This Court applies the same test as the lower court. On a motion to dismiss, the Receiver's factual allegations are assumed to be true and all reasonable inferences from those allegations are drawn in favor of the Receiver. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Braden v. Wal-Mart Stores, Inc.*, 588 F.3d 585, 594 (8th Cir. 2009). To survive a motion to dismiss, the Receiver need only plead "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). A claim has "facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the

defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. While the Receiver may not rely solely on "labels and conclusions" or "a formulaic recitation of the elements of a cause of action," the Receiver "need not [provide] detailed factual allegations" in support of his claims, since all that is required is sufficient factual information to establish that a claim is "plausible" no matter how remote or unlikely an actual recovery may be. *Twombly*, 550 U.S. at 555.

The plausibility standard does not impose a "probability" requirement, but "simply calls for enough facts to raise a reasonable expectation that discovery will reveal evidence of [the claim]." *Twombly*, 550 U.S. at 556. Nor does the Receiver need to explain away the Bank's claim that it was only providing "routine" banking services:

> Requiring a plaintiff to rule out every possible lawful explanation for the conduct he challenges would invert the principle that the complaint is construed most favorably to the nonmoving party, and would impose the sort of probability requirement at the pleading stage which *Iqbal* and *Twombly* explicitly reject.

Wal-Mart Stores, 588 F.3d at 597 (internal quotation marks and citations omitted).

B. Minnesota Aiding and Abetting Legal Standards

To establish common law aiding and abetting, the Receiver must show that (1) a tort was committed causing injury, (2) the Bank knew of the

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wrongdoing, and (3) the Bank substantially assisted the wrongful acts. *Am. Bank v. TD Bank, N.A.*, No. 09-cv-2240, 2011 U.S. Dist. LEXIS 49646, at *21 (D. Minn. May 9, 2011); *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 187 (Minn. 1999). The first element is not in dispute in this case.

The lower court and the Bank each incorrectly believed that, for the second element, constructive knowledge does not suffice, and "actual knowledge" must be pleaded. (ADD-8, A0008; Dkt. No. 44, at 17). The Bank argued in its briefing that "*Witzman* did not adopt a constructive-knowledge standard." (*Id.*, ironically citing decisions from New York and the Sixth Circuit that do not mention *Witzman*). The opposite is true.

In *Witzman*, the Minnesota Supreme Court resolved previous uncertainty by holding that professionals have no immunity from, and are not wholesale excluded from, aiding and abetting liability. *Witzman*, 601 N.W.2d at 187. In remarks that apply to both professionals and non-professionals, the Supreme Court explained the "knowledge" element. It first observed the general principle under which courts have typically allowed "constructive knowledge" to be presumed:

> In cases where the primary tortfeasor's conduct is clearly tortious or illegal, some courts have held that a defendant with a long-term or in-depth relationship with that tortfeasor may be deemed to have constructive knowledge that the conduct was

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> indeed tortious. However, where the conduct is not a facial breach of duty, courts have been reluctant to impose liability on an alleged aider and abettor for anything less than actual knowledge that the primary tortfeasor's conduct was wrongful.

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

It would have served no purpose for the Supreme Court to analyze the constructive knowledge question unless it was applying that as a component of Minnesota aiding and abetting law. Subsequent lower courts have cited *Witzman* while recognizing that "knowledge" under Minnesota aiding and abetting law may include "constructive knowledge," if the underlying conduct was illegal or clearly tortious. *E.g., Bank of Montreal v. Avalon Capital Grp., Inc.*, No. 10-cv-591, 2012 U.S. Dist. LEXIS 46935, at *21 (D. Minn. Apr. 3, 2012) (holding facts pleaded are "sufficient to create a plausible implication of constructive knowledge of clearly tortious or illegal conduct," citing *Witzman*); *Christopher v. Hanson*, No. 09-cv-3703, 2011 U.S. Dist. LEXIS 60201, at *34 (D. Minn. June 6, 2011) (holding primary tortfeasor's conduct "not so clearly illegal or unlawful so as to justify imputing constructive knowledge," citing *Witzman*); *see also Chem-Age*

Indus. v. Glover, 652 N.W.2d 756, 775 (S.D. 2002) (recognizing Minnesota's adoption of "constructive knowledge," citing *Witzman*).

Even if the higher standard of "actual knowledge" were required, a "defendant's general awareness of its overall role in the primary violator's illegal scheme is sufficient knowledge for aiding and abetting liability." *K&S P'ship v. Cont'l Bank, N.A.*, 952 F.2d 971, 977 (8th Cir. 1991) (citation omitted). Under Minnesota law, knowledge is a question of fact and may be inferred from circumstantial evidence, including evidence such as conducting business in a manner that is atypical or lacking in business justification. *Id.* at 977-79; *Am. Bank*, 2011 U.S. Dist. LEXIS 49646, at *22-24. Even "otherwise unremarkable events viewed together may suggest an unusual pattern of events intimating an illegal scheme." *K&S P'ship*, 952 F.2d at 979-80; *Metge v. Baehler*, 762 F.2d 621, 626 (8th Cir. 1985) ("Although the facts we have recounted here at length are unremarkable taken in isolation, we find that taken together, they present what should have been a jury issue on the question of aiding-and-abetting liability"); *see also Arreola v. Bank of Am., N.A.*, No. 11-cv-6237, 2012 U.S. Dist. LEXIS 144765, at *8-9 (C.D. Cal. Oct. 5, 2012) (ignoring red flags may, with other factors, evidence knowledge resulting in denial of motion to dismiss).

Regardless of whether the knowledge is "constructive" or "actual," such knowledge is evaluated in tandem with the allegations of "substantial assistance." *Witzman*, 601 N.W.2d at 188. Where there is a minimal showing of substantial assistance, a greater showing of scienter is required. *Id.*[3] Factors to consider include "the relationship between the defendant and the primary tortfeasor, the nature of the primary tortfeasor's activity, the nature of the assistance provided by the defendant, and the defendant's state of mind." *Id.* In a case involving professional services, "'substantial assistance' means something more than the provision of routine professional services." *Id.* at 189; *see also Wight v. BankAmerica Corp.*, 219 F.3d 79, 92 (2d Cir. 2000) (permitting pleading where substantial assistance included "arranging for and indeed supervising the transfer of money through the various accounts," in the context of "personal relationships" – such as that which existed between Bank Vice President Sarles and his brother who worked at the Scheme).

C. Knowledge-Pleading Legal Standards

These permissive Minnesota "knowledge" standards must also be evaluated in light of the permissive pleading standards under the Federal

[3] The converse is also true. *Camp v. Dema*, 948 F.2d 455, 459 (8th Cir. 1991) (liability for aiding and abetting may be established by a strong showing of substantial assistance coupled with a minimal showing of knowledge).

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Rules of Civil Procedure. As this Court recognizes, Rule 9(b) permits allegations of knowledge to be "averred generally." Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally."); *Florida State Bd. of Admin. v. Green Tree Fin. Corp.*, 270 F.3d 645, 654-55 (8th Cir. 2001) (observing that federal securities fraud cases require a heightened scienter, contrasting with the generality of Rule 9(b)).[4] When a plaintiff pleads that a defendant has access to particular pieces of information that reveal that underlying conduct is fraudulent, that meets the pleading standard. *Belizan v. Hershon*, 495 F.3d 686, 692 (D.C. Cir. 2007). And when a plaintiff pleads facts supporting that a defendant has sufficient culpable knowledge in one relevant period, that suffices to plead knowledge for periods both before and afterward. *Public Pension Fund Grp. v. KV Pharma. Co.*, 679 F.3d 972, 981 (8th Cir. 2012).

[4] In the unique circumstance of "heightened scienter" required to plead a federal securities fraud case, the individual elements of "knowledge" required to support a strong inference of "intent" need only be pleaded generally. *Florida State Bd. of Admin.*, 270 F.3d at 662 (knowledge of a discrepancy between two pieces of financial data); *Lustgraaf*, 619 F.3d at 875 (knowledge that statements were false). If "knowledge" may be averred generally in a statutory "heightened scienter" case, it may certainly be averred generally in a common law tort action.

D. The Complaint Sufficiently Pleads Actual Knowledge and Substantial Assistance

Astonishingly, the lower court stated that it could not locate any pleading of actual knowledge in the Complaint. (ADD-8, A0008). This ruling is, at best, perplexing. The Complaint states it explicitly, three times: "Associated Bank had actual knowledge of the fraud." (A0048 ¶13; A0075 ¶72; A0078 ¶73). And this allegation is no mere factual conclusion – it is the summation of dozens of particularly pleaded allegations that give rise to exactly that reasonable inference.

The lower court disregarded not only the factual and express pleading of actual knowledge of the primary tortfeasors' torts and crimes. It also disregarded facts such as:

- Cook, Kiley and the Bank worked together to create the banking structure on which the the Currency Program relied (the main mechanism of the Ponzi Scheme) (A0043 ¶5);
- The Bank opened accounts with improper documentation to implement the Currency Program (A0043-44 ¶¶6-8);
- On at least two separate Ponzi Scheme bank accounts, the Bank falsely stated that it had complied with the requirements of the Patriot Act (*Id*.; A0072 ¶61);

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- The Bank misstated the purpose of the accounts as for operating funds, not to hold investor funds (A0057-58 ¶¶36-37; A0059 ¶39); and
- Despite knowing each person's role, the Bank omitted indicating that the accounts were run by financial advisors (*Id.*; A0057 ¶36).

Each of the above-mentioned actions was tailored to avoid or delay detection under federal regulations, such as the BSA/AML and the Patriot Act. (*See* A0057-58 ¶37). The lower court also disregarded facts such as:

- The Currency Program's ostensible "legitimate" purpose required that funds regularly transfer from account #1705 to Crown Forex, SA in Switzerland, but the Bank knew that no funds ever did (A0055 ¶31);
- Swiss regulators' liquidation of Crown Forex, SA (which the Bank knew in February 2009) abolished the sole "legitimate" purpose for account #1705 to exist (A0070-71 ¶58);
- With this knowledge of the obliteration of any possible legitimate purpose for account #1705, the Bank continued to approve its use for many months to pump additional investor funds from victims to the fraudsters (A0071 ¶59);

- One such approved use of account #1705 was to allow Cook (who should not have been able to control the account at all) to tap it of $600,000 in cash, stuffed into a box, walking out of the branch under the noses of the Bank's security department who had initially questioned the withdrawal (A0073 ¶64).

These allegations easily support every known level of scienter, including both "actual" and "constructive" knowledge. The Complaint as a whole supplies even more reasonable inferences that the Bank actually knew of the underlying crimes and torts. For example, many more accounts besides #1705 were involved in the Scheme, and the Bank knew it.

The lower court also disregarded dozens of substantial assistance allegations. The lower court's stated belief that the Complaint only contained allegations of ignoring red flags (ADD-11, A0011) is just as perplexing as its failure to perceive the actual knowledge allegations. The Bank performed far more than "routine" banking services while knowing of the fraud and theft. And it did far more than just ignore some red flags. It actively participated in the fraud, and engaged in a highly atypical pattern of acts in support of the illegal Scheme.

As just a few examples, the Bank itself generated falsified ***cashiers checks*** (whose contents are entirely under Bank control) that contained

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fraudulent "remitter" notations. (A0073 ¶64). This lent legitimacy to the Scheme's lies that victims owned segregated accounts. (*Id*.). The well-pleaded factual allegations also include the Bank facilitating suspicious deposits and wire transfers in the millions and tens-of-millions of dollars (often in pieces to mask the true volume transferred) (A0062-63 ¶47; A0066 ¶51; A0071 ¶59), ignoring warnings of suspicious activity raised internally by the monitoring department and other Bank employees (A0063-64 ¶48; A0070 ¶57; A0073 ¶64), and approving massive depletions of account #1705 even after knowing that no legitimate business purpose could survive the liquidation of Crown Forex, SA. (A0073-74 ¶65). The Bank also advised the fraudsters on how to avoid detection under the BSA/AML, and then generated false account-opening documents – for several accounts – in violation of those regulations to further avert any scrutiny. (A0043 ¶¶5-6; A0072 ¶61).

The lower court failed to recognize these and the following additional active steps by the Bank to assist the fraudsters:

- Falsely stating on the account documentation for account #5601 that the business was located in an office suite. (A0057 ¶¶35-36)

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- Falsely stating on the account documentation for account #5601 that it was a "Checking/Money Market" account for use as a "GENERAL OPERATING ACCOUNT." (A0057 ¶36)
- Intentionally omitting from the account documentation for account #5601 that Kiley was a financial advisor, working from home, and that the intended use of account #5601 was to hold investor funds. (A0054-57 ¶¶29 and 34-36)
- Advising Shadi Swais, Cook and Kiley on how to avoid detection under the BSA/AML by recommending that an account in the name of the fictitious Crown Forex LLC be opened instead of the foreign domiciled Crown Forex, SA. (A0043 ¶¶4-5; A0058 ¶38)
- Falsely stating that it had complied with the Patriot Act for account #1705. (A0044 ¶7)
- Knowingly opening the Crown Forex LLC account #1705 without proper documentation. (A0043-44 ¶6)
- Allowing Cook to control account #1705 and others to personally enrich himself, even though he did not have ownership or authority. (A0046 ¶10; A0067-68 ¶54; A0069 ¶56; A0077-78 ¶¶72(O, EE))

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- Intentionally omitting from the account documentation for account #1705 that Kiley was a financial advisor, working from home, and that the intended use of account #1705 was to hold investor funds. (A0059 ¶39)
- Falsely stating on the account documentation for account #1705 that the business address was 5413 Nicollet Ave, Ste 14, Minneapolis. (A0059-60 ¶¶40-41)
- Falsely stating on the account documentation for account #1705 that it was a "Checking/Money Market" account. (A0059 ¶39)
- Falsely stating on the "DECLARATION OF NO WRITTEN OPERATING AGREEMENT" that Crown Forex LLC was a Minnesota LLC. (A0059 ¶42)
- Preparing false documentation that allowed the fraudsters to obtain the ODM equipment (on-site mass-deposit machines) needed to deposit millions in investor funds remotely. (A0060 ¶43)
- Illegally transferring millions in investor funds held in the fictitious Crown Forex LLC account #1705 to Cook's private accounts. (A0046-47 ¶¶10-11; A0067-70 ¶¶53-56; A0072 ¶60)

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- Allowing Cook to walk off with $600,000 in cash of investor funds despite widespread suspicions, under the gaze of the "Security and Crime Prevention Department." (A0046-47 ¶11)
- Correcting Vice President Sarles's illegal transfer of $1.7 million of investor funds from the Crown Forex LLC account #1705 to Cook's private bank account. (A0047-48 ¶12)
- Falsifying information on over $3.2 million in cashier's checks. (A0073 ¶64)
- Knowingly allowing checks to issue from the Crown Forex LLC account #1705 that falsely identified the funds were from a "Client Disbursement Account." (A0045-46 ¶9)
- Knowingly allowing checks to issue from the Crown Forex LLC account #1705 that falsely indicated the issuer was Associated Bank. (A0045-46 ¶9)
- Falsely stating that it had complied with the Patriot Act for account #5214. (A0072 ¶61)
- Knowingly opening the Basel Group LLC account #5214 without proper documentation. (A0072 ¶61)
- Falsely stating on the account documentation for account #5214 that it was a "Checking/Money Market" account. (A0072 ¶61)

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- Intentionally omitting from the account documentation for account #5214 that Kiley was a financial advisor, working from home, and that the intended use of account #5214 was to hold investor funds. (A0072 ¶62)
- Falsely stating on the account documentation for account #2356 that it was a "Checking/Money Market" account. (A0064-65 ¶49)
- Intentionally omitting from the account documentation for account #2356 that Cook was a financial advisor, and that the intended use of account #2356 was to hold investor funds. (A0064-65 ¶49)
- Illegally removing the owner from account #1812 and then transferring the funds therein to Cook's private account. (A0065-66 ¶50).

These acts, individually and taken together, defy characterization as "routine" banking services, or mere disregard of red flags (as the Bank attempted to do in lower court briefing). To do so turns the Receiver's entitlement to all reasonable inferences upside down. *Iqbal*, 556 U.S. at 678.

Nor were these atypical activities accidental. With the plump prize of massive non-interest bearing deposits in mind (A0066-67 ¶52), the Bank

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masked the true nature of the accounts to avoid detection under the BSA/AML. The Bank varnished the accounts with a layer of legitimacy that induced the victims to invest in the Scheme (A0045-46 ¶9; A0073 ¶64). The Bank also actively participated in the depletion of the illegally obtained investor funds for the fraudsters' financial gain. (A0046 ¶10; A0067 ¶53; A0068 ¶55; A0072 ¶60). Such allegations go far beyond the minimum necessary to support substantial assistance. *Arreola*, 2012 U.S. Dist. LEXIS 144765, at *8-9 (denying motion to dismiss). And given the Bank's in-depth knowledge of the Ponzi Scheme and its clear illegality, there is at least constructive knowledge, particularly in view of the long relationship and the fact that Vice President Sarles's brother was a part of the Scheme. *Witzman*, 601 N.W.2d at 188. That said, the Receiver need not rely on constructive knowledge, since the allegations show that the Bank actually knew exactly what the Ponzi Scheme was doing.

For the foregoing reasons, the Complaint should not have been dismissed, since it contained a sufficient factual pleading of knowledge and substantial assistance to support a claim of aiding and abetting the underlying torts.

E. The Bank's Misleading Arguments and Inapposite Cases Do Not Justify Affirmance

Despite all of this, in proceedings below, the Bank laid heavy emphasis on one particular paragraph of the Complaint that pleaded – as an alternative formulation of actual knowledge – the Bank's willful blindness. (A0079 ¶74). The lower court mistook this allegation as pleading the opposite of what it actually pleaded. The lower court believed that alleging willful blindness somehow signified an admission in the pleading (despite all other allegations discussed above) that the Bank did not actually know of the underlying torts and crimes. (ADD-9-10, A0009-10).

Not only does this perspective turn the notion of willful blindness on its head, since that concept is the legal equivalent to "actual knowledge." *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2069-70 (2011) (describing a "long history of willful blindness and its wide acceptance in the Federal Judiciary" and applying it in civil lawsuits). It also violates the mandate that all reasonable inferences must be made in the Receiver's favor. One such reasonable inference is that the primary allegations of actual knowledge must be accepted over any alternative allegations of willful blindness, even if willful blindness did not equate with actual knowledge. "The assertion that Defendants also had constructive knowledge does not negate the allegations that demonstrate that Defendants acted with actual

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knowledge." *Court-Appointed Receiver of Lancer Mgmt. Group LLC v. Lauer*, No. 05-cv-60584, 2010 U.S. Dist. LEXIS 31147, at *14 (S.D. Fla. Mar. 31, 2010) (denying motion to dismiss Receiver's aiding-and-abetting claim).

In proceedings below, the Bank also advanced three non-Minnesota decisions as controlling the outcome here.[5] Not only is each decision noncontrolling; each one is also clearly distinguishable on its facts.

From the *Agape* decision, the Bank emphasized allegations of red flags that included massive wire transfers, plus a bank employee's failure to correct a dollar error during one conversation. The Bank argued that these allegations made the *Agape* dismissal analogous. From the *Ryan* decision, the Bank emphasized allegations of red flags, including a bank's refusal to open a new account because of suspicions. The Bank argued that these allegations made the *Ryan* dismissal analogous. Finally, from the *Lawrence* decision, the Bank emphasized allegations of a bank customer's "atypical business transactions" – not allegations of a bank's atypical banking practices. Again, the Bank argued that those allegations made the *Lawrence* dismissal run on four legs with the facts here.

[5] They are: *In re Agape Litig.*, 681 F. Supp. 2d 352 (E.D.N.Y. 2010), *Ryan v. Hunton & Williams*, No. 99-cv-5938, 2000 U.S. Dist. LEXIS 13750 (E.D.N.Y. Sept. 20, 2000), and *Lawrence v. Bank of Am., N.A.*, 455 F. App'x 904 (11th Cir. 2012).

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Here, by contrast, the Complaint alleges specific affirmative acts that go well beyond ignoring red flags, failing to correct a person's misapprehension about a dollar amount, failing to act upon "red flags" or suspicious activity, or the unremarkable fact of a Ponzi scheme's (rather than a bank's) atypical business practices. As properly and sufficiently pleaded in the Complaint, the Bank here had actual knowledge and rendered substantial assistance, as exemplified by falsifying account opening documentation, falsifying documents such as cashiers checks to support the Scheme, having full knowledge of the nature of the Currency Program and the role that the Bank was to play in it, advising the fraudsters on how to avoid detection under the BSA/AML, implementing detection-avoidance measures using false information, knowing that the liquidation of Crown Forex, SA in Switzerland would frustrate any legitimate business purpose over the accounts opened for the Scheme but continuing to approve massive transfers and depletions out of the accounts for the fraudsters' personal gain, and many other atypical ***bank*** activities.

F. The District Court Overlooked More Pertinent Authorities

If any non-Minnesota authorities are persuasive, they are the ones overlooked by the lower court. For example, in *Arreola, N.A.*, 2012 U.S. Dist. LEXIS 144765, at *8-9, the district court denied a motion to dismiss on

facts far less compelling than here. A bank employee (Gonzalez) knew that falsified forms were being used in connection with fraudulent mortgage applications. *Id.* The *Arreola* complaint pointed out that aside from this employee's actions, the bank "ignored multiple 'red flags,' choosing instead to enjoy the benefits of its financial relationship with [the fraudster] and his business entities." *Id.* The *Arreola* complaint included allegations that the bank knew that business accounts involved receipt of investor funds, knew of multiple internal "red flags" that the banking activities triggered, and knew of transfers of money from investor-funded accounts to the fraudster's personal account. The court declined to dismiss because a "common-sense reading of these allegations, taken together, sufficiently establish at this stage, that the bank had actual knowledge of [the] fraud." *Id.*

Other decisions overlooked by the lower court upheld pleadings based on far less than what the Receiver pleaded here. *See, e.g., Mosier v. Stonefield Josephson, Inc.*, No. 11-cv-2666, 2011 U.S. Dist. LEXIS 124058, at *20-26 (C.D. Cal. Oct. 25, 2011) (denying motion to dismiss, holding that a professional's failure to comply with official standards allowed an inference of sufficient knowledge for Ponzi scheme "aiding and abetting" liability); *Anwar v. Fairfield Greenwich, Ltd.*, 728 F. Supp. 2d 372, 443 (S.D.N.Y. 2011) (denying motion to dismiss aiding and abetting claim

because red flags related to the Bernie Madoff scheme supplied enough facts to raise a strong inference of knowledge); *Court-Appointed Receiver of Lancer Mgmt. Group LLC*, 2010 U.S. Dist. LEXIS 31147, at *12-16 (denying motion to dismiss Receiver's aiding-and-abetting claim); *Neilson v. Union Bank of Cal., N.A.*, 290 F. Supp. 2d 1101, 1120-21 (C.D. Cal. 2003) (denying motion to dismiss even though complaint did not directly state that banks knew of the Ponzi scheme, since that was the "net effect" of allegations that included atypical banking procedures to service the relevant accounts).

The Bank's lying and falsifying documents also place this case into the realm where dismissal was not appropriate. In relevant part, the Court denied a motion to dismiss in *In re MuniVest Svcs.*, 500 B.R. 487, 503-07 (Bankr. E.D. Mich. Oct. 15, 2013). Like here, a Trustee alleged that a financial service provider (in this case an accountant) generated false documents that embodied "substantial assistance" to a Ponzi scheme. *Id.* at 506. The Trustee alleged that "knowledge" arose from the provider's awareness that funds purported to be for investments were actually being used to pay for expenses of the Ponzi scheme and for luxury items for the fraudster. *Id.* at 491, 503-04. The court held the pleading to be sufficient, noting that "[b]y any measure, the preparation and filing of false tax returns"

can be considered to be substantial assistance to the perpetrator of a fraud. *Id.* at 506. *MuniVest* shows that the Bank's preparation of false account-opening documents, false cashier's checks, and many more false documents, more than suffices as "substantial assistance." *MuniVest* also shows that the Bank's awareness of the misuse of funds (such as helping Cook stuff $600,000 in cash into a box from an account over which he was not supposed to have authority for the stated purpose of buying a yacht) adequately pleads knowledge of the crimes and torts. Generating fraudulent documents in fact evidences *both* knowledge *and* substantial assistance. *E.g.*, *Coquina Invs. v. Rothstein*, No. 10-cv-60786, 2011 U.S. Dist. LEXIS 7062, at *18-19 (S.D. Fla. Jan. 20, 2011) (denying bank's motion to dismiss claim for aiding and abetting Ponzi scheme because bank's vice president participated in scheme by misrepresenting bank funds were segregated for the plaintiff when they were not, and by "generating fraudulent documents.").

Allegations that the Bank falsified documents are a sufficient but not necessary ground for reversal. Even services that the Bank would call "routine" constituted substantial assistance to the Ponzi Scheme. *See Aetna Cas. & Sur. Co. v. Leahey Constr. Co.*, 219 F.3d 519, 537 (6th Cir. 2000) (extension of otherwise ordinary loan lent credibility and served as

"foundation for increased trust," and thereby constituted "substantial assistance" of a fraud); *Ivie v. Diversified Lending Group, Inc.*, No. 09-cv-751, 2011 U.S. Dist. LEXIS 27680, at *20-23 (W.D. Mich. March 17, 2011) (denying motion to dismiss, holding that "[e]ven the supplying of routine services can constitute substantial assistance if done with knowledge that such services are assisting the primary actor's tortious conduct.") (*citing Aetna*).

In short, the case law supports the Receiver and does not support the Bank. This is particularly true in cases (such as here) where a plaintiff makes allegations (in addition to ignoring red flags) of falsification, concealment, personal relationships and on-site visits to the business headquarters of the Ponzi Scheme.

G. Leave to Amend Should Have Been Allowed

The Receiver also appeals from the incorrect decision by the lower court not to convert the dismissal with prejudice into one without prejudice, so as to permit amendment of the Complaint. This was, in effect, denial of the Receiver's request for leave to amend the Complaint. Minnesota Local Rule 7.1(j) requires letter-briefing to seek permission for the filing of any motion to reconsider. The Receiver timely requested permission to file such a motion, which was summarily denied under the unexplained rationale that

the Receiver did not present a "compelling" circumstance. (A0221-22). As the Receiver explained (Dkt. No. 52), an amended complaint would have removed the one alternative allegation of willful blindness that seemed to have confused the lower court, and would have asserted additional torts on behalf of specific Receivership Entities that did not require "aiding and abetting" pleading elements (*e.g.*, negligence and breach of fiduciary duties to Kiley when allowing other receivership entities (Cook) to deplete Kiley's accounts despite having no owner or signatory authority to do so).

This Court has observed that dismissal without prejudice is the normal way to handle a defective complaint, and dismissal should usually come with leave to amend. *Michaelis v. Nebraska State Bar Ass'n*, 717 F.2d 437, 438-39 (8th Cir. 1983). "The usual method for dealing with a nebulous complaint, then, is either to grant leave to amend [] or to dismiss the complaint without prejudice." *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1386 (D.C. Cir. 1981) (citing *Foman v. Davis*, 371 U.S. 178, 182 (1962); Fed. R. Civ. P. 15(a)). This Court holds that decisions on post-judgment requests for leave to amend are reviewed "for an abuse of discretion, keeping in mind the district court was not at liberty to 'ignore the Rule 15(a)(2) considerations that favor affording parties an opportunity to

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test their claim on the merits.'" *Public Pension Fund Group*, 679 F.3d at 987 (reversing denial of leave to amend).

Here, the lower court did not explain any rationale for denying leave to amend. It overlooked both the normal practice required by this Court that defective complaints should ordinarily be dismissed without prejudice, and the permissive amendment standards of Rule 15(a)(2). The lower court merely stated, without explanation, that the reasons presented were not "compelling." But nothing could have been more "compelling" than this Court's mandates requiring that dismissal normally be without prejudice, the Receiver's offer to cure any confusion that "willful blindness" somehow negated allegations of actual knowledge, and the Receiver's proffer of added tort claims unaffected by the initial grounds for dismissal. The Bank's letter response (Dkt. No. 53) did not present any undue delay, bad faith, prejudice or futility rationales. Indeed, in holding the Receiver to a "compelling reasons" standard at all, the lower court abused its discretion – effectively replacing the permissive pleading-amendment standards of Rule 15(a)(2) with restrictive reconsideration standards.

At a bare minimum, the Court should reverse the denial of leave to amend with instructions to permit the Receiver to file a First Amended Complaint.

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VII. CONCLUSION

The lower court erred in dismissing the Complaint. Spurred by the Bank, the lower court cited faulty grounds to reach an incorrect result. Under the permissive pleading standards required by Minnesota law and Rule 9(b), the Receiver adequately pleaded aiding and abetting liability.

Associated Bank departed from standard banking practices. The Bank knew the mechanisms of, and lent direct aid to, the Ponzi Scheme. The Bank benefited by having custody and use of ill-gotten millions sitting in non-interest bearing accounts. In the Scheme's heyday, 2007-2009, credit markets had frozen, Federal Reserve-mandated stress tests were underway, and financial institution liquidity and balance sheet health meant the difference between profitability and FDIC takeover. Hundreds of Scheme victims, many elderly and impoverished, still await the chance to be made whole. The Receiver filed a factually sufficient Complaint that the lower court should have approved, for all of the reasons discussed above. The judgment of the lower court should be reversed.

RESPECTFULLY SUBMITTED,

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CERTIFICATE OF COMPLIANCE

I hereby certify that this document, including all headings, footnotes, and quotations, but excluding summary of the case, the table of contents, table of authorities, any addendum containing statutes, rules or regulations, and any certificates of counsel, contains 10,252 words, as determined by the word count of the word-processing software used to prepare this document, specifically Microsoft Word 2007 in Times New Roman 14 point font, which is no more than 14,000 words permitted under Fed.R.App.P. 32(a)(7)(B)(i).

Dated: December 20, 2013.

/s Robert P. Greenspoon

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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 version of the brief and addendum in non-scanned PDF format. I hereby certify that the file has been scanned for viruses and that it is virus-free.

/s Robert P. Greenspoon

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on December 20, 2013, an electronic copy of the Brief of Plaintiff-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 Brief will be accomplished by the CM/ECF system:

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