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.

On Appeal from the United States District Court for the District of Minnesota
(No. 3:13-cv-00232-DSD)
The Honorable David S. Doty

BRIEF OF APPELLEE

Charles F. Webber
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7000

Charles A. Rothfeld
Alex C. Lakatos
Paul W. Hughes
James F. Tierney
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
crothfeld@mayerbrown.com

Counsel for Defendant-Appellee

SUMMARY OF THE CASE

Summary. Perpetrators of a Ponzi scheme used accounts at several financial institutions in Minnesota, including Associated Bank, N.A. ("Associated"). After the Ponzi scheme was uncovered, the perpetrators were prosecuted and jailed. A Receiver was appointed to marshal the perpetrators' funds for defrauded investors and to recover sums from "winning" investors. The Receiver now alleges that Associated *actually knew* about the underlying Ponzi scheme and, armed with this knowledge, purposely and substantially aided it.

As the district court found, the Receiver's speculative and improbable allegations do not satisfy the demanding standard for aiding-and-abetting liability. This is particularly so given that the Receiver's claims sound in fraud, meaning that the particularity requirement of Rule 9(b) applies. Many other courts have reached the same result.

The Receiver is also barred from asserting these claims. Because the Receiver stands in the shoes of the perpetrators, *in pari delicto* bars his claims. And because some investors have already sued Associated and lost, *res judicata* bars the Receiver from relitigating those claims.

Oral argument. Because the decision below clearly and correctly recited the issues presented in this case, oral argument is unnecessary.

CORPORATE DISCLOSURE STATEMENT

Associated Bank, N.A., is wholly owned by Associated Banc-Corp, a publicly traded company.

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STATEMENT OF THE ISSUES

The district court dismissed the Receiver's claims that Associated aided and abetted a Ponzi scheme perpetrated by the bank's customers, finding that the complaint failed to plausibly allege either that the bank knew about the Ponzi scheme or that, armed with this knowledge, it substantially assisted the scheme. The issues presented are:

1. Did the district court correctly hold that the complaint fails to plausibly allege that Associated had "actual knowledge" of the underlying Ponzi scheme? (*Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179 (Minn. 1999); *El Camino Res. Ltd. v. Huntington Nat'l Bank*, 712 F.3d 917 (6th Cir. 2013) ("*El Camino II*"); *Lawrence v. Bank of Am., N.A.*, 455 F. App'x 904 (11th Cir. 2012)).

2. Did the district court correctly hold that the complaint fails to plausibly allege that Associated provided "substantial assistance" to perpetrators of the scheme? (*Witzman*, 601 N.W.2d 179; *Am. Bank of St. Paul v. TD Bank, N.A.*, 713 F.3d 455 (8th Cir. 2013); *Weshnak v. Bank of Am., N.A.*, 451 F. App'x 61 (2d Cir. 2012)).

3. Is dismissal of this action independently warranted by the *in pari delicto* doctrine? (*Christians v. Grant Thornton, LLP*, 733 N.W.2d 803 (Minn. Ct. App. 2007); *Knauer v. Jonathon Roberts Fin. Grp.*,

Inc., 348 F.3d 230 (7th Cir. 2003)). Or by *res judicata*? (*Lamson v. Towle-Jamieson Inv. Co.*, 245 N.W. 627, 628 (Minn. 1932)).

4. Did the district court abuse its discretion when it declined to reconsider its decision to dismiss the complaint with prejudice? (*Geier v. Missouri Ethics Comm'n*, 715 F.3d 674 (8th Cir. 2013); *Briehl v. Gen. Motors Corp.*, 172 F.3d 623 (8th Cir. 1999)).

STATEMENT OF THE CASE

Customers of Associated Bank ran a Ponzi scheme that made use of accounts at the Bank. After the scheme collapsed, a Receiver brought this action, alleging that the Bank was aware of and substantially assisted the scheme. The district court dismissed the action, finding that the complaint failed to adequately allege either awareness of or substantial assistance to the fraud.

In challenging that conclusion, the Receiver's brief to this Court makes conclusory and hyperbolic claims of misconduct by Associated, asserting repeatedly that the Bank falsified documents, advised the fraud's perpetrators how to avoid detection, and permitted transfers of funds that the Bank had to have known were improper. On examination, however, *none* of these provocative characterizations of Associated's conduct is borne out by the allegations of the complaint. The complaint's actual allegations,

meanwhile, are insufficient as a matter of law to establish aiding and abetting of fraud: they show, at most, that the perpetrators of the fraud acted suspiciously—conduct that courts uniformly have held insufficient to support an aiding-and-abetting claim. That is so for good reason: finding liability in these circumstances would impose on banks the impossible requirement that they guarantee the honesty of their customers.

This is not the first case to address aiding-and-abetting claims against Associated growing out of the Ponzi scheme at issue here. Victims of that scheme brought an action against Associated in Wisconsin state court, advancing claims identical to those now asserted by the Receiver. The Wisconsin trial court rejected those claims, just as the district court did here, and that decision was affirmed on appeal. The outcome of this appeal should be the same.

A. Legal Background.

Banks are governed by both state and federal law.

1. Minnesota law imposes closely defined duties on banks, among them the obligation to process customer transactions on demand. *See, e.g., Stowell v. Cloquet Co-op Credit Union*, 557 N.W.2d 567, 575 (Minn. 1997); *Farmers State Bank v. Sig Ellingson & Co.*, 16 N.W.2d 319, 324 (Minn. 1944) ("The bank's obligation is to pay the checks drawn on the depositor's

credit."); Minn. Stat. § 336.4-402(a) (imposing strict liability on banks for wrongfully dishonoring a check). In carrying out that obligation, banks must act promptly. *See*, *e.g.*, Minn. Stat. §§ 336.3-103(a)(9), 336.4-302(a)(1) (banks must timely pay demands); *see also* 12 C.F.R. §§ 229.30, 229.38(b) (strict deadline for returning checks).

At the same time, in Minnesota and all other jurisdictions, a bank's legal obligations are carefully circumscribed. A bank need not investigate a customer's suspicious behavior; it has no "duty" "to inquire minutely into the affairs of the depositor's checking account." *Swift Cnty. Bank v. United Farmers Elevators*, 366 N.W.2d 606, 609 (Minn. Ct. App. 1985) (quoting *Rodgers v. Bankers' Nat'l Bank*, 229 N.W. 90, 95 (Minn. 1930)). This is because, if it is to meet its obligations on a timely basis, "a bank cannot be expected to track transactions in fiduciary accounts or to intervene in suspicious activities." *Chazen v. Centennial Bank*, 71 Cal. Rptr. 2d 462, 466 (Ct. App. 1998).

2. Federal law also regulates certain interactions a bank has with its customers. Under the Bank Secrecy Act ("BSA"), a bank must report cash transactions exceeding $10,000. *See* 31 U.S.C. § 5313(a); 31 C.F.R. § 1010.311. Similarly, when a bank is aware of suspicious activity by its customers, it must file suspicious activity reports ("SARs") that may trigger

investigation by federal regulators. *See* 31 U.S.C. § 5318; 12 C.F.R. § 21.11.[1]

A fundamental aspect of the BSA is that SARs must be kept strictly confidential. As the Second Circuit has explained, "[f]inancial institutions are required by law to file SARs, but are prohibited from disclosing either that an SAR has been filed or the information contained therein." *Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir. 1999). Thus, a bank may not notify anyone involved in a transaction that a SAR was filed (31 U.S.C. § 5318(g)(2)), and may face criminal liability if it does so (*see id.* § 5322).

3. These state and federal legal regimes dictate how financial institutions should respond to suspicious activity by their customers. A bank generally must process the customer's transaction, as required by state law, but should also file a SAR, as required by federal law. The filing of the SAR alerts law enforcement officials and regulators to potentially suspicious conduct and permits the very kind of investigation that uncovered the fraud in this case. Meanwhile, clearing the transaction promptly facilitates SAR secrecy: it avoids "compromis[ing] an ongoing law enforcement investigation [by] tip[ping] off a criminal wishing to evade detection, or re-

[1] As courts have uniformly held, there is no private cause of action in connection with a bank's obligations under the BSA. *See B.E.L.T., Inc. v. Wachovia Corp.*, 403 F.3d 474, 476 (7th Cir. 2005).

veal[ing] the methods by which banks are able to detect suspicious activity." *Cotton v. PrivateBank & Trust Co.*, 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002).

Because of these secrecy requirements, Associated may not reveal whether it filed SARs to alert authorities to the allegedly suspicious activities underlying this case. Federal regulators have brought no charges against Associated in connection with this Ponzi scheme.

B. The Cook/Kiley Fraud.

Beginning in mid-2005, Trevor Cook, Patrick Kiley, and others perpetrated a Ponzi scheme that defrauded investors of millions of dollars (the "Cook/Kiley fraud"). *See* Compl. ¶ 8, *R.J. Zayed v. Peregrine Financial Corp.*, 12-cv-00269 (D. Minn.) [Doc. 1]. The scheme "purported to guarantee investors a return in excess of 10% annually through a foreign currency trading with Crown Forex, S.A., a Swiss Company." Add.2.

Perpetrators of the fraud used a number of entities—Oxford Global Partners, LLC, Universal Brokerage, FX, Crown Forex LLC, and other related entities (the "Receivership Entities") to implement the scheme. These entities maintained accounts, allegedly used in furtherance of the Cook/Kiley fraud, at several leading financial institutions, including Wells Fargo, Charles Schwab, Saxo Bank, Credit Suisse, and PFG Best. *See*

Compl. Ex. 12 ¶¶ 5, 48; *SEC v. Cook*, 9-cv-3333 (D. Minn.) [Doc. 100]. In 2008—three years after the scheme began, and long after it had operated at different financial institutions—the Receivership Entities opened accounts at Associated.[2] A54 ¶ 29.

In summer 2009, the Cook/Kiley fraud came to light and collapsed. The perpetrators have since been convicted, sentenced, and incarcerated. Chief Judge Michael Davis of the U.S. District Court for the District of Minnesota appointed R.J. Zayed as Receiver to marshal the perpetrators' assets in order to repay the investors. *SEC v. Cook*, 09-cv-3333 (D. Minn.) [Doc. 13].[3] The Receiver's status reports indicate that, primarily through claw-back actions, he has recovered many millions of dollars for investors. *Id.* [Doc. 1039].

C. Investors Sue Associated In Wisconsin.

In 2009, several investors who lost money in the Cook/Kiley fraud sued Associated in Wisconsin state court. A15 (*Grad v. Associated Bank, N.A.*, 09-cv-2949 (Wis. Cir. Ct.)). They asserted claims for negligence, aid-

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[2] Associated Bank is a regional bank offering financial services in Wisconsin, Illinois, and Minnesota.

[3] After Zayed recused himself from this matter, 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." Receiver Br. 3. We refer to these individuals collectively as "the Receiver."

ing and abetting breach of fiduciary duty, and aiding and abetting conversion. Like the Receiver here, the Wisconsin plaintiffs alleged that "Associated Bank ignored obvious red flags symptomatic of fraud or other illicit activity" (A16 ¶ 3)—*e.g.,* that Minnesota registration had not yet been obtained for Crown Forex LLC at the time that the perpetrators opened their Associated accounts (A26 ¶¶ 50-51) and that Kiley's background was inconsistent with the sophistication of the products he sold (A27 ¶ 54). The trial court dismissed that complaint (A39), and the Wisconsin Court of Appeals affirmed the dismissal. *Grad v. Associated Bank, N.A.*, 801 N.W.2d 349 (table), 2011 WL 2184335 (Wis. Ct. App. 2011).[4]

Another group of investors named Associated as a defendant in *Phillips v. Cook*, 0:09-cv-01732 (D. Minn.). They asserted a negligence claim against Associated based on allegations that Associated "failed to recognize and investigate 'red flags' and indicia of fraud." *Phillips* Third Am. Compl. ¶ 1,605 [Doc. 197]. Those plaintiffs voluntarily dismissed their claims against Associated.

[4] All three appellate judges agreed that the Wisconsin plaintiffs failed to state a claim for relief with respect to aiding and abetting; one judge dissented with respect to the investor's *negligence* claims. In his arguments below in this case, the Receiver extensively cited the dissenting judge's opinion with respect to the negligence claim (Opp. at 6 [Doc. 43]), but that opinion has no bearing on the very different claims of knowing misconduct advanced here.

D. The Receiver's Allegations.

After obtaining significant discovery from Associated,[5] the Receiver filed this four-count complaint. A41-A87. Each claim turns on the theory that Associated aided and abetted the perpetrators of the fraud: that it aided and abetted fraud (A75), breach of fiduciary duty (A82), conversion (A84), and false representations and omissions (A85).

The Receiver asserts that several years after the Ponzi scheme first began, Cook and Kiley met with an Associated vice president, Lien Sarles, to open accounts at Associated. A43. But the Receiver does not allege that Cook or Kiley told Sarles that they were running a Ponzi scheme. To the contrary, during a deposition of Cook that the Receiver attached to his complaint, Cook stated that "I don't think [Sarles] thought there was anything wrong. … I don't think he thought there was a fraud going on." A91. The Receiver also appended to his complaint (as Exhibit 4) a Sarles affidavit confirming that Sarles was not "aware that any of the individuals or

[5] Although this case is before the Court on the district court's grant of Associated's motion to dismiss, the Receiver has taken substantial third-party discovery against Associated in connection with other actions. *See CFTC v. Cook*, 09-cv-3332 (D. Minn.); *SEC v. Cook*, 09-cv-3333 (D. Minn.); *SEC v. Beckman et al.*, 11-cv-574 (D. Minn.). During the course of this production, the Receiver acknowledged that he was subpoenaing documents with the intent of suing Associated.

entities involved in these matters were engaged in criminal or fraudulent activities." Appellee Add. 7.

Rather than allege that Associated was *directly* aware of the Ponzi scheme, the Receiver asserts that the perpetrators of the fraud used their bank accounts in suspicious ways. The Receiver alleges repeatedly that Associated's knowledge may be inferred from what he characterizes as this "circumstantial evidence." *See, e.g.*, A48 ¶ 13.

This "evidence" shows that Associated knew certain accounts were to hold investor funds (A41-87 ¶¶ 10, 29, 31, 39, 45, 55, 60, 72(B), 72(I), 72(N), 72(AA), 72(FF)); that Kiley was a financial advisor who was operating his business out of a house rather than an office (*id.* ¶¶ 35, 40, 43, 72(A), 72(G)); that a Minnesota registration had not yet been obtained or provided for Crown Forex LLC at the time Kiley opened one particular account (*id.* ¶¶ 6, 42, 61, 72(K), 72(M), 72(S), 72(Z)); that an Associated employee knew that Cook was transferring money from the Crown Forex LLC account into his personal account (*id.* ¶¶ 10, 45); and that funds were not being transferred to Crown Forex, SA (*id.* ¶ 46).

The Receiver also alleges that Associated engaged in certain banking activities that assisted the perpetrators, including that Associated opened accounts for the principals and executed account documentation (A41-87

¶¶ 4-7, 29, 34-36, 38-43, 49, 61-62, 64-65, 75, 80); allowed the principals to access the accounts (*id.* ¶¶ 10, 50, 54, 56, 72(O), 72(EE)); "allow[ed] the account[s] to remain open" (*id.* ¶ 76); executed transfers of account funds (*id.* ¶¶ 9-12, 50, 53-56, 60, 64, 76, 77); permitted withdrawals (*id.* ¶ 11, 78); and labeled the accounts (*id.* ¶¶ 79, 80).

E. The District Court Dismisses The Action.

Associated moved to dismiss the complaint on multiple grounds. It contended that, even taking the Receiver's allegations as true, the Receiver failed to state a claim for aiding and abetting. Additionally, Associated contended that the Receiver's claim should be dismissed on grounds of *in pari delicto* and *res judicata*.

The district court granted Associated's motion to dismiss, concluding that the Receiver failed to plausibly allege an aiding-and-abetting theory. The court summarized the Receiver's allegations in some detail. Add.2-4. And it held that Rule 9(b), which requires that fraud be pled with particularity, applies in these circumstances. Add.6-7.

Turning to the knowledge requirement of aiding and abetting, the court explained that, under Minnesota law, "the requirement is *actual* knowledge and the circumstantial evidence must demonstrate that the aider-and-abettor *actually knew* of the underlying wrongs committed."

Add.8 (quoting *Varga v. U.S. Bank Nat'l Ass'n*, 952 F. Supp. 2d 850, 857 (D. Minn. 2013)). Although the Receiver alleged that Associated's customers engaged in suspicious activity, the court continued, "[n]owhere in the complaint does the Receiver allege that Associated Bank had actual knowledge of the Ponzi scheme." Add.8. Thus, the Receiver's allegations "amount to an argument that Associated Bank *should have known* of the underlying fraud based on numerous red flags," but "[s]uch a theory of liability is not viable in an aiding and abetting claim." Add.9 (emphasis added).

As to substantial assistance, the court held that "a plaintiff must 'show that the secondary party proximately caused the violation, or, in other words, that the encouragement or assistance was a substantial factor in causing the tort.'" Add.10 (quoting *K&S P'ship v. Cont'l Bank, N.A.*, 952 F.2d 971, 979 (8th Cir. 1991)). Liability must turn on a defendant's "affirmative acts, not acts it should have taken." *Id.* (quoting *Am. Bank of St. Paul v. TD Bank, N.A.*, 713 F.3d 455, 463 (8th Cir. 2013)).

Here, the court found that, "[t]aking all of the allegations in the complaint as true, the Receiver has not adequately pleaded that Associated Bank substantially assisted in the fraudulent scheme." Add.11. "The Receiver's allegations of substantial assistance—that Associated Bank ap-

proved fraudulent transfers after ignoring red flag and suspicious activity—generally do not provide a basis for a finding of substantial assistance." *Id*. Moreover, because "the relationship between Associated Bank and the Receivership Entities was an arms-length, commercial relationship," the conduct could not qualify as substantial assistance within the meaning of Minnesota law. Add.12.

The court therefore granted the motion to dismiss and directed the entry of judgment in favor of Associated. Add.12. Subsequently, the Receiver requested leave to file a motion to reconsider, ultimately seeking permission to file an amended complaint. Doc. 52. In making this request, the Receiver did not propose to add additional factual allegations; instead, he sought to make the complaint "more clear" and to add new legal theories. *Id*. at 2. Finding no "compelling circumstances" that would justify granting the motion, the court denied the Receiver's request. Add.14-15.

STANDARD OF REVIEW

The Court reviews dismissal pursuant to Fed. R. Civ. P. 12(b)(6) *de novo*. *See Summerhill v. Terminix, Inc.*, 637 F.3d 877, 880 (8th Cir. 2011). The Court reviews denial of a motion for reconsideration pursuant to D. Minn. Local Rule 7.1(j) for abuse of discretion. *See Nelson v. Am. Home Assur. Co.*, 702 F.3d 1038, 1041, 1043 (8th Cir. 2012).

SUMMARY OF THE ARGUMENT

I. As a matter of substantive Minnesota law, the Receiver must show that Associated had actual knowledge of, and substantially assisted, the Cook/Kiley Ponzi scheme. And because the underlying allegations are of fraud, the Receiver must make those showing with the particularity required by Rule 9(b).

The Receiver, however, has not plausibly alleged that Associated knew about the underlying fraud. The Receiver's complaint makes no *direct* allegations of knowledge. The repeated contentions in his appellate brief that the Bank "falsified" documents or engaged in other acts of knowing misconduct simply cannot be squared with the very different allegations of the complaint. And his theory that knowledge may be inferred from allegations that perpetrators of the fraud used their bank accounts in ways that were suspicious—that there were "red flags"—is insufficient as a matter of law to establish that Associated *actually* knew of the Ponzi scheme. Courts across the country have rejected identical contentions that a bank's knowledge of "red flags" equates to knowledge of the underlying torts committed by a bank customer. A holding to the contrary would fundamentally upset the legal duties of Minnesota banks, which have no obligation under state law to monitor the activities of their customers. Indeed,

the Receiver's own complaint—which asserts that, had Associated known of the fraud, it would have prevented the misconduct—negates this essential element.

Nor does the Receiver plausibly allege that, armed with knowledge of the Ponzi scheme, Associated substantially assisted it. As this Court has recognized, only affirmative acts that are a proximate cause of the fraud may qualify as substantial assistance. Nothing that Associated is alleged to have done here qualifies under this stringent aiding-and-abetting standard. Instead, the Receiver alleges quintessential banking activities: opening accounts, approving withdrawals and transfers, and advising customers on regulatory requirements. The presence of "red flags" does not transform these acts into substantial assistance of fraud.

II. The Receiver's complaint fails for other reasons, too. Because the Receiver stands in the shoes of the fraud's perpetrators, the *in pari delicto* doctrine bars him from suing Associated for allegedly aiding the perpetrators. The Seventh Circuit affirmed dismissal on that ground of a complaint brought by a federally appointed receiver in circumstances indistinguishable from those here. *See Knauer v. Jonathon Roberts Fin. Grp., Inc.*, 348 F.3d 230, 232 (7th Cir. 2003).

The action also is barred by *res judicata*. Several Cook/Kiley investors sued Associated in Wisconsin state court and lost. Because, under Minnesota law, the Receiver is in privity with those investors, *res judicata* bars him from advancing and relitigating an identical claim now.

III. The district court did not abuse its broad discretion in denying the Receiver's request to add wholly new legal theories to his complaint *after* the entry of judgment.

ARGUMENT

I. The Complaint Does Not Plausibly Allege A Claim For Aiding And Abetting.

It is the Receiver's obligation to demonstrate that Associated had actual knowledge of the Ponzi scheme. But he has not made that showing here. Although his brief to this Court attempts to obscure the record through the use of provocative and misleading rhetoric, the reality is that his complaint alleges—at most—ambiguous or suspicious acts by Associated's customers, none of which would have put the Bank on notice of misconduct. As courts have held repeatedly in essentially identical circumstances, allegations of this sort are insufficient to survive a motion to dismiss.

A. The Legal Standard: The Complaint Must Make Plausible And Nonconclusory Allegations That Associated Had Actual Knowledge Of The Ponzi Scheme.

1. The substantive standards for an aiding and abetting claim under Minnesota law are settled: the Receiver must plausibly allege that (1) the primary tortfeasor committed a tort that injured the plaintiff, (2) the defendant knew that the primary tortfeasor's conduct constituted a breach of duty, and (3) the defendant substantially assisted the primary tortfeasor in the achievement of the breach. *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 187 (Minn. 1999). *Witzman* identified Section 876 of the Restatement (Second) of Torts as stating the controlling standard for aiding and abetting. *Id.* at 186-87.

So far as the knowledge element is concerned, aiding and abetting requires "scienter—the defendants must *know* the conduct they are aiding and abetting is a tort." *Witzman*, 601 N.W.2d at 186. Because "the bank's knowledge of the scheme is the crucial element that prevents it from suffering automatic liability for the conduct of insiders" with which it does business (*K&S P'ship*, 952 F.2d at 977), "[a]n aider and abettor's knowledge *of the wrongful purpose* is a 'crucial element in aiding or abetting cases.'" *E-Shops Corp. v. U.S. Bank Nat'l Ass'n*, 678 F.3d 659, 663 (8th Cir. 2012).

The Receiver nevertheless makes several arguments in an effort to avoid his obligation to plead actual knowledge. Each fails.

First, invoking *K&S Partnership*, 952 F.2d at 977, the Receiver asserts that "general awareness" of wrongdoing could be enough to state a claim. Receiver Br. 29. But "general awareness" is simply a synonym for "actual knowledge." *See Metz v. Unizan Bank*, 2008 WL 2017574, at *17 (N.D. Ohio 2008), *aff'd*, 649 F.3d 492 (6th Cir. 2011). Indeed, *K&S Partnership* itself held 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. *K&S Partnership* thus *reversed* a jury verdict against a bank, concluding that—despite suspicious account activity—there was insufficient evidence to show the bank had actual knowledge of the underlying torts. *Id*. at 979-80.

Second, the Receiver tries to dilute the actual knowledge requirement, contending that actual knowledge and substantial assistance are "evaluated in tandem." Receiver Br. 30. But this does not alter the Receiver's obligation to plead *both* elements. *See Witzman*, 601 N.W.2d at 188-89. Absent a plausible allegation of actual knowledge, the Receiver's claim may not proceed.

Third, the Receiver is incorrect in asserting that constructive, rather than actual, knowledge is sufficient. Receiver Br. 27-29. This Court, in an aiding-and-abetting case against a bank decided under Minnesota law, recently confirmed that "actual knowledge" is the controlling standard. *Am. Bank*, 713 F.3d at 468. The Court held that an instruction telling the jury that it had to find that the defendant "actually knew" of the underlying fraud "accurately stated the law." *Id.*; *see also Metge v. Baehler*, 762 F.2d 621, 625-29 (8th Cir. 1985) (under federal common law, "actual knowledge" is required).

Witzman, the decision upon which the Receiver relies for his contrary argument, did not recognize a "general principle under which courts typically have allowed 'constructive knowledge' to be presumed," as the Receiver would have it. Receiver Br. 27. To the contrary, the court held that "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. Although the court noted that "some courts" in narrow circumstances had found "constructive knowledge" suffi-

cient,[6] it did not adopt that standard for Minnesota. *Id*. And even if it had, there is no allegation that the conduct here was a *facial* breach of a duty—nor could there be, given the Receiver's contentions that the perpetrators of the fraud purposefully concealed their wrongful conduct. *See*, *e.g.*, A75 ¶ 72. Accordingly, looking to *Witzman*, courts applying Minnesota law have uniformly held that "actual knowledge" is the lynchpin; "[c]onstructive knowledge will not suffice." *Varga*, 952 F. Supp. 2d 857-58. *See also Christopher v. Hanson*, 2011 WL 2183286, at *11 (D. Minn. 2011) (requiring actual, rather than constructive, knowledge).

Recently, the Sixth Circuit, interpreting the same aspect of the Restatement that controls Minnesota aiding-and-abetting law (Section 876(b)), held that, in the context of an aiding-and-abetting claim against a bank, "actual knowledge is required," expressly rejecting the view that constructive knowledge could suffice. *El Camino Res. Ltd. v. Huntington Nat'l Bank*, 712 F.3d 917, 922 (6th Cir. 2013) ("*El Camino II*"); *see also Pension Comm. of Univ. of Montreal Pension Plan v. Banc of Am. Sec.*

[6] The Minnesota court evidently recognized these circumstances to be limited to cases presenting claims of breach of trust governed by Section 326 of the Restatement of Trusts, rather than those—like this one—governed by Section 876 of the Restatement (Second) of Torts. *See Witzman*, 601 N.W.2d at 188 (citing *Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 283-84 (2d Cir. 1992) (in turn relying on Section 326 of the Restatement of Trusts)).

LLC, 446 F. Supp. 2d 163, 201 n.279 (S.D.N.Y. 2006) ("The overwhelming weight of authority holds that actual knowledge is required, rather than a lower standard such as recklessness or willful blindness."). The Receiver must satisfy the actual-knowledge standard here.[7]

2. The standard for pleading in federal court also is well-established: the Receiver must "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quotation omitted). "The plausibility standard requires a plaintiff to 'plead factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.'" *Farm Credit Servs. of Am., FLCA v. Haun*, 734 F.3d 800, 804 (8th Cir. 2013) (quoting *Iqbal*, 556 U.S. at 678).

A claim is not facially plausible if it is based on "naked assertion[s] devoid of further factual enhancement" (*Iqbal*, 556 U.S. at 678 (quotation omitted)), and a complaint must offer "more than a sheer possibility that a defendant has acted unlawfully." *Id*. When a complaint "pleads facts that

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[7] Even if a constructive knowledge standard (effectively, a "willful blindness" standard, *see United States v. Parker*, 364 F.3d 934, 946 (8th Cir. 2004)) controlled, the Receiver could not meet that standard. As we show below, just as the Receiver does not allege that Associated knew of the Ponzi scheme, he offers no plausible, non-conclusory allegations suggesting that Associated took "deliberate actions to avoid confirming a high probability of wrongdoing." *Global-Tech Appliances, Inc. v. SEB S.A.*, 131 S. Ct. 2060, 2070-71 (2011). Willful blindness is *not* simple deliberate indifference, recklessness, or negligence. *Id*.

are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of entitlement to relief.'" *Id.* Consequently, "[a] pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007)).

Moreover, in assessing plausibility, "the reviewing court" must "draw on its judicial experience and common sense." *Iqbal*, 556 U.S. at 679. Even if "allegations are consistent" with the plaintiff's theory, a complaint should be dismissed where there are "more likely explanations" or an "'obvious alternative explanation.'" *Id.* at 681-82; *see also 16630 Southfield Ltd. P'ship v. Flagstar Bank, F.S.B.*, 727 F.3d 502, 505 (6th Cir. 2013) ("[T]he existence of obvious alternative explanations simply illustrates the unreasonableness of the inference sought and the implausibility of the claims made.").

3. Additionally, the heightened pleading standard of Fed. R. Civ. P. 9(b) applies in this case because the Receiver asserts that Associated aided and abetted fraud. *E-Shops*, 678 F.3d at 663 ("Rule 9(b)'s particularity requirement for fraud applies equally to a claim for aiding and abetting."). "[T]he complaint," therefore, "must set forth the 'who, what, when, where, and how' surrounding the alleged fraud." *Id.*

Although Rule 9(b) provides that knowledge may be pleaded "generally," that rule "does not give … license to evade the less rigid—though still operative—strictures of Rule 8." *Iqbal*, 556 U.S. at 686-87. Even with respect to knowledge, a plaintiff may not "plead the bare elements of his cause of action, affix the label 'general allegation,' and expect his complaint to survive a motion to dismiss." *Id.* at 687. Instead, the Receiver must plausibly allege *every* element, including knowledge, in accord with the *Iqbal* and *Twombly* framework, without resort to conclusory labels. *See Mayfield v. Nat'l Ass'n for Stock Car Auto Racing, Inc.*, 674 F.3d 369, 377 (4th Cir. 2012) ("[M]alice must still be alleged in accordance with Rule 8—a 'plausible' claim for relief must be articulated.").

B. The Complaint Does Not Plausibly Allege Knowledge.

Against this background, to state an aiding-and-abetting claim against Associated, the Receiver must plausibly allege as a threshold matter that the Bank knew about the Ponzi scheme. *Witzman*, 601 N.W.2d at 188. The district court found that the complaint fails to do this because it does "not adequately plead that Associated Bank had actual knowledge of the scheme principals' fraud." Add.9. The Receiver characterizes this ruling as "at best, perplexing" because the complaint "states" "explicitly, three times: 'Associated Bank had actual knowledge of the fraud.'" Receiv-

er Br. 32. But these conclusory allegations are manifestly insufficient: they are the paradigm of the kind of "[t]hreadbare recitals of the elements of a cause of action" that a court must disregard. *Iqbal*, 556 U.S. at 678.

And once the labels and conclusions are set aside, the Receiver offers no well-pleaded allegations that, if proven, would establish that Associated had knowledge of the underlying fraud; he has "not nudged [his] claims across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. His brief offers no *direct* evidence of knowledge.[8] Instead, his theory is that Associated should have known that Cook and Kiley were operating a Ponzi scheme because Associated somehow facilitated suspicious customer activity, *i.e.*, "red flags." *See*, *e.g.*, Receiver Br. 32-34. In his complaint, the Receiver pleads a range of customer conduct that he asserts should have caused Associated to be suspicious, repeatedly referring to those acts as "red flags." *See* A41-87 ¶¶ 13, 48, 51, 59, 63-65, 67, 74, 78.

There are, however, two principal problems with this theory. It rests on a plain mischaracterization of the complaint's factual allegations. And

[8] This is in notable contrast to the circumstances in *American Bank*, which this Court recently decided. In that case, there was evidence of *direct* knowledge on the part of the defendant bank; the perpetrator of the fraud *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 [his] fraud." 713 F.3d at 466 & n5 (emphasis added). There are no comparable allegations here.

it advances a legal standard that has been roundly rejected as one that would impose inappropriate, and enormously burdensome, affirmative obligations on banks (and, indeed, on all businesses) to police the conduct of their customers.

1. The Receiver misstates the complaint's allegations.

The Receiver's brief to this Court is replete with repeated allegations of affirmative misconduct by Associated—that it "falsified," or "intentionally omitted" information from, or "doctored" documents; "actively participated" in the fraud; and "advised the fraudsters on how to avoid detection." *E.g.*, Receiver Br. 4, 11, 17, 18, 20, 24, 34-36, 38, 39. None of these appellate assertions, however, finds support in the complaint. And it is the factual content of the complaint that controls: "It is a basic principle that the complaint may not be amended by the briefs in opposition to a motion to dismiss, nor can it be amended by the briefs on appeal." *Gallagher v. City of Clayton*, 699 F.3d 1013, 1022 (8th Cir. 2012) (quotation omitted).

In particular, the Receiver's appellate brief attributes misconduct of five general sorts to Associated: that it must have known its customers were engaged in fraud because it was aware that the Swiss firm with which they were associated had been closed; that it coached the perpetrators on how to avoid detection; that it allowed suspicious transfers or

withdrawals of funds; that it "falsified" account-opening documents; and that it "falsified" cashier's checks. These allegations all rely on a handful of specific acts that the Receiver's brief repeatedly restates and repackages. But however these allegations are characterized, none is probative of knowledge.

a. *Associated "permitted" "transfers of funds after learning that Swiss authorities had rendered the Currency Program obviously impossible." See*, *e.g.*, Receiver Br. i, 13, 15, 24, 33, 35, 37, 38, 43. The Receiver maintains almost a dozen times that Associated must have known that it was facilitating fraud because it executed transfers *after* it learned about regulatory action against a fraudulent entity in Switzerland; his brief asserts flatly that Associated "knew in February 2009" of the liquidation of Crown Forex, SA. Receiver Br. 33. This allegation, however, has *no* foundation in the complaint. The complaint alleges only that there was a February 2, 2009, "Google Alert saying Crown Forex, SA is under investigation" (A71 ¶ 58). It does *not* assert—nor could it—that Associated *knew* about this Google alert. Moreover, the alert itself, which the Receiver reproduces as Exhibit 26, says simply: "Crown Forex investigation." It surely does not say that there had been any liquidation of Crown Forex, SA, let alone that Associated was aware of any such liquidation.

b. *Associated took acts "calculated to avoid or delay the scrutiny and detection of banking regulators." See*, *e.g.*, Receiver Br. 4, 10, 16-17, 35, 36, 43. The Receiver repeatedly asserts in his brief that Associated "advised the fraudsters on how to avoid detection." Receiver Br. 35. But that assertion finds no support in the complaint, which states only that Associated advised its customers of regulatory requirements. A43 ¶ 5. That is what banks are expected to do for their customers every day as a matter of routine.

c. *Associated permitted atypical account transfers, including a cash withdrawal of $600,000.* The Receiver alleges repeatedly that Associated approved suspicious cash transfers, such as the withdrawal of $600,000 for the stated reason of purchasing a yacht. *See* Receiver Br. 19, 21, 33, 46. But as we have explained, it is the *obligation* of a bank to permit a customer to transfer or withdraw his or her funds from an account. Even if recognized as unusual or suspicious, such transfers would not provide Associated with knowledge of a Ponzi scheme or other fraud.[9] And, of course,

[9] Associated allegedly approved withdrawals or account transfers even though some accounts could have been for personal use; the Receiver relies on these allegations for his assertion that Associated "actively participated in the fraud." Receiver Br. 34. But investment advisors are often entitled to compensate themselves from client funds; in some circumstances, the Securities and Exchange Commission's regulations allow investment advisors to make arrangements with their clients authorizing them "to with-
(cont'd)

the Receiver cannot know—and Associated is legally precluded from disclosing—whether it submitted SARs to government authorities on these transactions.[10]

d. *Associated "falsified" documents. See, e.g.*, Receiver Br. 11, 16, 18, 32, 35. The Receiver repeatedly asserts that Associated "falsified" account opening documents. In particular, the Receiver asserts that (1) accounts were opened without verification of Secretary of State registration material, (2) account opening statements falsely listed an address that included a "suite number," and (3) account opening statements failed to indicate that these accounts were designed to hold investor funds.

In fact, the documents to which the Receiver refers (and which he attaches to the complaint) are form signature cards and depository declaration statements prepared by the Wisconsin Bankers Association. These are

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draw client funds or securities maintained with a custodian upon [the advisor's] instruction to the custodian." 17 C.F.R. § 275.206(4)-2(d)(2)(ii). It is thus no surprise that "approving transfers"—including "personal payments" to the account holder—"even where there is a suspicion of fraudulent activity, does not amount to substantial assistance." *In re Agape Litig.*, 681 F. Supp. 2d 352, 358, 365 (E.D.N.Y. 2010).

[10] The Receiver alleges in conclusory fashion "on information or belief" that Associated disregarded its obligation to report suspicious account activity. Receiver Br. 19, 22 (citing A63 ¶ 48). In fact, as we have explained, it is legally impossible for the Receiver to know whether that is so.

forms filled out with information provided *by the customer*. As for the Receiver's specific allegations:

First, so far as the verification is concerned, the affidavit the Receiver attached to his complaint explains that Associated employee Sarles had opened multiple accounts for Cook and Kiley and "for all but one" he "obtained valid … Secretary of State registration documentation" and other requirements. Appellee Add. 4 ¶ 13. Thus, when he had "previously opened accounts for Cook and Kiley" he "had been provided all necessary account opening documents and information." *Id.* ¶ 14. When he opened the account on which the Receiver now focuses, Sarles "informed Kiley that he must send the documentation" from the Secretary of State after the forms were completed, but Sarles "did not remember to follow-up with Kiley to obtain the missing Secretary of State registration documentation." *Id.* at 4-5 ¶¶ 14, 17. Whether or not this oversight was negligent or a violation of bank policy, it certainly does not show that Sarles, much less Associated, *knew* that Kiley was operating a Ponzi scheme.

Second, the complaint uses ambiguous language as to who provided or completed the material containing the suite number. Thus, the complaint asserts that "the business address identified on the account documents falsely identified the business as being located in an office 'Ste 100'

or 'Suite #100.'" A57 ¶ 36. This may, again, suggest a failure to verify on Associated's part, but does not remotely demonstrate either "falsification" or knowledge of fraud by Associated.[11]

Third, the complaint does not specify *who* filled out the registration form that failed to designate the accounts as holding investor funds. The complaint says only, and in the passive tense, that "the account documentation was prepared to falsely indicate that account #5601 was a 'Checking/Money Market' account for use as a 'GENERAL OPERATING ACCOUNT.'" A57 ¶ 36. In fact, it is generally the customer who makes such statements to the bank in connection with account openings.

e. *Associated "falsified" certain cashier's checks*. *See*, *e.g.*, Receiver Br. 20-21. The Receiver identifies as a "documentary smoking gun" that Associated placed the names of other entities on the remitter line of cashier's checks that Crown Forex actually purchased, asserting that "[t]hese created the false impression of segregated accounts." Receiver Br. 20. But it is the *customer*, not Associated, that supplies the remitter information for a check—and that information is of no legal significance: "[R]emitters are often left off of cashier's checks. … [F]illing in of the remitter line on a

[11] Associated allegedly knew that Kiley operated out of a house (Receiver Br. 17), but even if that fact were unusual (or suspicious), it hardly offers knowledge of fraud; legitimate businesses often are run from residences.

cashier's check is akin to the filling in of the memo line on a personal check; helpful, but not required, and of no legal effect." *In re Spears Carpet Mills, Inc.*, 86 B.R. 985, 993 (Bankr. W.D. Ark. 1987).[12] Associated, accordingly, could well have believed that the remitter descriptions were of internal significance to the purchaser of the check. A customer, as a matter of its own bookkeeping, may view funds in a general account as earmarked or segregated for specific purposes; a bank has no way of knowing how a customer records its accounts. The remitter names were not improper at all, let alone a "smoking gun" that gave Associated actual knowledge of fraud.

In all, even if the Receiver's appellate assertions were grounded in the complaint, they would be insufficient to establish actual knowledge of the Ponzi scheme. But the fact is, the Receiver's hyperbole is constructed from insupportable characterizations. His contentions should be rejected for that reason alone.

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[12] As one banker has described best practices in this regard, "[a]s long as the check used to purchase the cashiers check is payable to and endorsed by the purchaser, I would probably be willing to list anyone as the remitter. Since there is no requirement that the remitter be shown on the cashiers check itself, I would not be comfortable telling the purchaser who has to be [listed]—he might suggest it was none of my business." Ken Golliher, *Remitter Requirements for Cashier's Checks* (Feb. 4, 2002), http://tiny.cc/alt3ax.

2. The Receiver's theory—that it may plead knowledge by alleging the presence of "red flags"—is wrong.

a. When stripped of its conclusory labels, the Receiver's brief really asserts that a bank may be presumed to have knowledge of its customers' intentionally tortious activity when the bank was exposed to "red flags" indicating suspicious behavior—which is to say, that Associated was put on notice of fraud by its customers' unusual movement of funds and related activity. But seeing someone act oddly—or suspiciously—hardly puts the observer on actual notice of fraud. Thus, as the district court concluded, "such a theory of liability is not viable in an aiding and abetting claim" (Add.9) because it does not require demonstration that "Associated Bank had 'actual awareness of its role in the fraudulent scheme.'" Add.10 (quoting *K&S P'Ship*, 952 F.2d at 977).

The Receiver's contrary argument, by contrast, would impose "near-strict liability for the torts of [a bank's] clients," leading to "a 'devastating impact' on commercial relationships." *El Camino Res., Ltd. v. Huntington Nat'l Bank*, 722 F. Supp. 2d 875, 906, 908 (W.D. Mich. 2010) (*El Camino I*), *aff'd*, *El Camino II*, 712 F.3d 917. Banks "will always have more information about the client's conduct than the general public, making them vulnerable to the hindsight accusation that they knew of the client's wrongdoing or were wilfully blind." *Id.* But courts must reject claims that,

like the Receiver's here, would "make such institutions the guarantors of their customers' conduct." *Id.*

The Receiver's theory, moreover, is irreconcilable with Minnesota law, which holds that banks have no duty to monitor the conduct of their account holders. *See Swift Cnty. Bank*, 366 N.W.2d at 609. Common-law tort obligations may not *de facto* undo state-law judgments as to the scope of bank duties. *See El Camino I*, 722 F. Supp. 2d at 907. It is little surprise, therefore, that the Receiver's "red flag" theory has been rejected repeatedly by courts around the country.

The Sixth Circuit, for example, recently concluded that, notwithstanding the presence of several "'red flags' associated with" a particular account, a bank did not have sufficient knowledge that its customer was committing fraud to support an aiding-and-abetting claim. *El Camino II*, 712 F.3d at 920. As is alleged here, the customer's "account exhibited odd and suspicious behavior." *Id.* at 923. The customer often "received large payments" from a particular company, and the bank did not understand how those entities "were related." *Id.* The bank, moreover, knew that a principal at its customer "had been sanctioned previously by the SEC for a securities violation." *Id.* While this all spoke "volumes to [the bank's] sus-

picions of wrongdoing," it "say[s] nothing of its actual knowledge of [the customer's] wrongdoing." *Id.*[13]

In just the same fashion, the Eleventh Circuit affirmed dismissal of a claim strikingly similar to that here. In *Lawrence v. Bank of America, N.A.*, 455 F. App'x 904, 905 (11th Cir. 2012), Diamond operated a Ponzi scheme through accounts at Bank of America, which allegedly had several warning signs of misconduct:

- "Diamond made exceptionally large deposits into the Diamond Ventures account." *Id.*
- "[M]illions of dollars streamed out of the Diamond Ventures Account to fund personal and gambling expenditures for Diamond." *Id.*
- "Diamond engaged in atypical business transactions, such as numerous wire transfers unrelated to any legitimate business activity." *Id.*
- Diamond "informed Bank of America of his personal history and the nature of his business, which was an 'investment club.' Bank of America does not permit investment clubs." *Id.*
- Because of the flow of funds, bank officials "should have known that the money being sent to investors came from new client deposits, rather than profits from foreign exchange companies." *Id.*

[13] *See also Lerner v. Fleet Bank, N.A.*, 459 F.3d 273, 294 (2d Cir. 2006) ("'red flags,' as alleged, were insufficient to establish a claim for aiding and abetting fraud because, although they may have put the banks on notice that some impropriety may have been taking place, those alleged facts do not create a strong inference of actual knowledge" of the underlying tort).

But because Florida law (like Minnesota law) "does not require banking institutions to investigate transactions," the Eleventh Circuit held that these "allegations simply fail to make … 'plausible'" the necessary element of "knowledge." *Id.* at 907.[14]

And myriad district courts have similarly held that "red flags" indicating suspicious activity by bank customers are not enough to show that the bank had knowledge of its customer's fraudulent conduct. *See*, *e.g.*, *Varga*, 952 F. Supp. 2d at 858 ("it is not enough to plead awareness" of "red flags"); *Wiand v. Wells Fargo Bank, N.A.*, 938 F. Supp. 2d 1238, 1244 (M.D. Fla. 2013) ("'red flags' … are insufficient to establish a claim for aiding and abetting"); *de Abreu v. Bank of Am.*, 812 F. Supp. 2d 316, 325 (S.D.N.Y. 2011) ("[N]otice of 'red flags' that [a customer] was engaging in fraudulent activity … would not be sufficient to support an allegation of actual knowledge"); *In re Agape Litig.*, 773 F. Supp. 2d 298, 318-19 (E.D.N.Y. 2011) ("While the Plaintiffs have gathered allegations of 'red flags' and suspicious circumstances, which in hindsight may appear to in-

[14] The Receiver tries to distinguish *Lawrence* on the ground that it involved the customer's "atypical business transactions" rather than allegedly atypical behavior by the bank. Receiver Br. 42. But the Receiver conflates the knowledge and substantial assistance requirements; we cite *Lawrence* to show that the Receiver's allegations of knowledge are insufficient.

dicate the obviousness of the fraud, these allegations fail to … sufficiently allege[] facts that raise a strong inference of actual knowledge from circumstantial evidence."), *aff'd sub nom. Weshnak v. Bank of Am., N.A.*, 451 F. App'x 61 (2d Cir. 2012); *Stern v. Charles Schwab & Co.*, 2010 WL 1250732, at *11 (D. Ariz. 2010) (knowledge of "red flags" insufficient to show knowledge of underlying fraud); *Nathel v. Siegal*, 592 F. Supp. 2d 452, 469 (S.D.N.Y. 2008) ("Even where a bank was on notice of 'red flags' that indicated certain accounts may have been vehicles for fraudulent activity and referred the case to its internal fraud unit, the bank had only suspicions but not actual knowledge of fraud."); *Ryan v. Hunton & Williams*, 2000 WL 1375265, at *9 (E.D.N.Y. 2000) ("Allegations that [the bank] suspected fraudulent activity … do not raise an inference of actual knowledge of … fraud."); *Nigerian Nat'l Petroleum Corp. v. Citibank, N.A.*, 1999 WL 558141, at *8 (S.D.N.Y. 1999). Contrary to the Receiver's assertion (Br. 42 & n.5), far more than three authorities establish this point.

Moreover, the circumstances of this case, viewed in light of "judicial experience and common sense" (*Iqbal*, 556 U.S. at 679), present particularly compelling reasons to apply the understanding that exposure to red flags is insufficient to establish actual knowledge of the Ponzi scheme. The Receiver does not allege that Associated shared in proceeds of the fraud or

otherwise benefited from it directly; instead, he posits that the Bank took the enormous risk of knowingly assisting a massive Ponzi scheme in hopes of receiving nothing more than deposits to be held in low-interest accounts. Receiver Br. 39. On the face of it, that is a highly *im*plausible explanation for the Bank's behavior. The much "more likely" and "obvious alternative explanation" (*Iqbal*, 556 U.S. at 681-82) is that, consistent with Minnesota law, Associated simply did not investigate its customers' actions and thus did not know that they were running a Ponzi scheme.

Accordingly, the rule 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), *aff'd,* 349 F. App'x 637 (2d Cir. 2009).[15]

b. Rather than respond to this authority, the Receiver points to a handful of other district court decisions, none of which is relevant here.

[15] It appears that the Receiver has abandoned his argument, made below, that an alleged profit motive for Associated could establish knowledge. Courts have rejected that kind of argument, reasoning that "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. Corp.*, 525 F. Supp. 2d 381, 389 (S.D.N.Y. 2007).

Thus, the Receiver relies heavily (Br. 5, 43-44) on *Arreola v. Bank of Am., N.A.*, 2012 WL 4757904, at *3 (C.D. Cal. 2012). But there, a bank branch manager allegedly took bribes directly from perpetrators of the fraud, which the court found was enough to show knowledge. *Id.* at *1-2. There are no comparable allegations here.

The Receiver's remaining authorities also are quite different from this case; all involved defendants who were insiders of, or who had inside information about, the fraud's perpetrators. In *Mosier v. Stonefield Josephson, Inc.*, 2011 WL 5075551, at *8 (C.D. Cal. 2011) (Receiver Br. 44), the court found actual knowledge because the defendant, an auditor, allegedly uncovered the fraudulent conduct during the course of its audit. In *In re MuniVest Services, LLC*, 500 B.R. 487, 505 (Bankr. E.D. Mich. 2013), the accountant had inside access to the perpetrator's books. In *Anwar v. Fairfield Greenwich Ltd.*, 728 F. Supp. 2d 372, 451 (S.D.N.Y. 2010), the defendant likewise had inside knowledge of the perpetrator's operation.[16] And in *Court-Appointed Receiver of Lancer Management Group LLC v. Lauer*, 2010 WL 1372442, at *4 (S.D. Fla. 2010), the defendant was alleg-

[16] Notably, the court *granted* a motion to dismiss as to defendant auditors that allegedly missed red flags, but were not insiders. *Anwar*, 728 F. Supp. 2d at 452-54.

edly "an officer or director" of the fraudulent entities. None of these cases involved conduct like that here.

The Receiver also looks to the application of California law in *Neilson v. Union Bank, N.A.*, 290 F. Supp. 2d 1101, 1121 (C.D. Cal. 2003), for the contention that the complaint need not "directly state that banks knew of the Ponzi scheme." Receiver Br. 45. But that approach is flatly inconsistent with Minnesota law—as well as the law of every other state that takes the Restatement approach to aiding and abetting. Indeed, *Neilson* has been criticized even in California. *See, e.g.*, *Chance World Trading v. Heritage Bank of Commerce*, 438 F. Supp. 2d 1081, 1086 (N.D. Cal. 2005).

At bottom, nothing here establishes that Associated actually knew that its customers were running a Ponzi scheme. The Receiver, accordingly, has failed to plead a necessary element of each of his claims.

3. The Receiver's complaint negates the necessary element of knowledge.

Finally, as the district court below noted, the Receiver's own complaint negates the necessary element of knowledge. *See* Add.9. The complaint expressly alleges that, "[h]ad Associated Bank investigated any of the numerous red flags it had before it as raised by several employees, Associated Bank would have uncovered and prevented the Ponzi scheme

from flourishing." A79 ¶ 74. The Receiver also expressly pleads that Associated did not prevent the Ponzi scheme. *See* A79-81. The necessary conclusion from these allegations is that Associated *would* have "prevented the Ponzi scheme" had it been aware of the misconduct—and, accordingly, that the Bank was *not* aware of the scheme.

In fact, the Wisconsin Court of Appeals considered a nearly identical allegation against Associated in the *Grad* lawsuit, and it held that this allegation defeated plaintiffs' aiding-and-abetting claims:

> Grad's complaint alleges that, had Associated known about the fraud, it would have "[frozen] the accounts and immediately report[ed] the suspicious facts and circumstances to law enforcement." … This allegation is inconsistent with a theory that Associated intended to assist [the Receivership Entity's] intentional torts.

Grad, 801 N.W.2d 349, 2011 WL 2184335, at *7. The same logic applies with equal force here.

At the motion to dismiss stage, a court must take as true *all* factual allegations, including those that plead the plaintiff out of court. In *Freitas v. Wells Fargo Home Mortgage, Inc.*, 703 F.3d 436, 440 (8th Cir. 2013), for example, the Court considered a claim of promissory estoppel. Although the bank allegedly represented that it would modify a particular loan, "the complaint's other allegations (which we must accept as equally true) ne-

gate any reasonable inference that this representation was a 'promise' sufficient to meet the first element of promissory estoppel." *Id*. at 440-41.[17]

Although a plaintiff may assert inconsistent theories in *separate* claims pursuant to Fed. R. Civ. P. 8(d)(3), "no authority is known ... which permits blowing hot and cold in the same cause of action." *Qwest Commc'ns Corp. v. Herakles, LLC*, 2008 WL 783347, at *12 (E.D. Cal. 2008) (quotation omitted). Here, the Receiver does not plead in the alternative; he presses only one theory—aiding and abetting. But the Receiver's allegation at Paragraph 74, taken as true, negates that theory.

The Receiver cannot save his claim by suggesting that he really means to allege willful blindness. Receiver Br. 41. Willful blindness is not a cognizable theory to begin with. *See* pages 20-21 & n.7, *supra*. Moreover, the Receiver's concession is inconsistent even with a willful blindness theory. One who willfully blinds himself does so to *avoid* bringing a fraud to light; the Receiver, however, alleges that had Associated known of the fraud, it would have taken steps to stop it. That contention doubtless is

[17] Even if the Receiver were permitted to amend his complaint—which, for reasons we explain below, he is not entitled to do—a party may not retract an admission; "[a] pleading abandoned or superseded … may be introduced into evidence as the admission of a party." *Sunkyong Int'l, Inc. v. Anderson Land & Livestock Co.*, 828 F.2d 1245, 1249 n.3 (8th Cir. 1987).

correct, but it negates the Receiver's assertion that Associated knew of, or willfully blinded itself to, the Ponzi scheme.

C. The Complaint Fails To Plausibly Allege Substantial Assistance.

The district court also properly concluded that the Receiver failed to plausibly allege that Associated substantially assisted the Ponzi scheme. To substantially assist a tort, a party must do more than provide "routine professional services." *Witzman*, 601 N.W.2d at 189. Under the Restatement approach to aiding-and-abetting liability, which Minnesota applies (s*ee id*. at 187), "mere maintenance of a bank account, receipt or transfer of funds, or repeated execution of wire transfers involving allegedly purloined funds do not constitute substantial assistance." *El Camino I*, 722 F. Supp. 2d at 911 (citing *Weiss v. Nat'l Westminster Bank PLC*, 453 F. Supp. 2d 609, 621-22 (E.D.N.Y. 2006)). But that is all the Receiver alleges in this case.

Substantial assistance "requires the plaintiff to show that the secondary party proximately caused the violation, or, in other words, that the encouragement or assistance was a substantial factor in causing the tort." *K&S P'ship*, 952 F.2d at 979. Inaction does not rise to the level of substantial assistance. Rather, "[l]iability is based on [a defendant's] affirmative acts, not acts it should have taken." *Am. Bank*, 713 F.3d at 463. "Some af-

firmative step is required, because 'the mere presence of the particular defendant at the commission of the wrong, or his failure to object to it, is not enough to charge him with responsibility.'" *Id.* at 462 (quoting *Witzman*, 601 N.W.2d at 189).

The district court properly concluded that nothing in the complaint alleges that Associated substantially assisted the fraud. As we have shown, none of the allegations that the Receiver advances goes beyond the "routine professional services" that the district court found Associated provided in the course of its "arms-length, commercial relationship" with the fraud's perpetrators. Add.12. Such allegations, even when accompanied by "red flags," are consistently found insufficient to hold a bank liable for aiding and abetting a Ponzi scheme.

For example, the Second Circuit recently affirmed dismissal of aiding-and-abetting claims brought against Bank of America ("BOA") in connection with a Ponzi scheme orchestrated by its customer. *Weshnak*, 451 F. App'x 61. The fraud's perpetrator, Cosmo, used bank accounts to run the investment scam. The allegations against BOA were extensive and, in significant respects, far more suggestive of improper conduct than those here:

- "Tom Sullivan, a BOA senior manager, recommended a structure of accounts that allowed Agape to move money from sub-accounts into an operating account and a Remote Depository System that allowed Agape to deposit checks from its headquarters." *Id.* at 62.

- "BOA effectively established an unofficial branch within Agape headquarters … to provide on-site banking services." *In re Agape Litig.*, 681 F. Supp. 2d 352, 358 (E.D.N.Y. 2010).

- "The BOA employee staffed to Agape's headquarters had access to Agape's business records and personal contact with Agape employees." *Id.* at 362.

- There were several "'red flags' or badges of fraud that should have induced BOA" to investigate the fraud's perpetrators, including that "investor deposits" were used for "(1) significant wire transfers totaling $100 million or more; (2) personal payments to [the perpetrator]; (3) interest payments to certain investors; and (4) payments to brokers." *Id.* at 358-59.

- The perpetrator "commingled these investors funds without segregating the money according to investor name" and used the "operating account" meant to fund investments "to wire funds to Panama and Switzerland." *Id.* at 358.

- "[W]hen a particular investor sought a redemption, it was the BOA employee—at Cosmo's direction—who issued the investor a check for $162,500." *Id.* at 362.

- There was "a conversation between the BOA employee and an unnamed broker in which the BOA employee apparently failed to correct the broker's misapprehension that the loan Agape was waiting for from BOA was for $1 million and not $28 million as the broker had been told by Cosmo." *Id.*

Notwithstanding these allegations against BOA, the Second Circuit concluded that a "bank's provision of its 'usual banking services to a customer … does not in and of itself rise to the level of substantial assistance.'" *Weshnak*, 451 F. App'x at 62. The Second Circuit thus affirmed the district court's decision, which had found that "opening accounts and approving transfers, even where there is a suspicion of fraudulent activity, [do] not amount to substantial assistance," because "BOA had no affirmative duty to detect and thwart Cosmo's fraud." *In re Agape Litig.*, 681 F. Supp. 2d at 365.

Other courts have reached the same result. *See, e.g.*, *Ryan*, 2000 WL 1375265 (banking activities coupled with red flags does not qualify as substantial assistance).[18]

Just as the Receiver does not plausibly allege that Associated has knowledge of the underlying Ponzi scheme, he cannot plead that Associated did anything that substantially assisted the scheme.

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[18] The Receiver points (Br. 30, 46-47) to three cases with respect to substantial assistance, but each case hinged the finding of substantial assistance on a showing of actual knowledge of the underlying tort. *See Wight v. BankAmerica Corp.*, 219 F.3d 79, 92 (2d Cir. 2000); *Aetna Casualty & Surety Co. v. Leahy Construction Co.*, 219 F.3d 519, 537 (6th Cir. 2000); *Ivie v. Diversified Lending Group, Inc.*, 2011 WL 996112, at *7 (W.D. Mich. 2011).

II. The Receiver Is Barred From Pursuing These Claims.

Not only does the Receiver fail to state a claim, but his action is barred for two independent reasons—the *in pari delicto* doctrine and *res judicata*. Although the district court did not reach these issues because it dismissed for failure to allege aiding and abetting (Add.7 n.6), this Court "may affirm the judgment on any basis supported by the record." *Spirtas Co. v. Nautilus Ins. Co.*, 715 F.3d 667, 670 (8th Cir. 2013) (quotation omitted).

A. The *In Pari Delicto* Doctrine Bars This Action.

"The doctrine of *in pari delicto* is the principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." *Grassmueck v. Am. Shorthorn Ass'n*, 402 F.3d 833, 837 (8th Cir. 2005) (quotation omitted). Like other affirmative defenses, *in pari delicto* may "provide the basis for dismissal under Rule 12(b)(6)" if it "is apparent on the face of the complaint." *ABF Freight Sys., Inc. v. Int'l Bhd. of Teamsters*, 728 F.3d 853, 861 (8th Cir. 2013). Here, the complaint establishes the defense: the Receiver, who admittedly stands in the shoes of the Receivership Entities (*see, e.g.*, Receiver Br. 2), argues that Associated aided and abetted torts committed *by* the Receivership Entities.

1. Minnesota has broadly embraced the *in pari delicto* doctrine, which "operates to prevent wrongdoers at equal fault from recovering against one another." *Christians v. Grant Thornton, LLP*, 733 N.W.2d 803, 814 (Minn. Ct. App. 2007). It applies "to tortious transactions based upon fraud or similar intentional wrongdoing" as "[g]enerally, anyone who engages in a fraudulent scheme forfeits all right to protection, either at law or in equity." *State ex rel. Head v. AAMCO Automatic Transmissions, Inc.*, 199 N.W.2d 444, 448 (Minn. 1972) (quotation omitted); *see also F&H Inv. Co. v. Sackman-Gilliland Corp.*, 728 F.2d 1050, 1054 (8th Cir. 1984). This conclusion stems from the rule that "[a]n intentional tortfeasor is prohibited from seeking contribution from other joint tortfeasors." *Oelschlager v. Magnuson*, 528 N.W.2d 895, 899 (Minn. Ct. App. 1995).

Christians is particularly instructive. There, a company's bankruptcy trustee brought claims against an auditor. *Christians*, 733 N.W.2d at 807-08. The trustee asserted that the auditor's erroneous report caused the company injury. But it was the company itself that had failed to disclose material transactions to the auditor. *Id.* at 814. Even assuming the auditor had some liability, the court concluded that *in pari delicto* barred the trustee's claims because the company "bears at least substantially equal responsibility for the injury it seeks to remedy." *Id.* (quotation omit-

ted). "[W]hen a defendant's only sin is its failure to prevent transgressions by the plaintiff, no benefit flows to the public from rewarding the transgressor." *Id*. at 815 (quotation omitted).

2. The doctrine applies here. There is no doubt that the Cook/Kiley entities for which the Receiver acts committed fraud. And under Minnesota law, "by virtue of his appointment" a "receiver stands" in the "shoes" of the receivership entity. *Merrill v. Zimmerman*, 188 N.W. 1019, 1022 (Minn. 1922); *see also Dickson v. Baker*, 77 N.W. 820, 821 (Minn. 1899).[19]

Thus, in circumstances identical to those here, the Seventh Circuit found that *in pari delicto* barred tort claims brought by a federally appointed receiver against a third party. In *Knauer*, 348 F.3d at 232, a receiver sued broker-dealers that had licensed perpetrators of a Ponzi scheme as securities representatives, asserting that the defendants had aided the perpetrators. The Seventh Circuit, however, held the action barred by the *in pari delicto* doctrine under Indiana law that (like Minne-

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[19] In *Christians*, the Minnesota courts applied the *in pari delicto* defense to a bankruptcy trustee, which is akin to a federal equity receiver. *Alexander v. Hedback*, 718 F.3d 762, 767 (8th Cir. 2013). Although the trustee contended that the *in pari delicto* defense "should not apply to bankruptcy trustees as a matter of public policy because it would harm innocent creditors," the court disagreed, holding that "courts regularly consider in pari delicto defenses and act to bar trustee claims on that basis despite the inevitable harm to creditors." *Christians*, 733 N.W.2d at 814.

sota's) generally holds a receiver to be situated the same as the corporation for *in pari delicto* purposes. *Id.* at 235-36. The court noted an exception to this rule in cases where assets have been fraudulently transferred to the party asserting the *in pari delicto* defense; that is so because there is a "key difference" between cases involving "fraudulent conveyance" to the defendant and those presenting claims for "tort damages from entities that derived no benefit from the embezzlements, but that were allegedly partly to blame for their occurrence." *Id.* at 236. In the latter circumstance—which describes this case[20]—"[t]he doctrine of *in pari delicto* … applies to defeat the receiver's claims." *Id.* at 238. The same approach controls here.[21]

3. Below, the Receiver nevertheless opposed *in pari delicto* by pointing to fraudulent-transfer cases.[22] But, as *Knauer* explains, these decisions

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[20] Below, the Receiver argued that Associated "benefited" from the embezzlement. But Associated is identically situated to the defendant in *Knauer*: neither is alleged to have obtained *embezzled funds*; both allegedly received ordinary fees for their services.

[21] *Knauer* has been broadly applied. *See*, *e.g.*, *Myatt v. RHBT Fin. Corp.*, 635 S.E.2d 545, 546-48 (S.C. Ct. App. 2006) (applying *in pari delicto* to a federally-appointed receiver pursuing aiding and abetting claims against a bank); *Hays v. Pearlman*, 2010 WL 4510956, at *5-7 (D.S.C. 2010).

[22] *See*, *e.g.*, *German-Am. Fin. Corp. v. Merchs.' & Mfrs.' State Bank*, 225 N.W. 891, 893-94 (Minn. 1929); *Kelley v. Coll. of St. Benedict*, 901 F. Supp. 2d 1123, 1129 (D. Minn. 2012).

say nothing at all about *third-party tort claims*. In fact, the leading fraudulent-transfer decision, *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995), which stated that "the defense of *in pari delicto* loses its sting when the person who is *in pari delicto* is eliminated," was *also* decided by the Seventh Circuit. *Knauer* (the later-decided case) clearly and expressly distinguished *Scholes*, holding it limited to the fraudulent-conveyance context.

The Receiver also cited *Head*, 199 N.W.2d at 448, for the proposition that, in certain circumstances, the *in pari delicto* doctrine may bend to public policy considerations. But *Head* merely noted that particular statutory schemes enacted by a legislature—like antitrust—may override the common-law doctrine of *in pari delicto*. *Head* itself applied *in pari delicto* to bar common-law claims. *Id.* Here, as in *Head*, there are no statutory policies that call for a different result; there are only common-law claims, and thus the common-law defense of *in pari delicto* applies. As we have noted, Minnesota courts broadly apply the doctrine, notwithstanding policy concerns of "inevitable harm to creditors." *Christians*, 733 N.W.2d at 814.

Finally, the Receiver pointed 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. That exception is inapplicable where, as here, perpetrators of a fraud and the corporation they controlled are one and the same. *See Grassmueck*, 402 F.3d at 840. The Receiver did not, and could not, argue that the exception applies in this case.

* * *

The complaint makes clear that the Receivership Entities perpetrated a massive fraud. Because there is no disputing that the role of the perpetrators in committing that fraud was comparatively far greater than any alleged role of Associated—even if one accepts as valid the Receiver's allegations of Associated's knowledge and substantial assistance—it is appropriate to affirm dismissal of the complaint on *in pari delicto* grounds now. This case is just like *Knauer*, and the result should be no different.

B. *Res Judicata* Bars The Receiver's Claims.

Separately, the Receiver's claims are barred by *res judicata*. Some Cook/Kiley investors previously sued Associated in Wisconsin state court on the same cause of action—and lost. Because the Receiver is in privity with those investors, the claims he raises here are barred by the outcome of that litigation.[23]

[23] Below, the Receiver attempted to argue that there was some tension between Associated's *in pari delicto* and *res judicata* arguments. But that is not so. *In pari delicto* demonstrates why the Receiver, who stands in the (cont'd)

Res judicata precludes "a subsequent lawsuit on the same cause of action as to matters actually litigated and as to other claims or defenses that could have been litigated." *SMA Servs., Inc. v. Weaver*, 632 N.W.2d 770, 773 (Minn. Ct. App. 2001). It has three requirements: (1) "there was a final judgment on the merits," (2) "a second suit involves the same cause of action," and (3) "the parties to both were identical or were in privity with identical parties." *Id*. These requirements are satisfied here.

1. There is no disputing the first two elements: several investors sued Associated in Wisconsin and lost on the merits, and the judgment was affirmed on appeal. *See* pages 7-8, *supra*. Those investors argued that Associated "aided and abetted" the Receivership Entities' "breach of a fiduciary duty to [the investors] and conversion of [the investors'] property." *Grad*, 801 N.W.2d 349, 2011 WL 2184335, at *1.

This suit involves the same cause of action as that one because "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

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shoes of the fraud's perpetrators, may not sue Associated for allegedly aiding the perpetrators. But *in pari delicto* does not apply to claims by *investors*. When the investors sued Associated in *Grad*, Associated did not press an *in pari delicto* defense. Although investors may sue Associated, they may not sue again after having already lost—nor may their privy.

many different theories of relief may apply." *A.B.C.G. Enters. v. First Bank Se.,* 504 N.W.2d 382, 385 (Wis. Ct. App. 1993).

The Receiver asserted below that there was 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." Doc. 43, at 15-16. But *res judicata* does not turn on identity of *legal* theories; it may not be circumvented by simple changes to a party's legal argument, or by bringing claims involving previously litigated conduct in a different state with different law. *A.B.C.G. Enters.,* 504 N.W.2d at 385.

2. As a matter of Minnesota law, the Receiver is in privity with the *Grad* investors, which satisfies the third *res judicata* requirement. The Minnesota Supreme Court has held that a "creditor of [a] corporation" is "in privity with the plaintiff receiver, who represent[s] and act[s] for all the creditors." *Lamson v. Towle-Jamieson Inv. Co.*, 245 N.W. 627, 628 (Minn. 1932). There, after a corporation's receiver sued for the value of a farm and lost, the court held that an individual creditor of the corporation—who sued the same defendants seeking the same relief—was in privity with the receiver, who acted for his benefit. *Id*. at 627-28. As the court explained, those "in privity with an unsuccessful litigant are as much

bound by the judgment finally defeating him as is the litigant himself." *Id.* at 628; *see also Javitch v. Gottfried*, 2007 WL 81857 (N.D. Ohio 2007) (settlement by investors in a fraudulent investment scheme barred subsequent claim by a receiver); *Britt v. Vernon*, 2006 WL 2843626 (E.D. Cal. 2006) (receiver's settlement precluded a claim by a creditor against the same defendant). That is *exactly* the situation here. According to the Receiver, the Receivership Entities owe the investors money (A41 ¶ 83); the investors are thus creditors of those entities.

It is immaterial that in *Lamson* the receiver rather than the investor sued first. What matters is the legal conclusion that the parties were privies. In fact, in *Javitch*, 2007 WL 81857, at *2-3, the court applied *res judicata* to a receiver's action that followed a claim first brought by an investor.

3. The Receiver argued below that *res judicata* does not apply because he did not participate in the *Grad* lawsuit. But it is *always* the case that application of the privity doctrine bars relitigation by someone who did not participate in the prior litigation. When, as here, investors have already sued in their own name, there is nothing left for the Receiver—their privy—to do. That is why the receiver-creditor relationship is alone sufficient for privity. 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.[24]

To be sure, "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." *Reil v. Benjamin*, 584 N.W.2d 442, 445 (Minn. Ct. App. 1998). But 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. Because the Receiver is in privity with investors who already sued and lost, his claims are barred.[25]

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[24] The Receiver also pointed below to *Commodity Futures Trading Commission v. Chilcott Portfolio Management*, 713 F.2d 1477, 1486 (10th Cir. 1983), but that case 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.

[25] For *res judicata* purposes, it does not matter that only a subset of Cook/Kiley creditors sued in Wisconsin, while the Receiver now seeks to benefit all victims of the fraud. The dispositive point is that persons who stood in the Receiver's shoes litigated and lost in Wisconsin the same claim that the Receiver now seeks to relitigate here. Of course, individual investors who did not participate in the Wisconsin litigation were not in privity with the individual Wisconsin litigants and are not bound by the judgment in that case. But if those investors wish to sue Associated, they must do so in their own names.

III. The District Court Did Not Abuse Its Substantial Discretion In Denying The Receiver's Request For Reconsideration.

After the Receiver lost the motion to dismiss and the district court entered judgment, the Receiver sought reconsideration so that he could amend the complaint (1) to *remove* an allegation from his pleading and (2) to add new claims regarding unspecified "additional torts" to his complaint. Receiver Br. 48.

A district court has considerable discretion in deciding whether, after it has entered judgment, to grant reconsideration and permit a late amendment. The district court did not abuse that discretion here, for at least three independent reasons: the Receiver cannot meet the demanding amendment standard imposed by Rule 59(e), which is quite different than the Rule 15 standard the Receiver cites; the Receiver cannot—and has not even attempted to—excuse his late efforts to add wholly new legal claims; and the Receiver has provided insufficient detail as to his proposed amendments.

1. The district court did not abuse its discretion because the Receiver cannot meet the demanding standard that applies when a party seeks to amend his or her complaint *after* judgment.

To begin with, the Receiver misstates the controlling law in significant ways. The Receiver's argument turns on the "permissive amendment

standards" of Rule 15. Receiver Br. 49. This argument is fundamentally wrong, however, because "after a court dismisses a complaint, a party's right to amend under Rule 15 terminates." *Geier v. Missouri Ethics Comm'n*, 715 F.3d 674, 677 (8th Cir. 2013). "Although leave to amend a complaint should be granted liberally when the motion is made pretrial, different considerations apply to motions filed after dismissal." *Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 629 (8th Cir. 1999).[26]

Under the proper standard, "[a] district court does not abuse its discretion in denying a plaintiff leave to amend the pleadings to change the theory of the[] case after the complaint has been dismissed under Rule 12(b)(6)." *Briehl*, 172 F.3d at 629. If the Receiver wanted to assert a different theory of the case, he should not have waited until the district court

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[26] The Receiver improperly cites *Michaelis v. Nebraska State Bar Ass'n*, 717 F.2d 437, 438 (8th Cir. 1983) (per curiam), for the proposition that a dismissal should "usually" be with leave to amend. *Michaelis* involved a dismissal under *Rule 8*—"[o]rdinarily dismissal of a plaintiff's complaint for failure to comply with Rule 8 should be with leave to amend." *Id.* at 438-39. A court may dismiss an action under Rule 8 for, among other things, failure to include "a short and plain statement of the grounds for the court's jurisdiction." Fed. R. Civ. P. 8(a)(1). *Michaelis* says nothing about this case, which was dismissed pursuant to Rule 12(b)(6) for failure to state a claim.

Similarly, the Receiver's out-of-circuit authority considers dismissal in the context of a "nebulous complaint." *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1386 (D.C. Cir. 1981). That was not the basis for dismissal here.

ruled on the motion to dismiss; "[t]he plaintiff must bear the consequences of waiting to address the court's rulings post-judgment." *Id.*

Accordingly, after the district court enters judgment against the plaintiff, the controlling standard for leave to file an amended complaint is that for relief from judgment. *See Dorn v. State Bank of Stella*, 767 F.2d 442, 443-44 (8th Cir. 1985). And that standard is demanding: Such a motion "serve[s] the limited function of correcting manifest errors of law or fact or to present newly discovered evidence," and is not an avenue to "tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment." *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006) (quotation omitted). "A district court has broad discretion in determining whether to grant or deny a motion to alter or amend judgment pursuant to Rule 59(e), and this [C]ourt will not reverse absent a clear abuse of discretion." *Id.*

Time and again, this Court has affirmed a district court's denial of a request for amendment in indistinguishable circumstances. *See*, *e.g.*, *Geier*, 715 F.3d at 678; *Briehl*, 172 F.3d at 630; *Hawks v. J.P. Morgan Chase Bank*, 591 F.3d 1043, 1051 (8th Cir. 2010); *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 551 (8th Cir. 1997); *St. Louis Fire Fighters Ass'n v. City of St. Louis*, 96 F.3d 323, 330 (8th Cir. 1996); *Humphreys v. Roche Biomed-*

ical Labs., Inc., 990 F.2d 1078, 1082 (8th Cir. 1993); *Dorn*, 767 F.2d at 444. The result should be no different here.

Because the Receiver points to no manifest error of law or newly discovered evidence that would justify reconsideration, the district court properly denied his request. By "holding the Receiver to a 'compelling reasons' standard" that derives from the "restrictive reconsideration standards" rather than applying "the permissive pleading-amendment standards of Rule 15(a)(2)" (Receiver Br. 49), the district court correctly applied the law.

2. Not only must the Receiver satisfy the demanding reconsideration standards that always apply when a party seeks to amend a complaint post-judgment, but he has an additional hurdle here. Because the Receiver seeks to add a wholly new legal theory (rather than add new allegations to support an existing theory), he must demonstrate a "valid reason" for his "failure to present the new theory at an earlier time." *Humphreys*, 990 F.2d at 1082 (quoting *Littlefield v. City of Afton*, 785 F.2d 596, 610 (8th Cir. 1986)).

This requirement is well-recognized, precluding the gamesmanship that would result if a litigant could press one theory, lose, and then try again with a wholly different theory. *See*, *e.g.*, *Hawks*, 591 F.3d at 1051;

Parnes, 122 F.3d at 551 ("The Plaintiffs in this case have failed to provide any valid reason for failing to amend their complaint prior to the grant of summary judgment against them."); *St. Louis Fire Fighters Ass'n*, 96 F.3d at 330 (amendment rejected because plaintiff "proffered no adequate reason explaining this delay").

The Receiver, however, says *nothing at all* about why he waited until after the district court dismissed the complaint before attempting to introduce new legal theories. The Receiver's failure to bear his burden on this point forecloses any argument here; it would be too late for him to advance such an argument in reply. *See United States v. Brown*, 108 F.3d 863, 867 (8th Cir. 1997).

Although the Receiver's silence is enough to doom his claim, he in fact had no reason for delay. When the Receiver brought this action, he was aware of two prior suits against Associated, both of which asserted the kind of "additional tort" claims that the Receiver now wants to add. *See* pages 7-8, *supra*. The Receiver certainly knew of alternative legal theories, but he chose not to pursue them.

Moreover, prior to filing the complaint in this case, the Receiver had access to scores of documents—including private account materials and internal bank emails—that he subpoenaed from Associated. *See* page 9 n.5,

supra. The Receiver's complaint was accompanied by 38 exhibits and is filled with scores of references to non-public information. Although he had extensive evidence about the case, the Receiver nonetheless declined to pursue these alternative theories.

The reason that the Receiver chose not to advance these other claims from the start is not hard to deduce. He now wants to pursue a claim for negligence (Receiver Br. 48), but a theory of negligence is in significant tension with, if not complete contradiction to, the actual knowledge requirement of aiding and abetting. While a plaintiff may plead in the alternative, the Receiver here chose not to do so, presumably to strengthen his aiding-and-abetting claims. The Receiver put forth the theory he felt strongest in his complaint; that he lost does not give him license to start over and try again.

3. The Receiver's argument fails for a third reason: his "desired amendments" here "are conclusory allegations with no factually supportive affidavits or other documentation to bolster a finding that they should otherwise be allowed in the interest of justice." *Humphreys*, 990 F.2d at 1082. To wholly change his legal theory, the Receiver must provide details about his proposed amendments. *Id*. He could have, for example, attached a proposed amended complaint to his letter request for reconsideration.

Absent such detail, neither the parties nor the Court can consider whether amendments would be futile.

CONCLUSION

The Court should affirm the district court's judgment.

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Respectfully submitted,

/s/ Charles A. Rothfeld

Alex Lakatos
Charles A. Rothfeld
Paul W. Hughes
James F. Tierney
MAYER BROWN LLP
1999 K Street NW
Washington, DC 20006
(202) 263-3000
phughes@mayerbrown.com

Charles F. Webber
FAEGRE BAKER DANIELS LLP
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
(612) 766-7000

Counsel for Defendant-Appellee

CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), the undersigned counsel for Defendant-Appellee certifies that:

(i) this brief complies with the type-volume limitation of Rule 32(a)(7)(B) because it contains 13,963 words, including footnotes and excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii);

(ii) this brief complies with the typeface requirements of Rule 32(a)(5) and the type style requirements of Rule 32(a)(6) because it has been prepared using Microsoft Office Word 2007 and is set in Century Schoolbook font in a size equivalent to 14 points or larger;

(iii) this brief and the addendum have been scanned with Symantec Endpoint Protection and no virus was detected.

Dated: February 11, 2014

/s/ Charles A. Rothfeld
Charles A. Rothfeld
MAYER BROWN LLP

CERTIFICATE OF SERVICE

The undersigned counsel for Defendant-Appellee certifies that the foregoing brief and addendum were served via the Court's electronic CM/ECF system on February 11, 2014.

Dated: February 11, 2014

/s/ Charles A. Rothfeld
Charles A. Rothfeld
MAYER BROWN LLP