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

OPPOSITION TO APPELLANT'S MOTION TO DETERMINE

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CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

Associated Bank, N.A. ("Associated") respectfully requests that the Court deny the Receiver's motion "to determine" in whole. The crux of the Receiver's motion is that, in order to advance alternative grounds for affirming the judgment, Associated was obligated to file a cross-appeal. That contention is flatly wrong. Thus, the "scope of issues" present in this appeal is not at all "unclear." Mot. 1.

As an initial matter, Associated respectfully submits that the Court should defer the Receiver's motion to the merits panel. The motion seeks to define the scope of issues properly subject to appeal, which is a function traditionally reserved to the panel that resolves the case. If the Court affirms the reasoning of the district court—which is Associated's principal argument—it will moot this motion, obviating any need to resolve it.

In any event, the Receiver's position is wholly without merit. In the district court, Associated advanced multiple reasons why the Receiver's complaint should be dismissed pursuant to Fed. R. Civ. P. 12(b)(6). Because the district court agreed with Associated on one (that the complaint failed to state a cause of action for aiding and abetting), it did not reach the others (that the complaint is barred by *in pari delicto* or *res judicata*). As the Court has reiterated time and again, a party must file a cross-

appeal only when it seeks to *modify* a judgment; a cross-appeal is both unnecessary and procedurally improper to advance an alternative basis for *affirming* a judgment. Here, Associated seeks nothing more than affirmance of the district court's judgment.

Finally, there is no basis to enlarge the Receiver's reply brief. Associated filed a brief in compliance with Fed. R. App. P. 32(a)(7)(B). The Receiver should be held to these same standards.

BACKGROUND

This case arises from a Minnesota-based Ponzi scheme. The Receiver, the plaintiff-appellant here, was appointed by a district court to marshal the assets of the entities that engaged in the fraud. In this case, the Receiver sued Associated Bank, N.A. ("Associated"), claiming that Associated knowingly aided and abetted the Ponzi scheme.

Associated moved to dismiss the complaint pursuant to Rule 12(b)(6). Associated demonstrated that the complaint failed to plausibly allege essential elements of the Receiver's aiding and abetting claim—either that Associated *actually knew* about the Ponzi scheme or that, armed with actual knowledge, Associated intentionally aided it.

In addition, Associated showed that the complaint should be dismissed because the *in pari delicto* doctrine—which precludes a wrongdoer

from suing another for aiding the wrongdoer's own conduct—bars the Receiver's action. The Seventh Circuit, for example, found that *in pari delicto* barred a nearly identical lawsuit. Moreover, because several investors (for whom the Receiver seeks to recover funds and is thus a privy) have already sued Associated and lost, Associated demonstrated that the Receiver's action is barred by *res judicata*.

The district court concluded the Receiver failed to plausibly allege a claim for aiding and abetting (Add.1-12), and it subsequently entered a judgment of dismissal in favor of Associated (Add.13). The district court therefore did not reach the alternative grounds for dismissal. (Add.7 n.6).

In its appellee brief, Associated demonstrates that the district court correctly dismissed the complaint for failure to state a claim. Associated also shows that the district court's judgment may be affirmed on the alternative grounds of either *in pari delicto* or *res judicata*.

The Receiver now seeks "clarification of the issues" in this appeal, contending that, in order to raise the *in pari delicto* and *res judicata* issues before this Court, Associated was required to file a cross-appeal.

ARGUMENT

I. A Cross-Appeal Is Neither Required Nor Permitted In These Circumstances.

The Receiver's argument—that Associated needed to file a cross-appeal to raise alternative grounds for affirming the district court's judgment—is flatly wrong.[1] This rule is simple: while "a cross-appeal must be filed to secure a favorable *modification* of the judgment," "arguments supporting the judgment as entered can be made without a cross-appeal" and, moreover, that a "[c]ross-appeal is unnecessary even with respect to matters that have been put aside by the district court." 15A Charles Alan Wright et al., Fed. Prac. & Proc. Juris. § 3904 (2d ed. 2013 update) (emphasis added).

Because Associated seeks to preserve, not modify, the district court's judgment—which is a judgment of dismissal in favor of Associated pursuant to Rule 12(b)(6) (Add.13)—no cross-appeal is necessary.

The Court has applied this rule time and again; it "may affirm a judgment on any ground raised in the district court, and the party that prevailed in the district court need not file a cross-appeal to raise alternative grounds for affirmance." *Ashanti v. City of Golden Valley*, 666 F.3d

[1] Because the "cross appeal rule" does not apply here, the Receiver's extensive discussion as to whether it is jurisdictional or prudential (Mot. 6-7) is irrelevant to this case.

1148, 1151 (8th Cir. 2012) (quotations omitted).[2] This is true "'whether or not that ground was relied upon or even considered by the trial court.'" *Colautti v. Franklin*, 439 U.S. 379, 397 n.16 (1979) (quoting *Dandridge v. Williams*, 397 U.S. 471, 475 n.6 (1970)).

Following this approach, the Court has often affirmed a district court's grant of a motion to dismiss on an alternative ground, notwithstanding the absence of a cross-appeal by the appellee. *United States ex rel. Dunn v. N. Mem'l Health Care*, 739 F.3d 417, 418 (8th Cir. 2014) ("We

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[2] This principle has been settled and unquestioned for many years. *See, e.g.*, *Transcon. Ins. Co. v. W.G. Samuels Co.*, 370 F.3d 755, 758 (8th Cir. 2004) ("[T]he party that prevailed in the district court need not file a cross-appeal to raise alternative grounds for affirmance."); *Butts v. Cont'l Cas. Co.*, 357 F.3d 835, 837 (8th Cir. 2004) ("no obligation to cross-appeal exists" where an appellee "simply seeks affirmance on slightly different grounds than those relied upon by the court below"); *Baskin v. St. Louis Beer Sales*, 117 F. App'x 485, 485 (8th Cir. 2004) (per curiam) ("party that prevailed in district court need not file cross-appeal to raise alternative grounds for affirmance"); *Johnson v. Enron Corp.*, 906 F.2d 1234, 1238 (8th Cir. 1990) ("a cross-appeal is not necessary" to raise "alternative arguments in support of the district court's grant of summary judgment"); *Wycoff v. Menke*, 773 F.2d 983, 985 (8th Cir. 1985).

The rule is also stated by Internal Operating Procedure III(F)(1): "Without filing a cross-appeal, an appellee may defend a judgment on any ground the record supports, even if rejected in the lower court. Appellees must file cross-appeals to attack the judgment, either to enlarge their own rights or to lessen the rights of their adversaries."

affirm the dismissal on the alternative ground that Dunn's complaint does not meet the requirements of Rule 9(b).").[3]

The Receiver looks (Mot. 5) to *United States v. American Railway Express Co.*, 265 U.S. 425, 435 (1924), but that case simply explains that "the appellee may not *attack the decree* with a view either to enlarging his own rights thereunder or of lessening the rights of his adversary." *Id.* (emphasis added). Thus, an appellee may not seek to *alter the judgment* without taking a cross-appeal. 15A Fed. Prac. & Proc. Juris. § 3904 (a cross-appeal is required only to modify a judgment, such as the amount awarded as damages, an award of costs, a decision to shift attorney's fees, or disposition of a counterclaim). But *American Railway Express* makes plain "that the appellee may, without taking a cross-appeal, urge in support of a decree any matter appearing in the record." 265 U.S. at 435.

A party does not "intend[] to enlarge defendants' own rights or lessen the rights of [the plaintiff]," when it "merely provides an alternative rationale, based on materials well developed in the record, for affirming the dismissal of [the plaintiff's] claims for relief." *Ute Distrib. Corp. v. Sec'y of*

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[3] *See also Morgan v. Javois*, 2013 WL 6570599 (8th Cir. 2013); *Sanchez v. Earls*, 534 F. App'x 577 (8th Cir. 2013); *Fullington v. Pfizer, Inc.*, 720 F.3d 739, 747 (8th Cir. 2013); *Brown v. Arkansas Dep't of Human Servs.*, 452 F. App'x 690, 692 (8th Cir. 2011); *Little Rock Cardiology Clinic PA v. Baptist Health*, 591 F.3d 591, 598 (8th Cir. 2009).

Interior, 584 F.3d 1275, 1282 (10th Cir. 2009); *see also Jenkins v. City of New York*, 478 F.3d 76, 86 n.6 (2d Cir. 2007) ("an alternative ground to support the district court's dismissal of [the plaintiff's] claims" "is advanced not 'with a view either to enlarging [defendants'] own rights under the judgment or of lessening the rights of their adversary'" (alterations omitted)).

Because Associated seeks affirmance of the judgment as it is written, it does not seek to "enlarge" its rights or "lessen" those of the Receiver.[4]

The Receiver offers the improbable argument that there is something unique about *in pari delicto* or *res judicata*, so that the cross-appeal rule works differently in this context. Mot. 7-8. The Receiver states that, were Associated to win on *in pari delicto*, it would bar "all hypothetical claims" that the Receiver could have brought or might want to bring. Mot. 7. Likewise, with respect to *res judicata*, the Receiver fears that dismissal on this basis would bar "all future hypothetical counts." Mot. 8. This argument is difficult to follow because, once the Receiver sued Associated

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[4] The Receiver's reliance (Mot. 9) on *Johnson v. U.S. Fire Insurance Co.*, 586 F.2d 1291 (8th Cir. 1978), is, accordingly, wholly inapposite. There, the district court entered judgment against the appellee for $390,000. *Id.* at 1293. Because the appellee did not cross-appeal, the Court refused to entertain the appellee's argument "that it owes nothing," as this was a transparent effort to modify, not affirm, the judgment. *Id.* at 1294 n.7.

and lost on the merits, the Receiver is barred from pursuing future claims against Associated *regardless* of the precise basis of the dismissal.[5] Both *in pari delicto* and *res judicata* support the exact outcome reached below—dismissal on the merits pursuant to Rule 12(b)(6).

This is not an open question in this Court; the Court has already concluded that no special cross-appeal rule applies in the context of *res judicata*. In *Ashanti*, the district court granted summary judgment in favor of defendants, determining that no reasonable juror could find for the plaintiff given the factual record. 666 F.3d at 1150. Noting that an appellee need not file a cross-appeal "to raise alternative grounds for affirmance" (*id.* at 1151), the Court affirmed the judgment on the alternative ground of *res judicata* (*id.* at 1154). There was no cross-appeal. Thus, it cannot be the case that some special rule applies when the alternative ground supporting affirmance of the judgment below is *res judicata*.

The Receiver's reliance (Mot. 8) on *Housing Authority of Kaw Tribe of Indians v. City of Ponca City*, 952 F.2d 1183 (10th Cir. 1991), is wrong

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[5] One of Associated's arguments on the merits is that the *res judicata* effect of a *prior* action bars the Receiver's claim. But regardless of the basis of the district court's judgment in *this* case, there is little question that the *res judicata* effect of *this* judgment will bar the Receiver from pursuing future "hypothetical" claims. That, of course, is an issue to be resolved only by some future "hypothetical" court.

for at least three reasons. *First*, it overlooks this Court's decision in *Ashanti*, which forecloses the Receiver's contention that *in pari delicto* or *res judicata* are somehow different. *Second*, in *Housing Authority*, the court denied the alternative *res judicata* argument, in part, by rejecting the position on the merits. *Id.* at 1195-96. *Third*, *Housing Authority* is unlike this case because there the dismissal entered by the district court was premised on a lack of standing, which is jurisdictional and thus *not* a decision on the merits for purposes of claim preclusion. *See United States ex rel. May v. Purdue Pharma L.P.*, 737 F.3d 908, 912 (4th Cir. 2013). Converting a judgment of dismissal for lack of jurisdiction to a dismissal on the merits arguably could expand the appellee's rights—the concern of the Tenth Circuit—and thus may modify the judgment. Here, by contrast, *all* grounds urged for affirmance go the merits.[6]

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[6] The other out-of-circuit cases cited by the Receiver also involve circumstances where, unlike here, the appellee sought to modify the judgment. In *Radio System Corp. v. Lalor*, 709 F.3d 1124, 1132 (Fed. Cir. 2013), the Federal Circuit explained that a "judgment of invalidity" is different than a "judgment of noninfringement." In *EF Operating Corp. v. American Buildings*, 993 F.2d 1046, 1049 (3d Cir. 1993), the court found that a dismissal for lack of jurisdiction is different than a summary judgment resolution on the merits. And, in *ANR Pipeline Co. v. Louisiana Tax Commission*, 646 F.3d 940, 949-50 (5th Cir. 2011), the court *affirmed* the judgment; it declined the appellee's invitation to *modify* it. These cases are wholly unlike the situation here, where each of the arguments advanced (cont'd)

Not only is a cross appeal unnecessary, it would be improper. As the Federal Circuit has explained, "a cross-appeal is proper only when 'acceptance of the argument it wishes to advance would result in a reversal or modification of the judgment rather than an affirmance.'" *Therasense, Inc. v. Becton, Dickinson & Co.*, 593 F.3d 1325, 1337 (Fed. Cir. 2010) (quoting *Bailey v. Dart Container Corp.*, 292 F.3d 1360, 1362 (Fed. Cir. 2002)). Likewise, the Ninth Circuit has held that "[n]o cross-appeal is required—*or appropriate*—where we are being asked only to affirm the district court's judgment in full, albeit on a ground rejected by the district court." *Doe v. Holy See*, 557 F.3d 1066, 1087 (9th Cir. 2009) (emphasis added). Because Associated won everything it sought—a judgment of dismissal on the merits—there was nothing for it to appeal.

The Receiver's contention that the *in pari delicto* and the *res judicata* issues are not properly before the Court is thus flatly wrong.

II. The Court Should Not Enlarge The Appellant's Brief.

Associated filed an answering brief that complies with the word limit of Fed. R. App. P. 32(a)(7)(B). Compliance with the rules that control every case cannot cause the Receiver hardship.

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by Associated alternatively justify the judgment actually entered by the district court.

The Receiver argues that Associated's failure to cross-appeal prejudiced it because, under a cross-appeal, it would have more words for its reply brief. Mot. 5. Of course, for reasons we have explained, Associated *could not* file a cross-appeal. In any event, this argument gets the facts backwards. While it is true that a cross-appeal would have enlarged the Receiver's briefs by 7,000 words (an extra 7,000 words for its step-three brief, Fed. R. App. P. 28.1(e)(2)), it would have *also* enlarged Associated's briefs by 9,500 words (an extra 2,500 words for its principal brief, plus a 7,000 word step-four brief, *id.*). Thus, proceeding as a traditional appeal—as the rules require—cost *Associated*, not the Receiver, net words.

If the Court does grant the Receiver's request for an enlargement of words, Associated respectfully requests permission to file a sur-reply equivalent to the enlargement.

CONCLUSION

The Court should deny appellant's motion in whole.

Dated: February 18, 2014

Respectfully submitted,

/s/ Charles A. Rothfeld

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CERTIFICATE OF SERVICE

The undersigned counsel for Defendant-Appellee certifies that the foregoing opposition to the appellant's motion to determine was served via the Court's electronic CM/ECF system on February 18, 2014.

Dated: February 18, 2014

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