

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

R.J. Zayed,

Case No. 13-cv-00232 (DSD-JSM)

Plaintiff,

v.

Rule 26(f) Report

Associated Bank, N.A.,

Defendant.

The parties/counsel identified below conferred as required by Fed. R. Civ. P. 26(f) and the Local Rules, on March 18, 2015, and prepared the following report.

The initial pretrial conference required under Fed. R. Civ. P. 16 and LR 16.2 is scheduled for April 7, 2015, at 3:00 PM, before the United States Magistrate Judge Janie S. Mayeron in Courtroom 9E of the U.S. Courthouse in Minneapolis, Minnesota.

(a) Description of the Case.

(1) Concise factual summary of plaintiff's claims:

This matter arises from the Trevor Cook Ponzi scheme, which bilked an estimated \$190 million dollars from investors over the course of three years. R.J. Zayed is the Court-appointed Receiver (hereafter, "Receiver") for Oxford Global Partners, LLC, Oxford Global FX, LLC, Oxford FX Growth, L.P., Universal Brokerage FX Management, LLC, Market Shot, LLC, and various other entities controlled by them (hereafter referred to collectively as "Receiver Entities"). After the scheme was exposed, Chief Judge Davis appointed the Receiver to take custody of Receiver Entities and to bring legal actions on behalf of the Receiver Entities.

The Receiver then brought this action, alleging Associated Bank aided and abetted the scheme. On April 5, 2013, Chief Judge Davis granted Zayed leave to recuse himself, and appointed three other attorneys to act as Receiver on Zayed's behalf for this matter. While the district court granted Associated Bank's motion to dismiss all counts of the complaint for failure to state a claim and denied the Receiver's request to file a motion to reconsider, that dismissal was later reversed and remanded for further proceedings by *Zayed v. Associated Bank, N.A.*, 2015 U.S. App. LEXIS 3137 (8th Cir. Minn. Mar. 2, 2015).

(2) Concise factual summary of defendant's claims/defenses:

Customers of Associated Bank ran a Ponzi scheme that made use of accounts at Associated Bank, Wells Fargo, Charles Schwab, Saxo Bank, Credit Suisse, and PFG Best. Like the other victims and financial institutions that were deceived by the Ponzi schemers, Associated Bank was unaware that the fraud was occurring. Despite the Receiver's hyperbolic claims to the contrary, there is no evidence that Associated Bank falsified documents, advised the Ponzi scheme's perpetrators on how to avoid detection, or permitted transfers of funds that Associated Bank knew were improper. Indeed, federal regulators have brought no charges against Associated Bank in connection with this Ponzi scheme.

As an initial matter, the Receiver's action fails as a matter of law. It should be dismissed on the grounds of *in pari delicto* and *res judicata*, which Associated Bank raised in its 2013 motion to dismiss. *See, e.g., Knauer v. Jonathan Roberts Fin. Grp., Inc.*, 348 F.3d 230, 232 (7th Cir. 2003) (affirming dismissal of complain brought by federally appointed receiver in similar circumstances). This Court and the Eighth Circuit did not reach these defenses when analyzing Associated Bank's motion to dismiss, and the Eighth Circuit specifically instructed this Court to consider these issues on remand. Further, because this Court ruled on Associated Bank's first ground for dismissal, *in pari delicto* and *res judicata* were not discussed at oral argument. Therefore, both grounds for dismissal are before the Court.

Moreover, the Receiver's action fails on the merits. There is no evidence that any agent of Associated Bank had actual knowledge of the Ponzi scheme. There is also no evidence that Associated Bank provided substantial assistance to the criminals that ran the Ponzi scheme. The only evidence is that Associated Bank provided "routine professional services"

that cannot amount to substantial assistance. *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 189 (Minn. 1999).

(3) Statement of jurisdiction (including statutory citations):

This Court has original jurisdiction under 28 U.S.C. § 1332 because the amount in controversy exceeds \$75,000 and there is complete diversity of citizenship between the parties.

(4) Summary of factual stipulations or agreements:

None at this time.

(5) Statement of whether a jury trial has been timely demanded by any party:

A jury trial has been timely demanded by the Receiver.

(6) Statement as to whether the parties agree to resolve the matter under the Rules of Procedure for Expedited Trials of the United States District Court, District of Minnesota, if applicable:

Not applicable.

(b) Pleadings.

Statement as to whether all process has been served, all pleadings filed and any plan for any party to amend pleadings or add additional parties to the action:

All named parties have been served. At this time, there is no plan to add additional parties to the action.

(c) Fact Discovery.

Receiver's position

There is no need to implement a stay in order to allow Associated Bank to re-brief and re-argue its *in pari delicto* and *res judicata* defenses. Both issues were fully briefed and argued two years ago. The complete briefing may be found at Docket Nos. 30, 43, and 44. In addition, a full

hearing on the issues was held before Judge Doty on May 17, 2013, including the *in pari delicto* defense. In its factual section, *supra*, Associated Bank now represents to the Court that the *in pari delicto* defense was “not discussed at oral argument.” This statement is false, and is contradicted by the Bank’s opening remarks to the Court at the hearing and the subsequent lengthy oral argument. (Dkt. No. 60 at page 7 et seq.) (“I’m going to focus today first on the *in pari delicto* doctrine...”)

Moreover, the mere filing of a motion to dismiss the complaint does not constitute good cause for the issuance of a discovery stay. *Te Connectivity Networks, Inc. v. All Sys. Broadband, Inc.*, 2013 U.S. Dist. LEXIS 117719, 5 (D. Minn. Aug. 20, 2013). The only justification provided by Associated Bank for staying discovery and to afford it the opportunity to re-brief and re-argue the issues is the alleged interest of third parties in filing amicus curiae briefs.

Yet, third parties remain unidentified. Moreover, the third parties had the opportunity two years ago to file amicus briefs, but chose not to do so. Nothing has changed since the *in pari delicto* and *res judicata* issues were fully briefed and argued two years ago. Nor does the desire of a third party to file an amicus brief somehow justify requiring the Receiver and the Court to duplicate their efforts.

The Receiver requests that discovery not be stayed and that the following fact discovery deadlines and limitations be set to move the case forward:

- (1) The parties must make their initial disclosures under Fed. R. Civ. P. 26(a)(1) on or before May 7, 2015.
- (2) The parties must complete any physical or mental examinations under Fed. R. Civ. P. 35. Not applicable.
- (3) The parties must commence fact discovery procedures in time to be completed by January 7, 2016.
- (4) The Court should limit the use and numbers of discovery procedures as follows:
 - (A) 35 interrogatories;

- (B) 50 document requests;
- (C) 35 factual depositions. The requested number of depositions results from the large number of Associated Bank employees involved with the massive Ponzi scheme. For example, over 19 employees had knowledge of the illegal transfers and false account information used by the Ponzi schemers, including the \$600,000 in investor funds Trevor Cook illegally withdrew from one of the accounts [See Docket Nos. 42-6, 7, 20, 22, and 24]. An additional 12 employees were involved with opening the accounts used by the Ponzi schemers [See Docket Nos. 42-2, 5, 8, 10-12, 14 and 21]. In addition, additional unidentified bank employees created the false remitters used by the Ponzi schemers. [See Docket No. 42-23]. It is also anticipated that there will be additional third party depositions, such as employees of the Ponzi scheme (including the brother of Associated Bank Vice President Lien Sarles);
- (D) 50 requests for admissions;
- (E) (Not applicable) Rule 35 medical examinations

Associated Bank's Position

Discovery should be stayed pending resolution of Associated Bank's *in pari delicto* and *res judicata* defenses. The Receiver's own case, *TE Connectivity Networks, Inc. v. All Sys. Broadband, Inc.*, makes it clear that this Court may issue a stay of discovery "where a motion to dismiss . . . seems likely to resolve the entire litigation" and the plaintiff seeks broad discovery. 2013 WL 4487505, at *2 (D. Minn. 2013); *see also Johnson v. Cnty. of Douglas*, 2011 WL 9368969, at *1 (D. Neb. 2011) (granting motion to stay discovery because "it is a settled proposition that a court has broad discretion and inherent power to stay discovery until preliminary questions that may dispose of the case are determined."). Several third parties have expressed interest in filing amicus curiae briefs regarding these defenses. In order to address the Eighth Circuit's analysis of these defenses, Associated Bank proposes the following schedule for briefing *in pari delicto* and *res judicata*:

Deadline	Proposed Date
Associated Bank's Renewed Motion to Dismiss and any supporting <i>amici curiae</i> briefs due.	May 7, 2015
Plaintiff's opposition brief and supporting <i>amici curiae</i> briefs due.	May 28, 2015
Reply brief in support of Renewed Motion to Dismiss and any supporting <i>amici curiae</i> briefs due.	June 11, 2015

If discovery is necessary after this Court rules on the *in pari delicto* and *res judicata* defenses, discovery can be significantly streamlined. Associated Bank previously produced over 10,000 pages of documents to the Receiver and Securities & Exchange Commission concerning wire transfers, withdrawals, deposits, money orders, cashier's checks, account statements, documents related to the opening and closing of accounts, signature cards, corporate resolutions, suspicious activity reports, telephone records, notes, and internal communications related to 12 separate Associated Bank accounts for the period January 1, 2008 through August 31, 2009. In addition, current and former Associated Bank employees have provided deposition testimony and affidavits in related litigation and investigations.

Moreover, there is no need for Plaintiff to conduct 35 factual depositions. The Receiver already has the benefit of the prior testimony of multiple individuals involved in the Ponzi scheme, former employees of Associated Bank, and United States Securities and Exchange Commission employees. See Docket Nos. 42-3 (testimony of Trevor Cook); Docket No. 42-4 (affidavit of Lien Sarles); Docket No. 42-12 (declaration of Scott Hlavcek); Docket No. 42-20 (declaration of Christopher Pettengill). In addition, to the extent that the Receiver seeks information about Associated Bank's knowledge at the time accounts were opened or certain transfers occurred, the Receiver should depose a Fed. R. Civ. P. 30(b)(6) representative of Associated Bank regarding these topics. See, e.g., *Resolution Trust Corp. v. S. Union Co.*, 985 F.2d 196, 197 (5th Cir. 1993) (observing that "Rule 30(b)(6) streamlines the discovery process."); *Johnson v. Big Lots Stores, Inc.*, 2008 WL 6928161, at *2 (E.D. La. 2008) (Rule 30(b)(6)

“saves the opposing party from being bandied from pillar to post by deposition witnesses who disclaim personal knowledge on topics with which others in the corporation are familiar.”). Through the use of Fed. R. Civ. P. 30(b)(6) and the discovery record from the multiple prior actions regarding the Ponzi scheme, the parties can easily complete discovery with 10 factual depositions.¹

Thus, Associated Bank proposes the following schedule and limitations for discovery, if necessary:

- (A) 25 interrogatories per party;
- (B) 50 document requests per party;
- (C) 10 factual depositions per party;
- (D) No limit on requests for admissions;
- (E) (Not applicable) Rule 35 medical examinations; and
- (F) One entry onto land.

Preservation of hard copy documents and electronically stored information.

Receiver's Position

All relevant documents need to be preserved for purposes of this litigation.

Associated Bank's Position

The cut-off for a party's need to preserve documents for purposes of this litigation shall be documents dated between January 1, 2006 and October 1, 2009.

¹ The Receiver is wrong to baldly assert that Associated Bank employees “had knowledge of illegal transfers.” As explained above, there is no evidence that any agent of Associated Bank had actual knowledge of the Ponzi scheme.

Stipulation Regarding the Review, Treatment, and Logging of Records Withheld Under Claim of Privilege. In order to reduce the burden and delay of privilege review, while minimizing risk of privilege waiver, the parties will meet and confer regarding a stipulation establishing a protocol for the review, treatment, and logging of privilege information and related motions.

Deadline	Proposed Date, following the court's ruling on Defendant's motion to dismiss
The parties must make their initial disclosures under Fed. R. Civ. P. 26(a)(1)	30 days
Identify experts	6 months
Close of Fact Discovery	6 months
Expert Reports	7 months
Identify rebuttal experts	7½ months
Rebuttal reports	8½ months
Expert discovery closes	9½ months
Dispositive motions	10½ months
Trial Ready	14½ months

(d) Expert Discovery.

(1) The parties anticipate that they will require expert witnesses at the time of trial.

(A) The plaintiff anticipates calling 3 experts in the fields of: forensic accounting (including damages), bank practices and/or BSA/AML compliance.

(B) The defendant anticipates calling 3 (number) experts in the fields of: forensic accounting (including damages), bank practices, BSA/AML compliance.

(2) The parties propose that the Court establish the following plan for expert discovery:

(A) Initial experts.

(i) The identity of any expert who may testify at trial regarding issues on which the party has the burden of persuasion must be disclosed on or before January 7, 2016.

(ii) The initial expert written report completed in accordance with Fed. R. Civ. P. 26(a)(2)(B) must be served on or before April 7, 2016.

(B) Rebuttal experts.

(i) The identity of any experts who may testify in rebuttal to any initial expert must be disclosed on or before April 21, 2016.

(ii) Any rebuttal expert's written report completed in accordance with Fed. R. Civ. P. 26(a)(2)(B) must be served on or before May 23, 2016.

(3) All expert discovery must be completed by July 22, 2016.

(e) Other Discovery Issues.

(1) Protective Order.

The Parties are negotiating a Protective Order.

(2) Discovery of Electronically Stored Information. The parties have discussed issues about disclosure or discovery of electronically stored information as required by Fed. R. Civ. P. 26(f), including the form or forms in which it should be produced and inform the Court of the following agreements or issues:

i. All relevant electronic documents, including all email, documents, archives, and webpages, of either party

relating to the parties' businesses and activities in issue in the action shall be retained;

- ii. The Parties agree that presumptively there is no need to search for or produce back-up tapes as part of their discovery obligations. The Parties agree to address the issue of back up or historic legacy data if and when an issue arises as to the need for such data that is not otherwise produced. The Parties agree to address the issue of restoration of deleted information if and when an issue arises as to deleted or lost data. If, in the future, a party contends that it has a substantial need for such data, the Parties shall meet and confer to attempt to resolve the dispute;
- iii. Metadata: The parties agree that no metadata (referring to electronic information about a document that does not appear on the face of the original document), audio, or video information will be searched for or produced absent a specific request. Metadata that is reasonably likely to reveal the date, author, or recipient of specific documents that the requesting party identifies as material to a fact or issue in dispute shall be produced upon request of a party. To the extent a request is made for other metadata the parties will discuss the burden to the producing party and try to reach agreement on a case-by-case basis; to the extent the parties cannot agree on the appropriate scope of such a request, the parties will seek the Court's guidance.
- iv. Exclusions: The parties agree that no voicemails, instant messages, and cell phone text messages will be searched for or produced absent a specific request; should a specific request be made, the parties agree that they will meet and confer on the scope of the request in order to try to alleviate the burden on the producing party; to the extent the parties cannot agree on the appropriate scope

of such a request, the parties will seek the Court's guidance;

- v. Format of ESI Documents: See Exhibit 1;
- vi. Format of Non-ESI Documents: All data, files, and communications that, in the ordinary course of business, are recorded in other media (e.g., microfiche, paper, etc.) or all data, files, and communications that were created electronically but now exist primarily in non- electronic format or without metadata shall be produced in .tif format with corresponding load files or in .pdf format. Where the data exists in a format that cannot be contained in .tif or .pdf format, the parties will meet and confer regarding the manner of production.
- vii. Documents already produced to either Party need not be produced again.

(3) Claims of Privilege or Protection. The parties have discussed issues about claims of privilege or of protection as trial-preparation materials as required by Fed. R. Civ. P. 26(f), including whether the parties agree to a procedure to assert these claims after production and request the Court to include the following agreement in the scheduling order:

Inadvertent production. The inadvertent production of any privileged materials or other materials exempt from production by any party making production of materials in this proceeding shall not be deemed a waiver or impairment of any claim of privilege or exemption (including under the attorney-client privilege or work-product doctrine) concerning any such materials or the subject matter thereof. Each such party reserves the right to redesignate as privileged or exempt any materials that it produces or has already produced. Such redesignation shall be effective as of the date of such redesignation; provided, however, that the receiving party shall, within five days of such notice, promptly endeavor to return all copies of any material

redesignated as privileged to the producing party. The producing party shall maintain any materials redesignated as privileged until the parties resolve any dispute concerning the privileged nature of the materials or the Court rules on any motion to compel. No party shall use or refer to any information contained within any materials at issue unless and until the producing party agrees or a motion to compel is granted by the Court.

(f) Proposed Motion Schedule.

Receiver's Position

- (1) Motions seeking to join other parties must be filed and served by May 7, 2015.
- (2) Motions seeking to amend the pleadings must be filed and served by May 7, 2015.
- (3) All other non-dispositive motions, with the exception of discovery motions, *in limine* motions, and *Daubert* motions must be filed and served by May 7, 2015.
- (4) All dispositive motions must be filed and served by August 22, 2016.

Associated Bank's Position

Associated Bank proposes the following motion schedule deadlines, which are contingent on the resolution of its *in pari delicto* and *res judicata* defenses:

Deadline	Proposed Date
Motions seeking to join other parties must be filed and served	30 days after the Court rules on <i>in pari delicto</i> and <i>res judicata</i> defenses
Motions seeking to amend the pleadings must be filed and served	30 days after the Court rules on <i>in pari delicto</i> and <i>res judicata</i> defenses
All other non-dispositive motions, excluding motions to compel discovery, <i>in limine</i> motions, and <i>Daubert</i> motions, must be filed and served	30 days after the Court rules on <i>in pari delicto</i> and <i>res judicata</i> defenses

All <i>Daubert</i> motions and motions <i>in limine</i> must be filed	90 days after close of expert discovery
All dispositive motions must be filed	45 days after close of expert discovery

(g) Trial-Ready Date.

Receiver's position

- (1) The Receiver proposes that the case will be ready for trial on or after October 10, 2016.
- (2) The Receiver proposes that the final pretrial conference be held on or before September 9, 2016.

Associated Bank's position

- (1) The case will be ready for trial 120 days after dispositive motions are filed.
- (2) Associated Bank proposes that the final pretrial conference be held 30 days prior to the trial ready date.

(h) Insurance Carriers/Indemnitors.

Associated Bank's insurance carrier is providing coverage of defense costs under a reservation of rights.

(i) Settlement.

- (1) The parties have discussed settlement before the initial pretrial conference, with the plaintiff making a demand and the defendant taking the demand under consideration.
- (2) The parties propose that a settlement conference be scheduled to take place before June 15, 2015. By no later than May 7, 2015, Associated Bank will provide any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(3) The parties do not believe that alternative dispute resolution will be helpful to the resolution of this case.

(j) Trial by Magistrate Judge.

The Parties do not consent to jurisdiction by the Magistrate Judge under 28 U.S.C. § 636(c).

Dated: March 24, 2015

Respectfully submitted,

s/ Brian W. Hayes

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EXHIBIT 1

Document Processing

The parties need not process for review any system files or other files that do not have readable hash values. The parties will globally de-duplicate documents and will provide the names of all custodians who had any de-duplicated documents in a "Duplicate Custodian" or similar field. Embedded objects will be broken out and produced as separate documents with metadata indicating that the parent and embedded documents are linked. All documents will be produced with time metadata synchronized to UTC.

To the extent possible, e-mails should be processed in a way that the actual time offset is displayed in the output.

Document Format

All documents should be produced as Bates-stamped 300 DPI Group IV single-page monochrome TIFF images with accompanying document-level extracted text for electronically stored information ("ESI") or OCR for scanned hard copy documents. No searchable text need be provided for redacted documents.

All spreadsheets should be produced as native format files accompanied by a single-page TIFF placeholder.

All images are black & white except for those that require color for interpretation. Color images are produced in .jpg format unless otherwise agreed.

Image Load/Cross Reference Files

Either an IPRO (.lfp) or Opticon (.opt) single-page image load/cross reference file with all productions. Image filenames should contain the

bates number information of the image. Note that volume label information (“@MSC001” in the sample IPRO file and “MSC001” in the sample Opticon file) is optional.

Sample IPRO .lfp file

IM,MSC00000014,D,0,@MSC001;MSC\0000;MSC00000014.TIF;2

IM,MSC00000015,,0,@MSC001; MSC\0000;MSC00000015.TIF;2

IM,MSC00000016,D,0,@MSC001; MSC\0000;MSC00000016.TIF;2

IM,MSC00000017,,0,@MSC001; MSC\0000;MSC00000017.TIF;2

Sample Opticon .opt file

MSC000001,MSC001,MSC\0000\MSC00000001.TIF,Y,,,3

MSC000002,MSC001,MSC\0000\MSC00000002.TIF,,,,

MSC000003,MSC001,MSC\0000\MSC00000003.TIF,,,,

MSC000004,MSC001,MSC\0000\MSC00000004.TIF,Y,,,2

MSC000005,MSC001,MSC\0000\MSC00000005.TIF,,,,

Data Load File

For Bates information and metadata, a Concordance-loadable data file, also known as a “DAT” file. Extracted text or OCR text should not be embedded in the DAT file. Rather, it should be provided as separate, document-level text files. Document-level text filenames should contain the beginning bates number information of the document. If a document is provided in native format with a placeholder tiff (*e.g.*, Excel files), the text file should contain the extracted text of the native file.

The delimiters and qualifiers to be used in the DAT file are:

- Record delimiter: Windows newline/Hard return (ASCII 10 followed by ASCII 13)
- Field delimiter: ..□□□□□□□□□□□□
- Multi-value delimiter: Semicolon ; (ASCII 59)
- Text qualifier:Small thorn þ (ASCII 254)

The DAT file should have a header line with field names and include the following fields, except that no party need: (i) provide data in the below fields where there is already metadata in the underlying documents from which to populate these fields nor (ii) translate any metadata in a foreign language into English.

Field	Comments
Beginning Bates Number	Include prefix.
Ending Bates Number	Include prefix.
Beginning Bates Range	First page of family range, e.g., first page of an email.
Ending Bates Range	Last page of family range, e.g., last page of last attachment to an email.
Page Count	Number of pages in document.
File Extension	Loose files, attachments and email.
File Size	Loose files, attachments and email (in bytes).
Title	Loose files and attachments only.
Custodian	Loose files, attachments, and email. Custodian full name.
Author	Loose files and attachments only.
From	Email only.
To	Email only.
CC	Email only.
BCC	Email only.
Subject	Email only.
Date Created	Loose files and attachments only. MM/DD/YYYY

Date Modified	Loose files and attachments only. MM/DD/YYYY
Date Sent	Email only. MM/DD/YYYY
Time Sent	Email only. HH:MM:SS AM/PM
Date Received	Email only. MM/DD/YYYY
Time Received	Email only. HH:MM:SS AM/PM
FilePath	Loose files. Original path to the file at collection time.
FolderPath	Email only. Path within the mail container file (e.g., PST file) to the message at collection time.
All Custodians	Email and loose files. List of custodians for whom data was collected, processed and globally deduplicated.
TextPath	The path to the extracted text or OCR for the document, including the file name.
NativePath	The path to the native-format file for the document, including the file name (if a native-format file is provided).

Sample DAT file

Beginning Bates Number Beginning Bates Number format file for the doc

MSC0000001 MSC0000001

25/2008 25/2008

units Receivable units

Receivable