UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

R.J. ZAYED, In His Capacity As Court-Appointed Receiver For The Oxford Global Partners, LLC, Universal Brokerage FX, and Other Receiver Entities, Plaintiff, v. ASSOCIATED BANK, N.A., Defendant.	)))))))))))))	CIVIL ACTION File No.: 13-cv-00232 (DSD-JSM)

THE RECEIVER'S MEMORANDUM IN OPPOSITION
TO ASSOCIATED BANK'S MOTION TO DISMISS

I. INTRODUCTION AND PROCEDURAL BACKGROUND

Associated Bank ("the Bank") departed from standard banking practices. The Bank lent direct aid to the Cook/Kiley Ponzi Scheme ("the Scheme"). The Bank benefited by having custody and use of ill-gotten millions sitting in non-interest-bearing accounts. (Compl. ¶ 52). Discovery will likely show additional benefits for the Bank from the Scheme. In the Scheme's heyday, 2007-2009, credit markets had frozen, stress tests were underway, and financial institution liquidity and balance sheet health meant the difference between profitability and FDIC-takeover.

The Receiver identified many of the Bank's atypical acts in its well-documented and detailed Complaint. The Bank aided the Scheme in numerous ways. For example, the Bank advised the Scheme on how to create and mask

accounts to avoid detection under the Bank Secrecy Act / Anti-Money Laundering Act ("BSA/AML"). The Bank opened and maintained the main account of the Scheme (the "Crown Forex LLC" account) without confirming that its putative owning entity even existed, and then lied on account documents that the Bank had complied with the requirements of the Patriot Act. Bank officers personally visited the Scheme's place of business – a private residence in a suburban neighborhood – and yet knowingly named a commercial address instead. The Bank allowed Crown Forex checks to issue that misstate the issuer as "Associated Bank" and prepared false cashier's checks to lend an aura of legitimacy to mollify the Scheme's victims. The false checks totalled more than $3.2 million and appeared to issue from the individual that was identified as the payee, or from an IRA or other account in the name of the payee. (Compl. ¶ 64; *see*, *e.g.*, Compl. Ex. 34). This action of the Bank created the illusion that the investors' funds were coming from individually segregated accounts, and not the co-mingled account at the Bank from which the funds were actually being remitted. The Bank even, at one point, allowed the Scheme's mastermind to walk off with $600,000 cash in a box. The Bank knew that the funds were for the personal purpose of buying a yacht, but with the endorsement of the "Security and Crime Prevention Department," took extra pains to source the funds from an account that the Bank knew held investor moneys. To make things worse, the Bank collaborated with the Scheme's agents to delay enhanced scrutiny from federal banking authorities, deliberately forestalling the Scheme's discovery.

All of these acts transcend any characterization as the innocent mistake of missing a few "red flags." The Bank's acts depart from federal and state banking requirements, from the Bank's own procedures and policies, and from common sense.

Having once helped deprive Minnesota and other investors of their life savings, the Bank then deprived them of their remedy in the courts of Wisconsin. It now seeks to foreclose any remedy by any party. After the Scheme unraveled, the Wisconsin Court of Appeals, in a 2-1 decision with a sharp dissent, accepted the Bank's rationale that it was not directly liable to the Scheme's most visible victims – the investors. *See generally Grad v. Associated Bank*, 801 N.W.2d 349, 2011 Wisc. App. LEXIS 449 (Wisc. App. 2011). They had no banking customer relationship, so the duty of care did not reach to them. *Id.*

Now that the court system has blockaded investor claims against the Bank, the Receiver brings this action. The Wisconsin court's rationale does not apply to the Receiver. Unlike the more indirect victims of the Scheme, the Receiver stands in the shoes of actual Bank customers – the Receivership Entities. Yet with no small dose of irony, the Bank now seeks a Rule 12(b)(6) dismissal. In its motion, the Bank now states that the *investors* are the proper plaintiffs to bring this case. (Bank Mem. 13-16). The Court should not let the Bank have it both ways.

As explained below, all of the asserted grounds for dismissal lack merit. The equitable defense of *in pari delicto* does not apply. *Res judicata* does not

exist. The Receiver has proper standing.

The Bank's motion to dismiss should be denied.

II. FACTUAL BACKGROUND

Chief Judge Davis appointed the Receiver "for the purpose of marshalling, preserving, accounting for and liquidating the assets" of the Receiver Estates. (Case No. 09-cv-3332 (D. Minn.), Dkt. No. 96, at 3). Among the powers of the Receiver are to "[i]nitiate, defend, compromise, adjust, intervene in, dispose of, or become a party to any actions or proceedings in state, federal or foreign jurisdictions necessary to preserve or increase the assets of the Defendants or to carry out his or her duties pursuant to this Order." (*Id.* at 4; *see also* Case No. 09-CV-3333 (D. Minn.), Dkt. No 68, at 3, granting Receiver "full power to sue [] and recover . . . rights, credits, moneys . . . of the Receiver Estates"; Case No. 11-cv-574 (D. Minn.), Dkt. No. 10, at 2-3, same).

The Bank agrees that the Receiver "may assert claims" that the Receivership Entities possess. (Bank Mem. 7). This, of course, tracks the holdings of other sister courts that had the occasion to address the scope of the Receiver's powers. *See, e.g., Zayed v. Buysse, et al.*, No. 11-cv-1042 (D. Minn.); *Zayed v. Kabarec*, No. 11-cv-1104 (D. Minn.); *Zayed v. NRP Financial, Inc.*, No. 12-cv-35 (D. Minn.); *Zayed v. Peregrine Financial Group, Inc.*, No. 12-cv-269 (D. Minn.). Yet, now, contrary to well-established authority, the Bank urges this Court to to tie the Receiver's hands and prevent this action from moving forward.

In brief summary here, with the prize of interest-free deposits in mind (Compl. ¶ 52), the Bank masked the true nature of the Scheme's accounts to avoid detection under various banking laws by falsifying account documents (Compl. ¶¶ 5, 13, 37-38, 44, and 61) and to varnish the accounts with an aura of legitimacy that induced the investors to invest in the Scheme. (Compl. ¶ 9). Moreover, the Bank actively participated in the embezzlement of the illegally obtained investor funds for the fraudsters' own financial gain. (Compl. ¶¶ 10, 11, 53-56 and 60).

The Bank was party to, or witness to, an unusual pattern of events intimating an illegal scheme. This evidence includes suspicious deposits and wire transfers in the millions and tens-of-millions, sometimes broken up into pieces (Compl. ¶¶ 47-48, 51, 59, 65 and 67-68), the opening of a string of similarly named Oxford accounts (Compl. ¶ 49), ignoring warnings of suspicious activity raised internally within the Bank by the monitoring department and other Bank employees (Compl. ¶¶ 12, 57 and 63), depleting funds from known investor accounts into known fraudster personal accounts (Compl. ¶¶ 49-65), and ignoring public information indicating that Crown Forex LLC and Crown Forex, SA were scams (Compl. ¶¶ 58 and 66). This is all, of course, after the Bank aided and abetted the Scheme by opening the Crown Forex LLC account by subverting

BSA/AML regulations (Compl. ¶¶ 5,13 and 37-38).

In his dissent from the decision depriving the investors of a negligence claim under Wisconsin law, Judge Brunner observed:

> If Grad's allegations are true, the Crown Forex account was so obviously fraudulent that, had Associated Bank bothered to look, it would have discovered the sham and prevented the misappropriation of millions of dollars. The court today concludes that, despite numerous federal banking regulations requiring Associated Bank to know its customers and what they are up to, the bank has no affirmative duty to investigate its customers' potential fraud.
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> * * *
>
> Given the public concern for protecting investors and the stability of our financial system, I cannot conceive of a case in which public policy is more supportive of allowing a third party to proceed against financial institutions for their negligent failure to follow banking laws.

Grad, 2011 Wisc. App. LEXIS 449, at *23, *36. What is now known that even Judge Brunner did not know is that the Bank did much more than not "bother to look." It actively participated. The Bank falsified account documents for fictitious entities. The Bank provided advice on how to avoid detection under the BSA/AML. The Bank falsely stated that it had complied with the requirements of the Patriot Act. And, the Bank illegally transferred millions in investor funds to Cook's private accounts.

Thus, the well-pleaded facts establish the Bank's deep entanglement with the Scheme. Bank officers were directly involved in the Scheme, at multiple levels, and the Bank directly benefited from the Scheme.

III. ARGUMENT

A. *IN PARI DELICTO* DOES NOT BAR THIS ACTION

Despite the fact-bound and equitable nature of the affirmative defense, the Bank first argues it is entitled to dismissal on the pleadings based on the *in pari delicto* doctrine. The Bank's arguments misunderstand this defense. None of the Bank's authorities involves a federal equity receiver asserting high-scienter torts against wrongdoers who directly participated in and benefited from a Ponzi scheme fraud.

1. The *In Pari Delicto* Doctrine Does Not Apply As a Matter of Law

i. Equity and Policy Considerations Foreclose the Defense

The doctrine of *in pari delicto* serves equitable and public policy purposes. Where investment fraud is involved, the Supreme Court cautioned that a court should only apply *in pari delicto* when "preclusion of suit would not significantly interfere with the effective enforcement of the securities laws and protection of the investing public." *Bateman Eichler, Hill Richards, Inc. v. Berner*, 472 U.S. 299, 310 (1985). Minnesota law is in harmony. "A paramount public interest in the enforcement of some statutes may call for judicial intervention in favor of one wrongdoer against the other in order to effectuate the enforcement of a public

policy which overrides considerations of a benefit inuring to a wrongdoer." *State by Head v. Aamco Automatic Transmissions, Inc.*, 199 N.W.2d 444, 448 (Minn. 1972) (cited by the Bank). Thus, a court should not apply *in pari delicto* in situations where a "private right of action will be an ever-present threat to deter anyone contemplating [unlawful] business behavior. . . ." *Id.* (applying defense in government consumer protection suit only after confirming that no private right of action would be harmed).

These policy directives impel the Court not to preclude suit by the last private entity – the Receiver – with any reasonable chance of holding the Bank accountable for its wrongful actions. Such a bar would be the death of equity. No party would remain who might recover from the Bank for its part in the Scheme.

ii. Case Law Forecloses the Defense

Not surprisingly, the Bank unearthed no authority on point. The Bank relies heavily on cases applying *in pari delicto* to bar suits by bankruptcy trustees (*e.g.*, Bank Mem. 8-9, citing *Grassmueck v. Am. Shorthorn Ass'n*, 402 F.3d 833 (8th Cir. 2005); *Peterson v. Winston & Strawn, LLP*, 2012 WL 4892758 (N.D. Ill. 2012); and *Christians v. Grant Thornton, LLP*, 733 N.W.2 803 (Minn. App. 2007)). The Bank calls *Christians* "particularly instructive," stating that a bankruptcy trustee like the one in *Christians* is "a position akin to the Receiver." (Bank Mem. 9). The Bank could not be more wrong.

While both bankruptcy trustees and receivers are court-supervised persons who replace the original management of an entity during court proceedings, the

comparison ends there. The powers and reach of a receiver are significantly different from, and broader than, those of a bankruptcy trustee. The Bankruptcy Code hard-codes by statute that a trustee stands in the exact same shoes as the debtor as of the filing of a petition in bankruptcy, with no exceptions. No such statutory provision applies to federal equity receivers.

The Fifth Circuit recently underscored why bankruptcy trustees and receivers get different treatment under *in pari delicto*. *See Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955, 965-68 (5th Cir. 2012). Describing the decisions barring relief by a bankruptcy trustee as "plainly distinguishable," the *Jones* court declined to port over *in pari delicto* principles to a receiver bringing a tort action against a bank. *Id.* at 968. This was because bankruptcy trustee powers are defined under Section 541(a) of the Bankruptcy Code, "which limits the debtor estate to interest of the debtor as of the commencement of the case." *Id.* (internal quotation omitted) (citing numerous cases distinguishing bankruptcy trustees from receivers to allow suit over *in pari delicto* defense). In contrast, the powers of receiverships are determined under state law. *Id.* at 966 n.11 (citing *O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83 (1994)). Thus, by federal statute, a trustee is considered to be the same "wrongdoer" for all purposes as the bankrupt entity, and would be bound, no exceptions, by all defenses assertable against such an entity. *Id.* But this principle will not necessarily apply to receivers.

In allowing the receivership's tort claims against the bank, *Jones* followed the Seventh Circuit's reasoning in *Scholes v. Lehman*, 56 F.3d 750, 754-55 (7th

Cir. 1995). *Scholes* noted that the defense of *in pari delicto* "loses its sting when the person who is in pari delicto is eliminated." *Id.* at 754.[1] In effect, the appointment of a receiver liberates the corporate entity from its status as an "evil zombie" of the wrongdoer management, reversing the equities of an otherwise-applicable defense. *Id.* Minnesota law is in accord with *Scholes*. "[W]hen an act has been done in fraud of the rights of the creditors of the insolvent corporation, the receiver may sue for their benefit, even though the defense set up might be valid as against the corporation itself." *German-American Finance Corp. v. Merchants & Manufacturers' State Bank of Minneapolis*, 225 N.W. 891, 893 (Minn. 1929).[2] This District Court, in a case the Bank itself cites, adopted the reasoning in *Scholes* for federal equity receivers. *Kelley v. College of St. Benedict*, No. 12-cv-822, 2012 U.S. Dist. LEXIS 153802, at *13-14 (D. Minn. Oct. 26, 2012) (citing *Scholes* for proposition that "when a receiver has been appointed for a corporation, the wrongdoer (the corporation) is removed from the picture and, hence, *in pari delicto* does not apply," so that a "receiver is not precluded from

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[1] The Bank argues that *Peterson v. McGladrewy & Pullen, LLP*, 676 F.3d 594, 599 (7th Cir. 2012) labeled this quotation from *Scholes* as dictum. The next sentence in *Peterson* that the Bank conspicuously fails to quote states, "It has nothing to do with §541 of the Bankruptcy Code; *Scholes* was not a bankruptcy proceeding." Thus, *Peterson* observed unremarkably that this quotation from *Scholes* was inapposite to bankruptcy trustee actions.

[2] The Bank incorrectly argues that *German-American* is limited to the fraudulent conveyance context. (Bank Mem. 12). The Bank is wrong. *German-American* did not concern a fraudulent transfer, but rather (like here) fraudulent bank recordkeeping calculated to mislead bank examiners and others about the nature of certain accounts. *Id.* at 534-35 (an "undisclosed agreement" not to collect on notes placed onto the bank's balance sheet).

asserting claims that would be barred by a corporation's own fraud had the corporation brought the claims on its own behalf.").

Jones also distinguishes another case cited by the Bank: *Knauer v. Jonathon Roberts Financial Group, Inc.*, 348 F.3d 230 (7th Cir. 2003). Like the unsuccessful defendant in *Jones*, the Bank argues that *Knauer* limited the earlier *Scholes* decision to preclusion of the defense against receivers asserting anything other than fraudulent transfer actions. (See Bank Mem. 11 n.2). However, *Knauer* did not distinguish *Scholes* with such a broad brush. *Knauer* allowed *in pari delicto* to succeed against a receiver who brought claims based just on the *relationship* with the defendants (*i.e.*, *respondeat superior* liability for the acts of, and failure to supervise, Ponzi-scheming employees). *Id.* at 237. But as *Jones* points out, *Knauer* "was decided under Indiana law, and reasoned that the equities of that case favored application of *in pari delicto* because the defendants were neither directly involved in the embezzlements at issue nor benefited from them." *Jones*, 666 F.3d at 968 n.12 (citing *Knauer*, 348 F.3d at 236-37). Here, the Receiver alleges the very direct involvement and benefit that both *Jones* and *Knauer* distinguish from the facts that controlled the outcome in *Knauer*.[3]

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[3] District courts of the Seventh Circuit also limit *Knauer* to its facts, and do not allow the *in pari delicto* defense to bar tort claims by receivers that assert defendant involvement in and benefit from the wrongdoing. *Central Comm'y Church of God v. Ent & Imler CPA Group, PC*, No. 03-cv-678, 2004 U.S. Dist. LEXIS 24339, at *30-31 (S.D. Ind. Nov. 24, 2004) (finding equitable alignment resembles *Scholes* "more closely than *Knauer*" because the receiver "alleged that Ent & Imler was directly involved in CEG's frauduent misrepresentations to noteholders by recklessly ignoring and perpetuating those misrepresentations.");

The Bank's other cases are equally inapposite. The Bank relies on *Dickson v. Kittson*,[4] 77 N.W. 820, 821 (Minn. 1899), to counter the holding in *German-American* (quoted above) that receivers liberate corporations from the fraud of their wrongdoers. The Bank quotes *Dickson* to argue that "the Minnesota rule [is] that a receiver stands 'in the shoes' of the receivership entities and thus is bound by any defenses that would apply to them." (Bank Mem. 10). The Bank misreads *Dickson*. While a receiver was a party in that case, the carryover of defenses applied between an assignee-for-the-benefit-of-creditors and the relevant assignor – *not* because a receiver coincidentally stepped in. *Id.* ("[A]n assignee for the benefit of creditors stands in no better position than his assignor, and what would be a defense against the latter will be a good defense against the former . . . ."). The Bank also cites two noncontrolling South Carolina decisions – *Myatt v. RHBT Financial Corporation*, 370 S.C. 391 (S.C. App. 2007), and *Hays v. Pearlman*, No. 10-cv-1135, 2010 WL 4510956 (D.S.C. Nov. 2, 2010) (Bank Mem. 11-12). Each of these decisions applies *Knauer* because of the omission that *Jones* noted must exist for *Knauer* to apply – no allegation of direct involvement in and benefit from the fraud.

Baker O'Neal Holdings, Inc. v. Ernst & Young LLP, No. 03-cv-132, 2004 U.S. Dist. LEXIS 6277, at *25-26 (S.D. Ind. Mar. 24, 2004) (distinguishing *Knauer* and holding *Scholes* applicable because "the plaintiffs have alleged that Roach (and thus Ernst & Young) were *directly* involved in O'Neal's wrongdoing."). If this Court finds *Knauer* persuasive in any way, the Court should simultaneously follow the district courts of the Seventh Circuit, the circuit where *Knauer* has controlling force. Those courts distinguish *Knauer* from the types of facts the Complaint alleges here.

[4] Referred to by the Bank as *Dickson v. Baker*.

Thus, the Bank's *in pari delicto* defense fails as a matter of law. The Bank incorrectly applies bankruptcy trustee cases to a receivership, fails to recognize the liberating qualities of receiverships under Minnesota law, and fails to address the factual distinctions (direct participation and benefit) that remove this case from the scope of its cited authority.

2. The *In Pari Delicto* Doctrine Should Not Apply on the Pleadings

Even if the Court found some merit in the Bank's *in pari delicto* argument, it should defer ruling on the defense. Since it involves the Court's equitable consideration – including the level and amount of wrong perpetrated by the defendant compared to the pre-receivership plaintiff – courts generally do not consider the defense on a motion to dismiss. *In re Student Finance Corp.*, No. 02-cv-11620, 2006 U.S. Dist. LEXIS 56759, at *6 (Bankr. D. Del. Aug. 10, 2006) (denying motion because discovery needed to determine if ostensibly-independent accountant should be construed as corporate insider); *In re Oakwood Home Corp.*, 340 B.R. 510, 536 (Bankr. D. Del. 2006). Here, under the Complaint's allegations, the Bank's own wrongdoing (including setting up an account in the name of a fictitious company to avoid scrutiny) led to at least $70 million of fraudulent investment. Tellingly, the majority of the Bank's cited cases on *in pari delicto* were decided on summary judgment or at trial, not on the pleadings:

> The resolution of the in pari delicto defense requires the Court to engage in "an essentially equitable and necessarily factbound apportionment of responsibility" among Mr. Meisner, the Debtor, and other insiders of the Debtor. *Pearlman v. Alexis*, 2009 WL

> 3161830, 2009 U.S. Dist. LEXIS 88546 (S.D.Fla. Sept. 25, 2009). It is not appropriate to engage in such an analysis at this stage of the litigation.

In re Phoenix Diversified Inv. Corp., 439 B.R. 231, 243 (Bankr. S.D. Fla. 2010).

As with *In re Student Finance Corp* and *In re Phoenix Diversified Inv. Corp*, discovery may show that one of the main perpetrators within the Bank – Vice President Lien Sarles – was in fact (at least constructively) a corporate insider with the Receivership Entities. What makes this more plausible is that Vice President Sarles (as alleged in the Complaint ¶ 34) is a brother of one of the mastermind's employees. At a minimum, the Bank's deep entanglement with the fraud, and that of its officers, merits discovery before the Court entertains the *in pari delicto* defense.

B. *RES JUDICATA* DOES NOT APPLY

The Bank next fails to support the application of *res judicata*. The Bank argues that the failure of certain investors in the Wisconsin action to plead a viable cause of action bars the Receiver from doing so. The Bank thus argues inconsistently. On the one hand, it argues that the investors should be the ones who sue because the Receiver and the investors are distinct entities. But when the investors fail in their suit (as certain ones did in the Wisconsin action), the Receiver should be barred from proceeding based on the Bank's allegation of "privity." Such a "heads I win, tails you lose" argument lacks merit. In a Ponzi scheme case, a "judgment on the merits in one investor action would have no collateral estoppel effect on any investor (or the Receiver) who was not a party to

that action." *Commod. Fut. Trading Comm'n v. Chilcott Portfolio Mgmt.*, 713 F.2d 1477, 1486 (10th Cir. 1983). The Bank cites no authority to the contrary.

The Bank's cited cases fail to call into question the Receiver's lack of privity with prior investor-claimants. In *Reil v. Benjamin*, 584 N.W.2d 442 (Minn. App. 1998), Reil's employer brought a subrogation action alleging negligence against a party who had injured Reil in a car accident. When Reil tried to sue on his own behalf, he was found to be in privity with his employer. The Court held that "privity requires that the estopped party's interests have been sufficiently represented in the first action so that the application of collateral estoppel is not inequitable." *Id.* at 445. Reil and his employer met the requirements of privity for numerous reasons, paramount of which was that "Reil took the witness stand in the subrogation case and gave sworn testimony regarding the facts surrounding the accident," "took steps toward consolidating his case with [his employer's]," and "operat[ed] under the same legal theory – negligence – on which issue the jury made a determination." *Id.* The *Reil* court distinguished a prior case that found a lack of privity on the ground that the prior case involved parties who "had no right to be heard at oral argument" and "did not have any control over the proceedings." *Id*.

Here, no privity attaches because the Receiver had no control over, no right to be heard in, and no participation in the prior investor lawsuit. Nor is the Receiver asserting complete identity of legal theories, since the investors asserted pure negligence and an aiding an abetting claim based on intentional conduct,

whereas the Receiver asserts four distinct aiding and abetting torts based on "knowing" conduct. *Compare Grad*, 801 N.W.2d at 349-52 with Complaint ¶¶ 70-98.

The Bank illogically supports its privity argument by advancing the converse proposition – that if the Receiver wins *this* case, then the Scheme's Ponzi investors would be found in privity with the Receiver. Not only is this proposition irrelevant to proving the Receiver's privity with outcomes reached by *prior suing investors*, it is also both unripe and incorrect. *See Chilcott*, 713 F.2d at 1486. The Bank's cited case (*Lamson v. Towle-Jamieson Inv. Co.*, 245 N.W. 627 (Minn. 1932)) involved a receiver who expressly represented the interests of a creditor, making a later party who "as a creditor [] now claims" a right against the same defendant in privity with the receiver. *Id.* at 628. Likewise, the Bank's other authority fails to support its creditors-in-privity-with-the-Receiver argument (*i.e.*, the converse of the question actually presented by the Bank's motion): *Britt v. Vernon*, No. 06-cv-1358, 2006 U.S. Dist. LEXIS 75128 (E.D. Cal. Oct. 2, 2006). In *Britt*, the court found that the later-barred party was in privity with a litigating receiver because it had provided affidavits and live testimony in support of the receiver, was the only creditor named in the receiver's complaint, and the settlement by the court was approved on condition that the later party be named a creditor of the receivership. *Id.* at *21-22. None of these factors remotely applies here.

C. THE RECEIVER HAS STANDING

The Bank also fails to support its argument that the Receiver lacks standing. This Court has already held that the Receiver has standing to pursue claims on behalf of the Receivership Entities, even if those claims ultimately benefit investors. "In a Ponzi scheme, the entities used to further the fraud, in whatever corporate form, are instrumentalities of the scheme but they are also victims of the scheme." *Zayed v. Buysse*, No. 11-cv-1042, 2011 U.S. Dist. LEXIS 59068, at *11 (D. Minn. June 1, 2011); *Zayed v. Peregrine Financial Group, Inc.*, No. 12-cv-269, Doc. 30 at 5-6 (D. Minn. June 22, 2012) ("Because this case involves a Ponzi scheme, the Receivership Entities are considered victims of the fraud and thus creditors of the Ponzi scheme.").

The Bank's argument to the contrary rests on the incorrect assumption (refuted above in Section III.B.) that *investors* would have no future claim based on the *Receiver's* participation in this lawsuit, under principles of privity and *res judicata*. The Bank states, "[i]f the Receiver does litigate this case, it will likely have preclusive effect on the individual investors. (Bank Mem. 16). Permitting the Receiver to proceed would, accordingly, violate the 'deep rooted historical tradition that everyone should have his own day in court.'" (*Id.*). Calling this action "troubling" because the investors have no means to "opt-out," and analogizing a receivership action to class actions, the Bank states that the individual investors "should decide whether to sue and how to resolve that litigation – just as several investors have already done." (*Id.* at 16-17). This

statement is particularly ironic, since the Bank has already quashed one effort by investors to recover from it.

As much as the Receiver appreciates the Bank's welcome concern for the investors it helped defraud, this argument simply rehashes the *res judicata* argument. Critically, the Bank cites no authority that dismissed a federal equity receiver's tort suit against a Ponzi scheme aider-and-abetter on prudential standing grounds. A receiver has standing to bring claims against third parties where that claim belongs to the receivership entity (as the claims here do). *See Buysse*, 2011 U.S. Dist. LEXIS 59068, at *11-12; *see also Marion v. TDI Inc.*, 591 F.3d 137, 147-49 (3d. Cir. 2010). Even where the Receivership's claims on behalf of the receivership entity might replenish a fund for the benefit of investors' interests, that does not make the receiver's claims those of the investors, since "that is precisely the purpose of a receiver: to marshal the receivership entities' assets, to which several parties assert conflicting claims, so that the assets may be distributed to the injured parties in a manner the court deems equitable." *Wuliger v. Mfrs. Life Ins. co.*, 567 F.3d 787, 795 (6th Cir. 2009).

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In short, all three of the Bank's proposed legal bars to this lawsuit lack merit. The *in pari delicto* doctrine does not apply, or is unripe, for numerous reasons. The prior failed investors suit – far from precluding the ability of the Receiver to proceed on *res judicata* grounds – confirms that the Receiver may properly sue. Finally, prudential standing arguments simply rehash meritless *res*

judicata arguments, sprinkling them with feigned concern for the more than 700 investors who would like one day to recover their funds. If such a concern were sincere, the Bank would not have brought the present motion.

IV. NEW ARGUMENTS IN REPLY WOULD BE IMPROPER

It would be improper for the Bank to raise new arguments in reply. *Swanda v. Choi*, No. 10-cv-970, 2012 U.S. Dist. LEXIS 126009, at *14 n.9 (D. Minn. Aug. 3, 2012). The local rule mandates likewise, stating that the "reply memorandum must not raise new grounds for relief or present matters that do not relate to the opposing party's response." D. Minn. LR 7.1(c)(3)(B). Thus if the Bank should do so, the Receiver respectfully requests that the Court not entertain them.

V. CONCLUSION

For all of the reasons above, the Receiver respectfully requests that the Court deny the Bank's motion to dismiss. No affirmative defense, no prior litigation outcome by investors, and no standing defect bars relief. Moreover, the Complaint

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Respectfully submitted,

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