

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

R.J. ZAYED, In His Capacity As  
Court-Appointed Receiver For The  
Oxford Global Partners, LLC, Uni-  
versal Brokerage, FX, and Other Re-  
ceiver Entities,

Plaintiff,

vs.

ASSOCIATED BANK, N.A.,

Defendant.

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

**DEFENDANT ASSOCIATED BANK, N.A.'S ANSWER**

Defendant Associated Bank, N.A. ("Associated Bank") answers the Complaint filed by R.J. Zayed, in his capacity as court-appointed receiver for The Oxford Global Partners, LLC, Universal Brokerage FX, and other Receiver Entities ("Receiver") as follows: Except as expressly admitted or qualified hereafter, Associated Bank denies all of the allegations of the Complaint.

**NATURE OF THE CASE**

1. Associated Bank admits only that this matter involves a Ponzi scheme and that the operators of this Ponzi scheme were Trevor Cook, Patrick Kiley, Chris Pettengill, Gerald Durand, and Jason Bo-Alan Beckman, and that each of these operators has been found guilty and sentenced to prison. Otherwise, Associated Bank lacks information sufficient to form a belief as to the truth of the remaining allegations in paragraph

- 1, and therefore denies them on this basis.
2. The allegations set forth in paragraph 2 refer to a court order, which speaks for itself. To the extent that any further response is required, Associated Bank admits the allegations in paragraph 2.
3. Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3, and therefore denies them on this basis.
4. Associated Bank denies the allegations in paragraph 4.
5. Associated Bank admits only that its former employee, Lien Sarles, discussed legitimate banking matters with Trevor Cook and/or Patrick Kiley, including setting up a bank account for Crown Forex LLC, and that it opened an account for Crown Forex LLC numbered XXX-1705. Otherwise, Associated Bank denies the remaining allegations in paragraph 5.
6. Associated Bank lacks knowledge sufficient to form a belief as to the truth of the allegations in the second sentence of paragraph 6 of the Complaint, and therefore denies them on this basis. Associated Bank denies the remaining allegations in paragraph 6.
7. Associated Bank denies the allegations in paragraph 7.
8. Associated Bank denies the allegations in paragraph 8.
9. Associated Bank admits only that the redacted check image appears to

contain the phrase “Client Disbursement Account.” Otherwise, Associated Bank denies the remaining allegations in paragraph 9.

10. Associated Bank admits only that, from time to time, Mr. Sarles and other employees of Associated Bank approved certain transfers from the XXX-1705 account. Otherwise, Associated Bank denies the remaining allegations in paragraph 10.
11. Associated Bank admits only that Trevor Cook withdrew \$600,000 from an account XXX-2331, an account over which Mr. Cook had signatory authority. Otherwise, Associated Bank denies the remaining allegations in paragraph 11.
12. Associated Bank admits only that Trevor Cook’s request to withdraw \$600,000 caused the bank to investigate the XXX-1705 account and Mr. Cook further. Otherwise, Associated Bank denies the remaining allegations in paragraph 12.
13. Associated Bank denies the allegations in paragraph 13.
14. Associated Bank admits that this Court has subject-matter jurisdiction over this action.
15. Associated Bank admits only that this Court has subject-matter jurisdiction over this action. Otherwise, Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 15, and therefore denies them

on this basis.

16. Associated Bank admits that venue lies in this district.
17. Associated Bank admits that venue lies in this district.
18. Associated Bank admits the allegations in paragraph 18 of the Complaint.
19. Associated Bank admits the allegations in paragraph 19 of the Complaint.
20. With respect to the allegations in paragraph 20, Associated Bank denies that paragraph 3(a) of the Plea Agreement and Sentencing Stipulations in *United States v. Pettengill*, No. 11-cr-192 (D. Minn. June 21, 2011) defines all of the listed entities as “Receivership Entities” or “UBS Entities.”
21. With respect to the allegations in paragraph 21, Associated Bank denies that paragraph 3(b) of the Plea Agreement and Sentencing Stipulations in *United States v. Pettengill*, No. 11-cr-192 (D. Minn. June 21, 2011) defines the listed entities as “Receivership Entities.”
22. Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 22, and therefore denies them on this basis.
23. Associated Bank admits only that Trevor G. Cook pled guilty to one count of mail fraud in violation of 18 U.S.C. § 1341 and one count of tax

evasion, in violation of 26 U.S.C. § 7201. Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 23, and therefore denies them on this basis.

24. Associated Bank admits only that Patrick J. Kiley was convicted of twelve counts of mail and wire fraud in violation of 18 U.S.C. §§ 2, 1341, 1343, one count of conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 371, and two counts of money laundering, in violation of 18 U.S.C. §§ 2 and 1957. Otherwise, Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 24, and therefore denies them on this basis.

25. Associated Bank admits only that Christopher Pettengill pled guilty to one count of securities fraud, in violation of 15 U.S.C. §§ 77q(a) and 77x, one count of conspiracy to commit wire fraud and mail fraud in violation of 18 U.S.C. § 371, and one count of engaging in a monetary transaction in property derived from a specified unlawful activity, in violation of 18 U.S.C. § 1957. Otherwise, Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 25, and therefore denies them on this basis.

26. Associated Bank admits only that Jason Bo-Alan Beckman was convicted of sixteen counts of mail and wire fraud in violation of 18 U.S.C. §§ 2, 1341, 1343, one count of conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 371, two counts of money laundering in violation of 18 U.S.C. §§ 2 and 1957, two counts of filing a false tax return in violation of 26 U.S.C. § 7206(1), and one count of tax evasion, in violation of 26 U.S.C. § 7201. Otherwise, Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 26, and therefore denies them on this basis.
27. Associated Bank admits only that Gerald Joseph Durand was convicted of twelve counts of mail and wire fraud in violation of 18 U.S.C. §§ 2, 1341, 1343, one count of conspiracy to commit mail and wire fraud in violation of 18 U.S.C. § 371, two counts of money laundering in violation of 18 U.S.C. §§ 2 and 1957, two counts of concealing a material fact from the United States in violation of 18 U.S.C. §§ 1001(a)(1) and 1002, and three counts of filing a false tax return in violation of 26 U.S.C. § 7206(1). Otherwise, Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 27, and therefore denies them on this basis.
28. Associated Bank admits the allegations contained in paragraph 28.

29. Associated Bank admits that it has branch offices located in Saint Louis Park, Minnesota, and Eagan, Minnesota. Associated also admits that it opened an account for Universal Brokerage FX Management, LLC, numbered XXX-5601, on January 2, 2008; that it opened an account for Crown Forex LLC, numbered XXX-1705, on June 16, 2008; that it opened an account for Basel Group LLC, numbered XXX-5214, on June 8, 2009; that it opened an account for Oxford Global Partners, numbered XXX-2356, on September 8, 2008; for Oxford Global FX, LLC, numbered XXX-2331, on October 8, 2008; for Market Shot LLC, numbered XXX-8733, on December 17, 2008. Otherwise, Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 29, and therefore denies them on this basis.
30. Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 30, and therefore denies them on this basis.
31. Associated admits only that from time to time there were transfers between account XXX-1705 and other accounts at Associated Bank. Associated Bank denies the remaining allegations contained in paragraph 31.

**FACTS GIVING RISE TO THIS CASE<sup>1</sup>**

32. Associated Bank incorporates its answers to paragraphs 1 through 31 of the Complaint by reference.
33. Associated Bank denies any “involvement in the Ponzi scheme.” Associated admits only that there were various transfers from account no. XXX-1705. Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 33, and therefore denies them on this basis.
34. Associated Bank admits only that its former employee, Mr. Sarles, discussed legitimate banking matters with Trevor Cook and/or Patrick Kiley. Otherwise, Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 34, and therefore denies them on this basis.
35. Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 35, and therefore denies them on this basis.
36. Associated Bank admits only that account XXX-5601 was opened on January 2, 2008, and that Patrick Kiley was one of the authorized signatories on the account. Otherwise, Associated Bank denies the re-

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<sup>1</sup> For the reasons stated herein, Associated Bank denies that any of the allegations contained in paragraphs 32 through 69 of the Receiver’s Complaint gives rise to a cause of action.



maintaining allegations contained in paragraph 36.

37. Associated Bank denies the allegations contained in paragraph 37.
38. Associated Bank denies the allegations contained in paragraph 38.
39. Associated Bank denies the allegations contained in paragraph 39.
40. Associated Bank denies the allegations contained in paragraph 40.
41. Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 41, and therefore denies them on this basis.
42. Associated Bank denies the allegations contained in paragraph 42.
43. Associated Bank denies the allegations contained in paragraph 43.
44. Associated Bank denies the allegations contained in paragraph 44.
45. Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 45, and therefore denies them on this basis.
46. Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 46, and therefore denies them on this basis.
47. Associated Bank admits that, from time to time, there were deposits to and withdrawals from the XXX-1705 account. Otherwise, Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 47, and therefore

denies them on this basis.

48. Because 31 U.S.C. §§ 5318(g)(2) and 5322 legally bar Associated Bank from revealing to anyone whether or not it has filed a SAR, Associated can neither admit nor deny whether it has done so. Associated Bank denies the remaining allegations contained in paragraph 48.
49. Associated Bank admits only that accounts XXX-1812, XXX-2356, and XXX-2331 were opened at Associated Bank, and that certain documents refer to account XXX-2356 as a “checking/money market” account. Otherwise, Associated Bank denies the remaining allegations contained in paragraph 49.
50. Associated Bank denies the assertion that there was “atypical behavior swirling around [the XXX-1812] account” that “defie[d] expectations of what a reasonable bank would (and should) do for any customer account.” In addition, Associated Bank denies that “[w]hen the [XXX-1812] account was opened, Pettengill was identified as the owner of the . . . account . . . and Cook was only identified as having signatory authority.” Associated Bank admits only that Christopher Pettengill’s signatory authority over the XXX-1812 account was removed by Oxford Global Investments Inc. Otherwise, Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 50 and each of its sub-paragraphs, and

therefore denies them on this basis.

51. Associated Bank admits only that there were transfers into and out of account XXX-1705 between November 14, 2008 and December 18, 2008. Associated denies the remaining allegations in paragraph 51.
52. Associated Bank admits only that the balance of account XXX-1705 varied and at times had a balance of over \$1,000,000, and that account XXX-1705 was not an interest-bearing account. Associated Bank denies the remainder of the allegations in paragraph 52.
53. Associated Bank admits only that account XXX-8733 was opened at Associated Bank, that the account was held by Market Shot LLC, that there was a telephone transfer service request for a transfer of \$40,000 from account no. XXX-1705 to account no. XXX-8733 on December 19, 2008, and that the comments section of the service request reads "Per customer request. Approved by Lien Sarles." Otherwise, Associated Bank denies the remaining allegations contained in paragraph 53.
54. Associated Bank Associated Bank admits only that there was a transfer of \$40,000 from account XXX-1705 to account XXX-8733. Otherwise, Associated Bank denies the remaining allegations contained in paragraph 54.
55. Associated Bank admits only that there was a telephone transfer service request for a transfer of \$2,000,000 from account XXX-1705 to ac-

count XXX-2331 on December 30, 2008. Otherwise, Associate Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 55, and therefore denies them on this basis.

56. Associated Bank admits only that there was a transfer of \$1,000,000 from account XXX-1705 to account XXX-2331. Otherwise, Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 56, and therefore denies them on this basis.

57. Associated Bank admits the allegations in the first sentence of paragraph 57. Associated Bank denies the remaining allegations in paragraph 57.

58. Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph, and therefore denies them on this basis.

59. Associated Bank admits only that between January 16, 2009 and May 21, 2009, there were deposits to and withdrawals from account XXX-1705. Associated denies the remaining allegations in paragraph 59.

60. Associated Bank admits only that on April 30, 2009, there was a transfer of \$1.7 million from account XXX-1705 to XXX-2331. Otherwise, Associated Bank lacks knowledge or information sufficient to form a be-

lief as to the truth of the allegations contained in paragraph 60, and therefore denies them on this basis.

61. Associated Bank admits only that account XXX-5214 was opened at Associated Bank and was related to Basel Group LLC. Associated Bank denies the remaining allegations contained in paragraph 61.
62. Associated Bank admits only that documents refer to account XXX-5214 as a “checking/money market” account. Associated Bank denies that any “Associated Bank employees” were “involved with Kiley.” Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 62, and therefore denies them on this basis.
63. Associated Bank admits only that Trevor Cook withdrew \$600,000 from account XXX-1705, and that Trevor Cook’s request to withdrawal of \$600,000 caused the bank to investigate the XXX-1705 account and Mr. Cook further. Otherwise, Associated Bank denies the remaining allegations in paragraph 63.
64. Associated Bank admits only that on June 29, 2009, 14 cashier’s checks were purchased, and that the remitter on each check appears in Exhibit 34 to the Receiver’s Complaint. Associated Bank denies the remaining allegations in paragraph 64.
65. Associated Bank admits only that between June 8, 2009, and July 6,

2009, there were deposits into and withdrawals from account XXX-2356. Associated denies the remaining allegations in paragraph 65.

66. Associated Bank admits only that Mr. Sarles received a copy of a newspaper article describing a lawsuit filed by creditors of the Receivership Entities, that Ms. Simon sent a copy of an article describing the lawsuit filed by creditors of the Receivership Entities to Mr. Sarles and Mr. Bianchi, and that on July 14, 2009, there was a wire transfer of \$101,000 to account XXX-5214. Otherwise, Associated Bank denies the remaining allegations in paragraph 66.
67. Associated Bank denies the allegations contained in paragraph 67.
68. Associated Bank denies the allegations contained in paragraph 68.
69. Associated Bank admits only that on February 23, 2012 it entered into a Consent Order with the Office of Comptroller of the Currency of the United States. Associated Bank denies the remaining allegations in paragraph 68.

## COUNT I

### **AIDING AND ABETTING FRAUD**

70. Associated Bank incorporates its answers to paragraphs 1 through 69 of the Receiver's Complaint by reference.
71. Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 71, and

therefore denies them on this basis.

72. Associated Bank denies the allegations contained in paragraph 72.
73. Associated Bank denies the allegations contained in paragraph 73.
74. Associated Bank denies the allegations contained in paragraph 74.
75. Associated Bank denies the allegations in paragraph 75.
76. Associated Bank denies the allegations contained in paragraph 76.
77. Associated Bank admits only that there were deposits to and withdrawals from the XXX-1705 account. Otherwise, Associated Bank denies the allegations contained in paragraph 77.
78. Associated Bank admits only that Trevor Cook withdrew \$600,000 from an account XXX-1705 and that deposits and withdrawals were made from the XXX-1705 account. Otherwise, Associated Bank denies the remaining allegations contained in paragraph 78.
79. Associated Bank denies the allegations contained in paragraph 79.
80. Associated Bank denies the allegations contained in paragraph 80.
81. Associated Bank denies that it allowed anyone to “maintain fictitious accounts.” Otherwise, Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the remaining allegations contained in paragraph 81, and therefore denies them on this basis.
82. Associated Bank denies the allegations contained in paragraph 82.
83. Associated Bank denies the allegations contained in paragraph 83.

The “WHEREFORE” clause set forth following paragraph 83 constitutes a legal conclusion to which no response is required. To the extent a response is required, Associated Bank denies that the Receiver is entitled to judgment against Associated Bank.

## COUNT II

### **AIDING AND ABETTING BREACH OF FIDUCIARY DUTY**

84. Associated Bank incorporates its answers to paragraphs 1 through 83 of the Receiver’s Complaint by reference.
85. Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 85, and therefore denies them on this basis.
86. Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 86, and therefore denies them on this basis.
87. Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in the first sentence of paragraph 87, and therefore denies them on this basis. Associated Bank denies the remaining allegations contained in paragraph 87.
88. Associated Bank denies the allegations contained in paragraph 88.

The “WHEREFORE” clause set forth following paragraph 88 constitutes a legal conclusion to which no response is required. To the ex-



tent a response is required, Associated Bank denies that the Receiver is entitled to judgment against Associated Bank.

### COUNT III

#### **AIDING AND ABETTING CONVERSION**

89. Associated Bank incorporates its answers to paragraphs 1 through 88 of the Receiver's Complaint by reference.
90. Associated Bank admits only that the Receiver seeks certain damages, but denies that the Receiver is entitled to the damages that he seeks, and denies the remaining allegations contained in paragraph 90.
91. Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 91, and therefore denies them on this basis.
92. Associated Bank lacks knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 92, and therefore denies them on this basis.
93. Associated Bank denies the allegations contained in paragraph 93.
94. Associated Bank denies the allegations contained in paragraph 94.

The "WHEREFORE" clause set forth following paragraph 94 constitutes a legal conclusion to which no response is required. To the extent a response is required, Associated Bank denies that the Receiver is entitled to judgment against Associated Bank.

**COUNT IV**

**AIDING AND ABETTING FALSE REPRESENTATIONS AND  
OMISSIONS**

95. Associated Bank incorporates its answers to paragraphs 1 through 94 of the Receiver's Complaint by reference.
96. Associated Bank admits only that the Receiver seeks certain damages, but denies that the Receiver is entitled to the damages that he seeks, and denies the remaining allegations contained in paragraph 90.
97. Associated Bank denies the allegations contained in paragraph 97.
98. Associated Bank denies the allegations contained in paragraph 98.

The "WHEREFORE" clause set forth following paragraph 98 constitutes a legal conclusion to which no response is required. To the extent a response is required, Associated Bank denies that the Receiver is entitled to judgment against Associated Bank.

**AFFIRMATIVE DEFENSES**

Associated Bank asserts the following affirmative defenses without conceding in any way that the Receiver does not have to prove each and every element of his claims. The responses set forth in paragraphs 1-98 of this Answer are incorporated into each of the following Affirmative Defenses by reference.

**FIRST AFFIRMATIVE DEFENSE****FAILURE TO STATE A CLAIM UPON WHICH RELIEF CAN BE GRANTED**

The Receiver's Complaint fails to state a claim upon which relief can be granted. Rejecting claims like the Receiver's, which seek to impose liability in hindsight for routine banking transactions, is essential for several reasons. *One*, permitting such claims would chill banking activity. *See, e.g., Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 189 (Minn. 1999) ("If we were to recognize that such routine services" are sufficient to permit an aiding and abetting claim, "then it would be the rare [professional] indeed who would not be subject to automatic liability merely because his client happened to be a tortfeasor."). *Two*, allowing such claims 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, 905, 908 (W.D. Mich. 2010) (internal quotation marks omitted), *aff'd* 712 F.3d 917 (6th Cir. 2013). In Minnesota, the commercial relationship between bank and customer requires a bank to, among other things, afford its customers prompt access to funds on deposit. If banks were liable in a situation like this, it would impose new, time-intensive duties on banks to police their customer's transactions, interfering with Minnesota's carefully considered policy. *Three*, permitting the Receiver's claims for aiding

and abetting breach of fiduciary duties and conversion to go forward would be particularly unwarranted. The Receiver has not plausibly alleged predicate claims for breach of fiduciary duty or conversion, which he must do to state aiding and abetting claims, because he has not plausibly alleged injury to the Receivership Entities. *Four*, the Receiver has failed to sufficiently allege that Associated Bank had actual knowledge of the Ponzi scheme operated by the Receivership Entities, and he has also failed to allege that Associated Bank rendered substantial assistance to the Ponzi scheme operated by the Receivership Entities.

## **SECOND AFFIRMATIVE DEFENSE**

### **STANDING**

The Receivership Entities were not harmed by any acts or omissions of Associated Bank and therefore the Receiver lacks standing to seek relief from Associated Bank.

## **THIRD AFFIRMATIVE DEFENSE**

### **STATUTE OF LIMITATIONS**

The Receiver's claims are barred, in whole or in part, by the applicable statute of limitations.

## **FOURTH AFFIRMATIVE DEFENSE**

### **NOT A PARTY IN INTEREST**

The Receiver is not the proper party in interest to bring any action re-

lated to the alleged misconduct of the Receivership Entities, their operators, or the accounts they maintained at Associated Bank.

### **FIFTH AFFIRMATIVE DEFENSE**

#### ***IN PARI DELICTO***

The Receiver's claims against Associated Bank are barred by the defense of *in pari delicto*. The Receivership Entities (via the Receiver) argue that Associated Bank should have "uncovered and prevented the Ponzi scheme from flourishing," (Compl. ¶ 74), but they may not recover on the theory that Associated Bank failed to stop *them* from committing misconduct. *See* ECF No. 78 at 9 (finding that dismissal on *in pari delicto* grounds was not warranted at the pleadings stage, but reserving judgment on fact-bound issues until summary judgment). Associated Bank did not participate in or benefit from the Ponzi scheme. The Receiver's claims against Associated Bank are based on allegations that the Receivership Entities opened deposit accounts at Associated Bank and then used the deposit accounts to receive and move funds as part of their Ponzi scheme. The Receivership Entities authorized, directed, and participated in these activities. The conduct of Cook and Kiley must be imputed to the Receivership entities for purposes of the *in pari delicto* defense because the Receivership entities are alter egos of Cook and Kiley. Because the Receiver purports to stand in the shoes of the Receivership Entities and the shoes of Trevor Cook, Patrick Kiley, Christopher Pet-

tengill, Gerald Durand, and Jason Bo-Alan Beckman, the Receiver's claims are barred just as the Receivership Entities' claims would be barred by the defense of *in pari delicto*. The Receivership Entities, via the Receiver, cannot recover for alleged harm based on the Receivership Entities' active participation in their own Ponzi scheme.

### **SIXTH AFFIRMATIVE DEFENSE**

#### **COLLECTIVE SCIENTER**

The Receiver's Complaint fails to state a plausible claim against Associated Bank because it improperly relies on the notion of "collective scienter." "Corporations," like Associated Bank, "have no state of mind of their own. Instead the scienter of their agents must be imputed to them." *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1254 (11th Cir. 2008). Because of that, when a cause of action requires both "an essentially subjective state of mind" and "some sort of conduct," as in aiding and abetting claims, "the required state of mind must actually exist in the [same] individual." *Southland Sec. Corp. v. InSpire Ins. Solutions, Inc.*, 365 F.3d 353, 366 (5th Cir. 2004). Here, the Receiver's Complaint proceeds on the mistaken premise that the knowledge and actions of several disparate Associated Bank employees can be aggregated and imputed to Associated Bank. The Receiver cannot pursue this action based on this mistaken view of scienter.

**SEVENTH AFFIRMATIVE DEFENSE**

**RATIFICATION**

The Receiver's claims against Associated Bank are barred by the defense of ratification. The Receiver's case against Associated Bank is based on a Ponzi scheme allegedly operated by Trevor Cook, Patrick Kiley, Christopher Pettengill, Gerald Durand, and Jason Bo-Alan Beckman and the Receivership Entities, a group of entities that purportedly had no legitimate business operations. Under these circumstances, the Receiver's aiding and abetting claims against Associated Bank—claims that are predicated on Trevor Cook, Patrick Kiley, Christopher Pettengill, Gerald Durand, and Jason Bo-Alan Beckman's operation of a Ponzi scheme—fail as a matter of law because the Receivership Entities were part of the Ponzi scheme and the Receivership Entities therefore ratified these individuals' conduct, including the alleged fraud, breach of fiduciary duties, and conversion.

**EIGHTH AFFIRMATIVE DEFENSE**

**PROXIMATE CAUSE**

The Receiver's claims against Associated Bank are barred because the actions taken by Associated Bank were not the proximate cause of any alleged loss incurred by the Receivership Entities. Instead, Trevor Cook, Patrick Kiley, Christopher Pettengill, Gerald Durand, and Jason Bo-Alan Beckman were the proximate cause of the supposed injury to the Receivership En-

tities. Trevor Cook pled guilty to mail fraud and tax evasion, admitting that he diverted funds from the Receivership Entities. *See* Information, *United States v. Cook*, No. 10-cr-75 (JMR) (D. Minn. Mar. 30, 2010) (ECF No. 1). Christopher Pettengill pled guilty to securities fraud, wire fraud, and engaging in a monetary transaction in property derived from an unlawful activity, all of which injured the Receivership Entities. *See* Information, *United States v. Pettengill*, No. 11-cr-192 (DSD) (D. Minn. June 13, 2011) (ECF No. 1). Likewise, Patrick Kiley, Gerald Durand, and Jason Bo-Alan Beckman were found guilty of wire fraud, mail fraud, conspiracy to commit mail fraud and wire fraud, and money laundering, all of which injured the Receivership Entities. Under these circumstances, the Receiver cannot demonstrate that Associated Bank proximately caused any injury to the Receivership Entities.

#### **NINTH AFFIRMATIVE DEFENSE**

##### **SET OFF FOR RECOVERED FUNDS**

Associated Bank is entitled to a set off to the extent that the Receiver or any other investor or creditor of the Receivership Entities, or related entities receives any recovery from any other source or third party.

#### **TENTH AFFIRMATIVE DEFENSE**

##### **SET OFF FOR NON-FRAUDULENT TRANSACTIONS**

The Receiver's claims are barred to the extent that his claims are based on funds that the Receivership Entities invested in foreign currencies. Ac-



According to the Complaint, the Receivership Entities solicited individuals for funds that they promised, in turn, to invest in foreign currencies. The Receiver cannot establish that Trevor Cook, Patrick Kiley, Christopher Pettengill, Gerald Durand, or Jason Bo-Alan Beckman breached a duty to the Receivership Entities or converted assets of these entities when they used funds held by the Receivership Entities to invest in foreign currencies, even if those investments were unsuccessful.

### **ELEVENTH AFFIRMATIVE DEFENSE**

#### **AGREEMENT TO INDEMNIFY AND HOLD HARMLESS**

The Receiver's claims are barred pursuant to the terms of the Depository Declaration, the agreement that each Receivership Entity entered into with Associated Bank when it opened accounts at Associated Bank. The Depository Declaration provides that: "The Depositor assumes full responsibility for and indemnifies and holds harmless [Associated Bank] and its directors, officers, employees and agents for, from, and against all loss, cost, expense, damage, or liability (including reasonable attorneys' fees) incurred in connection with any claim, counterclaim, or proceeding brought as a result of, or arising out of or relating to: (a) any and all payments made or any other action taken by [Associated Bank] in reliance upon the signatures . . . of any authorized persons . . ., (d) honoring any oral or written request for transfer of funds to, from or between the Depositor's Accounts that is made in accord-

ance with this Agreement and the Deposit Account Rules, or (e) honoring any telephone or electronic request . . . for the transfer of funds to, from or between the Depositor's Accounts[.]” The Receiver, who stands in the shoes of the Receivership Entities, is bound by these agreements. These provisions of the Depository Declaration foreclose the Receiver's claims because his claims are predicated on certain alleged transfers involving the Receivership Entities' bank accounts at Associated Bank.

**TWELFTH AFFIRMATIVE DEFENSE**

**WAIVER**

The Receiver's claim for aiding and abetting fraud is barred by the doctrine of waiver. The Receivership Entities performed the terms of their Depository Declarations with Associated Bank after they determined the existence of the alleged fraud and therefore waived the fraud.

**THIRTEENTH AFFIRMATIVE DEFENSE**

**SET OFF FOR RETURNED FUNDS**

Associated Bank is entitled to a set off to the extent that any investor that deposited funds (whether directly or indirectly) with an account at Associated Bank received payment of any funds back from Associated Bank.

**FOURTEENTH AFFIRMATIVE DEFENSE**

***RES JUDICATA***

To the extent that the Receiver's damages claims are based on the

investor losses at issue in *Grad v. Associated Bank, N.A.*, 801 N.W.2d 349 (Wis. Ct. App. 2011), the Receiver's claims are barred by the doctrine of *res judicata*.

## FIFTEENTH AFFIRMATIVE DEFENSE

### FAILURE TO MITIGATE DAMAGES

The Receiver's damages are limited to the extent the Receiver and/or the Receivership Entities have failed to mitigate their damages. *See, e.g., Bass v. Equity Residential Holdings, LLC*, 849 N.W.2d 87, 92 (Minn. Ct. App. 2014) ("Generally, the party alleging a loss because of a tort or breach of contract has a duty to mitigate damages."); *U.S. ex rel. Jordan v. Northrop Grumman Corp.*, 2002 WL 35454612, at \*18 (C.D. Cal. Aug. 5, 2002) (holding that affirmative defense to common law fraud—*i.e.*, "one who fails to avoid the consequences of a tort is disabled from recovering those damages which he could reasonably have avoided"—would not be stricken). In this case, the Receivership Entities knew or should have known that their principals and/or alter egos, Trevor Cook, Patrick Kiley, Jason Bo-Alan Beckman, Gerald Durand, and Christopher Pettengill, were using investor funds for their own personal gain. The Receivership Entities took no steps to stop this conduct and, therefore, failed to avoid damages that could have been reasonably avoided.

**SIXTEENTH AFFIRMATIVE DEFENSE**

**SPOLIATION OF MATERIAL EVIDENCE**

Receivership Entities, their agents, and/or their alter egos failed to preserve and permitted the spoliation of material evidence. Such conduct bars recovery from Defendant and/or gives rise to liability for damages payable to the answering defendant. *See, e.g., Constr. Sys., Inc. v. Gen. Cas. Co. of Wisconsin*, 2011 WL 3625066, at \*14 (D. Minn. 2011) (holding that a court may impose sanctions for spoliation based upon the prejudice caused to the opposing party). In July 2009, at Patrick Kiley's direction, two employees of the Receivership Entities, Julia Smith Gilsrud and Ruthie Riehm, destroyed documents kept at the Receivership Entities' office at 12644 Tiffany Court, Burnsville, Minnesota 55337-3487. During the same month, Patrick Kiley, Trevor Cook, and Mr. Cook's brother, Graham Cook, removed computers and other electronic media from the Receivership Entities' office at the Price Security Bank building in Eagan, Minnesota. Upon information and belief, Patrick Kiley, Trevor Cook, and Graham Cook intended to destroy or hide these computers and electronic media.

**SEVENTEENTH AFFIRMATIVE DEFENSE**

**FAILURE TO COMPLY WITH MINN. STAT. § 549.191**

Receiver's demand for punitive damages is invalid and must be stricken because it fails to comport with Minnesota Statutes § 549.191. That section

prohibits a party from pleading punitive damages until the court determines, following a hearing on a motion to amend the pleadings, that the moving party's affidavits present prima facie evidence of entitlement to punitive damages under one of the bases provided by § 549.20. *Kuehn v. Shelcore, Inc.*, 686 F. Supp. 233, 234 (D. Minn. 1988) (granting motion to strike prayer for punitive damages).

WHEREFORE, Defendant Associated Bank, N.A. respectfully requests that the Court: 1) enter final judgment in its favor against Plaintiff on all claims in the Complaint and order that Plaintiff take nothing by his claims, 2) award Associated Bank all costs and attorneys' fees to which it is entitled

under the law, and 3) award Associated Bank such other and further relief as the Court deems appropriate.

Dated: August 18, 2015

Respectfully submitted,

s/ Alex C. Lakatos

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