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, vs. ASSOCIATED BANK, N.A., Defendant.	Case No. 13-cv-00232 (DSD-JSM)

DEFENDANT ASSOCIATED BANK, N.A.'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO COMPEL RESPONSES TO ITS FIRST SET OF REQUESTS FOR ADMISSION

Associated Bank, N.A. ("Associated Bank") served Requests for Admissions that ask for responses to basic questions about this case, such as whether the Receivership Entities (aka the "Cook-Kiley Entities") destroyed documents when the Government was closing in on them (all signs point to "yes") or whether employees of the Cook-Kiley Entities actually told anyone at Associated Bank that they were committing a fraud (all signs point to "no"). Despite having a staggering quantity of pertinent information at his fingertips and years to digest it, the Receiver repeatedly has refused to admit or deny these and other matters. Instead, he relies on boilerplate responses

that he "does not have information sufficient to admit or deny."

Under Federal Rule of Civil Procedure 36(a)(4), before refusing to admit or deny a request, a party must (1) make "reasonable inquiry" and (2) based on the outcome of its inquiry, it must "state *in detail* why [it] cannot truthfully admit or deny." Rule 36(a)(4) (emphasis added). Here, the Receiver has done neither. This is a unique case where the Receiver, even before filing the suit, had a mountain of information that is more than sufficient to allow the Receiver to admit or deny the requests at issue. Given the vast quantity of relevant information in his possession, the Receiver's claim that he is unable to provide full responses to straightforward factual statements about his case is implausible and impermissible. Accordingly, the Court should compel the Receiver to respond to Associated Bank's requests as required by Rule 36.

BACKGROUND

A. Information Already In the Receiver's Possession

The Receiver already has a substantial amount of evidence from a myriad of sources.

Receivership entity materials. Since at least January 2011—*i.e.*, for nearly five years—the Receiver has been in possession of 60 imaged hard drives and 150 boxes of paper documents that he removed from the

Receivership Entities.[1] Ex. A at 2 (January 18, 2011 letter from Receiver's counsel describing documents seized from Receivership Entities).[2] The Receiver has hired a forensic consultant to gather and catalog all that evidence. *Id.* He has conducted multiple interviews of the Ponzi scheme principals, including the purported scheme mastermind, Trevor Cook. *Id.* at 3 (confirming that Receiver is in possession of investigators' notes and transcripts of interviews with Trevor Cook); Ex. B (representing that the Receiver conducted a 4.5 hour interview with Trevor Cook on April 23, 2010).

Associated Bank materials. The Receiver has obtained an affidavit from Lien Sarles, a former employee of Associated Bank who the Receiver alleges is the principal, if not only, contact between the bank and the schemers. *See* ECF No. 1-6 (attached as Ex. C). Moreover, even before the Receiver filed his Complaint, he already had over 1,900 pages of pre-suit discovery material that Associated Bank provided to him in 2011, including emails from key Associated Bank employees.

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[1] As the Court has previously noted, the Receiver stepped into the shoes of the Receivership Entities. *See* ECF No. 78 at 7 ("[A] receiver typically has the same rights and is subject to the same defenses as the entity that the Receiver represents.").

[2] "Ex." refers to exhibits to the Declaration of Stephen M. Medlock, Esq., which is filed concurrently with this Memorandum.

Discovery from related investigations and litigation. As if all that were not enough, the Receiver has had the benefit of investigations and litigation brought by the U.S. Securities and Exchange Commission, U.S. Commodity Futures Trading Commission, the Internal Revenue Service, and the U.S. Attorney for the District of Minnesota. *See, e.g.*, *U.S. Secs. & Exch. Comm'n v. Cook*, No. 09-cv-3333 (D. Minn.); *U.S. Commodity Futures Trading Comm'n v. Cook*, No. 09-cv-3332 (D. Minn.); *U.S. Secs. & Exch. Comm'n v. Beckman*, No. 11-cv-0574 (D. Minn.); *United States v. Beckman*, 787 F.3d 466, 474-75 (8th Cir. 2015). Moreover, he is in possession of the complete record from the 29 day criminal trial of three of the Ponzi scheme's principals—Jason Bo-Alan Beckman, Gerald Durand, and Patrick Kiley. *See United States v. Beckman*, 787 F.3d 466, 474-75 (8th Cir. 2015).

B. Associated Bank's Requests For Admission

On August 24, 2015, Associated Bank served the Receiver with its First Set of Requests for Admission. Ex. D. Among other things, Associated Bank requested that the Receiver admit or deny basic facts, including whether any Receivership Entity employee told Associated Bank that the Receivership Entities were perpetrating a fraud. Ex. D. at Reqs. 2-5, 8-9, 11. On September 23, 2015, the Receiver responded to each of these requests with the identical, zero-calorie statement: "Plaintiff has made reasonable inquiry

and the information he knows or can readily obtain is insufficient to enable him to admit or deny [the] Request." Ex. E. In compliance with the Local Rules, each of the Requests in dispute and the Receiver's answer are set out below:

> REQUEST NO. 2:
>
> During the relevant time period, no Employee of any Cook-Kiley Entity communicated to any Employee of Associated Bank that any Cook-Kiley Entity was perpetrating a fraud.
>
> ANSWER:
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> Plaintiff has made reasonable inquiry and the information he knows or can readily obtain is insufficient to enable him to admit or deny Request No. 2.
>
> REQUEST NO. 3:
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> During the relevant time period, no Employee of any Cook-Kiley Entity communicated to any Employee of Associated Bank that any Cook-Kiley Entity was breaching its fiduciary duties.
>
> ANSWER:
>
> Plaintiff has made reasonable inquiry and the information he knows or can readily obtain is insufficient to enable him to admit or deny Request No. 3.
>
> REQUEST NO. 4:
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> During the relevant time period, no Employee of any Cook-Kiley Entity communicated to any Employee of Associated Bank that any Cook- Kiley Entity was committing the tort of conversion.
>
> ANSWER:
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> Plaintiff has made reasonable inquiry and the information he knows or can readily obtain is insufficient to enable him to admit

or deny Request No. 4.

REQUEST NO. 5:

During the relevant time period, no Employee of any Cook-Kiley Entity communicated to any Employee of Associated Bank that any Cook-Kiley Entity was making false representations or omissions.

ANSWER:

Plaintiff has made reasonable inquiry and the information he knows or can readily obtain is insufficient to enable him to admit or deny Request No. 5.

REQUEST NO. 8:

At Patrick Kiley's direction, Julia Smith Gilsrud and Ruthie Riehm destroyed documents kept at the Cook-Kiley Entities' office at 12644 Tiffany Court, Burnsville, MN 55337-3487.

ANSWER:

Plaintiff has made reasonable inquiry and the information he knows or can readily obtain is insufficient to enable him to admit or deny Request No. 8.

REQUEST NO. 9:

In July 2009, Patrick Kiley, Trevor Cook, and Graham Cook removed computers from the Cook-Kiley Entities' office at the Prime Security Bank building in Eagan, Minnesota.

ANSWER:

Plaintiff has made reasonable inquiry and the information he knows or can readily obtain is insufficient to enable him to admit or deny Request No. 9.

REQUEST NO. 11:

Wells Fargo, Charles Schwab, Saxo Bank, and Credit Suisse had no knowledge of the Ponzi Scheme prior to June 22, 2009.

ANSWER:

> Plaintiff has made reasonable inquiry and the information he knows or can readily obtain is insufficient to enable him to admit or deny Request No. 11.

Ex. E at Reqs. 2-5, 8-9, 11.

C. Associated Bank's Requests For Admission Are Highly Relevant

These Requests go to the heart of the Parties' claims and defenses. The Receiver must prove that Associated Bank had "actual knowledge" of the alleged fraud, breach of fiduciary duties, conversion, and false representations and omissions. *Zayed v. Associated Bank*, 779 F.3d 727, 733 (8th Cir. 2015). Associated Bank's Requests 2-5 ask the Receiver to admit or deny whether any employee of the Receivership Entities ever communicated the existence of fraud, breach of fiduciary duties, conversion, or false representations and omissions to Associated Bank. *See* Ex. E at Reqs. 2-5, 11. Likewise, Requests 8 and 9 ask the Receiver to admit or deny whether the Receivership Entities destroyed evidence—facts that are critical to Associated Bank's spoliation of material evidence defense. *See* ECF No. 80 at 28; Ex. E at Reqs. 8-9. Finally, Request 11 asks whether other third party banks—at which the Ponzi scheme entities also held funds—had knowledge of the Scheme prior to June 22, 2009. This information, among other things, bears directly on the Receiver's damages claims in this case.

The Receiver's responses are inadequate. The Receiver has several terabytes of information and scores of volumes of relevant testimony at his disposal. He should be able to admit or deny these Requests for Admissions.

D. Associated Bank Made Every Effort to Avoid Burdening the Court With This Dispute

The Parties met and conferred multiple times regarding the Receiver's responses to Associated Bank's Requests for Admissions. Despite the Parties' good faith efforts, they have been unable to resolve this dispute. On September 29, 2015, Associated Bank sent the Receiver a letter explaining that these responses were insufficient, citing supporting authorities. Ex. F. Associated Bank requested that the Receiver supplement his responses to either admit or deny Requests 2-5, 8-9, and 11, or state particularly the reasons why he is unable to admit or deny each of those requests. *Id.*

On October 5, 2015, the parties held a telephone conference regarding the sufficiency of the Receiver's responses to these seven requests. On October 30, 2015, Associated Bank sent the Receiver an email requesting another telephone conference regarding the Receiver's responses to the bank's Requests for Admissions. *See* Exs. G & H. The parties held a telephonic discovery conference on November 4, 2015. Despite their good-faith attempts and desire not to burden the Court with discovery disputes,

Associated Bank and the Receiver are unable to resolve this dispute.

ARGUMENT

Under Federal Rule of Civil Procedure 26, a party "may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). When a party, as here, fails to adequately respond to discovery seeking relevant information, under Rule 37, a party, "[o]n notice to other parties . . . may move for an order compelling disclosure or discovery." Fed. R. Civ. P 37(a). For the purposes of Rule 37(a), "an evasive or incomplete disclosure, answer, or response must be treated as a failure to disclose, answer, or respond." Fed. R. Civ. P. 37(a)(4). Here, the Receiver has failed to provide complete and specific responses to Associated Bank's Requests 2-5, 8-9, and 11.

A. The Receiver Has Failed To Conduct A Reasonable Inquiry

Under Rule 36(a)(4) an answering party may "assert lack of knowledge or information as a reason for failing to admit or deny" only if the answering party first "has made reasonable inquiry" and nevertheless still has "insufficient [information] to enable it to admit or deny." Rule 36(a)(4). This provision does not permit a party to *merely state* that it has made reasonable inquiry; a party must actually *do so*. *Napolitano v. Synthes USA, LLC*, 297 F.R.D. 194, 198 (D. Conn. 2014) ("This is more than simply a technical

pleading requirement. Rather it reflects the obligation of a party to make a reasonable effort to obtain information needed to respond to the request."). A party must "attempt to find out the answer to the request." *Kay v. Lamar Advert. of S.D., Inc.*, 2009 WL 2882948, at *2 (D.S.D. 2009); *see also Johnson Int'l Co. v. Jackson Nat'l Life Ins. Co.*, 812 F. Supp. 966, 987 (D. Neb. 1993) ("Rule 36(a) requires a party answering a request for admission to ascertain the truth if the ability to do so is 'reasonably within his power.'").

At a minimum, "reasonable inquiry" means a "review and inquiry of those persons and documents that are within the responding party's control." *T. Rowe Price Small-Cap Fund, Inc. v. Oppenheimer & Co., Inc.*, 174 F.R.D. 38, 43 (S.D.N.Y. 1997). "The operative words" in this context "are 'reasonable' and 'due diligence.'" *Erie Ins. Prop. & Cas. Co. v. Johnson*, 272 F.R.D. 177, 184 (S.D.W. Va. 2010) (quoting *F.D.I.C. v. Halpern*, 271 F.R.D. 191, 193 (D. Nev. 2010)); *see also Henry v. Champlain Enters., Inc.*, 212 F.R.D. 73, 78 (N.D.N.Y. 2003) ("Rule 36 requires the responding party to make a reasonable inquiry, a reasonable effort, to secure information that is readily obtainable from persons and documents within the responding party's relative control and to state fully those efforts."). This has been construed to include "investigating and questioning plaintiffs' officers, administrators, agents, employees . . . or other personnel, who conceivably, but in realistic

terms, may have information which may lead to or furnish the necessary and appropriate response. In this connection, relevant documents . . . must be reviewed as well." *Piskura v. Taser Int'l*, 2011 WL 6130814, at *4 (S.D. Ohio 2011) (internal quotation marks omitted). Indeed, "[u]nder certain circumstances, parties may be required to inquire of third parties to properly respond to requests to admit." *Hanley v. Como Inn, Inc.*, 2003 WL 1989607, at *2 (N.D. Ill. 2003).

In this case, the Receiver has information sufficient to enable him to answer these requests and he should be compelled to do so. *See, e.g.*, *Halpern*, 271 F.R.D. at 194 ("If the information is held by the responding party or by an individual or entity with which the responding party maintains a relationship that enables it readily to procure the required information, then that party may be expected to seek out the information and respond substantively to the request for admission."). Indeed, it is difficult to fathom how the Receiver could have met this due diligence standard, yet somehow still lack the information necessary to admit or deny Associated Bank's requests for admissions.

Receivership Entities' own communications. Associated Bank asks the Receiver to admit that the Receivership Entities' own employees never communicated anything about the fraud to anyone at Associated Bank.

Again, the Receiver already has ample information to address its own employees' conduct. As noted above, for at least five years, the Receiver has had 60 imaged hard drives and 150 banker's boxes of hard copy documents related to the Receivership Entities. The Receiver has conducted multiple interviews with principals of the Cook-Kiley Ponzi scheme, including Trevor Cook. Ex. A at 3; Ex. B. In addition, Associated Bank produced over 1,900 pages of documents to the Receiver pursuant to a subpoena prior to the Receiver filing his complaint in this action. These documents include emails sent and received by key bank employees. Despite having such an enormous quantity of relevant information at his fingertips, the Receiver claims that he does not have information sufficient to admit or deny these basic factual requests.

Receivership Entities' destruction of documents. Associated Bank asked the Receiver to admit that, "At Patrick Kiley's direction, Julia Smith Gilsrud and Ruthie Riehm destroyed documents kept at the Cook-Kiley Entities' office," because John Loebel, an employee of the Cook-Kiley Entities, testified at trial that Gilsrud and Riehm destroyed documents on Kiley's instruction. *See U.S. v. Beckman*, No. 11-cr-00228 (D. Minn.), 5/23/2012 Tr. at 4078:10-20; *see also id.* 4148:14-17. (testimony of Cook-Kiley Entities employee Bradley Smallfield, that Trevor Cook, Graham Cook, and Patrick

Kiley removed computers and other electronic media from the Receivership Entities' office). What, other than delay, could the Receiver hope to achieve by waiting to answer "[a]s discovery in this action proceeds"? Ex. E. at 1. The Receiver has already had nearly six years since he was appointed, spent almost $8 million in fees and expenses, hired forensic professionals to collect and catalog documents from the Receivership entities, and deposed and interviewed Ponzi scheme principals and employees. It is implausible that "whether the Ponzi schemers shredded documents" could still be an unsolved mystery for the Receiver. Certainly no discovery that Associated Bank could provide would shed any light on the question whether the *Receivership Entities'* employees destroyed documents.

Other banks' knowledge. Associated Bank asked the Receiver to admit that "Wells Fargo, Charles Schwab, Saxo Bank, and Credit Suisse"—all of which maintained accounts for the Cook-Kiley Entities before and while the Cook-Kiley Entities had accounts at Associated Bank, and several of which, *unlike* Associated Bank, had personal accounts for the fraudsters—"had no knowledge of the Ponzi Scheme prior to June 22, 2009." Ex. A. at 7. Once again, the Receiver must already know the answer to this question. As the Receiver has argued to this Court, he was appointed by Chief Judge Davis to, among other things, "[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." ECF No. 43, at 4. Indeed, the Receiver has a fiduciary duty to adhere to Judge Davis's order and manage property (such as tort claims) for the benefit of the Ponzi scheme investors. *See, e.g.*, *Jo Ann Howard & Associates, P.C. v. Cassity*, 2014 WL 1870814, at *5 (E.D. Mo. 2014) ("Due to its broad powers over the receivership estate [the Receiver] is a fiduciary of all parties interested in the receivership, and must undertake to care for the property and manage it for creditors."); *PNC Bank, N.A. v. OCMC, Inc.*, 2010 WL 3782157, at *6 (S.D. Ind. 2010) ("A receiver owes fiduciary duties to the creditors that the receivership is set up to protect . . . . This duty includes protecting the receivership property such that the claims of creditors may be paid out of it.").

To discharge that duty, the Receiver necessarily would have had to form a view on whether other banks that did business with the Cook-Kiley Entities knew about the fraud. The fact that the Receiver has not sued any of the other banks—and that the statute of limitations for doing so has expired (*see* Minn. Stat. § 541.05 (2015))—strongly suggests that the Receiver has concluded that those banks were ignorant of the fraud. Associated Bank

merely asks the Receiver to admit as much. In any event, the notion that the Receiver needs discovery in *this action* to make that assessment simply is not plausible.

B. The Receiver's Responses Do Not Comply With Rule 36(a)(4)

Even if the Receiver lacked sufficient information to admit or deny—which as shown above, he does not—his responses would still be insufficient. Under that Rule 36(a)(4), if a party does not admit a matter, its "answer must specifically deny it or state *in detail* why the answering party cannot truthfully admit or deny it." Fed. R. Civ. P. 36(a)(4) (emphasis added). A "boilerplate response . . . that it can neither admit nor deny," such as the Receiver's here, "unaccompanied by reasons, will be held an insufficient response." *Hamilton v. Kerik*, 2002 WL 31834428, at *6 (S.D.N.Y. Dec. 17, 2002) (quoting 8B Charles Alan Wright, et al., *Federal Practice & Procedure* § 2261 (3d ed. 2015)); *Subramani v. Wells Fargo Bank, N.A.*, 2014 WL 7206888, at *1 (N.D. Cal. 2014) ("A bare assertion that he performed a reasonable inquiry and lacks information on this matter is insufficient; he must explain in detail why he cannot truthfully admit or deny this request for admission."); *United States ex rel. Englund v. L.A. Cty.*, 235 F.R.D. 675, 685 (E.D. Cal. 2006) ("The responding party's simple statement that he or she made a 'reasonable' inquiry and is unable to admit or deny the request

because insufficient information is available may not suffice as an answer to the request for admission.").

Accordingly, when a party refuses to admit or deny based on the assertion that it lacks sufficient information to do so, courts routinely require the party to explain what it did to meet its due diligence obligation. In *Tolton v. Marty*, 2011 WL 4625994, at *6 (D.S.D. 2011), for example, the Court ordered the responding party to "(1) describe with particularity what steps he took to attempt to obtain the information which would enable him to admit or deny, (2) describe what information he obtained after taking these reasonable steps, and (3) state why the information readily available to him did not enlighten him such that he could either admit or deny the requests.") *See also Medtronic Sofamor Danek, Inc. v. Michelson*, 2003 WL 23200027, at *4 (W.D. Tenn. 2003) (ordering party to supplement its responses "to admit, deny, or 'set forth in detail' the reasons why it cannot admit or deny the requests in accordance with Rule 36(a)"); *Al-Jundi v. Rockefeller*, 91 F.R.D. 590, 594 (W.D.N.Y. 1981) ("the answer must state specifically what efforts have been made or why reasonable efforts would be unavailing to obtain the requisite knowledge"); Wright & Miller at § 2261 n.2 (collecting additional cases that hold "[a] refusing party may not refuse to answer by merely tracking the language of Rule 36(a)").

The few cases that have permitted a refusal to admit or deny without a detailed explanation illustrate precisely why such a response is not appropriate in the Receiver's case. For example, in *Edeh v. Equifax Information Services, LLC*, Equifax demonstrated through the submission of several sworn affidavits that: (1) Equifax received thousands of (ostensibly similar) complaints each year and (2) Equifax did not have in its possession the information necessary to admit or deny plaintiff's requests. 2013 WL 1749912, at *8 (D. Minn. 2013) *aff'd,* 291 F.R.D. 330 (D. Minn. 2013); *see id.* at *8-9 ("the time spent by each individual handling the dispute in this case was not recorded," and "Equifax . . . does not maintain information regarding how many disputes on average a clerk or operator processes per work hour"). Faced with such facts, this court sensibly concluded that it "cannot require Equifax to provide information to [plaintiff] that [Equifax] does not possess." *Id.* at *9. In this context, the District Court denied the Plaintiff's motion to compel responses. *Id.*

But here, there are no comparable affidavits from the Receiver, nor could there be. As shown above, the requested admissions relate to information that is easily within the Receiver's knowledge. Here, unlike in *Edeh,* the Receiver has several terabytes worth of information and scores of relevant documents and transcripts in his possession. Nor, in contrast to

Edeh, is this one of thousands of suits with which the Receiver must contend. The Receiver has been appointed by the Court and has had over six years to investigate his claims against Associated Bank. He has done so at length and at great cost to the Ponzi scheme's investors. *See* Ex. I at 9 (noting that as of November 30, 2013, the Receiver had spent almost $8 million in fees and expenses). His blanket statement that he has conducted a reasonable inquiry "unaccompanied by reasons" or further detail is "insufficient" given his wealth of information about this case. *Hamilton*, 2002 WL 31834428, at *6.

CONCLUSION

For these reasons, the Court should grant Associated Bank's Motion and compel the Receiver to provide full and complete responses admitting or denying each of Associated Bank's requests for admission 2-5, 8-9, and 11.

Alternatively if this Court permits the Receiver to maintain the same position, this Court should compel him to provide the following information:

1) a detailed description of the steps he took to attempt to obtain the information which would enable him to admit or deny,
2) the information he obtained, and
3) a detailed statement regarding why the information readily available to him did not enlighten him such that he could either admit or deny the requests.

Dated: December 9, 2015

Respectfully,

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