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-JM) JANIE S. MAYERON, U.S. Magistrate Judge

RECEIVER'S RESPONSE TO ASSOCIATED BANK'S MOTION TO COMPEL RESPONSES TO FIRST SET OF REQUESTS FOR ADMISSION

In lieu of Associated Bank ("the Bank") marshaling evidence that it did *not* know about the Ponzi scheme at the heart of this case, the Bank instead wants the Receiver to admit that no one ever told the Bank about it. Despite having collected and reviewed mountains of documents and also interviewed numerous people formerly associated with the Receivership entities, the Receiver could not admit that no one ever told the Bank because he does not know that conclusively to be a fact. The Receiver does not know the content of every communication between all Receivership entity employees and Associated Bank employees. As a result, the Receiver responded that he lacked knowledge. The Bank balked, and through this motion asks, essentially, that its requests for admission be turned into open-ended interrogatories concerning the nature and scope of the Receiver's investigations. For all of the reasons stated more fully below, this Court should deny this request and the Bank's motion.

I. INTRODUCTION.

R.J. Zayed was appointed Receiver of the above-named entities (the "Receivership Entities") on November 23, 2009.[1] By the time of his appointment, federal agencies had investigated ongoing fraud in connection with a huge Ponzi scheme. *See, e.g., Zayed v. Associated Bank, N.A.*, 779 F.3d 727, 737 (8th Cir. 2015). In the days following his appointment, the Receiver took possession of the real estate out of which the Receivership entities operated, escorted any personnel affiliated with those entities off the premises, and froze assets owned by the Receivership entities.

At no time since the appointment of the Receiver have the Receivership entities operated as going concerns, as they did prior to the discovery of the Ponzi scheme. While the Receiver has collected a substantial amount of electronic documents and paper, including hard drives seized from the physical locations of some of the Receivership Entities, he has not interviewed every former employee of the Receivership Entities.

The requests that are the subject of the Bank's motion are fully set forth in its moving papers, so the Receiver does not provide them again verbatim, but they can be summarized as follows:[2]

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[1] For this case, Receiver Zayed recused himself. *See* ECF No. 19. Tara Norgard, Brian Hayes, and Russell Rigby are acting as Receiver for purposes of this case. *Id.* This response simply refers to "the Receiver" to cover any individual acting in that capacity.

[2] The Bank argues that each of its requests is relevant in the Rule 26 sense. The Receiver did not object to any of the requests on the basis of relevance, so he does not respond in detail to that argument here. Nonetheless, the Receiver takes issue with the Bank's assertion that the knowledge of other banks is relevant to the issue of damages. *See* ECF No.92 at 7). The Bank appears to be assuming that it will *not* be jointly and severally

- Request Nos. 2-5 concern the existence of certain communications between Cook-Kiley Entity[3] employees and Bank employees. The requests ask to admit that none occurred.
- Request Nos. 8 and 9 concern whether documents were destroyed and computers removed at the request of or by convicted schemers from before the Receiver was appointed.
- Request No. 11 asks the Receiver to admit the lack of knowledge of several third-party corporate entities, which are wholly unrelated to the Receivership entities.

The Receiver responded to each of these that he lacked knowledge, even after a reasonable inquiry, to admit or deny each of these requests.

On September 29, 2015, the Bank wrote a letter to the Receiver complaining about the supposed insufficiency of the Receiver's responses. In a subsequent phone call, counsel for the Receiver noted disagreement with the Bank's authorities and analysis, and stood on his objection. Counsel also indicated that it had researched the issue and had ample legal authority supporting the Receiver's position. No further discussion occurred prior to the Bank's filing of this motion, and noticing it for an oral hearing on December 30, 2015.

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liable for the full amount of damages. This assumption would be incorrect. While Minnesota has modified the common-law rule regarding apportionment of damages among multiple tortfeasors, it retains joint and several liability for, among other scenarios (1) where the joint tortfeasors were part of a common plan; and (2) where the torts are intentional. *See* Minn. Stat. § 604.02 (2010)). Here, the Ponzi scheme was part of a grand plan. And, the pertinent causes of action are intentional torts. Although the Court need not decide the issue of relevance on this motion, it appears to be an issue that will crop up soon, as the Bank appears to be gearing up to try numerous cases against absent non-party banks as a way of minimizing the impact of its own role.

[3] The Bank defines the term Cook-Kiley entities as broader than Receivership Entities, the former including, *inter alia*, Crown Forex, S.A.

II. ARGUMENT.

The Bank's motion to compel should be denied for two reasons. First and foremost, the Receiver's responses regarding the requests for admission at issue are proper as expressly set forth in Rule 36 and as held in prior cases by this Court. Second, even if a challenge to the reasonableness were proper under these circumstances – and it is not – as stated in his answers, the Receiver conducted a reasonable inquiry and despite this, does not have the knowledge to admit or deny the requests at issue. As discussed more fully below, for both reasons this Court should deny the Bank's motion.

A. The Receiver Fully Complied with Rule 36 By Answering as Expressly Permitted Under the Rule.

Contrary to the Bank's argument, the Receiver's responses comply with Rule 36. The Rule expressly sanctions the form of these responses. This Court, in prior decisions, has recognized this and rejected the identical argument that the Bank advances here. The Bank, by contrast, cites no case from this Court or from anywhere within the Eighth Circuit where a court compelled a party to provide an answer beyond what the Receiver has provided. Most of the cases that the Bank cites only address this issue in *dicta*, or involved facially implausible assertions of lack of knowledge.

1. When A Party Lacks Knowledge Even After A Reasonable Inquiry, And Is Unable To Admit Or Deny A Request For Admission, It Satisfies Rule 36 By Saying So.

Under Rule 36 of the Federal Rules of Civil Procedure, a party "may assert lack of knowledge or information as a reason for failing to admit or deny" a request for admission "if the party states that it has made reasonable inquiry and that the

information it knows or can readily obtain is insufficient to enable it to admit or deny." Fed. R. Civ. P. 36(a)(4); *see also Edeh v. Equifax Info. Servs., LLC*, 291 F.R.D. 330, 337 (D. Minn. 2013). According to the Advisory Committee Notes, this Rule "requires only that the answering party make reasonable inquiry and secure such knowledge and information as are readily obtainable by him. . .. Rule 36 requires only that the party state that he has taken these steps." Notes of Advisory Committee on Rules (1970 Amendment)*; see also Edeh v. Equifax Info. Servs., LLC,* No. 11-2671 (SRN/JSM) (D. Minn. Apr. 23, 2013) (ECF No. 150) (hereinafter "the *Edeh Opinion*"), *aff'd* by *Edeh*, 291 F.R.D. at 337; *Asea, Inc. v. S. Pac. Transp. Co.*, 669 F.2d 1242 (9th Cir. 1981); *Stark-Romero v. The Nat'l RR Passenger Co. (Amtrak)*, 275 F.R.D. 551, 555 (D.N.M. 2011)[4]; *Design Basics, LLC v. Campbellsport Bldg. Supply, Inc.*, No. 13-C-0560, 2014 U.S. Dist. LEXIS 104051, at *11 (E.D. Wis. Jul. 29, 2014); *Adley Express Co. v. Hwy. Truck Drivers & Helpers, Local No. 107*, 349 F. Supp. 436 (E.D. Pa. 1972).

[4] The Court in *Starck-Romero* analyzed both the language and policy of Rule 36 and concluded that reading the rule as the Bank argues would render parts "mere surplusage" and would permit parties to do an end run around the limit on the number of interrogatories allotted. *See Starck-Romero*, 275 F.R.D. at 556 ("If the Court were to interpret Rule 3[6](a)(4) as requiring a person who lacked knowledge to make the statement in the third sentence and describe in detail the inquiry, there would be little need to even have the third sentence – rendering it effectively surplusage, a disfavored result."); *see id.* at 557 ("To require the answering party to describe in detail the efforts it has made to inquire would be to turn the request for admission into an open-ended interrogatory.") (Citations and internal marks omitted). This latter concern is particularly relevant here, where the Bank has already hit its limit for interrogatories and has even agreed to withdraw one interrogatory, which contained dozens of discrete subparts. The Bank should not be able to sneak in extra interrogatories under the guise of requests for admission.

The *Edeh* case is particularly instructive. The plaintiff there served requests for admission on the defendant, Equifax. *See Edeh* Opinion at 7. In response, Equifax answered that "Upon reasonable inquiry, Equifax can neither admit nor deny this request." *Id.* Not satisfied with this answer, the plaintiff:

> argued that the Court should enter a standing order requiring Equifax to accompany any future assertions of "reasonable inquiry" or "lack of knowledge" in its discovery responses with *the description of the investigations performed* and "retroactively require Equifax to produce evidence of the investigation it conducted before certifying 'reasonable inquiry' or 'lack of knowledge' in response to the requests at issue . . .."

Id. (emphasis added) (internal citations omitted). In response to this request to "requir[e] . . . the description of the investigations performed," this Court rejected this argument, stating that Equifax "was under no obligation to do anything more [than 'state[] that it has made reasonable inquiry and that the information it knows or can readily obtain is insufficient to admit or deny' the request]." *Id.* at 8. This Court held that it would "not require Equifax to describe the nature of its investigation." *Id.*

Like Equifax in the *Edeh* case, the Receiver answered the requests for admission at issue for this motion with the following response: "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]." *See* Receiver's Responses to the Bank's First Set of Requests for Admission at 2-4 ("Exhibit E" to Dkt No. 93-1). Like the plaintiff in *Edeh,* the Bank has argued that these answers are insufficient and, as a result, the Receiver should be required to explain "in detail" his inquiry. *See* Associated Bank's Supporting Brief, ECF No. 92 at

18. Just as in *Edeh*, this Court should reject this request. There is no reason to deviate from the holding in *Edeh*, which bars relief.

Oddly, the Bank purports to rely on this Court's decision in *Edeh* at page 17 of its brief. But *Edeh* expressly rejects the Bank's position. The Bank's argument under *Edeh* ignores the main holding of that decision and cherry picks a few facts to formulate a new rule, which contradicts the portions of *Edeh* that it ignores. Specifically, after ignoring the portions of the *Edeh* Opinion discussed above, the Bank points to portions of that opinion concerning different requests for admission. Equifax gratuitously bolstered its argument in those areas with affidavits and affirmative representations in its brief. *See Edeh* Opinion at 15-16. In other words, Equifax voluntarily and unilaterally explained some of the basis of its inquiry in further detail beyond its responses. *Id.* The Bank argues that this provision of additional detail was not voluntary but mandatory and essential to the Court's holding denying the motion to compel. But the Bank cannot reconcile such a conclusion with the earlier portion of the decision – namely that such additional detail is not required. *Id.* at 8. In sum, the Bank's creative misreading of *Edeh* does not support its motion.

2. The Bank Relies On Cases That Are Not Persuasive, Let Alone Controlling.

The Bank cites a handful of cases in support of its argument that a party cannot do as Rule 36 says but must do more. None of these cases is a decision of this Court or of the Eighth Circuit. Thus, they do not control over the on-point *Edeh* case. Moreover, the Bank's cases are distinguishable on their facts. For example, several do not even concern a "lack of knowledge" response and are therefore just *dicta* on the points for which the Bank cites them. *See, e.g.*, *Hamilton v. Kerik*, No. 01-CV-6934 (GEL)(HBP), 2002 U.S. Dist.

LEXIS 24194, at *14-15 (S.D.N.Y. Dec. 17 2002) (cited by the Bank at page 15 of its Supporting Brief); *United States ex rel. Englund v. L.A. City*, 235 F.R.D. 675, 685 (E.D. Cal. 2006); *Medtronic Sofamor Danek, Inc. v. Michelson*, No. 01-2373 M1V, 2003 U.S. Dist. LEXIS 24236, at *8 (W.D. Tenn. Dec. 11, 2003) (cited by the Bank at page 16 of its Supporting Brief). Others are cases in which the Court had good and obvious reasons not to believe the claim of lack of knowledge – namely, where parties tried to avoid matters within the personal knowledge of an individual (not corporate) party. *See, e.g., Subramani v. Wells Fargo Bank, N.A.*, No. 13-cv-01605-SC, 2014 U.S. Dist. LEXIS 175145, at *4-5 (N.D. Cal. Dec. 18, 2014) (concerning a party's own payment to a bank) (cited by the Bank at page 15 of its Supporting Brief); *Tolton v. Marty*, No. 11-5018-JLV, 2011 U.S. Dist. LEXIS 113901, at *13-16 (D.S.D. Oct. 3, 2011) (concerning a party's own injuries) (cited by the Bank at page 16 of its Supporting Brief). To the extent that any case holds or suggest otherwise, *e.g., Al-Fundi v. Rockefeller*, 91 F.R.D. 590, 594 (W.D.N.Y. 1981), such authorities should be rejected as both stale and contrary to this Court's decision in *Edeh*, relying on improper readings of Rule 36, and untethered from the sound policy of Rule 36. In sum, the Bank has provided no reason to reject this Court's previous decision in *Edeh*.

B. The Receiver Conducted a Reasonable Inquiry.

At bottom, the Bank's argument boils down to an assertion that the Receiver could not possibly have conducted a "reasonable inquiry," stating that a reasonable inquiry would have produced an admission or denial. *See e.g.*, Associated Bank's Supporting Brief at 11 ("the Receiver has information sufficient to enable him to answer these requests."). But the Bank is wrong for several reasons. First, the Bank's argument rests on a

fundamental misunderstanding of the Receivership and the faulty premise that the Receivership entities were and still are legitimate going concerns. But this is not so.

The Receiver was appointed after the Ponzi Scheme had been uncovered by federal authorities. Despite "standing in the shoes" of the Receivership entities, those entities are also victims. Many of the employees of the Receivership entities have interests adverse to the Receiver. Several were either convicted of numerous crimes or pleaded guilty to such crimes. Some of those criminal appeals are ongoing, and individuals have and continue to assert a privilege against self-incrimination as a basis for refusing to provide testimony. The implication that the Receiver's role is akin to the CEO of legitimate businesses is simply off the mark. Even assuming information that bore on these requests existed in the personal knowledge of some former Receivership entity employee, the Receiver does not control those individuals and cannot simply compel them to set aside their Fifth Amendment privileges and speak to the Receiver.

Second, the Bank ignores the fact that its requests ask for admissions regarding all communications. It did not limit these communications to those reduced to tangible form – *i.e.*, letters and emails that could be found on hard drives. *See* Def. Assoc. Bank, N.A.'s First Set of Requests for Admission ("Exhibit D" contained in ECF No. 93-1). "Communications" also includes telephone communications and face-to-face meetings and even includes "symbolic expressions." *Id.* at 1-2. Thus, the fact that the Receiver is currently in possession of workstation hard drives from the receivership entities, among other things, does not mean that he has, is in possession, or knows of, each and every communication, including oral communications of every employee from a time before the

Receiver was appointed. In fact, the Receiver could not, by definition, possess communications that were never reduced to a tangible medium. So, despite having a collection of documents and other tangible media, he does not have, nor could he have, all possible "communications" with the Bank.

Finally, the Bank's requests ask the Receiver to admit a negative.[5] As the aphorism popularized by Carl Sagan goes, "the absence of evidence is not the evidence of absence." *Mathison v. Boston Sci. Corp.*, No. 2:13-cv-05851, 2015 U.S. Dist. LEXIS 59047 (S.D. W. Va. May 6, 2015) (citing Sagan, C., *The Demon-Haunted World: Science as a Candle in the Dark* 213 (1996)). While Sagan's turn of phrase may not be literally akin to a legal rule,[6] his point – that an absence of proof is not *conclusive* proof that something did not happen – is particularly apt in the context of a request to admit. Even if the Receiver is not aware of evidence that something happened (communications between Receivership employees and Bank employees regarding the existence of the Ponzi scheme), this does not mean that there is conclusive proof that it did not happen. And to state the obvious – discovery is continuing and no Bank employee has yet testified. Forcing an adversary to admit a negative is inappropriate where the adversary, after a reasonable inquiry, lacks knowledge

[5] Request 2-5, and 11 expressly seek admission of a negative – namely, that communications did not happen. Request 11 is further problematic insofar as it asks the receiver about a third party's lack of knowledge. Requests 8 and 9 in practical effect ask for a negative – namely, they ask the Receiver to confirm that something no longer exists. These two requests are further problematic in that they ask that the receiver admit that certain individuals engaged in illegal behavior while working for Receivership Entities before the Receiver was appointed.

[6] The absence of evidence might be probative of the fact that something didn't happen.

whether the point is conclusively true. *See, e.g.*, Fed. Rule 36 (when a party lacks knowledge or information sufficient to admit or deny, it may say so).[7] The Bank's attempt to turn the tables and conclusively establish the absence of a fact should not be permitted.

CONCLUSION

For the foregoing reasons, the Bank's motion to compel should be denied in its entirety.

[7] This is not to say that such a request to admit could never be appropriate in any context. It is not difficult to conceive of a request to an individual on a matter of personal knowledge that something did *not* happen. Even then, however, an individual should still be able to answer lack of information if that lack stems from a memory loss. After all "I don't remember" whether something happened is different from "I remember and it didn't happen."

Dated: December 16, 2015

Respectfully submitted,

/s/ Michael R. La Porte

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CERTIFICATE OF SERVICE

The undersigned attorney of record certifies that on December 16, 2015, copies of the foregoing document were served upon counsel for Defendant via e-mail to the following addresses:

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