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 NO. 13-232 (DSD/JSM)

ORDER

The above matter came before the Court upon Defendant Associated Bank, N.A.'s Motion to Compel Responses to its First Set of Requests for Admission [Docket No. 90]. Brian W. Hayes, Esq. and Michael R. La Porte, Esq. appeared on behalf of the Receiver. Charles F. Webber, Esq. appeared on behalf of defendant.

The Court, being duly advised in the premises, upon all of the files, records and proceedings herein, and for the reasons set forth in the memorandum below, now makes and enters the following Order:

IT IS HEREBY ORDERED that

1. Defendant Associated Bank, N.A.'s Motion to Compel Responses to its First Set of Requests for Admission [Docket No. 90] is **DENIED**.

2. With respect to defendant's Request for Admission Nos. 2-5, 8, 9 and 11, defendant shall be permitted to revise these requests and serve them on plaintiff. Any reworded requests for admission shall count towards the 100 requests allotted to defendant under the Amended Pretrial Scheduling Order [Docket No. 82].

Dated: January 8, 2016

s/ Janie S. Mayeron
JANIE S. MAYERON
United States Magistrate Judge

MEMORANDUM

I. INTRODUCTION AND BACKGROUND

Defendant Associated Bank has moved the Court for an Order compelling plaintiff to respond to its First Set of Requests for Admission, pursuant to Rules 36 and 37 of the Federal Rules of Civil Procedure. The relevant facts underlying this case, as found by the District Court, are as follows:

> This receivership action arises out of a criminal Ponzi scheme committed using [defendant] Associated Bank accounts. The scheme principals included, among others, Trevor Cook and Patrick Kiley. Cook and Kiley used several corporate entities to perpetuate their scheme.[1] The scheme purported to guarantee investors a return in excess of 10% annually through foreign currency trading with Crown Forex, S.A., a Swiss company. Compl. ¶ 3 [Docket No. 1]. Cook pleaded guilty and Kiley was convicted by a jury for their roles in the scheme. Id. ¶ 1. On December 11, 2009, Chief Judge Michael J. Davis appointed R.J. Zayed as the Receiver for the Receivership Entities.[2]
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> * * *
>
> On April 19, 2013, the Receiver filed this action, alleging claims for aiding and abetting fraud, aiding and abetting breach of fiduciary duty, aiding and abetting conversion and aiding and abetting false representations and omissions.

[1] These include Oxford Global Partners, LLC; Oxford Global FX, LLC; Oxford FX Growth, L.P.; Universal Brokerage FX Management, LLC; Market Shot, LLC; and other entities controlled by them (collectively, the "receivership entities"). See Compl. ¶ 2.

[2] On April 4, 2013, Zayed recused himself from this matter. [Docket No. 34]. Chief Judge Davis authorized Tara Norgard, Brian Hayes and Russell Rigby "to act on behalf of the Receiver and in his capacity as the Receiver, with all powers appertaining thereto." Id. at 3. The Court refers to these individuals collectively as the Receiver.

Order of District Court dated September 30, 2013 [Docket No. 50].[3]

On August 24, 2015, Associated Bank served the Receiver with its First Set of Requests for Admission. See Declaration of Stephen M. Medlock, Esq. in Support of Defendant Associated Bank, N.A.'s Motion to Compel Responses to its First Set of Requests for Admission ("Medlock Decl."), Ex. D (Defendant Associated Bank, N.A.'s First Set of Requests for Admission). The Receiver timely responded to this discovery. See Medlock Decl., Ex. E (Plaintiff R.J. Zayed's Response to Defendant Associated Bank, N.A.'s First Set of Requests for Admission). The Receiver's responses to the Requests at issue are as follows:

> **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:**
> 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:**
> 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:**
> 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.

[3] This Order was reversed on grounds other than the Court's factual findings. See Zayed v. Associated Bank, N.A., 779 F.3d 727 (8th Cir. 2015).

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. 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.

Id.

On December 9, 2015, Associated Bank moved the Court to compel the Receiver to provide full and complete responses admitting or denying each of these requests for admission. Alternatively, Associated Bank requested an Order compelling the Receiver to provide a detailed description of the steps he took to attempt to obtain the information which would enable him to admit or deny; the information he obtained; and 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. 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 [Docket No. 92], p. 18. In support of its motion, Associated Bank argued that the Receiver failed to conduct a reasonable inquiry before asserting that it lacked sufficient information to enable it to admit or deny the requests, in violation of Rule 36(a)(4) of the Federal Rules of Civil Procedure. Id., pp. 9-15. Associated Bank maintained that the Receiver possessed ample information regarding the subject matter raised in the requests for admission (i.e., the receivership entities' communications with Associated Bank, the receivership entities' destruction of documents, and whether other banks had knowledge of the alleged Ponzi scheme prior to June 22, 2009); therefore, it was "difficult to fathom" how the Receiver could have met its duty of due diligence, yet still lack information necessary to respond to defendant's requests. Id., pp. 11-15.

Associated Bank also contended that the Receiver's responses did not comply with Rule 36(a)(4) because the Receiver did not explain in detail why it could neither admit nor deny the requests for admission. Id., pp. 15-18. Associated Bank submitted that when a party refuses to admit or deny a request for admission based on a lack of sufficient information, courts routinely require the party to describe what it did to meet its due diligence obligation. Id., p. 16 (citing Tolton v. Marty, 2011 WL 4625994, at *6 (D.S.D. Oct. 3, 2011); Medtronic Sofamor Danek, Inc. v. Michelson, 2003 WL 23200027, at *4 (W.D. Tenn. Dec. 11, 2003); Al-Jundi v. Rockefeller, 91 F.R.D. 590, 594 (W.D.N.Y. 1981); 8B Charles Alan Wright, et al., Federal Practice & Procedure § 2261 n. 2 (3d ed. 2015)).

The Receiver opposed Associated Bank's motion to compel, arguing that its responses to the requests for admission fully complied with the language of Rule 36, as interpreted by the Rules Advisory Committee. Receiver's Response to Associated Bank's Motion to Compel Responses to First Set of Requests for Admission, pp. 4-8 [Docket No. 96] (citing Edeh v. Equifax Info. Servs., LLC, Civ. No. 11-2671 (SRN/JSM), 2013 WL 1749912 (D. Minn. Apr. 23, 2013), aff'd, 291 F.R.D. 330, 337 (D. Minn. 2013); Asea, Inc. v. S. Pac. Transp. Co., 669 F.2d 1242 (9th Cir. 1981); Stark-Romero v. Nat'l R.R. Passenger Co. (Amtrak), 275 F.R.D. 551, 555 (D.N.M. 2011); 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)). The Receiver also contended that the cases cited by Associated Bank were not controlling precedent in this Court and were distinguishable on their facts. Id., pp. 7-8.

Additionally, the Receiver maintained that it had conducted a reasonable inquiry prior to asserting that it lacked information sufficient to allow it to admit or deny Associated Bank's requests for admission. Id., pp. 8-11. The Receiver noted that it was appointed to its position after the Ponzi scheme had been uncovered by federal authorities, and many of the employees of the receivership entities were ultimately convicted of numerous crimes. Id., p. 9. The Receiver also indicated that some of these individuals have ongoing criminal appeals and refuse to provide testimony based on the privilege of self-incrimination. Id. Therefore, even assuming some former receivership entity employees possessed information bearing on the requests for admission, the Receiver submitted that it does not control these former employees or cannot compel them to disclose the information necessary for it to admit or deny the requests. Id.

The Receiver further submitted that because Associated Bank requested admissions regarding all communications from any receivership entity employee, the fact that it possesses hard drives or documents from the receivership entities "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." Id., pp. 9-10.

Lastly, the Receiver argued that for the most part, Associated Bank's requests "expressly [sought] admission of a negative – namely, that communications did not happen." Id., p. 10 n. 5. However, according to the Receiver, even if it was not aware of any communications between Associated Bank and any receivership entity employees regarding the existence of the Ponzi scheme, this was not conclusive proof

that such communications never happened. Id., pp. 10-11. On the other hand, as the Receiver observed at the hearing, had the requests asked the Receiver to admit or deny that it had no evidence in its possession to support the proposition set out in each request, the Receiver could have answered that request.

II. DISCUSSION

At issue is the meaning of Rule 36(a)(4), which governs a party's response to a request for admission. This provision states:

> If a matter is not admitted, the answer must specifically deny it or state in detail why the answering party cannot truthfully admit or deny it. A denial must fairly respond to the substance of the matter; and when good faith requires that a party qualify an answer or deny only a part of a matter, the answer must specify the part admitted and qualify or deny the rest. The answering party may assert lack of knowledge or information as a reason for failing to admit or deny only 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) (emphasis added).

"[U]nder 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.'" Edeh, 291 F.R.D. at 337 (quoting Fed. R. Civ. P. 36(a)(4)). "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.'" Id. (citing 1970 Amendment); Notes of Advisory Committee on Rules (1970 Amendment) ("The revised 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.") (emphasis added).

On the other hand, "a response which fails to admit or deny a proper request for admission does not comply with the requirements of Rule 36(a) if the answering party has not, in fact, made 'reasonable inquiry,' or if information 'readily obtainable' is sufficient to enable him to admit or deny the matter." Asea, Inc., 669 F.2d at 1247. But to require the answering party "to describe in detail the efforts it has made to inquire would be to turn the request for admissions into an open-ended interrogatory." Stark-Romero, 275 F.R.D. at 557.

In the instant case, this Court found that the Receiver fully complied with the requirement of Rule 36(a)(4) that it state in detail why it could not truthfully admit or deny the requests at issue by stating that it had "made reasonable inquiry" and that "the information he knows or can readily obtain is insufficient to enable him to admit or deny." Rule 36(a) did not require the Receiver to describe the nature and extent of its inquiry.[4] Further, there is no indication that the Receiver did not, in fact, conduct a reasonable investigation prior to answering Associated Bank's requests. Although Associated Bank believed it implausible that the Receiver could have met its duty of due diligence, given the wealth of information that it possessed, Associated Bank has offered no evidence suggesting that the Receiver failed to meet its obligations to conduct the diligent and reasonable inquiry under Rule 36(a)(4). Accordingly, the Court denied Associated Bank's motion to compel.

[4] At the hearing the Court observed that requiring a party to provide such information could implicate the attorney work product doctrine.

At the same time, the Court recognized that if the point of the requests was to glean whether certain matters were disputed for the purpose of narrowing discovery or for trial, this objective could be accomplished by rewording the requests to determine whether the Receiver possessed evidence to support the propositions at issue. See Henry v. Champlain Enterprises, Inc., 212 F.R.D. 73, 77 (N.D.N.Y. 2003) ("Considering that one purpose for such Requests is to narrow the issues of the case, a 'weeding out of the facts' if you will, they are designed to reduce trial effort and promote litigation efficiency. These Requests and corresponding answers are expeditious, efficient resolutions of factual issues and may, to a considerable degree, when propounded early in the litigation, control the cost of discovery as well. More important, the binding effect of Admissions is intended to lend clarity to the presentation of disputed facts in the litigation.") (internal quotation omitted). Thus, the Court indicated that Associate Bank could serve revised requests on the Receiver.[5]

J.S.M.

[5] The operative scheduling order allowed each side to serve 100 requests for admission on the other side. To date, Associated Bank has served only 32 requests.