No. _____

# In the Supreme Court of the United States

DOUGLAS A. KELLEY, in his capacity as the Trustee of the BMO Litigation Trust,

*Petitioner*,

v.

BMO HARRIS BANK N.A., as successor to M&I Marshall and Ilsley Bank,

*Respondent*.

**On Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit**

## PETITION FOR WRIT OF CERTIORARI


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## QUESTION PRESENTED

Under the Bankruptcy Code, the property held by a debtor's estate is determined according to state law as of the moment of entering bankruptcy. *See Butner v. United States*, 440 U.S. 48 (1979). For the Code to work properly, it is essential that federal courts overseeing bankruptcy proceedings get state law right. Here, both the bankruptcy court and the district court judge (a former Minnesota Supreme Court justice) understood that, under long-established Minnesota law, a receiver bringing claims on behalf of an insolvent company is not subject to the *in-pari-delicto* ("equal fault") defense based on the misconduct of the former management, because appointment of the receiver replaces the corrupt former management and thus alters the balance of equities. The Eighth Circuit, however, disagreed with both of those Minnesota-based jurists and fashioned its own novel version of Minnesota law, holding that, while the *receiver* is free from the *in-pari-delicto* defense, the *company* that he represents is not, and the *company* is the debtor in bankruptcy. Under that entirely unprecedented holding, the receiver can recover for the benefit of innocent creditors freed from the *in-pari-delicto* defense as long as he keeps the company outside of bankruptcy, but not if he seeks to take advantage of the tools available in bankruptcy. That decision not only wiped out a billion-dollar judgment here, but forces receivers going forward to choose between the protections of the Code and preserving valuable state-law claims free from *in pari delicto*.

The question presented is: Whether the Eighth Circuit should have certified the controlling question

of Minnesota law to the Minnesota Supreme Court, rather than fashion a novel rule that is foreign to Minnesota law and antithetical to important federal bankruptcy policy.

## PARTIES TO THE PROCEEDING

Petitioner is Douglas A. Kelley, in his capacity as the Trustee of the BMO Litigation Trust. Petitioner was plaintiff-appellee/cross-appellant below.

Respondent is BMO Harris Bank N.A., as successor to M&I Marshall and Ilsley Bank. Respondent was defendant-appellant/cross-appellee below.

## CORPORATE DISCLOSURE STATEMENT

Douglas A. Kelley is Trustee for the BMO Litigation Trust, a trust established pursuant to the Second Amended Chapter 11 Plan of Liquidation confirmed on April 15, 2016 by the United States Bankruptcy Court for the District of Minnesota in the bankruptcy cases administered as In re Petters Company, Inc., et al., Case No. 08-45257 (Bankr. D. Minn.). The BMO Litigation Trust has no parent corporation, and no publicly held corporation holds more than a ten percent interest in the BMO Litigation Trust.

## STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *Kelley v. BMO Harris Bank Nat'l Ass'n*, Nos. 23-2551, 23-2632 (8th Cir.) (petition for rehearing and rehearing en banc denied on November 14, 2024; judgment entered on September 12, 2024).
- *Kelley v. BMO Harris Bank N.A.*, No. 0:19-cv-01756 (D. Minn. June 23, 2023) (order denying judgment as a matter of law).
- *Kelley v. BMO Harris Bank N.A.*, 12-04288 (Bankr. D. Minn. June 27, 2019) (order denying summary judgment).

Petitioners are not aware of any other proceedings that are directly related to this case within the meaning of Rule 14.1(b)(iii).

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## PETITION FOR WRIT OF CERTIORARI

This Court has long recognized that certifying troublesome questions of state law to state Supreme Courts "save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974). The Eighth Circuit ignored that sound advice here. Instead, embracing a rationale that nobody argued, the Eighth Circuit not only departed from binding Minnesota precedent (and the views of both Minnesota-based federal jurists it was reviewing), it undermined federal bankruptcy policy by making the price of entering federal bankruptcy the loss of valuable state-law claims. Instead of honoring the general rule that one enters bankruptcy with the state-law interests that existed the moment before filing and advancing the basic purpose of bankruptcy—to maximize value for creditors—the court of appeals wiped out a billion-dollar judgment for creditors and left future receivers with a dilemma where they must choose between preserving valuable state-law claims and obtaining the protections available under bankruptcy. There is no reason to foist that perverse rule on the Minnesota courts, when there is every indication they would have—and indeed already have—rejected it. Certification is plainly the better course here.

Respondent BMO knowingly assisted Tom Petters and other insiders in carrying out one of the three biggest Ponzi schemes in U.S. history, saddling Petters Company, Inc. ("PCI") with billions in unrepayable debt. To salvage the depleted company and to protect the interests of PCI's creditors, a federal district court appointed Petitioner Douglas Kelley "as

Receiver for the [Petters] Entities [including PCI] with the full power of an equity Receiver." Shortly thereafter, Kelley placed PCI in bankruptcy and was named as the Trustee.

Kelley then brought suit against BMO for, among other things, "aiding and abetting a breach of fiduciary duty" to PCI, as BMO's willingness to disregard countless indications of fraud and money laundering, while affirmatively silencing 39 months of anti-money-laundering alarms, was critical to the Ponzi scheme's longevity and success. Both Minnesota-based federal jurists, including a veteran of the Minnesota Supreme Court, rejected BMO's efforts to shield itself by invoking the *in-pari-delicto* defense—holding instead that well-established Minnesota law developed in the context of earlier Ponzi schemes made clear that, after appointment of the receiver, this "equal fault" defense was no longer available. The jury then assessed all the evidence and awarded more than $1.1 billion (including interest). This award was earmarked for distribution to PCI's creditors under a court-approved liquidation plan, providing some recovery for Ponzi-scheme victims.

The court of appeals had other ideas. The court acknowledged that Minnesota law would allow Kelley, as the PCI receiver, to bring PCI's claims against BMO free from any *in-pari-delicto* defense before he put PCI into bankruptcy. But the court nonetheless concluded that the very same claims, when brought by Kelley as PCI's bankruptcy trustee, were barred by *in pari delicto*. The theory underlying this remarkable reverse alchemy, which was suggested by neither BMO nor any extant Minnesota law, was that, while

the receiver was free from the taint of prior corrupt management, the company remained indelibly tainted, and only the company, not the receiver, was the debtor in bankruptcy. This sleight of hand not only immunized BMO for its tortious conduct long after any corrupt PCI insiders had left the scene (and in Petters' case imprisoned), but left Petters' victims with nothing, despite Minnesota's *in-pari-delicto*-free avenue for compensation outside of bankruptcy. For good measure, the Eighth Circuit eliminated the one other avenue Minnesota law provides to ensure that the equitable defense of *in pari delicto* does not produce inequitable results, by directing judgment for BMO rather than remanding for the exercise of equitable discretion to apply or forego the defense.

The court of appeals' decision not only badly misreads Minnesota law, it also undermines federal bankruptcy policy in two key respects. First, federal bankruptcy law presumptively allows debtors to enter bankruptcy with the same state-law property interests they had the moment before filing. Indeed, the Code disfavors contractual provisions that trigger new liabilities upon the filing of bankruptcy (so-called *ipso facto* clauses). Those principles ensure that parties contemplating bankruptcy do not face artificial disincentives to take advantage of the tools available in bankruptcy. Second, and even more fundamentally, one of the most basic goals of bankruptcy is "to assemble, once a bankruptcy petition is filed, all of the debtor's assets for … his creditors." *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974). Needless to say, a decision that takes a claim worth more than a billion dollars to creditors outside of bankruptcy and renders it worthless inside bankruptcy radically disserves

those federal bankruptcy policies. Indeed, a state that consciously adopted such a regime would risk preemption for frustrating the purposes of federal bankruptcy law. But Minnesota has never adopted such a rule of law, and it certainly does not deserve to have this perverse and federal-bankruptcy-policy-frustrating rule thrust upon it by the Eighth Circuit.

This distortion of Minnesota law—and the consequent upheaval of federal bankruptcy policy—was as unnecessary as it was senseless. In keeping with the practice in many states, the Minnesota Legislature has provided that federal courts may certify an important question of Minnesota law to the Minnesota Supreme Court. *See* Minn. Stat. §480.065, subd.3. This Court has emphasized that the "[c]ertification procedure … allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Arizonans for Official Eng. v. Arizona*, 520 U.S. 43, 76 (1997). Following that principle, the Court has invoked the certification process on a number of occasions, both by certifying questions of state law itself or by remanding cases for lower courts to certify state-law questions. *See, e.g.*, *Cline v. Oklahoma Coal. for Reprod. Just.*, 570 U.S. 930 (2013); *McKesson v. Doe*, 592 U.S. 1, 6 (2020); *Bellotti v. Baird*, 428 U.S. 132, 134 (1976); *Lehman Bros.*, 416 U.S. at 391-92. This case calls for similar intervention. The Court should call for certification here in order to promote judicial federalism and obtain a proper interpretation of Minnesota law on an issue of vital importance to federal bankruptcy policy.

## OPINIONS BELOW

The Eighth Circuit's opinion is reported at 115 F.4th 901. App.1-12. The Eighth Circuit's order denying rehearing and rehearing en banc is unreported but available at 2024 WL 4792851. App.13-14. The district court's order denying interlocutory appeal is unreported but available at 2020 WL 1227725. App.65-81. The district court's order denying judgment as a matter of law is unreported but available at 2023 WL 4145827. App.82-130. The bankruptcy court's order granting in part and denying in part BMO's motion to dismiss is reported at 565 B.R. 154. App.15-41. The bankruptcy court's order denying summary judgment is reported at 603 B.R. 424. App.42-64.

## JURISDICTION

The court of appeals issued its decision on September 12, 2024. Petitioners sought rehearing and rehearing en banc of that decision, which the court denied on November 14, 2024. App.13-14. This Court has jurisdiction under 28 U.S.C. §1254(1).

## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Minn. Stat. §480.065, subd.3 provides:

> Power to answer. The supreme court of this state may answer a question of law certified to it by a court of the United States or by an appellate court of another state, of a tribe, of Canada or a Canadian province or territory, or of Mexico or a Mexican state, if the answer may be determinative of an issue in pending litigation in the certifying court and there is

no controlling appellate decision, constitutional provision, or statute of this state.

## STATEMENT OF THE CASE

### A. Factual Background

#### 1. The Ponzi scheme.

This case arises out of BMO Bank N.A.'s ("BMO")[1] involvement in a multi-billion-dollar Ponzi scheme operated by Tom Petters, Deanna Coleman, and Robert White through Petters Company, Inc. ("PCI") and related entities. *See Kelley v. Safe Harbor Managed Acct. 101, Ltd.*, 31 F.4th 1058, 1061 (8th Cir. 2022) (describing the Petters scheme). BMO helped Petters use a "small-business" checking account to carry out that fraud and launder tens of billions of dollars, engaging in conduct that allowed the scheme to flourish without detection and resulted in billions of dollars in losses. BMO's support of criminal activity went far beyond mere negligent banking, and included years of disregarding countless indications of fraud and affirmatively silencing years of money laundering alerts. A jury hearing all the evidence, and all BMO's protestations, concluded that the bank was knowingly complicit in the fraudulent scheme.

PCI's purported business was to buy overstock electronics from two wholesalers and resell them to big-box retailers. D.Dkt.433 at 1231:13-18. But PCI's business was fake. It made no sales or purchases, never received any payments from retailers, yet received large and temporary inflows from

[1] "BMO" refers to BMO Harris and its predecessor, Marshall & Ilsley Bank ("M&I").

wholesalers, whom PCI should have been paying for goods. D.Dkt.437 at 2851:22-2852:3; D.Dkt.430 at 434:1-441:15; CA8.Tr.App.1576-77; CA8.Tr.App.2122-23.[2] The two purported wholesalers were, in fact, complicit shams. CA8.Tr.App.1576.

Petters recruited lenders to finance PCI's "business" with billions in loans. D.Dkt.371 at 1932:13-1933:2. He and others then used the money to repay loans from earlier lenders, support other business ventures, and finance their lavish lifestyles. CA8.Tr.App.1576; D.Dkt.371 at 1933:3-8.

**2. BMO's facilitation of the scheme.**

For years, Petters searched for a bank he could "work with" to run the scheme, eventually finding BMO. D.Dkt.437 at 2854:7-14. From 2002 until September 2008, BMO provided Petters with a small-business checking account to conduct his fraudulent activities. D.Dkt.433 at 1167:21-1169:11; CA8.Tr.App.1574; D.Dkt.437 at 2854:15-21. With BMO's aid, the scheme exploded from $500,000 of outstanding loans from investors to $3.1 billion. D.Dkt.438 at 3232:8-23, 3236:23-3237:16. BMO laundered the scheme's proceeds, processing $74 billion in wire transfers, through this "small-business" account. CA8.Tr.App.2122-23.

As the jury ultimately found, ample record evidence established that BMO knew about, and substantially assisted, the breaches of fiduciary duty by PCI insiders. For example, account activity showed that most of the billions were wired *into* the small-

[2] "CA8.Tr.App." refers to the Trustee's Appendix at the Eighth Circuit.

business account *from* the two sham wholesalers. D.Dkt.430 at 434:1-441:15; CA8.Tr.App.2122-23. Based on the business model provided to BMO, however, the payment flows to wholesalers should have gone in the opposite direction with PCI paying money to the wholesalers. Similarly, BMO could see that retailers made no payments into the account to buy products. Indeed, even though BMO's bankers monitored the account and knew that PCI's stated business model entailed incoming payments from big-box retailers, like Walmart and Costco, neither BMO's bankers nor its analysts ever saw a single retailer payment into PCI's account. D.Dkt.433 at 1255:10-18; D.Dkt.434 at 1577:15-17; CA8.Tr.App.2124 (spreadsheet showing no retailer wires); CA8.Tr.App.1996-98.

BMO was also well aware of payments to PCI insiders that lacked any conceivable business purpose. The two bankers on the PCI account and the anti-money laundering ("AML") analysts could see that Petters, Coleman, and White were paid more than $97 million in checks and wires. *See* CA8.Tr.App.1121-1232; CA8.Tr.App.2124 (columns Y-Z); CA8.Tr.App.2104-08. Analysts reviewed these checks and wires (CA8.Tr.App.1438-1553), and bankers knew that "bonus" checks were being written without tax withholding and that some of the checks for millions of dollars were for Coleman to buy a house (D.Dkt.433 at 1305:10-1310:24). Despite that knowledge, BMO went along.

BMO officials even took affirmative steps to assist the PCI fraud. Thus, BMO bankers helped Coleman ghost-write letters on BMO's letterhead so that

Petters could use them to lend PCI legitimacy. D.Dkt.433 at 1283:20-1288:17. And BMO created special overdraft policies enabling Petters to avoid detection. CA8.Tr.App.1994-95; D.Dkt.373 at 2271:22-2272:25. On top of that, BMO legitimized the scheme by entering into sham agreements with PCI's lenders—ostensibly designed to earmark and route retailer payments to specific lenders' accounts—without ever performing any of the procedures required by those agreements. D.Dkt.434 at 1613:17-1614:3; CA8.Tr.App.1234-1250; CA8.Tr.App.2095-2103.

Finally, BMO affirmatively lifted a flood of AML alerts flagging suspicious activity in the account. For more than three years, billions in wire transactions in PCI's account—including the wrong-way wires from the sham wholesalers—triggered monthly money-laundering alerts, telling BMO that all of the wires were potentially fraudulent and needed investigation. CA8.Tr.App.1278-1437; CA8.Tr.App.2121. As required, BMO's AML analysts investigated the source and use of the funds and saw billions in wrong-way transactions. CA8.Tr.App.1438-1553. Yet, month after month, BMO officials cleared the alerts and allowed the mulching of PCI to continue unabated. When confronted at trial, BMO literally had no explanation for this conduct. For example, BMO's AML manager, who closed alarms for billions of dollars, testified *more than 200 times* that she did not know or could not recall basic facts about PCI's activity, her job responsibilities, or even whether her AML group was looking for money laundering. D.Dkt.365 at 217:11-229:16; D.Dkt.430 at 250:11-325:12. As a result, instead of filing even a single

Suspicious Activity Report ("SAR") with the government, which would have shut the whole scheme down (D.Dkt.373 at 2388:8-2390:9), BMO green-lighted PCI's meteoric growth, ultimately leaving PCI with $1.92 billion in losses.

**3. The scheme's collapse and BMO's belated reporting.**

The scheme finally collapsed in September 2008, after PCI had trouble finding financing and Coleman self-reported to the FBI. D.Dkt.437 at 2785:2-9, 2811:18-2813:24. Petters was convicted of fraud and is serving a 50-year prison sentence. CA8.BMO.App.2209-2214.[3]

After the collapse, BMO's AML analysts reinvestigated "the same exact transaction activity" that had previously set off AML alerts. D.Dkt.431 at 749:10-750:23; D.Dkt.432 at 889:3-11; CA8.Tr.App.1573-1993, 2039. This time, the analysts belatedly concluded that the activity had warranted filing a SAR. CA8.Tr.App.1588. In doing so, they admitted that "the investment scam can be seen in [PCI's] account during the review period. The incoming [and] outgoing wires and funds transferred through checks between companies and individuals known to have been involved with the fraud … appear suspicious." CA8.Tr.App.1587-88.

**4. Court appointment of a receiver.**

Following Petters' arrest, the United States asked the Minnesota District Court to place Petters, PCI, and others in civil receivership. *Kelley v. Coll. of St.*

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[3] "CA8.BMO.App." refers to BMO's Appendix at the Eighth Circuit.

*Benedict*, 901 F.Supp.2d 1123, 1126 (D. Minn. 2012). On October 6, 2008, the district court appointed Douglas A. Kelley as federal equity receiver for PCI and its affiliates. *Id.* The district court granted Kelley the authority to "sue for, collect, receive, take in possession, hold, liquidate, or sell and manage all assets of" the receivership entities (including PCI). *Id.* A few days later, Kelley, as receiver, petitioned for Chapter 11 relief on PCI's behalf, and PCI's legal and equitable interests became property of PCI's bankruptcy estate, 11 U.S.C. §541(a)(1), remaining in Kelley-as-Receiver's custody for several months while he "served as the de facto debtor-in-possession." *Ritchie Special Credit Invs., Ltd. v. U.S. Tr.*, 620 F.3d 847, 851 (8th Cir. 2010).

The bankruptcy court later approved Kelley's appointment as bankruptcy trustee and ordered Kelley-as-Receiver to transfer custody of PCI's assets to himself as trustee to "fully harmonize the status" in the receivership and bankruptcy cases. *In re Petters Co.*, 401 B.R. 391, 408-09 (Bankr. D. Minn. 2009), *aff'd*, 415 B.R. 391 (D. Minn. 2009), *aff'd*, 620 F.3d 847 (8th Cir. 2010). Kelley remained as receiver until July 29, 2021, administering receivership assets unrelated to PCI and other Ponzi scheme entities. CA8.Tr.App.286-88.

### B. Proceedings Below

#### 1. The Bankruptcy Court.

Kelley ultimately brought an adversary proceeding in bankruptcy court against BMO alleging violations of the Minnesota Uniform Fiduciaries Act, breach of fiduciary duty, and aiding-and-abetting fraud and breach of fiduciary duty. D.Dkt.1-1;

D.Dkt.3-11. Separately, based on some of the same conduct, the federal government accused BMO of "fraudulent conduct facilitat[ing] the continuation of Petters's scheme."[4] Kelley sought $1.92 billion dollars in damages, the undisputed amount that PCI owed its creditors. D.Dkt.373 at 2459:11-20.

BMO raised the equitable defense of *in pari delicto*, which, under Minnesota law, may bar a plaintiff who has participated in wrongdoing from recovering damages caused by that wrongdoing when the parties are equally at fault. *State by Head v. AAMCO Automatic Transmissions, Inc.*, 199 N.W.2d 444, 448 (Minn. 1972). Rejecting BMO's motion to dismiss on that ground, the Minnesota-based bankruptcy court explained that "Minnesota courts have declined to apply *in pari delicto* in cases in which the plaintiff is a receiver because the receiver represents the rights of the creditors 'even though the defense set up might be valid against the corporation itself.' The receiver is therefore 'not bound by the fraudulent acts of a former officer of the corporation." App.30-31 (citing *German-Am. Fin. Corp. v. Merchants' & Mfrs.' State Bank of Minneapolis*, 225 N.W. 891, 893 (Minn. 1929); *Magnusson v. Am. Allied Ins. Co.*, 189 N.W.2d 28, 33 (Minn. 1971); *Bonhiver v. Graff*, 248 N.W.2d 291, 296 (Minn. 1976); *Kelley*, 901 F.Supp.2d at 1129)). The bankruptcy court thus found Kelley's pre-bankruptcy appointment as a receiver "a compelling reason not to apply *in pari delicto*." App.31.

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[4] Press Release, U.S. Att'y's Off., E.D. Cal., *BMO Harris Bank Pays $10 Million to Resolve Fraud Allegations* (Oct. 12, 2018), https://bit.ly/40IAZyN.

BMO raised the *in-pari-delicto* defense again in a motion for summary judgment, and the bankruptcy court again rejected it. The court emphasized that, once corrupt management has been replaced by a receiver, the receiver can bring claims without being subject to the defense, stating: "Minnesota state and federal courts have consistently declined to apply *in pari delicto* when an equity receiver has been appointed because the wrongdoer is removed from the picture; the underlying purpose of the … *in pari delicto* defense, to avoid court entanglement in a dispute between wrongdoers, is gone." App.61. As the court explained, "[i]nstead of being wrongdoers, receivership entities are considered victims of the fraud and creditors in a Ponzi scheme case." App.61.

BMO also argued that PCI could not bring the claims against it because they properly belonged to PCI's creditors, not PCI. That argument failed as well because controlling Minnesota law actually gives the claims exclusively to the company in receivership. "If a cause of action seeks to recover for harm to all creditors similarly situated, and solely by virtue of their status as creditors, it is a derivative claim properly pursuable by [the debtor itself]."[5] App.51.

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[5] Additionally, the bankruptcy court granted Kelley's motion for spoliation sanctions, finding that BMO had intentionally destroyed evidence it knew was harmful, including 60 computer server back-up tapes in 2010-11, D.Dkt.15-19 at 27-28, 35-41, 44, and an additional six tapes containing millions of documents in 2014 (during this case), D.Dkt.15-19 at 28-29, 37, 39-41. The court said that it could "only draw one logical conclusion": that BMO intentionally destroyed documents to deprive Kelley of that evidence and tried to cover up its bad-faith and intentional misconduct by "obfuscation, consistent failures to be forthright,

**2. The District Court.**

Denying BMO's motion for interlocutory appeal, the district court—with former Minnesota Supreme Court Justice Wilhelmina Wright presiding—agreed that the claims against BMO belonged to PCI, not to its creditors, and further agreed that Minnesota law foreclosed BMO's *in-pari-delicto* defense. App.77-80.

With respect to the first issue, the district court noted that "when a corporation's assets are fraudulently depleted, rendering the corporation unable to repay creditors, it is the corporation—not the creditors—that is directly harmed, and the claim belongs to the bankruptcy estate." App.71 (citing *In re Senior Cottages of Am.*, 482 F.3d 997, 1006 (8th Cir. 2007); *Greenpond S., LLC v. Gen. Elec. Capital Corp.*, 886 N.W.2d 649, 657 (Minn. Ct. App. 2016)). The court then added: "The fact that fraudulent dissipation of corporate assets limits a corporation's ability to repay its debts 'is not ... a concession that only the creditors, and not [the corporation] itself, have sustained any injury.'" App.72 (alteration in original) (quoting *Senior Cottages*, 482 F.3d at 1006 (quoting *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1004 (9th Cir. 2005))). Rather, this result simply "reflects 'the economic reality that any injury to an insolvent firm is necessarily felt by its creditors.'" *Id.* (quoting *Smith*, 421 F.3d at 1004).[6]

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ever changing testimony, … frequent misrepresentations," and lying to the court, Kelley, and its own counsel. D.Dkt.15-19 at 3-4, 37, 40-41.

[6] As the case approached trial, the Eighth Circuit ruled that PCI's creditors lacked standing to sue third parties for helping Petters deplete PCI's assets. *Ritchie Special Credit Invs. v.*

The district court also rejected BMO's attempted reliance on the *in-pari-delicto* defense. The court observed that "[t]he *in pari delicto* defense rests on the 'principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing.' But 'when a receiver has been appointed for a corporation, the wrongdoer (the corporation) is removed from the picture and, hence, *in pari delicto* does not apply.'" App.78 (quoting *Grassmueck v. Am. Shorthorn Ass'n*, 402 F.3d 833, 837 (8th Cir. 2005) (quoting Black's Law Dictionary 806 (8th ed. 2004)) and *Kelley*, 901 F.Supp.2d at 1129). The court went on to state: "This determination is consistent with Minnesota's application of equitable defenses in the context of receiverships." App.78-79 (citing *German-Am. Fin.*, 225 N.W. at 893; *Magnusson*, 189 N.W.2d at 33; *Bonhiver*, 248 N.W.2d at 296-97).

**3. The Jury Trial.**

Following a month-long trial, the jury returned a verdict for Kelley, finding that BMO had aided and abetted a breach of fiduciary duty to PCI. The jury awarded compensatory damages of $484,209,716 and punitive damages of $79,533,394 (D.Dkt.381 at 3826:1-22), resulting in a judgment exceeding $1.1 billion including pre- and post-judgment interest. The district court then denied BMO's post-trial motions, once again rebuffing BMO's attempt to shield itself by resort to the *in-pari-delicto* defense. App.97 n.4, App.104.

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*JPMorgan Chase*, 48 F.4th 896, 899 (8th Cir. 2022); *accord Greenpond*, 886 N.W.2d at 657.

**4. The Eighth Circuit.**

The Eighth Circuit reversed, holding that, under its own reading of Minnesota law, PCI was subject to the *in-pari-delicto* defense notwithstanding that it had been in receivership before filing for bankruptcy. The court of appeals acknowledged the longstanding Minnesota rule that a receiver is "not bound by the fraudulent acts of a former officer of the corporation," App.7 (quoting *Magnusson*, 189 N.W.2d at 33; *German-Am. Fin.*, 225 N.W. at 893). However, it went on to declare that, even "assuming that Kelley has the better reading of Minnesota law" with respect to whether a receiver may avoid the *in-pari-delicto* defense, that law did not matter because "[u]nder Minnesota law, the appointment of a receiver does not change the receivership entity. A receivership changes only the corporation's management." App.7-8. Thus, while "[u]nder the Minnesota decisions, [Kelley] could have pursued claims in Minnesota court, on behalf of creditors, as a receiver who was unconstrained by the fraudulent acts of PCI's officers[,] [h]is appointment as receiver ... did not change PCI, which remained a wrongdoer." App.8. Based on this entirely novel interpretation of Minnesota law—one that had escaped the bankruptcy court, the district court, and even BMO—the court of appeals held that the defense of *in pari delicto* barred PCI's claim. Because both lower courts found *in pari delicto* inapplicable, they had no occasion to exercise the equitable discretion—based on equitable factors and public policy considerations—that Minnesota law generally gives trial courts to bar an otherwise applicable *in-pari-delicto* defense. Nonetheless, the

Eighth Circuit declined to remand for that analysis and simply directed judgment for BMO. App.11-12.

After seeing the Eighth Circuit's rewrite of Minnesota law in ways unimagined by the courts below or even BMO, petitioner sought rehearing and rehearing en banc and expressly urged the court of appeals to certify the following controlling question to the Minnesota Supreme Court:

"Under Minnesota law, are *in pari delicto* or similar defenses available when raised in response to the claim of an entity in receivership against a third-party for aiding and abetting the misconduct of the former management of the receivership entity?" CA8.Dkt.5449825 at 15.

The rehearing motion also sought a remand so that the lower courts could exercise the equitable discretion afforded them by Minnesota law. The Eighth Circuit denied the motions for rehearing and rehearing en banc without comment. App.13-14.

## REASONS FOR GRANTING THE PETITION

The Eighth Circuit below managed to distort Minnesota law and undermine federal bankruptcy policy in a single stroke. Although Minnesota law quite clearly provides that a defendant may not raise an *in-pari-delicto* defense against a receiver that takes over management of a company, the court of appeals concluded that the defense that would not hamstring recoveries outside of bankruptcy nonetheless dooms the exact same claims if, but only if, the receiver places the company under the protection of a federal bankruptcy court. The Eighth Circuit's theory, unmoored from the parties' arguments, the lower courts' decisions, and extant Minnesota law, meant

that a $1.1 billion judgment that represented the principal recovery for creditors victimized by the Petters scheme was actually worthless in bankruptcy, essentially imposing a massive penalty on the receiver (and the creditors) for taking advantage of the tools available in federal bankruptcy.

There is no indication that the Minnesota court system would endorse this inexplicable result and every indication it would not. After all, the Petters scheme is not the first Ponzi scheme victimizing creditors that the Minnesota courts have confronted. And in sorting through the ruins of an earlier scheme, the Minnesota Supreme Court made clear that *in pari delicto* should not frustrate recovery for the benefit of creditors once the corrupt former management is replaced by a receiver. *See, e.g.*, *Bonhiver*, 248 N.W.2d at 296-97.

Under these circumstances, there is no excuse for the Eighth Circuit to have thrust this perverse ruling on Minnesota law. Like most states, Minnesota has provided that federal courts may certify troublesome questions of state law to its supreme court for resolution. *See* Minn. Stat. §480.065, subd.3. The case for employing that certification mechanism here is particularly compelling. Not only has the Eighth Circuit decided an important issue of Minnesota law, it has decided it in a way that frustrates important federal bankruptcy policy. In this case alone, the decision deprives the estate of more than a billion dollars in value, and going forward it places receivers in the difficult position of choosing between the protections of bankruptcy and obtaining meaningful recoveries for innocent creditors. Worse still, absent

certification, there is no obvious way for the Minnesota court system to correct this irrational interpretation of Minnesota law. After all, as long as a receiver keeps a case outside of bankruptcy, Minnesota law already makes clear that the *in-pari-delicto* defense is no bar to recovery. But once a future receiver puts the company in bankruptcy, the case will proceed in federal court where the perverse decision below will be binding. The best way to cut this Gordian knot is for this Court to order certification either directly or as part of its remand instructions. *See, e.g.*, *Lehman Bros.*, 416 U.S. 386; *see also McKesson*, 592 U.S. 1; *Bellotti*, 428 U.S. 132.

## I. The Eighth Circuit's Decision Distorts Critical Elements Of Minnesota Law And Core Elements Of Federal Bankruptcy Policy.

### A. The Code Provides That a Debtor Enters Bankruptcy With the Same Property Rights That It Possessed Immediately Before Declaring Bankruptcy.

Section 541(a) of the Bankruptcy Code, 11 U.S.C. §541(a), makes clear that the property of a bankruptcy estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." But the Code itself does not define the term "property." Rather, "Congress ha[s] generally left the determination of property rights in the assets of a bankrupt's estate to state law." *Butner v. United States*, 440 U.S. 48, 54 (1979); *see also Rodriguez v. FDIC*, 589 U.S. 132, 137 (2020) (same); *Travelers Cas. & Sur. Co. v. Pac. Gas & Elec. Co.*, 549 U.S. 443, 450-51 (2007) (same); *Barnhill v. Johnson*, 503 U.S. 393,

398 (1992) (same). As the Court explained in *Butner*, "[p]roperty interests are created and defined by state law," and "[u]nless some federal interest requires a different result, there is no reason why such interests should be analyzed differently simply because an interested party is involved in a bankruptcy proceeding." 440 U.S. at 55.

The governing rule with respect to property interests applies in particular to third-party claims that the debtor may bring in bankruptcy and, critically for this case, defenses that a third party may assert against the debtor. The bankruptcy estate encompasses "causes of action belonging to the debtor at the time the case is commenced," and "[a] trustee's ability to assert causes of action on behalf of the bankrupt estate is subject to any equitable or legal defenses that could have been raised against the debtor." *Grassmueck*, 402 F.3d at 836. The scope of those claims, and the scope of any answering defenses, are themselves matters of state law and, in accordance with the text of Section 541(a)(1), must be determined "as of the commencement of the case," i.e., the date immediately before the filing for bankruptcy. Filing for bankruptcy, therefore, neither increases nor diminishes the applicable claims or applicable defenses. *See, e.g.*, *Butner*, 440 U.S. at 56 ("the federal bankruptcy court should take whatever steps are necessary to ensure that the mortgagee is afforded in federal bankruptcy court the same protection he would have under state law if no bankruptcy had ensued.").

That principle is critical to federal bankruptcy policy: it ensures that parties considering bankruptcy

are not artificially deterred from taking advantage of the tools available in federal bankruptcy. Congress has made deliberate choices about what claims are allowed or disallowed in bankruptcy and what powers are granted or withheld once bankruptcy proceedings commence. If valuable claims were lost or new liabilities triggered just by entering bankruptcy, those carefully calibrated congressional choices would be frustrated. For that reason, the Code generally disfavors contractual efforts to impose new liabilities triggered by a bankruptcy filing (so-called *ipso facto* clauses). 11 U.S.C. §365(e)(1). And if a state actually tried to have certain claims disappear or certain defenses arise upon a federal bankruptcy filing, there is every reason to think that such a law would be preempted. But despite its acknowledgement of the general rule that a party enters bankruptcy with the same property rights it had immediately before filing, the Eighth Circuit effectively attributed this same forbidden result to Minnesota law by holding that, while the receiver himself would not have been subject to the *in-pari-delicto* defense immediately before filing, the company he represented would have been and the company not the receiver is the debtor in bankruptcy. *See* App.8. The upshot of this baffling bifurcation was that PCI was barred from bringing claims against BMO in bankruptcy, even though, if the receiver had pursued the claims on PCI's behalf outside of bankruptcy, the *in-pari-delicto* defense would have fallen by the wayside and the company would have been able to recover for the benefit of its creditors. That "sounds absurd, because it is." *Sekhar v. United States*, 570 U.S. 729, 738 (2013).

### B. The Eighth Circuit's Misreading of Minnesota Law Deprived PCI of Highly Valuable State-Law Property Rights That PCI Possessed Prior to Entering Bankruptcy.

There was certainly no shortage of state-law guidance pointing in the opposite direction. Under Minnesota law, it has long been established that a receiver may bring suits on behalf of a company in receivership without being subject to the defense of *in pari delicto*. This sensible rule rests on two related rationales: first, that appointment of a receiver replaces the corrupt management that previously held the company hostage, assuring that any recovery by the company will not reward those wrongdoing officials; and, second, that the ouster of corrupt management dramatically alters the equities underlying the *in-pari-delicto* defense, allowing complicit third-party wrongdoers to be held liable so that the company's innocent creditors may gain a measure of relief.

The Minnesota Supreme Court first set forth this understanding nearly a century ago in *German-American Finance v. Merchants & Mfrs. State Bank*, 225 N.W. 891 (Minn. 1929). The court noted that "the general rule undoubtedly is that the receiver of an insolvent corporation has no greater rights than those possessed by the corporation itself and a defendant in a suit brought by him may take advantage of any defense that might have been made if the suit had been brought by the corporation before its insolvency." *Id.* at 893. But it went on to declare an important exception: "when an act has been done in fraud of the

rights of the creditors of the insolvent corporation the receiver may sue for their benefit, even though the defense set up might be valid as against the corporation itself." *Id.*

Four decades later, the Minnesota Supreme Court again invoked those same principles in addressing the fallout of an earlier Ponzi scheme in *Magnusson v. American Allied Insurance Co.*, 189 N.W.2d 28 (Minn. 1971). In doing so, however, the court not only repeated the controlling rule from *German-American*, it added new language specifically pointing out that the receiver had displaced the previous corrupt management: "Even assuming that this defense would be available against [the company now in receivership], it cannot constitute a defense against the receiver in this case. The receiver represents the rights of creditors *and is not bound by the fraudulent acts of a former officer of the corporation*." *Id.* at 33-34 (emphasis added).

To complete the *in-pari-delicto* trilogy, the Minnesota Supreme Court in *Bonhiver v. Graff*, 248 N.W.2d 291 (Minn. 1976), quoted the relevant principle from *Magnusson* but again added significant new language of its own, this time questioning whether—even aside from appointment of the receiver—the entity in receivership should be considered a guilty party for purposes of the *in-pari-delicto* defense: "Whether or not the company would be precluded from bringing this suit (*the company was the victim of the fraud, and not the perpetrator*), '(t)he receiver represents the rights of creditors and is not bound by the fraudulent acts of a former officer of the corporation.'" *Id.* at 296-97 (emphasis added). Like

PCI, the company in *Bonhiver* had been drained of its assets to enrich prior management, and the receiver was suing a complicit third party so that the "victim" of that unlawful looting could repay its creditors.

Against this background, both the bankruptcy court and the district court understood that, for purposes of assessing whether BMO could rely on the *in-pari-delicto* defense under Minnesota law, it was critical that, immediately before filing for bankruptcy, PCI was being managed by a receiver and not by its "former officer[s]." Noting that "[t]he defense of *in pari delicto* ... is an equitable defense governed by state law," the bankruptcy court observed that "Minnesota state and federal courts have consistently declined to apply *in pari delicto* when an equity receiver has been appointed because the wrongdoer is removed from the picture." App.61. The court emphasized that, in that situation, "the underlying purpose of the *in pari delicto* defense, to avoid court entanglement in a dispute between wrongdoers, is gone. Instead of being wrongdoers, receivership entities are considered victims of the fraud and creditors in a Ponzi scheme case." App.61 (footnote omitted).

As a former justice of the Minnesota Supreme Court, the district court judge was particularly well-positioned to assess Minnesota law, and she took the exact same view. Judge Wright noted that "[t]he *in pari delicto* defense rests on the 'principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing.'" App.78 (quoting *Grassmueck*, 402 F.3d at 837 (quoting Black's Law Dictionary 806 (8th ed. 2004))). But she

went on to hold that "'when a receiver has been appointed for a corporation, the wrongdoer (the corporation) is removed from the picture and, hence, *in pari delicto* does not apply.'" App.78 (quoting *Kelley*, 901 F.Supp.2d at 1129). Judge Wright recognized that this principle was well established in Minnesota law, observing that "[t]his determination is consistent with Minnesota's application of equitable defenses in the context of receiverships," citing *German-American*, *Magnusson*, and *Bonhiver* for that proposition. App.78-79.

The Eighth Circuit, however, decided to chart a different course. Inventing a theory that even BMO had not advanced, the court of appeals decided that, under Minnesota law, a receiver, in bringing suits against third parties, does not actually represent the entity in receivership and thus the entity itself has no immunity from the *in-pari-delicto* defense that carries forward into bankruptcy. As a result, even acknowledging that the receiver could have brought PCI's claims against BMO the day before it filed for bankruptcy without facing the *in-pari-delicto* defense, the court decided that the defense nonetheless haunted PCI (and the receiver-cum-trustee and PCI's creditors) as soon as bankruptcy was declared. This newly discovered principle of Minnesota law—severing receivers from the receivership entity and limiting a century of decisions allowing *in-pari-delicto*-free recoveries once corrupt insiders have been replaced to the receiver alone—was a windfall for the deeply complicit bank, and a disaster for PCI's creditors, who were effectively left empty-handed.

The court of appeals' path to this novel state-law theory was a circuitous one. Giving short shrift to the holdings of *German-American*, *Magnusson*, and *Bonhiver*, the court of appeals largely relied on a previously uncited case, *Northwestern Trust Co. v. St. Paul Southern Electric Railway Co.*, 225 N.W. 919, 920 (Minn. 1929), for the proposition that, "[u]nder Minnesota law, the appointment of a receiver does not change the receivership entity. A receivership changes only the corporation's management." App.8. As a result, the court of appeals explained, while Kelley "could have pursued claims in Minnesota court, on behalf of creditors, as a receiver who was unconstrained by the fraudulent acts of PCI's officers," his appointment as receiver for PCI "did not change PCI, which remained a wrongdoer." App.8

This analysis was wrong from start to finish. First, it is precisely the change in the "corporation's management"—from corrupt corporate insiders to an untainted court-appointed receiver—that renders the *in-pari-delicto* defense inapplicable to the corporation under Minnesota law. As both the bankruptcy court and district court had noted, the *in-pari-delicto* defense is an equitable doctrine that allows a wrongdoer to escape liability to an equally culpable party on the ground that equity should not reward one wrongdoer at another's expense. *Christians v. Grant Thornton, LLP*, 733 N.W.2d 803, 814 (Minn. Ct. App. 2007). The equitable framework is fundamentally altered, however, when a receiver is appointed to replace corrupt management and then seeks to recover on the corporation's behalf to benefit its creditors. In those circumstances, it would actually subvert the principles of equity to shelter complicit

wrongdoers at the expense of innocent parties injured by the wrong.

Resisting this seemingly obvious conclusion, the court of appeals instead decided that, despite Kelley's appointment as PCI's new management, PCI itself remained tainted with the corrupt acts of its prior management. As the court saw matters, "[w]hile the receiver controlled PCI, Minnesota law allowed him to pursue the claims on behalf of creditors, unbound by the corporation's fraudulent acts. But PCI itself was never 'cleansed,' so the *in-pari-delicto* defense was never 'extinguished.'" App.9.

Nothing in Minnesota law supports this indelible-stain theory. To the contrary, the Minnesota Supreme Court has made clear that, for purposes of the *in-pari-delicto* defense, a receiver "is not bound by the fraudulent acts of a former officer of the corporation." *Bonhiver*, 248 N.W.2d at 296-97. In the face of that clear statement, it makes no sense to suppose that, while the receiver is not bound because he has displaced former management, the corporation itself remains bound despite that displacement. Once corrupt former management has been purged and the receiver put in control, the receiver and the entity in receivership are effectively one and the same.

The court of appeals' newborn theory is even more farfetched in light of the Minnesota Supreme Court's pointed observation that a corporation misused by dishonest management is "the victim of the fraud, and not the perpetrator." *Id.* at 296. Here, the jury specifically found that BMO had aided and abetted a breach of fiduciary duty *to PCI*. *See* App.84. As in *Bonhiver*, that finding clearly put PCI on the victim

side of the wrongdoer-victim ledger, making application of the *in-pari-delicto* defense especially incompatible with governing principles of equity.

The court of appeals' conclusion is particularly remarkable given its devastating effect on innocent creditors. The Minnesota courts made clear in the context of the American-Allied scheme that *in pari delicto* did not prevent the receiver from recovering for the benefit of innocent creditors. *See generally Bonhiver*, 248 N.W.2d 291; *Magnusson*, 189 N.W.2d 28. In the context of the Petters scheme itself, the Minnesota courts then clarified that *in-pari-delicto*-free recovery for the receivership entity itself is the exclusive avenue for creditors to recover; they cannot bring their own independent action. *See Greenpond S.*, 886 N.W.2d at 657.

Given the solicitude for the ability of a receiver to pursue relief for the benefit of innocent creditors in cases like *Bonhiver*, it is inconceivable that the Minnesota courts would eliminate any ability of creditors to pursue relief independent of the post-receivership corporate entity only to have recovery by the corporate entity for the creditors' benefit blocked by an *in-pari-delicto* defense. After all, in a contest between creditors victimized by Petters' scheme and a bank that aided and abetted the scheme, the equities are not even close. Instead, the only rational view of Minnesota law is that *Greenpond* made the corporate claim the exclusive route for creditors' recovery because it was confident from the trilogy of *in-pari-delicto* cases that the actions of displaced corrupt management would not bar any recovery for the creditors' benefit. The notion that the Minnesota

courts would limit innocent creditors to a corporate claim that was worthless in the event of bankruptcy is a complete non-starter. Indeed, part of the reason that *Greenpond* precluded any direct action by a creditor was to avoid giving any one creditor a larger share of the recovery than they would have received pro rata in bankruptcy. *Id.* at 655. That the recovery would be zero and an aider-and-abettor would avoid any responsibility to blameless creditors they helped defraud is virtually unthinkable.[7]

### C. The Decision Below Undermines Important Federal Bankruptcy Policies.

It is problematic enough that the decision below got Minnesota law badly wrong, but to make matters considerably worse, the decision below misconstrues Minnesota law in a way that seriously undermines important federal bankruptcy policies. Most obviously, by wrongly shrinking the bankruptcy estate, it raises an unwarranted obstacle to accomplishing bankruptcy's "clear purpose," *i.e.*, "to assemble, once a bankruptcy petition is filed, all of the debtor's assets for the benefit of his creditors." *Kokoszka v. Belford*, 417 U.S. 642, 650 (1974); *see also*

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[7] Indeed, Minnesota law provides yet another avenue to prevent the equitable defense of *in pari delicto* from producing inequitable results—namely the discretion of trial courts not to apply the doctrine even where it would otherwise apply if doing so would result in inequity. *See, e.g.*, *Coughlin v. Reliance Life Ins. Co.*, 201 N.W. 920 (Minn. 1925) (stating that public policy is a "very definite exception" to *in pari delicto*). But the Eighth Circuit cut off this avenue as well—directing judgment for BMO and refusing to remand even though the lower courts had no occasion to exercise this discretion given their shared conclusion that the doctrine was wholly inapplicable.

*Sosebee v. Steadfast Ins. Co.*, 701 F.3d 1012, 1022-23 (5th Cir. 2012) ("the goal of Chapter 11 bankruptcy is to marshal[] the debtor's resources to provide the best possible opportunity for a successful rehabilitation which will ultimately redound to the benefit of all creditors.") (internal quotation marks omitted); *In re Brook Valley IV*, 347 B.R. 662, 673 (B.A.P. 8th Cir. 2006), *aff'd*, 496 F.3d 892 (8th Cir. 2007) ("The goal of Chapter 11 is to maximize the value of money and property available for distribution to creditors."). Under the Eighth Circuit's rule, rather than preserving the value of a debtor's property for transfer to the estate, the bankruptcy filing deprived PCI's claims of the value they had in the receiver's custody, a kind of reverse alchemy that "frustrate[s] the bankruptcy policy of a broad inclusion of property in the estate." *In re Simply Essentials*, 78 F.4th 1006, 1009 (8th Cir. 2023).

The court of appeals' view of Minnesota law also needlessly puts receivers between a rock and a hard place, forcing them to choose between keeping a company out of bankruptcy (while retaining the capacity to sue third parties for their role in harming the company) and taking advantage of the manifold tools available in federal bankruptcy proceedings (at the expense of sacrificing valuable claims that could provide meaningful relief to creditors). Faced with that option—and given the time period typically required to bring litigation to a conclusion—the receiver for an insolvent company may have little choice but to declare bankruptcy even at the cost of relinquishing highly valuable claims, a course of action that enriches only third-party wrongdoers like BMO. Here, if Kelley had recovered more than a

billion dollars from BMO immediately before placing PCI in bankruptcy, those funds themselves would unquestionably have become part of PCI's bankruptcy estate and available to PCI's creditors, who cannot sue to recover those funds themselves under Minnesota law. Yet, the Eighth Circuit has now taught Minnesota receivers that a declaration of bankruptcy strips such claims of all value, freeing bad actors from responsibility for their misconduct and leaving blameless creditors holding the bag. Founded upon a clear misunderstanding of Minnesota law, this irrational disincentive for receivers to invoke the bankruptcy process manages to sabotage the core goals that bankruptcy is intended to serve.

## II. The Eighth Circuit Could Have, And Should Have, Certified The Critical Question Of Minnesota Law To The Minnesota Supreme Court.

The mess that the Eighth Circuit created is all the more troubling because it was so readily avoidable. Minnesota has established a certification process for resolving unsettled questions of Minnesota law, *see* Minn. Stat. §480.065, subd.3, and, before charting a new course, the court of appeals should have made use of that process to obtain an authoritative interpretation of Minnesota law.

This Court has observed that the certification process "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism." *Lehman Bros.*, 416 U.S. at 391. "Taking advantage of certification made available by a State may 'greatly simplif[y]' an ultimate adjudication in federal court." *Arizonans for Official Eng.*, 520 U.S. at

79 (quoting *Bellotti*, 428 U.S. at 151); *see id.* (state certification procedures "do not entail the delays, expense, and procedural complexity that generally attend abstention decisions"); *see also Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 58 (2017) (Sotomayor, J, concurring) ("'the availability of certification greatly simplifies the analysis' of whether to abstain" (quoting *Bellotti*, 428 U.S. at 151)). Thus, the "[c]ertification procedure ... allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Arizonans for Official Eng.*, 520 U.S. at 76.

To be sure, certification of state-law questions is not meant to be an everyday occurrence. *See McKesson*, 592 U.S. at 5 ("Certification is by no means 'obligatory' merely because state law is unsettled."). But, when the answer to a disputed state-law question directly affects the proper operation of a federal statute or constitutional provision, an authoritative interpretation by a state Supreme Court may well be preferable to the guesswork of a federal court. As this Court has noted, "[s]peculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when … the state courts stand willing to address questions of state law on certification from a federal court." *Arizonans for Official Eng.*, 520 U.S. at 79 (quoting *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring)).

At various times, therefore, this Court has certified questions to state Supreme Courts, both

before and after a grant of certiorari. *See Cline*, 570 U.S. 930 (granting certiorari); *Massachusetts v. Feeney*, 429 U.S. 66 (1976) (certiorari pending*); Elkins v. Moreno*, 435 U.S. 647 (1978) (certiorari previously granted*)*; *see also Virginia v. Am. Booksellers Ass'n. Inc.*, 484 U.S. 383 (1988) (certification after noting probable jurisdiction). For example, in *Cline*, the Court granted the petition for certiorari and certified two state-law questions to the Supreme Court of Oklahoma, while directing that "[f]urther proceedings in this case are reserved pending receipt of a response from the Supreme Court of Oklahoma." 570 U.S. 930.

On several other occasions, this Court has ordered, or strongly encouraged, federal courts of appeals themselves to certify questions of state law to the appropriate state Supreme Court. In *Lehman Bros.*, the Court stated that "[t]he judgment of the Court of Appeals is vacated and the cases are remanded so that that court may reconsider whether the controlling issue of Florida law should be certified to the Florida Supreme Court pursuant to Rule 4.61 of the Florida Appellate Rules." 416 U.S. 391-92. Likewise, in *McKesson*, having noted that "the Fifth Circuit should not have ventured into so uncertain an area of tort law—one laden with value judgments and fraught with implications for First Amendment rights—without first seeking guidance on potentially controlling Louisiana law from the Louisiana Supreme Court," 592 U.S. at 6, the Court chose to "grant the petition for writ of certiorari, vacate the judgment of the United States Court of Appeals for the Fifth Circuit, and remand the case to that court for further proceedings consistent with this opinion." *Id.* And, in *Bellotti*—an appeal from a three-judge court—

the Court declared that "the court should have abstained, and we vacate the judgment and remand the cases for certification of relevant issues of state law to the Supreme Judicial Court [of Massachusetts], and for abstention pending the decision of that tribunal." 428 U.S. at 134.

The case for certification is particularly strong here for multiple reasons. First, as noted, there is every reason to think that the Eighth Circuit has gotten Minnesota law badly wrong. Having previously confronted the prospect that *in pari delicto* could leave innocent creditors of a Ponzi scheme without a remedy, the Minnesota Supreme Court bent over backwards to ensure a remedy. Two Minnesota-based federal jurists, one a former Minnesota Supreme Court justice, surveyed that law and found that BMO could not use the actions of long-displaced management as a defense. There is thus every indication that certification would be determinative here. Second, the decision below puts Minnesota law on a collision course with federal bankruptcy policy. It is a close question whether a state could consciously adopt the regime that the Eighth Circuit has attributed to Minnesota consistent with federal preemption principles. But it is not a close question whether a federal court should thrust a policy that defies federal bankruptcy policy on a state when certification is an available option. Third, if this Court does not order certification, it will be difficult for the Minnesota courts to reach the state-law issue decided here. After all, the whole premise of the decision below is that as long as a receiver stays out of bankruptcy, the established Minnesota law allowing the receiver to recover freed from *in pari delicto* will

govern. The receiver will only lose the benefit of that established Minnesota law if he files for bankruptcy, but at that point he will be in federal court where the Eighth Circuit's (mis)interpretation will be binding. Only certification provides a clear solution to that infinite loop. Given Minnesota's sovereign interest in deterring fraud and ensuring remedies for its victims, principles of federalism firmly commend giving the Minnesota Supreme Court its say before curtailing Minnesota's receivership protection.

Finally, the stakes in this case and going forward underscore the need for certification. In this case alone, more than a billion dollars of relief for victims of the Petters Ponzi scheme have been wiped out by the decision below. Whereas other receivers and similar entities have been able to generate significant recoveries for the victims of comparable Ponzi schemes by pursuing relief from entities even less complicit than BMO, *Bonhiver*, 248 N.W.2d 291; *Magnusson*, 189 N.W.2d 28, recovery for the victims of the Petters scheme largely stands or falls on the ability to recover against BMO. Even if this case had no impact going forward, a billion dollars in potential recovery for Ponzi scheme victims would fully justify certification. But baleful consequences of the decision below are hardly limited to these victims and this receiver. Going forward, the decision below puts every receiver on the horns of a dilemma, where the price of the tools Congress has provided to deal with insolvency is the sacrifice of what may well be the single most valuable asset of the would-be bankruptcy estate. There is no reason to think Minnesota law requires that result or that the Minnesota Supreme

Court would tolerate it. Certification provides the only sensible path forward.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari and either certify the central state-law question to the Minnesota Supreme Court or, alternatively, remand the case to the Eighth Circuit with a directive for that court to seek certification.

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February 12, 2025

# APPENDIX

## TABLE OF APPENDICES

*Appendix A*

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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No. 23-2551

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DOUGLAS A. KELLEY, in his capacity as the Trustee of the BMO Litigation Trust,

*Appellee*,

v.

BMO HARRIS BANK NATIONAL ASSOCIATION, as successor to M&I Marshall and Ilsley Bank,

*Appellant*.

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No. 23-2632

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DOUGLAS A. KELLEY, in his capacity as the Trustee of the BMO Litigation Trust,

*Appellant*,

v.

BMO HARRIS BANK NATIONAL ASSOCIATION, as successor to M&I Marshall and Ilsley Bank,

*Appellee*.

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Submitted: May 9, 2024
Filed: Sept. 12, 2024 (Amended: Sept. 12, 2024)

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Before COLLOTON, Chief Judge, BENTON and SHEPHERD, Circuit Judges.

## OPINION

COLLOTON, Chief Judge.

This appeal is the latest in a series of disputes arising from Thomas Petters's multibillion-dollar Ponzi scheme. When the scheme collapsed, a federal district court placed one of his companies, Petters Company, Inc. (PCI), in a receivership and appointed Douglas Kelley as a receiver. PCI then filed for bankruptcy, and Kelley was appointed trustee of the bankruptcy estate.

As trustee, Kelley filed an adversary proceeding in the bankruptcy court against BMO Harris as successor-in-interest to M&I Bank, alleging that M&I aided and abetted the Ponzi scheme. BMO raised the equitable defense of *in pari delicto* on the ground that the debtor, PCI, bore equal or greater responsibility for its injury. The bankruptcy court and the district court concluded that the defense was unavailable in light of the receivership. The case proceeded to trial, and a jury found that M&I aided and abetted PCI officers' breach of fiduciary duty and awarded Kelley more than $500 million in damages.

BMO appeals and raises numerous contentions regarding available defenses, sufficiency of the evidence, jury instructions, and damages. Because we conclude that the doctrine of *in pari delicto* barred Kelley's action against BMO, we reverse.

## I.

Petters created PCI to facilitate his Ponzi scheme. He represented to investors that PCI purchased consumer electronics from wholesalers and resold the products to retailers. In reality, Petters rerouted much of the money to himself and his fellow fraudsters using PCI's accounts at M&I Bank.

The scheme collapsed in 2008 when Petters was arrested. A jury found him guilty of various fraud offenses, and the district court sentenced him to 50 years' imprisonment. *See United States v. Petters*, 663 F.3d 375 (8th Cir. 2011). PCI pleaded guilty to wire fraud, conspiracy to commit mail and wire fraud, and conspiracy to commit money laundering.

At the federal government's request, a federal district court placed PCI into a receivership and appointed Douglas Kelley as the receiver under 18 U.S.C. § 1345(a)(2)(B)(ii). The district court authorized him to "fil[e] any bankruptcy petitions for [PCI] to protect and preserve [its] assets," provided that "bankruptcy cases so commenced by the Receiver shall during their pendency be governed by and administered pursuant to the requirements of the U.S. Bankruptcy Code" and "the applicable Federal Rules of Bankruptcy Procedure." Five days after his appointment, Kelley filed for bankruptcy on PCI's behalf. The bankruptcy court appointed Kelley to be the bankruptcy trustee.

As the trustee, Kelley filed an adversary proceeding against BMO in the bankruptcy court. He brought various claims under Minnesota law, including a claim for aiding and abetting breach of fiduciary duty. Kelley alleged that M&I employees

knew about the Ponzi scheme and gave PCI special treatment that helped the scheme avoid detection. For example, Kelley alleged that bank employees ignored money-laundering alerts from the bank's account-monitoring software and allowed PCI to overdraft millions of dollars, contrary to the bank's policies.

BMO moved for summary judgment. The bank argued that under the doctrine of *in pari delicto*, PCI could not recover based on M&I's alleged wrongdoing because PCI was itself a wrongdoer of equal or greater fault. The bankruptcy court ruled that the defense was unavailable. The court reasoned that under Minnesota law, "PCI had become a receivership entity" and thus was no longer bound by its officers' previous fraudulent acts. In the alternative, the court concluded that genuine issues of fact existed as to the parties' respective fault. The district court denied BMO's request for interlocutory review of the decision. The court conducted its own review of Minnesota law and determined that there were no substantial grounds for a difference of opinion on whether the defense was inapplicable in light of PCI's status as a receivership.

At trial, Kelley and BMO cross-moved for judgment as a matter of law on BMO's *in pari delicto* defense. The district court granted Kelley's motion and denied BMO's motion because it concluded that BMO had "no valid factual or legal basis" to advance the defense.

The jury found BMO liable for aiding and abetting breach of fiduciary duty. The jury awarded Kelley $484,209,716 in compensatory damages and $79,533,392 in punitive damages. After trial, BMO

renewed its motion for judgment as a matter of law, arguing again that *in pari delicto* barred Kelley's suit. The court denied the motion, and BMO appeals. We review the district court's denial of an equitable defense for abuse of discretion; an error of law is an abuse of discretion. *See Sturgis Motorcycle Rally, Inc. v. Rushmore Photo & Gifts, Inc.*, 908 F.3d 313, 343 (8th Cir. 2018); *Zayed v. Associated Bank, N.A.*, 779 F.3d 727, 737 (8th Cir. 2015).

**II.**

The equitable defense of *in pari delicto* embodies the principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing. *Grassmueck v. Am. Shorthorn Ass'n*, 402 F.3d 833, 837 (8th Cir. 2005). In Minnesota, the defense of *in pari delicto* is "appropriately applied to bar recovery" when the plaintiff's "fraud was no less than that of" the defendant. *State ex rel. Head v. AAMCO Automatic Transmissions, Inc.*, 199 N.W.2d 444, 448 (Minn. 1972). BMO argues that even assuming Kelley's allegations are true, PCI orchestrated the scheme and is necessarily more culpable—or at least, no less culpable—than the bank. On that view, if PCI had sued the bank in a Minnesota court, then BMO would have been entitled to prevail on the defense of *in pari delicto*.

But Kelley, as receiver-turned-trustee, brought this claim in an adversary proceeding in bankruptcy court. A trustee in bankruptcy stands in the shoes of the debtor. *Stumpf v. Albracht*, 982 F.2d 275, 277 (8th Cir. 1992). The defense of *in pari delicto* is thus available in an action by a bankruptcy trustee against another party if the defense could have been raised

against the debtor. *Grassmueck*, 402 F.3d at 836. State law governs whether the defense could have been raised against the debtor. *See id.* at 837. The parties debate how Minnesota law on receiverships affects this proceeding.

A receiver is a "disinterested person appointed by a court . . . for the protection or collection of property that is the subject of diverse claims." *Receiver*, Black's Law Dictionary (12th ed. 2024). A federal district court may in the exercise of its equitable powers appoint a receiver to "take control, custody, or management of property that is involved in or is likely to become involved in litigation for the purpose of preserving the property . . . and undertaking any other appropriate action with regard to the property pending its final disposition by the suit." 12 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2981 (3d ed. 2024); *see Gordon v. Washington*, 295 U.S. 30, 37 (1935). Although Kelley was appointed by a federal court, state law governs a federal receiver's rights in a state-law cause of action. *See O'Melveny & Myers v. FDIC*, 512 U.S. 79, 83, 88 (1994); *Jones v. Wells Fargo Bank, N.A.*, 666 F.3d 955, 966 n.11 (5th Cir. 2012) (per curiam).

A common-law tradition recognizes a receiver's dual role as one who "represents the creditors as well as the shareholders, and holds the property for the benefit of both." *Franklin Nat'l Bank v. Whitehead*, 49 N.E. 592, 599 (Ind. 1898); *see also Divide County v. Baird*, 212 N.W. 236, 242-43 (N.D. 1926)*; Lyons v. Benney*, 79 A. 250, 251 (Pa. 1911). Relying on that body of law, Minnesota decisions have concluded that

a receiver represents the rights of creditors of the receivership entity. *See German-Am. Fin. Corp. v. Merchs.' & Mfrs.' State Bank of Minneapolis*, 225 N.W. 891, 893 (Minn. 1929); *Farmers' & Merchs.' State Bank of Ogilvie v. Consol. Sch. Dist. No. 3*, 219 N.W. 163, 166 (Minn. 1928). Because a "receiver represents the rights of creditors," the Minnesota Supreme Court has ruled, he "is not bound by the fraudulent acts of a former officer of the corporation." *Magnusson v. Am. Allied Ins.*, 189 N.W.2d 28, 33 (Minn. 1971); *see Bonhiver v. Graff*, 248 N.W.2d 291, 296-97 (Minn. 1976). So "when an act has been done in fraud of the rights of the creditors of the insolvent corporation[,] the receiver may sue for their benefit, even though the defense set up might be valid as against the corporation itself." *German-Am. Fin.*, 225 N.W. at 893.

The parties dispute whether these decisions mean that a receiver, acting on behalf of creditors, may avoid the defense of *in pari delicto* even when he brings a claim that belongs to the corporate entity. Even assuming that Kelley has the better reading of Minnesota law on this point, Kelley is acting in this case as a bankruptcy trustee, not as a receiver. A bankruptcy trustee steps into the shoes of the debtor and is subject to any defenses that could be raised against the debtor, including the defense of *in pari delicto*. *Grassmueck*, 402 F.3d at 836.

Kelley maintains that he stepped into the shoes of a "cleansed" receivership entity that is no longer bound by its prior wrongdoing. We are not convinced that Minnesota law "cleanses" an entity that is placed in receivership. The Minnesota decisions in *German-American Finance*, *Magnusson*, and *Bonhiver* speak

only in terms of the *receiver* and what defenses are available against a receiver. That a receiver is not bound by a receivership entity's fraudulent acts, however, does not establish that the *entity* is "cleansed" of any prior wrongdoing.

Under Minnesota law, the appointment of a receiver does not change the receivership entity. A receivership changes only the corporation's management. *Nw. Tr. Co. v. St. Paul S. Elec. Ry.*, 225 N.W. 919, 920 (Minn. 1929); *see* Minn. Stat. § 576.21(p)-(q). Kelley-as-receiver thus had custody and control over all of PCI's assets, including its causes of action. Under the Minnesota decisions, he could have pursued claims in Minnesota court, on behalf of creditors, as a receiver who was unconstrained by the fraudulent acts of PCI's officers. His appointment as receiver, however, did not change PCI, which remained a wrongdoer.

PCI's management changed again when Kelley-as-receiver filed for bankruptcy on behalf of the entity. At that point, the bankruptcy estate was created. *See* 11 U.S.C. § 541(a). The estate included all legal or equitable interests of the debtor in property as of the commencement of the case. *Id.* § 541(a)(1). Kelley-as-receiver transferred custody of all of PCI's assets—including its causes of action—to "the duly-appointed Chapter 11 Trustee." Once he did so, Kelley-as-receiver no longer controlled PCI's assets and thus had no claims to bring. PCI's claims became part of the bankruptcy estate and belonged to the bankruptcy trustee. *See Ritchie Special Credit Invs., Ltd. v. JPMorgan Chase & Co.*, 48 F.4th 896, 898-99 (8th Cir. 2022).

In this proceeding, bankruptcy law governs the powers of the trustee and defines the property of the bankruptcy estate. 11 U.S.C. §§ 323, 541, 1106. So once Kelley transferred PCI's claims to the estate, bankruptcy law governed his ability to bring PCI's claims as the trustee. And in bankruptcy, the trustee is "subject to any equitable or legal defenses that could have been raised against the debtor." *Grassmueck*, 402 F.3d at 836. PCI is the debtor; the receiver is not involved in the bankruptcy proceeding. If PCI had sued BMO in a Minnesota court, the defense of *in pari delicto* would have been available. BMO thus should have been able to raise the defense against Kelley as the bankruptcy trustee.

Kelley argues that allowing BMO to raise the defense of *in pari delicto* in the adversary proceeding would revive a defense that Minnesota law had already "extinguished," and would conflict with the rule that "[a] debtor's property does not shrink by happenstance of bankruptcy." *Mission Prod. Holdings, Inc. v. Tempnology, LLC*, 587 U.S. 370, 381 (2019) (internal quotation omitted). We think this argument misstates the nature of the property held by the debtor, PCI. When PCI filed for bankruptcy, it possessed claims against BMO. Those claims were subject to a defense based on PCI's own wrongdoing. While the receiver controlled PCI, Minnesota law allowed him to pursue the claims on behalf of creditors, unbound by the corporation's fraudulent acts. But PCI itself was never "cleansed," so the *in-pari-delicto* defense was never "extinguished."

When Kelley transferred the claims to the bankruptcy estate, the custodian of the claims

changed, but the claims did not. The claims entered the bankruptcy estate subject to a defense based on PCI's previous fraudulent acts. Bankruptcy law does not provide a vehicle for PCI or its trustee to proceed unbound by PCI's own wrongdoing. *See Grassmueck*, 402 F.3d at 836. No Minnesota decision purports to eliminate the defense of *in pari delicto* in a bankruptcy case. The defense was thus available to BMO in this adversary proceeding.

Our conclusion is consistent with the decision of the Second Circuit in a comparable proceeding arising from another massive Ponzi scheme. *Picard v. JPMorgan Chase & Co.* (*In re Bernard L. Madoff Inv. Sec. LLC*), 721 F.3d 54 (2d Cir. 2013). The court there held that the doctrine of *in pari delicto* barred a trustee under the Securities Investor Protection Act—vested with the same powers as a bankruptcy trustee—from asserting claims on behalf of the estate of Bernard Madoff's failed brokerage firm for wrongdoing in which Madoff participated. The court ruled that "[t]he debtor's misconduct is imputed to the trustee because, innocent as he may be, he acts as the debtor's representative." *Id.* at 63.

Kelley suggests that *Madoff* is inapposite because the rule in New York is different from Minnesota law. Decisions applying New York law, however, align with the decisions from Minnesota: the *in-pari-delicto* defense does *not* apply against an innocent non-bankruptcy trustee or receiver who seeks recovery for investors or creditors, although a bankruptcy trustee is subject to the defense as in *Madoff*. *See Taylor v. U.S. Bank Nat'l Ass'n*, No. H-12-3550, 2015 WL 507526, at *9 (S.D. Tex. Feb. 6, 2015) (applying New

York law and concluding that *in-pari-delicto* defense did not apply against a receiver: "[W]hile bankruptcy trustees are regularly precluded by bankruptcy laws from bringing any suit that the corporation could not have brought pre-petition, a receiver appointed by the court outside of a bankruptcy setting is treated differently."); *Walker, Truesdell, Roth & Assocs., Inc. v. Globeop Fin. Servs. LLC*, No. 600469/09, 2013 WL 8597474, at *10 (N.Y. Sup. Ct. May 27, 2013) ("Unlike receivers, bankruptcy trustees are subject to Bankruptcy Code section 541, which prevents such trustees from bringing any suit that the corporation could not have brought pre-petition."); *Williamson v. Stallone*, 905 N.Y.S.2d 740, 751-52 (N.Y. Sup. Ct. 2010) (ruling that *in-pari-delicto* defense did not apply against non-bankruptcy trustee because "[u]nlike a bankruptcy trustee, who is precluded by Section 541 of the Bankruptcy Code from bringing any suit that the corporation could not have brought pre-petition, the Trustee here is an impartial individual appointed by the court who derives his powers from the partnership agreement and state law"); *Williamson v. Pricewaterhousecoopers, LLP*, No. 602106/2004, 2007 WL 5527944 (N.Y. Sup. Ct. Nov. 7, 2007) (ruling that "*in pari delicto* does not apply to an innocent, non-bankruptcy trustee where any recovery is for the sole benefit of those investors who lost money") (capitalization altered).

Because the district court committed legal error by determining that the defense was unavailable against Kelley-as-trustee, the court abused its discretion. The question remains whether this court should remand for the district court to reconsider the availability of the defense in light of our decision. On

this record, we conclude that remand is unnecessary. PCI was created solely to operate the Ponzi scheme. Even assuming that the bank aided the scheme to the degree that Kelley alleges, BMO cannot be more culpable than the entity that orchestrated the scheme. *See Madoff*, 721 F.3d at 64; *Off. Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145, 1155 (11th Cir. 2006). The defense of *in pari delicto* thus bars Kelley's claims on behalf of PCI. Any other result on remand would be an abuse of discretion, so no further proceedings are warranted. *See Robert Bosch LLC v. Pylon Mfg. Corp.*, 659 F.3d 1142, 1157 (Fed. Cir. 2011).

* * *

The judgment of the district court is reversed, and the case is remanded with directions to enter judgment in favor of BMO. The cross-appeal is dismissed as moot.

*Appendix B*

**UNITED STATES COURT OF APPEALS**
**FOR THE EIGHTH CIRCUIT**

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No. 23-2551

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DOUGLAS A. KELLEY, in his capacity as the Trustee of the BMO Litigation Trust,

*Appellee*,

v.

BMO HARRIS BANK NATIONAL ASSOCIATION, as successor to M&I Marshall and Ilsley Bank,

*Appellant*.

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No. 23-2632

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DOUGLAS A. KELLEY, in his capacity as the Trustee of the BMO Litigation Trust,

*Appellant*,

v.

BMO HARRIS BANK NATIONAL ASSOCIATION, as successor to M&I Marshall and Ilsley Bank,

*Appellee*.

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Filed: Nov. 14, 2024

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ORDER

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The petition for rehearing en banc is denied. The petition for rehearing by the panel is denied.

November 14, 2024

Order Entered at the Direction of the Court:

Acting Clerk, U.S. Court of Appeals, Eighth Circuit

/s/ Maureen W. Gornik

*Appendix C*

**UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF MINNESOTA**

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BK No. 08-45257
Adv. No. 12-4288

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IN RE: PETTERS COMPANY, INC.

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DOUGLAS A. KELLEY, in his capacity as the Trustee of the BMO Litigation Trust,

*Plaintiff*,

v.

BMO HARRIS BANK NATIONAL ASSOCIATION, as successor to M&I Marshall and Ilsley Bank,

*Defendant*.

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Filed: Feb. 24, 2017

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ORDER

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This adversary proceeding originates from the failure of the Petters Ponzi scheme orchestrated by Thomas J. Petters and his associates, the history of which has been well documented in this district as well as others nationwide.[1] Liquidating Trustee

[1] *See e.g.*, *In re Petters Co., Inc.*, 401 B.R. 391 (Bankr. D. Minn. 2009), *aff'd*, 620 F.3d 847 (8th Cir. 2010); *In re Petters Co., Inc.*,

Douglas A. Kelley ("Plaintiff") filed this adversary proceeding against BMO Harris Bank N.A., as successor to M&I Marshall and Ilsley Bank ("Defendant"), alleging violations of the Minnesota Uniform Fiduciaries Act ("MUFA"), breach of fiduciary duty, aiding and abetting breach of fiduciary duty, aiding and abetting fraud, and civil conspiracy.

Defendant filed a Motion to Dismiss Adversary Proceeding ("Motion") on October 24, 2016.[2] Plaintiff filed a response on November 11, 2016.[3] The Court heard oral argument on January 5, 2017. Joshua Yount, Thomas Kiriakos, and Adine Momoh appeared for the Defendant. Thomas Hamlin and Michael Rief appeared for the Plaintiff.

After oral argument, the Court ordered supplemental briefing on the issue of judicial estoppel.[4] The parties submitted their supplemental briefing and Ritchie Special Credit Investments, Ltd,

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440 B.R. 805 (Bankr. D. Minn. 2010); *In re Petters Co., Inc.*, 506 B.R. 784 (Bankr. D. Minn. 2013); *In re Petters Co., Inc.*, 548 B.R. 551 (Bankr. D. Minn. 2016); *In re Polaroid Corp.*, 472 B.R. 22 (Bankr. D.Minn. 2012); *aff'd*, 779 F.3d 857 (8th Cir. 2015); *see also Peterson v. Winston & Strawn LLP*, 729 F.3d 750, 751 (7th Cir. 2013); *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741, 744 (7th Cir. 2013); *United States Sec. and Exch. Comm'n v. Quan*, 817 F.3d 583, 587-589 (8th Cir. 2016); *Varga v. U.S. Bank Nat'l Ass'n*, 764 F.3d 833, 836-837 (8th Cir. 2014); *In re Cypress Fin. Trading Co., L.P.*, 620 Fed. Appx. 287, 288 (5th Cir. 2015); *In re Palm Beach Fin. Partners, L.P.*, 527 B.R. 518, 521 (S.D. Fla. 2015); *In re Palm Beach Fin. Partners, L.P.*, 517 B.R. 310, 319-321 (Bankr. S.D. Fla. 2013).

[2] Doc. 56.

[3] Doc. 59.

[4] Doc. 62.

and Ritchie Capital Management SEZC, Ltd, filed a Statement regarding their standing to sue BMO on January 31, 2017.[5]

This Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(b)(1) & 1334, Fed. R. Bankr. P. 7001, and Local Rule 1070-1. This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(H). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

This adversary proceeding was reassigned to the undersigned when Chief Judge Gregory F. Kishel retired on May 31, 2016. The undersigned hereby certifies familiarity with the record and determines that this matter may be addressed without prejudice to the parties in accordance with Fed. R. Civ. P. 63, as incorporated by Fed. R. Bankr. P. 9028.

The Motion is granted in part and denied in part for the reasons that follow.

**Background and Procedural History**

After Petters' Ponzi Scheme was uncovered in late 2008, Judge Ann Montgomery of the United States District Court for the District of Minnesota appointed the Plaintiff, Douglas Kelley, as the equity receiver for Petters Company Inc. and its affiliates ("PCI"). On October 11, 2008, the Plaintiff filed a Chapter 11 petition on behalf of PCI. The Plaintiff was appointed the Chapter 11 Trustee on February 26, 2009. On November 14, 2012, Plaintiff filed this adversary proceeding against Defendant.

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[5] Doc.74.

The Court confirmed the Second Amended Plan of Chapter 11 Liquidation on April 15, 2016. The Plan established the BMO Litigation Trust, which is administered by the Plaintiff, as Liquidating Trustee. The Plan transferred the BMO Litigation Trust Assets, including the causes of action asserted in this adversary proceeding, into the BMO Litigation Trust.[6]

The Plaintiff filed the First Amended Complaint ("Complaint") on October 20, 2016.[7] Generally, the Complaint alleges that the Defendant provided banking and related services to Petters and PCI.[8] The Complaint also alleges that Defendant was complicit in the Ponzi scheme, that Defendant "was presiding" over the checking account ("M&I account") through which virtually all funds involved in the Ponzi scheme "were laundered", and that Defendant served as a "critical lynchpin" legitimizing and facilitating the Ponzi scheme by signing Deposit Control Agreements ("DCAs") to placate investors, among other actions.[9]

The Complaint states five causes of action:

1. Count I alleges that Defendant violated Minn. Stat. § 520.08, the Minnesota Uniform Fiduciaries Act.

2. Count II alleges that the Defendant breached its fiduciary duties to PCI and PCI's investors.

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[6] *See* Findings of Fact, Conclusions of Law and Order Confirming the Second Amended Chapter 11 Plan of Liquidation Dated April 8, 2016, Case No. 08-45257, Doc. 3305, pg. 30.

[7] Doc. 55, pg. 2.

[8] Doc. 55, pg. 2.

[9] Doc. 55, pg. 2.

3. Count III alleges that Defendant aided and abetted Petters and his associates' fraud.

4. Count IV alleges that Defendant aided and abetted Petters and his associates' breach of fiduciary duties.

5. Count V alleges that Defendant engaged in a civil conspiracy with Petters and his associates.

**Standard of Review**

In reviewing a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6), a court must accept as true all of the factual allegations in the complaint and draw all reasonable inferences in the plaintiff's favor.[10] Although the factual allegations need not be detailed, they must be sufficiently plead to "raise a right to relief above the speculative level ...."[11] The complaint must state a right to relief that is plausible on its face.[12] Further, Rule 9(b) requires that allegations of fraud, including allegations of aiding and abetting fraud, must be plead

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[10] *Shank v. Carleton Coll.*, No. 16-CV-1154 (PJS/FLN), 2017 WL 80249, at *3 (D. Minn. Jan. 9, 2017); *citing Aten v. Scottsdale Ins. Co.*, 511 F.3d 818, 820 (8th Cir. 2008).

[11] *Shank*, 2017 WL 80249, at *3; c*iting Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

[12] *Shank*, 2017 WL 80249, at *3; *citing Twombly*, 550 U.S. at 570.

with particularity.[13] Rule 9(b) must be read "in harmony with the principles of notice pleading."[14]

Defendant's Motion contains six arguments for dismissal under Federal Rules of Civil Procedure 12(b)(1) and (6). (The Court will not address the sixth issue, judicial estoppel, because Count V, to which it pertains, is dismissed as discussed below.)

## I. Plaintiff has standing to pursue corporate claims.

Defendant's first main argument is that Plaintiff lacks standing to pursue claims on behalf of PCI or creditors.

A motion to dismiss attacking a party's standing under Rule 12(b)(1) is a challenge to the Court's subject matter jurisdiction. In deciding a motion under Rule 12(b)(1), the Court must first "distinguish between a 'facial attack' and a 'factual attack.'"[15] Here, because Defendant's challenge to Plaintiff's standing rests not on the truthfulness of Plaintiff's pleadings, but on the sufficiency of Plaintiff's pleadings, Defendant's jurisdictional challenge is facial and the Court applies the same standard of review as the

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[13] *E-Shops Corp. v. U.S. Bank Nat. Ass'n,* 795 F. Supp. 2d 874, 877 (D. Minn. 2011), *aff'd*, 678 F.3d 659 (8th Cir. 2012); *citing* Fed.R.Civ.P. 9(b).

[14] *Select Comfort Corp. v. Sleep Better Store, LLC*, 796 F. Supp. 2d 981, 984 (D. Minn. 2011); *quoting BJC Health Sys. v. Columbia Cas. Co.*, 478 F.3d 908, 917 (8th Cir.2007).

[15] *City of Wyoming v. Procter & Gamble Co.*, No. CV 15-2101 (JRT/TNL), 2016 WL 5496321, at *3 (D. Minn. Sept. 28, 2016); *citing Osborn v. United States*, 918 F.2d 724, 729 n.6 (8th Cir. 1990).

Court applies to a motion brought under Rule 12(b)(6).[16]

In order for a court to decide the merits of a particular dispute, a party must have standing.[17] Standing requires that a party assert its own legal rights and interests and cannot rest its claims to relief solely on the legal rights or interests of third parties.[18]

A bankruptcy trustee has standing, pursuant to 11. U.S.C. §§ 704(1) and 1106(a), to pursue claims or causes of action that belonged to the bankruptcy estate on the date of filing in order to fulfill its duty to "collect and reduce to money the property of the estate . . ."[19] Property of the estate includes all legal or equitable interests of the debtor in property as of the commencement of the case, including causes of action.[20]

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[16] *City of Wyoming*, 2016 WL 5496321 at *3; *citing Stalley v. Catholic Health Initiatives*, 509 F.3d 517, 521 (8th Cir. 2007); *see also Sierra Club v. Clinton*, 689 F. Supp.2d 1147, 1154 (D. Minn. 2010).

[17] *Safelite Grp., Inc. v. Rothman*, No., 2017 WL 337988, at *10 (D. Minn. Jan. 23, 2017); *citing Glickert v. Loop Trolley Transp. Dev. Dist.*, 792 F.3d 876, 880 (8th Cir. 2015).

[18] *See Warth v. Seldin*, 422 U.S. 490, 499 (1975).

[19] *In re Senior Cottages of Am., LLC*, 482 F.3d 997, 1001 (8th Cir. 2007); citing 11 U.S.C. § 704(1); *citing In re Ozark Rest. Equip. Co.*, 816 F.2d 1222, 1225 (8th Cir.1987).

[20] *In re Senior Cottages of Am., LLC*, 482 F.3d at 1001; *citing* 11 U.S.C. § 541(a)(1).

### A. The Plaintiff may pursue claims to recover for harm to PCI.

In Minnesota, a corporation may bring a claim when it has been injured.[21] The Complaint here alleges many instances of wrongdoing by the Defendant that hurt the debtor. Thus, the Plaintiff, as trustee of the BMO Litigation Trust, may pursue any claim to recover for harm done to PCI. These will be fully addressed count by count below.

### B. The Plaintiff may pursue derivative claims on behalf of creditors.

Defendant's next standing argument is that the Plaintiff cannot bring causes of action on "behalf of creditors" because, to have standing, the Plaintiff must assert his own legal rights and not those of others. While this prudential limitation on standing is consistently applied in the bankruptcy context, it is only applied when the claims at issue are solely direct claims of creditors.[22] That is not the case here. The Plaintiff is properly pursuing derivative claims of the estate, with two exceptions discussed below.

A derivative action arises when a person seeks redress for harm to a corporation, on behalf of the corporation, rather than for harm the person suffered

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[21] *Lorix v. Crompton Corp.*, 736 N.W.2d 619, 624 (Minn. 2007).

[22] *In re Bernard L. Madoff Inv. Sec. LLC.*, 721 F.3d 54, 58 (2d Cir. 2013); *citing Caplin v. Marine Midland Grace Trust Co.*, 406 U.S. 416 (1972); *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114, 118 (2d Cir.1991); *see also In re Duke & King Acquisition Corp.*, 508 B.R. 107, 132 (Bankr. D. Minn. 2014); *In re Ozark Rest. Equip. Co., Inc.*, 816 F.2d at 1228.

individually.[23] Derivative suits belong to the corporation in the first instance, but they are usually brought by shareholders against wrongdoers on behalf of the corporation because the corporation is unwilling or unable to do so.[24] Corporate shareholders may sue on behalf of the corporation because they share the risk of loss due to their status as shareholders.[25] This is what happens when a corporation is solvent.

Under Minnesota law, when a corporation is insolvent, or on the verge of insolvency, its directors and officers become fiduciaries of the corporate assets, which are held for the benefit of creditors.[26] This shift takes place "because insolvency expands the risk of corporate loss beyond shareholders to corporate creditors."[27] Thus, when a corporation is insolvent, the

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[23] *Nw. Racquet Swim & Health Clubs, Inc. v. Deloitte & Touche*, 535 N.W.2d 612, 617 (Minn. 1995); *citing Singer v. Allied Factors, Inc.*, 216 Minn. 443 (1944); *Seitz v. Michel*, 148 Minn. 474, 181 N.W. 106 (1921).

[24] *See In re UnitedHealth Grp. Inc. S'holder Derivative Litig.*, 754 N.W.2d 544, 550 (Minn. 2008); *citing Janssen v. Best & Flanagan*, 662 N.W.2d 876, 882 (Minn. 2003); *see also Pepper v. Litton*, 308 U.S. 295, 307, 60 (1939).

[25] *In re Sec. Asset Capital Corp.*, 396 B.R. 35, 40 (Bankr. D. Minn. 2008).

[26] *Helm Fin. Corp. v. MNVA R.R.*, 212 F.3d 1076, 1081 (8th Cir. 2000); *citing Snyder Electric Co. v. Fleming*, 305 N.W.2d 863, 869 (Minn. 1981); *see also In re Tri-River Trading, LLC*, 329 B.R. 252, 266 (B.A.P. 8th Cir. 2005), *aff'd sub nom. DeBold v. Case*, 452 F.3d 756 (8th Cir. 2006).

[27] *In re Sec. Asset Capital Corp.*, 396 B.R. at 40. Though, "the nature and extent of the performance of fiduciary duties by directors and officers of insolvent corporations do not change." *In re Sec. Asset Capital Corp* at 40.

corporation's derivative claims include claims to recover for harm to creditors. A corporation that executes a Ponzi scheme is by definition insolvent.[28] Thus, here, the estate's derivative claims for harm to creditors are properly pursuable by the Plaintiff who stands in the shoes of the debtor.[29]

The Court now turns to the method for determining whether the causes of action asserted by the Plaintiff to recover for harm to creditors are direct or derivative.[30] In the Eighth Circuit, whether a particular cause of action arising under state law is direct and belongs solely to a third person or is derivative and belongs to a debtor in bankruptcy is

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[28] *In re Petters Co., Inc.*, 495 B.R. 887, 923 (Bankr. D. Minn. 2013), *as amended* (Aug. 30, 2013); *see also Cunningham v. Brown*, 265 U.S. 1, 8 (1924); *Scholes v. Lehman*, 56 F.3d 750, 755 (7th Cir. 1995); *Warfield v. Byron*, 436 F.3d 551, 558 (5th Cir. 2006).

[29] First Amended Complaint, Doc. 55, pg. 9 ¶ 21. Any derivative causes of action that had accrued to PCI prebankruptcy passed into the bankruptcy estate when the Plaintiff filed the bankruptcy petition. These passed into the BMO Liquidating Trust as part of the confirmed plan, and are now properly pursuable by the Plaintiff. *See also* Findings of Fact, Conclusions of Law and Order Confirming the Second Amended Chapter 11 Plan of Liquidation Dated April 8, 2016, Case No. 08-45257, Doc. 3305, pg. 30; *In re Duke & King Acquisition Corp.*, 508 B.R. 107, 132-33 (Bankr. D. Minn. 2014).

[30] *Greenpond S., LLC v. Gen. Elec. Capital Corp.*, 886 N.W.2d 649, 655 (Minn. Ct. App. 2016), *review granted* (Jan. 17, 2017); *citing In re N.S. Garrott & Sons*, 772 F.2d 462, 466 (8th Cir.1985) *and Nat'l City Bank v. Coopers & Lybrand*, 409 N.W.2d 862, 869-70 (Minn. App.1987), *review denied* (Minn. Oct. 21, 1987); *see also In re Senior Cottages of Am., LLC*, 482 F.3d at 1001.

determined by state law.[31] Here, that would be Minnesota law. In Northwest Racquet, the Minnesota Supreme Court stated that the method in Minnesota for distinguishing between a direct and a derivative claim is to consider whether the injury to the individual plaintiff is separate and distinct from the injury to other persons in a similar situation as the plaintiff.[32] If a cause of action is to recover for harm to all creditors similarly situated, it is a derivative claim properly pursuable by the plaintiff.[33] Here, the Court must determine whether the complained-of injury in each cause of action in this case was an injury to

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[31] *In re Senior Cottages of Am., LLC*, 482 F.3d at 1001; *citing In re Ozark Rest. Equip. Co.*, 816 F.2d 1222, 1225 (8th Cir.1987).

[32] *Nw. Racquet Swim & Health Clubs, Inc. v. Deloitte & Touche*, 535 N.W.2d 612, 617 (Minn. 1995); *citing Seitz v. Michel*, 148 Minn. 474, 181 N.W. 106 (1921).

[33] Two Minnesota courts have already considered the question of whether the Plaintiff's claims in similar adversary proceedings are derivative or direct. In *Greenpond South, LLC v. General Electric Corp.*, the Minnesota Court of Appeals barred a party from pursuing derivative claims because the Chapter 11 Trustee of PCI had already asserted and settled those claims. *Greenpond S., LLC v. Gen. Elec. Capital Corp.*, 886 N.W.2d at 657, *review granted* (Jan. 17, 2017). In *Ritchie Capital Management, L.L.C., v. BMO Harris Bank, N.A.*, the United States District Court for the District of Minnesota dismissed Ritchie's claims against BMO, holding that because Ritchie's claims were "duplicative of the PCI Bankruptcy proceedings, abstention is appropriate . . ." *Ritchie Capital Mgmt., L.L.C. v. BMO Harris Bank, N.A.*, No. CV 15-1876 ADM/JJK, 2016 WL 1060213, at *12 (D. Minn. Mar. 15, 2016). Because of the current status of these cases, the Court will not rely on them but will conduct its own analysis.

particular creditors or to all creditors similarly situated.[34]

Count I

Count I alleges that Defendant breached MUFA because it processed PCI's transactions with actual knowledge that PCI's directors, in making such transactions, were breaching their fiduciary duties to PCI and its creditors (the Ponzi scheme victims). The type of harm described in Count I injured PCI, and indirectly harmed all of PCI's creditors, situated similarly, by virtue of their status as creditors. Count I is therefore a derivative claim pursuable by the Plaintiff.

Count II

Count II, titled "breach of fiduciary duty," alleges that Defendant breached its fiduciary duty to PCI and PCI's creditors. Count II also includes allegations that Defendant's conduct constituted gross negligence or willful misconduct.

Plaintiff alleges that Defendant's fiduciary duties arise under DCAs attached to the Complaint.[35] The DCAs contain contradictory language concerning to whom Defendant owed duties. For example, the Palm Beach Deposit Control Agreement (the "Palm Beach agreement") provides that Defendant would hold funds "in trust for the Protected Party" which would

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[34] *Wessin v. Archives Corp.*, 592 N.W.2d 460, 464 (Minn. 1999).

[35] In reviewing a motion to dismiss the court may consider materials that are necessarily embraced by or attached to the complaint. *Shank v. Carleton Coll.*, No. 16-CV-1154 (PJS/FLN), 2017 WL 80249, at *3 (D. Minn. Jan. 9, 2017); *citing Mattes v. ABC Plastics, Inc.*, 323 F.3d 695, 697 n.4 (8th Cir. 2003).

be Palm Beach.[36] Just a few paragraphs down, the Palm Beach agreement provides that Defendant would hold funds "for the benefit of Petters and the Protected Parties."[37] (The Palm Beach agreement uses the term Petters as a reference for PCI.[38]) There are at least two references in the Palm Beach agreement that Defendant would hold funds for the benefit of PCI.[39] The DCAs, therefore, support an allegation that Defendant owed fiduciary duties to PCI. Plaintiff, therefore, has standing to state a claim to recover for harm done to PCI by Defendant's alleged breach of those fiduciary duties.

A close reading of the Complaint and the attached DCAs shows that, to the extent Defendant owed any fiduciary duty directly to PCI's creditors in general, those duties stemmed solely from the DCAs. Plaintiff provides no facts supporting the existence of any other duty Defendant owed directly to PCI's creditors in general. Because the Complaint provides that only three creditors were signatories to the DCAs, any claim for breach of fiduciary duty owed to PCI's creditors would be to remedy the particularized harm to those three creditors. Such claims would be direct claims belonging solely to the three creditors. Plaintiff therefore does not have standing to pursue Count II to the extent Count II seeks to recover for harm done directly to the three creditors. Plaintiff only has standing to pursue harm to PCI itself.

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[36] Doc. 55-2, pg. 6.

[37] Doc. 55-2, pg. 6.

[38] Doc. 55-2, pg. 6.

[39] Doc. 55-2, pg. 6-7.

Count III

Count III alleges that Defendant aided and abetted Petters' fraud because Defendant provided substantial assistance to Petters with actual knowledge of the fraud by making "tens of billions of dollars in wire transfer payments" from the M&I account, among other allegations.[40] Count III further alleges that "[w]ithout the substantial assistance that [Defendant] provided, the Ponzi scheme would have been discovered earlier by law enforcement authorities and victims of the Ponzi scheme."[41] Though Count III is vague as to who exactly was hurt by the alleged conduct, the Court concludes that Count III seeks to recover for harm done directly to PCI and derivatively to the general creditors of PCI. Plaintiff therefore has standing to pursue Count III.

Count IV

Count IV alleges that Defendant had actual knowledge of Petters and his associates' fiduciary duties to PCI and its creditors, and that Defendant aided and abetted Petters and his associates' breach of those duties. Count IV sufficiently states a claim to recover harm to PCI as well as a derivative claim for harm done to PCI's creditors because the harm alleged only affected the creditors by virtue of their status as creditors. Plaintiff therefore has standing to pursue Count IV.

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[40] Doc. 55, pg. 50, ¶ 162.

[41] Doc. 55, pg. 50, ¶ 164.

Count V

Count V alleges that Defendant engaged in a civil conspiracy with Petters and his associates to defraud investors by inducing them to commit funds to the Ponzi scheme. The harm alleged in Count V injured creditors directly. The actions did not harm PCI directly, nor were creditors harmed by virtue of their status as creditors. Thus, Plaintiff may not pursue this claim.

In conclusion, Plaintiff has standing to pursue Counts I, II (to the extent it seeks to recover for harm done directly to PCI), III, and IV. Plaintiff lacks standing to pursue II (to the extent it seeks recovery for harm done directly to PCI's creditors) and Count V, which is a direct claim belonging solely to the creditors. Count V is dismissed.

**II. The Plaintiff is not barred by *in pari delicto*.**

Defendant's second main argument is that Plaintiff is barred by the doctrine of *in pari delicto* from pursuing any claim against Defendant because Plaintiff stands in the shoes of PCI, which was a party to the Ponzi scheme while under the control of Petters. Plaintiff responds by asserting that, under Minnesota law, appointment of a receiver allows the receiver to pursue claims that might otherwise be barred by *in pari delicto*.[42] Plaintiff also asserts that the defense is not appropriate for determination on a motion to dismiss.

The equitable defense of *in pari delicto* provides that "[g]enerally, anyone who engages in a fraudulent

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[42] *See German-Am. Fin. Corp. v. Merchants' & Mfrs' State Bank of Minneapolis*, 177 Minn. 529, 535 (1929).

scheme forfeits all right to protection, either at law or in equity."[43] *In pari delicto* "is based upon judicial reluctance to intervene in disputes between parties who are both wrongdoers in equal fault."[44] In order to bar recovery, the plaintiff's conduct must be at least equal to the defendant's wrongful conduct.[45] Though the doctrine is usually applied to parties to an illegal contract, it also applies to torts based upon fraud or similar intentional wrongdoing.[46] *In pari delicto* may be applied in the bankruptcy context to bar claims brought by trustees standing in the shoes of wrongdoers.[47]

Whether *in pari delicto* may be asserted by a third party against a wrongdoer's partner turns on the relationship between the partners, which is a question of state law.[48] Minnesota courts have declined to apply *in pari delicto* in cases in which the plaintiff is a receiver because the receiver represents the rights of creditors "even though the defense set up might be

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[43] *State by Head v. AAMCO Automatic Transmissions, Inc.*, 293 Minn. 342, 347 (1972); *citing Kansas City Operating Corp. v. Durwood*, 278 F.2d 354, 357 (8 Cir. 1960); *see also Grassmueck v. Am. Shorthorn Ass'n*, 402 F.3d 833, 836 (8th Cir. 2005).

[44] *State by Head*, 293 Minn. at 347.

[45] *See Stephenson v. Deutsche Bank AG*, 282 F. Supp. 2d 1032, 1066 (D. Minn. 2003).

[46] *State by Head*, 293 Minn. at 347.

[47] *See e.g. In re Bernard L. Madoff Inv. Sec. LLC.*, 721 F.3d 54, 63 (2d Cir. 2013); *Nisselson v. Lernout*, 469 F.3d 143, 157 (1st Cir. 2006).

[48] *Grassmueck*, 402 F.3d at 837; *citing In re Newman*, 875 F.2d 668, 670 (8th Cir.1989); *see also O'Melveny & Myers v. F.D.I.C.*, 512 U.S. 79, 114 (1994).

valid against the corporation itself."[49] The receiver is therefore "not bound by the fraudulent acts of a former officer of the corporation."[50]

Finally, under Minnesota law, courts have discretion over whether to apply equitable defenses.[51] The doctrine of in pari delicto requires "'the trial court to make a determination of fact regarding the mutual fault of the parties' [thus] a resolution of the defense 'on a motion to dismiss would be inappropriate.'"[52] Further, applying in pari delicto at the motion to dismiss stage is more likely to be inappropriate when the motion is brought under Rule 12(b)(6).[53]

First, Judge Montgomery appointed Douglas A. Kelley as receiver of PCI and related entities. The appointment of Kelley as receiver provides a compelling reason not to apply *in pari delicto* at this time. Second, the Court declines to determine whether *in pari delicto* would be appropriately applied to the facts of this case at this time because it is an inherently fact-bound inquiry. As the Court must

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[49] *German-Am. Fin. Corp. v. Merchants' & Mfrs' State Bank of Minneapolis*, 177 Minn. 529, 535 (1929).

[50] *Magnusson v. Am. Allied Ins. Co.*, 290 Minn. 465, 473, 189 N.W.2d 28, 33 (1971); *see also Bonhiver v. Graff*, 311 Minn. 111, 118 (1976); *Kelley v. Coll. of St. Benedict*, 901 F. Supp. 2d 1123, 1129 (D. Minn. 2012).

[51] *See City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 23 (Minn. 2011).

[52] *Stephenson v. Deutsche Bank AG*, 282 F. Supp. 2d 1032, 1066 (D. Minn. 2003); *citing Haynes v. Anderson & Strudwick, Inc.*, 508 F. Supp. 1303, 1317 (E.D.Va.1981).

[53] *In re RFC & ResCap Liquidating Trust Litig.*, No. 13-CV 3520 JRT/HB, 2015 WL 2451254, at *13 (D. Minn. May 21, 2015).

make all inferences in favor of the Plaintiff, the Court does not have enough facts to determine the fault of the parties. Thus, this argument fails.

## III. Plaintiff has sufficiently plead a claim for relief under MUFA.

Defendants' third argument is that Count I should be dismissed because Plaintiff has failed to state a claim under Minn. Stat. § 520.08, the Minnesota Uniform Fiduciaries Act. Count I alleges that Defendant is liable under MUFA for processing transactions through which Petters and his associates breached their fiduciary duties to, or acted in bad faith toward, PCI and PCI's investors. The transactions were wire transfers made from PCI's checking account.[54]

Defendant advances two arguments. First, that MUFA requires that the transactions be made by check, not wire transfer.[55] Second, that MUFA requires a plaintiff to plead specific check transactions.[56] The Court will address each in turn.

### A. Minnesota law would not require that transactions violating MUFA be made by check.

Plaintiff argues that Minnesota has adopted the Uniform Fiduciary Act, in the form of Minn. Stat. § 520.08, and that "virtually every court that has addressed this argument [of whether the transactions must be made by check] has rejected it, finding the

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[54] Doc. 55, pg. 13, ¶ 36.

[55] Doc. 56, pg. 48.

[56] Doc. 56, pg. 48.

references to 'checks' in UFA provisions cover wire transfers and other electronic payments."[57] No Minnesota court has directly addressed this issue. When a federal court interprets state law with no controlling authority, the federal court must predict how the state high court would rule.[58] The federal court can look to intermediate state court precedent as persuasive authority.[59] In *Minnesota Valley Country Club, Inc. v. Gill*, the Minnesota Court of Appeals, in examining whether a fiduciary violated Minn. Stat. §§ 520.08 and 520.09 by converting savings certificates to a cashier's check, reasoned that the actual format of the transactions is not as important as their substance. It was the type of conduct that the provisions in §§ 520.08 and 520.09 were intended to prevent that mattered.[60]

In light of this flexibility in interpreting Minn. Stat. § 520.08, and considering the case law from numerous other courts, the Court finds that the Minnesota Supreme Court would decline to apply the

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[57] Doc. 59, pg. 42; *citing Richard v. Platte Valley Bank*, 866 F.2d 1576 (10th Cir. 1989).

[58] *See Progressive N. Ins. Co. v. McDonough*, 608 F.3d 388, 390 (8th Cir. 2010); *Minnesota Supply Co. v. Raymond Corp.*, 472 F.3d 524, 534 (8th Cir. 2006); *Cont'l Cas. Co. v. Advance Terrazzo & Tile Co.*, 462 F.3d 1002, 1007 (8th Cir. 2006).

[59] *Progressive N. Ins. Co. v. McDonough*, 608 F.3d at 390.

[60] *Minnesota Valley Country Club, Inc. v. Gill*, 356 N.W.2d 356, 362 (Minn. Ct. App. 1984).

relevant UFA section solely to check transactions.[61] Defendant's argument fails.

### B. The Plaintiff does not need to plead specific check transactions to state a claim under Minn. Stat. § 520.08.

Defendant argues that the Eighth Circuit case *In re Buffets* requires that a plaintiff asserting a claim under Minn. Stat. § 520.08 specify individual transactions violating MUFA.[62] In *Buffets*, the Eighth Circuit noted that the UFA "provides principals limited protection against a bank's knowing or bad-faith processing of a *specific* transaction that breaches a fiduciary obligation. For the bank to act with bad faith in a particular transaction, the bank must be aware that the funds in question are held pursuant to a fiduciary obligation in the first place."[63]

The Complaint contains sufficient factual detail to place Defendant on notice of the claims Plaintiff asserts and to state a claim for relief that is plausible on its face. Given the high volume of transactions Defendant processed on behalf of PCI, requiring Plaintiff to plead each specific transaction goes beyond

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[61] *See U.S. Commodity Futures Trading Commission v. U.S. Bank, N.A.*, No. 13-cv-2041, 2014 U.S. Dist. LEXIS 162665, at *71-72, *72 n.11 (N.D. Iowa Nov. 19, 2014); *Penalosa Cooperative Exchange v. A.S. Polonyi Co.*, 745 F. Supp. 580, 587 (W.D. Mo. 1990).

[62] *Buffets, Inc. v. Leischow*, 732 F.3d 889 (8th Cir. 2013).

[63] *Buffets*, 732 F.3d at 900 (internal citations omitted); *citing* Minn. Stat. § 520.09; *Rodgers v. Bankers' Nat'l Bank*, 179 Minn. 197, 229 N.W. 90, 92-94 (1930).

the requirement of notice pleading.[64] Accordingly, Plaintiff has properly stated a claim for relief under MUFA and the request to dismiss Count I is denied.

## IV. Count II states a claim for relief based on Defendant's alleged breach of fiduciary duties owed to PCI.

Defendant's fourth argument is that Count II should be dismissed because Plaintiff failed to plead that Defendant owed fiduciary duties to PCI or its investors or breached any such duties. Count II has already been dismissed to the extent it states a claim for relief based on harm from Defendant's alleged fiduciary duties to investors. With regard to fiduciary duties that Defendant may have owed to PCI directly, the Court concludes that Count II sufficiently states a claim for relief.

To state a claim for breach of fiduciary duty under Minnesota law, the Plaintiff must plead the existence of a fiduciary duty, a breach of that duty, causation, and damages.[65] Count II sufficiently alleges that Defendant owed PCI fiduciary duties based on the DCAs, which provide that Defendant would hold funds "for the benefit" of PCI.[66] As discussed above, although the DCAs contain contradictory language over exactly what duties Defendant owed and to whom, resolution of that issue is a fact question not appropriately resolved on a motion to dismiss. Count II also

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[64] The Court notes that *In re Buffets* was decided on summary judgment when all facts were before the court, unlike here where the facts must be viewed in favor of the Plaintiff.

[65] *Reisdorf v. i3, LLC*, 129 F. Supp. 3d 751, 767 (D. Minn. 2015).

[66] Doc. 55-2, pg. 6.

sufficiently pleads Defendant's alleged breach of its fiduciary duties to PCI by processing transfers initiated by PCI's directors under the circumstances outlined in the Complaint.[67]

Count II states a claim for relief to the extent Count II seeks to recover for harm done to PCI by Defendant's alleged breach of its fiduciary duties to PCI.

## V. Plaintiff has sufficiently stated claims for aiding and abetting.

Defendant's fifth argument is that Counts III and IV should be dismissed for failure to plead actual knowledge and substantial assistance.

"Under Minnesota law, aiding and abetting the tortious conduct of another has three elements: '(1) the primary tort-feasor must commit a tort that causes an injury to the plaintiff; (2) the defendant must know that the primary tort-feasor's conduct constitutes a breach of duty; and (3) the defendant must substantially assist or encourage the primary tort-feasor in the achievement of the breach.'"[68] A defendant's "knowledge that the primary tort-feasor's conduct constitutes a breach of fiduciary duty is a 'crucial element' of a claim for aiding and abetting."[69]

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[67] Doc. 55, pg. 49, ¶ 157.

[68] *Varga v. U.S. Bank Nat. Ass'n*, 764 F.3d 833, 839 (8th Cir. 2014); *quoting Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 187 (Minn.1999).

[69] *Varga*, 764 F.3d at 839.

**A. Plaintiff has sufficiently plead that Defendant had actual knowledge of Petters' fraud.**

Defendant argues that the Eighth Circuit case Varga v. U.S. Bank National Association supports its contention that Plaintiff failed to plead actual knowledge. In order to have actual knowledge of underlying tortious conduct required by an aiding-and-abetting claim, a defendant must know what the primary actor was doing and that such conduct was wrongful.[70] Defendant further argues that "[t]aken together, the Complaint's factual allegations plead, at most, circumstances that appear suspicious with 20/20 hindsight."[71]

Plaintiff points to numerous factual allegations to support the assertion of Defendant's actual knowledge of Petters' fraud. Among other facts plead, Plaintiff alleges that:

1. Defendant knew that Petters had made false representations to investors that their investments were being repaid from monies received from large retailers, when in fact the investors were being repaid from funds raised from other investors;

2. Petters had made false representations to investors that the M&I account balance was multiple millions of dollars more than what Defendant knew it to be;

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[70] Doc. 56, pg. 58; *quoting Varga* at 857-858.

[71] Doc. 56, pg. 61.

3. Defendant knew that the activity in the M&I account was inconsistent with Petters' stated business activity;

4. Defendant knew that sham wholesalers were wiring money into the account;

5. Defendant knew that the high volume of transactions in the account was a sign of money-laundering; and

6. Defendant knew that Petters was looting the account.[72]

Plaintiff also argues that, as in this case, courts have held that a defendant with a long-term or in-depth relationship with a tortfeasor may be deemed to have constructive knowledge that the conduct was indeed tortious or illegal.[73]

Reading the Complaint as a whole, and construing the pleaded facts in the light most favorable to Plaintiff, the Court finds that the Plaintiff has sufficiently plead Defendant's actual knowledge of Petters' conduct and that such conduct was wrongful.[74]

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[72] *See* Doc. 59, pg. 55; *and* Doc. 50, pg. 55.

[73] Doc. 59, pg. 54; *citing Diduck v. Kaszycki & Sons Contractors, Inc.*, 974 F.2d 270, 283-84 (2d Cir. 1992).

[74] Though the Court need not consider such a test at this time, Plaintiff's allegations would also be sufficient for the Court to consider whether Defendant was willfully blind to, or took deliberate steps to avoid, detecting fraudulent conduct, or whether a reasonable person, given the information available to Defendant, would have been alerted to the fraud. *See In re Bernard L. Madoff Inv. Sec. LLC*, 515 B.R. 117, 139 (Bankr. S.D.N.Y. 2014); *see also MARCIA R. MEOLI, Plaintiff-*

### B. Plaintiff has sufficiently plead that Defendant provided substantial assistance to Petters.

Defendant argues that Plaintiff failed to plead substantial assistance as required to state claims for aiding and abetting fraud and breach of fiduciary duty. Defendant argues that Plaintiff is required to allege that Defendant took affirmative steps that were a substantial factor in causing the tortious acts.[75] Defendant further asserts that substantial assistance "means something more than the provision of routine professional services"[76] and that processing transactions, which Defendant alleges is all M&I did, is "the very definition of routine service."[77]

Plaintiff argues that under Minnesota case law, routine professional services coupled with actual knowledge of wrongful conduct may state a claim for aiding and abetting.[78] *Varga* supports Plaintiff's

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*Appellee/Cross-Appellant, v. The Huntington National Bank, Defendant-Appellant/Cross-Appellee.*, No. 15-2308, 2017 WL 526063, at *11 (6th Cir. Feb. 8, 2017).

[75] Doc. 56, pg. 63; *citing Varga*, 952 F. Supp. 2d at 859, *aff'd*, 764 F.3d 833 (8th Cir. 2014).

[76] *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 189 (Minn. 1999).

[77] Doc. 56, pg. 64; *citing Varga*, 952 F. Supp. 2d at 860, *aff'd*, 764 F.3d 833 (8th Cir. 2014).

[78] *See Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 189 (Minn. 1999); *see also Anderson v. U.S. Bank Nat. Ass'n*, No. A13-0677, 2014 WL 502955, at *7 (Minn. Ct. App. Feb. 10, 2014) (routine professional services constitute substantial assistance when they are performed with knowledge of the client's fraud).

argument as it notes that the bank was hired to process routine transactions and not retained to provide investment or other advice to the fiduciaries.[79]

The Court agrees with the Plaintiff. Counts III and IV go well beyond simply alleging

routine professional services. For example, Plaintiff alleges that Defendant was a party to the DCAs, and that Defendant assisted Petters by placating wary investors.[80] Plaintiff alleges that Defendant processed transactions, despite numerous internal anti-fraud alerts, which were not routine but were highly suspicious and indicated money laundering and fraud.[81] The Complaint also alleges that Defendant expedited the process of dismissing fraud alerts and creating an overdraft exception specifically for Petters, precisely because the activity in the M&I account was so unusual.[82] Accordingly, the Court finds that Plaintiff has sufficiently plead that Defendant substantially assisted Petters' fraud to withstand a motion to dismiss.

**CONCLUSION**

The Defendant's motion to dismiss is granted in part and denied in part. Plaintiff has standing to assert the claims in Counts I, III and IV. To the extent that Plaintiff states a claim in Count II for harm done to PCI, it is not dismissed. To the extent that Count II states a claim for the direct harm to three creditors, it

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[79] *Varga*, 952 F. Supp. 2d at 860, *aff'd*, 764 F.3d 833 (8th Cir. 2014).

[80] Doc. 59, pg. 60.

[81] Doc. 59, pg. 56.

[82] Doc. 59, pg. 60.

is dismissed with prejudice as Plaintiff lacks standing to assert the claim. Count V asserts direct claims belonging to specific creditors and is dismissed with prejudice as Plaintiff lacks standing to assert this claim.

**ORDER**

1. The Motion is granted in part and denied in part.

2. Count II is dismissed with prejudice to the extent it states a direct claim for harm done to specific PCI creditors.

3. Count V is dismissed with prejudice.

4. No further motions to dismiss, motions for judgment on the pleadings, or requests to amend the First Amended Complaint may be filed without leave of the Court.

/e/Kathleen H. Sanberg
KATHLEEN H. SANBERG
CHIEF UNITED STATES BANKRUPTCY JUDGE

*Appendix D*

**UNITED STATES BANKRUPTCY COURT**
**FOR THE DISTRICT OF MINNESOTA**

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BK No. 08-45257
Adv. No. 12-4288

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IN RE: PETTERS COMPANY, INC.

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DOUGLAS A. KELLEY, in his capacity as the Trustee of the BMO Litigation Trust,

*Plaintiff*,

v.

BMO HARRIS BANK NATIONAL ASSOCIATION, as successor to M&I Marshall and Ilsley Bank,

*Defendant*.

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Filed: June 27, 2019

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ORDER DENYING DEFENDANT'S MOTION FOR SUMMARY JUDGMENT

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On March 5, 2019, the Court heard oral argument on Defendant's Motion for Summary Judgment. Keith Moheban appeared for Defendant and Thomas Hamlin appeared for Plaintiff.

The Court has jurisdiction over this adversary proceeding pursuant to 28 U.S.C. §§ 157(b)(1) and 1334, Fed. R. Bankr. P. 7001, and Local Rule 1070-1.

This is a core proceeding within the meaning of 28 U.S.C. § 157(b)(2)(H). Venue in this Court is proper pursuant to 28 U.S.C. §§ 1408 and 1409.

**Introduction**

This adversary proceeding arises out of the Petters' Ponzi scheme orchestrated by Thomas J. Petters ("Petters") and his associates. Liquidating Trustee Douglas A. Kelley ("Plaintiff") filed this adversary proceeding against BMO Harris Bank N.A.[1] ("Defendant") for its alleged participation in the Ponzi scheme, claiming violations of the Minnesota Uniform Fiduciaries Act ("MUFA"), breach of fiduciary duty, aiding and abetting breach of fiduciary duty, aiding and abetting fraud, and civil conspiracy.

Defendant moves for summary judgment on all claims that remain after the Court's Order on Defendant's Motion to Dismiss (the "Order").[2] Defendant's Motion for Summary Judgment is based on two arguments: 1) that Plaintiff lacks standing to pursue the claims, and 2) that Plaintiff's claims are barred by the doctrine of *in pari delicto*.

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[1] As successor to M&I Marshall and Ilsley Bank.

[2] Dkt. 75. Count II, a claim for breach of fiduciary duties owed to Petters Company, Inc. ("PCI"), was dismissed with prejudice for lack of standing to the extent it stated a direct claim for harm done to specific PCI creditors. Count V, a claim for civil conspiracy, was dismissed with prejudice for lack of standing in its entirety as it asserted direct claims belonging to specific creditors. Four claims remain—Count I for a violation of MUFA, Count II for breach of fiduciary duties owed to PCI to the extent it states a claim for direct harm to PCI, Count III for aiding and abetting fraud against PCI, and Count IV for aiding and abetting breaches of fiduciary duties owed to PCI.

Plaintiff's response requested judgment as a matter of law confirming standing and rejecting the defense of *in pari delicto*.[3] Plaintiff reiterated this request at oral argument. Defendant objected as Plaintiff did not bring a motion for summary judgment.[4] Plaintiff's request could be proper pursuant to Federal Rule of Civil Procedure 56(f) if notice and a reasonable time to respond had been given. Here, however, the Court did not give notice that it would consider Plaintiff's request for summary judgment and give Defendant time to respond. Plaintiff's request is not properly before the Court.

For the reasons discussed below, Defendant's motion is denied.

## Background and Procedural History

### I. Petters' Ponzi Scheme

The facts about Petters' Ponzi scheme are well known.[5] Between 1994 and 2008, Petters and his

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[3] Dkt. 342.

[4] Dkt. 346 at 110:3-6 (Mar. 5, 2019)

[5] The Honorable Judge Susan R. Nelson of the United States District Court for the District of Minnesota recently provided a detailed background of the Ponzi scheme in *Kelley v. Kanios*, Case No. 18-cv-823 (SRN/SER), 2019 WL 2193163 (D. Minn. May 20, 2019). *See e.g.*, *In re Petters Co., Inc.*, 548 B.R. 551 (Bankr. D. Minn. 2016); *In re Petters Co., Inc.*, 506 B.R. 784 (Bankr. D. Minn. 2013); *In re Polaroid Corp.*, 472 B.R. 22 (Bankr. D. Minn. 2012), *aff'd*, 779 F.3d 857 (8th Cir. 2015); *In re Petters Co., Inc.*, 440 B.R. 805 (Bankr. D. Minn. 2010); *In re Petters Co., Inc.*, 401 B.R. 391 (Bankr. D. Minn. 2009), *aff'd*, 620 F.3d 847 (8th Cir. 2010); *see also SEC v. Quan*, 817 F.3d 583, 587-89 (8th Cir. 2016); *In re Cypress Fin. Trading Co., L.P.*, 620 F. App'x 287, 288 (5th Cir. 2015); *Varga v. U.S. Bank Nat'l Ass'n*, 764 F.3d 833, 836-37 (8th

associates orchestrated a Ponzi scheme through PCI and its affiliates. Petters was the sole owner, only director, and CEO of PCI.[6] Over many years, PCI, Petters, and his associates operated the Ponzi scheme by obtaining billions of dollars from investors through fraud, false pretenses, and misrepresentations about PCI's purported business of purchasing and selling consumer electronic goods to big-box retailers.[7] Instead of using the investments to purchase consumer goods for sale to retailers, the funds were used to pay other investors, to pay those assisting with the Ponzi scheme, and to pay for Petters' extravagant lifestyle.[8] Tens of billions of dollars in Ponzi scheme funds were routed through PCI's depository checking account at National City Bank, opened in December 1999 (the "PCI Account").[9] M&I acquired National City Bank in July 2001.[10] The allegations in this adversary proceeding concern M&I's actions in handling the PCI Account.

The Petters' Ponzi scheme ended in 2008.[11] In 2009, former officers Deanna Coleman and Robert White pleaded guilty on account of their roles in the

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Cir. 2014); *Peterson v. Winston & Strawn LLP*, 729 F.3d 750, 751 (7th Cir. 2013); *Peterson v. Somers Dublin Ltd.*, 729 F.3d 741, 744 (7th Cir. 2013); *In re Palm Beach Fin. Partners, L.P.*, 527 B.R. 518, 521 (S.D. Fla. 2015); *In re Palm Beach Fin. Partners, L.P.*, 517 B.R. 310, 319-21 (Bankr. S.D. Fla. 2013).

[6] Def.'s Mem., Dkt. 339, Ex. E at 8.

[7] *Id*. at 10, Ex. I at 2.

[8] Def.'s Mem., Dkt. 339, Ex. I at 2.

[9] *Id.* at 14; Dkt. 79 at 6-7.

[10] Dkt. 79 at 6-7.

[11] *See In re Petters Co., Inc.*, 506 B.R. at 788.

Ponzi scheme.[12] Later that year, Petters was tried and convicted of wire fraud, mail fraud, money laundering, and conspiracy.[13] In 2010, PCI pled guilty to wire fraud and conspiracy to commit mail fraud, wire fraud, and money laundering.[14]

## II. Receivership Order and Second Amended Plan of Liquidation

On October 6, 2008, Judge Ann Montgomery of the United States District Court for the District of Minnesota appointed Plaintiff, Douglas Kelley, as the equity receiver for PCI and its affiliates (the "Receivership Order").[15] The Receivership Order granted Kelley the full power of an equity receiver.[16] On October 11, 2008, pursuant to his authority as receiver, Plaintiff filed for Chapter 11 relief on behalf of PCI.[17] Plaintiff was then appointed to be the Chapter 11 Trustee on February 26, 2009.

In the main bankruptcy case, Judge Gregory F. Kishel confirmed PCI's Second Amended Plan of Chapter 11 Liquidation on April 15, 2016 (the "Plan").[18] The Plan established the BMO Litigation

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[12] *United States v. Coleman*, No. 08-cr-304 (D. Minn.), Dkt. 14 at 18-25; *United States v. White*, No. 08-cr-299 (D. Minn.), Dkt. 15 at 19-29.

[13] *United States v. Petters*, No. 08-cr-364 (D. Minn.), Dkt. 361.

[14] Def.'s Mem., Dkt. 339, Ex. I.

[15] Pl.'s Resp., Dkt. 342, Ex. 5.

[16] *Id*. The receivership is still ongoing. *United States v. Petters*, No. 08-cv-05348 (D. Minn.).

[17] *See generally In re Petters Co., Inc.*, No. 08-45257 (Bankr. D. Minn.).

[18] *Id*., Dkt. 3305.

Trust, which is administered by Plaintiff as the Liquidating Trustee.[19] The Plan transferred the BMO Litigation Trust Assets, including the causes of action asserted in this adversary, to the BMO Litigation Trust.[20]

After the Plan was confirmed, Plaintiff filed the First Amended Complaint (the "Complaint") on October 20, 2016.[21] The Complaint alleges that Defendant was complicit in the Ponzi scheme by its actions and inactions in its dealings with PCI, Petters, and the PCI Account.[22] The Complaint alleges that instead of responding to irregularities, as required by banking regulation and shutting down the PCI Account, Defendant served as a "critical lynchpin" in legitimizing and facilitating the Ponzi scheme as billions of dollars were laundered through the PCI Account.[23] Defendant signed Deposit Account Control Agreements ("DACAs") allegedly in order to placate investors and to prevent the scheme from becoming public.[24] Plaintiff further alleges that Defendant failed to act despite fraud alerts and other "red flags;" instead, it continued to execute transfers to and from the PCI Account.[25]

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[19] *Id.*

[20] *Id.*

[21] Dkt. 55.

[22] *Id.* at 2-4.

[23] *Id.*

[24] *Id.*

[25] *Id.* Plaintiff filed this adversary proceeding on November 14, 2012. Dkt. 1.

**III. Motion to Dismiss**

On October 24, 2016, Defendant filed its Motion to Dismiss arguing that Plaintiff lacked standing to pursue the claims, as it does here.[26] In its Order, the Court found that Plaintiff had standing to pursue any claim to recover for harm done to PCI.[27] The Court also held that Plaintiff could pursue derivative claims for harm to all creditors similarly situated because, under Minnesota law, an insolvent corporation's derivative claims include those to recover for harm to creditors.[28] The Court then made specific standing-related determinations for each cause of action.[29]

Four claims remain following the Order: Claim I for violation of MUFA; Claim II for breach of fiduciary duties owed to PCI to the extent it states a claim for direct harm to PCI; Claim III for aiding and abetting fraud against PCI; and Claim IV for aiding and abetting breaches of fiduciary duties owed to PCI. Defendant moves for summary judgment on these remaining claims, again alleging a lack of standing and the defense of *in pari delicto*.

The Court will address the new arguments about standing and *in pari delicto* raised by Defendant's Motion for Summary Judgment.

**Standard of Review**

Federal Rule of Civil Procedure 56, made applicable to this adversary pursuant to Federal Rule

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[26] Dkt. 56.

[27] Dkt. 75 at 6.

[28] *Id.* at 6.

[29] *Id.* at 8-11.

of Bankruptcy Procedure 7056, provides that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[30] Once the movant has made its showing, the burden shifts to the nonmoving party, who must establish that there are specific and genuine issues of material fact warranting a trial.[31] In ruling on a motion for summary judgment, courts "view the record in the light most favorable to the nonmoving party and afford that party all reasonable inferences."[32]

## Discussion

### I. Standing

A party must have standing for a court to decide the merits of a particular dispute.[33] In order to have standing, a party must assert its own legal rights and interests and cannot seek relief solely on the legal rights or interests of third parties.[34] Under 11 U.S.C. §§ 704(1) and 1106(a), bankruptcy trustees have standing to pursue claims belonging to the estate on the date of filing in order to fulfill their duty to "collect

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[30] Fed. R. Civ. P. 56(a); Fed. R. Bankr. P. 7056.

[31] *Celotex Corp. v. Catrett*, 477 U.S. 316, 324 (1986).

[32] *In re Patch*, 526 F.3d 1176, 1180 (8th Cir. 2008).

[33] *Safelite Grp., Inc. v. Rothman*, No. 15-cv-1878 (SRN/KMM), 2017 WL 337988, at *10 (D. Minn. Jan. 23, 2017) (citing *Glickert v. Loop Trolley Transp. Dev. Dist.*, 792 F.3d 876, 880 (8th Cir. 2015)).

[34] *Warth v. Seldin*, 422 U.S. 490, 499 (1975).

and reduce to money the property of the estate."[35] Property of the bankruptcy estate includes all legal or equitable interests of the debtor in property as of the commencement of the case.[36] "Whether a particular cause of action arising under state law belonged to the debtor in bankruptcy or to someone else is determined by state law."[37]

As discussed in the Order, Minnesota law provides that a corporation may bring a claim when it has been injured for either direct or derivative harm.[38] Thus, Plaintiff, as Trustee for PCI, has standing to assert causes of action that remedy the harm done to the estate.[39] Plaintiff, however, cannot bring direct claims that belong solely to a creditor.[40]

State law controls the analysis of whether a claim is direct or derivative.[41] In making this determination, the Minnesota Supreme Court has held that courts

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[35] *Moratzka v. Morris* (*In re Senior Cottages of Am., LLC*), 482 F.3d 997, 1001 (8th Cir. 2007) (citing 11 U.S.C. §704(1)).

[36] *Id.* (citing 11 U.S.C. § 541(a)(1)).

[37] *Id.* at 1001 (citing *Mixon v. Anderson* (*In re Ozark Rest. Equip. Co.*), 816 F.2d 1222, 1225 (8th Cir.1987)).

[38] Dkt. 75 at 6; *see Lorix v. Crompton Corp.*, 736 N.W.2d 619, 624 (Minn. 2007) (direct claims); *Greenpond S., LLC v. Gen. Elec. Capital Corp.*, 886 N.W.2d 649, 655 (Minn. Ct. App. 2016) ("The bankruptcy trustee has the sole right to bring claims belonging to the estate, including claims on behalf of creditors.").

[39] *In re Senior Cottages of Am., LLC*, 482 F.3d at 1001.

[40] *In re Ozark Rest. Equip. Co.*, 816 F.2d at 1225; *see In re Bernard L. Madoff Inv. Sec. LLC.*, 721 F.3d 54, 58 (2d Cir. 2013).

[41] *In re Senior Cottages of Am., LLC*, 482 F.3d at 1001 (citing *In re Ozark Rest. Equip. Co.*, 816 F.2d at 1225); *Greenpond S., LLC*, 886 N.W.2d at 655.

should look at the injury itself, rather than the legal theory the case is brought under.[42] An appropriate method for distinguishing between a direct and a derivative claim is to consider "whether the injury to the individual plaintiff is separate and distinct from the injury to other persons in a similar situation as the plaintiff."[43] In *Greenpond South, LLC v. General Electric Capital Corp.*, a case arising out of the Petters' Ponzi scheme, the Minnesota Court of Appeals determined that harm in the form of PCI's insolvency and inability to repay its creditors due to fraudulent withdrawals from the PCI Account represent direct harm to the bankruptcy estate.[44] Claims resulting from such harm belong to the estate.[45] If a cause of action seeks to recover for harm to all creditors similarly situated, and solely by virtue of their status as creditors, it is a derivative claim properly pursuable by Plaintiff.[46]

The Court turns to the new arguments regarding direct and derivative claims.[47]

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[42] *In re Medtronic, Inc. S'holder Litig.*, 900 N.W.2d 401, 407 (Minn. 2017); *Wessin v. Archives Corp.*, 592 N.W.2d 460, 464 (Minn. 1999); *see Greenpond S., LLC*, 886 N.W.2d at 656.

[43] *In re Medtronic,* 900 N.W.2d at 407-08 (quoting *Nw. Racquet Swim & Health Clubs, Inc.*, 535 N.W.2d 612, 617 (Minn. 1995)).

[44] *Greenpond S., LLC*, 886 N.W.2d at 657.

[45] *Id.*

[46] *Id.* at 656-58.

[47] In the Order, the Court previously analyzed whether the complained of injury in each cause of action is direct or derivative. Dkt. 75 at 6-11.

### A. Direct Claims

Defendant asserts that Plaintiff lacks standing because Plaintiff does not allege any direct harm to PCI, but instead is seeking to recover damages for harm to specific creditors, which would belong to those creditors. Defendant bases its arguments on the measure of damages and case law.

First, Defendant argues that the measure of damages ($1,925,748,160) used in Plaintiff's damages disclosures and expert report is based on the losses of eight investors and not all investors.[48] Thus, Defendant argues that if the direct harm was PCI's inability to repay creditors, then the claimed damages would be more than those of the eight individual creditors.[49] Plaintiff argues that the measure of damages used by his expert is the amount that Petters and his associates fraudulently paid from the PCI Account at M&I that became unavailable for repayment of creditors.[50] The Court agrees with Plaintiff; no facts were presented to rebut his expert's conclusions, merely argument.

Second, Defendant argues that courts have repeatedly rejected the inability to repay creditors

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[48] Def.'s Mem., Dkt. 339, Ex. J at 45.

[49] *Id*. at 44-45, Ex. K at 181:14-24. Plaintiff's damages expert testified that his calculations included PCI's eight largest net losers and did not include any other net losers.

[50] Pl.'s Resp., Dkt. 342, Ex. 2 at 47. Plaintiff's damages expert testified that "PCI is unable to pay these creditors, and those are . . . the damages to be pursued." Pl.'s Resp., Dkt. 342, Ex. 1 at 39:24-40:3, 49:14-16.

theory as a basis for a claim.[51] Plaintiff states that those cases are inapplicable because they rely on the *Wagoner* rule (which has been rejected by the Eighth Circuit) and are from the Second Circuit.[52] The one cited decision outside of the Second Circuit is from the Northern District of Georgia, *Perkins v. Smith, Gambrell & Russell*,[53] which, contrary to Defendant's assertion, supports Plaintiff's damages claim. In *Perkins*, the court held that under Georgia law, a trustee should not plead damages as "an amount equal to the funds invested in the debtor's Ponzi scheme, but should measure damages based on funds *improperly paid out by the debtor*."[54] Here, the measure of damages that Plaintiff is seeking is equal to the funds improperly paid out by Petters from the PCI Account for the applicable period—$1,925,748,160.[55]

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[51] Def.'s Mem., Dkt. 339 at 10-11.

[52] *In re Senior Cottages of Am., LLC*, 482 F.3d at 1002-04 (citing *Shearson Lehman Hutton, Inc. v. Wagoner*, 944 F.2d 114 (2d Cir. 1991)). The Second Circuit's "Wagoner rule" provides that a corporation does not have standing to bring a claim against outsiders for defrauding a corporation with the cooperation of an insider. *Id.* at 1002-04. Gradually, the Second Circuit and lower courts within the Second Circuit have shifted from treating this issue as one of standing to treating it like the affirmative defense that it is. *Id.* at 1003.

[53] *Perkins v. Smith, Gambrell & Russell, LLP*, No. 1:08-cv-2673, 2010 WL 11507605 (N.D. Ga. July 27, 2010).

[54] *Id.* at *12 (emphasis added).

[55] As Plaintiff's damages expert has testified, "[t]he damages that have been identified here are damages that reflect the harm to PCI in so far as PCI's inability to pay its creditors." Pl.'s Resp., Dkt. 342, Ex. 1 at 39:24-40:3. The Complaint alleges that PCI's

Defendant cites to the bankruptcy court's decision in *Senior Cottages* as supporting its lack of standing argument.[56] There, the bankruptcy court dismissed a trustee's claims for breach of duty of care, negligence, and aiding and abetting against the debtor's attorneys.[57] The bankruptcy court found that the complaint only referenced injuries to individual interests of creditors.[58] Defendant argues that like the trustee in *Senior Cottages*, Plaintiff should not be permitted to maintain this suit on any claim that PCI's creditors may have had in their individual capacity. This argument fails. The Eighth Circuit 1) reversed the bankruptcy court, and 2) determined that the trustee did have standing to assert claims against third parties that assisted in the underlying fraud.[59]

Defendant also argues that Plaintiff lacks standing as the claims are ordinary tort and statutory claims, rather than avoidance or fraudulent transfer claims or claims assigned by PCI's creditors.[60] This is irrelevant because Minnesota courts "look to the injury itself, rather than the legal theory in which it is

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investors expected that their investments would be repaid. Dkt. 55 at ¶ 150.

[56] *Moratzka v. Morris* (*In re Senior Cottages of Am., LLC*), 23 B.R. 895 (Bankr. D. Minn. 2005).

[57] *Id*. at 898, 901-02.

[58] *Id*. at 901-02.

[59] *In re Senior Cottages of Am., LLC*, 482 F.3d at 1006-07. At oral argument, the Court rebuked Defendant for its failure to cite the Eighth Circuit's opinion reversing the bankruptcy court. Dkt. 346 at 48:11-18 (Mar. 5, 2019).

[60] Def.'s Mem., Dkt. 339 at 6-7.

couched."[61] Here the alleged injury is, in part, the inability to pay creditors. Further, as to Plaintiff's aiding and abetting claims, Minnesota law provides that if a corporation has a cause of action against a principal for fraud or breach of fiduciary duty, the corporation also owns the cause of action against a third party for aiding and abetting the principal's misconduct.[62]

Thus, under Minnesota law, Defendant has failed to show as a matter of law that Plaintiff lacks standing to pursue direct claims for harm to PCI because of its inability to repay creditors caused by the fraudulent and improper withdrawals from the PCI Account.

As a final point, Defendant's memorandum of law argues that PCI was a "sham corporation" and did not suffer any cognizable harm because its primary existence was as a perpetrator of the Ponzi scheme.[63] In support of its theory, Defendant relies on the Eleventh Circuit's decision in *O'Halloran v. First Union National Bank of Florida*.[64] No Minnesota or

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[61] *Greenpond S., LLC*, 886 N.W.2d at 656 (citing *Wessin*, 592 N.W.2d at 464).

[62] *In re Senior Cottages of Am., LLC*, 482 F.3d at 1002. Although it may give rise to a defense that will be fatal to the action, the "collusion of corporate insiders with third parties to injure the corporation does not deprive the corporation of standing to sue the third parties." *Id*. at 1004.

[63] Def.'s Mem., Dkt. 339 at 17-18. Defendant did not advance this "sham corporation" theory at oral argument and may have abandoned it. To resolve any doubt on the matter, the Court rejects Defendant's argument.

[64] *O'Halloran v. First Union Nat'l Bank of Fla.*, 350 F.3d 1197 (11th Cir. 2003).

Eighth Circuit cases have adopted the "sham corporation" theory and the theory itself has been called into question by decisions within the Eleventh Circuit.[65]

Therefore, Defendant has failed to meet its burden entitling it to summary judgment on the issue of standing as the claims asserted in this case are not direct claims belonging solely to creditors.

**B. Derivative Claims**

Defendant also argues that Plaintiff has no derivative right to recover for individual creditor losses. Without support, Defendant claims that while shareholders and creditors can have rights and losses that are derivative of a corporation's rights and losses, the converse is not true. Further, Defendant argues that because PCI in its own right does not share the investor losses Plaintiff seeks to recover, Plaintiff lacks standing to bring derivative claims on behalf of PCI's creditors. The Court disagrees.

Plaintiff's alleged harm is the inability to repay creditors due to funds being improperly paid out of the PCI Account by Petters and his associates. This indirectly harms all of PCI's creditors by virtue of their status as creditors.[66] As discussed in the Order, when a corporation is insolvent, its derivative claims include

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[65] *E.g.*, *Wiand v. Lee*, 753 F.3d 1194 (11th Cir. 2014); *Official Comm. of Unsecured Creditors of PSA, Inc. v. Edwards*, 437 F.3d 1145 (11th Cir. 2006); *Wiand v. Morgan*, 919 F. Supp. 2d 1342, 1366 (M.D. Fla. 2013).

[66] *Greenpond S., LLC*, 886 N.W. 2d at 656-57 (finding that the injury suffered by the plaintiff was not separate and distinct from injuries suffered by other PCI investors).

claims to recover for harm to its creditors.[67] Plaintiff may pursue the estate's derivative claims for harm to all creditors similarly situated.[68]

Defendant also argues that *Greenpond.*,[69] discussed in the Order, was overturned by the Minnesota Supreme Court's decision in *In re Medtronic, Inc. Shareholder Litigation*.[70] This is incorrect. *Greenpond* was appealed to the Minnesota Supreme Court. The Minnesota Supreme Court granted review and stayed the appeal pending a decision regarding derivative claims in *Medtronic.* After *Medtronic* was decided, Chief Justice Gildea, the author of *Medtronic*, issued an order vacating the stay in the *Greenpond* case and denied Greenpond's petition for review. Greenpond then filed a motion to modify the denial of review, arguing that the Court of Appeals' decision was no longer good law and requesting that the case be remanded for reconsideration. Chief Justice Gildea rejected Greenpond's arguments and denied its motion to

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[67] Dkt. 75 at 7; *see Helm Fin. Corp. v. MNVA R.R.*, 212 F.3d 1076, 1081 (8th Cir. 2000) (citing *Snyder Elec. Co. v. Fleming*, 305 N.W.2d 863, 869 (Minn.1981)).

[68] As with its analysis of Plaintiff's direct claims, Defendant asserts there is no derivative standing because Plaintiff is not bringing avoidance or fraudulent transfer claims under the Bankruptcy Code. Defendant cites no case law, statute, or Bankruptcy Code provision that would prevent Plaintiff from bringing such claims, ignoring Section 544 of the Bankruptcy Code which allows a trustee to pursue state law claims for the benefit of the estate. 11 U.S.C. § 544.

[69] 886 N.W.2d 649 (Minn. Ct. App. 2016).

[70] 900 N.W.2d 401 (Minn. 2017). The Court did not rely on *Greenpond* in the Order due to the then current status of the case.

modify and request for remand.[71] Defendant's argument fails—*Greenpond* remains good law.

The finding in *Greenpond* by the Minnesota Court of Appeals was that "the harm sustained by the Petters entities as a result of fraudulent withdrawals from their accounts of other lenders' funds was its insolvency and inability to repay its creditors."[72] The Court of Appeals held that claims "resulting from this harm belong to the bankruptcy estate."[73] Plaintiff-investor's harm, the loss of money loaned to the Petters' entities, was found to be "inseparable from and based upon an injury suffered by the Petters entities."[74] Such claims were derivative and belonged to the bankruptcy estate.[75]

The method to determine whether a claim is direct or derivative used in *Greenpond* was the same as the one used by the Minnesota Supreme Court in earlier cases (*Wessin* and *Northwest Racquet*) and cited with approval in *Medtronic*.[76] The determination focuses on who suffered the injury and who would benefit from the recovery.[77] Defendant's argument that *Greenpond* is no longer good law has no merit.

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[71] Pl.'s Resp., Dkt. 342, Ex. 4.

[72] *Greenpond S., LLC*, 886 N.W.2d at 657 (citing *In re Bernard L. Madoff Inv. Sec. LLC.*, 721 F.3d at 81, 92).

[73] *Id.*

[74] *Id.*

[75] *Id.* at 657-58.

[76] *In re Medtronic,* 900 N.W.2d at 409; *Greenpond S., LLC*, 886 N.W.2d at 655-56).

[77] *In re Medtronic,* 900 N.W.2d at 407-09.

Defendant next argues that even if Plaintiff could pursue derivative claims on behalf of PCI's creditors, Plaintiff's claims are not based on injuries shared by all creditors but rather those of "eight cherry-picked investors, disregarding additional net losers and other creditors."[78] First, in *Medtronic*, the Minnesota Supreme Court noted that its decisions in *Wessin* and *Northwest Racquet* involved fewer than all shareholders.[79] Second, Plaintiff's expert report explains that the relevant damages period began in January 2002 when PCI's financial model shifted to large investment funds and away from smaller, individual investors.[80]

The Court addressed the issue of derivative harm in its Order by analyzing each of Plaintiff's claims to determine whether the alleged harm pertained to specific creditors or to all creditors similarly situated.[81] The type of harm alleged by Plaintiff only affected the creditors by virtue of their status as creditors, meaning the harm was derivative, with the exception of Count V, a claim of civil conspiracy, and Count II, which in part alleged breach of fiduciary duties to three creditors arising from certain DACAs.[82] Under *Medtronic*, *Greenpond*, and established Minnesota law, the Court finds that Defendant has failed to show as a matter of law that Plaintiff lacks standing to pursue derivative claims on behalf of the

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[78] Def.'s Mem., Dkt 339 at 16.

[79] *In re Medtronic*, 900 N.W.2d at 409 n.4.

[80] Pl.'s Resp., Dkt. 342, Ex. 3 at 5.

[81] Dkt. 75 at 8-11.

[82] *Id.*

estate for harm to PCI's creditors by virtue of their status as creditors.

Finally, we note that Defendant conflates constitutional standing with the equitable defense of *in pari delicto*.[83] This is improper, as the Eighth Circuit has held that the mere existence of a potential defense to a cause of action does not deprive a party of standing.[84] The *in pari delicto* defense is discussed next.

## II. *In Pari Delicto*

### A. Applicability of the Defense

As discussed in the Order, bankruptcy trustees are subject to any equitable or legal defenses that could have been raised against the debtor, including the defense of *in pari delicto*.[85] This defense provides that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing when the parties are equally at fault.[86] There is judicial reluctance to intervene in such disputes and waste judicial resources on equally-at-

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[83] *In re Senior Cottages of Am., LLC*, 482 F.3d at 1003-04 ("Whether a party has standing to bring claims and whether a party's claims are barred by an equitable defense are two separate questions, to be addressed on their own terms.") (citing *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 346 (3d Cir. 2001)).

[84] *Id.*

[85] Dkt. 75 at 11-12; *see Grassmueck v. Am. Shorthorn Ass'n*, 402 F.3d 833, 836-37 (8th Cir. 2005).

[86] *Grassmueck*, 402 F.3d at 836-37.

fault wrongdoers.[87] In order to determine if the defense is applicable, courts must make factual determinations regarding the mutual fault of the parties.[88] Given the fact intensive inquiry, *in pari delicto* is rarely applied before trial.

The defense of *in pari delicto* is not embodied in the Bankruptcy Code—it is an equitable defense governed by state law.[89] Under Minnesota law, first, courts are afforded discretion over whether to apply equitable defenses.[90] Second, Minnesota state and federal courts have consistently declined to apply *in pari delicto* when an equity receiver has been appointed because the wrongdoer is removed from the picture; the underlying purpose of the of the *in pari delicto* defense, to avoid court entanglement in a dispute between wrongdoers, is gone.[91] Instead of being wrongdoers, receivership entities are considered victims of the fraud and creditors in a Ponzi scheme case.[92]

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[87] *Christians v. Grant Thornton, LLP*, 733 N.W.2d 803, 814 (Minn. Ct. App. 2007).

[88] *Stephenson v. Deutsche Bank AG*, 282 F. Supp. 2d 1032, 1066 (D. Minn. 2003).

[89] *Grassmueck*, 402 F.3d at 837.

[90] *City of N. Oaks v. Sarpal*, 797 N.W.2d 18, 23 (Minn. 2011).

[91] *Zayed v. Associated Bank, N.A.*, No. 13-232 (DSD/JSM), 2015 WL 4635789, at *3 (D. Minn. Aug. 4, 2015) (citing *Kelley v. Coll. of St. Benedict*, 901 F. Supp. 2d 1123, 1129 (D. Minn. 2012).

[92] *Zayed v. Peregrine Fin. Grp., Inc.*, No. 12-269 (MJD/FLN), 2012 WL 2373423, at *2 (D. Minn. June 22, 2012). "Put differently, the defense of *in pari delicto* loses its sting when the person who is *in pari delicto* is eliminated." *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995).

Defendant argues that *in pari delicto* applies notwithstanding the appointment of Kelley as PCI's equity receiver and PCI's status as a receivership entity because: 1) the appointment occurred five days before the Chapter 11 petition was filed, and 2) Kelley did not bring this suit in his capacity as PCI's receiver, but rather in his capacity as PCI's Chapter 11 Trustee.[93]

The short time frame between appointment as receiver and the filing of the bankruptcy case is irrelevant. At the time the bankruptcy was filed, Kelley's appointment as equity receiver had removed the wrongdoers and corrupt management. PCI had become a receivership entity.[94] The Receivership Order granted Kelley the full power of an equity receiver, including the power to sue for all assets of PCI.[95] Kelley filed the bankruptcy case pursuant to his authority as receiver, even though here he is now acting as successor in interest to the Chapter 11 Trustee.[96]

In the Order, the Court found that Kelley's appointment as equity receiver of PCI provided a compelling reason not to apply *in pari delicto* at that time.[97] Defendant does not cite any controlling Minnesota or Eighth Circuit case law providing that *in pari delicto* becomes available once a receivership

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[93] Dkt. 1.

[94] Pl.'s Resp., Dkt. 342, Ex. 5.

[95] *Id.*

[96] The receivership, with Kelley as receiver, is still ongoing. *United States v. Petters*, No. 08-cv-05348 (D. Minn.).

[97] Dkt. 75 at 13.

entity is placed into bankruptcy. Defendant is correct that Section 541(a) claims are limited to the "legal or equitable interests of the debtor" and that a bankruptcy trustee's ability to assert causes of action on behalf of the debtor is subject to any equitable defenses that could have been raised against the debtor.[98] Here, however, the debtor was a receivership entity when it filed for bankruptcy. Defendant provides no support for its contention that *in pari delicto* could have been raised against the PCI receivership. There was no wrongdoer at the time of the filing the petition. Thus, the receivership prevents the application of the *in pari delicto* defense.

**B. Facts in Dispute**

Finally, in the alternative, if as a matter of law, the *in pari delicto* defense could be applied in this adversary proceeding despite the receivership, genuine issues of material fact would preclude summary judgment. Defendant and Plaintiff devote significant briefing and submitted thousands of pages in support of their arguments.

Defendant argues that undisputed facts show PCI bears at least equal responsibility for the claimed injuries, citing PCI's post-petition guilty plea and subsequent conviction of mail- fraud, wire-fraud, and money-laundering crimes.[99] Plaintiff counters that Defendant's knowledge of the fraud and failure to advise investors, as shown by Defendant's ignoring "scores" of fraud alerts from its internal detection system, makes the Defendant more liable, at least

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[98] 11 U.S.C. § 541(a); *Grassmueck*, 402 F.3d at 836.

[99] *See supra* note 14.

after March 2005 when M&I implemented an automated account monitoring system. Plaintiff cites the conclusions of a Department of Justice investigation that M&I committed fraud in connection with the Ponzi scheme in its handling of the PCI Account and entering into the DACAs.[100] Moreover, Deanna Coleman testified that M&I perpetuated the Ponzi scheme.[101] A jury must hear and weigh the evidence in order to apportion fault. Thus, the dispute as to material facts precludes summary judgment.

**Conclusion**

For the reasons stated above, Defendant's motion is denied. Defendant has failed to show as a matter of law that Plaintiff lacks standing to recover for direct or derivative harm to PCI. Defendant has also failed to show the defense of *in pari delicto* applies as a matter of law because PCI was a receivership entity at the time of the bankruptcy filing. Finally, in the alternative, genuine issues of material fact exist regarding the parties' respective levels of fault.

**Order**

IT IS ORDERED: Defendant's Motion for Summary Judgment is denied.

/e/Kathleen H. Sanberg
KATHLEEN H. SANBERG
CHIEF UNITED STATES BANKRUPTCY JUDGE

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[100] Pl.'s Resp., Dkt. 342, Ex. 7.

[101] Pl.'s Resp., Dkt. 342, Ex. 8 at 29:17-20.

*Appendix E*

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MINNESOTA**

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No. 19-cv-1756

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DOUGLAS A. KELLEY, in his capacity as the Trustee of the BMO Litigation Trust,

*Plaintiff*,

v.

BMO HARRIS BANK NATIONAL ASSOCIATION, as successor to M&I Marshall and Ilsley Bank,

*Defendant*.

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Nos. 19-cv-1826, 19-cv-1869

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BMO HARRIS BANK NATIONAL ASSOCIATION, as successor to M&I Marshall and Ilsley Bank,

*Appellant*,

v.

DOUGLAS A. KELLEY, in his capacity as the Trustee of the BMO Litigation Trust,

*Appellee*.

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Filed: Mar. 13, 2020

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ORDER

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In these related bankruptcy matters, Appellant-Defendant BMO Harris Bank N.A. (BMO Harris) moves for leave to file an interlocutory appeal of the June 27, 2019 Order of the United States Bankruptcy Court for the District of Minnesota, which denied BMO Harris's motion for summary judgment. (Case No. 19-cv-1826, Dkt. 2-6.) BMO Harris also moves to stay the bankruptcy proceedings and for an order accepting a document under seal. (Case No. 19-cv-1756, Dkt. 41; Case No. 19-cv-1826, Dkt. 19; Case No. 19-cv-1869, Dkt. 3.) Plaintiff-Appellee Douglas A. Kelley, in his capacity as the Trustee of the BMO Litigation Trust (the Trustee), opposes each of BMO Harris's motions. For the reasons addressed below, BMO Harris's motions are denied.

**BACKGROUND**

These matters arise from a Ponzi scheme orchestrated by Thomas J. Petters and his associates between 1994 and 2008. Petters was the owner, director, and CEO of Petters Company, Inc. (PCI). During the course of the Ponzi scheme, PCI obtained billions of dollars from investors through fraud, false pretenses, and misrepresentations about PCI's purported business. Billions of dollars were wired into and out of PCI's depository account at National City Bank, which was acquired by M&I Marshall and Ilsley Bank (M&I) in July 2001. BMO Harris is the successor to M&I, and the claims at issue in these bankruptcy matters pertain to M&I's handling of PCI's account.

Plaintiff-Appellee Douglas A. Kelley was appointed as the equity receiver for PCI on October 6, 2008. *See In re Petters Co.*, 401 B.R. 391, 398 (D. Minn. Bankr. 2009). Kelley filed for Chapter 11 bankruptcy

relief on behalf of PCI and was appointed as the Chapter 11 Trustee. *Id.* at 414. The bankruptcy court confirmed PCI's Second Amended Plan of Chapter 11 Liquidation, which transferred certain assets, including the causes of action at issue here, to the BMO Litigation Trust.

The Trustee subsequently filed a complaint alleging that BMO Harris was complicit in the Ponzi scheme through its dealings with Petters, PCI, and PCI's account. The complaint alleges that BMO Harris failed to respond to irregularities as required by banking regulations that, together with other acts and omissions, legitimized and facilitated the Ponzi scheme. The bankruptcy court granted in part and denied in part BMO Harris's motion to dismiss on February 24, 2017. *In re Petters Co.*, 565 B.R. 154 (D. Minn. Bankr. 2017). Four claims remain: Count I alleges that BMO Harris violated the Minnesota Uniform Fiduciaries Act, Count II alleges that BMO Harris breached fiduciary duties it owed to PCI, Count III alleges that BMO Harris aided and abetted fraud against PCI, and Count IV alleges that BMO Harris aided and abetted the breach of fiduciary duties owed to PCI. *See id.*

BMO Harris moved for summary judgment on the remaining four claims, arguing that the Trustee lacked standing and that BMO Harris's *in pari delicto* defense precludes the Trustee from recovery. The bankruptcy court denied BMO Harris's motion for summary judgment on both grounds. BMO Harris now moves for leave to file an interlocutory appeal of the bankruptcy court's summary judgment order.

## ANALYSIS

### I. BMO Harris's Motion for Leave to Appeal

BMO Harris seeks this Court's leave to appeal the bankruptcy court's June 27, 2019 Order, which denied BMO Harris's motion for summary judgment. When a bankruptcy court's order is not a final order, a party may file an interlocutory appeal to the district court only "with leave of the court." 28 U.S.C. § 158(a)(3). A district court's decision to grant or deny a motion for leave to appeal an interlocutory bankruptcy order "is purely discretionary." *In re M & S Grading, Inc.*, 526 F.3d 363, 371 (8th Cir. 2008). "Such leave, however, should be sparingly granted and only in exceptional cases." *In re Arch Coal, Inc.*, 592 B.R. 853, 856 (B.A.P. 8th Cir. 2018). The party seeking interlocutory appeal "must demonstrate that exceptional circumstances exist, not merely that the issue is hard, unique, or the case is difficult." *In re Nat'l Metalcraft Corp.*, 211 B.R. 905, 906 (B.A.P. 8th Cir. 1997) (internal citation omitted). When deciding whether to grant leave to appeal, courts consider whether refusal to do so would result in wasted litigation and expense, whether the appeal involves a controlling question of law for which there is a substantial basis for difference of opinion, and whether an immediate appeal would materially advance the ultimate termination of the litigation. *Id.*; *accord In re Arch Coal*, 592 B.R. at 856.

BMO Harris argues that the foregoing considerations warrant granting its motion for leave to appeal the bankruptcy court's June 27, 2019 Order because the bankruptcy court's rulings as to standing and BMO Harris's *in pari delicto* defense depart from established law and reversal of those rulings would

terminate or substantially narrow this litigation. The Trustee counters that the bankruptcy court's rulings do not involve questions of law for which there is a substantial basis for differing opinion as the rulings are based on well-settled law and, in part, on disputed material facts. The Court addresses each bankruptcy court ruling in turn.

**A. Standing**

The bankruptcy court rejected BMO Harris's standing arguments, concluding that the Trustee's claims against BMO Harris belong to the bankruptcy estate under Minnesota law because the claims involve direct harm to the debtor and only indirect harm to the creditors. BMO Harris argues that there are substantial grounds for a difference of opinion as to this conclusion.

It is a bankruptcy trustee's duty to "collect and reduce to money the property of the estate for which such trustee serves." 11 U.S.C. § 704(a)(1). The property of the estate includes "all legal or equitable interests of the debtor in property as of the commencement of the case." 11 U.S.C. § 541(a)(1). Because a cause of action is an interest in property that is included in an estate, a bankruptcy trustee has authority under Section 704(a)(1) "to assert causes of action that belonged to the debtor at the time of filing bankruptcy."[1] *In re Senior Cottages of Am., LLC*, 482

[1] Although many cases addressing this issue refer to the trustee's "standing" to pursue such claims, several courts have observed that this is a misnomer because the issue pertains to the trustee's *statutory authority* to pursue the claim—not the *justiciability* of the claim. *See, e.g.*, *Grede v. Bank of N.Y. Mellon*,

F.3d 997, 1001 (8th Cir. 2007). State law governs "[w]hether a particular cause of action arising under state law belonged to the debtor in bankruptcy or to someone else." *Id.*

Applying these legal standards, the bankruptcy court concluded that Minnesota law permits a corporation to bring claims involving direct harm to the corporation and that the fraudulent depletion of corporate assets that results in the inability to repay creditors is a direct harm to the corporation. The bankruptcy court also concluded that, under Minnesota law, when harm to a corporation only *indirectly* harms all similarly situated creditors, the creditors' derivative claims arising from the indirect harm belong to the corporation that was directly harmed. But a corporation cannot bring claims that belong *solely* to the creditor, the bankruptcy court concluded. The bankruptcy court concluded that the claims brought by the Trustee in this case belong to the estate because the claims involve direct harm to PCI and they are merely derivative claims of PCI's similarly situated creditors that were indirectly harmed. As such, the bankruptcy court denied BMO

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598 F.3d 899, 900 (7th Cir. 2010) (explaining that the Supreme Court of the United States used the phrase "lacks standing" in this context to refer to statutory authorization as opposed to justiciability (citing *Caplin v. Marine Midland Grace Tr. Co.*, 406 U.S. 416 (1972))); *Greenpond S., LLC v. Gen. Elec. Capital Corp.*, 886 N.W.2d 649, 654-55 (Minn. Ct. App. 2016) (adopting the reasoning of the Seventh Circuit in *Grede* that this issue involves statutory authority as opposed to justiciability). While the Court is mindful of this distinction, the distinction has no apparent material impact on the analysis that follows.

Harris's motion for summary judgment as to this issue.

In seeking leave to file an interlocutory appeal, BMO Harris argues there are substantial grounds for a difference of opinion as to the bankruptcy court's foregoing legal conclusions. A substantial ground for a difference of opinion exists when there are "a sufficient number of conflicting and contradictory opinions." *Union County v. Piper Jaffray & Co.*, 525 F.3d 643, 647 (8th Cir. 2008) (quoting *White v. Nix*, 43 F.3d 374, 378 (8th Cir. 1994)). BMO Harris offers several arguments in support of its position.

BMO Harris first contends that the Trustee cannot recover "creditor losses labeled as amounts the debtor is unable to repay." According to BMO Harris, the bankruptcy court's decision improperly recharacterizes creditor losses as harm to PCI. But when a corporation's assets are fraudulently depleted, rendering the corporation unable to repay creditors, it is the corporation—not the creditors—that is directly harmed, and the claim belongs to the bankruptcy estate. *See Senior Cottages*, 482 F.3d at 1006; *accord Greenpond S., LLC v. Gen. Elec. Capital Corp.*, 886 N.W.2d 649, 657 (Minn. Ct. App. 2016) (observing that "the harm sustained by the Petters entities as a result of fraudulent withdrawals from their accounts of other lenders' funds was its insolvency and inability to repay its creditors"). "Simply because the creditors of an estate may be the primary or even the only beneficiaries of [the estate's] recovery does not transform the action into a suit by the creditors" because, if that were the case, a bankruptcy trustee could *never* pursue claims on behalf of an estate that

has insufficient funds to pay all creditors. *Senior Cottages*, 482 F.3d at 1006 (quoting *Official Comm. of Unsecured Creditors v. R.F. Lafferty & Co.*, 267 F.3d 340, 348-49 (3d Cir. 2001)). The fact that fraudulent dissipation of corporate assets limits a corporation's ability to repay its debts "is not . . . a concession that only the creditors, and not [the corporation] itself, have sustained any injury." *Id.* (quoting *Smith v. Arthur Andersen LLP*, 421 F.3d 989, 1004 (9th Cir. 2005)). Instead, this consequence reflects "the economic reality that any injury to an insolvent firm is necessarily felt by its creditors." *Id.* (quoting *Smith*, 421 F.3d at 1004).

BMO Harris argues that the underlying bankruptcy court and district court decisions in *Senior Cottages* support its position.[2] But this argument lacks merit. In *Senior Cottages*, the bankruptcy court concluded that a trustee must allege "a specific injury to [the debtor] itself" as opposed to "an injury to the individual interests of creditors of [the debtor]." *In re Senior Cottages of Am., LLC*, 320 B.R. 895, 900-02 (Bankr. D. Minn. 2005). The bankruptcy court found that the trustee's complaint failed to do so because the debtor was "no more than a vehicle for a recovery to benefit creditors" for their losses. *Id.* at 901. The district court affirmed and observed that the trustee's proposed amended complaint merely "re-cast the injuries set out in the initial Complaint as belonging

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[2] In *Senior Cottages*, the Eighth Circuit reviewed the district court's affirmance of the bankruptcy court's decision denying the trustee leave to amend the complaint. *See id.* at 999. In support of its arguments, BMO Harris relies on the bankruptcy court and district court decisions in *Senior Cottages*.

to Debtor" by removing references to the creditors and alleging that the debtor "was deprived of capital." *In re Senior Cottages of Am., LLC*, No. 05-809, 2005 WL 2000185, at *3 (D. Minn. Aug. 18, 2005). But the Eighth Circuit disagreed. As relevant here, the Eighth Circuit concluded that the proposed amended complaint alleged harm to the debtor, not the creditors. *Senior Cottages*, 482 F.3d at 1006. In doing so, the Eighth Circuit held that the trustee of a bankruptcy estate is the proper party to assert claims that indirectly harm creditors, rejecting the defendants' argument that "a cause of action for harm to an insolvent corporation belongs to the creditors rather than the corporation itself" merely because the creditors will benefit from the recovery. *Id.* (citing *Smith*, 421 F.3d at 1004, and *Lafferty*, 267 F.3d at 348-49). The Eighth Circuit's holding in *Senior Cottages* controls here, notwithstanding any contrary or inconsistent holdings in the underlying bankruptcy court and district court decisions.[3]

In challenging the bankruptcy court's application of *Senior Cottages* here, BMO Harris also relies on appellate court decisions from other jurisdictions. But case law from other circuits has limited relevance to the bankruptcy court's application of binding Eighth Circuit precedent here. BMO Harris has not identified *any* conflicting or contradictory opinions *within* the

[3] The Eighth Circuit's rejection of the relevant underlying holdings does not demonstrate a contradiction or inconsistency in the governing law. To the contrary, the Eighth Circuit's decision settles the issue. It would make little sense if a litigant could establish an inconsistency or contradiction in legal authority by relying on decisions that have been reversed by a reviewing court.

Eighth Circuit. Moreover, the appellate decisions on which BMO Harris relies are *not* inconsistent with the Eighth Circuit's decision in *Senior Cottages*, and those decisions are inapposite here. The sufficiency of the plaintiffs' proof of damages was at issue in those cases, not whether the claims belong to the creditors instead of the debtor or the bankruptcy estate. *See In re Latitude Sols., Inc.*, 922 F.3d 690, 695-97 (5th Cir. 2019); *Melamed v. Lake Cty. Nat'l Bank*, 727 F.2d 1399, 1404 (6th Cir. 1984). BMO Harris's reliance on *Latitude* and *Melamed* is misplaced.

BMO Harris also relies on district court and bankruptcy court decisions from other circuits. These decisions—most of which predate *Senior Cottages*—also have limited relevance to the bankruptcy court's application of binding Eighth Circuit precedent here. Notably, BMO Harris relies on several decisions that are based on the Second Circuit's "*Wagoner* rule." *See, e.g.*, *In re Agape World, Inc.*, 467 B.R. 556, 574-77 (Bankr. E.D.N.Y. 2012); *In re Meridian Asset Mgmt., Inc.*, 296 B.R. 243, 257 (Bankr. N.D. Fla. 2003). But the Eighth Circuit's *Senior Cottages* decision expressly rejects the *Wagoner* rule. 482 F.3d at 1002-04. Moreover, to the extent that these decisions hold, expressly or implicitly, that a claim arising from a direct injury to a creditor does not belong to the debtor's bankruptcy estate, those decisions are not inconsistent with *Senior Cottages* or the bankruptcy court's decision here. The bankruptcy court in this case acknowledged that a trustee "cannot bring direct claims that belong solely to a creditor." But, consistent with the holding in *Senior Cottages*, the bankruptcy court concluded that the Trustee's claims in this case do not arise from direct harm to PCI's creditors.

Instead, the Trustee's claims arise from a direct harm to PCI—namely, the fraudulent depletion of PCI's assets, which involve only *indirect* harm to PCI's creditors.[4]

BMO Harris also contends that the bankruptcy court's ruling as to creditor "derivative" claims is contrary to law. To be sure, if a claim "belongs" to a creditor rather than the debtor, a bankruptcy trustee cannot bring such a claim "on behalf of" the creditor. *See In re Ozark Restaurant Equip. Co.*, 816 F.2d 1222, 1224-26 (8th Cir. 1987). But the bankruptcy court's decision here does not contradict that legal principle. The bankruptcy court concluded that the Trustee's claims do not "belong" to PCI's creditors, but rather those claims belong to PCI, the debtor.

A creditor's claims are "derivative," and thus belong to the debtor rather than the creditors, if they involve harm to the debtor that only incidentally harmed creditors. *Greenpond*, 886 N.W.2d at 655-57. As such, a creditor's derivative claims "belong exclusively to the bankruptcy estate" and "the trustee

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[4] BMO Harris persists in arguing that a bankruptcy trustee cannot bring claims that belong to a creditor. This is a correct statement of the law. But the bankruptcy court did not hold to the contrary. Rather, the bankruptcy court held that the Trustee's claims in this case *do not belong to the creditors*. This holding is consistent with the Eighth Circuit's decision in *Senior Cottages*. BMO Harris's disagreement with the bankruptcy court's application of settled Eighth Circuit law does not demonstrate a contradiction or inconsistency in the state of the law, which is required to obtain leave for interlocutory appeal.

is the proper person to assert the claim."[5] *Id.* at 655 (internal quotation marks omitted). Whether a claim is direct or derivative depends on "whether the injury harmed the stakeholder directly or the corporation." *Id.* at 657. A creditor's claim is derivative if the creditor's injury is "inseparable from and based upon an injury suffered by the [debtor]." *Id.* Here, the bankruptcy court concluded that the Trustee's claims are "derivative" vis-à-vis the creditors because the Trustee's claims involve direct harm to PCI but only incidental harm to PCI's creditors resulting from their status as creditors. This conclusion is consistent with governing law. *See, e.g.*, *id.*; *cf. In re Medtronic, Inc. Shareholder Litig.*, 900 N.W.2d 401, 406-11 (Minn. 2017) (explaining that a "derivative claim" involves harm to the corporation whereas a "direct claim" does not). As such, the *Ozark* and *Medtronic* decisions on which BMO Harris relies are inapposite. They do not demonstrate the existence of substantial grounds for a difference of opinion on this issue.

In short, BMO Harris has not identified any opinion within the Eighth Circuit that conflicts with or contradicts the bankruptcy court's rulings on these issues. And the decisions from other jurisdictions on which BMO Harris relies do not demonstrate that conflicting and contradictory opinions exist *outside* the Eighth Circuit. BMO Harris has not established

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[5] Although courts sometimes refer to such claims as being brought "on behalf of" creditors, that reference does not mean those claims belong to the creditors. Rather, such claims belong to the debtor but are asserted "on behalf of" the creditors because the creditors also may recover as an incidental result of the debtor's recovery. *See Greenpond*, 886 N.W.2d at 655-57.

substantial grounds for a difference of opinion as to the bankruptcy court's legal conclusions pertaining to the Trustee's authority to pursue the claims asserted in this case. Accordingly, BMO Harris's motion for leave to file an interlocutory appeal of this aspect of the bankruptcy court's summary judgment order is denied.

**B. *In Pari Delicto* Defense**

The bankruptcy court also denied BMO Harris's motion for summary judgment as to BMO Harris's *in pari delicto* defense. The bankruptcy court ruled that this defense is inapplicable in light of PCI's status as a receivership entity when it filed for bankruptcy and, alternatively, genuine disputes of material fact preclude summary judgment as to this defense. BMO Harris maintains there are substantial grounds for a difference of opinion as to these rulings. The Court is unpersuaded.

"A trustee's ability to assert causes of action on behalf of the bankrupt estate is subject to any equitable or legal defenses that could have been raised against the debtor." *Grassmueck v. Am. Shorthorn Ass'n*, 402 F.3d 833, 836 (8th Cir. 2005). "In particular, the equitable defense of in pari delicto is available in an action by a bankruptcy trustee against another party if the defense could have been raised against the debtor." *Id.* State law governs whether this equitable defense may be asserted in a particular case. *Id.* at 837.

Under Minnesota law, *in pari delicto* provides a complete defense when the plaintiff "bears at least substantially equal responsibility for the injury it seeks to remedy." *Christians v. Grant Thornton, LLP*,

733 N.W.2d 803, 814-15 (Minn. Ct. App. 2007) (internal quotation marks omitted); *see also Head v. AAMCO Automatic Transmissions, Inc.*, 199 N.W.2d 444, 448 (Minn. 1972) (explaining that in pari delicto applies when plaintiff's wrongdoing is "no less than" defendant's wrongdoing). Absent a legal or factual error, Minnesota courts have discretion when applying equitable defenses. *City of North Oaks v. Sarpal*, 797 N.W.2d 18, 24-25 (Minn. 2011).

The *in pari delicto* defense rests on the "principle that a plaintiff who has participated in wrongdoing may not recover damages resulting from the wrongdoing." *Grassmueck*, 402 F.3d at 837 (quoting Black's Law Dictionary 806 (8th ed. 2004)). But "when a receiver has been appointed for a corporation, the wrongdoer (the corporation) is removed from the picture and, hence, *in pari delicto* does not apply." *Kelley v. Coll. of St. Benedict*, 901 F. Supp. 2d 1123, 1129 (D. Minn. 2012) (citing *Scholes v. Lehmann*, 56 F.3d 750, 754 (7th Cir. 1995)); *accord Zayed v. Associated Bank, N.A.*, No. 13-232, 2015 WL 4635789, at *3 (D. Minn. Aug. 4, 2015); *Zayed v. Buysse*, No. 11-cv-1042, 2012 WL 12893882, at *42 (D. Minn. Sept. 27, 2012). This determination is consistent with Minnesota's application of equitable defenses in the context of receiverships:

> While the general rule undoubtedly is that the receiver of an insolvent corporation has no greater rights than those possessed by the corporation itself and a defendant in a suit brought by [the receiver] may take advantage of any defense that might have been made if the suit had been brought by the corporation

> before its insolvency, it is equally true that when an act has been done in fraud of the rights of the creditors of the insolvent corporation the receiver may sue for their benefit, even though the defense set up might be valid as against the corporation itself.

*German-Am. Fin. Corp. v. Merchants & Mfrs. State Bank of Minneapolis*, 225 N.W. 891, 893 (Minn. 1929); *accord Magnusson v. Am. Allied Ins. Co.*, 189 N.W.2d 28, 33 (Minn. 1971) (holding that, even if an equitable defense would be available against an insolvent debtor, "it cannot constitute a defense against the receiver" because a "receiver represents the rights of creditors and is not bound by the fraudulent acts of a former officer of the corporation"); *see also Bonhiver v. Graff*, 248 N.W.2d 291, 296-97 (Minn. 1976).

BMO Harris does not cite, nor is this Court aware of, any Minnesota or Eighth Circuit legal authority to the contrary. A "substantial ground for difference of opinion does not exist merely because there is a dearth of cases." *White*, 43 F.3d at 378. Moreover, the cases from other jurisdictions on which BMO Harris relies are inapposite because none of those cases involves an *in pari delicto* defense asserted against a receivership entity under Minnesota law. Nor does BMO Harris's reliance on provisions of the bankruptcy code—repealed or otherwise—demonstrate substantial grounds for a difference of opinion because the bankruptcy code provisions that BMO Harris cites have no apparent bearing on the application of an *in pari delicto* defense to a receivership entity under Minnesota law.

In short, BMO Harris has not demonstrated the existence of substantial grounds for a difference of opinion as to the bankruptcy court's legal conclusions pertaining to the *in pari delicto* defense.[6] Accordingly, BMO Harris's motion for leave to file an interlocutory appeal of this aspect of the bankruptcy court's summary judgment order is denied.

## II. BMO Harris's Motions to Accept a Document Under Seal and Stay Proceedings

BMO Harris also moves for an order accepting under seal a confidential exhibit that BMO Harris filed under seal in the bankruptcy proceedings and now seeks to rely on in the appeal of the bankruptcy court's summary judgment order. BMO Harris also seeks an order staying these proceedings pending BMO Harris's requested interlocutory appeal. In light of the Court's denial of BMO Harris's motion for leave to file an interlocutory appeal, BMO Harris's motions to accept a document under seal and to stay the proceedings are denied as moot.

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[6] BMO Harris also disputes the bankruptcy court's conclusion, in the alternative, that if the *in pari delicto* defense applies, genuine disputes of material fact preclude summary judgment on the issue. Because discretionary review of interlocutory bankruptcy orders "requires the presence of a controlling question of law, if the bankruptcy court's order is fact intensive, review is not proper under 28 U.S.C. § 158(a)(3)." *In re Gilbertson Restaurants, LLC*, 315 B.R. 845, 849 (B.A.P. 8th Cir. 2004). Here, BMO Harris's disagreements with this aspect of the bankruptcy court's ruling do not warrant discretionary interlocutory review.

**ORDER**

Based on the foregoing analysis and all the files, records and proceedings herein, IT IS HEREBY ORDERED:

1. Appellant-Defendant BMO Harris Bank N.A.'s motion for leave to file an interlocutory appeal, (Case No. 19-cv-1826, Dkt. 2-6), is DENIED.

2. Appellant-Defendant BMO Harris Bank N.A.'s motions to stay, (Case No. 19-cv-1756, Dkt. 41; Case No. 19-cv-1869, Dkt. 3), are DENIED as moot.

3. Appellant-Defendant BMO Harris Bank N.A.'s motion to accept sealed bankruptcy documents, (Case No. 19-cv-1826, Dkt. 19), is DENIED as moot.

Dated: March 13, 2020

s/Wilhelmina M. Wright
Wilhelmina M. Wright
United States District Judge

*Appendix F*

**UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF MINNESOTA**

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No. 19-cv-1756

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DOUGLAS A. KELLEY, in his capacity as the Trustee of the BMO Litigation Trust,

*Plaintiff*,

v.

BMO HARRIS BANK NATIONAL ASSOCIATION, as successor to M&I Marshall and Ilsley Bank,

*Defendant*.

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Filed: June 23, 2023

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ORDER

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After a 17-day trial on the breach of fiduciary duty and fraud claims brought by Plaintiff Douglas A. Kelley in his capacity as the Trustee of the BMO Litigation Trust (hereinafter, Kelley or the Trustee), against Defendant BMO Harris Bank N.A. (BMO Harris), the jury found for the Trustee on one of his four claims and awarded him more than $480 million in compensatory damages and nearly $80 million in punitive damages. (Dkt. 340.) The Trustee now asks the Court to award pre- and post-judgment interest on the verdict, (Dkt. 382), and he seeks judgment as a matter of law on one of BMO Harris's affirmative

defenses, (Dkt. 388). BMO Harris moves for judgment as a matter of law in its favor, (Dkt. 397), on the basis of ostensibly erroneous legal and evidentiary rulings. BMO Harris also moves for a new trial or conditional remittitur of the damages award, (Dkt. 402).

## BACKGROUND

The full factual background of this litigation is set forth in previous orders and will not be repeated here. Briefly, this matter arises from a Ponzi scheme orchestrated by Thomas Petters and his associates Deanna Coleman and Robert White between 1994 and 2008. Petters, Coleman, and White used Petters Company, Inc. (PCI), as the conduit for obtaining billions of dollars from investors through fraud, false pretenses and misrepresentations. These funds were wired into and out of PCI's depository account at BMO Harris's predecessor bank, M&I Marshall and Ilsley Bank (M&I), for whose conduct BMO Harris is legally responsible. The Trustee's claims relate to M&I's handling of PCI's account, contending that M&I was complicit in Petters's scheme because M&I did not alert authorities to irregularities in PCI's deposits and withdrawals that M&I knew or should have known about. The Trustee initially filed his claims against BMO Harris in PCI's bankruptcy proceeding in 2012. When the bankruptcy concluded, the claims were transferred to this Court for trial.

The jury heard evidence on four claims against BMO Harris: violation of the Minnesota Uniform Fiduciaries Act, breach of fiduciary duties to PCI, aiding and abetting fraud against PCI and aiding and abetting the breach of fiduciary duties owed to PCI. The jury found for BMO Harris on the first three

claims. But the jury found in favor of the Trustee on the fourth claim, that BMO Harris aided and abetted the breach of fiduciary duties, and awarded the Trustee compensatory and punitive damages of more than $550 million.

An additional background matter is relevant to the instant motions. In the discovery process in the underlying bankruptcy case from which this matter arose, BMO Harris destroyed email backup tapes containing tens of thousands of documents, despite knowing that those tapes were subject to a litigation hold. The bankruptcy court ultimately imposed spoliation sanctions on BMO Harris, including requiring an adverse-inference instruction that BMO Harris intentionally destroyed evidence that it knew was harmful to its case. This Court later ruled that the adverse inference was permissive, not mandatory, and allowed the parties to present evidence to the jury regarding BMO Harris's conduct. The jury was instructed that it could, but was not required to, find that the spoliated evidence would have been detrimental to BMO Harris. (Dkt. 349 at Instr. 9.)

## ANALYSIS

### I. Plaintiff's Motion to Alter or Amend Judgment

The Trustee seeks to amend or alter the judgment under Rule 59(e), Fed. R. Civ. P., to add pre- and post-judgment interest. According to the Trustee, the Court should award prejudgment interest under Minnesota law. BMO Harris objects to any award of prejudgment interest, arguing that if the Court considers awarding prejudgment interest, it should apply federal law to the Trustee's request. The parties agree that federal

law governs the award of post-judgment interest and that such interest in mandatory.[1]

In the usual case, "[m]otions under Rule 59(e) 'serve the limited function of correcting manifest errors of law or fact or to present newly discovered evidence' and 'cannot be used to introduce new evidence, tender new legal theories, or raise arguments which could have been offered or raised prior to entry of judgment.'" *Ryan v. Ryan*, 889 F.3d 499, 507 (8th Cir. 2018) (quoting *United States v. Metro. St. Louis Sewer Dist.*, 440 F.3d 930, 933 (8th Cir. 2006)). However, motions to amend the judgment to add prejudgment interest are appropriately raised under Rule 59(e), because "prejudgment interest 'is an element of [plaintiff's] complete compensation.'" *Osterneck v. Ernst & Whinney*, 489 U.S. 169, 175 (1989) (alteration in the original) (quoting *West Virginia v. United States*, 479 U.S. 305, 310, and n. 2 (1987)); *see also Cont'l Indem. Co. v. IPFS of New York, LLC*, 7 F.4th 713, 718-19 (8th Cir. 2021) (holding that whether to grant a Rule 59(e) motion seeking prejudgment interest is within district court's discretion).

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[1] The Trustee initially asked that any post-judgment interest award be calculated from the date all post-trial motions are finally determined, not the date of the verdict. He concedes, however, that recent authority from the Eighth Circuit Court of Appeals forecloses that argument, so that any award of post-judgment interest must be calculated from the date of the verdict. *Rescap Liquidating Tr. v. Primary Residential Mortg., Inc.*, 59 F.4th 905, 923 (8th Cir. 2023).

**A. Post-judgment Interest**

Federal law makes the award of post-judgment interest mandatory: "Interest shall be allowed on any money judgment in a civil case recovered in a district court." 28 U.S.C. § 1961(a). The rate of post-judgment interest is "equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding . . . the date of the judgment." *Id.* The Trustee contends, and BMO Harris does not dispute, that the applicable rate is 4.74 percent. The Court, therefore, directs the Clerk to add post-judgment interest of 4.74 percent to the judgment, calculated from the date of the verdict to the date of this Order.

**B. Pre-judgment Interest**

Although BMO Harris contends that federal law should apply to the Trustee's request for prejudgment interest, the "general view" is that "prejudgment interest is a substantive remedy governed by state law when state-law claims are brought in federal court." *Ewald v. Royal Norwegian Embassy*, No. 11-CV-2116 SRN/SER, 2015 WL 1746375, at *21 (D. Minn. Apr. 13, 2015) (quoting *Tobin v. Liberty Mut. Ins. Co.*, 553 F.3d 121, 146 (1st Cir. 2009)). Indeed, in federal cases arising under state law, "[t]he award of prejudgment interest . . . is determined by referring to the law of the state in which the cause of action arose." *Kisco Co. v. Verson Allsteel Press Co.*, 738 F.2d 290, 296 (8th Cir. 1984).

This is true even though the Trustee initially brought his claims in bankruptcy court, and the Eighth Circuit's ruling in *Kelley as Trustee for PCI*

*Liquidating Trust v. Boosalis*, 974 F.3d 884 (8th Cir. 2020), on which BMO Harris relies heavily, is not to the contrary. In *Boosalis*, the Trustee sought to void pre-bankruptcy transfers to certain of PCI's creditors under federal bankruptcy law, which allows a trustee to void pre-bankruptcy transfers if they are "voidable under applicable law." *Id.* at 888 (quoting 11 U.S.C. § 544, subd. 1(b)). The Trustee alleged that the transfers in Boosalis violated the Minnesota Uniform Fraudulent Transfers Act (MUFTA). *Id.*

The district court entered summary judgment for the Trustee and, as relevant here, ordered the creditors to pay prejudgment interest pursuant to Minnesota law on the damage award. The Eighth Circuit reversed the determination that Minnesota law governed the award of prejudgment interest, finding that the Trustee's underlying cause of action—a so-called "avoidance action" under § 544—is a federal cause of action, even though it requires the application of a state statute.[2] *Id.* at 901-02.

But the Trustee's causes of action are not avoidance actions under § 544, nor does federal law provide the Trustee with a right to recovery in this case. The Trustee is not seeking to void any transfers to BMO Harris. Rather, the Trustee is seeking to recover on PCI's behalf for BMO Harris's allegedly tortious conduct. Thus, the Trustee's fraud and breach-of-duty claims arise wholly under state law.

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[2] The *Boosalis* court specifically held that, because 11 U.S.C. § 550(a)(1) provides the basis for a trustee's recovery in an avoidance action, that section is the source of the recovery after the transfer has been avoided, rendering the cause of action federal. *Id.* at 902.

That those claims were initially brought in PCI's federal bankruptcy matter as an adversary proceeding and are therefore properly subject to the Court's jurisdiction under 28 U.S.C. § 1334 does not change the claims' underlying state-law character. The claims are state-law causes of action, and Minnesota law, therefore, governs the award of prejudgment interest. *Emmenegger v. Bull Moose Tube Co.*, 324 F.3d 616, 624 (8th Cir. 2003).

The parties also dispute whether the award of prejudgment interest is permissive or mandatory. Under federal law a district court has the discretion to deny or reduce prejudgment interest if "exceptional or unusual circumstances exist making the award of interest inequitable." *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 752 (8th Cir. 1986). The Minnesota prejudgment interest statute, on the other hand, provides that "[t]he prevailing party shall receive interest on any judgment or award from the time of commencement of the action . . . until the time of verdict." Minn. Stat. § 549.09, subd. 1(b). Thus, "the statutory award of interest is mandatory and . . . not subject to an equitable reduction." *Tate v. Scanlan Int'l, Inc.*, 403 N.W.2d 666, 674 (Minn. Ct. App. 1987); *see also Orcutt v. Crews*, No. A22-0548, 2022 WL 17409900, at *4 (Minn. Ct. App. Dec. 5, 2022) (noting that prejudgment interest under § 549.09, subd. 1(b) is "mandatory, not discretionary").

In support of its argument that the award of prejudgment interest is permissive, BMO Harris relies solely on decisions interpreting the award of such interest under federal law, not state law. Those authorities do not control here, because the award of

prejudgment interest is a matter of Minnesota, not federal, law. Minnesota requires the award of prejudgment interest without any equitable reduction, and the Trustee is entitled to prejudgment interest of 10 percent[3] on the amount of the verdict from the date he filed this lawsuit until the date of the verdict.

## II. Trustee's Motion for Judgment as a Matter of Law

The Trustee seeks judgment as a matter of law as to BMO's twenty-third affirmative defense, which asserts that the Trustee's claims are barred by consent and ratification. The Court previously concluded that it was appropriate for the jury to determine whether BMO Harris had established its consent-and-ratification defense. The Trustee now contends that it was error to submit the issue to the jury and that he is entitled to judgment as a matter of law on the defense. He concedes that the motion is brought "solely to preserve [the Trustee's] rights on appeal" and any ruling on the issue will have no effect on the verdict or the amount of damages. BMO Harris opposes the motion, arguing that the Court should grant judgment in its favor on this defense.

Judgment as a matter of law is appropriate "when 'a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.'" *Miller v. City of Springfield*, 146 F.3d 612, 614 (8th Cir. 1998). (quoting Fed. R. Civ. P. 50(a)(1)). The Court should not grant a motion for judgment as a matter of law "unless

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[3] There is no dispute that Minnesota's prejudgment interest rate is 10 percent.

no reasonable juror, taking all reasonable inferences in the light most favorable to the opposing party, the nonmovant, could find against the moving party." *In re RFC & ResCap Liquidating Tr. Action*, 399 F. Supp. 3d 804, 818 (D. Minn. 2019).

In reviewing a motion for judgment as a matter of law, the Court must

> (1) resolve direct factual conflicts in favor of the nonmovant,
>
> (2) assume as true all facts supporting the nonmovant which the evidence tended to prove,
>
> (3) give the nonmovant the benefit of all reasonable inferences, and
>
> (4) deny the motion if the evidence so viewed would allow reasonable jurors to differ as to the conclusions that could be drawn.

*Roberson v. AFC Enters., Inc.*, 602 F.3d 931, 933-34 (8th Cir. 2010) (quoting *Larson ex rel. Larson v. Miller*, 76 F.3d 1446, 1452 (8th Cir. 1996)).

The Trustee's motion calls for an advisory opinion. The Trustee asks for no relief other than the judgment itself, admitting that he brings the request for judgment as a matter of law only for purposes of appeal. But he does not specify what effect a ruling on his motion would have on any potential appellate issues. The Trustee does not argue, for example, that the outcome of the case would be different had the Court agreed with the Trustee initially and declined to submit the consent-and-ratification defense to the jury. Essentially, the Trustee seeks a declaratory judgment that BMO Harris's consent-and-ratification-

defense fails. Such a declaration, however, is no longer ripe.

"Article III limits courts to deciding actual 'Cases' and 'Controversies,' thereby prohibiting them from issuing advisory opinions." *Pub. Water Supply Dist. No. 8 of Clay Cnty., Mo. v. City of Kearney, Mo.*, 401 F.3d 930, 932 (8th Cir. 2005) (quoting U.S. Const. art. III, § 2). A request for a declaratory judgment is not ripe if there is no injury underlying the request. *County of Mille Lacs v. Benjamin*, 361 F.3d 460, 464 (8th Cir. 2004). A ripe claim requires an injury that is "certainly impending." *Pennsylvania v. West Virginia*, 262 U.S. 553, 593 (1923). The Trustee has identified no injury that is "certainly impending" that would render a determination on the consent-and-ratification issue ripe at this stage of the litigation. Absent any indication of how the ruling the Trustee seeks would have a concrete effect on this case—or, put another way, how the Court's ruling on the issue would remedy some injury the Trustee is suffering—the motion may be denied on this basis alone.

Even if ripe, however, the Trustee has not established that the Court erred in submitting the consent-and-ratification defense to the jury. The Trustee raises two arguments as to why the defense should not have been submitted to the jury. First, the Trustee contends that the appointment of a receiver "cleansed" PCI of any liability for a defense based on the wrongdoing of PCI's officers. Second, the Trustee argues that BMO Harris did not offer any evidence as to an essential element of the consent-and-ratification defense—that PCI had full knowledge of the facts related to the fraudulent activity—because, as the

Court instructed the jury, PCI "cannot be charged with full knowledge of the material facts related to an otherwise unauthorized act based on the knowledge of someone acting to defraud" PCI. (Dkt. 349 at Instr. 21.) According to the Trustee, the only evidence of PCI's knowledge brought out at trial was the knowledge of Petters and his co-conspirators, all of whom were acting to defraud PCI. For its part, BMO Harris contends that the Court erred in determining that PCI could not be charged with the knowledge of Petters and the other officers who were defrauding investors. According to BMO Harris, the facts elicited at trial established PCI's knowledge and the Court should grant BMO Harris judgment as a matter of law that PCI ratified or consented to the fraudulent activity. Such a ruling would necessarily set aside the verdict, because as the Court instructed, if BMO Harris proved its consent-and-ratification defense as to any claim, the jury was required to find for BMO Harris on that claim. *Id.*

**A. Availability of defenses**

The general rule is that a bankruptcy trustee stands in the shoes of the debtor entity the bankruptcy trustee represents, so that any cause of action the trustee brings is "subject to any equitable or legal defenses that could have been raised against the debtor." *Grassmueck v. Am. Shorthorn Ass'n*, 402 F.3d 833, 836 (8th Cir. 2005). But for an entity in receivership, certain equitable defenses brought under Minnesota law are not available against a trustee/receiver, even if the defenses would otherwise be available against the entity. *See German-Am. Fin. Corp. v. Merchants & Mfrs. State Bank of Minneapolis*,

225 N.W. 891, 893 (Minn. 1929); *Magnusson v. Am. Allied Ins. Co.*, 189 N.W.2d 28, 33 (Minn. 1971) (declining to apply *in pari delicto* defense against an insolvent debtor).

The Trustee asks the Court to extrapolate from these decisions that other defenses similar to the equitable defense of *in pari delicto* also are unavailable against an entity that is in receivership. The Trustee acknowledges, however, that there is no direct authority for his position that the receivership "cleansed" PCI of responsibility for the actions of its officers for purposes of an affirmative defense of consent and ratification.

The Court addressed the law related to the *in pari delicto* defense at length in a previous order and will not repeat that analysis here. (Dkt. 70 at 12-14.) In determining that BMO Harris could not raise the *in pari delicto* defense against PCI, the Court noted that such an equitable defense was one that Minnesota courts consistently found could not be raised against a receiver. *See, e.g.*, *Kelley v. Coll. of St. Benedict*, 901 F. Supp. 2d 1123, 1129 (D. Minn. 2012) ("[W]hen a receiver has been appointed for a corporation, the wrongdoer (the corporation) is removed from the picture and, hence, *in pari delicto* does not apply.").

The Trustee argues that there is no reason to distinguish between the *in pari delicto* defense and the consent-and-ratification defense, because both seek to assign responsibility for corporate officers' wrongdoing to the corporation itself. But the Trustee ignores that the *in pari delicto* defense is an equitable defense that a Court must resolve, while the defense of consent and ratification is a matter for the jury to

determine. *See Chem. Sales Co. v. Diamond Chem. Co.*, 766 F.2d 364, 369 (8th Cir. 1985) (finding that "the jury should have been explicitly instructed on the defense of implied consent or ratification").

This distinction matters. As with the standard for granting a motion for judgment as a matter of law, the Court should not remove matters from the jury's consideration "unless no reasonable juror, taking all reasonable inferences in the light most favorable to [BMO Harris] could find against the [Trustee]." *In re RFC & ResCap Liquidating Tr. Action*, 399 F. Supp. 3d 804, 818 (D. Minn. 2019). Given the dearth of authority that the consent-and-ratification defense cannot apply against a Trustee or receiver in a case such as this, and that the determination of the defense is a matter for the jury, the Court properly submitted the issue to the jury.

**B. Facts supporting the defense**

The Trustee also argues that BMO Harris failed to adduce any facts from which the jury could have determined that BMO Harris's consent-and-ratification defense applied, making judgment as a matter of law appropriate on the defense.

In opposing the Trustee's motion, BMO Harris does not point to specific facts from which the jury, as instructed, could have found that PCI had knowledge of the fraudulent actions of Petters and the other company officers. Rather, BMO Harris asserts that the Court erroneously instructed the jury that the knowledge of Petters and his accomplices could not be imputed to PCI. According to BMO Harris, because PCI itself was a fraudulent entity that existed only to commit fraud, the knowledge of company officers can

be imputed to the company. In addition, BMO Harris argues that the "sole-actor" doctrine required the jury to impute Petters's knowledge to PCI.

As addressed in the Court's order on BMO Harris's motion to exclude expert witnesses, BMO Harris has not identified any Eighth Circuit or Minnesota legal authority for its argument that the Court's consent-and-ratification instruction was erroneous. (Dkt. 214 at 48-50.) And binding Eighth Circuit decisions contradict the authority on which BMO Harris relies. *See Ritchie Special Credit Invs., Ltd. v. JPMorgan Chase & Co.*, 48 F.4th 896, 899 (8th Cir. 2022) (noting that PCI would have a "cause of action against [a lender] for helping Petters himself perpetuate the fraud") (emphasis omitted). PCI was both a victim and a perpetrator of Petters's scheme; as such, Petters's knowledge of the fraudulent scheme cannot be attributed to PCI. *See Steigerwalt v. Woodhead Co.*, 244 N.W. 412, 424 (Minn. 1932).

Nor is BMO Harris's "sole-actor" theory tenable in this situation. Under that theory, when the person committing the fraud is the sole agent of the entity used to commit that fraud, the knowledge of that sole actor must be attributed to the entity. *See Sussel Co. v. First Fed. Sav. & Loan Ass'n of St. Paul*, 238 N.W.2d 625, 628 (Minn. 1976) (discussing exception to the "rule that the knowledge of an agent engaged in an independent fraudulent act on his own account is not the knowledge of the principal . . . where the agent . . . is the sole representative of the principal"). BMO Harris contends that Petters was the sole actor in the scheme. Relying on *Grassmueck*, BMO Harris asserts that the involvement of other PCI employees

in the scheme does not preclude application of the "sole actor" exception. *See* 402 F.3d at 841 ("[T]he sole actor doctrine does not require that the agent whose knowledge is to be imputed literally act alone; the doctrine still applies if the 'sole actor' uses subordinates in perpetrating a fraud.").

But as the Trustee points out, *Grassmueck* did not involve Minnesota agency law and relied primarily on New York law in reaching its conclusions. The *Grassmueck* court had no occasion to opine on how a Minnesota court would view the sole-actor doctrine. And no Minnesota court has applied the sole-actor doctrine in a situation akin to this one, where the entity's agent was perpetrating a fraud with the assistance of others. It is evident from the Minnesota Supreme Court's use of the words "sole representative" that the doctrine applies in Minnesota only where the fraudulent agent is truly acting alone. *See Sussel*, 238 N.W.2d at 628.

BMO Harris is not entitled to judgment as a matter of law on its consent-and-ratification defense. But judgment in the Trustee's favor is also not warranted. As addressed above, the Trustee has not established that a determination of consent and ratification at this stage of the litigation is a ripe issue. And there was evidence from which a reasonable jury could have determined that PCI consented to or ratified the fraud of Petters and the other officers, even without imputing those individuals' knowledge to PCI.

Accordingly, the Trustee's motion for judgment as a matter of law on the consent-and-ratification defense is denied.

## III. BMO Harris's Motion for Judgment as a Matter of Law

BMO Harris renews the motion for judgment as a matter of law it made at the close of the Trustee's evidence and at the end of the case. BMO Harris contends that judgment is warranted in its favor on four issues: the aiding-and-abetting breach of fiduciary duties claim (Count IV), the jury's award of compensatory damages, the jury's award of punitive damages and BMO Harris's affirmative defenses of acquiescence, waiver, and the statute of limitations.[4]

Judgment as a matter of law is appropriate "when 'a party has been fully heard on an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find for that party on that issue.'" *Miller v. City of Springfield*, 146 F.3d 612, 614 (8th Cir.1998). (quoting Fed. R. Civ. P. 50(a)(1)). The Court should not grant a motion for judgment as a matter of law "unless no reasonable juror, taking all reasonable inferences in the light most favorable to the opposing party, the

[4] BMO Harris raises four additional defenses in its motion. The Court previously granted judgment as a matter of law to the Trustee on BMO Harris's defenses of *in pari delicto*, UCC preemption, and the contractual limitations period. (Dkt. 335 at 3, 5.) Although the Court warned BMO Harris against continuing to press defenses that have been repeatedly rejected, BMO Harris contends that it is required to raise these issues again to preserve its appellate rights. By mentioning these defenses in its motion, BMO Harris has sufficiently preserved the issues for appeal. The Court stands by its prior rulings and will not further address BMO Harris's motion as to these three defenses. In addition, in the previous section the Court rejected BMO Harris's contention that judgment as a matter of law was appropriate on the consent-and-ratification defense, and no further analysis of that defense is necessary.

nonmovant, could find against the moving party." *In re RFC & ResCap Liquidating Tr. Action*, 399 F. Supp. 3d 804, 818 (D. Minn. 2019).

**A. Count IV**

As the Court instructed the jury, the Trustee's claim of aiding and abetting a breach of fiduciary duty required proof of four elements:

> First, that Tom Petters, Deanna Coleman or Robert White breached a fiduciary duty they owed to PCI;
>
> Second, that M&I knew that the conduct of Tom Petters, Deanna Coleman or Robert White constituted a breach of fiduciary duty to PCI;
>
> Third, that M&I substantially assisted or encouraged Tom Petters, Deanna Coleman or Robert White in committing their breach of a fiduciary duty owed to PCI; and
>
> Fourth, that M&I's substantial assistance or encouragement was a proximate cause of PCI's harm.

(Dkt. 349 at Instr. 18.) BMO Harris argues in this motion that the Trustee's evidence was insufficient as a matter of law to prove the final three elements. BMO Harris also asserts that the jury's determination in Count I that BMO Harris did not breach the Minnesota Uniform Fiduciaries Act is irreconcilable with its determination on the aiding-and-abetting breach of fiduciary duty claim in Count IV, because Count I required proof of the same fiduciary duty as Count IV and a less-stringent standard of scienter and assistance.

### 1. Actual knowledge

BMO Harris first contends that there was insufficient evidence that any particular employee of M&I had the knowledge required to support the Trustee's claim for aiding and abetting breach of fiduciary duty. *See Zayed v. Associated Bank, N.A.*, 913 F.3d 709, 715 (8th Cir. 2019) ("Under Minnesota law, the scienter (knowledge requirement) for aiding and abetting is 'actual knowledge.'") (quotation omitted). According to BMO Harris, the facts here are akin to *Zayed* and it was error for the Court to stray from the *Zayed* court's holding that "sloppy banking" or "red flags"—which BMO Harris argues is the same as what the evidence established here—are insufficient to establish knowledge for an aiding and abetting claim. *Zayed*, 913. F.3d at 716.

*Zayed*, as this case, involved an entity used to facilitate a Ponzi scheme and claims of aiding and abetting on the part of the entity's bank. In *Zayed*, however, only one employee of the bank allegedly assisted the entity's furtherance of the scheme, and that employee's involvement with the entity was brief. *Id.* at 715. As the Court of Appeals noted, the allegations against this sole banker were that he should have known from otherwise innocuous facts—the use of a domestic entity when a foreign entity was also involved, opening a checking/money-market account rather than a fiduciary account and opening an account without proof that the entity was registered in Minnesota—that the entity was a Ponzi scheme. *Id.* at 716-17. But there was no evidence that the banker ever suspected that the entity's banking transactions were in any way fraudulent, and these

otherwise neutral facts were insufficient evidence of actual knowledge to support an aiding-and-abetting claim. *Id.* at 717.

The evidence here did not present innocuous facts that the Trustee argued should have caused M&I to take notice. There was ample evidence in the record from which the jury could have determined that M&I had actual knowledge of Petters's scheme.[5] This case is far from the unwarranted inferences about which the *Zayed* court was concerned.

In addition, BMO Harris relies heavily on *Zayed*'s holding that proof of actual knowledge is required. But that holding does not mean that an aiding-and-abetting claim can succeed only where the tortfeasor admits in her testimony or in evidence submitted to the jury that she knew something illegal or untoward was occurring. Actual knowledge merely means knowledge. Knowledge may be established either directly or circumstantially. "Circumstantial evidence is defined as evidence based on inference and not on personal knowledge or observation." *State v. Barker*, 888 N.W.2d 348, 354 (Minn. Ct. App. 2016) (quotation omitted). And "knowledge is generally established through circumstantial evidence," *United States v. Benitez*, 531 F.3d 711, 716 (8th Cir. 2008), as the *Zayed* decision recognized. *Zayed*, 913 F.3d at 715.

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[5] BMO Harris's repeated insistence that the Trustee in his testimony "admitted" that M&I employees did not have the requisite knowledge is not well taken. As the Trustee points out, BMO Harris made this argument to the jury; the verdict demonstrates the jury's rejection of the argument. Moreover, the testimony to which BMO Harris points is simply not a sweeping admission or any concession about M&I's knowledge.

To establish M&I's knowledge circumstantially, the Trustee was required to present evidence from which the inference of that knowledge could be drawn. Such circumstantial evidence includes evidence of willful blindness to obvious badges of fraud, and *Zayed*'s statements regarding actual knowledge are not to the contrary. *See, e.g.*, *United States v. Hansen*, 791 F.3d 863, 868 (8th Cir. 2015) (observing that "the concept of willful blindness is a limited exception to the requirement of actual knowledge" such that a criminal defendant charged with fraud can be convicted "even if [the defendant] lacked actual knowledge of the fraud, [if] a reasonable juror could have found [the defendant] was willfully blind to the truth"). The *Zayed* court did not determine that willful blindness can never establish knowledge for an aiding-and-abetting claim. Rather, the *Zayed* court concluded that the facts in that case did not establish any knowledge at all, whether through willful blindness, direct evidence, or otherwise.

Finally, even if BMO Harris is correct that the adverse-inference instruction, standing alone, does not constitute sufficient evidence of actual knowledge, that instruction, together with the evidence regarding specific M&I employees' actions and multiple episodes of inaction when presented with of evidence of the scheme, constitute sufficient evidence from which a reasonable jury could have found the knowledge element of the claim satisfied.

**2. Substantial assistance**

The jury was instructed that,

> "knowledge and substantial assistance are evaluated in tandem. Therefore, the stronger

> the evidence of a person's or entity's general awareness of breach of fiduciary duty, the less evidence of that person's or entity's substantial assistance is required. Similarly, the stronger the evidence of substantial assistance, the less evidence of general awareness is required."

(Dkt. 349 at Instr. 19.) Although BMO Harris attacks the sufficiency of the Trustee's evidence of M&I's substantial assistance, the jury could have determined that there was such clear evidence of M&I's knowledge that only a small amount of evidence of M&I's substantial assistance was required. And the adverse-inference instruction allowed the jury to infer that there would have been evidence in the record reflecting both knowledge and substantial assistance but for BMO Harris's destruction of that evidence. Viewing the evidence in the light most favorable to the Trustee, as is required on a motion for judgment as a matter of law, a reasonable jury could find sufficient evidence of M&I's substantial assistance. BMO Harris's motion on this point, therefore, fails.

**3. Proximate cause**

Next, BMO Harris contends that the evidence regarding causation was insufficient, arguing that any alleged aiding and abetting on the part of M&I did not cause PCI any damage. According to BMO Harris, because PCI was never able to pay its creditors, any assistance M&I provided to those using PCI as an instrumentality of fraud did not have any effect on PCI's ability to pay its creditors. Consequently, BMO Harris maintains, M&I's actions caused no harm. BMO Harris also argues that because M&I had no role

in causing PCI to incur the debts for which the Trustee sought to recover, M&I cannot be responsible for those debts. Moreover, BMO Harris asserts, because PCI also used the services of other banks, those banks could have processed the ostensibly "routine" transactions that M&I processed. And if M&I had blown the whistle on the fraud, PCI would have merely switched its banking activities to another bank. Finally, BMO Harris contends that the only cause of the harm to PCI is the misdeeds of Petters and his accomplices, not any conduct of M&I.

BMO Harris acknowledges the principle of Minnesota law that "[t]here may be more than one substantial factor—in other words, more than one proximate cause—that contributes to an injury." *Staub as Tr. of Weeks v. Myrtle Lake Resort, LLC*, 964 N.W.2d 613, 621 (Minn. 2021). BMO Harris's motion regarding causation, however, is directly contrary to this settled point of law. Addressing BMO Harris's last argument first, while it is certainly true that Petters, Coleman, and White are responsible for the harm to PCI, there was sufficient evidence from which the jury could conclude that that BMO Harris "substantially assist[ed] or encourage[d] the primary tort-feasor in the achievement of the breach." *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 187 (Minn. 1999). Given this evidence, the jury's verdict must stand.

BMO Harris's other causation arguments are similarly without merit. That other banks might have been willing to assist PCI if M&I refused to do so does not absolve M&I of its role in the scheme. The Trustee was not required to provide direct evidence that M&I played a prominent role in Petters's crimes. The claim

at issue is aiding and abetting, not the breach itself. Finally, BMO Harris's arguments regarding PCI's insolvency are contrary to logic. A tortfeasor who causes damage to an already damaged entity must be responsible for the additional damages the tortfeasor caused. Here, the Trustee claimed that, had M&I performed its duties correctly, PCI's losses would have been far less than they were. The jury was entitled to credit the Trustee's evidence and find that a proximate cause of the harm to PCI was M&I's aiding and abetting.

**4. Irreconcilable verdict**

The introduction to BMO Harris's motion contends that the jury's determination that BMO Harris did not breach any fiduciary duties but that BMO Harris aided and abetted the breach of those duties constitutes an irreconcilable verdict. However, BMO Harris's memorandum does not mention this contention, nor does BMO Harris provide any legal analysis or authority to support it. The Court likewise will not address this contention further. To the extent BMO Harris's motion relies on the argument that the verdict is not reconcilable, this aspect of the motion is denied.

**B. Compensatory damages**

BMO Harris raises a host of challenges to the compensatory damages award. Most of the challenges repeat legal theories that both this Court and the bankruptcy court have repeatedly rejected. BMO Harris contends that the damages award must be offset by amounts the Trustee has recovered in other matters. This argument is contrary to Minnesota's collateral-source rule. *Swanson v. Brewster*, 784

N.W.2d 264, 268 (Minn. 2010). BMO Harris argues that PCI was not harmed and that there is no causal connection between M&I's conduct and PCI's damages. Those arguments are addressed above, in addition to having been rejected in multiple prior orders. BMO Harris asserts that there was no factual basis for any damages. But BMO Harris provided damages estimates to the jury. That the jury's verdict exceeded BMO Harris's preferred damages amount does not mean the jury had no basis for its damages award. Moreover, the jury was entitled to credit whatever testimony it found credible.

BMO Harris contends that any damages amount must be limited to the amount of self-dealing of Petters and his associates because the only duty officers of an insolvent corporation owe to the corporation is not to engage in self-dealing. The fiduciary duties at issue in this case are not as narrow as BMO Harris argues, however, because "the nature and extent of the performance of fiduciary duties by directors and officers of insolvent corporations do not change." *In re Sec. Asset Cap. Corp.*, 390 B.R. 636, 642 (Bankr. D. Minn. 2008). BMO Harris insists that *In re Security Asset Capital Corp.* supports its position, pointing to the Bankruptcy Court's statement that an insolvent corporation's officers' breach of fiduciary duties is "practically limited to their self-dealing to the detriment of their corporations." *Id.* But this statement does not purport to describe all fiduciary duties that an insolvent corporation's officers owe. Rather, this statement describes the interplay of the business judgment rule and corporate officers' fiduciary duties. There is no business-judgment-rule at issue here. And even if the business judgment of

Petters, Coleman, and White were somehow at issue, "the principles upon which [the business judgment rule] is founded—care, loyalty and independence—must first be satisfied" before the business-judgment-rule can absolve an officer of liability. *Revlon, Inc. v. MacAndrews & Forbes Holdings, Inc.*, 506 A.2d 173, 180 (Del. 1986). Insolvency does not change officers' duties to the corporation and to its creditors.

Moreover, the evidence established that the self-dealing of PCI's officers was not as limited as BMO Harris argues. Indeed, if the jury viewed the evidence of self-dealing expansively, that self-dealing could more than support the compensatory damages award. The Court has repeatedly held that the proper "measure of damages sustained by a defrauded corporation may be derived by measuring the loss of money loaned to the corporation by creditors that the corporation was unable to repay as a result of the fraud," not the amount of the officers' self-dealing. (Dkt. 214 at 46 (citing *Greenpond S., LLC v. Gen. Elec. Cap. Corp.*, 886 N.W.2d 649, 657 (Minn. Ct. App. 2016)). BMO Harris continues to rely on decisions from other jurisdictions that the Court has previously found inapposite. BMO Harris has provided no new authority in support of its contentions. For the reasons addressed above and in prior orders, BMO Harris's motion to set aside the compensatory damages award is denied.

**C. Punitive damages**

BMO Harris moves for judgment as a matter of law on the punitive-damages award for two reasons: the facts do not support a finding that M&I employees acted with the requisite state of mind, and the facts do

not support imposition of liability on M&I for acts of its agents. Neither contention has merit.

According to BMO Harris, M&I's training materials show that employees were trained to recognize and try to prevent Ponzi schemes. Such training, BMO Harris argues, precludes a finding that M&I "acted with deliberate disregard for the rights or safety of others," as required for an award of punitive damages. (Dkt. 349 at Instr. 25.) BMO Harris argues that the only evidence of M&I's state of mind was evidence of its employees' constructive knowledge of the Ponzi scheme, insisting that proof of actual knowledge is required.

Again, however, the adverse-inference instruction is sufficient to allow the jury to conclude that the destroyed emails would have established M&I's deliberate disregard. And the existence of training materials does not absolve an entity from its employees' actions that are not in accord with those materials. *See, e.g.*, *MacGregor v. Mallinckrodt, Inc.*, 373 F.3d 923, 931 (8th Cir. 2004) ("[W]here an employer discriminates in contravention of its own policies, the existence of those policies does not allow the employer to escape punitive damages.").

BMO Harris offers no legal authority to support its position that constructive knowledge cannot support a finding of deliberate disregard. Rather, the authority on which BMO Harris relies states the obvious principle that negligence—couched as "incompeten[ce]" or "careless[ness]"—cannot support a claim for punitive damages. *Kapps v. Biosense Webster, Inc.*, 813, F. Supp. 2d 1128, 1166-67 (D. Minn. 2011). *Accord Ba Lam v. Cnty. of Ramsey*, No. A08-

0035, 2009 WL 173523, at *3 (Minn. Ct. App. Jan. 27, 2009) (actions that are merely "incompetent or inept" do not support a claim for punitive damages). If the jury credited the Trustee's evidence of M&I employees' actions and inactions in the face of signs that PCI was a Ponzi scheme, the jury was entitled to determine that such actions and inactions go beyond incompetence or carelessness and rise to the level of deliberate indifference. BMO Harris's motion on this basis is denied.

Nor is BMO Harris entitled to judgment on the punitive-damages award on its theory that none of the M&I employees involved were "employed in a managerial capacity with authority to establish policy and make planning-level decisions" for M&I. (Dkt. 349 at Instr. 26.) The requirement that an agent be a management-level employee does not mean that only the actions of a company's chief executive officer can give rise to punitive damages against the company. Rather, "[t]o determine managerial capacity, the critical inquiry regards the degree of discretion the employee possesses in making decisions that ultimately will determine corporate policy." *Tennant Co. v. Advance Mach. Co.*, 355 N.W.2d 720, 724 (Minn. Ct. App. 1984). In *Tennant*, for example, a company's sales representative committed illegal acts for which a jury imposed punitive damages. *Id.* at 722. Noting that the employee both trained other employees and "carried out the illegal activity with a manager's title"—in that case, "West Coast Sales Manager"—the *Tennant* court concluded that punitive damages were appropriately assessed against the company. *Id.* at 724.

The Trustee proffered evidence at trial that managerial-level employees of M&I knew or should have known of the Ponzi scheme long before M&I alerted the authorities about the scheme. The jury was entitled to credit this evidence. And even if the Trustee's evidence was lacking, the jury could have inferred that the destroyed documents established the requisite managerial-level knowledge on the part of M&I. The punitive damages award stands.

**D. Affirmative defenses**

The Court specifically reserved ruling on several of BMO Harris's affirmative defenses until the conclusion of trial but granted judgment as a matter of law on other defenses. (Dkt. 335 at 3-6.) As addressed above, BMO Harris persists in pressing many of the affirmative defenses the Court has previously rejected, contending that it is required to do so to preserve its appeal rights. But having received a decision on an issue, BMO Harris has not waived that issue by failing to ask the Court to reconsider its decision. BMO Harris's request for judgment as a matter of law on those defenses—*in pari delicto*, UCC preemption, and the contractual limitations period—is denied without further discussion. In addition, in ruling on the Trustee's motion for judgment as a matter of law, the Court determined that judgment was not appropriate for either party on BMO Harris's consent-and-ratification defense. The Court will not address that defense again in this section.

What remains for consideration are BMO's defenses of acquiescence, waiver, and the statute of limitations.

### 1. Acquiescence and waiver

The defenses of acquiescence and waiver, similar to the defense of consent and ratification, "generally require the element of full knowledge of the party against whom the [defenses] are to be applied." *In re RFC & ResCap Liquidating Tr. Litig.*, No. 13-CV-3520 JRT/HB, 2015 WL 2451254, at *8 (D. Minn. May 21, 2015); *see also Anderson v. First Nat'l Bank of Pine City*, 228 N.W.2d 257, 259 (Minn. 1975) (defining ratification as "when one, having full knowledge of all the material facts, confirms, approves, or sanctions, by affirmative act or acquiescence, the originally unauthorized act of another"); *Montgomery Ward & Co. v. Cnty. of Hennepin*, 450 N.W.2d 299, 304 (Minn. 1990) ("A waiver is a voluntary and intentional relinquishment or abandonment of a known right.").

As in its arguments regarding consent and ratification, BMO Harris contends that the knowledge of Petters, Coleman and White must be imputed to PCI. BMO Harris again relies in part on the "sole actor" theory for this contention. But the Court rejected that theory and will not repeat that analysis here. And to the extent BMO Harris's acquiescence and waiver defenses depend on a finding that PCI as a whole must be charged with knowing what Petters and his accomplices knew, the evidence at trial was insufficient to support BMO Harris's assertion that every employee of PCI knew about the fraudulent activities. Judgment as a matter of law on these affirmative defenses, therefore, is not appropriate.

### 2. Statute of limitations

Under Minnesota law, any cause of action for breach of fiduciary duty must be brought within six

years of the alleged breach. Minn. Stat. § 541.05, subd. 1(1). BMO Harris argued to the jury that the Trustee's claims were untimely because PCI's causes of action accrued before November 2006 but the Trustee did not file this lawsuit until November 2012. The jury was instructed that its verdict "must be for BMO and against Plaintiff on any counts" for which BMO Harris proved its statute-of-limitations defense. (Dkt. 349 at Instr. 20.) In finding for the Trustee on one count, the jury rejected BMO Harris's statute-of-limitations argument. BMO Harris argues that the jury's verdict is erroneous because the evidence established that the claim at issue accrued more than six years before the Trustee filed the complaint. BMO Harris also asserts that the Trustee cannot avoid the statute of limitations by proving fraudulent concealment for two reasons—because the Trustee stands in PCI's shoes and PCI knew about the fraud, and because there was no evidence that M&I concealed anything.

The Court instructed the jury, consistent with Minnesota law, that the Trustee's claims "accrued when the relevant facts supporting each element came into existence, including damages." *Id.* BMO Harris may believe that each element of the claims arose before November 2006, but the jury found otherwise, and the evidence supports the jury's determination. Moreover, as addressed multiple times in this Order, the adverse-inference instruction allowed the jury to infer that the destroyed documents contained evidence that was harmful to BMO Harris's defenses, including the statute-of-limitations defense. BMO Harris's reliance on a lack of evidence of fraudulent concealment, therefore, is unavailing. The jury could have determined that the destroyed emails contained

evidence of fraudulent concealment and rejected BMO Harris's defense on this basis alone.

Because a reasonable jury could have made the decision that this jury made, judgment as a matter of law on BMO Harris's statute-of-limitations defense is not warranted.

## IV. BMO Harris's Motion for New Trial or Remittitur

BMO Harris contends that if the Court does not otherwise grant judgment as a matter of law on the Trustee's claim for aiding and abetting the breach of fiduciary duties, a new trial is warranted. BMO Harris also argues that a remittitur of both the compensatory and punitive damages awards is warranted.

### A. New trial

Following a jury trial, on the motion of any party, a district court may grant a new trial on all or some of the issues. *See* Fed. R. Civ. P. 59(a)(1)(A). But "a district judge is not free to reweigh the evidence and set aside the jury verdict merely because the jury could have drawn different inferences or conclusions or because [the judge feels] that other results are more reasonable." *King v. Davis*, 980 F.2d 1236, 1237 (8th Cir. 1992). The "trial judge may not usurp the functions of a jury." *White v. Pence*, 961 F.2d 776, 780 (8th Cir. 1992). A new trial is warranted only when "the verdict was so contrary to the evidence as to amount to a miscarriage of justice." *Butler v. French*, 83 F.3d 942, 944 (8th Cir. 1996).

BMO Harris offers eight separate reasons why it believes a new trial is warranted. In addition, BMO Harris contends, as it did in its motion for judgment

as a matter of law, that the jury's verdict is against the great weight of the evidence. BMO Harris does not present any new argument on this point, however. Having rejected the contention above, the Court addresses only the arguments that specifically pertain to the motion for a new trial.

**1. Actual knowledge**

In the motion for judgment as a matter of law, BMO Harris argued that there was insufficient evidence of M&I's knowledge to support the Trustee's claim for aiding and abetting breach of fiduciary duty. In this motion, BMO Harris contends that the Court erred by failing to instruct the jury correctly on the knowledge requirement and by allowing the Trustee to argue about willful blindness in his summation.

When determining whether erroneous jury instructions warrant a new trial, the question is "whether the jury instructions, taken as a whole, fairly and adequately represent the evidence and applicable law in light of the issues presented to the jury in a particular case." *Brown v. Sandals Resorts Int'l*, 284 F.3d 949, 953 (8th Cir. 2002). "[J]ury instructions do not need to be technically perfect or even a model of clarity." *McCoy v. Augusta Fiberglass Coatings, Inc.*, 593 F.3d 737, 744 (8th Cir. 2010) (quoting *Brown*, 284 F.3d at 953). "The test is not whether the charge was faultless in every particular but whether the jury was misled in any way and whether it had understanding of the issues and its duty to determine those issues." *Westborough Mall, Inc. v. City of Cape Girardeau, Mo.*, 794 F.2d 330, 335 (8th Cir. 1986) (quotation omitted). Even if an instruction is erroneous, a new trial is

required "only where the error affects the substantial rights of the parties." *Brown*, 284 F.3d at 953.

BMO Harris challenges the instruction defining knowledge for purposes of aiding and abetting. Specifically, BMO Harris argues that the description of knowledge as "general awareness of breach of fiduciary duty" in that instruction was erroneous. (Dkt. 349 at Instr. 19.) Relying wholly on *Zayed*, BMO Harris asserts that the use of "general awareness" in this instruction conveyed to the jury that actual knowledge was not required.

But as discussed previously, *Zayed* does not stand for the proposition that direct evidence of knowledge is required. The Court's instruction that the jury could find that M&I aided and abetted a breach of fiduciary duty only if it found that "M&I knew that the conduct of Tom Petters, Deanna Coleman or Robert White constituted a breach of fiduciary duty to PCI," (Dkt. 349 at Instr. 18), is correct. And the statement explaining that "the stronger the evidence of a person's or entity's general awareness of breach of fiduciary duty, the less evidence of that person's or entity's substantial assistance is required," (Dkt. 349. at Instr. 19), similarly does not misstate the law. *See In re Temporomandibular Joint (TMJ) Implants Prod. Liab. Litig.*, 113 F.3d 1484, 1495 (8th Cir. 1997) (finding that, for an aiding and abetting claim, "the stronger the evidence of [the defendant's] general awareness of the alleged tortious activity, the less evidence of [the defendant's] substantial assistance is required, and the stronger the evidence of substantial assistance, the less evidence of general awareness is

required."). BMO Harris's motion for a new trial on this basis is denied.

BMO Harris also argues that the instructions erroneously failed to require the jury to find that any single M&I employee had knowledge of a breach of fiduciary duty, which ostensibly allowed the jury improperly to aggregate the knowledge of various M&I employees to determine that M&I had the requisite knowledge. But Minnesota courts consistently describe the knowledge at issue in an aiding-and-abetting claim as the corporate entity's knowledge, not the knowledge of any single employee. *See, e.g.*, *Park Midway Bank, N.A. v. R.O.A., Inc.*, No. A11-2092, 2012 WL 3263866, at *5 (Minn. Ct. App. Aug. 13, 2012) (noting that summary judgment on an aiding-and-abetting breach of fiduciary duty claim against a bank was appropriate when the plaintiffs "failed to point to specific facts in the record demonstrating that [the bank] had actual knowledge" of the breach); *Siler v. Principal Fin. Sec., Inc.*, No. C1-00-576, 2000 WL 1809048, at *6 (Minn. Ct. App. Dec. 12, 2000) (granting motion to dismiss aiding-and-abetting claim where the plaintiff did not allege that the financial organization, not any individual employee, "knew its actions were aiding and abetting [the] tort").

BMO Harris insists that *Aguilar v. PNC Bank, N.A.*, 853 F.3d 390 (8th Cir. 2017), stands for the proposition that an aiding-and-abetting claim may not aggregate employees' knowledge. *Aguilar* describes actual knowledge in the context of a breach of the Missouri Uniform Fiduciaries Law, noting that Missouri courts have found that such knowledge may not be established by merely "piecing together all the

facts known by different employees of the bank." *Id.* at 407. But this single comment did not apply to *Aguilar*'s facts, which did not involve any such "piecing together." In *Aguilar*, there was no evidence that any bank employee knew any facts that should have put them on notice of the breaches of fiduciary duties. And in discussing the aiding-and-abetting knowledge requirement, the *Aguilar* court repeatedly referred to the bank's "actual knowledge" or the bank's "understanding" of the facts and did not mention the knowledge or understanding of any individual employee. *Id. Aguilar* simply does not stand for the proposition for which BMO Harris cites it.

The Court did not err in declining to give BMO Harris's requested instruction on individual knowledge. And even if BMO Harris is correct that a single employee must possess the requisite knowledge, there was sufficient evidence from which the jury could conclude that multiple M&I employees each possessed that knowledge. Indeed, the adverse-inference instruction alone could have allowed the jury to conclude that M&I employees knew of the breaches. Consequently, the alleged error did not affect BMO Harris's substantial rights and BMO Harris's motion on this basis is denied.

Finally, BMO Harris contends that it was erroneous to allow the Trustee to argue to the jury that it could find knowledge from M&I's willful blindness, and to allow the Trustee to argue a broader definition of willful blindness than the law supports. BMO Harris contends that the Court's failure to give a willful-blindness instruction—an instruction to which BMO Harris objected—compounded the error

by allowing the jury to be confused regarding the standards for willful blindness.

The Court instructed the jury that it must find that M&I bank "knew that the conduct of" Petters and his accomplices "constituted a fraud." (Dkt. 349 at Inst. 16.) "[T]he element of knowledge may be inferred from deliberate acts amounting to willful blindness to the existence of a fact or acts constituting conscious purpose to avoid enlightenment." *Mattingly v. United States*, 924 F.2d 785, 792 (8th Cir. 1991). As addressed with respect to BMO Harris's motion for judgment as a matter of law, although willful blindness is not a substitute for actual knowledge, willful blindness can allow the jury to infer from other evidence that the defendant had that knowledge. None of the statements the Trustee made in closing arguments misstated this point or could have confused the jury as to what the jury was required to find. BMO Harris's motion is therefore denied.

**2. Substantial assistance**

BMO Harris next argues that the Court's instructions erroneously failed to require the jury to find an element of "blameworthiness" in conjunction with M&I's substantial assistance. The jury was instructed that, for purposes of the aiding-and-abetting claim, "[s]ubstantial assistance' is an affirmative step that is a substantial factor in bringing about an end result." (Dkt. 349 at Inst. 19.) According to BMO Harris, this instruction allowed the jury to conclude that M&I's provision of routine professional services to PCI could be substantial assistance, contravening *Zayed*, 913 F.3d at 720, and *Witzman v. Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 187

(Minn. 1999) (noting that, in cases asserting aiding and abetting liability against professionals such as lawyers, "substantial assistance" means more than "the provision of routine professional services").

But the jury was also instructed that to determine that M&I provided substantial assistance, the jury must find that M&I knew that the conduct of Petters and the other fraudsters was wrongful. Thus, absent some finding of blame, the jury could not have found for the Trustee on the aiding-and-abetting claim. Moreover, to the extent that BMO Harris argues that the evidence established only the provision of "routine professional services," BMO Harris misstates the record. The Trustee proffered evidence that M&I's assistance to PCI went beyond "routine professional services." And the jury was entitled to infer that the documents BMO Harris destroyed would have provided additional evidentiary support for the substantial-assistance element. BMO Harris's motion on this point is denied.

**3. Affirmative defenses**

The arguments BMO Harris raises in this motion challenging the jury instructions on its affirmative defenses of consent and ratification and the statute of limitations are the same arguments the Court rejected in ruling on BMO Harris's motion for judgment as a matter of law on these affirmative defenses. The Court will not repeat that analysis here. BMO Harris's contention that the jury instructions did not correctly reflect Minnesota law on these affirmative defenses also is rejected, and this aspect of the motion is denied.

**4. Investor-complicity evidence**

Next, BMO Harris argues that it was erroneous to preclude BMO Harris from offering evidence that certain investors in PCI were complicit in the fraudulent activities. In the order on the parties' motions in limine, the Court observed that, had BMO Harris wished to challenge the amounts PCI owed to its creditors as fraudulently obtained through those creditors' complicity, BMO Harris should have objected during the bankruptcy proceedings. (Dkt. 241 at 6.) The same holds true with BMO Harris's current challenge.

The contentions BMO Harris raises regarding the Trustee's supposed flouting of the Court's ruling on investor complicity—which prohibited evidence that investors were complicit or were innocent—also were raised in BMO Harris's mid-trial brief on the issue. The Court, having rejected those arguments, will not revisit that decision here. BMO Harris's motion on this basis is denied.

**5. Trustee's testimony**

BMO Harris next contends that a new trial is warranted because the Trustee offered impermissible opinion testimony. In support of this contention, BMO Harris points to testimony in which the Trustee stated his opinion as to what he believed M&I should have done in the case. BMO Harris also relies on the fact that the parties discussed this issue at length during the trial, and although the Court initially proposed a curative instruction, after further argument the Court determined that no curative instruction was necessary.

BMO Harris likens these circumstances to those in *United States v. Peoples,* 250 F.3d 630 (8th Cir. 2001). In *Peoples*, an investigating FBI agent testified repeatedly regarding what she believed certain recorded conversations were actually conveying. As but one of many examples, "[i]n response to conversations [among co-conspirators] that related to the burglary of [the victim's] house, [the agent] testified, 'I believe [the defendant] was there to actually murder [the victim] at the time.'" *Id.* at 640.

The Eighth Circuit reversed the defendant's conviction, noting that the Federal Rules of Evidence require that witnesses have personal knowledge of the matters testified to. *Id.* at 641 (citing Fed. R. Evid. 602). And although law-enforcement officers often are qualified to give expert testimony regarding slang or other terms in recorded conversations that might be unfamiliar to the jury, the testimony of the agent strayed far beyond that permissible scope. *Id.*

The Trustee's testimony here is not akin to the testimony found impermissible in *Peoples*. The challenged testimony, even if improper, was three pages of a trial transcript that spanned more than 3,800 pages, and was not the repeated impermissible opinion testimony the *Peoples* court rejected. And taken as a whole, the testimony was not improper. BMO Harris has not established that a new trial is warranted on this ground.

**6. Proposed jury instructions**

Parties may file requests for jury instructions after the close of evidence "on issues that could not reasonably have been anticipated by an earlier time that the court set for requests." Fed. R. Civ. P.

51(a)(2)(A). On June 6, 2022, the Court informed the parties that their proposed jury instructions were due 21 days before the pretrial hearing, which was held on October 12, 2022. BMO Harris submitted proposed jury instructions in accordance with that order. During the trial, BMO Harris requested to submit additional instructions, specifically on the issues of damages and spoliation. The Court declined to allow BMO Harris to submit those additional instructions.

BMO Harris argues that the Court erred in failing to give six new jury instructions that BMO Harris proposed at the close of the case. None of these instructions involved "issues that could not reasonably have been anticipated by" the date the Court set for the submission of jury instructions, however. As the Trustee points out, at least one of the proposed instructions—regarding the filing of Suspicious Activity Reports (SAR)—seems calculated to mislead the jury to believe that M&I in fact filed one or more SARs, when M&I did not do so. Moreover, the contention that BMO Harris did not know before trial that M&I's compliance policies would be at issue is specious.

The Court did not err in declining to allow BMO Harris to offer new jury instructions months after the deadline to do so. BMO Harris's motion on this point is denied.

**7. Evidence of FBI's investigation**

BMO Harris contends that the Trustee's causation argument hinged on the Trustee's argument that, if M&I had notified the bank of the irregularities in PCI's banking transactions, the FBI would have investigated and shut down PCI much earlier. But,

BMO Harris argues, the FBI did investigate PCI in 2003 and did not shut down PCI. Citing no legal authority for the proposition, BMO Harris asserts that it was prejudicial error to refuse BMO Harris's request to admit evidence regarding the FBI's investigation of PCI's M&I accounts in 2003.

BMO Harris is correct that evidence of a law-enforcement investigation is not always hearsay. *United States v. Davis*, 154 F.3d 772, 778-79 (8th Cir. 1998). But hearsay is not the only consideration the Court must evaluate in determining the admissibility of evidence. Rule 403 requires the Court to determine whether the prejudicial effect of evidence outweighs its probative value, and to decide whether certain evidence should not be presented to the jury because of the risk that the admission of such evidence would confuse the issues or waste the jury's time. Fed. R. Evid. 403. Here, admission of evidence of previous FBI investigations posed the risk that the case would devolve into a mini-trial on this collateral issue. *See White v. McKinley*, 605 F.3d 525, 537 (8th Cir. 2010) (affirming trial court's exclusion of evidence regarding an investigation when "admittance of the evidence would have created a mini-trial" on an issue collateral to the proceedings). BMO Harris is not entitled to a new trial on this ground.

**8. Other errors**

Finally, BMO Harris contends that the cumulative effect of other errors means that the jury's verdict was a result of improper prejudice against BMO Harris. BMO Harris points to a single comment in the Trustee's opening statement, two allegedly prejudicial statements during voir dire, and two

statements in the Trustee's summation that were ostensibly a "flagrant appeal to prejudice against banks." Relying on *Morrissey v. Welsh Company*, 821 F.2d 1294, 1304 (8th Cir. 1987), BMO Harris contends that these five statements, and the Court's refusal to bifurcate the punitive-damages portion of the trial,[6] combined to prejudice the jury against big banks with out-of-state counsel.

*Morrissey* was a wrongful-death action involving the death of a 22-year-old woman. In his opening statement and closing argument, the attorney for the young woman's parents repeatedly made statements that "were plainly unwarranted." *Id.* at 1303. Indeed, the attorney "made numerous appeals for sympathy" in both his opening and closing, repeatedly injecting "improper and prejudicial argument" into his comments to the jury, to which the trial court sustained multiple objections. *Id.* at 1304.

The Trustee's comments at issue here are far from those found improper in *Morrissey*. And even if any of the challenged comments could be viewed as improper, the five statements to which BMO Harris points, in the context of a month-long trial, simply are not the type of "plainly unwarranted and clearly injurious" statements that necessitate a new trial. *Id.* at 1303. BMO Harris's motion for a new trial on this basis is denied.

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[6] The Court will not revisit its ruling that bifurcation of this already-lengthy trial would be "unduly burdensome and time consuming" for all involved and would not unduly prejudice BMO Harris. (Dkt. 214 at 57-58 (quoting *Kociemba v. G.D. Searle & Co.*, 683 F. Supp. 1577, 1579 (D. Minn. 1988)).

### B. Remittitur

Whether to grant a remittitur of damages is a matter committed to the sound discretion of the district court. *Thorne v. Welk Inv., Inc.*, 197 F.3d 1205, 1210 (8th Cir. 1999). "Federal law governs whether remittitur is appropriate, but we 'refer to the law of the forum state when determining the inadequacy or excessiveness of a jury verdict.'" *Tedder v. Am. Railcar Indus., Inc.*, 739 F.3d 1104, 1111 (8th Cir. 2014) (citation omitted) (quoting *Vanskike v. Union Pac. R. Co.*, 725 F.2d 1146, 1150 (8th Cir. 1984)). Minnesota law provides for a remittitur "when excessive damages appear to have been given under the influence of prejudice or passion." *Genzel v. Halvorson*, 80 N.W.2d 854, 856 (Minn. 1957). BMO Harris seeks a conditional remittitur in the alternative to a new trial. Having determined that a new trial is not warranted, the Court will assess whether BMO Harris is entitled to a remittitur of the amount of compensatory or punitive damages the jury awarded.

#### 1. Compensatory damages

BMO Harris asks the Court to reduce the compensatory-damage award to "no more than $78.1 million." (Dkt. 404 at 5.) According to BMO Harris, $78.1 million is the "maximum possible amount to which [the Trustee] could possibly be entitled." *Id.*

BMO Harris's argument regarding compensatory damages is, yet again, another challenge to the Court's determination of the proper measure of damages. As addressed previously, the Court has repeatedly found that the proper measure of damages is the amount PCI was unable to pay its creditors that was proximately caused by M&I's actions. BMO Harris

again argues that the proper measure of damages is the amount PCI's insiders were paid from PCI's accounts. Having rejected this theory repeatedly, the Court declines to address it again here.

Nor is BMO Harris correct that the only fiduciary duty at issue was a duty not to self-deal. The fiduciary duties Petters, Coleman, and White owed to PCI did not disappear when PCI became insolvent, and were not replaced by only the duty not to engage in self-dealing.

Finally, the jury's damages award is not untethered to the evidence presented. BMO Harris may prefer that the jury believed BMO Harris's expert witness as to the appropriate measure of damages, but the decision whether to do so was solely the jury's province. The Trustee claimed more than one billion dollars in damages. The jury's award, which is approximately 25 percent of that amount, represents what the jury viewed as the appropriate damages for one of the Trustee's four claims. As long as there is proof presented to the jury of "a reasonable basis upon which to approximate the amount" of damages, the damage award is left to the jury to determine. *Children's Broad. Corp. v. Walt Disney Co.*, 245 F.3d 1008, 1016 (8th Cir. 2001) (quoting *Leoni v. Bemis Co.*, 255 N.W.2d 824, 826 (Minn. 1977)). There was sufficient evidence from which the jury could have determined its compensatory-damages award. BMO Harris's motion for a remittitur of that award, therefore, is denied.

**2. Punitive damages**

Under Minnesota law, when determining whether punitive damages are appropriate, a jury must

"consider the gravity of the wrong and the need to deter the harmful conduct." *Bradley v. Hubbard Broad., Inc.*, 471 N.W.2d 670, 678 (Minn. Ct. App. 1991). The jury was instructed that punitive damages were warranted only if the evidence "convince[s] you that BMO acted with deliberate disregard for the rights of others. You must have a firm belief, or be convinced there is a high probability, that BMO acted this way." (Dkt. 349 at Instr. 25.) Further, the Court instructed the jury regarding the standards for imposing punitive damages on a principal for its agent's actions and on the factors "which justly bear upon the purpose of punitive damages" under Minnesota law. Minn. Stat. § 549.20, subd. 3. Whether punitive damages are warranted in any particular case "is within the discretion of the jury," and "[t]he weight and force to be given evidence relating to punitive damages is exclusively a jury question." *Wilson v. City of Eagan*, 297 N.W.2d 146, 150 (Minn. 1980).

BMO Harris's first contention that the punitive-damages award is supported by "no evidence" is incorrect. The adverse-inference sanction alone could support a determination that BMO Harris acted with the requisite deliberate disregard to support an award of punitive damages. BMO Harris claims that the evidence established that M&I had policies in place to deter and detect Ponzi schemes. But the evidence also demonstrated that M&I's employees did not comply with those policies. That evidence, together with the adverse-inference instruction, could lead a reasonable jury to impose punitive damages.

BMO Harris also asserts that the amount of the punitive-damages award is excessive. According to BMO Harris, the evidence established that M&I's profits from PCI were only $1.4 million, making a punitive-damage award of nearly $80 million "wildly out of step." (Dkt. 404 at 12.) The jury was entitled to consider both BMO Harris's alleged profit and its financial condition when fashioning the jury's punitive-damages award, and a reasonable jury could have determined that an award of nearly $80 million was appropriate in light of the evidence presented on the relevant factors.

The final argument advanced by BMO Harris is that the punitive damages awarded violate BMO Harris's due-process rights because the award is "grossly excessive or arbitrary." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). When

> evaluating a punitive damages award's consistency with due process [the Court] consider[s] three criteria: (1) the degree or reprehensibility of the defendant's misconduct, (2) the disparity between the harm (or potential harm) suffered by the plaintiff and the punitive damages award, and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases.

*Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 440 (2001). BMO Harris argues that its conduct was not reprehensible and that, if the Court reduces the compensatory damages award to the

amount BMO Harris seeks, the punitive damages are clearly excessive.

The Court has declined to reduce the compensatory damages, however. BMO Harris's argument that the punitive damages are excessive when compared to a reduced compensatory-damages award fails. The punitive damages the jury awarded are not excessive in light of the compensatory-damages award. One "indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 580 (1996). The jury awarded $79,533,392 in punitive damages, or slightly more than 16 percent of the compensatory-damages award of $484,209,716, which is a ratio of six to one.

Although "the constitutional line is [not] marked by a simple mathematical formula," *id.* at 582, when evaluating the propriety of punitive damages, a ratio provides a useful shorthand. But the ratios found to be excessive involve punitive-damages awards that are far above the amount of compensatory damages. *E.g.*, *Conseco Fin. Servicing Corp. v. N. Am. Mortg. Co.*, 381 F.3d 811, 825-26 (8th Cir. 2004) (finding $18 million punitive-damages award violated due process when compensatory damages were $3.5 million and remitting punitive-damages award to $7 million). No decision has determined that a negative ratio, where the punitive damages are a fraction of the compensatory-damages award, is excessive. Indeed, even if the Court had reduced the compensatory damages as BMO Harris requested, a ratio of approximately one to one would not violate due process. *See State Farm Mut. Auto. Ins. Co. v.*

*Campbell*, 538 U.S. 408, 425 (2003) ("Single-digit multipliers are more likely to comport with due process . . . than awards with ratios in range of 500 to 1.").

Nor is BMO Harris correct that the evidence could not support a jury determination that BMO Harris's conduct was sufficiently egregious to warrant a punitive-judgment sanction. The jury was instructed regarding the standards to use to determine whether punitive damages were appropriate, and the Court must assume that the jury followed those instructions. *Francis v. Franklin*, 471 U.S. 307, 324 n.9 (1985) (noting "the crucial assumption underlying our constitutional system of trial by jury that jurors carefully follow instructions"). There was sufficient evidence presented from which the jury could have found that punitive damages were appropriate here. And even if BMO Harris were correct that the evidence of reprehensible conduct was lacking, the adverse-inference instruction permitted the jury to infer that the destroyed documents would contain evidence of that conduct. BMO Harris's challenge to the punitive-damages award fails.

**ORDER**

Based on the foregoing analysis and all the files, records and proceedings herein, IT IS HEREBY ORDERED:

1. Plaintiff's motion for pre- and post-judgment interest, (Dkt. 382), is GRANTED as addressed herein.

2. Plaintiff's motion for judgment as a matter of law, (Dkt. 388), is DENIED.

3. Defendant's motion for judgment as a matter of law, (Dkt. 397), is DENIED.

4. Defendant's motion for a new trial or conditional remittitur, (Dkt. 402), is DENIED.

LET JUDGMENT BE ENTERED ACCORDINGLY.

Dated: June 23, 2023

s/Wilhelmina M. Wright
Wilhelmina M. Wright
United States District Judge