No. 23-2551

In the
United States Court of Appeals for the Eighth Circuit

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

v.

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

On Appeal from the United States District Court
for the District of Minnesota
(The Honorable Wilhelmina M. Wright)
Case No. 0:19-cv-01756

BRIEF OF *AMICI CURIAE* THE BANK POLICY INSTITUTE, THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION, AND THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF DEFENDANT-APPELLANT, IN SUPPORT OF REVERSAL

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October 13, 2023

CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned counsel for the Bank Policy Institute ("BPI"), the Securities Industry and Financial Markets Association ("SIFMA"), and the Chamber of Commerce of the United States of America ("Chamber") hereby certify that they have no parent corporation and that no publicly held corporation owns 10% of their stock.

October 13, 2023

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The Bank Policy Institute is a nonpartisan public policy, research and advocacy group that represents universal banks, regional banks, and the major foreign banks doing business in the United States. The Institute produces academic research and analysis on regulatory and monetary policy topics, analyzes and comments on proposed regulations, and represents the financial services industry with respect to cybersecurity, fraud, and other information security issues. Issues of focus include capital and liquidity regulation, anti-money-laundering, payment systems, consumer protection, bank powers, bank examination, and competition in the financial sector.

The Securities Industry and Financial Markets Association ("SIFMA") is the leading trade association for broker-dealers, investment banks and asset managers operating in the U.S. and global capital markets. On behalf of the industry's one million employees, SIFMA advocates on legislation, regulation and business policy affecting retail and institutional investors, equity and fixed income markets and related products and services. SIFMA serves as an industry

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[1] No counsel for a party authored this brief in whole or in part. No persons other than *Amici*, their members, or their counsel contributed money intended to fund this brief's preparation or submission. Pursuant to Fed. R. App. P. 29(a)(2), counsel for Defendant-Appellant consents to the filing of this brief and counsel for Plaintiff-Appellee does not oppose it.

coordinating body to promote fair and orderly markets, informed regulatory compliance, and efficient market operations and resiliency. SIFMA also provides a forum for industry policy and professional development. SIFMA, with offices in New York and Washington, D.C., is the U.S. regional member of the Global Financial Markets Association (GFMA).

The Chamber of Commerce of the United States of America ("Chamber" and, together with BPI and SIFMA, "*Amici*") is the world's largest business federation. The Chamber represents approximately 300,000 direct members and indirectly represents the interests of more than 3 million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community.

The district court's decision below wrongly exposes banks and other financial institutions operating in Minnesota (including *Amici*'s members) to significant liability to the estates of criminals who, unbeknownst to the banks due to the criminals' deceit, use the banks' services to conduct illegal activities. Specifically, the district court below improperly lowered the scienter standard governing liability for aiding and abetting fraud and altogether eliminated the *in pari* *dilecto* defense against entities that were at some point placed into receivership. The decision below is wrong on the law, and it threatens to force banks operating in Minnesota to adopt a more stringent monitoring system than that required by the federal government and other states, thus creating an unwieldy patchwork of regulation over our nation's financial system and potentially reducing the availability of cost-efficient banking services in Minnesota.

INTRODUCTION

Both the scienter standard for aiding and abetting liability and the application of the *in pari delicto* defense to claims brought by bankruptcy trustees are critical legal questions affecting U.S. financial institutions and other businesses. This case arises from a years-long Ponzi scheme orchestrated by Thomas J. Petters, owner, director, and CEO of Petters Company, Inc. ("PCI").[2] Throughout the scheme, PCI fraudulently obtained billions of dollars, which were wired through PCI's account at National City Bank, which was ultimately acquired by another bank, which in turn was acquired by BMO Harris Bank ("BMO" and, collectively with its predecessors, the "Bank"). *See Kelley* v. *BMO Harris Bank N.A.*, 2023 WL 4145827, at *1 (D. Minn. June 23, 2023).

The trustee of PCI's estate sued BMO, arguing the BMO aided and abetted Petters' breaches of fiduciary duty. In denying BMO's motion for summary judgment, the district court improperly (i) imposed on BMO a negligence (bordering on strict liability) standard for aiding and abetting PCI simply by providing ordinary banking services to it, and (2) ruled that BMO could not invoke an *in pari delicto* defense against the estate because PCI had previously been placed into receivership.

[2] In 2009, a jury found Petters guilty of wire fraud, mail fraud, money laundering, and conspiracy; he was sentenced to 50 years of imprisonment and three years of supervised release. *United States* v. *Petters*, 663 F.3d 375, 378 (8th Cir. 2011).

The district court's rulings—culminating in a jury verdict finding the Bank liable for aiding and abetting breach of fiduciary duty and awarding a total of over $560 million in damages ($484,209,716 in compensatory damages and $79,533,392 in punitive damages)—have wide-reaching and negative impacts on *Amici*'s members. Although *Amici* believe that the facts presented at trial did not establish aiding and abetting liability, *Amici* write to explain that the district court's ruling wrongly exposes financial institutions to significant liability and costs on top of those they have put in place in response to federal laws and regulations. The district court's ruling also has the effect of singling out Minnesota banking customers for heightened scrutiny for potential liability from transactions, which could lead to disjointed internal regulatory systems or banks' refusals to do business with certain Minnesota customers. The result will be undue harm to the financial system and the economy as a whole.

ARGUMENT

I. THE DISTRICT COURT'S TREATMENT OF THE SCIENTER REQUIREMENT LEADS TO INCONSISTENT PUBLIC POLICY REGARDING BANKS' ONGOING REGULATORY COMPLIANCE.

A. Banks Are Already Subject to Numerous KYC, AML, and Other Requirements Under Federal and State Laws and Regulations.

Federal law has established a regulatory Know Your Customer ("KYC") and Anti-Money Laundering ("AML") regime governing banks' customer relationships that provides substantial barriers to wrongful conduct. Since 1970, banks have been required to adhere to the Currency and Foreign Transactions Reporting Act ("Bank Secrecy Act" or "BSA"), 31 U.S.C. § 5311 *et seq.*, which was a response to the "increasing use of banks and other institutions as financial intermediaries by persons engaged in criminal activity." *Ratzlaf* v. *United States*, 510 U.S. 135, 138 (1994). Congress has repeatedly amended and expanded the BSA, including through the establishment of the Financial Crimes Enforcement Network ("FinCEN") in 1990, a bureau of the U.S. Department of the Treasury focused on combating money laundering. Banks are required to establish robust programs to ensure compliance with the BSA. *See* 12 U.S.C. § 1818(s); 31 U.S.C. § 5318(h). Banks are also required to closely monitor transactions on a risk-basis and report suspicious activity. *See* 31 U.S.C. § 5318(g).

Importantly, banks and certain other financial institutions are required by federal regulations to verify the identities of their customers, *see* 31 U.S.C. § 5318(l), conduct due diligence on them, and monitor transactions on an ongoing and risk basis, *see, e.g.*, 31 C.F.R. § 1020.210(a)(2)(v). These regulations are extensive and far-reaching, at a minimum requiring banks to verify a customer's personal information, *see* 31 C.F.R. § 1020.220(a)(2), as well as conduct sufficient due diligence to understand "the nature and purpose of [the] customer relationship" and develop a personalized risk profile for that customer. 31 C.F.R.

§ 1020.210(a)(2)(v)(A).[3] In the event that a bank encounters a "transaction relevant to a possible violation of law or regulation," federal regulations require reporting the transaction to Treasury Department officials within 30 days, which the bank may do by filing a confidential Suspicious Activity Report ("SAR") with FinCEN. 31 C.F.R. § 1020.320(a)-(b). Transactions involving at least $5,000 must be reported if the bank knows, suspects, or has reason to suspect that they involve funds derived from unlawful activities, lack a business or lawful purpose, or are out of the ordinary for a particular customer. 31 C.F.R. § 1020.320(a)(2).

Financial institutions are also required to assess continuously both the general risks of their activities and the specific risks posed by each customer; the latter process can evolve over time depending on a particular customer's risk-profile, activities and new information that becomes available. 31 C.F.R. §§ 1020.210(a)(2)(v)(B), 1020.320(a)(2)(iii). When customer monitoring or new information raises red flags—even if those flags are not in themselves indications of illegal activity—banks follow up by investigating more closely; customers with more red flags merit closer and more frequent monitoring. *See, e.g.*, FFIEC,

[3] *See also* FFIEC Examination Manual, Customer Due Diligence (2018), http://bsaaml.ffiec.gov/docs/manual/06_AssessingComplianceWithBSARegulatoryRequirements/02.pdf.

BSA/AML Manual Appendix F: Money Laundering and Terrorist Financing "Red Flags", https://bsaaml.ffiec.gov/manual/Appendices/07.

Banks maintain comprehensive systems and employ substantial resources to comply with these regulatory requirements. A survey of 17 BPI member institutions found that, as of 2017, they collectively employed over 14,000 individuals and deployed up to 20 information technology systems to assist in BSA/AML compliance; 14 of these institutions together had invested approximately $2.4 billion in these efforts. BPI, *Getting to Effectiveness: Report on U.S. Financial Institution Resources Devoted to BSA/AML & Sanctions Compliance* 2 (Oct. 29, 2018), https://bpi.com/getting-to-effectiveness-report-on-u-s-financial-institution-resources-devoted-to-bsa-aml-sanctions-compliance/.

Federal regulators conduct frequent examinations of compliance programs, and banks face severe penalties for noncompliance. *See* FFIEC, *Assessing the BSA/AML Program*, https://bsaaml.ffiec.gov/manual/AssessingTheBSAAMLC omplianceProgram/01. Banks that lack sufficient KYC/AML controls are subject to regulatory sanctions and fines ("civil money penalties"). In 2021, regulators issued fines against financial institutions relating to AML program deficiencies that totaled approximately $1.6 billion. *See* Kroll, *Global Enforcement of Anti-Money Laundering Regulation: Shift in Focus*, http://kroll.com /en/insights/publications/financial-compliance-regulation/global-enforcementreview. In the five years preceding 2021, AML fines totaled more than $5.1 billion. *Id.* KYC/AML compliance is diligently monitored, and requires vast internal procedures and systems, and significant deficiencies can lead to investigation and prosecution by law enforcement authorities.

B. The District Court's Treatment of the Minnesota Aiding and Abetting Law Undermines the Federal and State BSA/AML Regulatory System.

The federal regime described above creates a balance between (i) the need for banks to be able to screen customers to deter and prevent illegal activity, while (ii) enabling customers to engage in transactions efficiently and inexpensively, and (iii) establishing the basic ground rules that allow banks to process transactions without exposing themselves to a negligence standard that borders on strict liability. In creating this balance, Congress specifically chose not to create a private right of action for BSA violations. *Venture Gen. Agency, LLC* v. *Wells Fargo Bank, N.A.*, 2019 WL 3503109, at *6 (N.D. Cal. Aug. 1, 2019) ("Congress' purpose in enacting the BSA was to ensure that certain business records assist government agencies in conducting criminal, tax, or regulatory investigations. . . . [C]ourts are unanimous in holding that there is no private right of action under the BSA.").

Congress enacted this federal regime against the background of state common law regimes that did not impose a negligence standard that borders on strict liability for common banking activities. By imposing this type of negligence standard, the district court's decision below thus undermines the federal regulatory regime's balance and poses unwarranted risks for banks going forward.

First, the court sought to aggregate what unrelated individuals at the Bank knew about the bad actor, without evidence that any of these individuals, working in different areas of the Bank, ever shared their disjointed pieces of knowledge. *See* Order Denying Defendant's Motion to Dismiss at 17, *Kelley*, No. 12-04288 (ECF No. 75); *Kelley*, 2023 WL 4145827, at *14. From this, the court still found that there had been "actual knowledge," despite the fact that the knowledge found was circumstantial and fragmented at best. *See Kelley*, 2023 WL 4145827, at *14. In other words, contrary to this Court's requirement that a defendant truly have "actual knowledge" to be liable for aiding and abetting, the district court effectively interpreted Minnesota's aiding and abetting law as a strict liability offense. *See Zayed* v. *Associated Bank, N.A.*, 913 F.3d 709, 715 (8th Cir. 2019) (evidence "must demonstrate that the aider-and-abettor *actually knew* of the underlying wrongs committed"); *Camp* v. *Dema*, 948 F.2d 455, 459 (8th Cir. 1991) (noting that "knowledge . . . is inherent in the terms 'aiding and abetting' themselves" and that "the knowledge element is critical"); *see also United States* v. *Philip Morris USA Inc.*, 566 F.3d 1095, 1122 (D.C. Cir. 2009) ("[W]e are dubious of the legal soundness of the 'collective intent' theory [under which] corporate knowledge of certain facts can be accumulated from the knowledge of various individuals.").

Second, the court improperly ignored that aiding and abetting liability typically requires a showing of "substantial assistance" on the part of the alleged aider and abettor, rather than the mere performance of routine activities. *Zayed*, 913 F.3d at 720 (citing *Witzman* v. *Lehrman, Lehrman & Flom*, 601 N.W.2d 179, 189 (Minn. 1999) (no aiding and abetting for providing basic accounting services)). This "substantial assistance" requirement is an important protection for banks, which should only be subject to aiding and abetting liability where there is some evidence of the bank's active participation in the scheme, or evidence of actual knowledge of the scheme. Citing *Witzman*'s holding that the provision of routine accounting services by an accountant does not rise to the level of the requisite "substantial assistance" for aiding and abetting liability, this Court has held that "[t]he same could easily be said of banks." *Id.* (quoting *Witzman*, 601 N.W.2d at 189). Importantly, substantial assistance and actual knowledge go hand in hand, and a showing of one will demand less evidence of the other. *See Varga* v. *U.S. Bank Nat. Ass'n*, 952 F. Supp. 2d 850, 859 (D. Minn. 2013), *aff'd*, 764 F.3d 833 (8th Cir. 2014). "If it were otherwise, aiding and abetting would be indistinguishable from simply aiding," which "would cast too wide a net, bringing under it parties involved in nothing more than routine business transactions." *Camp*, 948 F.2d at 459.

Thus, the Court's ruling threw out of balance the standard aiding and abetting regime—requiring knowledge and substantial assistance—and the federal regulations allows banks to facilitate efficient and cost-effective services to customers without the looming fear of potential liability embedded in every single routine transaction.[4]

If affirmed, the ruling below will significantly increase the costs and burdens for banks and potentially result in negative outcomes for bank customers in Minnesota. Working with accountholders from Minnesota would now require increased scrutiny at both the account-opening and transaction-monitoring levels

[4] Numerous courts have refused to find aiding and abetting by financial institutions in connection with Ponzi schemes. *See, e.g.*, *Lawrence* v. *Bank of Am., N.A.*, 455 Fed. App'x 904, 907 (11th Cir. 2012) (holding atypical transactions insufficient to give bank "providing only routine banking services" actual knowledge of alleged Ponzi scheme and affirming dismissal of claims alleging bank aided and abetted fraudulent scheme); *Rosner* v. *Bank of China*, 349 Fed. App'x 637, 639 (2d Cir. 2009) ("Even if [bank] had reason to suspect that [customer] was laundering money, this does not mean that [bank] had actual knowledge of the fraudulent scheme perpetrated by [customer]."); *PLB Investments LLC* v. *Heartland Bank and Trust Co.*, 2021 WL 492901, at *6, *9 (N.D. Ill. Feb. 9, 2021) (rejecting "should have known" standard and holding transfers to Ponzi schemer's personal accounts insufficient to demonstrate "actual knowledge"); *Wiand* v. *Wells Fargo Bank, N.A.*, 938 F. Supp. 2d 1238, 1246 (M.D. Fla. 2013) ("Cases addressing the liability of banks for Ponzi schemes consistently hold that 'red flags' arising from suspicious activity giving rise to the presumption that the bank should have known about the Ponzi scheme are insufficient to allege aiding-and-abetting liability."); *In re Agape Litig.*, 773 F. Supp. 2d 298 (E.D.N.Y. 2011) (granting bank's motion to dismiss where allegations were "red flags" or badges of fraud); *Litson–Gruenber* v. *JPMorgan Chase & Co.*, 2009 WL 4884426, at *3 (N.D. Tex. 2009) (dismissing bank case where plaintiffs' "narrative is . . . a story of suspicious activity that Plaintiff contends should have provided Defendant notice of the [P]onzi scheme").

beyond that designed to comply with already existing federal requirements. Banking transactions would need to be approached with increased caution, delay, and/or ultimately rejection if banks could be liable regardless of whether they have actual knowledge *and* regardless of their level of active participation in a fraudulent scheme. *See* David S. Ruder, *Multiple Defendants in Securities Law Fraud Cases*, 120 U. Penn. L. Rev. 597, 630 (1972) ("Imposition of such liability upon banks [absent actual knowledge] would virtually make them insurers regarding the conduct of insiders to whom they loan money."). This will be burdensome for *amici*'s members, who could be forced to develop Minnesota-specific controls and compliance programs beyond the extensive KYC/AML regimes already in place.

As a result, banks may become wary of taking on Minnesota customers, thereby increasing the number of unbanked and underbanked people in the State, leading to a less available and more unstable financial system generally. *See* FDIC, *2021 FDIC National Survey of Unbanked and Underbanked Households*, https://www.fdic.gov/analysis/household-survey/2021report.pdf ("[E]xpanding Americans' access to safe, secure, and affordable banking services is integral to . . . maintaining the stability of and public confidence in the U.S. financial system.").

II. THE DISTRICT COURT'S REFUSAL TO ALLOW THE *IN PARI DELICTO* DEFENSE IS ERRONEOUS AND UNFAIRLY HARMS BANKS IN PARTICULAR.

The *in pari delicto* doctrine provides 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) (citing *Black's Law Dictionary* 806 (8th ed. 2004)). The doctrine dates back to the common law and has been a foundational aspect of the judicial system since its inception. *See, e.g.*, *Stephenson* v. *Deutsche Bank AG*, 282 F. Supp. 2d 1032, 1065 (D. Minn. 2003) ("The equitable defense of *in pari delicto*, which literally means 'in equal fault,' is rooted in the common-law notion that a plaintiff's recovery may be barred by his own wrongful conduct.") (internal citations omitted); *Kirscher* v. *KPMG*, 15 N.Y.3d 460, 464 (2010) (*in pari delicto* "has been wrought in the inmost texture of our common law for at least two centuries").

The court's decision, however, would undermine this long-recognized and absolute defense. Under that decision, a company could avoid the defense by simply entering into a receivership several days before filing for bankruptcy.

It is black-letter law that a bankruptcy trustee who asserts claims that belong to the debtor is "subject to any equitable or legal defenses that could have been raised against" the debtor, including "the equitable defense of *in pari delicto*." *Grassmueck*, 402 F.3d at 836. Courts routinely apply the *in pari delicto* defense in cases in which the bankruptcy trustee of a company, which was found to have engaged in misconduct, files lawsuits against others alleging that they failed earlier to detect, report, prevent, or stop its own misconduct. *See id.*; *Official Cmte. of Unsecured Creditors of PSA, Inc.* v. *Edwards*, 437 F.3d 1145, 1150-51 (11th Cir. 2006) (collecting cases). As intended, in the bankruptcy context, the *in pari delicto* defense prevents debtors or their representatives from attempting to recover from third parties for their own misconduct.

Here, in an outlier decision (Br. for Appellant BMO Bank N.A. ("Appellant Br.") at 9-10), the district court held that, because PCI had entered into a receivership five days before it filed for bankruptcy, Plaintiff Douglas Kelley, who was acting as both receiver and bankruptcy trustee, was not subject to the *in pari delicto* defense. *See* Order Denying Defendant's Motion for Summary Judgment at 16, *Kelley* v. *BMO Harris Bank N.A.*, No. 12-04288 (Bankr. D. Minn. June 27, 2019) (ECF No. 351). Relying on outdated and inapplicable case law (Appellant Br. at 22-28), the court held that receivership somehow "removed" the company's wrongdoing such that the trustee sued on behalf of a company devoid of any misconduct. *Id.* at 15. As such, the jury was not instructed on the *in pari delicto* defense. *See* Final Jury Instructions, *Kelley* v. *BMO Harris Bank N.A.*, No. 19-cv-01756-WMW (D. Minn. Nov. 8, 2022) (ECF No. 349).

The decision is not only erroneous, but threatens to harm banks disproportionately going forward, undermine the *in pari delicto* defense, and create the improper incentive for companies to go into receivership before filing for bankruptcy regardless of whether that extraordinary remedy is appropriate.

A. Weakening *In Pari Delicto* Leads to Unnecessary Litigation Against Banks and Disrupts the Routine Provision of Financial Services.

Banks are involved in the vast majority of payment transactions that occur in the United States. To illustrate, in the second quarter of 2023 alone, the Automatic Clearing House, which handles electronic payment transfers in the United States for banking institutions, facilitated 7.8 billion payments transferring $20 trillion. *See* National Automated Clearinghouse Association, *Overall ACH Network Volume*, https://www.nacha.org/content/ach-network-volume-and-value-statistics. The Clearing House Interbank Payments System ("CHIPS") and the Federal Reserve's Fedwire collectively transfer over $6.05 trillion each day. *See* The Clearing House, *About CHIPS*, https://www.theclearinghouse.org/payment-systems/chips. Federal Reserve, *Fedwire Funds Service – Monthly Statistics*, https://www.frbservices.org/resources/financial-services/wires/volume-value-stats/monthly-stats.html. This, along with the perception that banks have "deep pockets," makes banks a ubiquitous target of litigation, including from the bankruptcy estates of bad actors. Indeed, the trend of litigation against financial institutions by bankruptcy receivers and trustees has increased dramatically over the last two decades, and is expected to increase further yet. *See How Will Bankruptcy Trustee and Receiver Litigation Be Different in the Future?*, Nat'l L. Rev. (May 21, 2021).[5] In cases of admitted wrongdoing by the bankrupt customer, there is no negative consequence to the trustee in seeking to impute the bankrupt's wrongdoing to the bank that processed the transactions.

The district court's elimination of the *in pari delicto* defense is thus particularly detrimental to banks as the providers of financial services. Under the district court's reasoning, banks would no longer have the benefit of this affirmative defense against companies that were at one point or another in receivership, and in many cases would have to navigate additional exposure for vast sums of money that should otherwise be protected by *in pari delicto*. As explained *supra* at 9, banks must balance the need to utilize sufficient controls to identify customers engaged in misconduct while also running efficient businesses and providing their customers with access to the financial system and cost-effective payment mechanisms. The controls in place must not be so burdensome and expensive as to make banks unduly wary of taking on customers or delaying or preventing legitimate transactions. Without these affirmative defenses, banks would be forced to develop additional and

[5] The COVID-19 pandemic has seen an increase in trustee-led lawsuits, and "trustee and receiver lawsuits are [] expected to increase in the subsequent months and years." *How Will Bankruptcy Trustee and Receiver Litigation Be Different in the Future?*, Nat'l L. Rev. (May 21, 2021).

restrictive internal controls to protect themselves from further exposure that would substantially interfere with regular business and disadvantage customers.

B. Creditors Will Be Incentivized to Place Companies into Receivership at the First Sign of an Impending Bankruptcy.

The district court's holding will also likely incentivize companies to enter into receivership before a bankruptcy trustee is appointed, especially in instances of suspected fraud. Although the appointment of a receiver is typically seen as an extraordinary remedy, *Morgan Stanley Smith Barney LLC* v. *Johnson*, 952 F.3d 978, 980 (8th Cir. 2020) ("a receiver is an extraordinary equitable remedy that is only justified in extreme situations"), if entering receivership will eliminate powerful affirmative defenses for banks, more companies likely will seek to enter receivership in an effort to "cleanse" a company from wrongdoing. Per the district court's decision, the receivership, no matter how brief, absolves a company of any wrongdoing. Thus, once "cleansed," a bankruptcy trustee would have seemingly unlimited authority to recover funds for a bankrupt entity guilty of fraud or other wrongdoing. The district court's decision would pave the way for unrestricted recovery for trustees, who could go after any financial services firm that provided some service in the ordinary course of business that a company used in committing its wrongdoing. This too flies in the face of the foundational premises of trusteeship. *See Grassmueck*, 402 F.3d at 836.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment.

October 13, 2023

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CERTIFICATE OF COMPLIANCE

This document complies with the type-volume limit of Fed. R. App. P. 29(a)(5) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 3,979 words. This document complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word 2016 in 14-point Times New Roman. This document has been scanned for viruses and is virus-free.

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing brief was filed electronically on October 13, 2023 and will therefore be served electronically on all counsel of record.

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