

UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA

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R.J. Zayed,  
*in his capacity as*  
*Court Appointed Receiver for The Oxford*  
*Global Partners, LLC, Universal Brokerage,*  
*FX, and Other Receiver Entities,*  
Plaintiff,

Case No. 13-cv-232 (DSD/SER)

**ORDER**

v.

Associated Bank, N.A.,

Defendant.

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Brian W. Hayes and Tara C. Norgard, Esqs., Carson Caspers Vandenburg Lindquist & Schuman, PA, Minneapolis, Minnesota, for Plaintiff.

Keith A. Vogt, Esq., Takiguchi & Vogt, LLP, Oak Brook, Illinois, for Plaintiff.

William W. Flachsbart, Esq., Flachsbart & Greenspoon, LLC, Chicago, Illinois, for Plaintiff.

Alex C. Lakatos, Esq., Mayer Brown LLP, Washington, D.C., for Defendant.

Charles F. Webber, Esq., Faegre Baker Daniels LLP, Minneapolis, Minnesota, for Defendant.

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STEVEN E. RAU, United States Magistrate Judge

The above-captioned case comes before the undersigned on Plaintiff R.J. Zayed's Motion to Compel Production of Litigation Hold Notices and Inspection of Document Repositories of Two Key Witnesses ("Motion to Compel Hold Notices") [Doc. No. 160] and Motion to Compel Documents and Testimony Relating to Suspicious Activity Reports ("Motion to Compel SARs") [Doc. No. 166]. The Court heard oral arguments on November, 21, 2016, and ruling from the

bench, denied the motions. The purpose of this Order is to memorialize the Court's rulings for the convenience of the parties and the clarity of the docket.

## **I. BACKGROUND**

A full recitation of the allegations and factual background can be found in the Eight Circuit's decision in *Zayed v. Associated Bank, N.A.*, 779 F.3d 727, 730–32 (8th Cir. 2015) (reversing the district court's order granting Defendant's motion to dismiss and remanding for further proceedings). At issue here is whether Plaintiff's motions were timely filed. Therefore, only the relevant portion of the factual and procedural history of the case is presented.

The Scheduling Order was amended numerous times. *See* (First Am. Pretrial Scheduling Order) [Doc. No. 82]; (Second Am. Pretrial Scheduling Order) [Doc. No. 107]; (Third Am. Pretrial Scheduling Order) [Doc. No. 123]; (Fourth Am. Pretrial Scheduling Order) [Doc. No. 140]; (Fifth Am. Pretrial Scheduling Order) [Doc. No. 157]. The discovery deadline of June 3, 2016, was established in the Third Amended Pretrial Scheduling order on April 25, 2016, and did not change in subsequent Scheduling Orders. As a result, all scheduling orders on or after April 25, 2016, stated unequivocally that “[a]ll fact discovery of any kind shall be commenced in time to be completed on or before June 3, 2016.” *See, e.g.*, (Third Am. Pretrial Scheduling Order at 2).

With respect to Plaintiff's Motion to Compel Hold Notices, Plaintiff provided an e-mail to the Court during the hearing that was sent from Mr. Sarles and that was allegedly not included in the document production produced by the Defendant.<sup>1</sup> From the document itself, it is unclear when exactly Plaintiff obtained this document. The document is labeled with two separate dates,

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<sup>1</sup> Mr. Sarles was an employee at Associated Bank, N.A., and allegedly assisted those involved in the Ponzi scheme underlying the cause of action in this case by bypassing security safeguards when opening an account and allowing transfers from that account for individuals without signatory authority. *See Zayed*, 779 at 730–32.

February 16, 2016, and May 21, 2016. Regardless of the exact date by which Plaintiff was in possession of this document, the latest possible date was May 21, 2016, because the document was used during the deposition of Mr. Sarles on May 21, 2016. As a result of the existence of this and other “missing” documents, Plaintiff asserts that “indicia of spoliation” exists and that this Court should allow Plaintiff to collect documents from the original computer sources. *See* (Mem. of Law in Supp. of Receiver’s Mot. to Compel Hold Notices) [Doc. No.162 at 11].

With respect to Plaintiff’s Motion to Compel SARs, many of Plaintiff’s discovery requests date back more than a year. For example, Plaintiff’s Request for Production No. 8 was issued on August 24, 2015, and a response including objections regarding the privilege surrounding suspicious activity reports (“SARs”) was received by Plaintiff on September 28, 2015. *See, e.g.*, (Def. Associated Bank, N.A.’s Opp’n to Receiver’s Mot. to Compel SARs, “Def’s Opp’n to Mot. to Compel SARs” ) [Doc. No. 212 at 5]. Similarly, during depositions conducted by Plaintiff in April and May, Defendant raised numerous SARs-related objections. *See, e.g.*, (Mem. of Law in Supp. of Receiver’s Mot. to Compel SARs, “Mem. in Supp. of Motion to Compel SARs”) [Doc. No. 168 at 8–11]. In some instances, Plaintiff asserts that these objections had a chilling effect on the deponent. *See (id. at 12)*. In addition to a supplemental document production, Plaintiff also seeks to retake seven depositions that were conducted in the months of April, May, June, and September. *See (id. at 25)*; *see also* (Decl. of William W. Flachsbart in Supp. of the Receiver’s Mot. to Compel SARs, “Flachsbart Decl.”) [Doc. No. 169 ¶¶ 3–10] (detailing the persons from which Plaintiff seeks additional depositions).

## **II. DISCUSSION**

### **A. Legal Standard**

Courts do not abuse their discretion for denying a motion to compel that is untimely filed after the close of discovery, but before the non-dispositive deadline. *See Firefighter's Inst. for Racial Equal. v. City of St. Louis*, 220 F.3d 898, 903 (8th Cir. 2000).

**B. Analysis**

While it is true that Plaintiff filed its Motion to Compel Hold Notices and its Motion to Compel SARs on the eve of their non-dispositive motion deadline, this ignores the fact that the close of discovery controls in this instance. This Circuit has routinely held that without a compelling justification, it is well within the discretion of the court to deny a motion to compel as untimely when filed after the close of discovery. *See Firefighter's Inst. for Racial Equal.* 220 F.3d at 903 (denying Plaintiff's motion to compel and stating that Plaintiff provided no justification for filing its motion to compel three days after the close of discovery).

As detailed above, Plaintiff was put on notice before the close of discovery on June 3, 2016, regarding the issues for which they filed their motions on October 20, 2016. For example, with respect to SARs-related objections, Defendant asserted those objections to Requests for Productions dating back to September 2015, and in depositions conducted in April and May of 2016. *See* (Def's Opp'n to Mot. to Compel SARs at 5); (Mem. in Supp. of Motion to Compel SARs at 8–11). Likewise, with respect to potential indicia of spoliation, Plaintiff had a document from Mr. Sarles in its possession no later than May 21, 2016, that they assert was not produced.

Here, Plaintiff provides no legitimate justification for the delay between when they had the information and the date the motions were filed beyond the assertion that the non-dispositive motion deadline had not tolled at the time of the filing of Plaintiff's motions. With respect to Plaintiff's Motion to Compel Hold Notices, Plaintiff's assertion that they were first made aware of indicia of spoliation only after the September 2016 deposition is unavailing. For example,

Plaintiff provided this Court with an e-mail from Mr. Sarles obtained no later than May 21, 2016, which they claim was not produced by the Defendant. If Plaintiff was concerned that Defendant was not producing certain documents or may have caused the spoliation of evidence regarding Mr. Sarles—a central figure in this lawsuit—it would have been prudent to take steps immediately and not wait until October 20, 2016, more than four months after the close of discovery to seek relief from the Court.

Similarly, with respect to Plaintiff's Motion to Compel SARs, Plaintiff's delay is equally problematic. For example, Plaintiff received initial objections to some of its discovery requests on September 28, 2015, almost a full year before bringing their Motion to Compel SARs. Likewise, during depositions conducted by Plaintiff in April and May, Defendant raised numerous SARs-related objections. Given the importance Plaintiff seems to place on these SARs-related discovery issues, the time to raise them is not months after the close of discovery on the eve of both the non-dispositive and dispositive motion deadlines. For similar reasons, if Plaintiff believed that the SARs-related objections had a chilling effect on some of the depositions as a whole, waiting nearly five months after the close of discovery to raise this issue is not a timely response.

As a result, the Court in its discretion considers both the Motion to Compel Hold Notices and the Motion to Compel SARs as being untimely filed.

### **III. CONCLUSION**

Accordingly, based on all the files, records, and proceedings herein, **IT IS HEREBY ORDERED** that Plaintiff R.J. Zayed's Motion to Compel Production of Litigation Hold Notices and Inspection of Document Repositories of Two Key Witnesses [Doc. No. 160] and Motion to

Compel Documents and Testimony Relating to Suspicious Activity Reports [Doc. No. 166] are  
**DENIED.**

Dated: November 22, 2016

*s/ Steven E. Rau*  
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STEVEN E. RAU  
United States Magistrate Judge