UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

R.J. ZAYED, In His Capacity As Court-Appointed Receiver For The Oxford Global Partners, LLC, Universal Brokerage, FX, and Other Receiver Entities Plaintiff, vs. ASSOCIATED BANK, N.A., Defendant.	Case No. 13-cv-00232 (DSD-JSM)

MEMORANDUM OF LAW IN SUPPORT OF DEFENDANT'S OPPOSITION TO PLAINTIFF'S MOTION TO DE-DESIGNATE DOCUMENTS AND UNSEAL COMPLAINT

Associated Bank respectfully opposes the motion ("Mot.") of Plaintiff R.J. Zayed ("Receiver") in his capacity as Court-Appointed Receiver, and the motion ("Star Trib. Mot.") of putative intervenor Star Tribune, to de-designate certain documents subject to a Stipulated Protective Order and unseal the redacted Complaint filed in this action. Associated Bank opposes de-designation of a small number of documents (which are also referred to in the Complaint).

The motions should be denied for several reasons. To begin, the Receiver obtained the documents he seeks to unseal through an improper use of his subpoena power, in that the Receiver—contrary to what the Federal Rules allow—took the discovery from Associated not to support one of the actions that the Receiver was already pursuing, but rather to fish for new, as-yet-unfiled claims against Associated. The Receiver should not benefit from this misconduct. Additionally, because this motion

seeks to modify the protective order entered by Chief Judge Michael J. Davis in a different case, the Receiver was required to present the motion to Chief Judge Davis rather than to this Court. On the merits, Associated Bank appropriately designated as Confidential certain documents from within the Bank's private files—including correspondence and employee evaluations—that are not shared with the public, and therefore should remain subject to the Stipulated Protective Order. Nor have the Receiver or Star Tribune established good cause for modifying the Protective Order. There is no common law right of access to discovery materials, which are not "judicial records." And there is no First Amendment right of access, either, because the public has not traditionally enjoyed access to discovery materials, and because public disclosure of discovery materials is not calculated to play a significant role in fostering the functioning of the discovery system.

For these reasons, the motions of the Receiver and Star Tribune should be denied.

FACTS

On June 24, 2011, the Receiver served a Subpoena on Associated Bank in *CFTC v. Cook*, No. 09-cv-3332 MJD/FLN (D. Minn.); *SEC v. Cook*, No. 09-cv-3333 MJD/FLN (D. Minn.); and *SEC v. Beckman, et al.*, No. 11-cv-574 MJD/FLN (D. Minn.). On August 3, 2011, the Receiver and Associated Bank entered into a Stipulated Protective Order "concerning the treatment of information produced in response to the June 24, 2011 Subpoena." *See* Stipulated Protected Order, *CFTC v. Cook*, No. 09-cv-3332 MJD/FLN, Dkt. No. 835 (filed Aug. 3, 2011). In the Stipulated Protective Order, the Receiver unambiguously acknowledged that "the Receiver has sought Confidential

Information (as defined in paragraph 3 below)." *Id*. ¶ 2. The Stipulated Protective Order then afforded Associated Bank latitude to determine which documents it would label as "Confidential" based on its determination that the documents contained confidential information:

> 3. "Confidential Information" means any document, file, portions of files, or response to the Subpoenas—including any extract, abstract, chart, summary, note, or copy made therefrom—that is designated by the Bank in response to the Subpoenas in the manner provided in paragraph 4 below as containing confidential, proprietary, or commercially or personally sensitive information that requires the protections provided in this Stipulated Protective Order.

Id. ¶ 3.

Once the Protective Order was in place, the Bank—relying on the plain meaning of the word "confidential"—designated as "confidential" those internal bank records not ordinarily available to the public, including customer banking records, internal bank files, and employee performance reviews. The Receiver did not object to these designations. To the contrary, the Receiver on several occasions contacted Associated Bank to request additional documents and/or clarifications of documents produced in response to the subpoena, never once contesting the "Confidential" labels.

In the course of discussions between the Receiver and Associated concerning Associated's response to the June 24, 2011, Subpoena, the Receiver made a startling admission. The Receiver acknowledged that he was not subpoenaing Associated's documents for use in any litigation that the Receiver had already filed. Rather, the Receiver admitted that he was using the June 24, 2011, subpoena to obtain Associated's

documents to determine whether the Receiver wished to bring a brand new, as-yet-unfiled, claim against Associated Bank. In the Receiver's own words:

> [T]he Receiver has not yet ascertained whether or not to bring suit against Associated Bank at this time. * * * [T]he Receiver needs to access to complete information about every potential claim; that is the very reason it has issued the June 24, 2011 subpoena to you [Associated Bank].

Declaration of Alex Lakatos Ex. B at 2 (Letter from B.W. Hayes to A. Lakatos (Oct. 27, 2011)). Associated Bank objected to the Receiver's fishing expedition in search of as-yet-unfiled claims against the Bank. *See id.* Ex. A (Letter from A. Lakatos to B.W. Hayes (Oct. 27, 2011)). In response, the Receiver threatened to seek contempt sanctions against Associated Bank if Associated did not produce the documents sought. *Id.* Ex. B at 3. Subject to its objections, Associated Bank agreed to make a production.

On February 4, 2013, the Receiver, in connection with this action and over a year after it received Associated's initial production on July 29, 2011, sought Associated Bank's consent to unseal certain documents that Associated Bank had labeled as "Confidential" pursuant to the Stipulated Protective Order. In response, Associated Bank divided the documents subject to the Receiver's request into three groups.

First, as to documents that would reveal information only about the Receivership Entities and their bank accounts, Associated Bank consented to unseal, reasoning that the decision whether to maintain the confidentiality of such documents that implicate solely the Receivership Entities's own information properly lies with the Receiver. Second, as to documents that would reveal the bank information of third-parties who are not Bank customers, Associated took no position. Had these individuals been Associated's

customers, Associated would have sought to keep their information confidential (something that bank customers expect of their bank). But, as this group of documents involved strangers, Associated took no position. This Court, however, may wish to exercise its own discretion as to whether persons (who, according to the Receiver's allegations, may be victims of a fraud) should have documents relating to their finances unsealed. Third, there are documents that (as the Receiver has acknowledged) are available only from the Bank's files, *see* Lakatos Decl. Ex. C (e-mail from K. Vogt to A. Lakatos, Feb. 20, 2013), and that reflect certain internal operations of the Bank. The Bank keeps such documents confidential in the ordinary course of business, properly labeled them as "confidential" under the Stipulated Protective Order, and maintains that the should remain confidential.

ARGUMENT

I. This Court should decline to entertain the Receiver's motion because the Receiver obtained the documents at issue through an improper use of the discovery process.

The Receiver expressly acknowledged that he used the June 24, 2011, Subpoena in *CFTC v. Cook*, 09-cv-3332 MJD/FLN, not to obtain discovery is support of *that action* (or any other pending action filed by the Receiver), but rather to explore the possibility of bringing *new* claims against Associated Bank, which was not a party to *CFTC v. Cook* (or any other suit filed by the Receiver). *See* Lakatos Decl. Ex. B at 2 ("[T]he Receiver needs to access to complete information about every potential claim; that is the very reason it has issued the June 24, 2011 subpoena to [Associated Bank].").

Although—as Associated Bank will demonstrate at an appropriate time—the

claims that the Receiver ultimately asserted against Associated Bank are without merit, the Receiver's approach of taking discovery in search of such claims was improper. In the words of the Supreme Court, "when the purpose of a discovery request is to gather information for use in proceedings other than the pending suit, discovery properly is denied." *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 352 n.17 (1978); *see also Kaylor v. Fields*, 661 F.2d 1177, 1184 (8th Cir. 1981) ("Discovery should follow the filing of a well-pleaded complaint. It is not a device to enable a plaintiff to make a case when his complaint has failed to state a claim."); *Stoner v. Walsh*, 772 F. Supp. 790, 800 (S.D.N.Y. 1991) ("The purpose of discovery is to find out additional facts about a well-pleaded claim, not to find out whether such a claim exists.").

Accordingly, under the Federal Rules of Civil Procedure, "the parties . . . have no entitlement to discovery to develop new claims or defenses that are not already identified in the pleadings." Fed. R. Civ. P. 26(b)(1), advisory committee note to 2000 amendment; *see also Tottenham v. Trans World Gaming Corp.*, No. 00-cv-7697, 2002 WL 1967023, at *2 (S.D.N.Y. June 21, 2002) (holding that discovery may not be used as a "fishing expedition to discover additional instances of wrongdoing beyond those already alleged"); *Abrahams v. Young & Rubicam*, 979 F. Supp. 122, 129 (D. Conn. 1997) (similar); *Exigence LLC v. Catlin Underwriting Agency US, Inc.*, No. 09-cv-00915, 2010 WL 3398473, at *2 (E.D. Ark. Aug. 26, 2010) (party "has no entitlement to discover information that would assist him in prosecuting his pending state court action or in developing a potential direct action" separate from the suit in which discovery was sought). Relying on this rule, the Court in *Blue Angel Films Ltd. v. First Look Studios*

Inc., No. 08-cv-6469, 2011 WL 830624, at *1-2 (S.D.N.Y. March 9, 2011), quashed a subpoena on Bank of America that—like the Receiver's subpoena to Associated Bank—was intended to obtain evidence to develop new claims against a non-party to the suit.

In short, the Receiver countermanded the federal rules by conducting discovery (1) in an action that was not filed against Associated, but (2) in search of a new claims against Associated. Nothing about the Receiver's status as an instrument of the court permits the Receiver to short circuit the Federal Rules of Civil Procedure in this way. To the contrary, the order appointing the Receiver expressly requires that he carry out his authority to serve discovery requests and "issue subpoenas * * * consistent[ly] with the Federal Rules of Civil Procedure." Order Appointing Receiver at 3-4, *S.E.C. v. Cook*, No. 09-cv-3333, Dkt. No. 13 (D. Minn. filed Nov. 23, 2009).

This Court need not stand idly by while the Receiver improperly uses his subpoena power in this way. Rather, this Court may exclude the improperly obtained evidence, or, at a minimum, decline to entertain the Receiver's current motion seeking to capitalize on his misuse of the discovery process:

> [T]he risks attendant to the misuse of the subpoena power are great. Under this delegation of public power, an attorney is licensed to access, through a non-party with no interest to object, the most personal and sensitive information about a party. Moreover, the injury resulting from attorney misuse of the subpoena power is not limited to the harm it inflicts upon the parties. Rather, misuse of the subpoena power also compromises the integrity of the court's processes. The Court, pursuant to its inherent powers, has the authority to impose just, non-monetary sanctions to ensure compliance with the Federal Rules of Civil Procedure, beyond excluding from evidence the materials improperly obtained as a result of the subpoena, and to protect the integrity of the judicial system.

Spencer v. Steinman, No. 2:96–CV–1792, 1999 WL 33957391, at *2 (E.D. Pa. Feb. 26,

1999) (quotations and citations omitted); *see United States v. Santiago-Lugo*, 904 F. Supp. 43, 48 (D.P.R. 1995) ("The mere fact that an attorney abuses the subpoena power directly implicates the court itself and creates an embarrassment for the institution. In addition, the general duty of an attorney toward third parties is violated when a subpoena is misused.").

The Receiver's subpoena was calculated to uncover discovery to which the Receiver was not entitled. The Receiver and the Star Tribune should not benefit from this misuse of the subpoena power. The Court should deny the motions on this ground alone.

II. This Court should decline to entertain the Receiver's motion because the motion should have been filed with the Court that entered the Stipulated Protective Order.

The Receiver's motion before this Court—which seeks to nullify the effect of "Confidential" designations made pursuant to a Stipulated Protective Order entered by Chief Judge Michael J. Davis—is an improper attempt at an end run around Chief Judge Davis. A plaintiff who wants to use discovery material covered by a protective order in a second case "should * * * [seek] modification of that order from the issuing court." *Yates v. Applied Performance Techs, Inc.*, 205 F.R.D. 497, 501 (S.D. Ohio 2002); *see Nat'l Benefit Programs, Inc. v. Express Scripts, Inc.*, No. 10-cv-907, 2011 WL 6009655, at *4 (E.D. Mo. Dec. 1, 2011) ("declin[ing] to interfere with an extant protective order, issued by and subject to the authority of another Court," and reasoning that motions for modification "should be directed to the Court that issued" the order); *see also Abraham v. Intermountain Health Care, Inc.*, 461 F.3d 1249, 1268 (10th Cir. 2006) ("[A]s long as a

protective order remains in effect, *the court that entered the order* retains the power to modify it, even if the underlying suit has been dismissed.") (emphasis added) (quoting *United Nuclear Corp. v. Cranford Ins. Co.*, 905 F.2d 1424, 1427 (10th Cir. 1990)). As a matter of "comity" and "courtesy" (*Donovan v. Lewnowski*, 221 F.R.D. 587, 588 (S.D. Fla. 2004)), courts regularly require parties to go to the court that issued the protective order to seek modification. *See, e.g.*, *Mona Vie, Inc. v. Amway Corp.*, No. 08-cv-2464, 2009 WL 524938, at *4 (D. Colo. Mar. 2, 2009); *Dushkin Publ'g Group, Inc. v. Kinko's Serv. Corp.*, 136 F.R.D. 334, 335–36 (D.D.C. 1991); *Puerto Rico Aqueduct & Sewer Auth. v. Clow. Corp.*, 111 F.R.D. 65, 67–68 (D. P.R. 1986).

The Receiver should have sought modification of the Protective Order from Chief Judge Davis, who issued the order. The request before this Court, by contrast, burdens the comity and courtesy interests that disfavor horizontal collateral attacks on orders entered by other courts. Because the Receiver brought his Motion before the wrong court, this Court should deny it.

III. If the Court reaches the merits of the Receiver's Motion, it should be denied.

A. Associated Bank properly designated documents as "Confidential" under the Stipulated Protective Order.

The Receiver incorrectly makes the naked assertion that Associated's designations of certain documents as "Confidential" "do not satisfy the agreed definition of 'Confidential Information.'" Mot. at 3. But in fact, Associated's designations fall within the scope of the Stipulated Protective Order. Tellingly, the Receiver does not quote the "agreed definition" at issue, which provides:

"Confidential Information" means any document, file, portions of files, or

> response to the Subpoenas—including any extract, abstract, chart, summary, note, or copy made therefrom—that is designated by the Bank in response to the Subpoenas in the manner provided in paragraph 4 below as containing confidential, proprietary, or commercially or personally sensitive information."

Stipulated Protective Order ¶ 3. Associated Bank's designations, therefore, were proper so long as the Bank determined that the materials at issue were "confidential." The plain meaning of "confidential" is "done or communicated in confidence," or in other words, private. American Heritage Dictionary (5th ed. 2011). All of the documents that the Bank labeled as confidential are from within the Bank's files, and such files are private files of the Bank that are not shared with the public.

The Receiver challenges whether specific designations are proper. But the Receiver's suggestion that the documents at issue are not confidential because they contain internal bank communications about certain Receivership Entities (Mot. at 3) makes no sense. For example, Exhibit 21 (which the Receiver seeks to unseal) is the employee evaluation of one of the Bank's employees. Even if the evaluation discusses the employee's clients, and even if those clients happen to include certain of the Receivership entities, it hardly follows that the employee's evaluation loses its otherwise presumptively confidential character because it also "concern[s] Receiver accounts and entities." Mot. at 4; *see Orbovich v. Macalester Coll.*, 119 F.R.D. 411, 415 (D. Minn. 1988) (Symchych, M.J.) (noting that because "the contents of the tenure and personnel files sought by plaintiff are indeed confidential, and procured by a private promise of such confidentiality, the discovery will be subject to a protective order, barring any and all further disclosure absent order of the court"); *see also Cason v. Builders FirstSource-*

Southeast Group, Inc., 159 F. Supp. 2d 242, 247 (W.D.N.C. 2001) (noting the "strong public policy against the public disclosure of personnel files," but permitting discovery under a protective order). The same is true for the other sealed documents; the fact that Receivership Entities may be discussed does not mean the Bank and its customers have no confidentiality interest.

B. The Receiver, and the Star Tribune, fail to show good cause for the modification of the Stipulated Protective Order.

Given that the Bank's confidentiality designations were consistent with the Stipulated Protective Order, the Receiver's only option to unseal the documents is demonstrate that the Stipulated Protective Order should be modified. In order to do so "[t]he party seeking to modify [the] protective order"—here, Receiver and the Star Tribune—must "show[] good cause for the modification." *Medtronic, Inc. v. Boston Scientific Corp.*, No.99-cv-1035, 2003 WL 352467, at *1 (D. Minn. Feb. 14, 2003) (Kyle, J.) (denying motion to unseal, and reasoning that it is "presumptively unfair for courts to modify protective order which assure confidentiality and upon which the parties have reasonably relied"); *see Jochims v. Isuzu Motors, Ltd.*, 145 F.R.D. 499, 501 (S.D. Iowa, 1992) ("[T]here is general unanimity among the courts that where a party to a stipulated protective order seeks to modify that protective order, that party must demonstrate particular good cause in order to gain relief from the agreed to protective order."); *cf. SmithKline Beecham Corp. v. Synthon Pharms., Ltd.*, 210 F.R.D. 163, 166 (M.D. N.C. 2002) ("A court should be hesitant to modify protective orders for matters unrelated to the litigation in front of it because otherwise, in the long run, parties may begin to distrust

protective orders."). Moreover, it is unfair to allow the Receiver "to conduct discovery under one set of rules and then have [a] court abrogate those rules after [he] ha[d] achieved his desired result," tantamount to "discovery by ambush." *Jochims*, 145 F.R.D. at 503.

In this case, the Receiver and the Star Tribune both fail to show good cause to modify the Stipulated Protect Order. First, although at common law the public (including "[the] press [which] has no greater right of access to the courts than does the public," *Webster Groves Sch. Dist. v. Pulitzer Publ'g Co.*, 898 F.2d 1371, 1374 n.3 (8th Cir. 1990), has a "general right to inspect and copy public records and documents," the Eighth Circuit has specifically rejected the contention that there is a "*strong* presumption" in favor of disclosure. *United States v. McDougal*, 103 F.3d 651, 657 (8th Cir. 1996). Rather, the Eighth Circuit applies a "deferential standard," that leaves the decision whether to unseal "to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of a particular case." *Id.* at 658. As discussed above, in this case, that discretion should be exercised by the Judge who entered the Protective Order.

Even more important here, the public's right of access extends only to "judicial records and documents." *McDougal*, 103 F.3d at 657 (holding that "appellants have failed to assert a cognizable common law claim [for access to the videotape of President Clinton's testimony] because the videotape itself is not a judicial record"). As the Eighth Circuit recently explained in *IDT Corp. v. eBay*, — F.3d —, 2013 WL 490751 (8th Cir. Feb. 11, 2013), federal courts generally do not treat discovery motions or discovery

exhibits as part of the judicial record that is subject to the common-law right of access. *Id.* at *2 (the "trend in federal cases [is] to treat pleadings in civil litigation (*other than discovery motions and exhibits*) as presumptively public" (emphasis added)); *see also Leucadia, Inc. v. Applied Extrusion Techs., Inc.*, 998 F.2d 157, 164 (3d Cir. 1993) ("[T]here is a presumptive [common law] right of access to pretrial motions of a nondiscovery nature"); *In re Estate of Martin Luther King, Jr., Inc. v. CBS, Inc.*, 184 F. Supp. 2d 1353, 1365 (N.D. Ga. 2002) ("The public has no common-law right of access to discovery materials, exchanged during a process that is typically conducted in private with minimal judicial supervision.").

In this case, although the Receiver and the Star Tribune purport to seek disclosure of exhibits to a pleading, they are really seeking disclosure only of materials obtained in discovery, and that are not related to any dispositive motion. Specifically, the Receiver and the Star Tribune seek materials obtained through the misuse of discovery in another action and unilaterally appended to the instant Complaint by the Receiver—an obvious attempt to bootstrap the documents from the status of discovery documents that are presumptively not open to the public to "pleadings" that are presumptively open. But the Receiver's action does not transform the discovery materials into "judicial records," for if it did the Receiver could unilaterally subvert the protective order through the simple expedient of converting the confidential materials into "pleadings" and then insisting that they must be made public. *Cf. McDougal*, 103 F.3d at 656 (holding that litigants at trial do not "have control to decide whether or not the public's right may be exercised"). As such, the disputed materials are not subject to the common law right of access.

Second, as the Eighth Circuit explained in *Webster Groves*, the Supreme Court has never found a First Amendment right to access to *civil* proceedings or to the court file in a *civil* proceeding. 898 F.2d at 1376. Assuming that such a First Amendment right exists, the Eighth Circuit's leading decision analyzing the scope of the First Amendment right to access documents in a criminal context, *In re Search Warrant for Secretarial Area Outside Office of Gunn*, 855 F.2d 569 (8th Cir. 1988), provides the relevant framework that makes clear that the First Amendment does not afford the public or the press access to discovery documents not part of a dispositive motion. The relevant factors are (1) "whether the place and process have historically been open to the press and the general public" and (2) "whether public access plays a significant positive role in the functioning of the particular process in question." *Id.* at 573 (quoting *Press-Enter. Co. v. Super. Ct. of Cal.*, 478 U.S. 1, 8 (1986)).

Under those factors, no First Amendment right of access exists. Discovery documents have not historically been filed with any court, and discovery historically takes place outside the presence of the court and public, between only the private parties to a dispute. *See, e.g.*, Richard L. Marcus, *Myth and Reality in Protective Order Litigation*, 69 Cornell L. Rev. 1, 15 (1983) ("[D]iscovery is not a public process. The public has no reliable method for determining when or where discovery proceedings will take place and no absolute right to attend them even if aware of the time and place. * * * [T]he underlying assumption of the litigants and the courts [is] that discovery compels the disclosure of information solely to assist preparation for trial."). Nor have courts or the Federal Rules of Civil Procedure sought to make such practices public, because there

is no view that public access is helpful to the discovery process—or that public access will assist the public in overseeing the judiciary's role in managing discovery. *See* Laurie Kratky Doré, *Settlement, Secrecy, and Judicial Discretion: South Carolina's New Rules Governing the Sealing of Settlements*, 55 S.C. L. Rev. 791, 817 (2004) ("Public access to unfiled discovery, for instance, does not assist the public in monitoring or understanding a court's primary adjudicative function. Discovery is largely a self-regulating process that ideally entails minimal judicial involvement."). Accordingly, there is no First Amendment interest in disclosure of the documents sought.

This does not mean it can never be appropriate to unseal the documents at issue. If, for example, the documents are necessary to support a motion for summary judgment, the Receiver and the Star Tribune might renew their motion. At this stage, however, the request to unseal is premature and the public has no cognizable interest in disclosure.

CONCLUSION

The motions of the Receiver and putative intervenor Star Tribune should be denied.

Dated: March 1, 2013

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