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March 15, 2013

By ECF

The Honorable Janie S. Mayeron
632 Federal Building
316 North Robert Street
St. Paul, MN 55101

Re: R.J. Zayed v. Associated Bank, N.A. (No. 13-cv-232)

Dear Magistrate Judge Mayeron:

We represent Defendant Associated Bank, N.A., in this case. We respectfully submit this supplemental letter brief in response to your request at the hearing on Friday, March 8, 2013, for additional briefing on the question whether the Court has authority to decide whether documents are confidential—or to “de-designate” them—under the stipulated protective order issued by Chief Judge Davis. *See* Stipulated Protective Order, *SEC v. Cook*, No. 09-cv-3333 MJD/FLN (Doc. 870) (on file in this case as Doc. 10-1 (Vogt Decl. Ex. A)).

I. Only Chief Judge Davis should modify, interpret or apply the Protective Order.

A court that did not enter a protective order should defer to the court that entered the protective order—not only to resolve any requests to modify it, but also to adjudicate any requests to interpret it, apply it, and/or “de-designate” documents protected under it.

For example, in *Doyle v. BNSF Ry. Co.*, 2007 WL 2751571, at *3 (W.D. Wash. Sept. 19, 2007), the court addressed a situation in which a protective order entered by another court provided that documents produced pursuant to it could be used only in the original action. The court held that “[t]he *only means* of avoiding this effect of the Confidentiality Order are (1) challenging the designation of material as ‘protected’ * * * , (2) seeking amendment of the Confidentiality Order * * * , or (3) asking the [other] court to vacate or otherwise lift the Confidentiality Order” (emphasis added). Accordingly, the court in *Doyle* held that the documents would remain subject to the original court’s protective order “unless and until such time as the [other court] lifts or modifies said Confidentiality Order *or determines* that information subject to the Confidentiality Order does not constitute or contain proprietary information, trade secrets, or other sensitive information.” *Id.* at *6 (emphasis added).

Similarly, in *Hawley v. Business Computer Training Institute, Inc.*, 2008 WL 2048329 (W.D. Wash. May 9, 2008), the court granted defendant's motion to prevent plaintiffs from using materials designated as "confidential" under a protective order entered in another case. The Court reasoned that the only way for the plaintiffs to use the materials consistently with the protective order would be: "(1) challenging the designation of material as 'confidential' under paragraph 2 of the Amended Protective Order or (2) seeking modification or rescission of the Amended Protective Order from the [other] court." *Id.* at *3. The court held that both of these tasks—*i.e.*, applying the protective order to determine if a document properly was labeled as "confidential" *and* modifying the protective order—were properly handled by the court that entered the protective order. *See id.* ("In the interests of comity and due process, this Court will not disturb the Amended Protective Order.").

In short, under *Hawley* and *Boyle*, it is the court that entered the Protective Order—and not a subsequent court, such as this one—that should apply the Protective Order to determine whether documents were properly designated under it and qualify for the protections it affords.

II. The relief that the Receiver seeks is most appropriately characterized as a modification of the Protective Order.

In any event, the Receiver seeks relief that goes beyond merely applying the Protective Order, and can only be understood as requiring a modification of the Protective Order. In the Receiver's own words, "in order for this [unsealing] to occur, an Order from the Court is needed to *modify* the Protective Order." (Doc. 9 at 6 (Plaintiff's Memorandum of Law, dated February 21, 2013) (emphasis added)); *see also id.* at 3 (invoking the Protective Order's "provi[sion] that a party may file a motion to modify the protection afforded thereunder"); Doc. 19 at 7 (StarTribune's Memorandum of Law, dated February 22, 2013) (explaining that StarTribune seeks "modif[ication of] the protective order.").

The Receiver (and the StarTribune) cannot prevail unless a court modifies the Protective Order. By its express terms, the Protective Order vests the Bank with the right to designate documents as "confidential," and acknowledges that materials designated by the Bank contain "information that requires the protections provided in th[e] Stipulated Protective Order." (Doc. 10-1 at ¶ 3.) It is beyond cavil that the Bank designated the documents now at issue as confidential under the Protective Order. Accordingly, excluding the contested documents from the Protective Order's coverage requires not merely applying the Protective Order, but interpreting it and modifying it.

In *Dushkin Pub. Group, Inc. v. Kinko's Service Corp.*, 136 F.R.D. 334, 335–36, n.4 (D.D.C. 1991), the Court expressed its view that a protective order issued by another court was intended to apply only to documents labeled confidential "by the producing party," and not to documents labeled as confidential by third parties. But, because "the plain language of the order is not so limited . . . the court is constrained to enforce the order as written." *Id.* (declining to require production of documents deemed confidential pursuant to a protective order entered in another case). Here, too, Associated Bank respectfully urges the Court to apply the Protective Order according to its literal terms. The Protective Order itself provides expressly that the Bank may designate documents as Confidential, and the Receiver may file "a motion seeking further, more limited or different protection from the Court [*i.e.*, Chief Judge Davis] under Rule 26(c) of the Federal Rules of Civil Procedure." (Doc. 10-1 at ¶ 13.)

Because the relief sought involves modifying the Protective Order's terms to exclude the contested documents from the Protective Order's coverage, Associated Bank respectfully submits that the decision should be Chief Judge Davis's to make.

We thank the Court for its consideration of the matter.

Sincerely,

s/ D. Charles Macdonald

D. Charles Macdonald

cc: Brian W. Hayes (by ECF)
Alex C. Lakatos (by ECF)