



INTELLECTUAL
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By ECF

The Honorable Janie S. Mayeron
United States District Court
632 Federal Building
316 North Robert Street
Saint Paul, MN 55101

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

Dear Magistrate Judge Mayeron:

As requested, the Receiver has researched the issue of whether the Court has the authority to de-designate documents covered by the Stipulated Protective Order issued by the Chief Judge of this Court. As we argued at the hearing, we are not asking this Court to modify the Stipulated Protective Order in any way—we are simply asking the Court to interpret and de-designate documents subject to that Order. Given the plain language of that Order and the requirements set forth in Rule 26(c)(1)—and the fact that none of the documents contain trade secret or other confidential research, development, or commercial information—we respectfully urge the Court to approve the Court-appointed Receiver’s motion so that the Complaint and all exhibits may be unsealed and publicly filed (subject to necessary redactions) in the above-referenced action. (*See* Dkt. Nos. 1, 9, 10-1); Fed. R. Civ. P. 26(c)(1).

We found no case law directly on point to this Court’s question. However, there is case law indicating that the Court has the authority to order in favor of the Receiver. For example, a court in the Northern District of Illinois faced consolidated litigation involving two protective orders: one issued from Illinois and the other from Maryland. *Camilotes v. Resurrection Healthcare*, No. 10-cv-366, 2012 U.S. Dist. LEXIS 82221, at *16 n.4 (N.D. Ill. June 14, 2012). While the court ultimately decided that the documents at issue in the motion were not subject to the Maryland Order, the court noted that:

Even if the Maryland Protective Order applied to the NDNQI Documents, the Court would nevertheless have the authority, and indeed the duty, to determine whether there is good cause to allow the parties to file such documents under seal in this case. *See Citizens*, 178 F.3d at 945 (“The judge . . . is duty-bound . . . to review any request to seal the record (or part of it).”)

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Camilotes, 2012 U.S. Dist. LEXIS 82221, at *16 n.4 (citing *Citizens First Nat'l Bank v. Cincinnati Ins. Co.*, 178 F.3d 943 (7th Cir. 1999)). The *Camilotes* court appears to be of the persuasion that it could interpret documents subject to another court's order.

Furthermore, other courts have faced a similar request such as what is upon this Court and have ordered in favor of de-designation. See, e.g., *Medtronic Vascular, Inc. v. Abbott Cardiovascular Sys., Inc.*, No. 06-cv-1066, 2007 U.S. Dist. LEXIS 89273 (N.D. Cal. Nov. 20, 2007). In *Medtronic*, the Magistrate Judge (Edward M. Chen) granted the party's motion to de-designate documents and related testimony subject to a protective order issued by the trial judge (Judge Phyllis J. Hamilton). *Id.* at *4, 8.

On a related point, other courts, when asked to issue an order involving the interpretation and production of documents pursuant to a protective order entered by another court, have employed four "rules of reason" to decide the issue. *Abel v. Mylan, Inc.*, No. 09-cv-0650, 2010 U.S. Dist. LEXIS 106436, at *9-10 (N.D. Okla. Oct. 4, 2010); *Tucker v. Ohtsu Tire & Rubber Co.*, 191 F.R.D. 495, 500 (D. Md. 2000).

The first rule considers Chief Judge Davis's involvement in issuing the Stipulated Protective Order. *Abel*, 2010 U.S. Dist. LEXIS 106436, at *9. An order resulting from deliberation and analysis by the prior court should be given deference. However, as discussed at the hearing, the Stipulated Protective Order at issue here resulted from an agreement of the parties without any deliberation or analysis by Chief Judge Davis.

The second rule examines the source of the information at issue. *Id.* Does it belong to Associated Bank or is it information of a third party in the possession of Associated Bank? Here, the information sought to be de-designated is not Associated Bank's information. Rather, the information concerns a Receiver Entity or a third party with which a Receiver Entity transacted business, such as the individual investors defrauded by the scheme. Exhibit 16 is an example of this mixture. As represented to the Court, the Receiver is willing to work with Associated Bank to ensure that personal information of third parties is appropriately redacted from the documents at issue.

The third rule examines the expense of re-litigating the matter before Chief Judge Davis. *Id.* Given that this issue has already been fully briefed and argued before this Court, judicial economy is best served by resolving the matter here.

Finally, any order issued should strive to maintain the prior terms of the Stipulated Protective Order. *Id.* at *9-10. Again, the Receiver is not asking the Court to modify the Order in any way. Here, as mentioned above, the Receiver is certainly willing to work with all concerned to maintain the protections afforded to information that is truly confidential to Associated Bank or a third party.

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However, with respect to any documents that contain information about a Receiver Entity, the Receiver maintains that any restriction should be removed. Associated Bank's argument that it will suffer harm because the documents originate out of its "private" files should be rejected especially since no supporting affidavits or examples have been provided to the Court. *Medtronic*, 2007 U.S. Dist. LEXIS 89273, at *8.

Before concluding, at the hearing the Court also conveyed some reservation about language in specific sections of the Stipulated Protective Order. Particularly, ¶¶ 1 (discussing the Receiver's ability to use Confidential Information for any action brought under his authority in the SEC and CFTC actions) and 7 (stating who may not view Confidential Information). Because the Court only requested briefing on the narrow above-discussed issue, we have not and will not brief our interpretation of the specific language here—but we respectfully reserve the right to brief the question should that be the Court's request. Our position, of course, would be that nothing in the Stipulated Protective Order (or the law) precludes this Court from de-designating the documents, thus pulling them out of any confidential designation which would preclude their disclosure to the public at large.

Respectfully submitted,

s/ Brian Hayes

Brian W. Hayes

cc: Charles F. Webber, Esq. (by ECF)
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