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,

v.

ASSOCIATED BANK, N.A.

Defendant.

CIV. NO. 13-232(DSD/JSM)

ORDER

The above matter came before the undersigned on Plaintiff's Motion to De-Designate Documents and Unseal Complaint [Docket No. 7] and non-party Star Tribune's Motion to Intervene and to Unseal Documents [Docket No. 17]. Keith A. Vogt, Esq. and Brent Elswick, Esq. appear on Plaintiff's behalf. Charles McDonald, Esq. appeared on Defendant's behalf. Mark Anfinson, Esq. appeared on behalf of the Star Tribune.

The Court, being duly advised in the premises, upon all the files, records and proceedings herein, and for the reasons described in the memorandum below, now makes and enters the following Order.

IT IS HEREBY ORDERED that

1. Plaintiff's Motion to De-Designate Documents and Unseal Complaint [Docket No. 7] is **GRANTED** in part and **DENIED** in part.

2. Non-Party Star Tribune's Motion to Intervene and Unseal Documents [Docket No. 17] is **DENIED** as moot.

Dated: April 15, 2013

Janie S. Mayeron
JANIE S. MAYERON
United States Magistrate Judge

MEMORANDUM

I. BACKGROUND

Plaintiff R. J. Zayed ("Receiver") is the Court-appointed receiver[1] for UBS Diversified Growth, LLC (d/b/a USB Diversified), Market Shot, LLC, Oxford Global Advisors, LLC, Oxford Global Partners, LLC, Oxford Global FX, LLC, Oxford FX Growth, L.P., and various other entities controlled by those businesses. Complaint, p. 1. [Docket No. 1]. Zayed was appointed Receiver after Trevor Cook, Patrick Kiley, Chris Pettengill, Gerald Durand and Jason Bo-Alan Beckman were convicted or entered into plea agreements regarding their roles in a Ponzi scheme in which investors lost very substantial sums of money. Id., ¶1.

Before filing the instant lawsuit, the Receiver obtained third party discovery through a subpoena to Associated Bank ("Bank") in matters in which the Receiver was attempting to "claw back" illegal transfers made pursuant to the Ponzi scheme: CFTC v. Cook, Civ. No. 09-3332 (MJD/FLN) (D. Minn.); SEC v. Beckman, Civ. No. 11-574 (MJD/FLN) (D. Minn.); SEC v. Cook, Civ. No. 09-3333 (MJD/FLN). The Receiver obtained documents from the Bank via a subpoena served on the Bank on June 24, 2011, in connection with those cases. On August 3, 2011, the Receiver and the Bank

[1] On April 4, 2013, Chief Judge Davis signed an Order recusing R.J. Zayed from the instant lawsuit and authorizing Tara Norgard, Brian Hayes and Russell Rigby to act on the Receiver's behalf in connection with the lawsuit. [Docket No. 34].

entered into a Stipulated Protective Order. CFTC v. Cook, Civ. No. 09-3332 (MJD/FLN) (D. Minn.) Protective Order ("Protective Order"). [Docket No. 835]. Chief Judge Michael Davis signed this Protective Order and it was filed on August 3, 2011. Id.

The Protective Order provided in part as follows:

> 1. All documents, information, data, and other material produced or disclosed in response to the Subpoenas, whether or not designated as "Confidential Information," shall be used solely for purposes of this action or any other action brought by the Receiver in his capacities as Receiver in *CFTC v. Cook, et al.*, Civ. No. 09-cv-3332 (D. Minn.), *SEC v. Cook, et al.*, Civ. No. 09-cv-3333 (D. Minn.), and *SEC v. Beckman, et al.*, Civ. No. 11-cv-574 (D. Minn.) and shall not be disclosed or used for any other purpose. The terms of this Agreement shall apply to any documents, information, data, and other material produced or disclosed in response to the Subpoenas used in any other actions brought by the Receiver in his capacity as Receiver in the above-cited cases.
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> 2. In the Subpoenas, the Receiver has sought Confidential Information (as defined in paragraph 3 below). The Bank asserts that the disclosure of such information except as permitted by this Stipulated Protective Order could result in significant injury to the business or privacy interests of the Bank, its customers and/or the persons and entities that are the subject of the Subpoenas. The Receiver and the Bank thus have entered into a Stipulation and request the Court enter the within Protective Order for the purpose of preventing the disclosure and use of Confidential Information except as set forth herein.
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> 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.
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> 11. The termination of this action shall not relieve the Receiver or other persons obligated hereunder from their responsibility to maintain the confidentiality of Confidential Information pursuant to this Order, and the Court shall retain continuing jurisdiction to enforce the terms of this Order.
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> 13. Nothing in this Protective Order shall. . . (d) preclude the Receiver or the Bank from filing a motion seeking further, more limited or different protection from the Court under Rule 26(c) of the Federal Rules of Civil Procedure. . . .

The Bank produced its documents pursuant to the subpoena and designated them "Confidential" pursuant to the Protective Order.[2] According to the Bank, after receiving the subpoena, the Receiver admitted that he did not want the Bank's documents in connection with the pending lawsuits, but to determine whether the Receiver wanted to bring a new lawsuit against the Bank itself. Declaration of Alex Lakatos, Ex. B (letter from counsel for Receiver to counsel for the Bank). [Docket No. 23-2].[3]

The Receiver commenced the instant suit against the Bank on January 29, 2013. The Complaint generally alleged that the Bank aided and abetted the Ponzi schemers' fraud in various ways. The publically available version of the Complaint has been heavily redacted as it quotes from or references documents the Bank previously

[2] The Receiver contended that the Bank designated all of its documents as "Confidential." Plaintiff's Memorandum of Law in Support of Plaintiff's Motion to De-Designate Documents and Unseal Complaint ("Pl. Mem."), p. 7. [Docket No. 9]. The Bank did not contest this statement.

[3] Unless otherwise indicated, docket numbers refer to the instant lawsuit.

designated as "Confidential." In addition, Exhibits 3, 5-10, 13, 16-19, 21-24, 27, 29-37 to the Complaint have been filed under seal. See Docket Nos. 1-3 (Placeholder for Exhibits to Complaint).

The Receiver now seeks to de-designate certain documents referenced in and attached to the Complaint and to unseal the Complaint "so that the entire Complaint, and all exhibits referenced in and incorporated thereto, may be made available to the public and the many interested parties in this litigation." Motion, p. 1. [Docket No. 7].

A. The Receiver's Motion to De-Designate and Unseal

Before filing the instant motion, the Receiver's counsel and the Bank's counsel agreed on de-designating some of the exhibits at issue. Pl. Mem., pp. 2-3; Declaration of Keith Vogt in Support of Plaintiff's Motion to De-Designate Documents and Unseal Complaint ("Vogt Decl."), Ex. B (chart describing the Bank's agreements regarding de-designation). [Docket No. 10]. The Bank did not oppose the de-designation of Exhibits 3, 5, one page of Exhibit 7, Exhibits 13, 17, 18, one page of Exhibit 19, Exhibits 22, 23, one page of Exhibit 34, one page of Exhibit 36, and one page of Exhibit 37. Vogt Decl., Ex. B. The Bank continued to oppose the de-designation of the other exhibits and took no position on the de-designation of Exhibits 6 and 16. Id.

The Receiver contended that the documents the Bank refused to agree to de-designate did not contain "Confidential" information as that term is defined in the Protective Order. Pl. Mem., p. 3. Instead, the documents contain information regarding the Receiver's own accounts and entities, which the Receiver has the right to and wishes to disclose. Id. To the extent that the documents reflected Bank employee discussions or actions, those discussions or actions related to the Receiver's entities,

not the Bank's confidential information. Id., p. 4. Additionally, the Receiver maintained that the Bank failed to show any trade secret or confidential research, development, or commercial information in the exhibits that would jeopardize any business practice—the standard reflected in Fed. R. Civ. P. 26(c)(1)(G). Id., p. 5. Finally, the Receiver cited the presumptively public nature of court filings as a reason to de-designate the documents. Id. (citing Schedin v. Ortho-McNeil-Janssen Pharms., Inc., Civ. No. 08-5743 (JRT), 2011 WL 18315997 at *1-2 (D. Minn., May 12, 2011); Citizens First Nat'l Bank v. Cincinnati Ins. Co., 178 F.3d 943, 946 (7th Cir. 1999)). At oral argument on the motion, the Receiver emphasized that he was not seeking to modify the Protective Order. Rather, the Receiver was only asking the Court to de-designate documents the Bank had improperly marked as "Confidential" pursuant to the Protective Order and that did not meet the standard of Fed. R. Civ. P. 26.

As to those documents on which the Bank took no position, the Receiver maintained that because the Bank had not agreed to de-designate the documents the Bank's hands were tied. Id., p. 6. In other words, the Bank's lack of a position on those documents was tantamount to objecting to their de-designation.

B. Star Tribune's Motion to Intervene

The Star Tribune moved to intervene pursuant to Fed. R. Civ. P. 24(b) for the limited purpose of joining in the Receiver's motion. Star Tribune's Memorandum of Law in Support of Its Motion to Intervene and to Unseal Documents ("Star Tribune Mem."), p. 1. [Docket No. 19]. The Star Tribune indicated that it had reported extensively on the Ponzi scheme, which had generated substantial public interest. Id. The Star Tribune

argued that permissive intervention would not prejudice the rights of the existing parties to the action and would not result in any undue delay in the proceedings. Id., p. 3.

In support of its motion, the Star Tribune also cited the presumptively public nature of court filings. Id., pp. 3-4. In addition, the Star Tribune noted that to overcome the presumptive right of access, under both the common law and the First Amendment, the party seeking to preserve the confidential nature of court filings is required to make a particular showing that disclosure would result in a "'clearly defined and very serious injury to its business.'" Id., p. 5 (quoting United States v. Exxon Corp., 94 F.R.D. 250, 251 (D.C. Cir. 1981)). The Star Tribune had not seen the documents at issue and, therefore, could not comment on their content. Id., pp. 6-7. Nonetheless, the Star Tribune joined in the Receiver's position that there was no factual basis for keeping the documents under seal. Id., p. 7.

C. The Bank's Opposition to the Receiver's and Star Tribune's Motions

The Bank opposed the Receiver's motion and the motion of the Star Tribune, arguing that the Receiver obtained the documents through a subpoena issued in CFTC v. Cook, SEC v. Beckman, and SEC v. Cook and was now improperly attempting to use the documents in his suit against the Bank. Memorandum of Law in Support of Defendant's Opposition to Plaintiff's Motion to De-Designate Documents and Unseal Complaint ("Def. Mem."), pp. 1, 2, 5. [Docket No. 22]. The Bank argued that the way in which the Receiver obtained the documents "countermanded" the Federal Rules of Civil Procedure by conducting discovery in an action that had not been filed against the Bank to search for new claims against the Bank. Id., p. 7.

The Bank further asserted that the instant motion was an "end run" around the Protective Order signed and entered by Chief Judge Davis. Id., p. 8. The Bank contended that the Receiver essentially wanted to "nullify" the Bank's confidential designations and that to do so, it must return to Chief Judge Davis with a motion to modify the existing Protective Order—not launch a "horizontal collateral" attack on the Protective Order through a motion in the instant lawsuit. Id., pp. 8-9.

But even assuming that it was proper for this Court (as opposed to Chief Judge Davis) to modify the Protective Order, the Bank submitted that the Receiver had not established good cause for doing so. Id., p. 11. First, to the extent that there was a question of balancing the public's general right to inspect and copy public records and documents against the Bank's right to maintain the confidentiality of its documents, the Bank argued that the exhibits attached to the Complaint were discovery documents, which are not presumptively public. Id., p. 13 (quoting In re Estate of Martin Luther King, Jr. 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.")). The Bank alleged that the Receiver attached the confidential documents to the Complaint to bootstrap the presumption of public access afforded pleadings onto discovery documents, which are not presumed to be public. Id., p. 13.

Second, the Bank rejected the Star Tribune's argument that the public has a First Amendment right to the documents, arguing that pursuant to Webster Groves Sch. Dist. v. Pulitizer Publ'g Co., 898 F.2d 1371, 1376 (8th Cir. 1990), there is no First Amendment right of access to civil proceedings or to the court file in a civil case. Id., p.

14. Further, the documents at issue did not meet the standard for public access to documents described by the Eighth Circuit in In re Search Warrant for Secretarial Area Outside Office of Gunn, 855 F.2d 569 (8th Cir. 1988). Id., pp. 14-15. There, the Eighth Circuit described the framework to be applied to determine if there was a First Amendment right to documents. Under the first factor, the court is to determine "whether the place and process have historically been open to the press and general public" and under the second factor, the Court must decide "whether public access plays a significant positive role in the functioning of the particular process in question." Id. at 573 (quotation omitted). The Bank argued that under the first factor, discovery and discovery documents have not historically been matters of public record. Def. Mem., p. 14. Under the second factor, the Bank asserted that there has never been a tradition of making discovery a public process nor is there jurisprudential consensus that public participation would be helpful in discovery. Id., pp. 14-15.

Lastly, as to the merits of the Receiver's motion, the Bank contended that it correctly designated the documents "Confidential" as that term was defined in the Protective Order and merely because some of the documents related to the Receiver's entities did not strip them of their Confidential character. Id., p. 10. The Bank noted particularly that exhibit 21 was an internal Bank evaluation of a Bank employee. Id. Even assuming that the evaluation discussed Receiver-entities, it did not follow that the evaluation lost its confidential character. Id.

The Bank did not submit a declaration from any of its officers or directors regarding the nature of the harm that might befall the Bank if the Court ordered the exhibits and Complaint unsealed.

III. DISCUSSION

A. Standard of Review

"In granting a stipulated protective order, the court delegates to the litigants significant discretion to decide what shall be treated as confidential." Google, Inc. v. American Blind & Wallpaper Factory, Inc., Civ. No. 03–5340, 2006 WL 5349265, at *2 (N.D. Cal. Feb. 8, 2006) (citation omitted). But "[a] problem arises if it later appears that the parties have abused their authority to designate documents 'Confidential' or that, for some reason, some of the sealed information should not legitimately remain closed to the public." In re Coordinated Pretrial Proceedings in Petroleum Products Antitrust Litigation, 101 F.R.D. 34, 41 (D. C.D. Cal., 1984). In that case, the Court must determine whether there is good cause to seal judicial files pursuant to Fed. R. Civ. P. 26 because the information is allegedly trade secret or confidential business information. "'Whether trade secrets are involved or not, and whether their revelation will cause damage to someone, are questions of fact, to be decided [by the court] after receiving evidence.'" Healey v. I-Flow, LLC, 282 F.R.D. 211, 214 (D. Minn. 2012) (quoting In re Iowa Freedom of Info. Council, 724 F.2d 658, 663 (8th Cir.1983)). "Courts should not simply take representations of interested counsel on faith, but should instead conduct a limited in camera review of documents alleged to contain trade secrets and other proprietary information." Id. The party seeking to keep information confidential must show that it is likely that public disclosure of the information would harm the party. See In re Cendant Corp., 260 F.3d 183, 196 (3d Cir. 2001) ("[C]ontinued sealing must be based on current evidence to show how public

dissemination of the pertinent materials now would cause the competitive harm [they] claim[ ].") (emphasis omitted).

In weighing the application of Fed. R. Civ. P. 26(c), the Court is mindful that "the courts of this country recognize a general right to inspect and copy public records and documents, including judicial records and documents." In re Neal, 461 F.3d 1048, 1053 (8th Cir. 2006) (citing and quoting Nixon v. Warner Commc'n, 435 U.S. 589, 597 (1978)). This right of access is not, however, absolute and the Court is entitled to exercise supervisory control over its own records and the decision to seal a file (or portion thereof) is within the Court's discretion. Webster Groves Sch. Dist. v. Pulitzer Publ'g Co., 898 F.2d 1371, 1376 (8th Cir. 1990).

The Court also recognizes that parties rely on protective orders to effectuate the exchange of information in a legal action without the fear of unwarranted disclosures of sensitive information. See Securities & Exchange Comm'n v. TheStreet.Com, 273 F.3d 222, 229-31 (2d Cir. 2001) (citation omitted). Nevertheless, this fact alone is not sufficient to warrant the wholesale withholding or redaction of pleadings or exhibits merely because a party labels the documents "Confidential." See John Does I-VI v. Yogi, 110 F.R.D. 629, 632 (D.D.C. 1986) (citations omitted) ("Blanket [protection] orders only postpone, rather than prevent, the need for the Court to closely scrutinize discovery materials to see if the seal is justified."). Indeed, whereas here, the Bank has seen fit to designate all of the documents it produced to the Receiver as "Confidential" does not mean that this Court must blindly accept these designations when the documents are referenced by the parties in court proceedings.

That is not to say that the Bank's marking of all of its documents "Confidential" is per se inappropriate; it is to say that as the party seeking to keep them from the public, it has the burden of demonstrating that the material is the type of information that is deserving of protection. See In re Cendant Corp., 260 F.3d at 194 ("the party seeking the closure of a hearing or the sealing of part of the judicial record 'bears the burden of showing that the material is the kind of information that courts will protect' and that 'disclosure will work a clearly defined and serious injury to the party seeking closure.'") (quoting Miller v. Indiana Hosp., 16 F.3d 549, 551 (3d Cir. 1994)); see also Virginia Dep't of State Police v. Washington Post, 386 F.3d 567, 575 (4th Cir. 2004), cert. denied 544 U.S. 949 (2005) ("This presumption of access, however, can be rebutted if countervailing interests heavily outweigh the public interests in access, and the party seeking to overcome the presumption bears the burden of showing some significant interest that outweighs the presumption.") (quotation omitted); Pansy v. Borough of Stroudsburg, 23 F.3d 772, 786-87 (3d Cir. 1994) ("The burden of justifying the confidentiality of each and every document sought to be covered by the protective order remains on the party seeking the order.") (citing Cipollone v. Liggett Group, Inc., 785 F.2d 1108, 1121 (3d Cir. 1986), cert. denied, 484 U.S. 976 (1987)). Broad allegations of harm, without more, are insufficient to overcome the presumption of access. See In re Cendant Corp., 260 F.3d at 194; see also Bryan v. Eichenwald, 191 F.R.D. 650, 653 (D. Kan. 2000) ("A speculative possibility does not justify limiting public access to judicial records."). "[T]he decision as to access is one best left to the sound discretion of the trial court, a discretion to be exercised in light of the relevant facts and circumstances of the particular case." Nixon, 435 U.S. at 599.

Thus, before the Court will agree to redact or seal pleadings, it must satisfy itself that the contents of these documents are actually in need of protection from access by the public. The parties cannot, by their own private arrangement, dictate the flow of information in what is otherwise a public proceeding, unless there is good reason to do so. See generally, Press-Enterprise Co. v. Superior Court of California, Riverside County, 464 U.S. 501, 509 (1984) ("'People in an open society do not demand infallibility from their institutions, but it is difficult for them to accept what they are prohibited from observing.' Closed proceedings, although not absolutely precluded, must be rare and only for cause shown that outweighs the value of openness.") (quoting Richmond Newspapers, Inc. v. Virginia, 448 U.S. 555, 572 (1980)).

B. This Court has the Authority to De-Designate Documents

The issues raised by the instant motions are two-fold: (1) does this Court have the authority to de-designate documents and unseal the documents, or must that question be addressed by Chief Judge Davis?, and (2) do the documents the Bank has designated "Confidential" deserve protection from disclosure under Fed. R. Civ. P. 26? In addition, at the motion hearing, a third issue arose: the parties disagreed on whether or not the language in paragraph one of this Protective Order – "All documents, . . . produced or disclosed in response to the Subpoenas, whether or not designated as "Confidential Information," shall be used solely for purposes of this action or any other action brought by the Receiver in his capacities as Receiver in *CFTC v. Cook, et al.*, Civ. No. 09-cv-3332 (D. Minn.), *SEC v. Cook, et al.*, Civ. No. 09-cv-3333 (D. Minn.), and *SEC v. Beckman, et al.*, Civ. No. 11-cv-574 (D. Minn.)" – precludes the use of the Bank documents in the instant lawsuit (emphasis added). According to the Bank, those

words mean that the documents cannot be used in any lawsuit other than the three enumerated lawsuits. Further, to the extent that there is confusion about how to interpret the Protective Order, Chief Judge Davis should resolve the issues, not this Court. The Receiver argued that the point of paragraph one was to provide the Receiver with the ability to use documents in future Receiver-initiated lawsuits, such as the instant suit.

At the conclusion of the hearing, the Court allowed the parties to further brief the question of whether this Court has the authority to de-designate documents under the Protective Order issued by Chief Judge Davis.

The Receiver filed a letter brief reiterating that he was not seeking a modification of the Protective Order,[4] only the de-designation of documents that do not contain trade secret, confidential research, development or commercial information. Receiver's Letter Brief, p. 1. [Docket No. 26]. The Receiver cited Camilotes v. Resurrection Healthcare, Civ. No. 10-366, 2012 WL 2192168 (N.D. Ill. June 14, 2012) in support of this Court's authority to de-designate documents.[5] There, although the court decided that a

[4] Although, as the Bank pointed out in its letter brief, the Receiver specifically asked this Court to modify the Protective Order. Bank's Letter Brief, p. 2 [Docket No. 27] (citing Pl. Mem., p. 6) ("Thus, for all practical purposes, the parties agree that the exhibits should be unsealed; but in order for this to occur, an order from the Court is needed to modify the Protective Order.")).

[5] The Receiver also cited Abel v. Mylen, Inc., Civ. No. 09-650, 2010 WL 3910141 (N.D. Okla., Oct. 4, 2010) in favor of his position. In Able, the plaintiff sought access to documents that had been designated confidential pursuant to protective orders entered in other cases. Id. at *3. The court acknowledged that courts have differing views on the subject, but ultimately concluded that it was appropriate to allow the production of documents subject to the same protections afforded by the protective orders in the other cases. Because the court was not confronted with the question of de-designation under another court's protective order, this Court found the case not particularly instructive.

protective order entered in another case did not govern documents that plaintiffs sought to de-designate, the court also noted that "[e]ven 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. . .the judge. . .is duty-bound. . . to review any request to seal the record (or part of it)." Id. at *5, n. 4.

The Bank contended that the Receiver's request must be interpreted as a motion to modify the Protective Order and as a result, only Chief Judge Davis should decide the issue of de-designation. Bank's Letter Brief, p. 2. The Bank cited Hawley v. Business Computer Training Instit, Inc., Civ. No. 08-5055, 2008 WL 2048329 at *3 (W. D. Wash., May 9, 2008) in support of its position that the question of de-designation must be answered by Chief Judge Davis. There, the court concluded that a challenge to the designation of documents as "confidential" under a stipulated protective order entered in another case, or the modification of the stipulated protective order should be heard by the court that entered the order. Id. In that case, the stipulated protective order did not contain the language found in the Protective Order at issue here, which explicitly provides that documents and information may be used in "this action or any other action brought by the Receiver. . . ." (emphasis added).

As a threshold matter, the Court rejects the Bank's argument that it was improper for the Receiver to use the documents obtained through subpoena in the SEC v. Beckman, SEC v. Cook, and CFTC v. Cook lawsuits in the instant suit. The Protective Order gave the Receiver the right to use any information subpoenaed from the Bank in connection with any action brought by the Receiver in his capacities as Receiver in

those suits. In addition, pursuant to paragraph F of the Order Continuing Appointment of the Temporary Receiver in CFTC v. Cook, Civ. No. 09-3332 [Docket No. 96] and paragraph D of the Second Amended Order Appointing Receiver in SEC v. Cook, Civ. No. 09-3333 [Docket No. 68], the Receiver has the right to bring any legal actions he deems necessary or appropriate to discharge his duties. Thus, reading these descriptions of the Receiver's role together, the Court concludes that the Receiver was within his rights to use the documents obtained from the Bank through the previous subpoena in the instant suit.

Turning to the issues presented by the Bank's motion, the Court finds that it has the authority to de-designate documents, particularly in light of the language of paragraph 1 of the Protective Order, which states: "The terms of this Agreement shall apply to any documents . . . produced or disclosed in response to the Subpoenas used in any other actions brought by the Receiver in his capacity as Receiver in the above-cited cases." (emphasis added). This language specifically contemplated there might be "other actions" (not before Chief Judge Davis) in which the Protective Order must be applied and interpreted. The Receiver is not calling on this Court to modify the terms of the Protective Order. Rather, the Court is being asked to apply the Protective Order to the documents at issue and to decide if the documents merit protection under Fed. R. Civ. P. 26(c). Moreover, this Court will not interpret the Protective Order in a way that would require the parties in the instant lawsuit to schedule motions with Chief Judge Davis each time they want a ruling on the application of the Protective Order with respect to particular documents governed by the Order. Doing so would be a waste of judicial resources and is simply not necessary.

As to the merits of the Receiver's motion, the Court determines as follows:

1. The documents the Bank did not oppose de-designating shall be de-designated and unsealed (exhibits 3, 5, 7 (page ABCCVL001187), 13, 17, 18 19 (page ABFCCVL1045), 22, 32, 34 (page AB009559), 36 (page ABCCVL001082) and 37 (page ABCCVL000177 (emails)).

2. The documents on which the Bank took no position shall be treated as follows: Exhibit 6 shall be de-designed and unsealed. This exhibit is comprised of copies of checks drawn on Receiver-entity accounts. Because the Receiver now stands in the shoes of these entities and the entities would have access to copies of their own checks from the Bank, it follows that the Receiver should also have access to the documents. Further, there is nothing in the record to indicate that the Bank or any third party would be harmed by the release of these documents.

Exhibit 16 is a chart of financial transactions of individual investors and Receiver-entities. This document was not prepared by the Bank[6] and the Receiver marked the document "Confidential" believing that the information contained in the document was based on information the SEC obtained from the Bank. The document contains the names of many non-party individual investors and shows their investments. At the hearing, this Court expressed its concern about the disclosure of the individual

[6] Exhibit 16 is not Bates-numbered and there is indication who did prepare it. At the hearing, the Receiver's attorney indicated that he understood that the document was prepared by SEC accountants based on information the government obtained from the Bank for use in the SEC enforcement actions. The document was a government document provided by the government to the Receiver and marked Confidential by the Receiver out of an abundance of caution. The Receiver stated that much of the information, including the individual investors' names had been made public during the SEC enforcement action, but he did not believe that Exhibit 16 itself was part of the public record.

investors' names as those parties did not have notice or an opportunity to be heard regarding the disclosure of their financial information. The Receiver did not object to redacting the investors' names and indicated that he was most interested in the "patterns of transactions" shown on the document, not the individual investors' names. Further, the Receiver wanted to de-designate the names of the Receiver-entities, and the names of the institutional investors.

This Court concludes that the non-party individual investors and institutional investors that are not Receiver-entities have a right to maintain the confidentiality of their financial transactions (or at least they should have the right to weigh in on the issue of whether their financial transactions should be open to the public). Further, the Receiver presented no compelling argument as to why the names of the institutional investors that are not Receiver-entities should be made public and this Court sees no reason to treat those businesses any differently from the individual investors. Therefore, the Court will permit all of Exhibit 16 to be de-designated with the exception of the names of the individual investors and institutional investors that are not Receiver-entities. That information must be redacted from the document before it is publically filed and will remain designated as confidential.

Exhibit 34, pages AB009545-9558, reflects copies of cashier's checks drawn from a Receiver-entity at the Bank. The Receiver stands in the shoes of the Receiver-entities and is, therefore, entitled to handle these documents as he wishes. In addition, there is no indication that these documents deserve protection pursuant to Rule 26.

That portion of Exhibit 37 that reflects checks payable to Receiver-entities or a deposit to the Bank shall be de-designated. There is no indication that these

documents are confidential within the meaning of Rule 26 and, at any rate, the Bank took no position on de-designating this portion of Exhibit 37.

3. The documents the Bank opposed de-designating, Exhibits 7 (page ABCCVL000977), 8, 9, 10, 19 (page ABCCVL392), 23-31, 33, 35 shall be de-designated. This Court was satisfied that the information reflected in these documents belongs to the Receiver as the party that now stands in the shoes of the entities reflected in the documents, or that the content of the documents does not meet the requirements of Rule 26, or both. Merely because the documents were maintained by the Bank in the ordinary course of business and are not shared with the public does not render the information in them protected. In addition, the Bank did not submit a declaration describing how the information contained in these documents met the standard of Rule 26, or describing any harm that would result from de-designating the documents.

As to Exhibit 21, this exhibit is a performance evaluation of a Bank employee. The Receiver sought the de-designation of page one of the exhibit, which describes how the Bank evaluates employees and a sentence on the second page of the evaluation. This Court agreed with the Bank that merely because this document may reference a Receiver-entity does not make the document fair game for the Receiver. Further, unlike copies of the Receiver-entity checks and exhibits that bear directly on Receiver-entity accounts and transactions, the Receiver, standing in the shoes of the Receiver-entities, would not have access to this performance evaluation. In weighing the public's interest in access to judicial records against the rights of the non-party employee, this Court concluded that the balance weighed in favor of maintaining the

"Confidential" designation of Exhibit 21 to some extent. Therefore, to address the interests of the non-party employee, page one of exhibit 21 shall be de-designated except that the name of the employee shall remain redacted, and the balance of the evaluation shall remain redacted except for the one sentence on the second page of the evaluation beginning with "My deposit gathering" and ending with "non-interest bearing account," which shall not be redacted.

4. Those portions of the Complaint that are currently sealed because they quote from documents the Court has now ordered be de-designated shall be unsealed and a version of the Complaint consistent with this Order shall be filed on ECF.

5. Because this Court has ordered the de-designation and unsealing of a substantial amount of information, the Receiver is directed to present the Bank with a version of the Complaint and exhibits it intends to publically file on ECF before such filing takes place so that the Bank may be assured that the documents comport with the terms of this Order.

C. The Star Tribune's Motion to Intervene is Denied as Moot

"Most circuits have held the permissive intervention is the appropriate procedural course for third party challenges to confidentiality orders." In re Baycol Prods. Litig., 214 F.R.D. 542, 543 (D. Minn. 2003). Here, however, the issue was whether the documents marked as "Confidential" by the Bank even met the standard for protection described by Rule 26; not whether the documents filed with and referenced in the Complaint were properly sealed. Having concluded that virtually all of the exhibits at

issue in this motion should be de-designated and consequently, do not deserve to be withheld from the public, the Star Tribune's Motion to Intervene is denied as moot.

J.S.M.