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October 10, 2013

Via ECF

The Honorable David S. Doty
United States District Court
United States Courthouse, Suite 14W
300 South Fourth Street
Minneapolis, MN 55415

Re: R.J. Zayed v. Associated Bank, N.A., 13-CV-232 (DSD/JSM)

Dear Judge Doty:

We write under Local Rule 7.1(j) requesting permission to file a motion to reconsider the grant of Associated Bank's Rule 12(b)(6) motion, for the limited purpose of asking the Court to amend its order (Dkt. No. 50) to a dismissal without prejudice.

Dismissal with prejudice is a particularly harsh outcome for a matter such as this, and is outside the norm at this stage of the pleadings. Ordinarily, dismissal of a pleading should be with leave to amend. *Michaelis v. Nebraska State Bar Ass'n.*, 717 F.2d 437, 438-39 (8th Cir. 1983). "The usual method for dealing with a nebulous complaint, then, is either to grant leave to amend [] or to dismiss the complaint without prejudice." *United States ex rel. Joseph v. Cannon*, 642 F.2d 1373, 1386 (D.C. Cir. 1981). A dismissal with prejudice will necessarily lead to a protracted appeals process without the chance at the District Court of addressing concerns with the form of the pleadings. If the Court later dismisses any such amended pleading, the appeal, if any, would be better focused on a version of the pleadings tailored to the Court's concerns about the Complaint as it presently exists.

First, the Receiver would like to move the Court for reconsideration to give the Receiver the opportunity to amend the words of the Complaint, at ¶ 74, that caused the Court to state that "[the Receiver's] allegations amount to an argument that Associated Bank should have known of the underlying fraud based on numerous red flags." (Dkt. No. 50, at 9, citing ¶ 74). The Receiver's intent in ¶ 74 was not to rely on a "should have known" theory to prove liability, since immediately prior, in ¶ 72, the Receiver pleaded the exact allegation that the Court believed was missing, that "Associated Bank had actual knowledge of the fraud." (Dkt. No. 1, at ¶ 72). The Receiver augmented this "actual knowledge" pleading at ¶ 72 and elsewhere with specific actions and statements that the Bank took (which should be accepted as true at this stage), including particular false statements (¶ 72(A, B, F, G, I, K, Y, AA, FF)), particular detection-avoidance advice to the fraudsters (¶ 72(D)), and particular actions showing that the Bank did not just

ignore red flags but in fact created them (¶ 72(E, J, N, O, P, R, S, X, BB, EE)).[1] The Receiver regrets that its "belt and suspenders" approach to allege ***both*** actual knowledge ***and*** willful-blindness-type actual knowledge led the Court's opinion to state, "Nowhere in the complaint does the receiver allege that Associated Bank had actual knowledge of the Ponzi scheme." (Dkt. No. 50, at 8). Again, this ruling is difficult to square with the words at ¶ 72 that state, "Associated Bank had actual knowledge of the fraud," and more so in view of the particularized facts that support the "actual knowledge" allegation. The additional allegation in ¶ 74 of the Bank's knowledge of a high probability of illegal activity and deliberate avoidance (an alternative formulation of actual knowledge recognized under the law as "willful blindness") regrettably seems to have been viewed as trumping the express "actual knowledge" allegation – a situation easily curable on the presentment of an Amended Complaint that rewords ¶ 74.

The Receiver can also amend to make it more clear that its "substantial assistance" pleading did not rely solely on the fact "that Associated Bank approved fraudulent transfers after ignoring red flag and suspicious activity," (Dkt. No. 50, at 11), as the Court stated when finding its pleading insufficient. Of the thirty-two particularized statements, acts and omissions of ¶ 72 (A through FF), only six arguably fall into the category identified as insufficient by the Court when pleaded alone (N, O, P, Q, S, BB). The Receiver believes that an amended pleading will make it more clear that "substantial assistance" took many forms, only one of which was the type that might not suffice alone.

Now knowing the Court's concerns with the pleading, the Receiver can also amend to add a claim on behalf of one of the receivership entities (Kiley) that Associated Bank breached its fiduciary duties to Kiley and acted negligently when allowing another of the receivership entities (Cook) to funnel moneys out of Kiley's accounts despite not being an account holder. Such new claims are direct claims based on the Receivership's privity with Associated Bank – not aiding and abetting claims – and therefore no issue of knowledge and substantial assistance would apply.

The Receiver appreciates the Court's kind attention to these compelling factors. Since an amended pleading would make clear the existence of the previously pleaded and yet-to-be-pleaded causes of action, the Receiver respectfully requests leave to file a motion asking the Court simply to convert the dismissal with prejudice to one without prejudice.

Respectfully submitted,

Robert P. Greenspoon

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[1] It should have been sufficient in the Complaint to aver knowledge generally under Fed. R. Civ. P. 9. The added particularly-pleaded facts (acquired pre-discovery) go beyond the minimum requirements of a sufficient knowledge allegation.