Charles F. Webber
+1 612 766 8719
chuck.webber@FaegreBD.com

Faegre Baker Daniels LLP
2200 Wells Fargo Center 90 South Seventh Street
Minneapolis Minnesota 55402-3901
Phone +1 612 766 7000
Fax +1 612 766 1600

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BY 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., No. 13-cv-232 (DSD/JSM)

Dear Judge Doty:

I write in response to the Receiver's letter of October 10, 2013, requesting permission to file a motion for reconsideration (Dkt. 52). As the Court well knows, a motion for reconsideration requires a showing of "compelling circumstances" (LR. 7.1(j)), and it "should not be employed to relitigate old issues." *Williams v. U.S. Bank Nat. Ass'n ND*, Civ. No. 12-1247 DSD/JJK, 2013 WL 4609647 (D. Minn. Aug. 29, 2013). The Receiver cannot meet that demanding standard.[1]

In his letter, the Receiver does not identify *any* specific factual allegations he wishes to add to his Complaint. Instead, the Receiver suggests that he will make his existing allegations "more clear." (Dkt. 52 at 2.) But the Court carefully reviewed those allegations, summarized them in depth, and found that they fail to state a claim. Nothing in the Receiver's letter would change that result.[2]

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[1] The Receiver cites *Michaelis v. Nebraska State Bar Ass'n*, 717 F.2d 437, 438 (8th Cir. 1983), for the assertion that a dismissal should "[o]rdinarily" be with leave to amend. But the Receiver fails to note that *Michaelis* was discussing a Rule 8 dismissal—"[o]rdinarily dismissal of a plaintiff's complaint for failure to comply with *Rule 8* should be with leave to amend." *Id.* at 438-39 (emphasis added). While that rule makes good sense in the context of Rule 8 (which permits dismissal for, among other things, failure to include "a short and plain statement of the grounds for the court's jurisdiction"), it says nothing about *this* case, which was dismissed pursuant to Rule 12(b)(6) for failure to state a claim.

[2] The Court's holding that the Receiver failed to plead actual knowledge is not "difficult to square with the words at ¶ 72." (Dkt. 52 at 2.) As the Court explained, "labels and conclusions" are not sufficient to state a claim. *Ashcroft v. Iqbal*, 129 S. Ct. 1937, 1949 (2009).

The Receiver seeks to plead new, ill-defined claims. But the Receiver offers no basis as to why he should be permitted to add entirely new theories after having had the chance to do so in response to Associated Bank's motion to dismiss. "A district court does not abuse its discretion in denying a plaintiff leave to amend the pleadings to change the theory of their case after the complaint has been dismissed under Rule 12(b)(6)." *Briehl v. Gen. Motors Corp.*, 172 F.3d 623, 629 (8th Cir. 1999).

In fact, the Receiver had two unique benefits in pleading his claims, both of which weigh against permitting him to add wholly new legal theories at this juncture. *First*, the Receiver was aware of two prior lawsuits brought against Associated Bank arising out of this fraud. A Wisconsin trial court dismissed negligence and aiding-and-abetting claims against Associated Bank, and the court of appeals affirmed. *See Grad v. Associated Bank, N.A.*, 336 Wis. 2d 474 (Ct. App. 2011). And, in *Phillips v. Cook*, 0:09-cv-01732-MJD-JJK (D. Minn.), plaintiffs asserted negligent-mis-representation and breach-of-fiduciary-duty claims against Associated. Those claims were withdrawn. When the Receiver filed this action, he was well aware of alternative legal theories that he could have pursued, but he chose not to.

Second, prior to filing the Complaint in this case, the Receiver had access to scores of documents—including account materials and internal emails—that Associated Bank produced for use in the criminal and SEC proceedings against the fraudsters. The Receiver's Complaint, which was accompanied by 37 exhibits, is filled with references to this non-public information. *See*, *e.g.*, Compl. ¶¶ 7, 9, 12, 53, 54, 59, 65. This is not a case where the Receiver wishes to plead a new cause of action based on newly-discovered information. Indeed, the Receiver had far more information than the usual plaintiff has when a Complaint is filed and presumably took his best shot in the original Complaint.

For whatever reason—perhaps because a court had previously dismissed a negligence claim against Associated Bank in *Grad*, or perhaps because the Receiver was aware that these tort claims would sharpen Associated's *in pari delicto* defense—the Receiver made the strategic decision to rest his Complaint on his aiding-and-abetting theories. The Receiver has offered no reason why he should have a second bite at the apple.[3]

Thank you.

Sincerely,

s/ Charles F. Webber

Charles F. Webber

cc: Plaintiff's counsel (by ECF)

[3] Were the Court to contemplate allowing the Receiver leave to add new claims, Associated Bank respectfully requests that the Court first permit full reconsideration briefing, so that Associated may explain why this proposed amendment is futile.