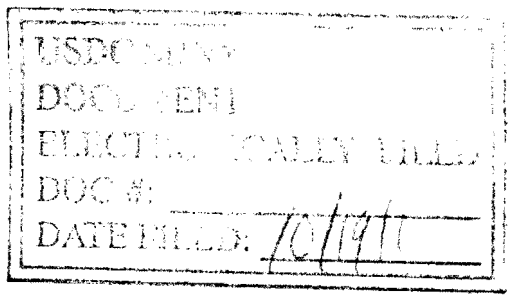

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IRVING H. PICARD,

Plaintiff,

-v-

SAUL B. KATZ et al.,

Defendants.

11 Civ. 3605 (JSR)

MEMORANDUM ORDER

JED S. RAKOFF, U.S.D.J.

In a joint telephonic conference with Chambers on October 6, 2011, the defendants proposed a protective order ("the proposal") to govern the confidentiality of documents exchanged in discovery. In that same conference, the Trustee argued that the Court should rely on the Litigation Protective Order ("LPO") that currently governs discovery in the underlying proceedings from which this case arose. The parties submitted letter briefs on October 11, 2011 and responded to each other's letters on October 12, 2011. As explained below, the Court hereby adopts defendants' proposal.

With two additions, defendants' proposal is identical to the Court's model protective order that the Court has utilized, with great success, for many years and that maximizes public disclosure at trial. Defendants' additions are: (1) the inclusion of a "highly confidential" designation that, where applicable, would allow only the parties' attorneys, the Court, and certain support personnel to see material exchanged in discovery; and (2) a clause providing that any

material classified as confidential in the underlying SIPA proceeding "is deemed to have been designated as Confidential Discovery Material pursuant to the terms of this Order." The Court finds each of these additions unobjectionable. As to the first addition, the "highly confidential" designation, in a manner that is pretty much standard, restricts only the flow of information between the attorneys and their clients. For example, potential business partners of the defendants may not want defendants to see certain financial information, but would have no objection to defendants' counsel seeing the information on an "attorneys' eyes only" basis. The "highly confidential" designation accommodates this desire while still allowing the attorneys to have access to any such information that pertains to the case. As to the second addition, the retention of classifications from the SIPA proceeding promotes efficiency by not requiring the parties to redo what they have already done. This is not to say, however, that any given designation cannot be challenged in this Court.

The Trustee mounts several objections to defendants' proposal. First, the Trustee argues that the Court can modify a protective order only upon a showing of "improvidence in the grant of [the previous] protective order or some extraordinary circumstance or compelling need." Martindell v. Int'l Tel. & Tel. Corp., 594 F.2d 291, 296 (2d Cir. 1979). This high standard, however, applies only where, as in

Martindell, someone has relied on a protective order when submitting confidential information, and modification of that order threatens to permit the disclosure of information that the person believed would be kept confidential. Here, in contrast, the defendants' proposal keeps confidential everything that was previously marked confidential and simply adds some modest, standard, further restrictions. Thus, the proposal does not threaten to permit disclosure of any information that would be confidential under the LPO.

Moreover, "protective orders that are on their face temporary or limited may not justify reliance by the parties. Indeed, in such circumstances reliance may be unreasonable." SEC v. TheStreet.Com, 273 F.3d 222, 231 (2d Cir. 2001). Here, the Trustee could not have reasonably expected that the LPO, fashioned during his investigative stage, would necessarily govern all the adversary proceedings he has brought, especially one like this case, which has been removed from the Bankruptcy Court. Just as the Trustee previously argued, with success, that the Rule 2004 discovery he took at the investigative stage (and that was governed by the LPO) would not substitute for the further discovery he wishes to take in this adversary proceeding, so he should have anticipated that the LPO would not address all of the concerns that his subsequent adversarial discovery would raise.

Next, the Trustee argues that applying multiple protective orders to the SIPA litigation will impose significant administrative burdens on him, requiring him to determine which orders apply to which

documents whenever he has to comply with a discovery request in any of the proceedings. This fear appears exaggerated, as the defendants' proposed protective order applies only to this adversary proceeding, which, as previously mentioned, has been wholly removed from the Bankruptcy Court and from the rest of the SIPA litigation until the conclusion of trial. To be sure, when you have multiple litigations, problems of the sort the Trustee hypothesizes may occasionally arise, but experience shows that, in practice, they are easily dealt with.

Finally, the Trustee argues that the Court should not retain documents' classifications from the SIPA proceeding because the defendants designated far too much as confidential, and retention will require the Trustee to spend a large amount of time challenging defendants' previous designations. Putting aside the inconsistency of this argument with some of the Trustee's other arguments, the Court doubts that any such challenges will involve such effort. But if there are such challenges, the Court will deal with them expeditiously.

In summary, the Court will adopt defendants' proposed protective order for discovery in this case. The Court hereby orders the defendants to submit a clean copy of their proposed protective order for the Court to sign and docket.

SO ORDERED.

JED S. RAKOFF, U.S.D.J.

Dated: New York, New York
October 18, 2011