

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 17-60907-Civ-Moreno/Seltzer

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

JEREMY LEE MARCUS, *et al.*,

Defendants.

**CONFIDENTIALITY AND PROTECTIVE ORDER BETWEEN THE
RECEIVER AND PNC BANK, N.A. REGARDING DOCUMENTS PRODUCED
PURSUANT TO D.E. 427**

WHEREAS, Jonathan E. Perlman, the Court-appointed Receiver (“Receiver”) of the Receivership Entities in the above-captioned case, served PNC Bank, N.A. (“PNC”) with a subpoena *duces tecum* on May 1, 2018 seeking production of documents (the “Subpoena”); and

WHEREAS, on April 2, 2019, the Receiver moved to compel production of documents responsive to the Subpoena (D.E. 357); and

WHEREAS, on April 29, 2019, PNC opposed the Receiver’s motion to compel (D.E. 363); and

WHEREAS, on June 11, 2019 Magistrate Judge Seltzer entered a Report and Recommendation recommending that the Receiver’s motion to compel be denied (D.E. 380); and

WHEREAS, on October 15, 2019 this Court entered an Order Adopting in Part Magistrate Judge’s Report and Recommendation and requiring PNC to produce communications between PNC and third-parties regarding the Defendants and bank-generated investigation reports of the Defendants by November 13, 2019 (D.E. 427).

WHEREAS, PNC contends the documents to be produced pursuant to the Subpoena contain financial and other sensitive information which may be confidential and trade secret information which PNC contends is confidential; and

WHEREAS, good cause exists for the entry of this Protective Order (the "Order").

NOW THEREFORE, upon entry by the Court pursuant to Rule 26(c) of the Federal Rules of Civil Procedure, the following Order shall govern the disclosure of confidential information from PNC to the Receiver in the above-referenced case, *Federal Trade Commission, et al. v. Jeremy Lee Marcus, et al.* 17-60907-Moreno/Seltzer, currently pending in the United States District Court for the Southern District of Florida (the "Action"). The Receiver and PNC are each a "party" and together, the "parties."

1. Scope of Order. All information disclosed pursuant to the Order Adopting in Part Magistrate Judge's Report and Recommendation (D.E. 427) is subject to this Order and shall be deemed Confidential Information to the extent that it is designated as Confidential Information pursuant to this Order. Confidential Information shall not be used or disclosed to anyone except as provided in this Order. For the purposes of this Order, the term "Information" includes documents, testimony, written discovery, deposition transcripts and other communications of any kind (whether oral, written or otherwise), and the contents or substance thereof. Anything that discloses the contents or substance of Confidential Information shall be deemed Confidential Information for purposes of this Order.

2. What Information May Be Designated Confidential. Information may be designated as Confidential Information if PNC believes or asserts in good faith that such material:

- (a) constitutes a trade secret; or
- (b) is protected by statute, rule, or regulation.

3. Who May Designate Information Confidential. Information produced pursuant to the Order Adopting in Part Magistrate Judge's Report and Recommendation (D.E. 427) may be designated as Confidential Information, in whole or in part, by: (i) PNC, or (ii) any party to this Action or the related action, *Jonathan E. Perlman v. PNC Bank, N.A.*, 19-CIV-61390-RS (the "Related Action") asserting an interest in maintaining the confidentiality of such information.

4. No Restriction on Party's or Nonparty's Own Confidential Information. The provisions of this Order requiring confidential treatment of Confidential Information or restricting the use of Confidential Information shall not be construed to prevent any person subject to this Protective Order from using or disclosing its own Confidential Information in the Action or otherwise. This provision does not prevent a party from arguing that such disclosure would constitute waiver of confidentiality, depending on the circumstance of disclosure.

5. Manner in Which Information May Be Designated Confidential. A party or nonparty may designate information as Confidential Information by giving notice in writing or on the record of a deposition or court proceeding, to all parties to this Action or the Related Action who received the information that the information is being designated as Confidential Information. In addition, a person producing a document may designate the document and the contents thereof as Confidential Information by producing the document marked with the word "Confidential". The failure to mark a document as "Confidential" at the time of production shall not constitute a waiver of the right to designate the document as Confidential Information at a later time.

A party or non-party seeking to designate information as Confidential Information should do so:

- (a) at the time any such information or a copy of any such document is provided to the requesting party;

- (b) prior to or at the time any such document or information is produced for inspection;
- (c) in the case of testimony, at the time the testimony is given by so stating on the record or, within 15 days after the transcript of such testimony is made available to the designating party by providing to all counsel written notice of those portions of the transcript so designated; the Court Reporter shall promptly conform the original transcript of such testimony by stamping the word CONFIDENTIAL on each page so designated; all counsel shall conform their copies of the transcript in accordance with the designation; the portions so designated shall not be utilized or disclosed by any other party, its agents, or its employees except in accordance with the terms of this Order; regardless of whether any designations are made by counsel at the deposition or during the time period within which a party may make a designation, all parties will treat the transcript as having been designated CONFIDENTIAL for fifteen (15) days from receipt of such transcript; or
- (d) in the case of information presented in a pleading or memorandum, at the time of filing.

6. Withdrawal of Designation or Consent to Disclosure or Use. A party or nonparty designating information as Confidential Information may withdraw such designation or may consent to the disclosure or use of such information beyond the terms of this Order, without prejudice to any designation by any other party or nonparty, by so notifying all parties to this Action or the Related Action in writing or on the record of a deposition or court proceeding.

7. Restriction on Disclosure of Confidential Information. Any person receiving Confidential Information as a result of discovery under the Subpoena shall, pursuant to the Federal Rules of Civil Procedure, have a duty to preserve its confidentiality. Confidential Information shall not be disclosed to anyone other than:

- (a) the parties' counsel;
- (b) non-party employees of such counsel assigned to and necessary to assist such counsel in this Action or the Related Action;
- (c) the parties;

- (d) the officers, directors, employees, principals, or partners of the party that designated the information as Confidential Information;
- (e) non-party expert witnesses, to the extent necessary to assist a party's counsel in this Action or the Related Action;
- (f) court reporters, to the extent necessary for the purposes of this Action or the Related Action; and
- (g) court personnel to the extent necessary for the purposes of this Action or the Related Action.

Without limiting the generality of these restrictions on disclosure, Confidential Information shall not be provided to any person unless that person is one of the persons to whom disclosure is expressly authorized under subparagraphs (a) through (g) of this paragraph or as set forth herein below.

Confidential Information shall be used for the prosecution or defense of claims between the parties in the Related Action or as set forth herein, and shall not be used for any other purpose (including but not limited to commercial, business, competitive or other purposes), for any reason whatsoever, without the prior written consent of the designating party or nonparty (and, if required, the consent of a regulatory agency or other authority), and shall be disclosed to no one except those listed herein in paragraph 7. Notwithstanding the foregoing, the Receiver may use Confidential Information to the extent he reasonably believes is appropriate under the Court's Preliminary Injunction Order [DE 21] and Default Final Judgment and Order for Permanent Relief and Monetary Judgment Against the Corporate Defendants [DE 293] entered in this Action, including by sharing Confidential Information with counsel for the Federal Trade Commission and the State of Florida Attorney General's office. Except as provided herein, the Receiver shall maintain the confidentiality of the Confidential Information in accordance with this Order.

8. Notification of Restriction on Use and Disclosure. Before any person listed in paragraph 7(b), (c), and (e) through (g) is given access to Confidential Information the attorney

supplying the Confidential Information shall provide the recipient a copy of this Order and notify the recipient that their receipt of the Confidential Information is subject to the terms of this Order. Every such person shall be subject to such terms, including but not limited to the requirement that such Confidential Information may not be disclosed to any person other than as authorized by this Order.

9. Notice of Intent to Use Confidential Information in Depositions or Hearings, at Trial or in Court Filings. Counsel shall give notice in accordance with this paragraph if counsel intends to file with the Court any transcript, pleading, affidavit, memorandum, exhibit or other document containing or constituting Confidential Information. Such notice shall be given to counsel for each party and to counsel for any nonparty that has designated the information as Confidential Information pursuant to this Order. The notice shall be given reasonably in advance of such inquiry, use or filing of Confidential Information, to enable the person receiving such notice to assert its rights under this Order, to move the Court for further relief, or to waive compliance with this Order. The confidentiality of any Confidential Information in depositions shall be maintained as specified in paragraph 10 hereof. Any Confidential Information filed with the Court shall be filed under seal as specified in paragraph 11 hereof. Any party, and any nonparty producing Confidential Information, may move the Court to establish such further safeguards as may be necessary to protect against disclosure of Confidential Information.

10. Confidential Information in Depositions. If counsel for any party or counsel for any nonparty witness determines that testimony given or to be given during a deposition in this Action or the Related Action is Confidential Information, such counsel may request that all persons, other than counsel, the court reporter, the witness and other persons entitled to receive Confidential Information pursuant to Paragraph 7 hereof, leave the deposition room during the confidential portion of the deposition. Further, each transcript of a deposition shall be treated as Confidential Information until

fifteen (15) days after such transcript is actually received by counsel for each party and for the witness, in order to permit such counsel to designate portions of the transcript and exhibits as Confidential Information. Upon such timely designation, the Court Reporter shall promptly conform the original transcript of such testimony by stamping the word CONFIDENTIAL on each page so designated, all counsel shall conform their copies of the transcript in accordance with the designation, and the portions so designated shall not be utilized or disclosed by any other party, its agents, or its employees except in accordance with the terms of this Order.

11. Sealing of Confidential Information in Court Filings. Before filing any item designated as containing Confidential Information, the filing party shall file a motion under the Court's Local Rules and procedures to file the item under seal. If the Court grants the motion then the filing party shall file the item under seal. If the Court denies the motion then it shall be treated as a determination under this Order that the item is not confidential. The designating party may seek review of a determination of non-confidentiality in accordance with applicable law. The filing party has no obligation to seek such review.

12. Notice of Demand for Confidential Information. In the event that any party or other person who has received Confidential Information under this Order is requested or required to disclose any Confidential Information, whether by subpoena, interrogatory, request for production, request for admission, civil investigative demand, oral question in a deposition or hearing, or any other procedure or process (each of which is referred to herein as a "Demand"), such person shall promptly notify counsel for all parties and for any nonparty who designated the material as Confidential Information pursuant to this Order. Such notice shall be given promptly, and in no event more than two (2) business days after receipt of the Demand, to enable the notified person to seek a protective order or other appropriate remedy or to waive compliance with the provisions of this Order.

In the event that a protective order is not obtained, the person receiving the Demand shall not disclose any Confidential Information, except to the extent required by law.

13. Information that is not Confidential. Notwithstanding anything to the contrary contained herein, Confidential Information does not include information: (i) that is or becomes generally available to the public other than as a result of a disclosure by a party, person, or entity in breach of this Order; or (ii) that is or becomes available to the receiving party on a non-confidential basis from a source other than the other parties or a producing nonparty or the Related Action, provided that such source is not bound by a confidentiality agreement with or other contractual, legal, or fiduciary obligation of confidentiality to any other party or producing nonparty in this Action or the Related Action with respect to such information.

14. Disclosure of Confidential Information. If any Confidential Information is disclosed to any person or entity other than in the manner authorized by this Order, the person or entity responsible for the disclosure shall, upon discovery of the disclosure, promptly inform the party or person who designated the disclosed information Confidential of all facts pertinent thereto which, after due diligence and prompt investigation, are known to the party responsible for the disclosure, including the name, address and employer of the person to whom the disclosure was made and the date of disclosure, and shall make reasonable efforts to prevent disclosure by each unauthorized person who receives such information and to retrieve from that unauthorized person all copies of documents containing that Confidential Information.

15. Challenge to Designation of Confidentiality. Nothing in this Order shall limit any of the parties from challenging designations of confidentiality under this Order, or from requesting the Court to provide further or additional protections of confidentiality, or from agreeing between themselves to any modification of this Order subject to approval of the Court. If any Party objects to

the designation of any material as “CONFIDENTIAL,” the parties will meet and confer in an effort to resolve the dispute. If the designating and objecting parties are unable to resolve the dispute, then, within 10 days of the objection, the designating party shall apply to the Court for a determination in accordance with Florida law and the standards set forth in this Order. A failure of a party to challenge a designation of confidentiality when made shall not be a waiver of that party’s right to later assert that the information actually is not confidential or entitled to the protection of this Order. The contested information and documents shall retain their protected confidential status pending resolution of the dispute.

16. No Waiver of Objections to Admissibility. This Order and the definitions herein shall not constitute a waiver by the parties of any objection which might be raised as to the production or use of documents and information, including the admissibility of any documents or information into evidence in this Action or the Related Action and each party reserves such rights, privileges and objections. Moreover, this Order does not constitute an agreement to produce any documents, including but not limited to documents which a party is prohibited from producing by law or regulation.

17. Survival of Order: Retention of Jurisdiction. The provisions of this Order shall survive the termination of this Action. This Court retains jurisdiction following the termination of this Action for purposes of any proceedings for the enforcement or modification of this Order.

The parties agree that injunctive relief is the only appropriate way to remedy a violation of this Order and that no monetary or different relief is available under this Order.

18. Disposition of Confidential Information. Unless the Court orders otherwise, at the conclusion of this Action and the Related Action, or such earlier time as the parties to the Related Action may agree, all Confidential Information in the possession of the parties or their counsel shall

be returned to the person who produced such information or destroyed at the option of the person who produced such information. All persons who have received Confidential Information under this Order shall certify in writing, within 30 days of the conclusion of this Action, that all Confidential Information has in fact been returned or destroyed.

19. Right to Seek Modification or Further Order. Nothing herein shall preclude any party from seeking from the Court (a) a modification of this Order, subject to the procedures set forth in paragraph 15 hereof, or (b) a further protective order.

20. Paragraph Titles. The paragraph titles in this Order are for convenience of reference only and shall not in any way restrict or alter the meaning of any provision hereof.


21. Federal Trade Commission. Notwithstanding any other provision in this Order, the Federal Trade Commission may disclose Confidential Information to other governmental entities, as provided by 16 C.F.R. §§ 4.9–4.11, 15 U.S.C. §§ 46(f) and 57b-2, or as otherwise authorized or required by law. Such entities include officers and employees of Federal or State law enforcement agencies (including duly authorized employees of the Commission) and congressional committees. In addition, the Federal Trade Commission shall retain, return, or destroy Confidential Information in accordance with 16 C.F.R. § 4.12. Should the Federal Trade Commission receive Confidential Information under this Order, this is the only Section that applies to the Federal Trade Commission and any such information it receives.

22. State of Florida. Notwithstanding any other provision in this Order, the State of Florida may disclose Confidential Information to other government agencies, to law enforcement personnel, including employees of a United States federal, state, or other governmental entity charged with enforcing criminal or civil laws or as required by the Public Records Act, Chapter 119 of the Florida Statutes. In the event that the State of Florida receives a request under the Public Records Act that

seeks to compel disclosure of Confidential Information, the State of Florida shall give prompt and written notice by email transmission to HardyP@ballardsahr.com, Vartabedianm@ballardspahr.com, and PHomer@homerbonner.com. Such notice shall include a copy of the public records request. Thereafter, any challenge to the confidentiality of the Confidential Information shall be rebutted, if at all, only by PNC and not by the State of Florida whose involvement shall be limited solely to providing notice to PNC of any challenge to PNC's claim of confidentiality. To the extent PNC seeks to assert an exemption in connection with a public records request to the State of Florida, PNC shall be obligated to seek an appropriate protective order or otherwise establish the applicability of any exemption. Failure to seek a protective order within seven days of notice shall render the documents subject to production under any applicable public records requirements and not protected by a claim of exemption or confidentiality. In addition, notwithstanding any other provision in this Order, the State of Florida shall retain, return, or destroy Confidential Information in accordance with the Public Records Act and the State of Florida recordkeeping requirements. Should the State of Florida receive Confidential Information under this Order, this is the only Section that applies to the State of Florida and any such information it receives.

Dated: 11/26 2019.

IT IS SO ORDERED:



FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE