

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 0:17-cv-60907-MORENO

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

JEREMY LEE MARCUS, *et al.*,

Defendants.

PNC BANK, N.A.’S RESPONSE TO RECEIVER’S MOTION FOR *IN CAMERA* REVIEW OF DOCUMENTS WITHHELD BASED ON THE SAR PRIVILEGE

Third-Party PNC Bank, N.A. (“PNC”), hereby responds to the Motion of Receiver, Jonathan E. Perlman (“Receiver”), for an *in camera* review of documents withheld based on the SAR privilege (the “Motion”) and, in support thereof, avers as follows:

1. On October 15, 2019, the court entered an Order adopting in part the Magistrate Judge’s Report and Recommendation on Receiver’s Motion to Compel PNC Bank, N.A. to Comply with Subpoenas, for Sanctions, and for Related Relief. [Dkt. No. 427]. As part of that Order, the Court required PNC produce “bank-generated investigation reports of the Defendants” but provided that in connection with Receiver’s request for these reports, “PNC Bank may provide the Receiver with a privilege log to the extent the documents are privileged under the Bank Secrecy Act.”

2. In compliance with the Order, on November 27, 2019, PNC produced fifty-two (52) documents to the Receiver as well as its First Confidential Privilege Log (the “Privilege Log”), which identified thirty-four (34) documents PNC withheld from its production on the basis of the statutory prohibition against disclosing certain documents related to Suspicious Activity Reports (“SAR”) (the “SAR Confidentiality Rule”).

3. With respect to those documents identified on PNC's Privilege Log, PNC described them as "containing information concerning a decision whether to file or not file a Suspicious Activity Report."

4. PNC's withholding of those documents is based on the categorical prohibition against the production of SARs "or any information that would reveal the existence of a SAR" set forth in the Bank Secrecy Act "(BSA)" at 12 C.F.R. § 21.11(k); 31 C.F.R. § 1020.320(e). Those regulations state that any bank, or any agent of the bank, which receives a subpoena or is otherwise requested to disclose a "SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i)." 12 C.F.R. § 21.11(k)(1)(i). *See also United States v. LaCost*, No. 10-CR-20001, 2011 U.S. Dist. LEXIS 43681, at *22 (C.D. Ill. Apr. 22, 2011) (concluding "incident reports that led to the filing of a SAR and other documents related to the filing of SARs" are within the prohibition against disclosing a SAR); *United States v. Holihan*, 248 F. Supp. 2d 179, 187 (W.D.N.Y. 2003) (recognizing that supporting documentation to a SAR "may disclose the existence of a SAR and its contents, thereby thwarting the regulation's intent" and protecting such supporting documentation from disclosure in their entirety); *Union Bank of Cal. v. Superior Court*, 130 Cal. App. 4th 378, 397 (Cal. App. Ct. 2005) ("documents a bank prepares for the purpose of investigating or drafting a possible SAR, including memos or emails drafted for that purpose" are within the prohibition against disclosing a SAR).

5. Further, FinCEN guidance explains that this rule of confidentiality is also extended to "any document stating that a SAR has not been filed." Confidentiality of Suspicious Activity Reports, 75 F.R. 75593, 75595 (Dec. 3, 2010) ("FinCEN Guidance"). The rationale behind this extension is that "[w]ere FinCEN to allow disclosure of information when a SAR is not filed,

institutions would implicitly reveal the existence of a SAR any time they were unable to produce records because a SAR was filed.” *Id.*

6. Documents falling within the SAR Confidentiality Rule are properly withheld in their entirety. *See, e.g., Shapiro v. Wells Fargo Bank, N.A.*, No. 18-civ-60250, 2018 U.S. Dist. LEXIS 219188, at *4 (S.D. Fla. July 23, 2018).

7. On December 23, 2019, prior to the Receiver filing the instant Motion, PNC informed the Receiver it would be immediately producing an amended Privilege Log, which PNC did produce on December 24, 2019. The Amended Privilege Log expanded the list of protected documents from thirty-four (34) to forty (40).

8. On December 23, 2019, the Receiver filed the Motion, requesting “that this Court conduct an *in camera* review of the withheld documents to determine whether the documents are indeed privileged.” [Dkt. No. 446].

9. In certifying his efforts to confer with PNC with respect to the relief sought in the Motion, Receiver states:

PNC agrees that the Court should conduct an *in camera* review of the documents to determine whether the information in the documents is protected or should be produced. However, PNC would like the opportunity to engage in *ex parte* communications with the Court in the course of its *in camera* inspection, to explain PNC’s view of why the SAR privilege applies to the documents being submitted. The Receiver believes that the Court is familiar with the law and can review the documents without PNC’s assistance, and opposes PNC being provided the opportunity to make *ex parte* argument to the Court. [DKT. No. 446 ¶ 5].

10. While Receiver accurately states that PNC does not oppose an *in camera* review of the withheld documents for the Court to consider the applicability of the SAR Confidentiality Rule, Receiver’s characterization of PNC’s full position is inaccurate. In conferring over the Motion with Receiver, PNC proposed the following language:

The Receiver has conferred with counsel for PNC, which does not oppose an *in camera* review. However, PNC's position is that, when conducting its *in camera* review, the Court should allow counsel for PNC to provide the Court with context regarding the nature of the documents at issue, which are technical in nature, and why they fall into the ambit of the SAR confidentiality rule. Counsel may provide such context in writing, by telephone, or in person, and respectfully requests that the Court allow counsel for PNC to be able to do so after the New Year holiday.

11. PNC agrees with the Receiver that "the Court is familiar with the law." PNC's requested modification to the relief requested, however, is based on the intensely *factual* nature of the applicability of the SAR Confidentiality Rule. That is, whether a document "reveal[s] the existence of a SAR" requires an understanding of the unique facts surrounding its creation. Such understanding may not necessarily arise from the face of a given document, but instead requires consideration of a totality of circumstances. PNC contends that *in camera* review contemplates the need for the Court's review of information from PNC providing context for the documents, because the Court needs that information to analyze application of the SAR Confidentiality Rule and because disclosure of the information needed to determine the application of SAR Confidentiality Rule necessarily would compromise the very protection sought to be preserved. *See, e.g., U.S. v. Ellis*, 154 F.R.D. 697, 700 (M.D. Fla. 1993) ("'*in camera*' is routinely used to mean review by the court alone *or with the party producing the documents or other material at issue, to the exclusion of opposing counsel*") (emphasis added).

12. Accordingly, while PNC does not oppose the Court's conduct of a *in camera* inspection, it respectfully requests the Court conduct an *in camera* review of the documents identified on PNC's Privilege Log, permitting counsel for PNC to provide the Court with the factual context regarding the nature of the documents at issue in the manner preferred by the Court (in writing, by telephone, or in person).

WHEREFORE, PNC respectfully requests the Court conduct an *in camera* view of the withheld documents to determine the applicability of the SAR Confidentiality Rule, and permit counsel for PNC to provide factual context regarding the nature of the documents at issue.

Date: December 30, 2019.

Respectfully submitted,

s/Peter D. Hardy

Peter D. Hardy (admitted *pro hac vice*)
Diana M. Joskowicz (admitted *pro hac vice*)
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Telephone: 215.864.8838
HardyP@ballardspahr.com

Mark S. Kokanovich (admitted *pro hac vice*)
Ballard Spahr LLP
1 E. Washington Street, Suite 2300
Phoenix, AZ 85004
Telephone: 602.798.5532
KokanovichM@ballardspahr.com
Respectfully submitted,

s/Peter W. Homer

Peter W. Homer, Esq.
Homer Bonner Jacobs, P.A.
1441 Brickell Avenue
1200 Four Seasons Tower
Miami, FL 33131
Telephone: (305) 350-5100
PHomer@homerbonner.com

CERTIFICATION OF SERVICE

I hereby certify that, on December 30, 2019, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will also send notice of this electronic filing to all counsel of record.

Respectfully submitted,

s/Peter W. Homer

Peter W. Homer, Esq.