

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

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

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

JEREMY LEE MARCUS, *et al.*,

Defendants.

REPLY IN SUPPORT OF RECEIVER’S AMENDED MOTION FOR *IN CAMERA* REVIEW OF DOCUMENTS WITHHELD BASED ON THE SAR PRIVILEGE

The Receiver submits this reply in support of his Amended Motion for *In Camera* Review [DE 447] (“Motion”) and in response to PNC’s Response to the Motion [DE 448] (“Response”).

A. This Court already rejected PNC’s over-broad interpretation of the SAR privilege.

PNC’s Response mostly re-argues the same over-broad interpretation of the SAR privilege that this Court *already rejected* when it ruled that the “privilege extends to Suspicious Activity Reports, but not to underlying documents.” [DE 427] (Order granting in part Receiver’s Motion to Compel) (citing *Shapiro, P.A. v. Wells Fargo Bank N A.*, No. 18-60250-C1V-HUNT, 2018 WL 4208225, *1 (S.D. Fla. July 23, 2018)). The Court made that ruling after the issue was fully briefed by PNC and the Receiver and with the benefit of oral argument. Thus, the Court knows the law and is more than capable of applying the law to the documents at issue without PNC whispering in its ear at an *ex parte* hearing.

To the extent PNC is withholding responsive documents that reveal the existence of a SAR, the law in this Circuit and the opinion of the OCC is that PNC must produce the documents with references to the SAR redacted. *See* Order Granting Motion to Compel at 2, *Pearlman vs. Bank*

of Am., No. 6:09-ap-00054-KSJ (M.D. Fla. Dec. 3, 2013), DE 51 (overruling SAR privilege objection and ordering bank to produce all responsive documents with references to SARs redacted) (Composite Exhibit “B” to DE 403 in this case); Order Granting Motion to Compel at 2-3, *Perlman v. Bank of Am.*, No. 9:11-cv-80331-HURLEY/HOPKINS (S.D. Fla. Sept. 10, 2014), DE 154 (ordering bank to produce redacted documents so as to not reveal existence of SAR); *Shapiro*, 2018 WL 4208225, at *2 (ordering bank to produce documents in redacted format so as not to reveal existence of SAR); *Wiand v. Wells Fargo Bank, N.A.*, 981 F. Supp. 2d 1214, 1217 (M.D. Fla. 2013) (“SAR privilege does not shield from discovery reports, memoranda, or underlying transactional documents generated by a bank’s internal investigation procedures”) (collecting cases); *see* Composite Exhibit “C” to DE 403 in this case (OCC letter stating that consistent with Bank Secrecy Act requirements and OCC regulations, bank could produce documents by redacting any language that “showed TD Bank did, or did not, file a SAR in connection with particular transactions or events,” and stating that documents containing “statements indicating that a transaction was or was not suspicious” need not be redacted under law); *see id.* (OCC letter advising that production of documents redacted to not reveal the existence of SAR comported with BSA requirements).

In short, this Court already decided that the SAR “privilege extends to Suspicious Activity Reports, but not to underlying documents.” [DE 427]. PNC’s clear attempt to seek rehearing on this ruling through a response to a motion for *in camera* review should be rejected.

B. By definition, *ex parte* communications are unnecessary to determine whether the SAR privilege applies; and any additional information that PNC wishes to provide should be supplied through a non-deficient privilege log.

PNC seeks to engage in *ex parte* communications with the Court to provide “context” to support its assertion of the SAR privilege. This request should be rejected. The SAR privilege is

not subject to any of the context-specific nuances that can apply to other privileges and that could possibly make *ex parte* communications necessary to resolve this dispute.¹ That is because the SAR privilege applies *only* to a SAR and “information that would reveal the existence of a SAR.” 12 C.F.R. § 21.11(k)(1)(i). Thus, if the Court’s *in camera* review of PNC’s documents does not facially, objectively “reveal the existence of a SAR,” then the privilege does not apply. “Factual context” is irrelevant to this analysis. The Receiver is not aware of a *single decision* from the large body of cases analyzing the SAR privilege that allowed *ex parte* communications as PNC is requesting. PNC cites none.

Further, PNC can and should supply any information it feels is needed to decide whether the SAR privilege applies in an amended, non-deficient privilege log that contains enough information to “allow the Court to assess the applicability of the privileges or protection asserted.” *Siegmunds v. Xuelian Bian*, No. 16-CV-62506-MORENO/LOUIS, 2018 WL 3725775, at *4 (S.D. Fla. Aug. 1, 2018). PNC’s current privilege log merely repeats the same description verbatim with respect to each item: “containing information concerning a decision whether to file or not file a Suspicious Activity Report.” That broad and vague description is unhelpful: information “concerning a decision whether to file or not file” as SAR likely includes the very “underlying documents” that this Court already ordered PNC to produce.

¹ To decide whether the attorney-client privilege applies, for example, a court needs to know “whether the communication is designed to meet problems which can fairly be characterized as predominately legal,” making the inquiry context-sensitive. *Preferred Care Partners Holding Corp. v. Humana, Inc.*, 258 F.R.D. 684, 697 (S.D. Fla. 2009).

Dated: January 6, 2020.

Respectfully submitted,

GENOVESE JOBLOVE & BATTISTA, P.A.
Attorneys for Jonathan E. Perlman, Court-
Appointed Receiver
100 Southeast 2nd Street, Suite 4400
Miami, Florida 33131
Telephone:(305) 349-2300
Facsimile: (305) 349-2310

By: /s/ Michael Friedman
Gregory M. Garno, Esq., FBN 87505
ggarno@gjb-law.com
Michael A. Friedman, Esq., FBN 71828
mfriedman@gjb-law.com

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply was served via CM/ECF Notification to all parties on the attached service list on this 6th day of January, 2020.

By: /s/ Michael Friedman

SERVICE LIST

Via CM/ECF Notification

Amanda Elizabeth Finley afinley@sequorlaw.com

Angeleque P. Linville alinville@ftc.gov

Barry Seth Turner barry.turner@dunnlawpa.com, mzucker@dunnlawpa.com,
rbasnueva@dunnlawpa.com

Diana M. Joskowicz JoskowiczD@ballardspahr.com

Gregory Matthew Garno ggarno@gjb-law.com, chopkins@gjb-law.com,
gjbecf@ecf.courtdrive.com, gjbecf@gjb-law.com, vlambdin@gjb-law.com

Irina Rebeca Sadovnic isadovnic@gjb-law.com, hgray@gjb-law.com

Jonathan Perlman jperlman@gjb-law.com, cmonzon@gjb-law.com, eserres@gjb-law.com,
gjbecf@ecf.courtdrive.com

Mariaelena Gayo-Guitian mguitian@gjb-law.com, chopkins@gjb-law.com,
gjbecf@ecf.courtdrive.com, vlambdin@gjb-law.com

Mark S. Kokanovich KokanovichM@ballardspahr.com

Maurice Belmont VerStandig mac@mbvesq.com, molly@mbvesq.com

Melanie J. Vartabedian VartabedianM@ballardspahr.com

Michael Bild mbild@gjb-law.com, cmonzon@gjb-law.com, lpiotrowski@gjb-law.com

Michael A Friedman mfriedman@gjb-law.com, btraina@gjb-law.com, cmonzon@gjb-law.com,
gjbecf@ecf.courtdrive.com, jsardina@gjb-law.com, mchang@gjb-law.com

Nicholas Steven Agnello nagnello@burr.com, flservice@burr.com, rzamora@burr.com

Peter D. Hardy HardyP@ballardspahr.com

Peter W. Homer phomer@homerbonner.com, jgarcia@homerbonner.com

Ronnie Adili ronnie.adili@myfloridalegal.com

Ryann H. Flack ryann.flack@myfloridalegal.com, laura.gomez@myfloridalegal.com

Terence M. Grugan Grugant@ballardspahr.com

Valerie M. Verduce vverduce@ftc.gov