

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 0:17-CV-60907-MORENO/STRAUSS

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

JEREMY LEE MARCUS, *et al.*,

Defendants.

**ORDER GRANTING AMENDED RECEIVER’S MOTION FOR *IN CAMERA* REVIEW
OF DOCUMENTS WITHHELD BASED ON THE SAR PRIVILEGE (DE 447)**

THIS CAUSE has come before the Court upon the Court-appointed Receiver, Jonathan E. Perlman’s (“Receiver’s”) Amended Receiver’s Motion for *In Camera* Review of Documents Withheld Based on the SAR Privilege¹ (“Motion”) seeking review of documents withheld by third-party PNC Bank, N.A. (“PNC”) in the above-captioned case (DE 447). The District Court referred the Motion for an Order pursuant to 28 U.S.C. 636(b)(1)(A) and (B) and the Magistrate Judge Rules of the United States District Court for the Southern District of Florida (DE 453). PNC responded (DE 448) and the Receiver replied (DE 449). After carefully considering the briefings,

¹ The Bank Secrecy Act, 31 U.S.C. § 5318(g)(1) requires financial institutions to report any suspicious transaction by filing a suspicious activity report (“SAR”). SARs are confidential, and a financial institution may not disclose whether a transaction has been reported. 31 U.S.C. § 5318(g)(2)(A); 12 C.F.R. § 21.11(k); 31 C.F.R. § 1020.320(e) (stating that, provided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, the prohibition on disclosure by banks does not prohibit disclosure of “the underlying facts, transactions, and documents upon which a SAR is based”). “This prohibition is commonly known as the SAR privilege,” and it is an unqualified discovery and evidentiary privilege that a financial institution is not permitted to waive. *Wiand v. Wells Fargo Bank, N.A.*, No. 812CV00557T27EAJ, 2013 WL 12157564, at *1 (M.D. Fla. Dec. 11, 2013) (internal quotations and citation omitted).

the record and following a hearing on the matter that was held on March 5, 2020, the Motion² is **GRANTED**.

At the March 5, 2020 hearing, PNC provided the Court with a binder containing all withheld documents along with two exemplars corresponding to: (1) Entry No. 5 on Revised First Confidential Privilege Log of Non-Party PNC Bank, N.A. (“Privilege Log”) (DE 447 at 8) (marked by PNC as MORENO000018), and (2) Entry No. 35 on Privilege Log (DE 447 at 9) (marked by PNC as MORENO000160). The exemplars provide examples of PNC’s proposed redactions of the two primary types of documents listed on the Privilege Log. The Court agreed to examine these examples and the binder of documents PNC submitted. Counsel for the Receiver and PNC agreed that, if following review, the Court is satisfied that the examples in no manner favor PNC relative to other examples that might be utilized from the whole population of documents provided, the Court’s direction on production and redaction relative to these examples would be sufficiently illustrative to enable the Receiver and PNC to resolve their disclosure dispute on the remainder of the documents.

Accordingly, it is hereby **ORDERED** that:

1. The Receiver’s Motion for *in camera* review is **GRANTED**.
2. PNC’s request for *ex parte* communication with the Court to further explain why the documents are privileged is **DENIED**.³
3. The parties are directed to file supplemental briefing of no more than five (5) pages, double-spaced, on or before March 12, 2020, as to whether PNC’s continuing

² The Motion is styled so as to request a single relief—*in camera* inspection.

³ The Motion’s Certificate of Conference (DE 447 at 3) describes the Receiver’s objection to PNC’s request to engage in *ex parte* communication with the Court to explain why PNC believes the SAR privilege applies to the documents submitted.

activity reports (“CARs”) are subject to the SAR privilege.⁴

4. To the extent that the Motion (DE 447) requests the Court to compel PNC to produce whole or redacted versions of the documents listed on the Privilege Log (DE 447 at 8-10), a further Order will follow after the Court receives the supplemental briefings and completes the *in camera* review.

DONE AND ORDERED in Chambers, Fort Lauderdale, Florida, this 6th day of March 2020.


Jared M. Strauss
United States Magistrate Judge

Copies furnished to:

All Counsel of Record

⁴ At the hearing held on March 5, 2020, counsel for the Receiver objected to PNC withholding documents pertaining to CARs on the basis that the term is unfamiliar and not recognized under the SAR privilege. Counsel for PNC asserted that the CARs term is an industry standard and that CARs fall within the SAR privilege. The Court was unclear whether PNC’s references to CARs are actually references to SARs or whether CARs are otherwise subject to the SAR privilege. Therefore, the Court ordered the parties to provide supplemental briefing on the issue.