

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.

**RECEIVER'S SUPPLEMENTAL BRIEFING REGARDING
CONTINUING ACTIVITY REPORTS**

Jonathan E. Perlman, as court-appointed Receiver (the "Receiver") for the Receivership Entities, by and through undersigned counsel, submits this supplemental briefing at the direction of the Court's Order Granting Amended Receiver's Motion for *In Camera* Review of Documents Withheld Based on the SAR Privilege [ECF No. 468], which directed the parties to file supplemental briefing on the question of whether "continuing activity reports" or, as PNC Bank, N.A. ("PNC") refers to them, "CARs," are subject to the privilege governing Suspicious Activity Reports (the "SAR privilege").

1. This Court held a hearing on March 5, 2020 regarding the Receiver's Amended Motion for *In Camera* Review of Documents Withheld Based on the SAR Privilege. [ECF No. 447]. At the hearing, the Court accepted documents from PNC for the purpose of *in camera* review. At the end of the hearing, PNC's counsel advised for the first time that PNC's proffered documents include "continuing activity reports" or "CARs," and claimed that a "CAR" is the same as a "Suspicious Activity Report" or "SAR," and therefore subject to the SAR privilege. Receiver's counsel (who has litigated issues surrounding SARs but never heard of a "CAR")

objected that he did not know if such a document would be subject to the SAR privilege. Thus, the Court directed the parties to submit additional briefing on this narrow issue.

2. PNC states in its supplemental briefing on this narrow issue that a “CAR” is “how PNC identifies reports on continuing suspicious activity that are filed after an initial related Suspicious Activity Report, or SAR, has been filed.” [ECF No. 473].

3. The Receiver has not been able to find any reference to a distinct form or document known as a “CAR” in FinCEN guidance or the Bank Secrecy Act or its regulations, nor does a search of Westlaw reveal any legal authority discussing the application of the SAR privilege to a “continuing activity report” or a “CAR.”

4. FinCEN guidance, however, does discuss the descriptor “continuing activity report,” which, as PNC discusses in its supplemental brief, is one of the four check-boxes appearing on the face of the standard FinCEN SAR form:

Suspicious Activity Report Version Number: 1.2

OMB No. 1506-0065 (Report)
OMB No. 1506-0001, 1506-0006, 1506-0015, 1506-0019, 1506-0029, and 1506-0061 (Regulations)

Filing Instructions:

1. Complete the report in its entirety with all requested or required data known to the filer.
2. Click "Validate" to ensure proper formatting and that all required fields are completed.
3. Click "Sign with PIN" and enter your 8-digit PIN to electronically sign the report.
4. Click "Save" to save a local copy of the report.
5. Click "Print" (optional) to print a paper copy of the report for record keeping purposes.
6. Click "Submit" and go to your "Track Status" to confirm acceptance.

Filing name

***1 Type of filing**
(Check all that apply)

Initial report Correct/Amend prior report
 Continuing activity report Joint report

5. As explained in the FinCEN SAR filing instructions, the indicator “continuing activity report” is an element of the official SAR form that connotes that the SAR is being filed

with respect to a continuation of previously-reported suspicious activity. *See FinCEN Suspicious Activity Reports (FinCEN SAR) Electronic Filing Requirements*.¹

6. Under the Bank Secrecy Act, 31 U.S.C. § 5318(g)(2), and its implementing regulations, 12 C.F.R. § 21.11(k)(1)(i), the SAR privilege extends **only** to “a SAR, or any information that would reveal the existence of a SAR.” As discussed extensively in the Receiver’s prior briefing on this issue, the privilege is construed narrowly. *See* Receiver’s Reply in Support of Amended Motion for *In Camera* Review of Documents Withheld Based on the SAR Privilege [ECF No. 449] and cases cited therein.

7. Thus, if the “CAR” at issue actually is the standard FinCEN SAR form embedded in paragraph 3 of PNC’s Supplemental Briefing [ECF No. 473] with the “continuing activity report” box checked, then the Receiver agrees that it falls within the SAR privilege. If, however, the so-called “CAR” is anything other than an SAR—*e.g.*, documentation, communications, investigative files, notes, internal reports or memorandum, underlying transactional documents, etc. of PNC’s internal investigation into continuing suspicious or fraudulent activity—then those documents are not subject to the SAR privilege and should be produced. If the documents at issue are not SARs but contain information that would reveal the existence of a SAR with the “continuing activity report” box checked, then the document should be produced with the privileged information redacted.

¹ Available at https://bsaefiling.fincen.treas.gov/docs/XMLUserGuide_FinCENSAR.pdf.

Respectfully submitted on March 12, 2020.

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CERTIFICATE OF SERVICE

I hereby certify that on March 12, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record and entities identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

/s/ Michael A. Friedman

Attorney