

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

**CASE NO. 17-60907-CIV-MORENO/STRAUSS**

FEDERAL TRADE COMMISSION, *et al.*,

Plaintiffs,

v.

JEREMY LEE MARCUS, *et al.*,

Defendants.

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**RECEIVER JONATHAN E. PERLMAN'S  
OBJECTION TO MAGISTRATE'S MARCH 27, 2020 ORDER DENYING RECEIVER'S  
REQUEST TO PRODUCE REDACTED VERSIONS OF DOCUMENTS WITHHELD  
BASED UPON THE SAR PRIVILEGE [DE 483]**

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Jonathan E. Perlman, Receiver for the Receivership Entities,<sup>1</sup> objects to the Magistrate's March 27, 2020 Order Denying Receiver's Request to Compel PNC to Produce Redacted Versions of Documents Withheld Based Upon the SAR Privilege [DE 483].

### SUMMARY

On October 15, 2019, this Court granted the Receiver's motion to compel the production of PNC's "bank-generated investigation documents of the Defendants." Ex. 1, Order Adopting in Part Magistrate Judge's Report [DE 427]. The Court explained in its ruling:

The Bank's main objection against producing these documents is that they are privileged under the Bank Secrecy Act, 31 U.S.C. § 5318(g)(2). **The privilege extends to Suspicious Activity Reports, but not to underlying documents.**

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Accordingly the Court grants the motion to compel the production of these documents. Of course, PNC Bank may provide the Receiver with a privilege log to the extent the documents are privileged under the Bank Secrecy Act.

*Id.* at p. 2 (emphasis added). The Court made that ruling after the Receiver and PNC fully litigated the scope of the privilege to this Court across multiple briefs.

PNC failed to produce its "bank-generated investigation documents" despite this Court's ruling. Instead, PNC provided a privilege log of items such as "supporting documentation" and other items that are not "Suspicious Activity Reports," but instead are the "underlying documents" that PNC was ordered to produce. So the Receiver filed a motion for *in camera* review, asking the Court to determine whether the documents were properly withheld under the Court's ruling. PNC responded by admitting that it had withheld "incident reports that led to the filing of a SAR" and "supporting documentation"—i.e., underlying documents—but PNC claimed that these items are privileged, citing the same authority that PNC previously argued and this Court rejected.

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<sup>1</sup> "Receivership Entities" means all entities over whom this Court has appointed the Receiver, including "Receivership Defendants" in DE 21 and "Corporate Defendants" in DE 293, and each of their divisions, subsidiaries, affiliates, predecessors, successors, and assigns.

This Court referred the matter to the magistrate who, after reviewing the documents *in camera*, entered the order at issue. Disregarding this Court’s prior ruling and the substantial case law upon which it was based, the magistrate determined that all of the documents that PNC withheld are privileged entirely and cannot be produced even with redactions. The magistrate so ruled even though PNC concedes that the documents include “preliminary” reports—underlying documents, not SARs. The magistrate further ruled that the documents cannot be produced with redactions even though PNC concedes that the narrative portions of the documents—the portions critical to the Receiver—do not necessarily reveal or mention any SAR.

The magistrate ignored this Court’s ruling and misapplied the law. In doing so, the magistrate also disregarded the opinion of the Office of the Comptroller of the Currency—the agency that promulgated the regulation and the scope of the privilege. For these reasons, detailed below, the Receiver respectfully requests that this Court conduct its own *in camera* review, reverse the magistrate’s order, and order PNC to produce the underlying documents that this Court already ordered PNC to produce six months ago.

## **BACKGROUND**

### **A. The Receiver’s pending claims against PNC.**

The Federal Trade Commission and the State of Florida, Office of the Attorney General filed this action alleging that Defendants defrauded consumers of millions of dollars through phony debt-relief services. This Court appointed the Receiver and directed him to investigate the Receivership Entities’ affairs and to assert claims, including for tort and fraudulent transfer, against third parties for the benefit of consumers.<sup>2</sup> The Receiver’s investigation identified facts to support such claims against PNC, who maintained accounts for the Defendants and received millions of

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<sup>2</sup> See [DE 174, 293].

dollars from the Receivership Entities and defrauded consumers. These facts are alleged in the Receiver's direct case against PNC, *Perlman v. PNC Bank, N.A.*, No. 19-61390-SMITH, where District Judge Smith recently ruled that the Receiver states viable claims for aiding and abetting conversion and breach of fiduciary duty against PNC.<sup>3</sup>

**B. The Receiver's pre-suit subpoena to PNC, PNC's objection under the Bank Secrecy Act, and the Receiver's response.**

Through his investigation, the Receiver learned (among other facts alleged against PNC) that in July 2014, PNC unilaterally closed accounts held in the names of certain Receivership Entities that Defendants had used to perpetrate the scheme. PNC also froze funds in the accounts to protect itself against claims and reported to other banks (through a company that financial institutions use to exchange information about fraudulent banking conduct) that PNC closed the accounts "for cause," meaning fraud or serious misconduct. Yet PNC then opened new accounts for Defendants and accepted millions of dollars from the Receivership Entities and consumers.

Before filing his direct action against PNC, the Receiver issued a subpoena *duces tecum* to PNC seeking any internal reports about the Receivership Entities' accounts.<sup>4</sup> All banks, including PNC, generate such reports when they observe unusual or suspicious activity in a customer's account, or make the decision to freeze funds in a customer's account, or to close an account and terminate a relationship (especially with a customer like Defendants, which was worth millions of

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<sup>3</sup> See *Perlman v. PNC Bank, N.A.*, No. 19-61390-SMITH [DE 64 at pp.12-15].

<sup>4</sup> The subpoena contained numerous requests seeking this information, which this Court collectively referred to as "bank-generated investigation reports" [DE 427]. As discussed in decisions of the Eleventh Circuit and this Court, these reports are critical in an aiding and abetting case. See, e.g., *Perlman v. Wells Fargo Bank, N.A.*, 59 Fed. App'x 988 (11th Cir. 2014) (reversing dismissal of aiding and abetting claim because bank's internal reports established "plausible inference of actual knowledge."); *Coquina Investments v. Rothstein*, No. 10-60786-CIV, 2011 WL 4949191, \*4 (S.D. Fla. Oct. 18, 2011) (account monitoring reports were "admissible circumstantial evidence relevant to whether TD bank had knowledge of the fraud") (citing *United States v. Williams*, 390 F.3d 1319, 1325 (11th Cir. 2004)).

dollars in deposit accounts to PNC). PNC responded to the subpoena by producing only account statements and signature cards, but no internal reports, under a cover letter falsely stating that PNC had produced all responsive documents. The Receiver deposed a PNC corporate representative to learn what PNC had done to dutifully search for and produce internal reports. PNC's corporate representative under Rule 30(b)(6) testified that the subpoena was referred to PNC's legal department, but had no further knowledge because she does not work in that department.<sup>5</sup>

On April 2, 2019, the Receiver filed in this Court a motion to compel PNC to produce the internal reports and other responsive documents, and to provide a competent witness to explain what responsive documents exist [DE 357]. PNC objected that the Bank Secrecy Act, 31 U.S.C. § 5318(g)(2), and its implementing regulation, 12 C.F.R. § 21.11, prohibit “the production of a Suspicious Activity Report, or SAR, or any information that would reveal the existence of a SAR,” which is a government form prescribed by regulators [DE 363]. Although an internal bank report is not a SAR, PNC argued that the privilege extends “not only to a SAR itself, but also in appropriate circumstances to material prepared by the financial institution as part of its process to detect and report suspicious activity.” [*Id.* at p.16]. The Receiver responded that the privilege applies only to “a SAR, or any information that would reveal the existence of a SAR,” citing the actual language of the regulation and cases explaining that “a bank may not cloak its internal reports and memoranda with the veil of confidentiality simply by claiming they concern suspicious activity or concern a transaction that resulted in the filing of a SAR.” [DE 365 at pp.8-10]. The Receiver argued, consistent with controlling law, that if PNC's internal reports contain information “that would reveal the existence of a SAR,” then the reports should be produced with that information redacted. [*Id.* at p.10].

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<sup>5</sup> See [DE 360 at pp.7, 9-12]

This Court referred the motion to Magistrate Judge Seltzer, who recommended denying it in a report issued on June 11, 2019 that did not address the Bank Secrecy Act [DE 380].<sup>6</sup> The Receiver objected [DE 395]. PNC responded by again raising the SAR privilege [DE 400, p. 14]. The Receiver again argued that the privilege does not apply to an internal bank report that does not reveal a SAR, citing among other cases *Peter E. Shapiro, P.A. v. Wells Fargo Bank, N.A.*, 18-civ-60250-Ungaro, 2018 WL 4208225, at \*1 (S.D. Fla. July 23, 2018), which states that “the SAR privilege does not shield from discovery reports, memoranda, or underlying transactional documents generated by a bank’s internal investigation procedures.” [DE 403 at p.7]. In addition, the Receiver proffered two letters from the Office of the Comptroller of the Currency (“OCC”) to the parties in *Coquina Investments v. TD Bank, N.A.*, No. 10-60786-Civ-Cooke (S.D. Fla.). [DE 403, Comp. Ex. C].<sup>7</sup> There, District Judge Cooke ordered TD Bank to request, under 12 C.F.R. 4.33, the OCC’s opinion whether the bank could produce certain “non-public OCC information,” namely, information potentially protected by the SAR privilege.<sup>8</sup> In a letter dated December 2, 2011, the OCC directed TD Bank to *un-redact* portions of a document “**that do not explicitly reveal that a SAR was or was not filed.**” [*Id.* at p.2 of 6] (emphasis added).

**C. This Court rules that the Bank Secrecy Act “extends to Suspicious Activity Reports, but not to underlying documents.”**

On October 10, 2019, this Court conducted a hearing on the matter. At oral argument, neither the Court nor the parties raised the Bank Secrecy Act. The Receiver’s counsel explained

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<sup>6</sup> Generally, Judge Seltzer’s view was that the discovery should be conducted in the Receiver’s direct action against PNC, *Perlman v. PNC Bank, N.A.*, No. 19-61390-SMITH.

<sup>7</sup> The OCC’s letters are attached hereto as Composite Exhibit 6 for ease of reference.

<sup>8</sup> See Order to Show Cause, *Coquina Investments v. TD Bank, N.A.*, No. 10-60786-Civ-Cooke (S.D. Fla. Nov. 18, 2011), DE 641 (ordering TD Bank to provide communications with OCC regarding redactions); Order, *id.* at DE 656 (ordering TD Bank to seek OCC’s expedited review of TD Bank’s redactions).

to the Court that PNC's internal bank reports are critical to the Receiver's aiding and abetting claims:

**Receiver's counsel:** Knowledge, the bank's knowledge is essentially what we're going to be litigating in the other case. The documents we're looking for have direct evidence of that. PNC is now arguing on a Motion to Dismiss before we've been allowed to take any discovery that we haven't sufficiently alleged actual knowledge of the underlying fraud that gave rise to this receivership that's actually before you.

The documents we're seeking have direct evidence of that issue. It's the **bank's records that it kept contemporaneously to monitoring the accounts that the fraudsters used at PNC and the conclusions, if any, that PNC drew about what was happening in those accounts**, such as for example, wow, gee, it looks like there's a fraud being conducted through these accounts.

So, in light of those somewhat unique circumstances, we believe it's important to get the discovery now because it essentially, we believe, will render frivolous the arguments that PNC is making before Judge Smith.

**The Court:** So you want the discovery here because it helps you win the case there.

**Receiver's Counsel:** It helps us survive a Motion to Dismiss there.

**The Court:** Okay. I got it.

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**Receiver's counsel:** And again, what's critical to me is the bank is arguing now today that we cannot sufficiently allege that they knew what was going on, while not disputing at all that they have in their possession now documents that say what they knew about what was going on.

**The Court:** [Addressing PNC's counsel] Why don't you want to give them what you're going to have to give them eventually, unless Judge Smith dismisses the case?

**PNC's Counsel:** I mean, I'm sorry, I'm just, respectfully, not going to take the bait from counsel . . . .

Ex. 2, Oct. 10, 2019 Hrg. Tr., at 11:4-12:1, 15:8-15 (emphasis added).

On October 15, 2019, this Court entered its Order Adopting in Part Magistrate Judge's Report and Recommendation. Ex. 1. Pertinent here, the Court *granted* the Receiver's motion to compel PNC to produce the "bank-generated investigation documents" described at the hearing, citing the *Shapiro, P.A.* decision that the Receiver had cited to the Court:

The Receiver also seeks the bank-generated investigation reports of the Defendants. The Bank's main objection against producing these documents is that they are privileged under the Bank Secrecy Act, 31 U.S.C. § 5318(g)(2). **The privilege extends to Suspicious Activity Reports, but not to underlying documents.** *Shapiro, P.A. v. Wells Fargo Bank, N.A.*, No. 18-60250-CIV-HUNT, 2018 WL 4208225, \*1 (S.D. Fla. July 23, 2018). To the extent these reports and the underlying assets allow the Receiver to recover and prevent dissipation of assets, they are related to the goals of this litigation. The Court does not see the benefit of delaying this production to a later date when discovery starts in the direct action. **Accordingly the Court grants the motion to compel the production of these documents.** Of course, PNC Bank may provide the Receiver with a privilege log to the extent the documents are privileged under the Bank Secrecy Act.

*Id.* at p. 2 (emphases added). The Court ordered PNC to produce the investigation reports and that PNC could provide a privilege log “to the extent the documents are privilege under the Bank Secrecy Act”—which, according to this Court’s ruling in the very same Order, “extends to Suspicious Activity Reports, but not to underlying documents.” *Id.*

**D. PNC withholds “underlying documents” and then renews the same arguments about the scope of the privilege that this Court rejected.**

On November 27, 2019, PNC produced documents bates-stamped PNC 012227-012305. PNC did not produce a single internal report surrounding its decision to close the accounts, nor any documents describing the facts, transactions, or circumstances that led to that decision. In fact, PNC produced no reports at all except three 4-page “alerts,” two dated July 25, 2015 and one dated July 11, 2015, each concerning an account in the name of a Receivership Entity. Each alert includes a list of transactions that triggered the alert including the date, amount, and source of funds. Each alert also contains a table captioned “Actions Taken on Alert” with a narrative “Comments” section that identifies the customer, the reason for the alert, and the steps PNC took to investigate the alert. The alerts that PNC chose to produce were resolved by “withholding action” after PNC concluded

that the transactions were “reasonable,” and contain an explanation of what information the bank reviewed to arrive at that conclusion.<sup>9</sup>

PNC also provided a privilege log identifying 34 items withheld as privileged under the Bank Secrecy Act. PNC logged each item with the same identical or near-identical description:

- “Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report.”
- “Transaction monitoring alert containing information concerning a decision whether to file or not file a Suspicious Activity Report.”
- “Supporting documentation, for a transaction monitoring alert, containing information concerning a decision whether to file or not file a Suspicious Activity Report.”

Ex. 4, First Revised Privilege Log.

PNC’s decision to withhold “supporting documentation” facially conflicts with the Court’s ruling that “underlying documents” are not privileged. Moreover, the absence from PNC’s production of any internal reports or memoranda concerning the decision to terminate the relationship with Defendants is striking. So, on December 23, 2019, the Receiver filed a Motion for *In Camera* Review of Documents Withheld Based on the SAR Privilege [DE 446], explaining that this Court ruled that the “privilege extends to Suspicious Activity Reports, but not to underlying documents” and asking the Court to review the documents *in camera* to determine whether they were properly withheld under that ruling. The next day, PNC provided a “First Revised” privilege log enlarging the list of items from 34 to 40, and the Receiver filed an Amended Motion for *In Camera* Review attaching the First Revised privilege log [DE 447].

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<sup>9</sup> PNC produced these items to the Receiver under a confidentiality agreement. These documents are attached hereto as Composite Exhibit 3 in redacted format. The Receiver has filed or will be filing a motion to file the documents under seal in accordance with the confidentiality agreement.

PNC responded to the Amended Motion for *In Camera* Review by interjecting the same overbroad objection based on the same authority that PNC previously argued and this Court rejected. PNC argued that the privilege applies to “incident reports that led to the filing of a SAR” and “supporting documentation” [DE 448, ¶¶ 4-5]—the documents in the First Revised privilege log—notwithstanding the Court’s ruling that the privilege does not extend to “underlying documents.” Additionally, PNC explained that if a document contains any reference to a SAR or information revealing whether a SAR was filed, then the entire document was withheld. [*Id.* at ¶ 6]. The Receiver argued that this Court had already rejected PNC’s arguments about the scope of the privilege, and that PNC should be ordered to produce any document that is not a SAR, but reveals the existence of a SAR, with the protected information redacted [DE 449 at pp.1-2]. In addition to case law, the Receiver again proffered the letters that the OCC issued in connection with *Coquina v. TD Bank*, where the OCC opined that the bank’s “redactions were appropriate to prevent disclosure of whether or not a SAR had been filed”—not that the document should be withheld entirely, as PNC contends. Comp. Ex. 6, OCC letters, at p.2 of 6

**E. PNC confirms that it is withholding unprotected “incident reports that led to the filing of a SAR” and “supporting documentation” – underlying documents that should have been produced under this Court’s ruling.**

On February 7, 2020, this Court referred the Receiver’s Amended Motion for *In Camera* Review to Magistrate Judge Strauss under 28 U.S.C. § 636(b)(1)(A) and (B) and the Magistrate Judge Rules of the S.D. Fla. Local Rules. On March 5, 2020, the Magistrate held a hearing on the matter. PNC’s counsel described the 40 documents that PNC withheld. *See* Ex. 5, March 5, 2020 Hrg. Tr. According to PNC: “There are two basic buckets of documents. There are alerts and there are cases. An alert is kind of a preliminary document and the process, if it advances along, it becomes what is called a case.” *Id.* at 8:12-15. PNC confirmed that the alerts and cases contain

“narrative sections” that reveal “the sort of thing the bank is looking at and how they value it,” which then feeds “downstream, of course, for SARs.” *Id.* at 14:1-4; 20:9-13.

PNC further explained that the documents contain “sections that just say whether a SAR was filed or not”—PNC correctly characterized those as “easy” because the parties agree that a statement “whether a SAR was filed or not” is protected. *Id.* at 12:10-22. Yet the documents also contain a narrative portion that PNC claims is protected “even if one couldn’t necessarily tell, oh, in this instance there was a SAR filed or there was not a SAR filed.” *Id.* at 13:23-25. PNC explained that the narrative portions reveal “the sort of thing the bank is looking at and how they value it and how they try to detect suspicious activity for the benefit of law enforcement downstream, of course, for SARs.” *Id.* at 14:1-4 (emphasis added). In other words, they are the documents that Receiver’s counsel described at the hearing and which this Court ordered PNC to produce: “the bank’s records that it kept contemporaneously to monitoring the accounts that the fraudsters used at PNC and the conclusions, if any, that PNC drew about what was happening in those accounts.” Ex. 2, Oct. 10, 2019 Hrg. Tr., at 11:4-12:1. But PNC argued to the magistrate that these narratives are protected even if they do not reveal a SAR because they “are essentially what becomes possible narrative section and a possible SAR,” even if the narrative comes from some other document and is “cut and paste into the SAR.” *Id.* at 20:9 to 21:9.

PNC’s description strongly indicates that the “alerts” described at the hearing are the same as the “alerts” that PNC produced to the Receiver. The alerts that PNC produced, like those it withheld, are preliminary incident reports that link to cases (the alerts PNC produced have a field for “Linked Cases”), with narratives describing the transactions that triggered the alert and “the sort of thing the bank is looking at and how they value it.” The only apparent difference between the alerts that PNC held back and the alerts it produced is how PNC resolved them: the alerts that

PNC produced were resolved with PNC “withholding action” while the alerts PNC held back apparently led “downstream” to cases which may, in turn, have led to a decision about a SAR.

**F. Contrary to applicable law and this Court’s Order, the magistrate rules that the Bank Secrecy Act actually does apply to PNC’s “underlying documents.”**

The hearing concluded with the magistrate indicating that he would review *in camera* two exemplars of documents with PNC’s proposed redactions (though the magistrate indicated in his ruling that he reviewed all 40 withheld documents).<sup>10</sup> On March 27, 2020, after entering a pro forma order granting the Receiver’s request for *in camera* review [DE 468], the magistrate entered his Order Denying Receiver’s Request to Compel PNC to Produce Redacted Versions of Documents Withheld Based Upon the SAR Privilege [DE 483]. In short, the magistrate ruled that all of the withheld documents are privileged under the Bank Secrecy Act and cannot be produced even in redacted form. The magistrate acknowledged this Court’s ruling that “the privilege extends to [SARs] but not to underlying documents,” but concluded that this Court had not actually rejected PNC’s arguments “but merely stated the law.” [DE 483 at p.12].

The magistrate determined that the documents are covered by the SAR privilege because, though they are underlying documents and not SARs, they “represent material of an evaluative nature prepared for the specific purpose of complying with federal reporting requirements,” citing *Wiand v. Wells Fargo Bank, N.A.*, No. 8:12-cv-00557-T-27EAJ, 2013 WL 12157564, at \*3 (M.D. Fla. Dec. 11, 2013). [*Id.* at p.12]. This includes the alerts—though the fact that PNC does not use alerts specifically to comply with its reporting obligation is established by PNC’s production of three alerts that do not mention any SAR or any decision whether to file a SAR. Rather, the alerts that PNC described at the hearing are preliminary documents with narrative

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<sup>10</sup> PNC provided the 40 documents to the magistrate in an approximately two-inch binder. The Receiver respectfully requests the transfer of the documents to this Court’s chambers for review.

sections that do not “necessarily tell, oh, in this instance there was a SAR filed or there was not a SAR filed.” Ex. 5, March 5, 2020 Hrg. Tr. at 13:23-25.

Additionally, the magistrate determined that the OCC letters proffered by the Receiver are inapplicable because they “addressed disclosure of non-public OCC information;” according to the magistrate, “the issue of non-public OCC information is not before this Court.” [DE 483 at p. 14]. However, the magistrate did not address that the “non-public OCC information” discussed in the letters was information that the bank withheld based on the SAR privilege. As the OCC explained in one of the letters: “Under the OCC’s regulations a SAR and any information that would reveal the existence of a SAR are confidential non-public OCC information.” Comp. Ex. 6, OCC letters, at p.3 of 6.

## **ARGUMENT**

### **A. Standard of Review.**

When a party timely objects to a magistrate judge’s order on a non-dispositive matter, the district judge “must modify or set aside any part of the order that is clearly erroneous or is contrary to law.” Fed. R. Civ. P. 72(a); *see also* 28 U.S.C. § 636(b)(1)(A) (same); S.D. Fla. L.R. Mag. 4(a)(1) (same). “An order is clearly erroneous where, although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed. An order is contrary to law where it fails to apply or misapplies relevant statutes, case law or rules of procedure.” *Doe v. Lynn Univ., Inc.*, No. 9:16-CV-80850, 2017 WL 275448, at \*1 (S.D. Fla. Jan. 19, 2017) (reversing in part magistrate’s relevance rulings) (citations omitted). “The Magistrate Judge’s application of the law is reviewed de novo, as the application of an improper legal standard is never within a court’s discretion.” *Tosto v. Zelaya*, No. 06-21213-CIV, 2012 WL 12849956, at \*2 (S.D. Fla. Feb. 2, 2011) (citing *Johnson & Johnson Vision Care*,

*Inc. v. 1-800 Contacts, Inc.*, 299 F.3d 1242, 1246 (11th Cir. 2002)) (quotation marks and ellipses omitted); *see also Haines v. Liggett Group Inc.*, 975 F.2d 81, 91 (3d Cir. 1992) (“‘contrary to law’ indicates plenary review”); *PowerShare, Inc. v. Syntel, Inc.*, 597 F.3d 10, 15 (1st Cir. 2010) (contrary to law standard “is plenary”).

**B. The Bank Secrecy Act privilege applies to SARs and work product directly related to the decision whether to file a SAR, and does not apply to reports, memoranda, and transactional documents generated by a bank’s internal investigation procedures—i.e., “underlying documents.”**

“It is well established that the party invoking a privilege “bear[s] the burden of proving its existence.” *Wiand v. Wells Fargo Bank, N.A.*, 981 F. Supp. 2d 1214, 1216 (M.D. Fla. 2013) (discussing SAR privilege) (citing *In re Grand Jury Investigation*, 842 F.2d 1223, 1225 (11th Cir. 1987)). “Moreover, because withholding of otherwise discoverable information serves to obscure the truth, a privilege should be construed as narrowly as is consistent with its purpose.” *Id.* (citing *United States v. Suarez*, 820 F.2d 1158, 1160 (11th Cir. 1987)).

Under the regulation implementing the Bank Secrecy Act, “a SAR or any information that would reveal the existence of a SAR” are confidential but the “underlying facts, transactions, and documents upon which a SAR is based” are not confidential. 12 C.F.R. § 21.11. Construing the regulation, courts hold that “the SAR privilege does not shield from discovery reports, memoranda, or underlying transactional documents generated by a bank’s internal investigation procedures.” *Shapiro P.A.*, 2018 WL 4208225, at \*1 (citing *Wiand*, 981 F. Supp. 2d at 1217 (collecting cases)).

Because the regulation protects “information that would reveal the existence of a SAR,” 12 C.F.R. § 21.11, courts also hold that “documents representing drafts of SARs or other work product or privileged communications that relate to the SAR itself” are protected, because these documents “disclose whether a SAR has been prepared or filed.” *Wiand*, 2013 WL 12157564, at \*2 (citing *Union Bank, N.A. v. Superior Court*, 130 Cal. App. 4th 378 (Cal. Ct App. 2005)). This

aspect of the privilege is narrow. It applies to “documents generated at the decisionmaking stage that contain a discussion of SAR requirements and reflect [the bank’s] decisionmaking process specifically as to whether to file a SAR.” *Wultz v. Bank of China Ltd.*, 56 F. Supp. 3d 598, 602 (S.D.N.Y. 2014); *In re JPMorgan Chase Bank, N.A.*, 799 F.3d 36, 44 (1st Cir. 2015) (privilege inapplicable when the documents do not “constitute a draft SAR, and none of the documents reflect the decision-making process as to whether a SAR should be filed, the process of preparing a SAR, or an attempt to explain the content of a SAR post-filing.”); Order, *Lesti v. Wells Fargo Bank, N.A.*, No2:11-cv-695-FtM-29DNF (M.D. Fla. July 30, 2013), DE 96 at p. 7 (“drafts of SARs or other work-product—privileged communications—that relate directly to a SAR” are protected) (citing *Cotton v. PrivateBank & Trust Co.*, 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002)).

**C. The privilege does not apply to “incident reports that led to the filing of a SAR” or “supporting documentation”—the documents at issue—even if PNC made a decision “downstream” to file a SAR based on the reports or incorporated the report’s narrative into work product directly related to a SAR.**

Courts recognize that “any bank [including PNC] has its own reasons for investigating suspicious activity other than the statutory obligation to file a SAR—including to protect itself from fraud and to make sure it does not violate or abet the violation of other banking regulations and statutes, such as money laundering statutes.” *Wultz*, 56 F. Supp. 3d at 602; *see Regions Bank v. Allen*, 33 So. 3d 72, 77 (Fla. Dist. Ct. App. 2010) (banks “have risk management procedures in place for detecting suspicious activity wholly apart from their procedures for complying with federal reporting obligations.”) (citing *Union Bank*, 130 Cal. App. 4th at 389-393). “A bank may not cloak its internal reports and memoranda with a veil of confidentiality simply by claiming they concern suspicious activity or concern a transaction that resulted in the filing of a SAR.” *Id.* Thus, internal reports generated for the bank’s own risk management purposes—like PNC’s alerts—“do not become confidential by reason of being attached or described in a SAR.” *Cotton*, 235 F. Supp.

2d at 814 (emphasis added); see *Freedman & Gersten, LLP v. Bank of Am., N.A.*, No. CIV A. 09-5351 SRC, 2010 WL 5139874, at \*3 (D.N.J. Dec. 8, 2010) (documents “drafted in response to the suspicious activity” are not privileged even if investigation “was undertaken in anticipation of the potential filing of a SAR;” though bank “may have undertaken an internal investigation in anticipation of filing a SAR, it is also a standard business practice for banks to investigate suspicious activity”). Indeed, “even if [a bank] filed a SAR based on [an internal] report, the report itself would not be privileged—to the extent that it could be produced without revealing the existence of the SAR filing.” *Wultz v. Bank of China Ltd.*, 2013 WL 1788559, at \*1 (S.D.N.Y. Apr. 17, 2013) (emphasis added).

An error at the center of this objection was the magistrate’s decision that all of PNC’s cases and alerts are privileged in their entirety merely because PNC has incorporated these items, or narratives from them, into a document concerning whether to file a SAR. As discussed above, a review of the three alerts PNC produced, combined with PNC’s description at the hearing of the alerts PNC held back, reveals that alerts are not “documents generated at the decisionmaking stage that contain a discussion of SAR requirements and reflect [the bank’s] decisionmaking process specifically as to whether to file a SAR.” *Wultz*, 56 F. Supp. 3d at 602. Nor are alerts “material of an evaluative nature prepared for the specific purpose of complying with federal reporting requirements,” as the magistrate found: PNC generates alerts irrespective of its federal reporting requirements. That is confirmed by the three alerts that PNC produced, which do not mention a SAR or contain any information that would reveal whether a SAR was filed. Some alerts apparently lead to cases, and some cases, in turn, to a memorandum concerning whether to file a SAR. But contrary to the magistrate’s ruling, attaching an alert or incorporating its narrative into that last memorandum does not convert the alert or underlying facts described therein into

privileged information. Documents “do not become confidential by reason of being attached or described in a SAR.” *Cotton*, 235 F. Supp. 2d at 814; *In re Whitley*, No. 10-10426C-7G, 2011 WL 6202895, at \*4 (Bankr. M.D.N.C. Dec. 13, 2011) (documents do not “become privileged because they may prompt the filing of SAR or are referred to in SAR.”)

This Court made this point in *Perlman v. Bank of America, N.A.*, No. 9:11-cv-80331-HURLEY/HOPKINS (S.D. Fla.). There, the dispute centered on whether the SAR privilege applied to an internal form that Bank of America dubbed a “TRM.” *See* Ex. 7, Aug. 29, 2014 Hrg. Tr. on Plaintiff’s Motion to Compel [DE 152]. Like PNC’s alerts, TRMs are generated in response to suspicious activity independent of the SAR reporting obligation; like an alert, a TRM could, but does not necessarily, culminate in a SAR. Magistrate Judge Hopkins determined that because “the purpose of a TRM is not limited to SAR reporting,” TRMs are “not generated for the specific purpose of fulfilling SAR reporting obligations and, therefore, are discoverable.” *Id.* at 4:10-15; *id.* at p. 6:19-21 (“If it is exclusively prepared for the SAR function, then, it is protected. If it is not only for the SAR function that it is prepared, then it would not be protected.”). That standard is correct. *See Lesti v. Wells Fargo Bank*, 297 F.R.D. 665, 668 (M.D. Fla. 2014) (internal reports are protected only if they are “generated for the specific purpose of fulfilling the institutions reporting obligations.”) (emphasis added); *cf. Union Bank*, 130 Cal. App. 4th at 386 (bank form was protected because its “sole purpose” was to “aid the bank in complying with its obligation [to] file SAR’s”). As Judge Hopkins explained, the focus is on what the document is “prepared for. Not what it is eventually used for.” Ex. 7, p. 7:20-22. The court thus ordered the bank to produce “anything that is part of the internal investigation that [the bank is] not claiming is exclusively prepared for SAR purposes.” *Id.* at 17:24-18:3.

**D. To the extent non-privileged alerts or narrative portions of alerts have been incorporated or attached to a document that is privileged, the non-privileged portion must be produced with the protected information redacted.**

The magistrate also erred by permitting PNC to conceal non-privileged information—the alerts and the transactions and other underlying facts identified therein—by incorporating that information into a document concerning whether to file a SAR. Cases involving a bank’s attempt to conceal non-privileged “underlying documents” by bundling them with privileged documents have rejected the magistrate’s wholesale approach. For example, in *Wiand v. Wells Fargo*, 981 F. Supp. 2d 1214, a decision which the magistrate relied upon in his Order, the court reviewed the bank’s “internal bank emails and reports” and determined that “only one portion of one of those pages [was] covered by the SAR privilege” because that paragraph “could be considered a report of an evaluative nature intended to comply with the federal reporting requirements in light of the comments stated in that paragraph.” *Id.* at 1218 (emphasis added). The court ordered that a different paragraph within the same document was not privileged and needed to be un-redacted because it “merely describes the transactional documents reviewed”— the information in PNC’s alerts. *Id.* The *Wiand* court also ordered documents containing “a list or description of certain transactions”—again, the information in PNC’s alerts—to be produced, overruling the bank’s SAR objection despite that other parts of the document were privileged. *Id.* Thus, *Wiand* does not support wholesale concealment of non-privileged information merely because it is attached or incorporated into a privileged document, as the magistrate ordered here.

Another case the magistrate cited, *Lesti v. Wells Fargo Bank, N.A.*, No. 2:11-cv-695-Ftm-29DNF, likewise ordered “underlying documents” to be untangled from privileged information. In *Lesti*, the bank produced two pages of an “Investigation Report Summary” and withheld the rest. Order, *Lesti*, No. 2:11-cv-695-Ftm-29DNF (M.D. Fla. July 30, 2013), DE 96. The court

denied the plaintiff's motion to compel as to the other pages "because they contain work-product related directly to the filing or preparation of a SAR." *Id.* p. 8 (emphasis added). However, the court held that the other two pages were not privileged "because the information contained in those two-pages does not disclose the existence or contemplation of a SAR but merely states the factual events leading up to the suspicious conduct." *Id.* at p. 9. PNC's alerts are the same. The two pages from *Lesti* are attached as Exhibit 8 to this objection. They are indistinguishable from the narrative portions of PNC's alerts.

This Court in *Perlman v. Bank of America, supra*, reached the same result. After ordering the bank to produce all documents not "exclusively prepared for SAR purposes," the court conducted an *in camera* review of the documents that the bank maintained were protected under that ruling. The bank produced certain documents with redactions to the plaintiff and provided the court with both redacted and un-redacted versions. *See* Order Granting in Part and Denying in part Motion to Compel, *Perlman v. Bank of Am.*, No. 9:11-cv-HURLEY/HOPKINS (S.D. Fla. Sept. 10, 2014), DE 154. The court approved the bank's redactions to information "protected under the SAR privilege." *Id.* The court did not rule, as the magistrate here did, that the inclusion of the protected information rendered the entire document privileged.<sup>11</sup>

Finally, and significantly, the opinion of the OCC per its letters issued in the *Coquina v. TD Bank* action is that a bank must produce non-privileged information while redacting any privileged information. One of the OCC's letters, dated December 2, 2011, focuses on a redacted document. The OCC opined that the bank's "redactions were appropriate," not that the entire

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<sup>11</sup> *See also Kapila v. Bank of Am.*, No. 6:09-ap-00054-KSJ (Bankr. M.D. Fla. Dec. 3, 2013), ECF No. 51 (Comp. Ex B to DE 403 in this case) (overruling SAR objection and ordering bank to produce all documents, including "account monitoring" documents with references to SARs redacted).

document needed to be withheld based on the presence of some protected information.<sup>12</sup> Comp. Ex. 6, OCC letters, at p. 2 of 6. Further, the OCC authorized the bank to *un-redact* parts of the document “**that do not explicitly reveal that a SAR was or was not filed:**”

Based on a review of the redacted information, I conclude that the **redactions were appropriate** to prevent disclosure of whether or not a SAR had been filed in connection with specific transactions. However, I also conclude that allowing TD Bank to un-redact certain additional information would not violate the requirement of federal law so long as the redactions do not disclose that a SAR was or was not filed.

\*\*\*

... **the OCC will authorize TD Bank to un-redact those portions of the document at issue that do not explicitly reveal that a SAR was or was not filed.** This means that TD Bank may un-redact statements indicating that a transaction was or was not suspicious, but may not unredact any text or code showing that the TD Bank did, or did not, file a SAR in connection with particular transactions or events.

*Id.* (emphases added).

A federal agency like the OCC is afforded deference in the interpretation of the law under which it acts, and even greater deference when, as here, the agency interprets its own regulations. *See United States v. Mead Corp.*, 533 U.S. 218, n. 13 (2001) (OCC rulings and interpretative letters entitled to *Chevron* deference). Yet the magistrate disregarded the OCC’s interpretation because it dealt with “non-public OCC information,” which the magistrate considered “not before this Court.” [DE 483 at p. 14]. The magistrate failed to recognize, however, that the “non-public OCC information” at issue was information the bank had withheld under the SAR privilege, because “a SAR and any information that would reveal the existence of a SAR are confidential non-public

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<sup>12</sup> The OCC’s other letter, dated November 22, 2011, is consistent with this Court’s prior ruling: “The prohibition on the disclosure of SARs or information that would reveal whether a SAR has or has not been filed in connection with suspicious activity does not prevent litigants from discovering all of the factual information underlying the transactions that are at issue. Bank records concerning those transactions are not covered by prohibition so long as they do not themselves refer to the filing of a SAR, or otherwise indicate that a SAR has or has not been filed in connection with a specific transaction.” Comp. Ex. 6, OCC letters, at p. 6 of 6.

OCC information.” Comp. Ex. 6, OCC letters, at p.3 of 6. The letters, moreover, dealt specifically with “whether the disclosure of the redacted information could be authorized by the OCC consistent with the requirements of the Bank Secrecy Act and OCC regulations that prohibit the disclosure of suspicious activities reports ... .” *Id.* at p.1 of 6. Far from being inapplicable, the OCC’s guidance in the letters squarely applies and demonstrates the magistrate’s error: as the OCC explained, “redactions [are] appropriate to prevent disclosure of whether or not a SAR [has] been filed” and should be limited only to portions of PNC’s documents that “explicitly reveal that a SAR was or was not filed.” *Id.* at p.2 of 6.

### CONCLUSION

This Court already ruled that the “privilege extends to Suspicious Activity Reports, but not to underlying documents.” The Receiver respectfully requests that the Court now enforce that ruling. The Court should conduct its own *in camera* review, reverse the magistrate, and order PNC to produce all “underlying documents” with privileged information redacted.

Dated: April 16, 2019.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

I hereby certify that on April 16, 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.

By: /s/ Gregory M. Garno  
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**SERVICE LIST**

**Federal Trade Commission v. Jeremy Lee Marcus, et al.  
USDC, SD Fla., Case No. 17-60907-CIV-MORENO/SELTZER**

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[10675-609/3045018/11]

# Exhibit “1”

UNITED STATES DISTRICT COURT FOR THE  
SOUTHERN DISTRICT OF FLORIDA  
Fort Lauderdale Division

**Case Number: 17-60907-CIV-MORENO**

FEDERAL TRADE COMMISSION, et al.,

Plaintiffs,

vs.

JEREMY LEE MARCUS, et al.,

Defendants.

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**ORDER ADOPTING IN PART MAGISTRATE JUDGE'S REPORT AND  
RECOMMENDATION**

THE MATTER was referred to the Honorable Barry S. Seltzer, United States Magistrate Judge, for a Report and Recommendation on Receiver's Motion to Compel PNC Bank, N.A. to Comply with Subpoenas, for Sanctions, and for Related Relief, filed on April 2, 2019. The Magistrate Judge filed a Report and Recommendation (D.E. 380) on June 11, 2019. The Court has reviewed the entire file and record. The Court has made a *de novo* review of the issues that the objections to the Magistrate Judge's Report and Recommendation present, and conducted a hearing in open Court on October 10, 2019. Being otherwise fully advised in the premises, it is

**ADJUDGED** that United States Magistrate Judge Barry S. Seltzer's Report and Recommendation is **AFFIRMED** and **ADOPTED** in part. The Court agrees with the report in so far as it recommends the Court not allow duplicative discovery. The report found that due to the pendency of the Receiver's direct case against PNC Bank, *Perlman v. PNC Bank, N.A.*, No. 19-61390-SMITH, allowing discovery in this underlying case would result in duplicative discovery. The Magistrate Judge also found that the Receiver could more appropriately pursue

the discovery in his direct case against PNC Bank, where the relevance and proportionality of the discovery under Rule 26 would be more readily established. At oral argument on October 10, 2019, however, this Court learned from both sides that they are not taking discovery in the receiver's direct action, *Perlman v. PNC Bank, N.A.*, pending resolution of the motions to dismiss. The Court also learned from counsel for PNC Bank that the requested documents evincing communications between the bank and third-parties regarding the Defendants did not exist. To the extent those documents exist, the Court finds they are relevant to the goal of this case of recovering and preserving assets, as well as the underlying goal of this case, which is to recover for the fraud perpetrated by the Defendants. Given that perhaps these documents do not exist, and if they do, they are probably limited in number, the Court views a benefit in requiring the production in this case, rather than in the direct case, to facilitate the speedy recovery and prevent the further dissipation of assets. This is especially true, where, as here, the parties agree discovery is stayed in *Perlman v. PNC Bank*.

The Receiver also seeks the bank-generated investigation reports of the Defendants. The Bank's main objection against producing these documents is that they are privileged under the Bank Secrecy Act, 31 U.S.C. § 5318(g)(2). The privilege extends to Suspicious Activity Reports, but not to underlying documents. *Shapiro, P.A. v. Wells Fargo Bank, N.A.*, No. 18-60250-CIV-HUNT, 2018 WL 4208225, \*1 (S.D. Fla. July 23, 2018). To the extent these reports and the underlying assets allow the Receiver to recover and prevent dissipation of assets, they are related to the goals of this litigation. The Court does not see the benefit of delaying this production to a later date when discovery starts in the direct action. Accordingly, the Court grants the motion to compel the production of these documents. Of course, PNC Bank may provide the Receiver with a privilege log to the extent the documents are privileged under the

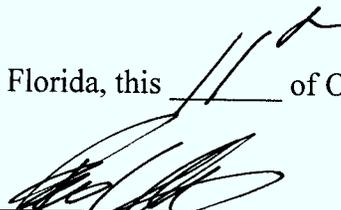
Bank Secrecy Act.

Finally, the Receiver seeks to obtain PNC Bank's Anti-Money Laundering policies and other anti-fraud policies. The Court denies the motion to compel as to these documents consistent with the Magistrate Judge's Report and Recommendation. The Receiver has not established how this category of documents will enhance his ability to recover assets. The Court, therefore, will deny the motion in this case. The Court, however, recognizes that these policies will most likely be discoverable in the Receiver's direct action against PNC Bank.

Accordingly, it is

**ADJUDGED** that the Receiver's Motion to Compel is GRANTED in part as set forth in this Order. The Court directs PNC Bank to comply with this Order by no later than November 13, 2019.

DONE AND ORDERED in Chambers at Miami, Florida, this 11 of October 2019.

  
\_\_\_\_\_  
FEDERIC A. MORENO  
UNITED STATES DISTRICT JUDGE

Copies furnished to:

United States Magistrate Judge Barry S. Seltzer

Counsel of Record

# Exhibit “2”

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UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION  
CASE NUMBER 17-60907-CV-MORENO

FEDERAL TRADE COMMISSION, et al.,

Plaintiffs,

Courtroom 13-3

vs.

Miami, Florida

JEREMY LEE MARCUS, et al.,

October 10, 2019

Defendants.

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DISCOVERY HEARING  
BEFORE THE HONORABLE FEDERICO A. MORENO  
UNITED STATES DISTRICT JUDGE

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**EXHIBITS**

Exhibits	Marked for Identification		Received in Evidence	
Description	Page	Line	Page	Line

1 (The following proceedings were held at 3:37 p.m.)

2 THE COURT: While they're bringing in Jones, let's talk  
3 about 17 -- 17-60907-Civil, Federal Trade Commission, but in  
4 reality -- oh, Mariela ...

5 (There was a brief discussion off the record.)

6 THE COURT: 17-60907, it's originally Federal Trade  
7 Commission versus Jeremy Lee Marcus, but now the receiver and  
8 PNC Bank are having a dispute, a discovery dispute. My  
9 goodness.

10 Who's here on behalf of the receiver?

11 MR. FRIEDMAN: Good afternoon, Your Honor. Michael  
12 Friedman. My law partner, Barry Blum, is here as well as the  
13 receiver, Mr. Perlman.

14 THE COURT: Who's here on behalf of PNC Bank?

15 MR. HARDY: Good afternoon, Your Honor. My name is  
16 Peter Hardy and with me also is Peter Homer at the table.

17 THE COURT: Okay. Thank you. Mr. Homer, I see you.

18 MS. FLACK: Your Honor, Ryann Flack on behalf of  
19 plaintiff, State of Florida, Office of the Attorney General.

20 THE COURT: Okay. Do you have anything to say here?

21 MS. FLACK: I'm here in case the Court has any  
22 questions.

23 THE COURT: I'm sorry. I can't hear you.

24 MS. FLACK: I apologize, Your Honor. No, I'm here in  
25 case the Court has any questions.

1 THE COURT: Oh. Chances are I probably do,  
2 unfortunately, as the court reporter would say.

3 Now, there is a related PNC Bank case, right?

4 MR. HARDY: Correct, Judge.

5 THE COURT: And there's discovery being exchanged in  
6 that case already, right?

7 MR. FRIEDMAN: No, Your Honor.

8 THE COURT: Oh, there's discovery being fought over.

9 MR. FRIEDMAN: I'm sorry, Judge?

10 THE COURT: There are fights over discovery?

11 MR. FRIEDMAN: There's no discovery open in the other  
12 litigation, Perlman versus PNC, because the form -- pretrial  
13 scheduling order in that case requires the pleadings to be  
14 closed first and PNC has filed a Motion to Dismiss.

15 THE COURT: So there's no discovery.

16 MR. FRIEDMAN: No discovery in that case yet. PNC is  
17 arguing that that case should be --

18 THE COURT: I know what they're arguing, but -- who has  
19 that case?

20 MR. FRIEDMAN: Judge Smith up in Fort Lauderdale,  
21 Judge.

22 THE COURT: Okay. Well, you know he just got on the  
23 bench. He's got to try all those criminal cases first and all  
24 of that, but eventually, there's going to be discovery unless  
25 the case is dismissed, right?

1 MR. FRIEDMAN: Right. That's true, Judge, yes.

2 THE COURT: You want the case dismissed.

3 MR. FRIEDMAN: No, we don't want the case dismissed.

4 THE COURT: I didn't think so. So there's going to be  
5 discovery in that case, or you're going to be like a criminal  
6 lawyer and say, let's go to trial, no witnesses, just let me see  
7 the exhibits, no depos, let's go, because it only involves life  
8 imprisonment. Here we're talking about money, so we need  
9 everything.

10 MR. FRIEDMAN: Well, I know what you're getting -- I  
11 get what you're getting at, Judge.

12 THE COURT: Give me an answer.

13 MR. FRIEDMAN: The answer to that question is:  
14 Primarily we're litigating now the issue of PNC's knowledge, its  
15 aiding and abetting claims that are at issue in that case.

16 THE COURT: So what are you going to do in that other  
17 case before Judge Smith?

18 MR. FRIEDMAN: Those are the claims at issue in that  
19 case, right.

20 THE COURT: So you definitely want discovery.

21 MR. FRIEDMAN: We want the discovery now, Judge. We've  
22 been waiting for it for over a year. We filed the discovery  
23 presuit, and we have been waiting for it for just about a year.

24 THE COURT: Okay.

25 MR. FRIEDMAN: The problem we have --

1 THE COURT: You weren't able to convince the  
2 magistrate.

3 MR. FRIEDMAN: Couldn't convince the magistrate judge.

4 THE COURT: That was Judge Seltzer.

5 MR. FRIEDMAN: Correct, Your Honor.

6 THE COURT: He's been here so long and done such a  
7 great job, he is ready to retire, and you want me to reverse him  
8 and say this is one of the very few times you were wrong in a  
9 discovery dispute.

10 MR. FRIEDMAN: Right, and you know, Judge --

11 THE COURT: Oh, my goodness gracious.

12 MR. FRIEDMAN: The problem, unfortunately, with Judge  
13 Seltzer's ruling is that it went a lot farther than it needed to  
14 in terms of deciding a legal issue incorrectly.

15 The problem with Judge Seltzer's ruling, really the nub  
16 of the issue and the reason we're before you, is because Judge  
17 Seltzer said in an equitable receivership setting the receiver  
18 is limited to obtaining discovery relevant to the disputes in  
19 the case between the underlying parties, here the FTC and the  
20 State of Florida versus --

21 THE COURT: You think he is wrong in that.

22 MR. FRIEDMAN: He is wrong on that, Your Honor,  
23 correct.

24 THE COURT: So this is an objection on principle,  
25 p-l-e, in the event that it impacts other cases with

1 receiverships.

2 MR. FRIEDMAN: That is certainly a concern here. We  
3 are talking about essentially --

4 THE COURT: So the best thing to do is not even to rule  
5 on this Report and Recommendation so as not to create what you  
6 consider is bad law, right, an uncorrect law, and especially  
7 from a practical standpoint, when you can get your documents in  
8 the other case whenever Judge Smith -- which you have to be  
9 patient, he just got on board from State court. Give him a  
10 little bit of a chance, let's be fair, and then he rules  
11 eventually on it.

12 I don't know who his magistrate is. It may even be  
13 Seltzer.

14 MR. FRIEDMAN: I don't think so, Judge.

15 THE COURT: But he's only going to be there for a few  
16 months anyway, and then that takes care of it.

17 MR. FRIEDMAN: Right.

18 THE COURT: So we get rid of the principle. We are  
19 practical about it and let PNC give up those documents in the  
20 other case eventually. You'd be happy with that.

21 MR. FRIEDMAN: I would be happy to get the documents.

22 THE COURT: At any time.

23 MR. FRIEDMAN: Sooner rather than later. Again, I'll  
24 get to the couple of issues that --

25 THE COURT: No, you have written about it already.

1 MR. FRIEDMAN: Right. Right. And clearly, you have  
2 read everything.

3 THE COURT: That's the problem. You know what I should  
4 do? The Supreme Court is even saying we should be quiet for two  
5 minutes before we ask a question. I should do that.

6 MR. FRIEDMAN: No, I appreciate it, Judge, because the  
7 first two minutes is the hardest part, and then, once we get  
8 into the back and forth, for me it's a lot easier. I'm  
9 struggling before the hearing trying to write stuff out.

10 THE COURT: But you know I read it.

11 MR. FRIEDMAN: So let me just make the record and the  
12 two points that we're concerned about.

13 THE COURT: You're not making the record because what  
14 the lawyers say is not evidence. So if you believe it, you have  
15 made a record already.

16 MR. FRIEDMAN: All right. So I'll just make the  
17 points.

18 THE COURT: Okay.

19 MR. FRIEDMAN: Better? Okay. I'll just make the  
20 points.

21 It's so fun to watch you, Judge, when you're not  
22 actually at the podium, so entertaining when you're sitting, I  
23 was chuckling and laughing all afternoon, but it's less funny  
24 now.

25 THE COURT: Most lawyers charge -- when they find out

1 who the judge is, they charge extra. I don't blame them.

2 No, you know, it's better to get to the bottom line.

3 You don't want to regurgitate what you wrote.

4 MR. FRIEDMAN: No, and I'll try to put the laser point  
5 on the two issues.

6 Number one is, we're dealing with issues of -- and I  
7 don't know that we briefed this for you, Judge, and I'll try to  
8 articulate it quickly.

9 THE COURT: You didn't brief it before Judge Seltzer.

10 MR. FRIEDMAN: I don't know that we did because the  
11 claims were not yet pending at the time. This was presuit  
12 discovery at the time, right? So the issues in the case before  
13 Judge Smith, aiding and abetting claims --

14 THE COURT: I love Judge Smith, I even love more the  
15 fact that he is on the bench for obvious reasons, but should we  
16 get into the issue before him?

17 MR. FRIEDMAN: All right. I think it's so important  
18 that I really want to but --

19 THE COURT: Go ahead.

20 MR. FRIEDMAN: I'll move --

21 THE COURT: You've waited. Go ahead.

22 MR. FRIEDMAN: Let me move to a different issue.

23 THE COURT: Go ahead. You've waited. It's fair.

24 MR. FRIEDMAN: All right. Then I'll make the point as  
25 long as you're inviting me to. The issue is --

1 THE COURT: I'm allowing you.

2 MR. FRIEDMAN: Thank you, Judge. I'll take you up on  
3 the allowance.

4 Knowledge, the bank's knowledge is essentially what  
5 we're going to be litigating in the other case. The documents  
6 we're looking for have direct evidence of that. PNC is now  
7 arguing on a Motion to Dismiss before we've been allowed to take  
8 any discovery that we haven't sufficiently alleged actual  
9 knowledge of the underlying fraud that gave rise to this  
10 receivership that's actually before you.

11 The documents we're seeking have direct evidence of  
12 that issue. It's the bank's records that it kept  
13 contemporaneously to monitoring the accounts that the fraudsters  
14 used at PNC and the conclusions, if any, that PNC drew about  
15 what was happening in those accounts, such as for example, wow,  
16 gee, it looks like there's a fraud being conducted through these  
17 accounts.

18 So, in light of those somewhat unique circumstances, we  
19 believe it's important to get the discovery now because it  
20 essentially, we believe, will render frivolous the arguments  
21 that PNC is making before Judge Smith.

22 THE COURT: So you want the discovery here because it  
23 helps you win the case there.

24 MR. FRIEDMAN: It helps us survive a Motion to Dismiss  
25 there.

1 THE COURT: Okay. I got it. Now, if I were having the  
2 Judge Smith case, what would be your argument?

3 MR. HARDY: As to knowledge, Your Honor?

4 THE COURT: No. Well, he has argued it, you can argue  
5 that, but as to the discovery.

6 MR. HARDY: Sure.

7 THE COURT: Let's say right here I tell Judge Smith,  
8 give me that case, give me your tired, your poor, your wretched  
9 cases ready to be adjudicated, and then I'm here, and then you  
10 put on a different hat and you say, I'm representing PNC, and I  
11 don't even know if I have the case, whatever the case is before  
12 Judge Smith.

13 Then, what's your argument about discovery?

14 MR. HARDY: Sure. A few points. So I think,  
15 respectfully, receiver's counsel slightly mischaracterized what  
16 Judge Seltzer ruled. Judge Seltzer did not rule, to my  
17 understanding, that they simply cannot as a matter of principle  
18 or a matter of law look into third-party potential claims. He  
19 just had a very practical and, I think, common sense application  
20 of the traditional principles under Rule 26 regarding relevance  
21 and, critically, proportionality.

22 So I don't think that this is some sort of issue of  
23 law. I think, rather, this is a much more mundane and garden  
24 variety of discovery dispute.

25 THE COURT: Well, let's go through what Judge Seltzer

1 said, because it wasn't a long order, it's right to the point,  
2 right? "Moreover, on the eve of the discovery" -- well, first  
3 he talks about the receiver and acknowledgment that discovery  
4 requests were not relevant to the present dispute between the  
5 parties in this case.

6 "Moreover, on the eve of the discovery hearing, the  
7 receiver indicated that he filed a new lawsuit against PNC  
8 to recover the assets of the receivership defendant. The  
9 undersigned" -- that's Magistrate Seltzer -- "finds that the  
10 purposes of Rule 26 would not be served by duplicative  
11 discovery in this case, even if otherwise appropriate, given  
12 the receiver's access to that same information in the new  
13 lawsuit through ordinary discovery procedures."

14 In other words, he said just what we said at the  
15 beginning, you know, you want it in that case, it may be  
16 relevant in that case, it may be a good thing. He really didn't  
17 say anything as a matter of law that you're not entitled to it,  
18 you can get it there, over and done with.

19 So I take the case from Judge Smith because it's a  
20 newer case obviously.

21 MR. HARDY: Yes, sir.

22 THE COURT: And he says related case -- judges always  
23 like to give more than receive, and I accept it and then we go  
24 through the discovery there. I move fast on that case. You  
25 still have to give up the documents anyway, right?

1 MR. HARDY: Sure, in a proper proceeding regarding  
2 discovery and, you know, there are issues that we're going --

3 THE COURT: In a proper proceeding he says, give it to  
4 me, you said no, he moves to compel. I bring you in here  
5 probably during a sentencing or something like that. Okay. And  
6 if you don't decide, I decide, or I refer it to my magistrate.  
7 She issues a Report and Recommendation. If you object, it's a  
8 little bit of a delay.

9 MR. HARDY: But it will be the traditional orderly  
10 process, and please let's not forget they actually do already  
11 have a lot of documents.

12 THE COURT: They have 20,000 or 12 -- I forget how much  
13 it was.

14 MR. HARDY: A lot.

15 THE COURT: It was a lot, yes. I mean, I remember  
16 reading thousands of documents, right?

17 MR. FRIEDMAN: We are awash in the documents that the  
18 bank chooses to give us, not the documents we want that we've  
19 asked for.

20 THE COURT: Well, they can't make the case for you,  
21 right?

22 MR. FRIEDMAN: Right. That's true, Judge. Their  
23 documents will make the case if and when we get them.

24 THE COURT: Which you can get in that other case, but  
25 you think you are not getting them. What is the status of that?

1 Has anything happened?

2 MR. FRIEDMAN: The status of that is, we, on Friday I  
3 believe, filed our response to the bank's Rule 12(b)(6) Motion  
4 to Dismiss. The bank has also filed a Rule 12(b)(1) Motion to  
5 Dismiss separately which we have a deadline to brief in I think  
6 28 some odd days. So we're pretty well off from anything  
7 opening up in that case in terms of the pleading being closed.

8 And again, what's critical to me is the bank is arguing  
9 now today that we cannot sufficiently allege that they knew what  
10 was going on, while not disputing at all that they have in their  
11 possession now documents that say what they knew about what was  
12 going on.

13 THE COURT: Why don't you want to give them what you're  
14 going to have to give them eventually, unless Judge Smith  
15 dismisses the case?

16 MR. HARDY: I mean, I'm sorry, I'm just, respectfully,  
17 not going to take the bait from counsel. He's making some  
18 assumptions. This is how cases proceed: You file a Motion to  
19 Dismiss, you win or lose. They're certainly vigorously  
20 contesting it, and then we proceed to discovery. Plaintiffs do  
21 not have in the normal course access to pre-litigation  
22 discovery.

23 And please, I think it's now very, very clear that what  
24 we're talking about here is all about suing PNC. There's been  
25 some suggestions that this is really about pursuing third

1 parties. I know you've read the pleadings, I get it, so I'm not  
2 going to pursue that. I mean, I can speak to that, I think it's  
3 a red herring, but this is all about suing PNC, which they have  
4 done.

5 THE COURT: The red herring thing, where does that come  
6 from?

7 MR. HARDY: I don't know.

8 THE COURT: See. Do you?

9 MR. FRIEDMAN: I don't, Your Honor. I mean, I know the  
10 phrase.

11 THE COURT: English is my third language so I always  
12 like to know about that. It had to do with hunting.

13 MR. HARDY: I believe Mr. Homer can tell you.

14 MR. HOMER: Hunting. What you would do is you would  
15 drag a rotten body across the trail to throw somebody off track.

16 MR. HARDY: That sounds a bit more colorful.

17 THE COURT: Hunting, I knew it was hunting. I just  
18 wanted to know if you knew. I'm not a hunter, but I'm a lover  
19 of the English language.

20 Okay. Now, if I were to accept that case from Judge  
21 Smith, assuming he wanted to give it to me -- did you move to  
22 transfer, by the way?

23 MR. FRIEDMAN: We filed a Notice of Related Case. I  
24 don't believe we moved to transfer.

25 THE COURT: But that case would involve what?

1 MR. FRIEDMAN: In terms of what, Your Honor? I  
2 apologize.

3 THE COURT: In terms of work for me if I'm dumb enough  
4 to say I'll accept it.

5 MR. FRIEDMAN: Well, it will involve some paper  
6 discovery, some depositions, and a jury trial.

7 THE COURT: You don't want me at the depositions.

8 MR. FRIEDMAN: Right, that would not be work for you,  
9 you're right, Judge. I apologize.

10 THE COURT: You wouldn't want me. It would be a lot  
11 shorter for both sides. And you're suing for what?

12 MR. FRIEDMAN: Aiding and abetting, breach of fiduciary  
13 duty, conversion --

14 THE COURT: That's a big thing.

15 MR. FRIEDMAN: I'm sorry?

16 THE COURT: Big thing.

17 MR. FRIEDMAN: A big thing, yes, it is, Your Honor,  
18 that's correct. That's correct. That's right.

19 THE COURT: So that means it would take a long time to  
20 dispose of that case unless it gets dismissed.

21 MR. FRIEDMAN: Right. I think the last time we took  
22 one to trial, it was a 10-day jury trial. It lasted about 10  
23 days.

24 THE COURT: Who was the judge?

25 MR. FRIEDMAN: Judge Hurley up in West Palm.

1 THE COURT: He's a great judge, but he's much more  
2 patient than I am.

3 MR. FRIEDMAN: So maybe it would be a little bit  
4 shorter, seven days.

5 THE COURT: That's why he has a courthouse named after  
6 him, but in any event --

7 MR. FRIEDMAN: And, you know, I will take the bait on  
8 the third-party discovery, by the way, Judge, that counsel  
9 mentioned because we're not here in an ordinary case, we're here  
10 in an equity receivership. One of the things we raised in the  
11 papers, which I'm sure you saw, is that we've asked for  
12 communications, not just the PSA stuff, the account monitoring  
13 stuff, but we've also said that you should give us all of your  
14 communications with anyone else about the fraudster or these  
15 entities.

16 THE COURT: You could sue a lot of other entities in  
17 your investigation.

18 MR. FRIEDMAN: If PNC knew what was happening and they  
19 communicated that to others that did business with the  
20 fraudster, exactly. Those are highly relevant to the  
21 receivership, not to the PNC case, to the receivership case.

22 THE COURT: But then we would have the same arguments  
23 when you go against those third parties.

24 MR. FRIEDMAN: We would have --

25 THE COURT: Then you would have several lawsuits that

1 would be assigned to different judges, and all of a sudden, if I  
2 accept Judge Smith's case, then I'd get all the cases in your  
3 investigation about it in order to resolve a simple discovery  
4 dispute. You say, so what, just do it.

5 MR. FRIEDMAN: I don't know how to respond. I don't  
6 want to make any more work for you, Judge, but I'm happy to be  
7 here before you, I'm happy to be before Judge Smith. But if  
8 there are other leads that bring us to other defendants that can  
9 generate recoveries for defrauded consumers, we'll absolutely  
10 pursue them.

11 THE COURT: See, my concern is one of now assignment of  
12 cases, whether one judge -- I mean, this could be the Southeast  
13 Bank case or something, all of a sudden there are a hundred  
14 cases. One judge is not going to resolve all of them. It's not  
15 for not doing the work. I think I have sufficient work ethic.  
16 But it doesn't make sense for one judge to do everything with  
17 all the investigation and lawsuits that you may find.

18 MR. FRIEDMAN: Okay, Judge.

19 THE COURT: See, your opponent's position is, you do it  
20 the traditional way in each case and you get the judge as you  
21 find him and some are faster than others and life is like that,  
22 which is kind of like what Judge Seltzer said. He said it more  
23 elegantly, you want to get it, get it over there. Right?

24 MR. FRIEDMAN: Well, again, in the context of an equity  
25 receivership it's different. I mean, it happens to be that in

1 the case of PNC, in this case -- and I won't get into it because  
2 it's Judge Smith's case -- the facts were so egregious that we  
3 were able to move forward without the discovery. Right?

4 THE COURT: When did you file the case?

5 MR. FRIEDMAN: June of -- I believe June of this year  
6 was when the PNC case was filed.

7 THE COURT: Whose case was it originally?

8 MR. FRIEDMAN: Judge Dimitrouleas originally and then  
9 it was transferred to Judge Smith shortly after he took the  
10 bench.

11 THE COURT: All right.

12 MR. FRIEDMAN: Again, as I was saying, we were  
13 fortunate in that regard, but in most of these situations, a  
14 receiver or a third party coming in doesn't know what the claims  
15 are out there, does not know --

16 THE COURT: Until you get documents.

17 MR. FRIEDMAN: Until you come to the receivership  
18 court, you issue subpoenas out of the receivership case, and you  
19 find that information out and then you can go and bring suits.  
20 So it's not at all out of the ordinary for this type of  
21 discovery to take place in the one centralized receivership  
22 court. It's the only place that it can take place.

23 THE COURT: You made that same argument before Judge  
24 Seltzer.

25 MR. FRIEDMAN: And he didn't like it, but, you know, he

1 injected this Rule 26 analysis, and again, I have nothing but  
2 respect for Judge Seltzer, but it's just -- it's not supported  
3 by any authority anywhere or any precedent anywhere, contradicts  
4 all of the authority on this issue which says the receiver is  
5 entitled to discovery that's relevant to the receivership, not  
6 the underlying case. So if there are potential claims against  
7 third parties that could generate causes of action, recoveries  
8 for the receivership, this is the appropriate place to be  
9 pursuing that discovery.

10 THE COURT: Last word from PNC, whoever wants to speak.

11 MR. HARDY: Thank you. I don't know how two things can  
12 be simultaneously true: It's so egregious and we can't mount  
13 our own Complaint because we don't have sufficient information.  
14 They are very capably and vigorously arguing the bank's alleged  
15 knowledge in the matter before Judge Smith. So, again, I just  
16 come back to they actually already have a ton of documents.

17 THE COURT: All right. I'm not going to rule from the  
18 bench. I have to think a little bit about it, and sorry you had  
19 to wait so long. I probably should have had you go first and  
20 not make you suffer through everything.

21 MR. FRIEDMAN: Just to respond to that last comment, I  
22 just want to make sure it's clear, Judge.

23 THE COURT: The last one to speak isn't the one who  
24 wins necessarily.

25 MR. FRIEDMAN: I understand. I understand. The 12,000

1 documents, it just rubs the receiver the wrong way because it's  
2 a lot of -- it's a red herring. It's a red herring, Judge. The  
3 12,000 documents --

4 THE COURT: English lord following the Bloodhound.

5 MR. FRIEDMAN: Or a red herring because the documents  
6 that really contain the critical information we're looking for  
7 are not among the 12,000.

8 THE COURT: That's why you want them.

9 MR. FRIEDMAN: That's why we want them.

10 THE COURT: That's why they don't want to give them to  
11 you according to you.

12 MR. FRIEDMAN: Correct.

13 THE COURT: I got it.

14 MR. FRIEDMAN: Thanks, Judge.

15 THE COURT: Thank you for being patient with me.

16 MR. HARDY: Yes, sir.

17 THE COURT: How is your family, Mr. Homer?

18 MR. HOMER: Hanging in there, Your Honor.

19 THE COURT: Okay.

20 MR. HOMER: Thank you.

21 THE COURT: I don't want to ask too much, so I ask a  
22 little bit. You can tell why I was asking. All right. Nice  
23 seeing you.

24 Do you want to say anything?

25 MS. FLACK: Yes, Your Honor, if I could. I just want

1 to clarify regarding the Report and Recommendation from Judge  
2 Seltzer, that the State of Florida, we support the receiver's  
3 argument that the analysis regarding what discovery is relevant  
4 to, it should be relevant to the receivership and the  
5 receivership estate and not the plaintiff's action.

6 And also, the multiple orders that are already in place  
7 that allow for the receiver to conduct discovery against third  
8 parties, want to make sure that --

9 THE COURT: Well, it's discovery from third parties.

10 MS. FLACK: Discovery from third parties, yes.

11 THE COURT: Not against third parties, though

12 sometimes --

13 MS. FLACK: I apologize. Yes, discovery from third  
14 parties to pursue potential third-party claims and this would be  
15 the appropriate forum to conduct that discovery.

16 THE COURT: Okay.

17 MS. FLACK: Thank you, Your Honor.

18 MR. HARDY: I feel compelled to say one thing.

19 THE COURT: Don't worry about it. Go ahead.

20 MR. HARDY: Thank you. Because I want to get this out  
21 there because I don't want there to be down the road any sort of  
22 misapprehensions.

23 My understanding of what they're focused on is alleged  
24 communications between PNC and other financial institutions.

25 These are the third parties that they say perhaps they want to

1 investigate. I can tell you, and I'll make this representation  
2 to the Court, now we need to double-check this, but we have  
3 looked and we've done due diligence. Those alleged  
4 communications do not exist. PNC did not communicate with other  
5 financial institutions regarding Jeremy Marcus. They took the  
6 deposition of a former PNC --

7 THE COURT: Why not give them the documents then?

8 MR. HARDY: No, because what's left over then is  
9 internal documents, anti-money laundering policies, which say  
10 nothing about third parties, do nothing about third parties.  
11 They took the deposition of this former employee and he did not  
12 have a lawyer. We weren't there. He said a lot of crazy things  
13 and I believe -- I can't speak for receiver's counsel, of  
14 course, that this is the basis for their feeling that PNC has  
15 been supposedly communicating with other third parties. It's  
16 not true based on our good faith search of documents.

17 Obviously, if we find anything and we're going to  
18 continue to search and we're going to have to deal with it with  
19 Judge Smith, we are going to have all these issues -- or  
20 yourself -- whoever is presiding over the proceeding. You know,  
21 obviously we'll give those up because those are going to be  
22 relevant, but this is -- well, I won't use that word that we've  
23 been using.

24 THE COURT: What word is that?

25 MR. HARDY: Red herring.

1 THE COURT: Okay.

2 MR. FRIEDMAN: This is the first I've heard of it,  
3 Judge.

4 THE COURT: Well, it was worth coming just for that.

5 MR. FRIEDMAN: Right, it was worth coming just for  
6 that. They could have told me that a year ago when I reached  
7 out to meet and confer before this hearing and before the Judge  
8 Seltzer hearing. That would have been nice.

9 THE COURT: That's why scheduling oral argument is a  
10 good thing, some of my colleagues disagree, but it's a bad thing  
11 for some people who are waiting though. Okay.

12 MR. FRIEDMAN: So what that would leave then, Judge, is  
13 just the really critical PSA stuff which counsel says -- again,  
14 they have that stuff, they're just not giving it to us. So just  
15 to make sure that's clear, that statement doesn't moot the  
16 dispute. I think that's a fair statement.

17 THE COURT: Who came the farthest?

18 MR. HARDY: I'm sorry?

19 THE COURT: Who came the farthest geographically?

20 MR. HARDY: I think that would be myself, Your Honor.

21 THE COURT: That's why I'm going to give you the very  
22 last word.

23 MR. HARDY: That's fine. You've been more than  
24 indulgent. We rest.

25 THE, COURT: Thank you. Have a good afternoon.

1 MR. FRIEDMAN: Thank you, Judge.

2 THE COURT: I'll figure something out. All right.

3 This case never ends. That's why I am hesitant to take on more.

4 (The hearing concluded at 4:04 p.m.):

5

6 C E R T I F I C A T E

7 I hereby certify that the foregoing is an accurate  
8 transcription of proceedings in the above-entitled matter.

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10 11-11-19  
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DATE

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# Composite Exhibit “3”

























# Exhibit “4”

Revised First Confidential Privilege Log of Non-Party PNC Bank, N.A.

Entry No.	Beginning Bates No. (if any)	Doc Date	Author	Recipient	CCs	Privilege	Description of Document/Communication
1		6/8/2018				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
2		2/1/2014				SAR	Transaction monitoring alert containing information concerning a decision whether to file or not file a Suspicious Activity Report
3		2/15/2014				SAR	Transaction monitoring alert containing information concerning a decision whether to file or not file a Suspicious Activity Report
4		2/15/2014				SAR	Transaction monitoring alert containing information concerning a decision whether to file or not file a Suspicious Activity Report
5		4/1/2014				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
6		5/31/2014				SAR	Transaction monitoring alert containing information concerning a decision whether to file or not file a Suspicious Activity Report
7		8/12/2014				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
8		4/6/2016				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
9		1/15/2014				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
10		7/8/2014				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
11		7/24/2014	Loretta Traster			SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
12		7/24/2014				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
13		9/8/2014				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
14		10/20/2014				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
15		12/31/2014				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
16		1/12/2015				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
17		1/29/2015				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
18		3/30/2015				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
19		4/13/2015				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report

Revised First Confidential Privilege Log of Non-Party PNC Bank, N.A.

Entry No.	Beginning Bates No. (if any)	Doc Date	Author	Recipient	CCs	Privilege	Description of Document/Communication
20		6/4/2015				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
21		7/20/2015				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
22		8/31/2015				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
23		9/10/2015				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
24		9/24/2015				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
25		9/28/2015				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
26		9/30/2015				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
27		12/14/2015				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
28		12/31/2015				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
29		2/19/2016				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
30		3/2/2016				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
31		4/6/2016				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
32		none	Loretta Traster			SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
33		none	Sean Mceuen			SAR	Supporting documentation, for a transaction monitoring alert, containing information concerning a decision whether to file or not file a Suspicious Activity Report
34		10/14/2016				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
35		4/2/2014				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
36		4/2/2014				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
37		8/12/2014				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report

Revised First Confidential Privilege Log of Non-Party PNC Bank, N.A.

Entry No.	Beginning Bates No. (if any)	Doc Date	Author	Recipient	CCs	Privilege	Description of Document/Communication
38		5/12/2017				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report
39		5/12/2017				SAR	Supporting documentation, for a Mantas case file, containing information concerning a decision whether to file or not file a Suspicious Activity Report
40		6/8/2018				SAR	Mantas case file containing information concerning a decision whether to file or not file a Suspicious Activity Report

# Exhibit “5”

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IN THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

FORT LAUDERDALE DIVISION

CASE NO.: 17-cv-60907-FAM

FEDERAL TRADE COMMISSION, )  
et al., )  
 )  
Plaintiffs, )  
 )  
JEREMY LEE MARCUS, et al., )  
 )  
Defendants. )  
/

March 5, 2020

Pages 1 - 29

MOTION HEARING

BEFORE THE HONORABLE JARED M. STRAUSS  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

On behalf of the Plaintiffs:

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BY: GREGORY M. GARNO, ESQ.

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APPEARANCES CONTINUED:

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Transcribed By:

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1 (Thereupon, the following proceeding was held:)

2 THE COURT: Good afternoon.

3 Okay. We are here on Case Number 17-60907-cv-Moreno.

4 The style of the case is Federal Trade Commission, et  
5 al. versus Jeremy Lee Marcus, et al.

6 However, we are here on an amended motion or a motion  
7 from the court appointed receiver Jonathan E. Perlman in an  
8 attempt to get documents from PNC Bank. The motion is a motion  
9 for *in camera* review of documents withheld based on the SAR  
10 privilege.

11 Could I have appearances from both counsel for  
12 Mr. Perlman and counsel for PNC Bank.

13 MR. FREIDMAN: Good afternoon, Your Honor.

14 Michael Friedman and Greg Garno from Genovese Joblove  
15 and Battista on behalf of Mr. Perlman, the receiver.

16 THE COURT: Good afternoon.

17 MR. GARNO: Good afternoon.

18 MR. HOMER: Good afternoon, Your Honor.

19 Peter Homer from Homer Bonner on behalf of PNC. And  
20 with me, who has been admitted *pro hac* in the matter is Peter  
21 Hardy from the Ballard Spahr's law firm.

22 THE COURT: Hardy did you say?

23 MR. HARDY: Hardy. Yes, sir.

24 THE COURT: Good afternoon to you all.

25 I have read the motion and response here. I have a

1 couple of questions for both parties, but let me make sure that  
2 I understand the scope of what is going on.

3           There is obviously a document request that included  
4 from the receiver certain financial documents within PNC's  
5 control. There has been some objections about whether certain  
6 of those documents are privileged because they relate to the  
7 existence or nonexistence of SARs.

8           PNC has now served a privilege log, which I think  
9 attached to the amended motion, had forty different entries on  
10 it and these are that which are being withheld as purportedly  
11 privileged.

12           And those are the documents that the parties are  
13 asking the Court to review *in camera* to see if they do, in  
14 fact, fall within the SAR privilege.

15           Is that correct?

16           MR. FREIDMAN: That's correct, Judge.

17           MR. HARDY: Yes.

18           THE COURT: Okay. And from the filings, what I gather  
19 the issue is, is that PNC asserts that these documents, though  
20 not SARs themselves, are documents that would reveal the  
21 existence or nonexistence of a SAR.

22           While the receiver is taking the position that --  
23 although you haven't been able to receive these documents that  
24 they are more likely simply the underlying documents that are  
25 not themselves subject to privilege.

1 Am I stating that correctly?

2 MR. FREIDMAN: That's correct, Judge.

3 And to take it one step further our position, as we  
4 lay out in our reply and as supported by the authorities we  
5 cite in the reply, to the extent there is a document that is  
6 being withheld that is not a SAR, but has information in it  
7 that reveals the existence of a SAR.

8 You know, you have a document that is not a SAR, but  
9 it says we decided to file a SAR. We believe that the  
10 appropriate thing is for that document to be produced, with  
11 that statement that I just referenced, redacted.

12 THE COURT: Right.

13 And so we are going to get to that because that is, in  
14 fact, one of the questions that I have.

15 Before I get to that, I just want to make sure that I  
16 understand as I have come into the middle of this and not  
17 familiar with the overall litigation.

18 Mr. Friedman, could you just explain to me the purpose  
19 of seeking these documents, if I understand it correctly, is  
20 there are assets that the receiver is seeking to locate. And  
21 the purpose of the subpoena, in general, is to locate where  
22 those assets may be so that you can take further action to  
23 either seize them or control them in some way?

24 MR. FREIDMAN: It is a little broader than that,  
25 Judge. Although, that is one of the purposes. And there was

1 some litigation surrounding, you know, potential documents  
2 revealing information that third parties might have.

3 But the primary thing, the dispute that was kind of  
4 framed before Judge Moreno and that we litigated and that we  
5 believe he decided in the receiver's favor is, is it  
6 appropriate at this time in this case, in the receivership  
7 case, to require PNC to produce documents that could relate,  
8 not only to what you just mentioned, but also to the receiver's  
9 pending claims against PNC that are being asserted in another  
10 case.

11 THE COURT: Right.

12 MR. FREIDMAN: And Judge Moreno essentially said, yes,  
13 there is no reason to hold back that production at this time.

14 THE COURT: Right.

15 I think if I recall correctly, originally my  
16 predecessor's report and recommendation said that that should  
17 be an issue for the other case, but that discovery has been  
18 stayed in that other case. Is that --

19 MR. FREIDMAN: I don't know if it is stayed, but it is  
20 not open yet because there is a motion to dismiss pending.

21 THE COURT: And so the documents that you are seeking  
22 could potentially relate to both locating assets, but also  
23 relate to the claims that you are trying to pursue against PNC  
24 itself?

25 MR. FREIDMAN: Correct.

1 THE COURT: Okay.

2 MR. HARDY: Your Honor, may I speak on that point?

3 THE COURT: Sure.

4 MR. HARDY: Thank you. I appreciate it.

5 Just to clarify our position, I do agree with opposing  
6 counsel that at issue is the issue of redactions back to your  
7 initial question.

8 THE COURT: Actually, I'm sorry, Mr. Hardy.

9 Let me just interrupt you. I just want to make clear  
10 to everyone. Our only record here is from the digital audio  
11 recorder, which will only pick you up if you are speaking into  
12 the microphone.

13 I could hear you just fine, but if anyone wants to get  
14 a transcript of this later, it would behoove you to speak into  
15 the microphone.

16 MR. HARDY: Thank you. I appreciate that.

17 On that note, so as to the redactions, it is our  
18 position that redactions will be insufficient in regards to not  
19 disclosing with these particular forty documents as to whether  
20 or not a SAR was or was not filed. That's true.

21 I also want to be clear that the reason that we had  
22 asked for some sort of *ex parte* communication was if you were  
23 to find that they should be produced with redactions, these are  
24 highly technical documents.

25 They are not user friendly. And we feel that it would

1 be important for me to try to explain to you why we think  
2 certain parts should be redacted and certain parts should not.

3 I am very aware that you are extremely familiar with  
4 SARs. I don't know how many folks are intimately familiar with  
5 internal bank documents relating to the implementation of its  
6 anti money laundering policies.

7 I have the forty documents here with me, of course,  
8 that are at issue. I also have two examples. And without  
9 getting into the details because, of course, I don't want to  
10 disclose the details.

11 THE COURT: Right.

12 MR. HARDY: There are two basic buckets of documents.

13 There are alerts and there are cases. An alert is  
14 kind of a preliminary document and the process, if it advances  
15 along, it becomes what is called a case.

16 I have an example here for your information of an  
17 alert with our proposed redactions along with, in this case,  
18 its connected case. So the alert led to a case. I have  
19 another example.

20 The other thing I wanted to mention, I appreciate you  
21 giving me the opportunity, is we take issue with the notion  
22 that Judge Moreno gave a green light to a wide open discovery  
23 quest in this case regarding PNC's alleged knowledge.

24 It is true that opposing counsel eventually came to  
25 that argument. Their argument kind of shifted over time, but

1 his order doesn't actually say that. And I can represent to  
2 you that we have disclosed the two documents, which pertain to  
3 PNC's communications with other financial institutions, which  
4 they sought regarding third parties, the Defendants.

5 I can tell you, and you will obviously see for  
6 yourself because you are going to be looking at these things,  
7 these documents, which are very technical, say nothing about  
8 assets held by third parties anywhere.

9 They will not assist the receiver pursuing other  
10 parties in the underlying FTC action. I fully understand their  
11 argument about they need it for our knowledge.

12 THE COURT: Right.

13 So you have anticipated some of my questions, but the  
14 first one is -- and I understand that you are under some  
15 constraint of it is hard to talk about and describe these  
16 documents to me without, you know, revealing what is in the  
17 documents, but we're going to try.

18 You've referred to how these are hyper-technical  
19 documents that you need to be familiar with the banks internal  
20 processes that seems to really understand.

21 So I guess my first question is, if you need to  
22 explain to me why information in the documents is going to or  
23 not going to reveal the existence of a SAR, how is it that  
24 turning over the documents to someone who doesn't have that  
25 explanation, is going to reveal or not reveal the existence of

1 a SAR?

2 MR. HARDY: Fair question.

3 Let me rephrase what I've said. You could eventually  
4 figure it out given enough time. I am just suggesting that if  
5 you are given these things in the first instance, it is not  
6 going to be inherently obvious to you.

7 I do think that if a third party got them, they could  
8 eventually start to piece it together and that really is going  
9 to the heart of our concern. And you know, attached to that is  
10 we did eventually get a confidentiality agreement in the FTC  
11 case.

12 However, because the State of Florida had significant  
13 objections to us doing it at all -- actually the mechanism is  
14 essentially whatever the receiver gets he is free, perhaps not  
15 entitled or obligated in his own arrangements, to provide them  
16 to both the FTC and the State of Florida.

17 The State of Florida has Sunshine laws. This was a  
18 very important point for the State Attorney General. And what  
19 we are left with doing if say, for example, anyone makes a  
20 Sunshine law request for these documents, then PNC gets notice  
21 and we have to come in and we have to seek a protective order  
22 and make the argument, which I think is a legitimate argument,  
23 but there is obviously no guarantees that these are trade  
24 secrets.

25 So my point is, there is a degree of exposure here.

1 And what these documents do is they provide really good  
2 insights into the processes and algorithms that are used to  
3 detect suspicious activity.

4 THE COURT: Okay. You said eventually that someone  
5 could, with enough time, someone could piece together I guess  
6 the meaning of the documents.

7 What additional information, absent someone like  
8 yourself or someone from the bank there to sit and walk them  
9 through, I mean, what additional information would someone need  
10 in order to piece it together from the documents that they  
11 couldn't tell from its face?

12 MR. HARDY: Again, I just get back to time.

13 And perhaps Your Honor will, you know, spend a -- I  
14 mean, at the heart of this SAR request was to have an *ex parte*  
15 and perhaps you will spend a great deal of time.

16 I think, eventually, you can start to see how certain  
17 alerts feed into certain cases. You can see certain -- there  
18 are codes and designations of how -- I am trying to be careful  
19 here.

20 THE COURT: Sure.

21 MR. HARDY: Of how the bank sets its own thresholds  
22 for its underlying computer system.

23 And then, certain transactions are given a numerical  
24 designation, which is going to suggest whether it is a high or  
25 low risk, et cetera.

1 I mean, you know, I am not -- don't get me wrong. I  
2 am not saying that you can't figure it out. I'm just saying we  
3 thought it would be helpful.

4 THE COURT: Again, I don't take it as an insult to my  
5 intelligence or anything that way.

6 My concern, my bigger question is more of, well, if  
7 someone can't look at it and just figure it out, then, really  
8 it seems like there is no secret to protect if the document is  
9 not going to be announcing it on its face.

10 MR. HARDY: I mean, these documents really go to the  
11 heart of how PNC implements its AML policy.

12 They are extremely sensitive and we think that they  
13 do, when the writing context can reflect, whether a SAR was or  
14 was not filed. Even if you redact, you know, there are  
15 sections that just say whether a SAR was filed or not.

16 THE COURT: Right.

17 MR. HARDY: I mean, it is literally right there and I  
18 think we all agree --

19 THE COURT: That's pretty easy to redact.

20 MR. HARDY: Pardon me.

21 That's the easy one. It is the other stuff that I  
22 think we are disagreeing on.

23 THE COURT: So you are suggesting that there are codes  
24 that if someone spent enough time looking at could figure out,  
25 well, if there is a one here that means that a SAR was filed

1 and if there is a zero that it is not and something like that?

2 MR. HARDY: They could reverse engineer.

3 And if these things are potentially floating around  
4 out there in the public, we absolutely don't want them out  
5 there.

6 THE COURT: Well, of course, wouldn't you need to --  
7 in order to reverse engineer, wouldn't you need to know at  
8 least one or more instances where SARs were issued in order to  
9 reverse engineer to kind of go back to the codes and say, well,  
10 gee, if this must mean that because primarily it was issued  
11 here or not here?

12 MR. HARDY: I don't know the answer to that question  
13 off the top of my head.

14 I will say this, the next step is going to be in  
15 *Perlman v. PNC* -- the other case there are two points. In  
16 *Perlman v. PNC* and, then, they are going to be asking us for  
17 our policies. Now, that's not in front of you and I understand  
18 that. I'm just saying --

19 THE COURT: You are concerned that if they get the  
20 policies they can marry the policies with these documents and  
21 that would give them a chance to figure out --

22 MR. HARDY: Right. None of this stuff is in a vacuum.

23 The second thing is, is that even if one couldn't  
24 necessarily tell, oh, in this instance there was a SAR filed or  
25 there was not a SAR filed.

1           What you can tell is this is the sort of thing the  
2 bank is looking at and how they value it and how they try to  
3 detect suspicious activity for the benefit of law enforcement  
4 downstream, of course, for SARs.

5           And if, for example, you are a person of bad intention  
6 and one were to get ahold of this -- and again, I get back to  
7 my point on the confidentiality order -- it will give you some  
8 ideas as to how to basically circumvent the anti money  
9 laundering policies and we think that is a very legitimate  
10 concern.

11           THE COURT: Then, other questions that I had, the  
12 privilege log has forty entries.

13           MR. HARDY: Yes, sir.

14           THE COURT: Are we talking about forty individual  
15 pieces of paper, or are we talking about the ones that you  
16 mentioned there are alerts and there are cases and the ones  
17 that are styled as cases, you know, I could imagine. Are we  
18 talking about is a case fifty pages or is the case one page?

19           I'm wondering if these forty entries -- I'm trying to  
20 get a sense of what is the volume that we are actually talking  
21 about having to go through and look at.

22           MR. HARDY: Right.

23           I don't know right off the top of my head if there is  
24 any document that is only a page. The alerts are shorter. I  
25 am ball-parking here.

1           They tend to be about two to three pages. The alerts,  
2 that differs. Some of them might be up to ten. So it is not  
3 forty pages, but I don't think it is over two hundred.

4           THE COURT: So you think the cases might be around ten  
5 pages? Again, I'm not holding --

6           MR. HARDY: Yes. I have a binder here that I am  
7 holding up.

8           THE COURT: Is that the entirety of the forty  
9 entries --

10          MR. HARDY: It is.

11          THE COURT: -- is that binder?

12          MR. HARDY: Correct.

13          THE COURT: Okay. The other question I had is how  
14 consistent or how common, is there a commonality to the cases  
15 and to the alerts? And what I mean by -- and you will see  
16 where I am going pretty quickly from this.

17                 If I ask you to just give me an example of each, an  
18 example of a case and an example of an alert and I gave a  
19 ruling on those specific documents, would those be sufficiently  
20 illustrative of the other cases and the other alerts such that  
21 you can say, okay, we know where the Judge is going and we can  
22 now go from there?

23          MR. HARDY: Yeah, I think so because the formats are  
24 all the same in terms of how the documents are laid out.

25                 I mean, they are basically, you know, filled in with

1 columns and rows and things of that nature. There might be a  
2 few one of permutations here and there but, basically, yes is  
3 the answer to your question.

4 THE COURT: Okay. So if I granted the motion for  
5 *in camera* review as to one, for example, and one case example  
6 and could either rule or give you guidance on those the parties  
7 could then take that ruling and figure out how to apply that to  
8 the other 38 documents? That sounds reasonable from PNC's  
9 point of view?

10 MR. HARDY: Yes. And the guidance would be much  
11 appreciated and I think this is where you are going.

12 I mean, we could certainly anticipate a scenario  
13 where, let's say, you know, in a vacuum we just willy-nilly do  
14 redactions then, of course, it is going to be difficult to do a  
15 privilege log that in our view will be sufficiently opaque and  
16 in their view will be sufficiently detailed. And you know, we  
17 might just end up right back to where we are. So some guidance  
18 would be helpful.

19 THE COURT: I didn't realize I haven't addressed the  
20 hard issue, which is whether or not to allow *ex parte*  
21 communication about the *ex parte* explanation. Before I get to  
22 that, though, I have a couple of questions for you, Mr.  
23 Friedman.

24 Number one, do you think -- obviously you not having  
25 seen the documents might be hard to answer this, but what I

1 have just spoken to Mr. Hardy about having two illustrative  
2 examples examined and extrapolating from there, is that  
3 something that you would be comfortable with?

4 MR. FREIDMAN: I think our concern there, Judge, is if  
5 the bank is permitted to pick the example it might create a  
6 situation where their example --

7 THE COURT: Right. I anticipated that.

8 I thought I would just pick two of the numbers on the  
9 list and that way we can avoid the cherry-picking possibility.

10 MR. FRIEDMAN: Right.

11 MR. HARDY: May I suggest as a practical proposal?

12 We didn't cherry-pick, but if you don't trust me, Your  
13 Honor can get all forty of them. I mean, we have the two here  
14 now. It actually took some time to do these redactions.

15 THE COURT: Sure.

16 MR. HARDY: It is kind of an excruciating process.

17 I would propose these. I don't think they are  
18 particularly bank friendly. I don't think they are. You know,  
19 I am representing to you that we didn't cherry-pick. You can  
20 have all of them and compare and contrast, but it sets up the  
21 system.

22 THE COURT: Well, you know, I guess before I do  
23 something, let me just ask my other question.

24 I, in preparing for the hearing, we came across an  
25 order that Judge Matthewman had entered in a different case.

1 I apologize. I don't know if I have the -- Jen, do  
2 you have that?

3 My law clerk is going looking for that, but it struck  
4 us that a similar issue that also dealt with PNC is of similar  
5 concern about whether technical internal bank documents were  
6 going to reveal SAR privilege.

7 And I think Judge Matthewman's concern was before  
8 anyone undertook a whole lot of work here is whether even these  
9 documents were going to be helpful to the -- I think it was the  
10 Plaintiff in that case that was seeking them.

11 Because, again, if a lot of these documents are very  
12 technical computer coded and there is going to be blacked out  
13 information about the SARs, I am kind of wondering whether you  
14 even need them, Mr. Friedman, or whether it is actually going  
15 to advance your interest or not.

16 Now, you can't tell that without looking at them what  
17 Judge -- and the case that I am looking at is *Ackner v. PNC*  
18 *Bank*. It's Case Number 16-cv-81648. And this particularly was  
19 an order that was issued May 15 of 2017.

20 Essentially, what Judge Matthewman ordered was counsel  
21 for both parties, no one else, just simply an attorney for each  
22 party together in a room. No copies. No photographs. No, you  
23 know, notating the documents out.

24 Nothing of that nature, but simply giving I guess the  
25 requesting party an opportunity to look at the documents and

1 even see does this even move the ball forward because the  
2 subpoena you issued is very detailed.

3 I imagine you got a lot of information out of that. I  
4 am wondering whether the information that these documents would  
5 have, would it even give you anything more than what you  
6 already have and, you know, it sort of moots the whole  
7 exercise.

8 Especially if all it is adding is a bunch of technical  
9 data that either might get redacted or might not seem relevant  
10 on its face. Then, really, what is the point of going through  
11 this exercise to begin with?

12 MR. FREIDMAN: So, my expectation, Judge, would be  
13 based on viewing similar documents in the past would be that  
14 there would be some narrative information beyond the technical  
15 data that would be helpful.

16 If it is a document that only reveals technical data,  
17 then to counsel's point earlier in the hearing, that  
18 information could be important to the extent that we are later  
19 able to obtain policy manuals and procedures that will tell us  
20 what the technical data means.

21 THE COURT: But isn't that exactly what their concern  
22 is that in interpreting technical data you are going to learn  
23 things that would otherwise be privileged?

24 MR. FREIDMAN: To the extent there is technical data  
25 that reveals the existence or nonexistence of a SAR, we would

1 agree that that technical data is subject to the privilege, but  
2 there may be other technical data that with the use of manuals  
3 and procedures, it could be interpreted in a manner that is  
4 helpful and doesn't reveal confidential information.

5 MR. HARDY: And if I may, just for the record -- I'm  
6 sorry. I didn't mean to interrupt.

7 MR. FREIDMAN: No, that's okay.

8 THE COURT: Please.

9 MR. HARDY: There is narrative. There are narrative  
10 sections. However, some of these -- and I don't know off the  
11 top of my head are essentially what becomes possible narrative  
12 section and a possible SAR, which would be squarely covered by  
13 the privilege.

14 THE COURT: Well, I'm not sure if that's right,  
15 though. Just because there is information that is later, say,  
16 cut and paste into the SAR that it is still not the SAR itself,  
17 it is still not indicating that that information is going to be  
18 used in the SAR, right?

19 MR. HARDY: I respectfully disagree.

20 And I think actually the case that Judge Moreno cited  
21 *Shapiro v. Wells Fargo* has some cited language. The second  
22 category of documents representing drafts, SARs, or other work  
23 product, or privilege communication that relate to the SAR  
24 itself, that's covered.

25 And I want to draw your attention to --

1 THE COURT: Right.

2 Just language that might later get transferred from  
3 one of these documents into the SAR, can you really fairly call  
4 that a draft of the SAR if there is no indication from the  
5 document that it is in that that is a draft of the SAR as  
6 opposed to a document that might one day be used to create a  
7 SAR?

8 MR. HARDY: I think in the context of these documents  
9 my answer is yes.

10 MR. FREIDMAN: And Judge, respectfully, this is in our  
11 view what Judge Moreno already ruled on when he ruled that  
12 these documents had to be -- that the underlying documents had  
13 to be produced and that the items that could be withheld are  
14 things that are subject to the BSA privilege.

15 That is a SAR or a document that reveals the existence  
16 of the SAR. And to the extent that it is the latter that  
17 information ought to be redacted.

18 THE COURT: Okay. One question.

19 Again, just getting back to Judge Matthewman's  
20 proposal. One concern I had in seeing that I wasn't sure if  
21 even such a meeting under court order and supervision if that  
22 would, in itself, waive the privilege that you say should  
23 attach to the documents.

24 What is your opinion on that, Mr. Hardy?

25 MR. HARDY: I agree with what you just said because I

1 can't tell these gentlemen or I can't show them a document that  
2 reflects whether a SAR was or was not filed.

3 THE COURT: Right.

4 Even for the purposes of them perhaps looking at it  
5 and saying, no, this isn't going to be helpful to me anyway.

6 MR. HARDY: I concede that it is awkward, but it is  
7 what it is.

8 MR. FREIDMAN: I think what both parties agree on,  
9 Judge, is that we really do need you to step in and take a look  
10 at the documents and call balls and strikes.

11 THE COURT: Okay. All right. And obviously, if it  
12 wasn't clear from the questions that I have been asking, my  
13 hesitation is I want to make sure that the Court is able to use  
14 its time efficiently and not be wading through stacks of  
15 documents. And find a way that we can perhaps streamline the  
16 process and get the information and get you guys moving on what  
17 you need to be doing.

18 I'm hardened by the fact that that seems like that  
19 binder is not too terribly overwhelming. I imagine in a case  
20 like this that is really nothing.

21 What I am going to do is this. I understand what  
22 PNC's position is regarding the need for (inaudible) to explain  
23 to you what is going on in the document, but I think the  
24 receiver's objection to having *ex parte* communications is well  
25 taken.

1           What I would like to do is this. I would like to, I  
2 guess, grant the motion. Perhaps the best thing to say is to  
3 grant it in part.

4           What I am going to do is I will take the binder of all  
5 -- Mr. Hardy, are you able to -- you said you had examples of  
6 ones that you have redacted in a way that you think -- the  
7 examples you were going to show those were redacted as you  
8 think you would have to redact them if you were to disclose  
9 them or what exactly --

10           MR. HARDY: Correct, Your Honor.

11           They are blown up because these are very hard to read  
12 and, you know, they are tiny text. So we have one alert and  
13 one case and they are connected. The alert led to the case.

14           THE COURT: Okay.

15           MR. HARDY: The case, by the way -- and this is just  
16 how these documents are and refer to other cases. So there is  
17 like a lot of stuff jammed into any one given document.

18           THE COURT: Right.

19           MR. HARDY: And what we have done is with the red box  
20 we have highlighted that which we think should be redacted  
21 under the SAR privilege. You could see it.

22           THE COURT: Okay. So what you have there does not  
23 actually have the redactions. It has what you would propose to  
24 redact?

25           MR. HARDY: The proposed redactions.

1 THE COURT: Okay.

2 MR. HARDY: And one last thing, on this one and this  
3 is slightly unusual. There are a few blue boxes and that is  
4 because the blue boxes pertain to actions that were taken by  
5 staff once litigation had commenced at the direction of  
6 counsel.

7 THE COURT: And are you able to identify for us which  
8 documents on the list, of the one through forty, which ones  
9 those are?

10 MR. HARDY: I can. So there is a privilege log,  
11 right, of the forty documents. It is number five. The  
12 privilege log is not in chronological order.

13 THE COURT: Okay. So number five, it's a document  
14 dated 4/1 2014.

15 MR. HARDY: That's right.

16 THE COURT: And that has the description with what  
17 most of these are the case file containing information.

18 MR. HARDY: Yes, that's the alert. And number 35 --  
19 by the way, the binder I am going to give you is in  
20 chronological order, but the case is number 35, which is dated  
21 April 2nd of 2014.

22 THE COURT: Okay. So I think what strikes the right  
23 balance here is, I will take the binder and I will take the two  
24 examples that you have prepared. I think my intention, quite  
25 frankly, is to try to look at the examples and see if we can

1 extrapolate from there so the Court does not have to go through  
2 each and every one of the forty.

3           But because I understand the receiver's concern about  
4 cherry-picking, we will go through at least some to make sure  
5 that these are particularly bank friendly examples that they  
6 have picked.

7           However, I think seeing the examples with the proposed  
8 redactions, I think strikes a balance here of allowing the bank  
9 to express what they think the big problem is without weeding  
10 through the situation where the receiver was properly concerned  
11 about of a stream of communication, or I think as you put it in  
12 your filing, whispering in the Court's ear.

13           I think this strikes a balance practice. So what I  
14 would ask you to do -- I will grant the motion for the *in*  
15 *camera* review. I will take the entire binder, as well as the  
16 two examples. And I am not sure if we need to mark the  
17 examples in any particular way.

18           MR. HARDY: They actually have, in anticipation of  
19 potential production, Bates stamps on them.

20           THE COURT: Okay. Could you identify what those are  
21 just so that it is clear --

22           MR. HARDY: Yes.

23           THE COURT: -- for the record what the numbers would  
24 be?

25           MR. HARDY: Yes. The alert, number five on the

1 privilege log --

2 THE COURT: Yes.

3 MR. HARDY: -- is Moreno 000018. That's the first  
4 page.

5 THE COURT: Okay.

6 MR. HARDY: Number 35 is Moreno 000160.

7 THE COURT: 160?

8 MR. HARDY: 160, right.

9 And one thing -- and humor me, but when you look at  
10 these and this is a systemwide observation and it has nothing  
11 to do with any particular document. A CAR is a continuing  
12 activity report. Stated otherwise, it is another SAR.

13 MR. FREIDMAN: I object to that because I have never  
14 heard of that term and I am not aware of it in the context of  
15 the BSA.

16 MR. HARDY: It's a suspicious activity report. It is.

17 THE COURT: Is that almost like an addendum or a  
18 supplement to a previously issued SAR?

19 MR. HARDY: Yes. If you file a SAR and for whatever  
20 reason you decide you need to amend, expand, or what have you,  
21 industrywide it is another BSA. Yes, a continuing activity  
22 report.

23 THE COURT: Is this term defined anywhere in the  
24 statute or --

25 MR. HARDY: It's on the form itself.

1 And actually, now that I think about it lots of --  
2 this is beyond your point -- lots of guidance out there warning  
3 banks to make sure you file your activity reports.

4 THE COURT: Okay. I will ask Mr. Hardy to give those  
5 items over to my law clerk.

6 MR. HARDY: Yes, sir.

7 THE COURT: And if you can give me one moment.

8 I guess, given that it seems to be always some  
9 dispute, can the parties provide any supplemental briefing on  
10 this continuing activity report term?

11 I mean, if it's a clearly defined or commonly used  
12 term, I would like to think that you could easily provide some  
13 authority that establishes what the nature of it is and that it  
14 falls within the privilege.

15 MR. HARDY: Sure. My point is when you are looking at  
16 these and you see that -- and forgive me. I didn't assume you  
17 would know what it meant. I just want folks to be clear.

18 THE COURT: I never heard the term before. I mean, it  
19 sounds like it is named for what it is.

20 MR. HARDY: Yes. Sure.

21 THE COURT: And Mr. Friedman, I mean, if you find  
22 authority that suggests that a CAR does not rise to the level  
23 of a SAR and it should be treated differently, I am happy to  
24 see that as well.

25 MR. FREIDMAN: Thank you, Judge. We will take a look

1 at that.

2 THE COURT: I mean, if you could submit any  
3 supplemental briefing within week?

4 MR. FREIDMAN: Of course.

5 THE COURT: So one week from today which would be, I  
6 believe, March 12th.

7 And otherwise, are there any additional matters that  
8 you think the Court needs to address in order to address this  
9 motion or any other matter that --

10 MR. FREIDMAN: The only other thing that I would  
11 propose with respect to any supplemental briefing is perhaps a  
12 page limit, Judge.

13 THE COURT: Sure. I mean, I think that --

14 MR. FREIDMAN: Gladly.

15 THE COURT: -- less than five pages or less, I think,  
16 should be more than sufficient for this one.

17 MR. FREIDMAN: Yes.

18 THE COURT: Any other matters, Mr. Friedman?

19 MR. FREIDMAN: No. Just to thank you, Judge. I am  
20 sure document review is not high on your list. So I greatly  
21 appreciate it.

22 THE COURT: I will share with you -- never mind. I am  
23 going to leave that unsaid. Like I said, we want to find the  
24 most efficient way to address the parties --

25 MR. FREIDMAN: Sure.

1 THE COURT: -- problems and get everyone on their way.  
2 Mr. Hardy or Mr. Homer, anything else from the Bank's  
3 point of view?

4 MR. HARDY: I just want to bring one case to the  
5 parties and the Court's attention.

6 It is *Regions Bank v. Allan*. It is actually a State  
7 of Florida case. It is 33 S.3d 72. It is 2010 and it holds  
8 that redactions are insufficient in regards to the issue that  
9 we are talking about. That's the only thing.

10 MR. FREIDMAN: All right. Well, with that said,  
11 Judge, I will just refer you to the briefing that we already  
12 submitted to the Court in our reply at Page 2. That's ECF 449  
13 where we go through a number of authorities. Including the  
14 authorities from the OCC supporting that redactions are the  
15 appropriate way of handling the situation.

16 THE COURT: Well, thank you, gentlemen.

17 I can't really give you much more insight until I  
18 actually look at things.

19 Thank you for your arguments and if there is nothing  
20 else, we will stand in recess.

21 MR. HARDY: Thank you, Your Honor.

22 MR. FRIEDMAN: Thank you, Judge.

23 (Thereupon, the proceedings concluded.)  
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CERTIFICATE

I hereby certify that the foregoing transcript is an accurate transcript of the audio recorded proceedings in the above-entitled matter.

03/06/20

Bonnie Joy Lewis,  
Registered Professional Reporter  
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# Composite Exhibit “6”

Case 0:10-cv-60786-MGC Document 666-1 Entered on FLSD Docket 12/02/2011 Page 1 of 2



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Comptroller of the Currency  
Administrator of National Banks

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Washington, DC 20219

VIA ELECTRONIC MAIL

December 2, 2011

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Subject: *Coquina Investments v. TD Bank, N.A.*, No. 10-60786-Civ-Cooke (S.D. Fla.)

Dear Counsel:

This is in response to the November 26, 2011 from David S. Mandel, attorney for plaintiffs and November 30, 2011 letter from Carl A. Fornaris in which the parties seek an expedited decision from the Office of the Office of the Comptroller of the Currency (the "OCC") concerning the permissibility of disclosing certain materials that had been redacted in a 42 page document that defendant TD Bank, N.A., had provided to plaintiffs' counsel. At issue is whether the disclosure of the redacted information could be authorized by the OCC consistent with the requirements of the Bank Secrecy Act and OCC regulations that prohibit the disclosure of suspicious activities reports ("SARs") and information indicating that a SAR had or had not been filed in connection with particular transactions.

As explained in a November 22, 2011 letter from Horace G. Sneed to counsel for TD Bank, OCC regulations provide that a SAR and any information that would reveal that a SAR has been filed are confidential non-public OCC information. 12 C.F.R. § 4.32(b)(1)(vii). The Bank Secrecy Act, 31 U.S.C. § 5318(g)(2), and implementing OCC regulations, 12 C.F.R. § 21.11(k), forbid the disclosure of a SAR and information indicating whether or not a SAR has been filed except for the law enforcement purposes underlying the Bank Secrecy Act. Thus, neither TD Bank, nor the OCC, may disclose whether a SAR has been filed except to fulfill the law enforcement purposes of the Bank Secrecy Act. See 12 C.F.R. § 21.11(k), as amended, 75 Fed. Reg. 75583 (Dec. 3, 2010).

Based on a review of the redacted information, I conclude that the redactions were appropriate to prevent disclosure of whether or not a SAR had been filed in connection with specific transactions. However, I also conclude that allowing TD Bank to un-redact certain additional information would not violate the requirements of federal law so long as the redactions do not disclose that a SAR was or was not filed. As the OCC explained in the preamble to the regulation governing confidentiality of SARs:

Any document or other information that affirmatively states that a SAR has been filed constitutes information that would reveal the existence of a SAR and must be kept confidential. By extension, a national bank also must afford confidentiality to any document stating that a SAR has not been filed. Were the OCC 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.

75 Fed. Reg. 75579

Notwithstanding the requirement to keep confidential information that would disclose whether or not a SAR has been filed, the OCC will authorize TD Bank to un-redact those portions of the document at issue that do not explicitly reveal that a SAR was or was not filed. This means that TD Bank may un-redact statements indicating that a transaction was or was not suspicious, but may not un-redact any text or code showing that the TD Bank did, or did not, file a SAR in connection with particular transactions or events.

If you have any additional questions regarding this matter, please contact Horace G. Sneed at (202) 874-5280.

Sincerely,



Daniel P. Stipano  
Deputy Chief Counsel



---

Comptroller of the Currency  
Administrator of National Banks

---

Washington, DC 20219

VIA ELECTRONIC MAIL

November 22, 2011

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Subject: *Coquina Investments v. Scott W. Rothstein, et al.*,  
No. 0:10-cv-60786-Cooke/Bandstra (S.D. Fla.)

Dear Ms. Evans and Mr. Fornaris:

This concerns your November 21, 2011 telephone call to me and March 28, 2011 written notification to the Office of the Comptroller of the Currency (the "OCC") pursuant to 12 C.F.R. 21.11(k) concerning requests by plaintiff in the above-named case that implicate federal law prohibiting the disclosure of Suspicious Activity Reports ("SARs"). You represent defendant TD Bank, N.A., a national bank that is supervised by the OCC. You contacted me by telephone yesterday to advise the OCC of an order issued by United States District Court Judge Marcia G. Cooke seeking, among other things, a response from the OCC regarding the availability of SARs for use in private civil litigation. As explained below, in the context of private civil litigation, the Bank Secrecy Act, 31 U.S.C. § 5318(g) and the OCC's regulations prohibit the OCC from disclosing or authorizing national banks to disclose any SAR or information that would reveal whether a SAR has or has not been filed in connection with any suspicious activity.

#### Discussion

Under the OCC's regulations a SAR and any information that would reveal the existence of a SAR are confidential non-public OCC information. 12 C.F.R. § 4.32(b)(1)(vii). Generally, no person in lawful possession of non-public OCC information may disclose that information unless

they have complied with the requirements of 12 C.F.R. §§ 4.31-4.40, which also provides the mechanism for any litigant who wants to use non-public OCC information in litigation to seek authorization from the OCC for access to that information. Under these procedures, it is the litigant that wants to use the non-public OCC information that is required to file the request with the OCC. It is that litigant's obligation to respond to the regulatory requests set forth in 12 C.F.R. § 4.33 in order to demonstrate the litigant's need to use non-public OCC information. While the regulation sets forth the information a requester must supply the OCC, there is no specific form to be filed. Accordingly, to the extent that the plaintiff seeks to use non-public OCC information in this action, it is the plaintiff's obligation to file a request with the OCC; and to the extent that TD Bank wants to use non-public OCC information, it is TD Bank's obligation to file the request with the OCC.

In addition to the general restrictions on disclosure of non-public OCC information, SARs are subject to further statutory and regulatory prohibitions on their disclosure. The Bank Secrecy Act, 31 U.S.C. § 5318(g)(2), and implementing OCC regulations, 12 C.F.R. § 21.11(k), forbid the disclosure of a SAR except for the law enforcement purposes underlying the Bank Secrecy Act. The Bank Secrecy Act provides:

- Notification prohibited. (A) In general. If a financial institution or any director, officer, employee or agent of any financial institution, voluntarily or pursuant to this section or any other authority, reports a suspicious transaction to a government agency—
- (i) The financial institution, director, officer, employee, or agent may not notify any person involved in the transaction that the transaction has been reported; and
  - (ii) No officer or employee of the Federal Government or of any State, local, tribal, or territorial government within the United States, who has any knowledge that such report was made may disclose to any person involved in the transaction that the transaction has been reported, other than as necessary to fulfill the official duties of such officer or employee.

31 U.S.C. § 5318(g)(2).

The OCC has issued regulations to implement the Bank Secrecy Act, including its prohibition on disclosures that would interfere, directly or indirectly, with the effectiveness of this Congressionally-mandated law enforcement mechanism. As recently amended, 12 C.F.R. § 21(k) provides:

*Confidentiality of SARs.* A SAR, and any information that would reveal the existence of a SAR, are confidential, and shall not be disclosed except as authorized in this paragraph (k).

75 Fed. Reg. 75576, 75583 (Dec. 3, 2010). Because of the recognized importance of SARs to law enforcement and the importance of confidentiality of the filing of SARs, more than a dozen state and federal courts have refused to permit discovery of SARs from a bank in private civil litigation. *See, e.g., Union Bank of California, N.A. v. Super. Ct. of Alameda County*, 29 Cal. Rptr. 3d 894, 901 (Cal. Ct. App. 2005). *See also Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir. 1999) (“[E]ven in a suit for damages based on disclosures allegedly made in an SAR, a financial institution cannot reveal what disclosures it made in an SAR, or even whether it filed an SAR at all.”). Courts have also held that the privilege accorded a SAR is unqualified and cannot be waived. *Whitney Nat’l Bank v. Karam*, 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004); *Gregory v. Bank One Indiana, N.A.*, 200 F. Supp. 2d 1000, 1002-1003 (S.D. Ind. 2002). *See also FDIC v. Flagship Auto Center, Inc.*, 2005 WL 1140678 at \*5 (N.D. Ohio May 13, 2005) (“The Magistrate cannot compel the production of the SARs and Plaintiff is prohibited from providing any information that a SAR has been prepared or filed”); *Wuliger v. OCC*, 394 F. Supp. 2d 1009, 1016 (N.D. Ohio 2005) (surveying cases prohibiting discovery of SARs in civil litigation).

The OCC recently amended its regulations to reflect the OCC’s obligations under the Bank Secrecy Act. In accordance with the statutory language, the amended regulation prohibits the OCC and its officers and employees from disclosing a SAR “or any information that would reveal the existence of a SAR, except as necessary to fulfill official duties consistent with Title II of the Bank Secrecy Act.” The amended regulation goes on to explain that “official duties”

shall not include the disclosure of a SAR, or any information that would reveal the existence of a SAR, in response to a request for use in a private legal proceeding or in response to a request for disclosure of non-public OCC information under 12 CFR 4.33.

12 C.F.R. § 21.11(k)(2), as amended, 75 Fed. Reg. 75583 (Dec. 3, 2010).

The confidentiality of SARs, or any information that would reveal the existence of a SAR, must be maintained for a number of compelling reasons. The OCC believes that disclosure of SARs could chill the willingness of a national bank to file SARs and to provide the degree of detail and completeness in describing suspicious activity in SARs that will be of use to law enforcement in combating terrorism, terrorist financing, money laundering and other financial crimes. *See Confidentiality of SARs*, 75 Fed. Reg. 75576, 75578 (Dec. 3, 2010). Even occasional disclosure of a SAR for purposes unrelated to the statutory reasons for collection of the information may adversely affect timely, appropriate and candid reporting by institutions. If institutions believe that information in a SAR can be used for purposes unrelated to law enforcement purposes, they will have an incentive to adjust the nature of their reporting to respond to the risks they perceive from the other uses of the SARs. For example, an institution may delay or forego filing a SAR if it believes that private litigants will be able to use the SAR to prove that the institution suspected fraudulent conduct by a customer but negligently failed to take action to stop the customer’s conduct before the private litigants were injured. Similarly, if an institution believes that it may be held liable in civil litigation for failing to file a SAR, it may attempt to reduce its risk of liability by establishing an unreasonably low threshold for filing SARs, essentially flooding the

system with information that could obscure more serious activities. Moreover, institutions may be reluctant to file reports, or may delay filing reports, out of fear that the SAR's disclosure would interfere with the institution's relationship with a customer. These reasons for the confidentiality of SARs are not eliminated when the criminal prosecution has concluded, or if no action is ever taken with respect to a SAR. They are ongoing and make confidentiality of SARs an essential component to the successful operation of the statute's suspicious activity reporting requirement.

Under the OCC's regulations, TD Bank is prohibited from disclosing any SAR or revealing whether a SAR has been filed in connection with any suspicious activity. 31 U.S.C. § 5318(g)(2) and 12 C.F.R. § 21.21(k). The OCC's regulation provides guidance to national banks when responding to requests for the disclosure of a SAR or any information that would disclose that a SAR has been prepared or filed. Under that regulation, a national bank that receives a request for SARs or information that may disclose whether a SAR has been prepared or filed is required to "decline to produce the SAR or such information, citing [12 C.F.R. § 21.21(k)] and 31 U.S.C. 5318(g)(2)(A)(i), and [to] notify the \* \* \* Director, Litigation Division, Office of the Comptroller of the Currency \* \* \* ." 12 C.F.R. § 21.21(k)(1). As required by the OCC's regulation, your March 28, 2011 letter to me notified the OCC that TD Bank had been served with requests for production of documents that sought, among other things, all "Suspicious Activity Reports ("SAR") pertaining to Rothstein and/or RRA and any account owned by Rothstein and/or RRA." Your response to the request notified plaintiff of the relevant OCC regulations. I am unaware of any request from plaintiff's counsel seeking access to any non-public OCC information or SARs, if any exist.

The prohibition on the disclosure of SARs or information that would reveal whether a SAR has or has not been filed in connection with a suspicious activity does not prevent litigants from discovering all of the factual information underlying the transactions that are at issue. Bank records concerning those transactions are not covered by prohibition so long as they do not themselves refer to the filing of a SAR, or otherwise indicate that a SAR has or has not been filed in connection with a specific transaction.

I trust this explains the OCC's position with respect to the availability of SARs for use in private civil litigation.

Sincerely,

  
Horace G. Sheed  
Director  
Litigation Division

# Exhibit “7”

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THE UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA

WEST PALM BEACH DIVISION

CASE NO.: 11-cv-80331-DTKH

JONATHAN E. PERLMAN, ESQ., )  
as Court Appointed Receiver )  
of Creative Capital Consortium, )  
LLC, et al., )  
Plaintiffs, )  
v. )  
BANK OF AMERICA, N.A., )  
Defendant. )

August 29, 2014

Pages 1 - 20

PLAINTIFFS' MOTION TO COMPEL  
BEFORE THE HONORABLE JAMES M. HOPKINS  
UNITED STATES MAGISTRATE JUDGE

APPEARANCES:

On behalf of the Plaintiffs:

GENOVESE JOBLOVE & BATTISTA, P.A.  
100 SE 2nd Street  
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Miami, FL 33131.  
BY: WILLIAM B. BLUM, ESQ.  
BY: MICHAEL A. FRIEDMAN, ESQ.  
BY: JOSHUA R. ALHALEL, ESQ.

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APPEARANCES CONTINUED:

On behalf of the Defendant:

REED SMITH LLP  
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BY: SETH M. KEAN, ESQ.

REED SMITH LLP  
225 Fifth Avenue.  
Pittsburgh, PA 15222  
BY: JOSEPH E. CULLEITON, ESQ.

LIEBLER, GONZALEZ & PORTUONDO  
44 West Flagler Street  
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BY: DORA F. KAUFMAN, ESQ.

Transcribed By:

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1 (Thereupon, the following proceeding was held:)

2 THE COURT: Calling Jonathan E. Perlman versus Bank of  
3 America.

4 Counsel, please announce your appearances.

5 MR. BLUM: Good afternoon, Your Honor.

6 Barry Blum from Genovese Joblove and Battista for the  
7 Plaintiff Jonathan Perlman the receiver.

8 MR. FRIEDMAN: Good afternoon, Judge.

9 THE COURT: You will have to speak into the  
10 microphone. We're recording through the microphones.

11 MR. FRIEDMAN: Of course. Excuse me, Judge. My  
12 apologies. Michael Friedman, Genovese Joblove and Battista  
13 also for the receiver.

14 MR. ALHALEL: Good afternoon, Your Honor. Joshua  
15 Alhalel also on behalf of the receiver.

16 THE COURT: Good afternoon.

17 MR. CULLEITON: Good afternoon, Your Honor.

18 Joe Culleiton from Reed Smith on behalf of Bank of  
19 America.

20 MR. KEAN: Good afternoon Your Honor. Seth Kean from  
21 Reed Smith also on behalf Bank of America.

22 MS. KAUFMAN: And Dora Kaufman of Liebler, Gonzalez  
23 and Portuondo also on behalf of the Bank of America.

24 THE COURT: Good afternoon.

25 We're here, of course, on the Plaintiff's motion to

1 compel production of documents withheld based on the SAR  
2 privilege. And it appears to me that the Defense is attempting  
3 to withhold routine investigative materials that have some  
4 independent basis, independent of the SAR reporting  
5 requirements.

6 And that the SAR privilege does not extend to cover a  
7 bank's internal reporting documents that are created  
8 independently of SAR reporting requirements or in the ordinary  
9 course of business.

10 In particular, as to the TRMs, it appears that the  
11 30(b)(6) witness for the Defendant said that the purpose of a  
12 TRM is not limited to SAR reporting. And that being the case,  
13 it seems to me that the TRMs are not generated for the specific  
14 purpose of fulfilling SAR reporting obligations and, therefore,  
15 are discoverable.

16 And at least one appellate opinion in *Union Bank of*  
17 *California v. Superior Court*, 29 Cal. Reporter 3d, 894 at 903,  
18 a 2005 case, indicated that:

19 "A bank may not cloak its internal reports and  
20 memoranda with a veil of confidentiality simply by claiming  
21 they concerned suspicious activity or concerned a transaction  
22 that resulted in the filing of a SAR."

23 It seems to me that if the only function of the item  
24 is to comply with the bank's SAR reporting requirements that's  
25 one thing, but if there are other functions performed by the

1 document, then, it would be discoverable.

2 I assume Plaintiff agrees with that or would you not?

3 MR. BLUM: Yes, Your Honor, we did. I can now put one  
4 and two of my outline away. We do agree with all of that, Your  
5 Honor.

6 THE COURT: Defense, let me hear what you have to say  
7 about that.

8 MR. CULLEITON: Would Your Honor like me to -- I know  
9 I have to speak into a microphone.

10 THE COURT: It doesn't make any difference which one.

11 MR. CULLEITON: Okay. Thank you, Your Honor.

12 It is our position that the SAR privilege extends  
13 beyond simply a SAR or draft SARs and includes some universe of  
14 investigative materials or investigative documents.

15 THE COURT: Well, that's not inapposite to what I  
16 said.

17 MR. CULLEITON: Specific for the TRMs, Your Honor, we  
18 do not disagree that there are multiple functions for the TRMs.

19 One of those functions and in certain instances the  
20 TRMs, as was the case in the *Union Bank* decision, one of the  
21 purposes would be for an employee to report potentially  
22 suspicious or unusual activity.

23 And that when that document is used in the course of  
24 business for that purpose, it is part of the bank's  
25 investigative process that goes into ensuring that the bank

1 complies with --

2 THE COURT: The key there and what I want you to focus  
3 on is the other functions that the document fulfills. And if  
4 it fulfills other functions, which are not protected by the SAR  
5 privilege, then, they would be discoverable on that basis, it  
6 seems to me.

7 MR. CULLEITON: I think if you are using a document  
8 like that for one of the other functions it would be  
9 discoverable. If you are using that document --

10 THE COURT: All right. We're in agreement.

11 MR. CULLEITON: And if you are using that document --

12 THE COURT: Well, if it is prepared for, among other  
13 things, another function other than the SAR function, then it  
14 would be discoverable.

15 MR. CULLEITON: But if it is prepared for its purpose  
16 within the SAR function, it would covered by the --

17 THE COURT: No. The key there is whether or not it is  
18 exclusively prepared for the SAR function.

19 If it is exclusively prepared for the SAR function,  
20 then it is protected. If it is not only for the SAR function  
21 that it is prepared, then it would not be protected.

22 MR. CULLEITON: I think the *Union Bank* case and other  
23 recent cases call for a more flexible approach to documents  
24 like this.

25 In terms of recognizing that there may be more than

1 one function for a particular document within the bank, but if  
2 you are in a situation -- for example, we don't take the  
3 position that every investigation that is conducted within the  
4 bank is covered by the SAR and the SAR privilege.

5 But investigations and documents that reflect that  
6 investigative process that are the purpose of that is to comply  
7 with SAR reporting requirements.

8 THE COURT: Don't just say the purpose. Say let's  
9 just deal with the exclusive purpose. That's what we are  
10 talking about. Don't be so loose with your terminology.

11 MR. CULLEITON: I don't --

12 THE COURT: Because purpose can include SAR and other  
13 purposes. And my point is that if there are other purposes,  
14 then it is not protected.

15 MR. CULLEITON: If you are using that particular  
16 document for a purpose other than the SAR reporting requirement  
17 process, then, I would agree with Your Honor it is not  
18 protected. But this is a flexible document that is used, as  
19 Your Honor says, for multiple purposes.

20 THE COURT: Well, I don't think you can restrict it to  
21 used either. I think you need rather to focus in what it is  
22 prepared for. Not what it is eventually used for.

23 MR. CULLEITON: I agree with that. I would say it  
24 that way as well that it is prepared in order to report  
25 potentially suspicious or unusual activity.

1 THE COURT: Exclusively. You've got to use  
2 exclusively in that sentence.

3 MR. CULLEITON: Okay.

4 THE COURT: Because we're not talking about things  
5 that are just used for SAR purposes. We are only talking about  
6 things that are used exclusively for SAR purposes.

7 MR. CULLEITON: I think I understand Your Honor's  
8 point. And I cannot, because of the SAR privilege and how far  
9 it extends, you know, I can present this as a hypothetical.

10 If a TRM was used for the exclusive purpose of  
11 starting the SAR process in order for the bank to comply with  
12 its federal reporting requirements, then, that document should  
13 not be discoverable.

14 If it was used exclusively --

15 THE COURT: If it was prepared -- go ahead.

16 MR. CULLEITON: If it was used exclusively --

17 THE COURT: Used or prepared.

18 MR. CULLEITON: Or prepared. I apologize.

19 If it is used exclusively or prepared for a different  
20 purpose and this is a document that has more than one purpose,  
21 then, it will be discoverable. So I don't know that we are --

22 THE COURT: We're in agreement.

23 MR. CULLEITON: Okay.

24 THE COURT: It's a long way of saying we're in  
25 agreement, right, Plaintiff?

1 MR. BLUM: On that point we are, Your Honor.

2 If I could add one thing. I mean, Mr. Culleiton just  
3 said we do not take the position that every investigation is  
4 privileged, but I think they have taken that position.

5 That's part of the problem here. We have not had one  
6 page of one document of any internal review of these accounts  
7 and not one e-mail because they are saying it is all covered by  
8 this privilege.

9 On that last point, I agree. I agree that the  
10 document has to have been prepared for the sole purpose of the  
11 SAR privilege. It has to be essentially SAR work product. It  
12 can't be something that they looked at for SAR.

13 And in fact, Mr. Dunning (phonetic) actually corrected  
14 my co-counsel Mr. Joseph and said don't use the word suspicious  
15 when you are talking about these TRMs. That's what he said at  
16 Page 345. He said don't use suspicious. We call it unusual.  
17 Suspicion, it's not suspicion. It is unusual. Suspicion  
18 relates to suspicious activity reports.

19 He actually said later, look, a TRM might say a guy  
20 had green shoes on, you know. So you might call the fashion  
21 police, but that's not SAR stuff and that's where the problem  
22 is here. They are taking a document and they are saying, well,  
23 there might be one instance where a TRM might get sucked up  
24 into a SAR process.

25 And Your Honor is right. It has to be prepared for

1 the purpose of the SAR investigation. That's what all these  
2 cases --

3 MR. FRIEDMAN: Only.

4 MR. BLUM: Only.

5 THE COURT: So what's the problem?

6 MR. BLUM: Well, we've never seen any documents. We  
7 have never seen any privilege log. We have not seen one page  
8 of one document of any bank investigation of any type. We  
9 attached it to our thing.

10 They closed the accounts of Mr. Theodule in September  
11 and said after a careful review of the above referenced  
12 accounts, we are closing your accounts.

13 Mr. Dunning explained that would have come from a TRM,  
14 an investigation report, a recommendation to close the  
15 accounts, a supervisory review, a consultation, a  
16 communication, all of that, and we have none of that. And in  
17 our conversations they have said --

18 THE COURT: Okay. Let's deal with that.

19 MR. BLUM: Okay.

20 THE COURT: Why haven't you turned over any of that?

21 MR. CULLEITON: Your Honor, I disagree that we haven't  
22 turned over anything. They have thousands of pages of what are  
23 the transactions for these accounts. The actual financial  
24 activity that resulted in closure letters being sent out. So  
25 they have that.

1 THE COURT: But you must have had some internal review  
2 that discussed it, right?

3 MR. CULLEITON: To the extent there was an internal  
4 review that looked at that activity, that review that  
5 investigative process is what we would argue is covered by the  
6 SAR privilege.

7 THE COURT: It seems to me that it's got a dual  
8 purpose. It's got, number one, to comply with your SAR  
9 requirements. And number two, it is part of your review to see  
10 if you should be closing the account. That's a separate  
11 purpose.

12 MR. CULLEITON: Those go one in the same, Your Honor.

13 THE COURT: That's where we have an issue.

14 MR. CULLEITON: I would say --

15 THE COURT: Right, Plaintiff?

16 MR. BLUM: That's exactly right, Your Honor.

17 And that's not what Mr. Dunning, the 30(b)(6)  
18 representative, said. He said it's a totally different group  
19 that looks at this. There's an account closure group, a risk  
20 management group, a financial intelligence and not the AML  
21 group that --

22 THE COURT: Well, of course it is. That only makes  
23 sense to me that it is a different function.

24 MR. BLUM: Banks have been doing --

25 THE COURT: SAR function, I mean, the bank has to make

1 an independent -- it seems to me that the bank has to do an  
2 independent review to see if the account should be closed.

3 MR. BLUM: Right.

4 THE COURT: And that's independent of any SAR  
5 requirements and I am sure has far different criteria.

6 And so whatever is done -- I mean, don't you do an  
7 independent review? You already admitted to me that you do an  
8 independent review, right?

9 MR. CULLEITON: Your Honor, the review that would be  
10 done to close an account. Your Honor, for example if a  
11 client --

12 THE COURT: Okay. The simple answer is yes.

13 So whatever documents are generated as part of that  
14 review are generated as part of that review and they are not  
15 covered by the SAR privilege.

16 MR. CULLEITON: Your Honor, I think that if you are  
17 closing an account, for example, because the client is  
18 constantly bouncing checks, or something like that, then there  
19 would be a review. That process would come to a conclusion.

20 If, for whatever reason, the bank has been alerted to  
21 and is investigating potentially suspicious activity in doing  
22 that in accordance with its reporting requirements and its  
23 policies on how it detects and reports suspicious activity,  
24 that process in itself could lead to account closures as well.

25 And so that's why I have a problem. There is not an

1 independent --

2 THE COURT: Hold on.

3 The road we are going down is you are going to have to  
4 provide a privilege log of all items that you say are  
5 privileged according to SAR --

6 MR. CULLEITON: I apologize, Your Honor.

7 THE COURT: The road you are going down is that you  
8 may have to file a privilege log under seal for my review to  
9 show me what parts of your internal investigations that you  
10 haven't turned over that you claim are protected by the SAR  
11 privilege. I personally don't believe that your entire  
12 internal memoranda are going to be SAR privileged.

13 Now, there may be discreet items within those internal  
14 memoranda that may discuss SAR and I could understand why that  
15 would be privileged. And I would be interested in hearing from  
16 you as to how we can resolve those issues, but to say that your  
17 wholesale memoranda, internal memoranda are SAR privileged, I  
18 mean, they are prepared for another purpose, it seems to me.

19 MR. CULLEITON: To be clear, that's not our position,  
20 Your Honor. Our position is that the SAR privilege extends  
21 beyond just the SAR and the draft SAR itself.

22 There is another group of investigative documents that  
23 it would extend to. It doesn't extend to everything. That is  
24 not our position. In terms of a privilege log the bank is not  
25 permitted, for example, to write even on a privilege log SAR,

1 privilege log entry number one, or draft SAR.

2 THE COURT: I'm saying under seal just for my review.

3 MR. CULLEITON: Even under seal, Your Honor, I don't  
4 think we can say SAR.

5 THE COURT: Do you think my court order is trumped by  
6 SAR?

7 MR. CULLEITON: I'm not trying to overrule any order.  
8 What I am saying is we can log these documents. I  
9 don't even think we have a disagreement with the other side in  
10 terms of SAR or draft SAR. I don't even think they would  
11 expect us to put that on a log.

12 THE COURT: As far as putting it under seal for my  
13 review only and not even showing it to the other side?

14 MR. CULLEITON: I would ask if Plaintiffs would have  
15 any issue with us not logging a SAR or a draft SAR if they  
16 existed.

17 MR. BLUM: I'm going to defer to the Court on that,  
18 Your Honor. Our position is that the actual SAR, which is a  
19 form document, is privileged.

20 I think, though, I'm loathed to say I agree with that  
21 because I don't want them saying, oh, well this thing might be  
22 a SAR or a draft SAR too. And if it is under seal without even  
23 me seeing it I don't see any harm.

24 THE COURT: I'm concerned with their position that  
25 they're not a wholesale handing over any internal memoranda of

1 why the account was closed.

2 MR. BLUM: Right. I think their focus is, Your Honor,  
3 if the activity --

4 THE COURT: And they are saying that it is  
5 inextricably -- I think they are saying that it is inextricably  
6 intertwined with their SAR privilege.

7 MR. BLUM: Right. The SAR itself I think will show  
8 the contrast. And so I think it should be turned over to you.

9 Again, under seal without even me seeing it that was  
10 done in lots of cases, Your Honor. It is done in the *William*  
11 case. It is done in several of the other cases we cite.

12 In fact, in one case they actually print the privilege  
13 log and it relates to SAR and the Judge actually says I don't  
14 know what the big deal is about it. Everybody obviously knows  
15 the SAR was filed. That's why it even says that in the  
16 opinion, but I'm not suggesting that.

17 But they are actually -- several of these cases talk  
18 about a privilege log being submitted to the other side and  
19 certainly to the Court under seal. You know, I think that at  
20 the minimum that has to be done because you are right. It is  
21 not as if -- the problem is that all of these investigations  
22 are being cloaked under SAR, which *Union* says and *William* says  
23 you can't do.

24 THE COURT: And they are all hiding behind that.

25 MR. BLUM: Right. You're exactly right, Your Honor.

1           It's like if my client comes into me and has a smoking  
2 gun and gives it to me and I review it and I think about it and  
3 I communicate with my partners about it. That communication to  
4 my partners might be work product, but that document isn't work  
5 product. It's out there even if I base my complaint. That's  
6 what they're trying to say. Once there is a dispute everything  
7 gets sucked into SAR and it is not about the activity. It is  
8 about the process.

9           Your Honor is one hundred percent spot on. You've  
10 figured out what these cases say. And I think you should have  
11 all of the documents they are withholding, SAR, draft SARs,  
12 whatever, submitted to you *in camera*. What's the harm?

13           THE COURT: Well, I don't need to see the actual  
14 suspicious activity reports.

15           MR. BLUM: Fair enough.

16           THE COURT: But anything beyond that that relates to  
17 their internal investigation either gets turned over, or if you  
18 are going to use the SAR as a shield, it gets filed under seal  
19 for my eyes only.

20           MR. CULLEITON: We understand that, Your Honor.

21           With that distinction, you don't need to see the SAR,  
22 we are fine turning over --

23           THE COURT: Wouldn't you agree with that Plaintiff?

24           MR. CULLEITON: -- if there is a hypothetical SAR that  
25 exists.

1 THE COURT: I understand.

2 MR. CULLEITON: Yes. But everything else, yes, we  
3 could log it.

4 THE COURT: Would that process, Plaintiff?

5 MR. BLUM: Yes, Your Honor. If there's a SAR, if Your  
6 Honor doesn't need that, I'm fine with that.

7 THE COURT: Why would I need the SAR? I mean, that's  
8 clearly not discoverable, right?

9 MR. BLUM: If he gives it to me, he has to kill him.  
10 I don't want that to happen.

11 THE COURT: The actual SAR itself. I mean, that is  
12 clearly --

13 MR. BLUM: Absolutely.

14 THE COURT: -- discoverable.

15 MR. BLUM: Not discoverable.

16 THE COURT: I'm sorry. Not discoverable.

17 MR. BLUM: You ruled already, Your Honor. It's  
18 discoverable -- no, no. I understand. We're not asking for it  
19 and we understand that.

20 THE COURT: But if there is anything else that is a  
21 part of their internal review process that is not a SAR itself  
22 that they are claiming is privileged due to the SAR privilege,  
23 they should file under seal for my eyes only.

24 And anything that they are not claiming, anything that  
25 is part of the internal investigation that they are not

1 claiming is exclusively prepared for SAR purposes and,  
2 therefore, protected under SAR, they need to turn that over if  
3 they haven't done that already.

4 MR. BLUM: Right. Correct. We believe they haven't,  
5 Your Honor. The only thing I might ask is I agree with the  
6 privilege log under seal and everything.

7 THE COURT: So what -- I'm sorry. Go ahead.

8 MR. BLUM: If I might have -- if they do that if they  
9 could just -- I don't know if you are going to Bates stamp  
10 them. Certainly if I just had an understanding of the number  
11 of pages.

12 I don't care what they are. The justification will  
13 only go to Your Honor is what I'm hearing, but I would like to  
14 understand it, you know, just to help move the case along when  
15 Your Honor eventually rules if we're talking about fifty pages  
16 or 50,000 pages.

17 THE COURT: Well, we will find out.

18 How long is it going to take you to comply with that  
19 order?

20 MR. CULLEITON: Next week, Your Honor.

21 THE COURT: Is that fine?

22 MR. BLUM: That's fine, Your Honor. If I just have a  
23 number of pages that are being submitted on the log. You don't  
24 even have to tell me what they are.

25 THE COURT: Are you going to file it in paper format?

1 MR. CULLEITON: I'm not sure with the seal process. I  
2 think that's how we would do it.

3 THE COURT: Normally that's how you would do it.

4 MR. CULLEITON: Yes, that's how we would do it, Your  
5 Honor.

6 THE COURT: I'm talking about are you going to file  
7 paper documents.

8 MR. CULLEITON: Yes.

9 THE COURT: Not whether or not you are going to file  
10 it electronically. You don't file under seal electronically.

11 MR. CULLEITON: Actually, whatever Your Honor prefers  
12 is fine. We could do that.

13 THE COURT: The actual rule requires that you actually  
14 file it -- you already did it once properly so.

15 MR. CULLEITON: Okay. We will to do it that way.

16 MR. BLUM: Your Honor, I think if you file  
17 electronically, I think it is available to the public.

18 THE COURT: I didn't mean to file it electronically.

19 What I meant was are you going to file paper documents  
20 or are you going to file a hard drive, or a flash drive, or  
21 something like that? That's what I wanted to know.

22 MR. CULLEITON: Paper.

23 THE COURT: If possible, I would prefer to have it in  
24 paper document form.

25 MR. CULLEITON: We will.

1 THE COURT: But sometimes that is not manageable and I  
2 don't want to get into any more descriptions of what we are  
3 talking about. So any filings will be in paper.

4 MR. CULLEITON: Yes, Your Honor.

5 THE COURT: Okay. And as soon as I get it, I will  
6 know. And along with that anything that falls into the third  
7 category, which is those items that are not protected by the  
8 SAR privilege that you have not turned over, you will also turn  
9 those over within a week.

10 MR. CULLEITON: We believe it is our position that we  
11 have turned those documents over. The documents that have not  
12 been turned over are the second category that we contend is --

13 THE COURT: Okay.

14 MR. CULLEITON: -- not a SAR, but part of the  
15 investigative process that also is afforded some protections.

16 THE COURT: That is exclusively part of the SAR  
17 process.

18 MR. CULLEITON: Yes, Your Honor.

19 THE COURT: Okay. We're clear.

20 MR. CULLEITON: Thank you, Your Honor.

21 MR. BLUM: Thank you for the time on a short basis.

22 THE COURT: I'm happy to. Thank you all. Have a  
23 great weekend.

24 (Thereupon, the proceedings concluded.)

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CERTIFICATE

I hereby certify that the foregoing transcript is an accurate transcript of the audio recorded proceedings in the above-entitled matter.

04/08/20

Bonnie Joy Lewis,  
Registered Professional Reporter  
CASE LAW REPORTING, INC.  
7001 Southwest 13 Street,  
Pembroke Pines, Florida 33023  
954-985-8875

# Exhibit “8”



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May 2, 2012

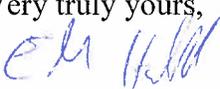
Stuart A. Davidson, Esq.  
Robbins Geller Rudman & Dowd LLP  
120 E. Palmetto Park Road, Suite 500  
Boca Raton, FL 33433

Re: Lesti et al v. Wells Fargo Bank NA  
Middle District of Florida Case No: 2:11-cv-00695-JES-DNF

Dear Mr. Davidson:

Attached please find Wells Fargo Bank, N.A.'s Response to Plaintiffs, Franz Lesti's and Petra Richter's First Request for Production, along with a compact disc containing documents bates-labeled WF-Lesti 0001 - WF-Lesti 08220.

Should you have any questions, please do not hesitate to contact me.

Very truly yours,  
  
Elliot Hallak

EH/keb  
Enc.

**Investigations Case Summary**

**040**

Case ID 2007004817

09-Jun-08

PCO CLIENT MANAGEMENT INC-Money Laundering/Structu

CASE 2007004817

INVESTIGATION DATA SUMMARY

PCO CLIENT MANAGEMENT, INC  
430 SE 24TH STREET  
CAPE CORAL FL 33990

TIN: T205453378  
Work: 239-745-9300

DDA 2000028877271	S	OP	06272007	N	500066.85
DDA 2000031965057	S	OP	05292007	N	3759136.87

PREVIOUS SAR FILED: None

BRANCH INVOLVED:

INVESTIGATIVE ACTIVITY REVIEW

case was generated by a 314B request from Tony Scott at Suntrust bank. Scott advised Sun Trust received negative news on their customer Private Commercial Office and that their customer issued a check that was deposited into a client's Wachovia account, PCO Client Management Inc in the amount of \$7,000,000 on June 1, 2007. Private Commercial Office was the subject of a warning notification letter submitted by the Austrian Financial Market Authority following complaints received by investors in that country. Scott also advised Sun Trust had not been able to identify any specific BSA violations but recent activity with the client has led to increased suspicious. Their customer receives about \$24 million in foreign wires, mainly from Austria and Germany each month which is then wired out to individuals. The company claims to be a stock day trading/investment company. The first address Ulrich Engler, the owner of the business gave for the business was actually the address of a UPS Store. He was asked for an updated address. The new address turned out to be a private residence owned by a family who had been there for several years. He was sent a list of questions to answer about the nature of the business but has not answered. Sun Trust requested Wachovia share any information found regarding the client that might be deemed suspicious. The accounts were reviewed from the date they were opened through July 2, 2007.

There was one transfer from DDA 2000031965057 into DDA 2000028877271 of \$500,000 on June 29, 2007. There were no debits from this account.

the exception of a \$7 million dollar check from Private Commercial Office, Inc dated 5-30-07 that was deposited into this account on 5-30-07 the day after it was opened, DDA 2000031965057 was funded entirely by wire transfers. Monies left this account via international wire transfers. During the month of June 2007 there were 1675 wire transfers from this account totaling \$10,301,639.13 and 14 transfers into the account totaling \$10,193,745.88. In July 2007 (current date is July 10, 2007) there were 1701 wire transfers from this account totaling 8,914,329.14 and 61 credits into the account totaling \$8,803,937.29. Many of these wires went back to Austria and Germany. According to the 314B request the funds into the Sun Trust account originated in Austria and Germany.

Wachovia Bank NA/2007004817

## Investigations Case Summary Continuation

041

Case ID 2007004817

09-Jun-08

PCO CLIENT MANAGEMENT INC-Money Laundering/Structu

On July 10, 2007 contact was made with this customer's financial specialist (FS) who advised she had personally been to this customer's office space which also happened to be her (signor Angelika Neumeier-Fuchs's) residence. The FS advised she was told by Neumeier-Fuchs that she is from Germany and was in the process of a divorce. Neumeier said she always wanted to start her own business and live in the US so last August (2006) she moved from Germany to Florida with her 12 year old son. Her husband soon followed but on his arrival informed Neumeier that he had a girlfriend and wanted a divorce. Neumeier started her company PCO Client Management, Inc in August 2006 and Private Commercial Office, Inc is her sole client. She said she manages the billing for Private Commercial Office, Inc. The funds are wired into her account from PCO, Inc's main operating account. Once she receives the wires she then wires the funds for PCO, Inc. She told the FS that PCO, Inc's clients are European investors who deal mostly in real-estate. She advised she would soon develop other clients and would require additional accounts to be opened.

According to Lexis Nexis Angelika Neumeier-Fuchs also uses the names: Angelika Neumeier, Angelika Matzner-Fuchs, and Angelika Josefa Neumeier Fuchs. The telephone number Lexis Nexis lists as the telephone number, 239-772-4838, at her address located at 430 SE 24<sup>th</sup> Ave, Cape Coral, FL is actually listed to Elias Pereyra. Google reflects (239) 574-6382 as the telephone number associated with that address with that number being assigned to Gisela Soyke.

Regarding Ulrich Engler, Lexis Nexis lists a Richie Engler of 1217 Cape Coral E. Parkway, Cape Coral, FL with an SSN 360 60 2786 that was issued in Illinois which is also linked to a Robert A. Doerr, DOB: 7-9-60. According to Lexis Nexis Engler's full name is Ulrich Felix Anton Engler, with a DOB of 3-28-61.

According to the internet a Warning Notification was issued by the Austrian Financial Market Authority FMA in Vienna on November 22, 2006 as follows: "Pursuant to Article 24 para 6 of the Wertpapieraufsichtsgesetz (WAG; Austrian Securities Supervision Act) the Austrian Financial Market Authority (FMA) is entitled to inform the general public by publication in an official bulletin published nationwide that a particular company is not authorized to provide certain financial services (as stipulated in Section 1 para 1 no. 19 of the Bankwesengesetz (BWG; Austrian Banking Act)). With the announcement in the official gazette "Amtsblatt zur Wiener Zeitung" on 22 November 2006 the FMA makes use of its right and warns against doing any financial services business with the following company

Private Commercial Office, Inc, Engler, Ulrich with alleged location in 1217 Cape Coral Pkwy, #121, Cape Coral, Florida 33904, USA

This company is not authorized by the FMA. Therefore it is not entitled to provide investment advice concerning client funds, to manage client portfolios in accordance with mandates given by investors or to broker business opportunities for the acquisition or sale of certain financial instruments. This action by the FMA comes as a result of several inquiries and complaints by investors in Austria. Interestingly, this customer's bank statements are sent to: PCO CLIENT MANAGEMENT, INC at 1217 CAPE CORAL PKWY #121, CAPE CORAL FL 33904.

CONCLUSION

Wachovia Bank NA/2007004817

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