

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.

**NON-PARTY PNC BANK, N.A.’S OPPOSITION TO RECEIVER’S
OBJECTION TO MAGISTRATE JUDGE’S ORDER DENYING RECEIVER’S
REQUEST TO COMPEL PNC TO PRODUCE REDACTED VERSIONS
OF DOCUMENTS WITHHELD BASED UPON THE SAR PRIVILEGE**

Non-party PNC Bank, N.A. (“PNC”) opposes Receiver Jonathan E. Perlman’s (the “Receiver”) Objection [DE No. 492] to Magistrate Judge Strauss’ Order Denying Receiver’s Request to Compel PNC to Produce Redacted Versions of Documents Withheld Based Upon the SAR Privilege (the “Strauss Order”) [DE No. 483].

I. INTRODUCTION

This is the Receiver’s *third* attempt to convince the Court to misinterpret the law to reach the wrong result. Rejecting the Receiver’s first two attempts, this Court and Magistrate Judge Strauss both correctly concluded that PNC is prohibited by law from producing two categories of documents in response to the third-party subpoena directed to it: (1) Suspicious Activity Reports (“SARs”); and (2) documents (in whatever form) that might reflect whether a SAR has or has not been filed, including material of an evaluative nature or documents prepared for the specific purpose of complying with federal reporting requirements. Thus, as accurately described by Magistrate Judge Strauss, this Court correctly ordered PNC to produce “bank-generated investigation reports . . . [t]o the extent these reports and the underlying assets allow the Receiver to recover and prevent dissipation of assets.” But, as the Receiver consistently ignores, the Court’s Order continued: “[o]f course, PNC Bank may provide the Receiver with a privilege log to the extent the documents are privileged under the Bank Secrecy Act.”

The implication of this Court's Order could not be clearer: there might be "underlying documents" that include "bank-generated investigation reports" that are discoverable and others that are protected under the Bank Secrecy Act ("BSA"). The former must be produced and the latter must be identified on a privilege log. In compliance with this well-settled law, PNC did exactly what this Court commanded: it produced over 12,000 pages of documents, including certain documents associated with its BSA and Anti-Money Laundering ("AML") compliance systems. As also required by the Court's Order and federal law, PNC identified on a privilege log 40 documents it withheld as subject to the SAR privilege. Magistrate Judge Strauss – *who in camera reviewed the actual documents subject to this motion* – determined that the documents identified on PNC's privilege log were properly withheld as underlying the decision to file a SAR. Instead of accepting this conclusion and without any actual knowledge (unlike Magistrate Judge Strauss), the Receiver baldly asserts that the documents are "merely factual" and "unrelated to the filing or non-filing of a SAR." But the Receiver's latest attempt to defy federal law concerning SARs and related documents and overturn Magistrate Judge Strauss's reasoned and informed decision: (1) applies the wrong legal standard; (2) ignores Magistrate Judge Strauss' factual determinations made after reviewing the documents *in camera*; (3) fails to identify any clear error in Magistrate Judge Strauss' findings; and (4) does not – and indeed cannot – point to anything in the Strauss Order that is contrary to Eleventh Circuit law.

Magistrate Judge Strauss' denial of the Receiver's request for production of withheld documents was plainly correct and this Court should not disturb that decision.

II. FACTUAL BACKGROUND

A. The Receiver's Subpoena Initially Seeks Inappropriately Broad Categories of Documents from a Third Party to the Instant Action.

The Receiver's objection to Magistrate Judge Strauss' denial of his motion to compel is the latest phase of litigation stemming from a third-party subpoena propounded by the Receiver on PNC in May 2018 – two years ago. Despite this action being administratively closed by that time, the Receiver sought thirty-six broad categories of information (the "Subpoena"). (*See* Motion to Compel [DE 357] at 25). The Receiver moved in April 2019 to compel PNC to produce additional documents including numerous categories of documents implicating PNC's BSA/AML compliance.

On April 22, 2019, PNC opposed the Receiver's Motion to Compel on two primary grounds, in addition to the fact that the Motion to Compel was untimely under the Local Rules.

First, PNC argued the vast majority of the discovery sought was not relevant to the Receiver's appointed purpose of tracing and recovering dissipated funds from the Receivership Entities' accounts – that the Subpoena was, in fact, “nothing more than an attempted end-run around the Federal Rules of Civil Procedure's prohibition against pre-suit discovery.” (Opp. to Motion to Compel [DE No. 363] at 11). Second, PNC argued it was statutorily prohibited from disclosing several categories of documents by the BSA. (*Id.* at 15–17).

Nonetheless, PNC agreed to voluntarily produce numerous documents responsive to the Subpoena. PNC produced over 12,000 pages of documents, including customer records and account documents concerning accounts held in the past with PNC by the Receivership Entities, Jeremy Marcus, and “Relevant Parties” as defined in the Subpoena. PNC produced account opening documentation, signature cards, deposit records, checks and other deposit details, withdrawal records, account statements, wire records, and account closing documentation.

On June 5, 2019, Magistrate Judge Barry S. Seltzer denied the Receiver's Motion to Compel, in part due to the fact that discovery sought under the Subpoena would duplicate discovery in the Related Action through ordinary discovery procedures. And on October 15, 2019, this Court adopted Magistrate Judge Seltzer's Report and Recommendation in part, “agree[ing] with the report in so far as it recommends the Court not allow duplicative discovery.” (Order [DE No. 427] at 1). However, this Court also found that because the parties “are not taking discovery in the [Related Action],¹ pending resolution of the motions to dismiss[,]” limited discovery should be granted for “documents evincing communications between [PNC] and third-parties regarding the Defendants[,]” if they exist. (*Id.* at 2). This Court also required PNC to produce “bank-generated investigation reports of the Defendants . . . [t]o the extent these reports and the underlying assets ***allow the Receiver to recover and prevent dissipation of assets[.]***” (*Id.* (emphasis added)).² But, recognizing that such documents might be privileged

¹ Discovery has now commenced in the Related Action.

² None of the withheld documents will assist the Receiver in further tracing assets or identifying third-parties to sue. Further, the receivership will terminate on September 30, 2020 [DE 490]. Since the time that this Court issued its Order adopting in part Magistrate Judge Seltzer's Report and Recommendation, the Receiver has filed only a single lawsuit against two third-parties with no connection to PNC, alleging only \$335,461 in damages. *See* Compl. at 1–6, *Perlman v. Huntco Consulting LLC*, No. 0:20-cv-60769-RAR (S.D. Fla.) (filed April 14, 2020).

under the BSA, this Court directed that “[o]f 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 2-3).

B. Consistent with this Court’s Order, PNC Produces Documents and a Privilege Log.

On November 27, 2019, in compliance with the Order, PNC produced fifty-two documents to the Receiver. PNC’s production included information from Early Warning System and Chex, a third party that assists PNC to identify potential fraud during the account opening process; certain non-privileged account alerts; and documents underlying alerts PNC did withhold, including scanned checks, account registration documents, customer affidavits, PNC correspondence with customers, and transaction lists. PNC also produced a Confidential Privilege Log (the “Privilege Log”), which identified thirty-four documents³ PNC withheld from its production on the basis of the SAR privilege. Those documents were generated by PNC to meet the Bank’s reporting requirements and contained reasoning for a SAR investigation. By their very nature these documents would reveal whether or not a SAR was filed.

In response, on December 23, 2019, the Receiver filed a Motion requesting “that this Court conduct an *in camera* review of the withheld documents to determine whether the documents are indeed privileged” (“Motion for *In Camera* Review”). [DE 446]. On February 7, 2020, this Court transferred the Motion for *In Camera* Review to Magistrate Judge Strauss.

On March 5, 2020, Magistrate Judge Strauss conducted a hearing on the Motion for *In Camera* Review. [DE 467]. PNC provided Magistrate Judge Strauss with all documents withheld under the SAR privilege and disclosed on PNC’s Privilege Log, along with two exemplars of proposed redactions of the documents for the Court’s consideration in the event production was ordered.⁴

C. Magistrate Judge Strauss Affirms PNC’s SAR Privilege Claims and Denies the Receiver’s Request for Production of Alerts and Cases.

³ On December 24, 2019, PNC produced an Amended Privilege Log expanding the list of protected documents from thirty-four to forty.

⁴ It is PNC’s understanding that Magistrate Judge Strauss will forward the materials he reviewed *in camera* to this Court.

On March 27, 2020, Magistrate Judge Strauss denied the Receiver’s request for production of withheld documents, finding that the documents sought by the Receiver are “subject to the SAR Privilege in their entirety” because they “reveal whether a SAR has been prepared or filed.” (Strauss Order at 13-14). Addressing the Receiver’s contention that all factual “underlying documents” are subject to disclosure, Magistrate Judge Strauss correctly explained that “underlying documents” might nevertheless be privileged when they were not prepared in the ordinary course of business but rather “for the specific purpose of complying with federal reporting requirements.” After reviewing the documents cited on PNC’s Privilege Log, Magistrate Judge Strauss held that they “are primarily comprised of ‘alerts’ and ‘cases’” “that represent material of an evaluative nature prepared for the specific purpose of complying with federal reporting requirements.” (*Id.* at 10, 12 (citation omitted)). Magistrate Judge Strauss also found that some of the documents withheld from production consisted of “investigations,” which “are similar to alerts[.]” (*Id.* at 10 n.5). Further, “all of the documents explicitly state whether or not a SAR was filed.” (*Id.* at 12–13). Finally, Magistrate Judge Strauss held that the withheld documents were not subject to disclosure in a redacted form because extensive redactions were required to preserve the privilege and less fulsome redactions “might reveal whether a SAR has been prepared or filed.” (*Id.* at 14). In other words, any effort to redact privileged information from the withheld documents would render them unintelligible.

On April 16, 2020, the Receiver filed the instant Objection. [DE 492].

III. ARGUMENT

A. Legal Standard.

The Receiver misstates black letter law and wrongly asserts that Magistrate Judge Strauss’ Order is subject to full *de novo* review. *De novo* review is the standard when a Magistrate Judge issues a report and recommendation. Magistrate Judge Strauss, however, did not issue a report and recommendation; he instead issued an order on a non-dispositive matter. Accordingly, his ruling must be affirmed unless the Receiver can show that the Strauss Order was “clearly erroneous or contrary to law.” Fed. R. Civ. P. 72(a); *Sun Capital Partners, Inc. v. Twin City Fire Ins. Co.*, 2015 U.S. Dist. LEXIS 191396, *4 (S.D. Fla., July 2, 2015). Unlike the *de novo* standard applicable to a report and recommendation, “[c]lear error is a highly deferential standard of review” and poses a significant hurdle for the Receiver. *Holton v. City of Thomasville School Dist.*, 425 F.3d 1325, 1350 (11th Cir. 2005). See *Tec Serv v. Crabb*, No. 11-

62040-CIV, 2014 U.S. Dist. LEXIS 186458, at *3-4 (S.D. Fla. Feb. 24, 2014) (distinguishing “deferential” clearly erroneous or contrary to law standard of review of magistrate judge’s order from *de novo* standard of review of magistrate judge’s report and recommendation).

Under this standard, a magistrate judge’s factual findings may be disturbed only “when although there is evidence to support them, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed.” *1550 Brickell Assoc’s, v. Q.B.E. Ins. Corp.*, No. 07-22283-CIV, 2010 U.S. Dist. LEXIS 121250, at *5–6 (S.D. Fla. Nov. 1, 2010) (internal alterations omitted). Thus, “the district judge may not undo the magistrate judge’s determination simply because it is convinced it would have decided the case differently.” *Manno v. Healthcare Revenue Recovery Grp., LLC*, No. 11-61357, 2012 U.S. Dist. LEXIS 132860, at *5 (S.D. Fla. Sept. 18, 2012) (internal citation omitted).

Similarly, the Receiver bears the heavy burden of showing the Strauss Order was contrary to law because it “fails to apply or misapplies the relevant statutes, case law, or rules of procedure.” *Summit Towers Condo Ass’n v. QBE Ins. Corp.*, No. 11-60601, 2012 U.S. Dist. LEXIS 59633, at *4 (S.D. Fla. April 5, 2012) (holding that magistrate judge did not misapply any case law when the body of law showed disagreement among courts regarding discovery of reinsurance information).

The Receiver’s suggestion that this Court should apply a less demanding *de novo* standard, rather than the statutorily-mandated clearly erroneous standard, is wrong.

B. Magistrate Judge Strauss’s Decision was not Contrary to Law or Clearly Erroneous.

Magistrate Judge Strauss faithfully applied the correct law of this Circuit. Therefore, his decision was neither contrary to law nor clearly erroneous. Setting forth the applicable law, Magistrate Judge Strauss concluded that “the law in this Circuit supports a thoughtful and careful approach in order to distinguish ‘[1] factual documents created in the ordinary course of business that may have given rise to a [SAR]’ from ‘[2] documents that might reveal whether a SAR has been prepared or filed.’” (Strauss Order at 13–14 (quoting *Shapiro v. Wells Fargo Bank, N.A.*, No. 18-CIV-60250, 2018 U.S. Dist. LEXIS 219188, at *2 (S.D. Fla. July 23, 2018)). Drawing on *Lesti v. Wells Fargo Bank, N.A.* and *Cotton v. PrivateBank & Tr. Co.*, Magistrate Judge Strauss explained that the former category of documents includes “factual documents which give rise to suspicious conduct . . . produced in the ordinary course of discovery because they are business records made in the ordinary course of business.” (*Id.* at 8 (quoting 297 F.R.D. 665,

668 (M.D. Fla. 2014) citing 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002)). With respect to the latter, he explained that it excludes from production not only documents representing drafts of SARs or other work product or privileged communications relating to the SAR itself, but also documents the bank “prepared as part of [the] financial institution’s process for complying with federal reporting requirements” and material prepared by the bank “as part of its process to detect and report suspicious activity, regardless of whether a SAR was ultimately filed or not.” (*Id.* at 9 (citing *Lesti*, 297 F.R.D. 665 at 668), 12). This is a plainly correct pronouncement of the law governing the SAR privilege in this Circuit and the Receiver does not contend otherwise.

Applying these standards, Magistrate Judge Strauss undertook a thoughtful and fact-intensive evaluation of the documents that PNC withheld based upon the SAR privilege. He found that: (1) the documents were generated in compliance with PNC’s federal reporting obligations, and (2) the documents were not merely underlying factual documents, but rather documents that revealed whether a SAR had been prepared and filed.

Under the BSA, banks are required to take steps to implement a fulsome and effective AML program. 31 C.F.R. §§ 1020.210-220. Among other things, a financial institution must monitor transactions involving its accounts. 31 C.F.R. § 1020.210(b)(5)(ii). They primarily do so by implementing an automatic monitoring system that uses particular algorithms to review transactions. For PNC, these algorithms represent “scenarios” that PNC believes may indicate the existence of a possible fraudulent transaction. PNC goes to great lengths to protect information regarding these scenarios and the particular algorithms from disclosure. (*See* *Senatore Aff.* at ¶¶ 14–18 [DE 371, Ex. A]; *see also* Exhibit A at 11-14).

The application of these scenarios on the transactions occurring through the bank, as well as any fraud referrals, result in “alerts,” sometimes referred to as incident reports. These alerts represent the application of PNC’s algorithms and typically contain information regarding the scenario that precipitated the alert. PNC reviews each alert to determine whether the alert requires more investigation into whether a SAR should or should not be filed. These determinations are made by reviewing the documents underlying the transactions – that is, wire reports, checks, and any other information regarding the customer or transactions. The alert also contains sensitive information regarding PNC’s internal thresholds that align with regulatory guidance and would prompt further “SAR investigation.” At the end of the alert investigation, PNC makes a determination as to whether to elevate the alert to a SAR investigation, and open a

“case.” A case by its very nature represents “work product or privileged communications that relate to the SAR itself.” *Lesti*, 297 F.R.D. at 667–68. Indeed, alerts that are elevated to cases contain PNC’s reasoning for initiating the SAR investigation. Cases contain PNC’s work product when determining whether or not to file a SAR. An alert that has been elevated to a case always discusses the case and its outcome, reflecting the same protected work product. Additionally, supporting documentation filed with alerts or cases frequently contains evaluative work product regarding whether or not a SAR was appropriately filed.

Magistrate Judge Strauss agreed with PNC’s points made during oral argument that the withheld documents show “how certain alerts feed into certain cases . . . [because] there are codes and designations . . . of how the bank sets its own thresholds for its underlying computer system . . . and then certain transactions are given a numeric designation . . . to suggest whether it is a high or low risk, etc.” (Exhibit A at 11:16-25). The documents withheld from production make known “the sort of thing[s] 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).

Magistrate Judge Strauss conducted an *in camera* review, as requested by the Receiver, and determined that these documents were of an evaluative nature created as part of PNC’s efforts to comply with federal reporting requirements. (Strauss Order at 12 (citing *Wiand v. Wells Fargo Bank, N.A.*, No. 8:12-cv-00557-T-27EAJ, 2013 U.S. Dist. LEXIS 197218, at *8 (M.D. Fla. Dec. 11, 2013))). Indeed, these evaluative documents stand in stark contrast to factual supporting documents underlying any and all investigations into the Receivership Entities’ PNC accounts, which PNC turned over to the Receiver long ago: wire reports, checks, and other documents produced in the ordinary course of business, and that may be used to “support” an investigation.

The Receiver’s Objection ultimately rests on a false equivalency: all cases and alerts are categorically discoverable because some cases and alerts may be discoverable. The Receiver’s strained logic is: (i) “underlying facts, transactions, and documents upon which a SAR is based” are not privileged, and (ii) the investigative documents withheld by PNC contain facts upon which a SAR may or may not have been based; therefore (iii) none of the investigative documents must be protected. The Receiver cites to three incident reports that PNC did produce because those three incident reports “do not mention any SAR or any decision whether to file a

SAR.” Thus, according to the Receiver, all of the withheld documents must be “merely factual” non-privileged “underlying documents.” (Obj. at 11). The Receiver’s argument badly misunderstands the scope of the SAR privilege and diminishes the intensely factual nature of this evaluation and Magistrate Judge Strauss’ careful performance of same.

The authorities cited by the Receiver cite the same legal standard applied by Magistrate Judge Strauss and reveal the errors in the Receiver’s reasoning. The Receiver cites *Lesti*, for the proposition that “internal reports are protected only if they are ‘generated for the specific purpose of fulfilling the institution[’]s reporting obligations.’” (Obj. at 16 (citing 297 F.R.D. at 668)).⁵ This Court, Magistrate Judge Strauss and PNC all have acknowledged this. Indeed, Magistrate Judge Strauss credited PNC’s own description of the processes by which these documents were generated and found that the documents withheld were specifically generated by systems implemented as part of the institution’s AML program, were evaluative in nature, and would reveal the existence or non-filing of a SAR.

In contrast, the documents discussed in *Cotton* were exactly the sort of documents PNC already has produced to the Receiver on multiple occasions:

[I]f a wire transfer of funds is described in a SAR as a suspicious activity, the wire transfer transaction remains subject to discovery. Therefore, the better approach prohibits disclosure of the SAR while making clear that the underlying transaction such as wire transfers, checks, deposits, etc. are disclosed as part of the normal discovery process.

Cotton, 235 F. Supp. 2d at 814. These are indeed the types of underlying documents that PNC would generate in the ordinary course of business that may underlie a SAR investigation and are not protected from disclosure. *See also In re Whitley*, No. 10-10426C-7G, 2011 Bankr. LEXIS 4793, at *13-14 (Bankr. M.D.N.C. Dec. 13, 2011) (relying on *Cotton* and holding that the bank “shall not be required to produce . . . any document that identifies any information as being a part of the contents of a SAR or otherwise reveals that [the bank] has prepared such a SAR or any document that reveals that [the bank] has made a decision that a SAR . . . will not be filed”).

The Receiver also tries to equate the documents withheld from production to other banks’ investigative documents that have been found discoverable in other cases. *See Freedman &*

⁵ The Receiver has produced no actual facts in support of his baseless assertion that the alerts and cases at issue are not generated as part of PNC’s reporting obligations under the BSA.

Gersten, LLP v. Bank of Am., N.A., Civil Action No. 09-5351 (SRC)(MAS), 2010 U.S. Dist. LEXIS 130167, at *5-11 (D.N.J. Dec. 8, 2010); *Wultz v. Bank of China Ltd*, 2013 U.S. Dist. LEXIS 55806, at *5 (S.D.N.Y. Apr. 16, 2013) (bank belatedly asserting the SAR privilege over investigative files on sole basis that files “might have been transmitted to the OCC, and that the transmittal might have been related in some way to a SAR”); *Perlman v. Bank of America, N.A.*, No. 9:11-cv-80331-HURLEY/HOPKINS (S.D. Fla.). Yet, once again, the Receiver argues from what he imagines these documents to be, not what they were found to be by Magistrate Judge Strauss. That some investigative files may be discoverable does not make them all discoverable. Magistrate Judge Strauss conducted just this inquiry – with the benefit of an in camera review of the actual documents at issue – and determined that the documents should be shielded from disclosure. The Receiver desires a different outcome, but that is plainly insufficient to establish that Magistrate Judge Strauss’ determination was “clearly erroneous.”

C. Magistrate Judge Strauss’s Determination that Redactions Will Not Suffice to Preserve the SAR Privilege Was Not “Clearly Erroneous.”

The Receiver insists that the documents withheld from production should be produced with redactions that conceal direct references to a SAR but otherwise reveal all other information in them. Even if protected information could theoretically be redacted, Magistrate Judge Strauss determined it could not here because: (1) the documents at issue were otherwise protected from disclosure; and (2) the SAR privilege extends beyond explicit references to a SAR to include other related information. (Strauss Order at 13–14 (analyzing *Shapiro*, 2018 U.S. Dist. LEXIS 219188; *Perlman v. Bank of Am., N.A.*, No. 11-CIV-80331, 2014 WL 12300315 (S.D. Fla. Sept. 10, 2014))). Indeed, in addition to each alert or case document that was withheld expressly stating whether or not a SAR was filed, the documents contain a variety of other information that could be used to understand whether a SAR was filed or was not filed. *See* 75 FR 75576-01 at 75579; 75 FR 75593-01 at 75595 (OCC and FinCEN guidance providing that the SAR privilege covers “[a]ny document . . . that affirmatively states that a SAR has been filed [or] has not been filed”). In other words, the documents contain explicit references to a SAR or information that reflects whether or not a SAR was filed.

The cases cited by the Receiver actually support the proposition that merely redacting the reference to the filing or non-filing of a SAR is not enough to protect the privilege. In *Regions Bank v. Allen*, the Florida appellate court ***unanimously rejected redaction of investigative files*** under the SAR privilege, finding they must instead be withheld in their entirety:

The trial court correctly determined that Bank should not produce any SARs; however, the second ruling [requiring redaction from “any requested document any reference to a SAR or any language disclosing whether there was or was not a SAR or whether a SAR was or will be prepared”] is too broad because redaction will not be adequate to protect the confidentiality of a SAR investigation or the fact of a SAR’s preparation. Redaction of a document does not change its character.

33 So. 3d 72, 77 (Fla. 5th DCA 2010). *Cf. Union Bank of Cal. v. Superior Court*, 130 Cal. App. 4th 378, 398 (2005) (overturning trial court’s order granting motion to compel documents reflecting “the process of preparing [a] SAR”).

As part of the *in camera* review, Magistrate Judge Strauss received PNC’s proposed redactions. (Strauss Order at 5–6). Again undertaking a careful and fact-intensive inquiry, Magistrate Judge Strauss found that information in the documents was protected from disclosure as PNC’s decision-making regarding whether or not to file a SAR. (*Id.* at 14). However, Magistrate Judge Strauss also determined that redactions were not practical with respect to these documents because privileged information so permeated the documents that to remove it would render the documents unintelligible. Magistrate Judge Strauss explained:

To the extent redaction could theoretically provide sufficient protection of the [BSA] privilege, the Court did consider PNC’s proposed redactions to the Exemplars. PNC’s proposed redactions to these alerts and cases are extensive, but, . . . are also justified. The Court determined that ***these extensive redactions would render the redacted versions unusable.***

(*Id.* at 14 n.8 (emphasis added)). In sum, Magistrate Judge Strauss reviewed the documents, made a reasoned factual determination, and accurately applied the law to the facts. There is nothing clearly erroneous with his Order.

Finally, the Receiver also cites an OCC opinion letter that permitted – but did not require – TD Bank in a separate case to unredact certain portions of a document consistent with the SAR privilege. (*See* Objection at 18-19). The OCC ***did not*** state that all possible redactions that might conceivably be made to any document discussing a SAR decision, no matter how extensive, must be made in lieu of withholding the document. Magistrate Judge Strauss possessed that letter and accounted for it fully in his analysis.

Ultimately, Magistrate Judge Strauss carefully and methodically reviewed forty very technical documents and reasonably determined on the basis of the entire record that they fell

completely within the SAR privilege. This finding is accurate under any standard of review. Under the highly deferential standard of review for clear error, the Receiver is utterly incapable of supporting any “definite and firm conviction that a mistake has been committed” by Magistrate Judge Strauss. *Holton*, 425 F.3d at 1350.

IV. CONCLUSION

For all the foregoing reasons, PNC respectfully requests that this Court overrule the Receiver’s Objection, and affirm the Magistrate’s Order denying the Receiver’s request to compel PNC to produce redacted versions of documents withheld based upon the SAR privilege.

Dated: May 7, 2020

Respectfully submitted,

s/Peter D. Hardy

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Respectfully submitted,

Dated: May 7, 2020

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CERTIFICATION OF SERVICE

I hereby certify that, on May 7, 2020, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system, which will also send notice of this electronic filing to all counsel of record.

Respectfully submitted,

s/Peter W. Homer

Peter W. Homer, Esq.

EXHIBIT

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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

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MOTION HEARING

BEFORE THE HONORABLE JARED M. STRAUSS
UNITED STATES MAGISTRATE JUDGE

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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

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