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.
_____/

RECEIVER JONATHAN E. PERLMAN'S REPLY IN SUPPORT OF HIS 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]

GENOVESE JOBLOVE & BATTISTA, P.A.
Gregory M. Garno, Esq. (FBN 87505)
Michael A. Friedman, Esq. (FBN 71828)
100 Southeast 2nd Street, Suite 4400
Miami, Florida 33131
Telephone: (305) 349-2300
Facsimile: (305) 349-2310

The Receiver submits this Reply in support of his 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] ("Objection").

ARGUMENT

A. The SAR privilege applies narrowly to SARs and "information that would reveal the existence of a SAR;" it does not extend broadly to information that would reveal "the sort of things the bank looks at" in evaluating suspicious activity as PNC led the magistrate to conclude.

The error at the center of the magistrate's ruling was his acceptance of PNC's erroneous view that the SAR privilege protects information that reveals "the sort of thing[s] the bank is looking at and how they value it," "**even if one couldn't necessarily tell [from that information], oh, in this instance there was a SAR filed or there was not a SAR filed**." [DE 496 pp.8, 10; DE 492 p.15] (quoting PNC's statements to the magistrate) (emphasis added). By the plain language of the regulation, the privilege extends only to "a SAR or any information that would reveal the existence of a SAR." 12 C.F.R. § 21.11; *see* [DE 492 pp.13-140 (gathering decisions construing the privilege narrowly). Under that standard, the documents and information at issue—reflecting the bank's observations and descriptions of underlying factual events that triggered an alert (i.e., "the sort of things the bank is looking at")—cannot be protected when PNC concedes the information does not reveal whether "there was a SAR filed or there was not a SAR filed." Moreover, PNC's position adopted by the magistrate cannot be reconciled with the interpretation of the OCC—the agency that promulgated the regulation—which has stated that the privilege does not apply to parts of documents "**that do not explicitly reveal that a SAR was or was not filed**." [*Id.* p.19] (quoting Comp. Ex. 6 to Objection) (emphasis added).

B. The non-privileged information in PNC's alerts did not become privileged by virtue of being later attached to, described in, or incorporated into a SAR.

The magistrate's error is illustrated by the fact that PNC withheld some account monitoring "alerts" (those that later led to a decision about whether to file a SAR) while producing others. *See* [DE 492 pp.7-11, 14-18] (discussing content of alerts produced to the Receiver and those withheld as described by PNC). PNC concedes that its alerts "typically contain information regarding the scenario that precipitated the alert" [DE 496 p.7]—not whether or not a SAR was or was not filed. This type of information is precisely what the Receiver described to this Court as the information he is seeking, and which this Court ordered PNC to produce. [DE 492 pp.6-7] (quoting hearing transcript and Court's order). PNC tries to justify withholding these non-privileged documents because they 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.;" according to PNC, this information is protected because it "make[s] known 'the sort of thing[s] the bank is looking at and how they value it and how they try to detect suspicious activity . . . ." [DE 496 p.8]. That standard is wrong: the privilege protects "a SAR or any information that would reveal the existence of a SAR," 12 C.F.R. § 21.11, not information that might (with enough time, an abacus, and a slide rule) be reverse-engineered to determine whether a SAR may theoretically be filed in a hypothetical situation. "The relevant regulation bars only disclosure of information that 'would' reveal the existence of an SAR; it does not prohibit disclosure of information that 'could' or 'might' reveal the existence." *First Am. Title Ins. Co. v. Westbury Bank*, No. 12-CV-1210, 2014 WL 4267450, at *2 (E.D. Wis. Aug. 29, 2014).

Moreover, all of PNC's claims about the information in the withheld alerts equally apply to the alerts that PNC chose to produce: they contain narrative portions identifying the reasons the

alert was generated, the types of information that PNC reviewed to determine whether the activity was suspicious, and the conclusions that the PNC drew from that review. [DE 492 pp.7-11].[1] Thus, the only apparent distinction between the alerts described by PNC and those produced to the Receiver is that the withheld alerts have been incorporated into "cases" that "contain PNC's work product when determining whether or not to file a SAR." [DE 496 p.8]. But incorporating non-privileged "information regarding the scenario that precipitated the alert" into a document that discuss whether to file a SAR, or even the SAR itself, does extend the privilege to that otherwise non-privileged information. *See Wultz v. Bank of China Ltd.*, 56 F. Supp. 3d 598, 600 (S.D.N.Y. 2014) (rejecting bank's argument "that documents produced at each step of this process [to decide whether to file a SAR] are protected by the SAR privilege since they result from the implementation of [bank's] policies and procedures for the filing of SARs."); *see also* [DE 492 pp.13-16] (collecting similar decisions from this Court and others).

C. The magistrate should have ordered PNC's alerts and other non-privileged documents produced with any information that "explicitly reveal[s] that a SAR was or was not filed" redacted.

PNC argues that the magistrate correctly ordered all of the documents withheld entirely because "the SAR privilege extends beyond explicit references to a SAR to include other related information." [DE 496 p.10]. No: the privilege applies to "a SAR or any information that would reveal the existence of a SAR." 12 C.F.R. § 21.11. It does not apply to "related information" (whatever that means). That is why this Court and others consistently have required otherwise non-privileged documents that contain "information that would reveal the existence of a SAR" to be produced with only the protected portions withheld. *See* [DE 492 pp.17-18] (discussing cases). That also is way the OCC, in an **opinion** issued in connection with another bank case (on all fours

[1] The Receiver has moved to file the alerts produced to him under seal in accordance with the parties' confidentiality agreement, which motion is pending. [DE 491].

with this one) authorized the bank-defendant to un-redact portions of a document "that [did] not explicitly reveal that a SAR was or was not filed." [*Id.* pp. 18-20]. Contrary to PNC's claim, the magistrate did not "account for [this OCC opinion] fully in his analysis." [DE 496 p.11]. The magistrate **completely ignored** the OCC's guidance after mistakenly concluding that it does not apply. For its part, PNC failed to take any steps to respond to the OCC's guidance in its briefing below, [DE 492 pp.19-20], or in its instant Response.

In the face of numerous federal court decisions and the opinion of the OCC, the sole case that PNC cites to support withholding documents entirely instead of applying redactions is the Florida Fifth DCA decision in *Regions Bank v. Allen*, 33 So. 3d 72 (Fla. Dist. Ct. App. 2010). [DE 496 pp.10-11]. The panel in *Allen* however acknowledged that a "bank may not cloak its internal reports and memoranda with a veil of confidentiality simply by claiming they concern … a transaction that resulted in the filing of a SAR," as PNC seeks to do here. *Regions Bank*, 33 So. 3d at 77. The trial court ordered the bank to produce all documents except SARs while redacting other documents. The appellate court reversed the latter decision and directed the trial court to conduct an in camera review to ensure that the privilege was protected. *Id*. The appellate court did not hold that redactions categorically are improper and did not preclude the trial court from ordering such relief on remand; the court merely required the trial court to conduct an in camera review before ordering any documents produced. This decision is not helpful to PNC.

While the magistrate indicated that PNC's redactions are so extensive that the documents are useless in redacted form, that is the result of PNC's over expansive and erroneous interpretation of the privilege that the magistrate accepted. PNC clearly redacted so-called "related information," and information showing "the sort of thing[s] the bank is looking at and how they value it" but does not reveal a SAR—*i.e.*, the information that PNC claimed and the magistrate erroneously

accepted as privileged. If the documents are usable after applying redactions according to the correct standard, then those redactions should be ordered and the documents produced.

D. PNC's "12,000" pages of documents remain a red herring.

PNC argues that it has produced "over 12,000 pages of documents" and thereby produced "exactly what this Court commanded." [DE 496 p.2]. PNC tried this same misdirection when the parties were before the Court on the Receiver's initial motion to compel; the Court was not fooled then and it should not be fooled now. As the Receiver explained then, none of these 12,000 documents touted by PNC were even sought in the Receiver's subpoena (other than perhaps the subpoena's catch-all request). Moreover, PNC produced these 12,000 documents on July 22, 2019 and August 23, 2019—which was months before this Court ordered PNC on October 15, 2019 to produce the "bank-generated investigation reports" at issue. PNC's claim that it somehow did "exactly what this Court commanded" in October by producing lots of non-responsive documents months earlier is misguided at best, and highly misleading.

CONCLUSION

PNC's statement of the SAR privilege adopted by the magistrate is overbroad and wrong. If the privilege is extended to the types of documents at issue—documents from which "one couldn't necessarily tell, oh, in this instance there was a SAR filed or there was not a SAR filed" but which merely led "downstream" to a decision whether to file a SAR—then the exception would quickly swallow the rule. That approach contravenes the well-established rule that "a privileges should be construed as narrowly as is consistent with its purpose" because it serves to obscure the truth. *Wiand v. Wells Fargo Bank*, N.A., 981 F. Supp. 2d 1214, 1216 (M.D. Fla. 2013) (citing *United States v. Suarez*, 820 F.2d 1158, 1160 (11th Cir. 1987)). Here, the purpose of the privilege is to protect "a SAR or any information that would reveal the existence of a SAR." The magistrate's

ruling extends the privilege far beyond the purpose; obscures the truth by making evidence critical to the Receiver's claims unavailable; and departs from the well-settled law of this Court and others holding that the information at issue is discoverable. The magistrate's decisions should be reversed and the Court should order PNC to produce all non-privileged information without delay.

Respectfully submitted,

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

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

CERTIFICATE OF SERVICE

I hereby certify that on May 21, 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/ Michael A. Friedman
Michael A. Friedman, Esq.

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

Valerie M. Verduce, Esq.
vverduce@ftc.gov
Angeleque P. Linville, Esq.
alinville@ftc.gov
Federal Trade Commission
225 Peachtree Street, Suite 1500
Atlanta, GA 30303
Telephone: (404) 656-1355
Facsimile: (404) 656-1379
Attorneys for Federal Trade Commission

Ryann Flack, Esq.
Ryann.Flack@myfloridalegal.com
Ronnie Adili, Esq.
Ronnie.Adili@myfloridalegal.com
Office of the Attorney General
Consumer Protection Division
SunTrust International Center
1 S.E. 3rd Ave, Suite 900
Miami, FL 33131
Telephone: (786) 792-6249
Attorneys for State of Florida, Office of Attorney General

Jonathan E. Perlman, Esq.
jperlman@gjb-law.com
W. Barry Blum, Esq.
bblum@gjb-law.com
Gregory M. Garno, Esq.
ggarno@gjb-law.com
Michael A. Friedman, Esq.
mfriedman@gjb-law.com
Genovese Joblove & Battista, P.A.
100 Southeast 2nd Street
Suite 4400
Miami, FL 33131
Telephone: (305) 349-2300
Facsimile: (305) 349-2310
Receiver and his Counsel

Peter Homer, Esq.
phomer@homerbonner.com
Homer Bonner Jacobs, P.A.
1441 Brickell Avenue
Four Seasons Tower, Suite 1200
Miami, FL 33131
Telephone: (305) 350-5100
Facsimile: (305) 372-2738
Counsel for PNC Bank, N.A.

Peter D. Hardy, Esq.
HardyP@ballardspahr.com
Telephone: (215) 864-8838
Terence M. Grugan, Esq.
Grugant@ballardspahr.com
Telephone: (215) 864-8131
Diana M. Joskowicz, Esq.
JoskowiczD@ballardspahr.com
Telephone: (215) 864-8311
Ballard Spahr LLP
1735 Market Street, 51st Floor
Philadelphia, PA 19103
Pro Hac Vice, Counsel for PNC Bank, N.A.

Mark S. Kokanovich, Esq.
KokanovichM@ballardspahr.com
Telephone: (602) 798-5532
Ballard Spahr LLP
One East Washington St., Suite 2300
Phoenix, AZ 85004
Pro Hac Vice, Counsel for PNC Bank, N.A.

Melanie J. Vartabedian, Esq.
VartabedianM@allardspahr.com
Telephone: (801) 531-3000
Ballard Spahr LLP
One Utah Center
201 South Main Street, Suite 800
Salt Lake City, UT 84111-2221
Pro Hac Vice, Counsel for PNC Bank, N.A.

Jeremy Marcus
7155 Davit Circle
Lake Worth, FL 33467
Served via U.S.Mail

Craig David Smith
13586 Harwell Path
Apple Valley, MN 55124
Served via U.S. Mail

Yisbet Segrea
5020 Canal Drive
Lake Worth, FL 33463
Served via U.S. Mail