IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case Number: 1:24-cv-22142-GAYLES/GOODMAN

FANNY B. MILLSTEIN and
MARTIN KLEINBART,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.,

Defendant.

PLAINTIFF'S DISCOVERY MEMORANDUM AS TO PRIVILEGE ASSERTED BY DEFENDANT PURSUANT TO BANK SECRECY ACT AND RELATED PROVISIONS

BACKGROUND

In defending against allegations of actual knowledge and substantial assistance of a fraud, it is only natural for a defendant accused of aiding and abetting the fraud to look for ways to avoid disclosing evidence that may tend to prove those allegations. Typically the discovery rules correct for that. That is why the so-called Suspicious Activity Report ("SAR") privilege invoked by Defendant Wells Fargo Bank, N.A. ("Wells Fargo") is dangerously seductive, because it could allow a defendant the opportunity to conceal compelling evidence that would otherwise be discoverable. Indeed, Wells Fargo categorically claims that, for the entire swath of discoverable materials responsive to the requests at issue, it "is legally prohibited from disclosing, acknowledging, or admitting the existence of under the Bank Secrecy Act ("BSA") and related provisions. *See* 12 C.F.R. §§ 4.31, et seq., and 21.11(k), 31 C.F.R. § 1020.320(e)(1)(i), and 31 U.S.C. § 5318(g); *see also* 75 Fed. Reg. 75593, 75595 (Dec 3, 2010)." This begs the question as to precisely which of these materials are actually privileged. As explained herein, the Court needs to examine each of those documents claimed to be privileged *in camera* and narrowly tailor the privilege to only those materials that ***would*** reveal the existence of a particular SAR in order to prevent Defendant's use of the privilege as a tool for the suppression of the truth.

Wells Fargo's privilege log amounts to an absolute refusal to identify the nature and subject matter of the materials being withheld on the basis of the SAR privilege in contravention of S.D. Fla. L.R. 26.1(e)(2)(B) and the Court's Discovery Procedures Order entered in this case on Sept. 20, 2024. In conclusory fashion, Defendant asserts it is prohibited from providing any specificity as to the documents or information being withheld on privilege grounds:

> Generally, these documents are created by Wells Fargo's confidential and proprietary process for identifying potentially suspicious activity for the purpose of investigating, evaluating, and determining whether or not to file a SAR. Certain information explicitly reveals whether or not Wells Fargo filed a SAR, and each document is intimately part of the evaluation process. Even for the parts of the documents that do not explicitly reveal the SAR / No SAR decision, production ***may*** provide a roadmap to circumvention of Wells Fargo's FCI Program and/or otherwise reveal aspects of Wells Fargo's systems. Such information is protected by the BSA....
>
> [T]he FCI files include internal documents that ***may*** reference explicitly whether or not a SAR was filed, or detail Wells Fargo's confidential and proprietary system for identifying potentially suspicious activity pursuant to the BSA. Additionally, the inclusion (or not) of certain documents ***may*** in itself reveal whether or not a SAR was filed. Thus, the Privilege Log references FCI files in their entirety rather

than by individual document…

See Wells Fargo Bank. N.A.'s Privilege Log dated December 10, 2024 (emphasis added).

Wells Fargo's objections to the production of SAR "evaluative materials" also provide little meaningful insight into what it withheld. However, those objections do indicate Wells Fargo's claims of an "evaluative privilege" broadly extend "to producing any algorithms (or similar types of information) utilized by Wells Fargo to detect suspicious activity in order to comply with its BSA/AML obligations" and that "such information would contain the confidential, proprietary information of Wells Fargo." *See* Defendant's First Set of Objections and Responses to Plaintiffs' First Set of Requests, dated November 22, 2024 (emphasis added). But the agreed protective order in this case abrogates Defendant's objections based on the purported confidential and proprietary nature of the withheld materials, and nothing should be withheld on this basis. Accordingly, Wells Fargo's decisions to withhold documents must be closely scrutinized.

When the parties met and conferred as to Wells Fargo's wide-ranging and conclusory assertion of an SAR privilege, Plaintiffs suggested that the Court be provided with the materials at issue for an *in camera* review to determine whether or not all of them are absolutely and categorially privileged. Wells Fargo took the position that any *in camera* review would in and of itself constitute a violation of the above-cited BSA provisions. That position is devoid of legal support.

LEGAL STANDARD

The party claiming a privilege has the burden of proving its applicability, which cannot be discharged "by mere conclusory or *ipse dixit* assertions, for any such rule would foreclose meaningful inquiry into the existence of the relationship, and any spurious claims could never be exposed." *Goosby v. Branch Banking & Trust Company*, 309 F.Supp.3d 1223, 1232 (S.D. Fla. 2018) (*quoting Bridgewater v. Carnival Corp.*, 286 F.R.D. 636, 638 (S.D. Fla. 2011)). "More significantly, '[t]his burden, to sustain a claim of privilege, is heavy because privileges are 'not lightly created nor expansively construed, for they are in derogation of the search for the truth.'" *Id.* (*citing U.S. v. Nixon*, 418 U.S. 683, 710 (1974)). Thus, the asserted SAR privilege must be narrowly tailored, since 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." *Regions Bank v. Allen*, 33 So. 3d 72, 76–77 (Fla. Dist. Ct. App. 2010) (quoting *Union Bank of Cal. v. Sup. Ct.*, 29 Cal.Rptr.3d 894, 901-03 (Cal. Ct. App. 2005)).

The SAR privilege is explicitly limited to a "SAR or any information that ***would*** reveal the existence of a SAR," but does not include "the underlying facts, transactions, and documents upon which a SAR is based ..." 12 C.F.R. § 21.11(k) (emphasis added).

As observed in *Wultz v. Bank of China Ltd.*, 56 F. Supp. 3d 598, 602 (S.D.N.Y. 2014), this regulatory language bars production of only those documents that "would reveal the existence of a SAR." That Court accordingly reasoned that it did not see how a bank's "investigatory documents differ in character from the 'underlying ... documents upon which a SAR is based' -- records that the regulations themselves explicitly exclude from the SAR prohibition." *Id.* Similarly, in *First American Title Insurance Co. v. Westbury Bank*, No. 12-CV-1210, 2014 WL 4267450 at *3 (E.D. Wis. Aug. 29, 2014), the court found that documents generated as part of a bank's standard business practice, such as investigating potential fraud or other irregularities, remained discoverable even when the "fraud investigation parallels the process of preparing a SAR." "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." *Id.* at *2-3. In other words, "review of the document must" reveal "with effective certainty the existence of a SAR" and "information that, with the aid of supposition or speculation, might tend to suggest to a knowledgeable reviewer whether a SAR was filed, is not privileged." *Id. See also Trott v. Deutsche Bank, AG*, No. 20 Civ. 10299, 2024 WL 1994342 at * 2 (S.D.N.Y. May 6, 2024) (rejecting defendant bank's assertion of SAR privilege for withheld "Suspicious Activity Information Forms" that included neither any specific discussion of SAR requirements, nor any analysis regarding whether a SAR should be filed, nor indicated whether a SAR was actually filed).

By contrast, the cases cited by the Defendant in its objections ignore the express language of the applicable regulations, thereby improperly broadening the SAR privilege. The phrase "***would*** reveal the existence of an SAR" does not provide license to speculate whether materials claimed to be privileged by a defendant bank may, could or might reveal an SAR. *See* 12 C.F.R. § 21.11(k) (emphasis added). *Compare Lan Li v. Walsh*, 2020 WL 5887443 at *2 (S.D. Fla. Oct. 5, 2020); *FTC v. Marcus*, 2020 WL 1482250 at *4-5 (S.D. Fla. Mar. 27, 2020). Defendants' cases claim strong public policy reasons argue in favor of a broader reading of the SAR privilege to encourage banks to detect and report suspicious activity to the government, something they are, of course, already obligated to do. However, based on the plain language of the regulations, these public policy reasons can apply only to materials that ***would*** reveal whether a SAR is filed. Public

policy arguments cannot expand the limited scope of the exception to discovery created by regulation "in derogation of the search for the truth." *See Goosby*, 309 F.Supp.3d at 1233. Presumably the drafters of the regulations balanced these concerns in setting the standard at "***would*** reveal." Indeed, public policy actually weighs against an unwarranted and improperly speculative expansion of the privilege to ***may, could*** **or** ***might*** reveal. The broader approach advanced by *Lan Li* and *Marcus* would permit banks the unfettered ability to use the SAR privilege to hide inculpatory evidentiary materials simply by claiming they generally concern suspicious activity or a transaction that may, could, or might result in the filing of a SAR. *See Pierce Cty., Wash. v. Guillen*, 537 U.S. 129, 144-46 (2003) (explaining that privileges are construed narrowly to avoid "suppress[ing] otherwise competent evidence").

However, "the SAR privilege does not shield from discovery reports, memoranda, or underlying transactional documents generated by a bank's internal investigation procedures." *Wiand v. Wells Fargo Bank, N.A.*, 981 F. Supp. 2d 1214, 1217 (M.D. Fla. 2013) (citations omitted). As noted in a subsequent opinion in *Wiand*, there are two types of supporting documents:

> The first category represents the factual documents which give rise to suspicious conduct. These are to be produced in the ordinary course of discovery because they are business records made in the ordinary course of business. The second category is documents representing drafts of SARs or other work product or privileged communications ***that relate to the SAR itself***. These are not to be produced because they ***would*** disclose whether a SAR has been prepared or filed.

Wiand v. Wells Fargo Bank, N.A., No. 8:12-CV-557-T-27EAJ, 2013 WL 12157564, at *2 (M.D. Fla. Dec. 11, 2013) (emphasis added; internal quotations omitted). *See also Regions Bank*, 33 So. 3d at 76–77 (determining it necessary for the trial court to examine *in camera* any documents that may fall into a grey area of disclosure on the basis of an asserted SAR privilege).

For example, in *Ackner v. PNC Bank, N.A.*, No. 16–cv–81648, 2017 WL 1383950 at *2-3 (S.D. Fla. Apr. 12, 2017), the court held the SAR privilege does not extend to the policies and procedures regarding a defendant bank's fraud detection processes. *See also In re JPMorgan Chase Bank, N.A.*, 799 F.3d 36, 44 (1st Cir. 2015) (finding that the SAR privilege does not extend to any document that might speak to the investigative methods of financial institutions); *Freedman & Gersten, LLP v. Bank of America, N.A.*, 2010 WL 5139874 at *3 and n.3 (D.N.J. Dec. 8, 2010) (holding that although the defendant 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...," and ordering production of "any memoranda or documents drafted in response to the suspicious activity at issue in this case" notwithstanding the fact that the bank's "entire investigation was undertaken in anticipation of the potential filing of an SAR"); *United States v. Holihan*, 248 F.Supp.2d 179, 187 (W.D.N.Y. 2003) ("[A]ny supporting documentation which would not reveal either the fact that an SAR was filed or its contents cannot be shielded from otherwise appropriate discovery based solely on its connection to an SAR"); *Weil v. Long Island Sav. Bank*, 195 F. Supp. 2d 383, 389 (E.D.N.Y. 2001) (finding that the privilege is limited to the SAR and the information contained therein and does not apply to the supporting documentation); *In re Whitley*, 2011 WL 6202895 at *4 (Bankr. M.D.N.C. Dec. 13, 2011) (observing that a "common theme in the cases in which a bank or other lending institution has invoked the SAR privilege has been to sustain the objection as to any SAR or any document that would reveal whether a SAR had been submitted, but to deny the objection as to other bank documents").

APPLICATION

Based on the above-described legal principles, the Court should narrowly tailor Defendant's assertion of the SAR privilege by undertaking an *in camera* review of each of the materials withheld on the basis of Defendant's claim of SAR privilege and determining whether each would reveal the existence of a particular SAR. For instance, to address the example raised by Wells Fargo in its objections, given the myriad of holdings of the above-cited legal authorities, "algorithms (or similar types of information) utilized by Wells Fargo to detect suspicious activity in order to comply with its BSA/AML obligations" are not categorically subject to the SAR privilege. Instead, the Court may review *in camera* whether a particular application of an algorithm "***would*** reveal the existence of a SAR." *See* 12 C.F.R. § 21.11(k) (emphasis added).

CONCLUSION

For the reasons discussed above, Plaintiffs respectfully request that the Court undertake an *in camera* review of the materials withheld by Defendant on the basis of SAR privilege and sustain the invoked privilege only as to any particular SAR or any material that ***would*** reveal whether a particular SAR had been submitted, and reject the invoked privilege as to other bank materials.

Dated: January 10, 2024

Respectfully submitted,

SILVER LAW GROUP
11780 W. Sample Road
Coral Springs, FL 33065
Tel.: (954) 755-4799
Fax: (954) 755-4684

/s/ *Peter M. Spett*
Peter M. Spett, Esq.
Florida Bar No. 0088840
Email: pspett@silverlaw.com
Scott L. Silver, Esq.
Florida Bar No. 095631
Email: ssilver@silverlaw.com
Ryan A. Schwamm, Esq.
Florida Bar. No. 1019116
Email: rschwamm@silverlaw.com

BUCKNER + MILES
2020 Salzedo Street, Ste. 302
Coral Gables, Florida 33134
Seth Miles, Esq.
Email: seth@bucknermiles.com
David M. Buckner, Esq.
Email: david@bucknermiles.com
Brett E. von Borke, Esq.
Email: vonborke@bucknermiles.com

SALLAH ASTARITA & COX, LLC
One Boca Place
2255 Glades Rd., Ste. 300E
Boca Raton, FL 33431
James D. Sallah, Esq.
Email: jds@sallahlaw.com
Joshua A Katz, Esq.
Email: jak@sallahlaw.com

Counsel for Plaintiffs and the Class

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 10, 2024, a copy of the foregoing was furnished by E-Mail to:

MCGUIREWOODS LLP

Emily Y. Rottmann, Esq.
50 N. Laura Street, Suite 3300
Jacksonville, Florida 32202
Tel: (904) 798-3200
Fax: (904) 798-3207
erottmann@mcguirewoods.com
clambert@mcguirewoods.com
flservice@mcguirewoods.com

Jarrod D. Shaw, Esq,
Nellie E. Hestin, Esq.
Tower Two-Sixty
260 Forbes Avenue, Suite 1800
Pittsburgh, PA 15222
jshaw@mcguirewoods.com
nhestin@mcguirewoods.com

Mark W. Kinghorn, Esq.
Zachary L. McCamey, Esq.
William O. L. Hutchinson, Esq.
201 N. Tryon St., Suite 3000
Charlotte, NC 28202-2146
mkinghorn@mcguirewoods.com
zmccamey@mcguirewoods.com
whutchinson@mcguirewoods.com

Attorneys for Defendant Wells Fargo Bank, N.A.

BERGER SINGERMAN LLP
Brian G. Rich, Esq.
Gavin Gaukroger, Esq.
Michael J. Niles, Esq,
313 N Monroe Street, Suite 301
Tallahassee, FL 32301-7643
brich@bergersingerman.com
ggaukroger@bergersingerman.com
mniles@bergersingerman.com

Attorneys for Non-Party Receiver Daniel Stermer

/s/ *Peter M. Spett*
Peter M. Spett, Esq.
Florida Bar No. 0088840