UNITED STATES DISTRICT COURT
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.
_____/

WELLS FARGO'S DISCOVERY MEMORANDUM REGARDING SCOPE OF THE BANK SECRECY ACT

I. INTRODUCTION

Wells Fargo has produced or has agreed to produce substantial information in this litigation, including the underlying factual information that Plaintiffs are seeking through this motion. Yet, Plaintiffs are requesting more and trying to force Wells Fargo to produce documents Wells Fargo is legally prohibited from producing. Indeed, Plaintiffs have extensive underlying factual records and information: Wells Fargo has produced over 100,000 pages and the parties are currently negotiating the production of substantial ESI.

Despite this extensive production, including those portions of the investigatory files Wells Fargo is not prohibited from disclosing, Plaintiffs seek *in camera* review, and ultimately production, of documents that Wells Fargo is prohibited from disclosing under federal law. The issue here is narrow – whether the Bank Secrecy Act ("BSA") and law interpreting the BSA preclude Wells Fargo from producing the documents it has withheld because they could disclose the existence of a Suspicious Activity Report ("SAR") and reflect the evaluation of whether or not to file a SAR. While Plaintiffs try to frame this issue as Wells Fargo evading its discovery obligations, it is not. As set forth above, Wells Fargo has made substantial productions in this case and continues to do so. It is not evading any obligation. Rather, it is asserting a nuanced privilege that is unwaivable.

Simply put, Wells Fargo followed the Florida federal case law setting forth the scope of the privilege. *See*, *e.g.*, *Fed. Trade Comm'n v. Marcus*, No. 17-CV-60907, 2020 WL 1482250, at *3 (S.D. Fla. Mar. 27, 2020). Wells Fargo also logged the withheld documents (in a "Privilege Log"), identifying portions of twelve financial crimes investigation files ("FCI Files") that include evaluative documents Wells Fargo is legally prohibited from disclosing, acknowledging or admitting the existence of pursuant to 12 C.F.R. § 21.11(k), 31 C.F.R. § 1020.320(e)(1)(i), and 31 U.S.C. § 5318(g). Despite Plaintiffs' attempts to characterize the assertion of this privilege as an evasive tactic (*see generally,* D.E. 51 at 2), the privilege is not waivable, is held by the United States government, and *must* be asserted by Wells Fargo. *See id.*; *see also Marcus*, 2020 WL 1482250, at *3. Moreover, the Privilege Log is not only adequate, it provides the information Plaintiffs need to understand what is being withheld. Notably, on December 10, 2024, Wells Fargo produced portions of the FCI Files that Plaintiffs are complaining about, totaling more than 850 pages. Through that production, Wells Fargo produced the transactional and underlying factual documents. It has only withheld documents that would reveal the existence or nonexistence of a

SAR, including evaluative materials necessary to determine whether to file a SAR, as it is required by law to withhold.

II. ARGUMENT

A. The BSA's purpose is to facilitate open communication between banks and the government in the detection of suspicious activity and potential financial crime.

As the BSA itself states, its purpose is to "require certain reports or records that are highly useful in—(A) criminal, tax, or regulatory investigations, risk assessments, or proceedings; or (B) intelligence or counterintelligence activities, including analysis, to protect against terrorism." 31 U.S.C. § 5311(1). Under the BSA, the Secretary of the Treasury may require a bank to "report any suspicious transaction relevant to a possible violation of law or regulation," and such reports must be kept secret. 31 U.S.C. § 5318(g)(1). Banks report suspicious transactions by filing a SAR and preserving supporting documentation underlying that report. 12 C.F.R. § 21.11; 31 C.F.R. § 1020.320.

The Financial Crimes Enforcement Network ("FinCEN") and the Office of the Comptroller of the Currency ("OCC")—both of which are part of the Treasury Department—dictate certain obligations with respect to the filing of SARs. Among other requirements, FinCEN requires that a bank file a SAR if it "knows, suspects, or has reason to suspect that . . . [t]he transaction involves funds derived from illegal activities or is intended or conducted in order to hide or disguise funds or assets derived from illegal activities." 31 C.F.R. § 1020.320(a)(2). In the same vein, the OCC also requires banks to file a SAR "when they detect a known or suspected violation of Federal law or a suspicious transaction related to a money laundering activity or a violation of the Bank Secrecy Act." 12 C.F.R. § 21.11(a).

B. The BSA prohibits Wells Fargo from disclosing a SAR or revealing whether or not it filed a SAR.

The BSA unequivocally prohibits Wells Fargo from disclosing to anyone other than regulators the contents of a SAR or even information simply *revealing* that it filed a SAR, a point which Plaintiffs do not appear to contest. *See*, *e.g.*, 31 U.S.C. § 5318(g)(2)(A)(i) ("[N]either the financial institution . . . or other reporting person, may notify any person involved in the transaction that the transaction has been reported or otherwise reveal any information that would reveal that the transaction has been reported[.]"); *see also* Confidentiality of Suspicious Activity Reports, 75 Fed. Reg. at 75593; 75595 (FinCEN also recognizing that financial institutions "should afford

confidentiality to any document stating that a SAR has not been filed"); 12 C.F.R. § 21.11(k)(1)(i) ("No national bank, . . . shall disclose a SAR or any information that would reveal the existence of a SAR."); 31 C.F.R. § 1020.320(e)(1)(i) (same). As this Court recently explained, the SAR privilege is an "unqualified discovery and evidentiary privilege that a financial institution is not permitted to waive." *Marcus*, 2020 WL 1482250, at *3.

Indeed, there are civil and criminal penalties for revealing the existence of a SAR. 31 U.S.C. § 5321 (imposing penalties of up to $100,000 per violation for revealing the existence of a SAR); 31 U.S.C. § 5322 (imposing fine of up to $250,000 and/or a five-year prison term). Accordingly, whenever a request (like Plaintiffs') may involve information that could implicate privileged material, Wells Fargo raises this very objection. At base, what Plaintiffs request would require that Wells Fargo violate federal law. Wells Fargo cannot comply with such a request.

Breaking the SAR privilege "could compromise an ongoing law enforcement investigation, provide information to a criminal wishing to evade detection, or reveal the methods by which banks are able to detect suspicious activity." *Whitney Nat. Bank v. Karam*, 306 F. Supp. 2d 678, 680 (S.D. Tex. 2004). For example, "the disclosure of an [sic] SAR may harm the privacy interests of innocent people whose names may be contained therein." *Cotton v. PrivateBank & Tr. Co.*, 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002). And a bank "may be reluctant to prepare an [sic] SAR if it believes that its cooperation may cause its customers to retaliate." *Id.* To avoid this chilling effect on banks, and as the OCC explained in its regulation:

> [T]he strong public policy that underlies the SAR system as a whole—namely, the creation of an environment that encourages a national bank to report suspicious activity without fear of reprisal—leans heavily in favor of applying SAR confidentiality not only to a SAR itself, but also in appropriate circumstances to material prepared by the national bank as part of its process to detect and report suspicious activity, regardless of whether a SAR ultimately was filed or not. This interpretation also reflects relevant case law.

75 Fed. Reg. 75576, 75579; 75 Fed. Reg. 75593, 75595. Any production related to a SAR would frustrate this purpose.

C. The BSA forbids financial institutions from disclosing information related to their evaluative process for determining whether to file a SAR.

As Plaintiffs appear to acknowledge, the prohibition encompasses a "SAR or any information that would reveal the existence of a SAR" (D.E. 51 at 4). The parties also agree that the SAR privilege does not protect the "underlying facts, transactions, and documents" on which a bank bases its decision regarding whether to file a SAR. *See* 31 C.F.R.

§ 1020.320(e)(1)(ii)(A)(2); 12 C.F.R. § 21.11(k)(1)(ii)(A)(2). Transactional documents are those such as routine correspondence and transactional documents including account statements, wire transfer records, cancelled checks, and deposit slips. *Lesti*, 297 F.R.D. at 668; *Regions Bank v. Allen*, 33 So. 3d 72, 76-78 (Fla. 5th DCA 2010); *Cotton*, 235 F. Supp. 2d at 814 (transactional documents include wire transfers, checks, deposits, or any other underlying factual documents which may cause a bank to submit a SAR that are made in the ordinary course of business). As explained above, ***Wells Fargo has already produced the documents providing the underlying facts and transactions, including those transactional documents that were located in the FCI Files***, totaling more than 850 pages from just the FCI Files. In addition, ***Wells Fargo has also already produced hundreds of its policies and procedures related to BSA investigatory issues generally*** (despite Plaintiffs indicating otherwise).

Wells Fargo has only withheld limited materials that indicate the existence or non-existence of a SAR, including those that specifically reflect Wells Fargo's evaluative process to determine whether to or not to file a SAR. These are the only materials about which the parties disagree. But under the BSA as applied in this District, documents relating to the evaluation of whether to file a SAR – like those Wells Fargo withheld here – are also protected by the SAR privilege. The regulations and relevant case law make clear that the SAR privilege extends beyond documents that expressly state whether or not a SAR was filed, and also prohibits banks from disclosing evaluative documents (*i.e.*, reports, memoranda, and other material) generated as part of that underlying process. Courts in this District, as well as other districts within the Eleventh Circuit, have routinely held that "the SAR privilege extends beyond the SAR itself or documents that specifically reveal the SAR." *Metrocity Holdings, LLC v. Bank of Am., N.A.*, No. 22-CV-22541, 2024 WL 2980522, at *4 (S.D. Fla. May 24, 2024); *see also Marcus*, 2020 WL 1482250, at *6 (explaining that any documents or information "prepared for the specific purpose of complying with federal reporting requirements" are prohibited from disclosure); *Lan Li v. Walsh*, No. CV 16-81871, 2020 WL 5887443, at *2-3 (S.D. Fla. Oct. 5, 2020) (explaining that certain categories of documents, including transaction monitoring alerts, evaluative processes and algorithms, transaction monitoring cases, and evaluative reports were prohibited from disclosure); *Monarch Air Group, LLC v. JPMorgan Chase Bank, N.A.*, No. 21-CV-62429-WPD, 2023 WL 9472589, at *4 (S.D. Fla. Dec. 18, 2023) (explaining that financial institutions are not permitted to waive the SAR privilege); *Lesti v. Wells Fargo Bank, N.A.*, No: 11-cv-695, 2014 WL 12828854,

at *1 (M.D. Fla. Mar. 4, 2014) (acknowledging SAR privilege applies to documents generated for the specific purposes of fulfilling an institution's reporting obligations); *Wiand v. Wells Fargo Bank, N.A.*, 981 F. Supp. 2d 1214, 1217-18 (M.D. Fla. Oct. 25, 2013) (finding that internal reports and other documents of evaluative nature were prohibited from disclosure because they were generated in furtherance of the bank's federal reporting requirements).

Courts have explicitly recognized that the disclosure prohibition extends to reports, memoranda, and alerts prepared by a bank as part of its SAR reporting and evaluative process, such as those Wells Fargo has withheld here. *Lan Li*, 2020 WL 5887443, at *2-3 (evaluative documents regarding content and nature of investigation undertaken to comply with federal reporting requirements subject to complete withholding). In *Lan Li*, the court considered a number of categories of withheld documents that are directly analogous to the documents withheld by Wells Fargo here and found the following were subject to the disclosure prohibition:

> 1. Transaction monitoring alerts, which contain information concerning a decision whether to file a SAR;
> . . .
> 3. Evaluative processes and algorithms used by [the financial institution] to detect suspicious activity and comply with AML and BSA regulations;
> 4. Transaction monitoring "cases," which contain information concerning a decision whether to file a SAR; and
> 5. Evaluative reports created by [the financial institution] which concern a transaction monitoring case to comply with AML and BSA regulations.

Id. at *2. The court found that "their complete withholding is not an over-application of the SAR privilege, but instead is necessary to protect the confidential information contained therein. Nothing less than the complete withholding of these documents will satisfy this objective." *Id.* at *2-3; *see also Marcus*, 2020 WL 1482250, at *4-8 (denying motion to compel unredacted or redacted "alerts" and "cases," including their respective investigations, and differentiating those categories of internal bank documents related to the financial institution's federal reporting processes from factual transactional documents created in the ordinary course of business).

Despite this District's clear recognition of the SAR privilege prohibiting the disclosure of alerts, evaluative processes and algorithms, transaction monitoring cases, and evaluative reports, Plaintiffs ask this Court to adopt decisions from districts elsewhere the country; Plaintiffs

simultaneously fail to appreciate distinctions in the cases they cite in support of production.[1] In sum, the clear case law in this District supports the position Wells Fargo has taken in this litigation—especially considering Wells Fargo's underlying productions.

D. Courts have approved withholding of the portions of Wells Fargo's financial crimes files that were withheld and logged here.

In evaluating Wells Fargo documents, courts in the Eleventh Circuit and across the country routinely deny production of the withheld portions of Wells Fargo's FCI Files (which include evaluative processes related to the filing of a SAR) at issue here.[2] *Lesti v. Wells Fargo Bank, N.A.*, 297 F.R.D. 665, 668 (M.D. Fla. 2014) (SAR prohibition applies to SARs, draft SARs, and "internal memorandum prepared as part of [Wells Fargo]'s process for complying with federal reporting requirements"); *Wiand*, 981 F. Supp. 2d at 1218 (finding communications between Wells Fargo and another financial institution commenting on SAR-related information, regulatory authority, and evaluative content regarding same to be privileged); *333 8th St. NE, LLC v. Turnkey Title,*

[1] Plaintiffs fail to appreciate the distinction in the case law between underlying transactional documents, which may be disclosed and have been produced to Plaintiffs here, and SAR-evaluative documents, which may not be disclosed. *See Wultz v. Bank of China Ltd.*, 56 F. Supp. 3d 601, 602 (S.D.N.Y. 2014) (permitting withholding of documents that contain a discussion of SAR requirements and reflect the bank's decisionmaking process specifically); *First Am. Title Ins. Co. v. Westbury Bank*, No. 12-cv-1210, 2014 WL 4267450, at *3 (E.D. Wis. Aug. 29, 2014) (only ordering production of documents generated in the ordinary course of business and not as part of the bank's reporting requirements); *Freedman & Gersten, LLP v. Bank of Am., N.A.*, No. CIV.A. 09-5351 SRC, 2010 WL 5139874, at *6 (D.N.J. Dec. 8, 2010) (ultimately concluding in subsequent order that certain of the withheld documents from the bank's investigatory file were evaluative and prohibited from disclosure); *In re JPMorgan Chase Bank, N.A.*, 799 F.3d 36, 44 (1st Cir. 2015) (failing to consider the transactional-evaluative distinction utilized by this District in analyzing documents); *United States v. Holihan*, 248 F. Supp. 2d 179, 187 (W.D.N.Y. 2003) (finding only that supporting documentation (*i.e.*, business records generated in the ordinary course of business) could be disclosed); *Weil v. Long Island Sav. Bank*, 195 F. Supp. 2d 383, 389-90 (E.D.N.Y. 2001) (only finding transactional "supporting documentation" not subject to the prohibition of disclosure); *In re Whitley*, No. 10-10426C-7G, 2011 WL 6202895, at *4 (M.D.N.C. Dec. 13, 2011) (reasoning that ordinary-course-of-business documents are not encompassed by the prohibition, but not ordering production as to investigations solely conducted for BSA compliance); *Ackner v. PNC Bank, N.A.*, No. 16-cv-81648, 2017 WL 1383950, at *2-3 (S.D. Fla. April 12, 2017) (ordering production of ordinary-course-of-business fraud detection policies); *Trott v. Deutsche Bank, AG*, No. 20 CIV.10299 (DEH), 2024 WL 1994342, at *2 (S.D.N.Y. May 6, 2024) (addressing SAR privilege for documents that were not generated by the SAR team [financial crimes team] during an investigation, but instead were created to determine whether activity warranted forwarding to the SAR team for investigation).

[2] Wells Fargo reserves the right to provide supplemental explanatory information on the documents withheld should the Court order an *in camera* review of the documents in dispute.

LLC, No. CV 23-941, 2024 WL 3617460, at *2 (D.D.C. Aug. 1, 2024) (Wells Fargo only required to produce transactional documents and not the financial crimes file, investigator's evaluative notes, alerts or other SAR protected materials). This Court should not deviate from these decisions.

E. Courts have found *in camera* review inappropriate in situations involving the BSA.

Because of the prohibition on disclosure of SAR privileged documents, courts have held that an *in camera* review could not be conducted. See *Gregory v. Bank One, Ind., N.A.*, 200 F. Supp. 2d 1000, 1003 (S.D. Ind. 2002) (finding lower court's acceptance of information subject to the SAR privilege under seal for *in camera* review improvidently granted); *see also Norton v. U.S. Bank Nat'l Ass'n*, 179 Wn. App. 450, 324 P.3d 693, *rev. denied*, 180 Wn.2d 1023 (Feb. 18, 2014) (declining *in camera* review of documents memorializing bank's internal investigations and monitoring of suspicious activity); *Weatherly v. Pershing LLC*, No. 3:14-CV-366, 2015 U.S. Dist. LEXIS 187422 n. 3 (N.D. Tex. 2015) (declining to engage in *in camera* review of privileged documents); *Cotton*, 235 F. Supp. 2d at 813 (SARs are not discoverable and "courts have refused to order an exception to that privilege").

Gregory is instructive. There, in analyzing the BSA/AML regulations applicable to financial institutions, the court found that there is no judicial exception to the SAR disclosure prohibition, and that the court was not authorized to create one. *Gregory*, 200 F. Supp. 2d at 1003. In so finding, the court declined the *in camera* review of SAR-related documents to uphold the court's "obligation to prevent disclosures of privileged information." *Id*.

F. The BSA prohibits a more detailed privilege log.

Plaintiffs also contend that Wells Fargo's Privilege Log is insufficient. It is not, and instead appropriately identifies the withheld FCI Files pursuant to scope of the privilege in this District. The Privilege Log clearly flags the BSA's prohibition of disclosure and specifically identifies, by case/package number, twelve specific FCI Files. This provides a clear picture of what was withheld. Moreover, Plaintiffs' request for a more detailed privilege log necessarily implicates the SAR privilege. *See* 75 Fed. Reg. 75593, 75595; 75 Fed. Reg. 75576, 75579. Providing further detail, including the precise documents and communications within each of the FCI Files that were withheld, ***would necessarily reveal whether or not a SAR was filed*** and compromise the SAR privilege and the BSA's purpose. Accordingly, any request for a more detailed privilege log as to the FCI Files should be denied.

Dated: January 17, 2025

Respectfully submitted,

MCGUIREWOODS LLP

/s/ Emily Y. Rottmann

Emily Y. Rottmann
Florida Bar No. 93154
erottmann@mcguirewoods.com
clambert@mcguirewoods.com
flservice@mcguirewoods.com
50 N. Laura Street, Suite 3300
Jacksonville, Florida 32202
Tel: (904) 798-3200
Fax: (904) 798-3207

Jarrod D. Shaw (admitted *pro hac vice*)
jshaw@mcguirewoods.com
Nellie E. Hestin (admitted *pro hac vice*)
nhestin@mcguirewoods.com
Tower Two-Sixty
260 Forbes Avenue, Suite 1800
Pittsburgh, PA 15222
Tel: (412) 667-6000

Mark W. Kinghorn (admitted *pro hac vice*)
mkinghorn@mcguirewoods.com
Zachary L. McCamey (admitted *pro hac vice*)
zmccamey@mcguirewoods.com
William O. L. Hutchinson (admitted *pro hac vice*)
whutchinson@mcguirewoods.com
201 N. Tryon St., Suite 3000
Charlotte, NC 28202-2146
Tel: (704) 343-2000

Attorneys for Defendant Wells Fargo Bank, N.A.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on January 17, 2025, a copy of the foregoing was furnished by

E-Mail to:

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

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

Scott L. Silver, Esq.
Ryan A. Schwamm, Esq.
Peter M. Spett, Esq.
SILVER LAW GROUP
11780 W. Sample Road
Coral Springs, FL 33065
ssilver@silverlaw.com
rschwamm@silverlaw.com
pspett@silverlaw.com
Attorneys for Plaintiffs and the Class

/s/ Emily Y. Rottmann
Attorney