

DE 79 – Filed February 13, 2025

PAPERLESS ORDER re 75 Sealed Document,, filed by Wells Fargo Bank, N.A., 72 Order on Motion to Seal,,,

On February 7, 2025, Defendant Wells Fargo, pursuant to Court Order, filed under seal the documents listed on its privilege log. The Undersigned had ordered Wells Fargo to also file conventionally with the Clerk a flash drive containing the purportedly privileged documents and to deliver a courtesy copy of that drive to chambers.

Earlier today, I received the courtesy version of the flash drive -- along with a printout of all the documents and a letter (dated February 6, 2025) from defense counsel Emily Rottmann. This two-page letter is designated "CONFIDENTIAL" at the bottom of both pages.

The letter does not show a copy being served on Plaintiff's counsel, so, with the "confidential" label added to the mix, the Undersigned assumes that Wells Fargo's attorney did *not* provide a copy of the letter to opposing counsel.

That is problematic.

Although the letter contains, in all capital letters, the warning "CONFIDENTIAL," there does not appear to be anything confidential, privileged or worthy of secretive treatment in it.

But the letter contains a section entitled "Comments." That section explains the circumstances under which Wells Fargo designates potentially suspicious activity for the purpose of determining whether to file a Suspicious Activity Report ("SAR"). It also provides additional background about the Bank's process for making the SAR/No-SAR decision.

The letter says that Wells Fargo is giving me the information "solely to aid the Court in evaluating these documents." It also represents that it is "happy to provide further clarification or briefing on these issues or others if it would aid the Court in its review."

Yet the circumstances outlined in the letter are precisely the ones which Plaintiffs are entitled to know about, as they directly relate to my evaluation of the scope of the SAR privilege.

I will not consider any of the information in the letter unless Wells Fargo agrees to provide a copy of the letter to Plaintiffs by filing it on CM/ECF, with an appropriate title. By 5:00 p.m. on Friday,

February 14, 2025

, Wells Fargo shall file a notice which (1) advises whether it previously provided a copy of its February 6, 2025 letter to Plaintiffs' counsel (and, if so, when, and how); (2) gives notice of its position on whether the letter is, in fact, confidential (and, if so, why); and explains whether it objects to publicly filing the letter on CM/ECF, so that Plaintiffs' counsel (and the public) have access to it.

Given that the letter does not appear to offer any information which Wells Fargo has not already disclosed or hinted at in public filings and/or during the recent hearing on the SAR privilege issue, the Undersigned would be surprised if Wells Fargo were to take the position that the letter is genuinely "confidential" and cannot be produced to Plaintiffs' counsel or otherwise made public. But we shall see.

If Wells Fargo agrees to file the letter on CM/ECF, then it shall file the letter by

February 18, 2025

. And if it does not agree, then the Undersigned will not consider any of the points in the letter as part of my analysis of the under-seal documents and the determination of whether the SAR privilege protects none, some or all of the documents Wells Fargo has withheld in discovery.

Moreover, if Wells Fargo does not agree, then the Undersigned will file the letter under seal so that there is a record of what counsel sent to me in what seems to be an inappropriate *ex parte* communication with the Court.

On the other hand, it may well be that defense counsel did provide a copy of the letter to Plaintiffs' counsel but inadvertently omitted to show that as a "cc" designation on the letter. If that is the history, then there is no improper *ex parte* communication. The required notice will disclose whether a copy was previously provided (i.e., whether there was, or was not, an *ex parte* communication).

Signed by Ch. Magistrate Judge Jonathan Goodman on

2/13/2025

. (JG) (Entered: 02/13/2025)