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.

PLAINTIFFS' MEMORANDUM IN RESPONSE TO WELLS FARGO'S
NOTICE OF COMPLIANCE WITH COURT ORDER (DE 83)

Wells Fargo's Notice of Compliance (the "Notice") with the Court's Order Requiring Clarification (DE 83; the "Order") is its *fourth* attempt to lobby this Court with the same legal arguments.[1] In response to the Court's straightforward questions of fact, the Notice asserts that Wells Fargo may withhold relevant evidence of its actual knowledge of the Ponzi scheme on the basis of an extremely overbroad interpretation of the SAR privilege under the Bank Secrecy Act and related provisions. Defendant rehashes the same erroneous legal arguments and conclusions – that it should be allowed to claim any and all "evaluative" conduct by the bank as shielded by the SAR privilege, regardless of whether it "would reveal" the existence of a SAR. Instead Wells Fargo claims it should be able to withhold all documents that touch upon any investigation or evaluation of suspicious activity that *might* have resulted in the filing of a SAR, leaving it free to argue (as it does in its pending motion to dismiss Plaintiffs' FAC) that it had no reason to suspect that any fraud was being perpetrated.

Defendant's burden to sustain the privilege "is heavy because privileges are not lightly created nor expansively construed, for they are in derogation of the search for the truth." *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) and *citing U.S. v. Nixon*, 418 U.S. 683, 710 (1974)) (cleaned up). *See also 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"). As noted by Plaintiffs in their prior submissions and oral argument, the scope of the SAR privilege, as set forth in the plain language of the regulations, is strictly limited to a "SAR or any information that ***would*** reveal the existence of a SAR" and explicitly does not

[1] As the Court knows, besides its prior written memorandum and oral argument on this issue, Defendant raised these same legal arguments in an improper *ex parte* letter delivered to the Court that failed to copy Plaintiffs' counsel until the Court ordered Defendant to do so (DE 79).

include "the underlying facts, transactions, and documents upon which a SAR is based ..." 12 C.F.R. § 21.11(k) (emphasis supplied).

Without being able to review the withheld documents or have any information as to their contents that should have been disclosed in a privilege log that complies with the Local Rules and Court's Discovery Order, Plaintiffs are nevertheless able to discern that most, and perhaps all, the withheld materials referenced in the Notice constitute investigatory documents and include some information that is not covered under even the broadest interpretation of the SAR privilege. The discussion below addresses in turn why each of the five categories of withheld materials identified by Defendant in its Notice fall outside the scope of the privilege.

I. Unusual Activity Reports ("UAR")

Defendant admits that it overreached in withholding these reports on the basis of the SAR privilege, and they should therefore be produced in their entirety. *See* Declaration of Michael Tompkins, attached as Exhibit A to the Notice ("Tompkins Decl.") ¶¶7-8. As acknowledged by Defendant, "[s]uch documents are utilized by Wells Fargo in a variety of circumstances *regardless of whether or not a SAR is ultimately filed*, and may be submitted by any employee." Notice at 2 (citing Tompkins Decl. ¶8) (emphasis supplied).

Defendant further explains that "while a UAR may be used as an ***input***" into Wells Fargo's "confidential" system to determine whether to open a "Case" to determine whether to file a SAR, "it is not converted into a SAR, *per se*." Notice at 2 (citing Tompkins Decl. ¶¶9-12) (emphasis in original). That should end the inquiry. Further evidence of the fact that a UAR has no relationship to whether a SAR would be filed appears in the publicly-filed sworn declaration of Wells Fargo employee Christine Cagle in support of defendants' motion for summary judgment in *Bowlsby v. Wells Fargo Bank, N.A.*, No. 3:18-cv-02740-W-LL, ECF No. 21-4 (S.D. Cal. Dec. 27. 2019)

(referred to in the Notice at 2). In that sworn declaration, Ms. Cagle stated as follows in relevant part, "I encouraged my underwriter team to report such unusual activity and submit Unusual Activity Referral reports ("UAR") as necessary. During the time I was a Lending Manger II in San Diego, there were at least a dozen UARs filed by my team. Most, if not all, of the underwriters who reported to me at one time reported unusual activity in relation to loans they were underwriting, and some had filed multiple UARs, including strong performers with high productivity and quality. I never wrote up or disciplined any underwriter, including Plaintiff, for reporting unusual activity or potential structured funds." *Id.* ¶7.

In addition to Defendant's express admission that a UAR has no direct relationship to whether a SAR would be filed, the recent decision in *Trott v. Deutsche Bank, AG*, No. 20 Civ. 10299, 2024 WL 1994342 at * 2 (S.D.N.Y. May 6, 2024), holds that these types of bank documents that report unusual activity are not covered by the SAR privilege. As recognized in the *Trott* decision, "nothing in the text of the relevant regulations suggests with any clarity that the documents that are part of a bank's investigatory process are covered by SAR privilege. . . 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.* (quoting *Wultz v. Bank of China Ltd.*, 56 F. Supp. 3d 598, 600-01 (S.D.N.Y. 2014) (cleaned up)).

Furthermore, documents and information do not and cannot possibly gain privileged status by being inputted into what Wells Fargo claims to be a "confidential" system. First, the agreed-upon 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. Second, as noted above, Wells Fargo's UAR procedures are a matter of public record, and any UAR itself does not reveal whether a SAR was filed. Third, to allow a bank defendant to

bootstrap privileged status to documents or information that may be inculpatory by uploading it into a SAR evaluative system defeats the entire principle that such privilege should be narrowly construed because it is in derogation of the truth. Accordingly, all documents and information relating to UARs are outside the SAR privilege.

II. "SAR Address" Field

Similar to the first category of withheld materials, Defendant again reveals its overreach by withholding any documents or information regarding the "SAR Address," since "[t]his field is not an indicator that the case subject is or was the subject of a SAR . . . and do not reveal anything other than the location of the case subjects and/or accounts the investigator is reviewing [and] are not included on an ultimate SAR." Notice at 3 (citing Tompkins Decl. ¶13).

Despite this category of information having nothing to do with whether a SAR would be filed, Defendant likewise tries to bootstrap the privilege onto this material and withhold the entire "Transactions" workbook document that includes this term because it was "***only created in during* [sic] *the course of the FCI's investigation as to whether or not to file a SAR.***" *Id.* (emphasis in original). To support this faulty legal conclusion, Defendant once again relies on the same court decisions already debunked and distinguished by Plaintiffs in their prior submissions and arguments. *Cf. Lan Li v. Walsh*, No. CV 16-81871, 2020 WL 5887443 at *2-3 (S.D. Fla. Oct. 5, 2020) (after *in camera* review, determining particular materials were specifically prepared to comply with SAR reporting requirements); *Fed. Trade Comm'n v. Marcus*, No. 17-CV-60907, 2020 WL 1482250 at *6 (S.D. Fla. May 27, 2020) (same); *Lesti v. Wells Fargo Bank, N.A.*, No. 11-cv-595, 2014 WL 12828854, at *2-3 (M.D. Fla. Mar. 4, 2014) (addressing motion to compel testimony at deposition when SAR privilege was invoked); *Wiand v. Wells Fargo Bank, N.A.*, 981 F. Supp. 2d 1214, 1217-18 (M.D. Fla. 2013) (limited by subsequent district court opinion in *Wiand*, No. 8:12-CV-00557-T-27EAJ, 2013 WL 12157564 at *3 (M.D. Fla. Dec. 11, 2013) that recognized

"documents that identify suspicious activity but do not reveal whether a SAR exists should be treated as falling within the underlying facts, transactions, and documents, and should not be afforded confidentiality").

As noted in Plaintiffs' prior submissions and oral argument, the better-reasoned authority that hews to the actual language of the regulations holds that those regulations' unambiguous language is limited to the SAR itself and any material that ***would*** reveal whether a particular SAR had been submitted, and rejects the invoked privilege as to other bank materials because the same regulation specifically exempts from the privilege "the underlying facts, transactions, and documents upon which a SAR is based ..." 12 C.F.R. § 21.11(k). *See 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); *Wultz*, 56 F. Supp. 3d at 602 (holding that a bank's investigatory documents do not differ in character from the underlying documents upon which a SAR is based, and therefore are excluded from coverage under the SAR privilege); *First Am. Title Ins. Co. v. Westbury Bank*, No. 12-CV-1210, 2014 WL 4267450 at *3 (E.D. Wis. Aug. 29, 2014) (stating that a bank's investigatory documents remained discoverable even when the "fraud investigation parallels the process of preparing a SAR" because review of the documents "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"); *Freedman & Gersten, LLP v. Bank of America, N.A.*, No. 09-5351 (SRC) (MAS), 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) ("any 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*, No. 10-10426C-7G, 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"). And, of course, if no SAR was filed, there is nothing to shield.

Indeed, documents apparently similar to the "Transactions" workbook referenced by Defendant are routinely ordered to be produced under similar circumstances. *See, e.g., In re Mongelluzzi*, No. 8:11-bk-01927-CED, 2015 WL 5093789 at *1-2 (Bankr. M.D. Fla. Aug. 27, 2015) (holding that a bank's financial crime investigation is conducted as a standard business practice, independent of its obligation to file a SAR with the government, and ordering that the following materials were not covered by the SAR privilege: *"a. Investigatory Documents and Reports concerning the [alleged primary perpetrators'] account activities. . . . b. Computer Generated Account Monitoring Reports or Alerts concerning the [alleged primary perpetrators'] account activities. . . . c. Internal Bank E–Mails and Reports Concerning the [alleged primary perpetrators'] Account Activities. . . .d. Policies and Procedures. . . .*") (cleaned up; italics in original; citing multiple reported and unreported federal court decisions in which those categories

of materials were ordered produced). Accordingly, all documents and information relating to the "SAR Address" Field and the "Transactions" workbook documents in which it appears do not fall within the SAR privilege.

III. "SAR Flag" Field

As with the prior category, Defendant acknowledges that this field "much like 'SAR Address' is located within the TellerView tab of the 'Transactions' worksheet" and it "is not related to Suspicious Activity Reports." Notice at 4 (citing Tompkins Decl. ¶14). In this context, the SAR abbreviation represents "System Approval Required" and does not reveal whether a SAR exists, but is created by Wells Fargo's systems for its bank tellers to flag "when a transaction is above the teller's threshold and needs to seek an approval." *Id.* Thus, this is yet another example of Defendant's overreach of withholding information on the basis of the SAR privilege when such information has no relationship to whether a SAR was filed. For the same reasons discussed above, the "Transactions" workbook documents in which the "SAR Flag" field appears do not fall within the SAR privilege.

IV. Hold References

Once more, as with the previous categories, Defendant acknowledges this this field "does not indicate whether or not a SAR was filed, and instead refers to the status of the applicable deposit accounts." Notice at 5 (citing Tompkins Decl. ¶¶15-16). Such hold references are not generated by Wells Fargo's fraud investigators but are contained within "TellerView." *Id.* Accordingly, this is still another example of Defendant's overreach of the SAR privilege when such information has no relationship to whether a SAR was filed. For the same reasons discussed above, the "Transactions" workbook documents in which the "Hold References" appear does not and must not fall within the SAR privilege.

V. <u>"Suspicious Activity" References</u>

This appears to be the only category of information that would reveal if a SAR were filed, and therefore may be covered by the SAR privilege, ***but***, as the Court rightfully inquires, the context of the use of the term "suspicious" matters and it cannot be categorically applied to every possible situation where that term appears. For example, it is one thing if a fraud investigator determines activity to be "suspicious" in the course of an anti-money laundering investigation. It is another if a bank teller or local branch officer finds a customer's behavior to be "suspicious" and tells that to the fraud investigator. Such a circumstance would not reveal the existence or non-existence of a SAR. More importantly, the overbroad application of the SAR privilege that Defendant is applying here seeks to obscure potentially inculpatory evidence by blocking Plaintiffs from reviewing the fraud investigators' notes and comments in relation to the Ponzi scheme, which are highly relevant to proving Defendant's actual knowledge that is at the heart of Defendant's theory of the case.

Thus, as noted above, the entire narrative notes and comments sections of the "Transactions" workbook and all underlying investigatory documents and information do not fall within the SAR privilege. Only that portion that ***would*** reveal that a SAR was filed is shielded from disclosure and should be redacted. Defendant states that typically a fraud investigator's "narrative will identify what led to an investigation being opened, discuss the information reviewed, evaluate that information, and explain the investigator's recommendation as to whether to file a SAR (which is ultimately reviewed by the investor's supervisor)." Notice at 6 (citing Tompkins Decl. ¶¶9-12). From this description, the only information that potentially falls within the SAR privilege is the investigator's recommendation to file a SAR.[2] Under similar

[2] Arguably, if the investigator recommends against filing a SAR or the supervisor decides not to file one, the recommendation ***would not*** reveal that a SAR exists. In any event, Plaintiffs propose

circumstances, courts have permitted redaction of only the information covered by the SAR privilege and have ordered the production of the rest of the information contained in the document at issue. *See Perlman v. Bank of America, N.A.*, No. 11-CV-80331-HURLEY/HOPKINS, 2014 WL 12300315 at *1 (S.D. Fla. Sept. 10, 2014); *Gomez v. Wells Fargo Bank*, No. 13-23420-CIV-DIMITROULEAS, 2014 WL 11878974 at *2-3 (S.D. Fla. May 22, 2014); *see also First Am. Title Ins. Co.*, 2014 WL 4267450 at *3; *Wultz v. Bank of China Ltd.*, No. 11 Civ. 1266 (SAS), 2013 WL 1788559 at *1-3 (S.D.N.Y. Apr. 17, 2013).[3]

CONCLUSION

For the foregoing reasons, the Court should narrowly construe the SAR privilege in the documents and information withheld by Defendant from Plaintiffs and order the production of all documents and information except for the limited information that would reveal the existence of a SAR, which can be redacted.

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that the Court redact the recommendation and decision either way, as the existence or non-existence of a SAR itself has no bearing on this case.

[3] The sole authority relied on by Defendant to support its argument that redaction is improper and entire documents should be withheld is the *Marcus* decision. *See Marcus*, 2020 WL 1482250, at *3. As raised in Plaintiffs' prior submissions and at oral argument, that decision takes an incorrect and overly expansive view of the SAR privilege, which is not in accord with the plain meaning of the applicable Bank Secrecy Act regulation and is out of sync with subsequent guidance by the United States Supreme Court that courts should not defer to agency interpretations in the absence of real ambiguity (as was done in the *Marcus* opinion). *See Kisor v. Wilkie*, 139 S. Ct. 2400, 2414 (2019) (deferring to agency interpretations "can arise only if a regulation is genuinely ambiguous. And when we use that term, we mean it – genuinely ambiguous, even after a court has resorted to all the standard tools of interpretation"). *See also Wultz*, 56 F. Supp. 3d at 601 ("Had the regulation or perhaps even the interpretation outright barred production of documents prepared by a bank as part of its process to investigate suspicious activity, the materials at issue here would be properly withheld. But neither the regulation nor the interpretive language contains any such bar").

Dated: March 17, 2025

Respectfully submitted,

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I HEREBY CERTIFY that on March 17, 2025, a copy of the foregoing was furnished by E-Mail to:

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