UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO.: 1:24-cv-22142-GAYLES/GOODMAN

FANNY B. MILLSTEIN and
MARTIN KLEINBART,

Plaintiffs,

v.

WELLS FARGO BANK, N.A.,

Defendant.

DEFENDANT WELLS FARGO'S PARTIAL OBJECTIONS TO THE POST-DISCOVERY HEARING ADMINISTRATIVE ORDER OF THE MAGISTRATE JUDGE

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Defendant Wells Fargo Bank, N.A. ("Wells Fargo") partially objects to Magistrate Judge Goodman's Post-Discovery Hearing Administrative Order, specifically the portion ordering the production of Wells Fargo's litigation holds relevant to the issues present in this lawsuit.

INTRODUCTION

Wells Fargo respectfully objects to Magistrate Judge Goodman's order compelling Wells Fargo to produce litigation holds that Wells Fargo issued related to this litigation. That order improperly invades the work product doctrine and attorney-client privilege without basis. Moreover, the order requires Wells Fargo to produce documents that Plaintiffs did not request and were not the subject of the discovery request that prompted the hearing. Wells Fargo respectfully requests that this Court correct that error.

Litigation holds are categorically protected by the work product doctrine and the attorney-client privilege. They reveal counsels' impressions and assessment of a case at its inception. And they reflect attorneys' communications with their clients and instructions regarding document preservation. This is the heartland of work product protection and attorney-client privilege, and the general rule is that the production of litigation holds cannot and should not be compelled. While some courts have held that a narrow exception to that bar exists when the court makes a finding that spoilation has occurred, here, no such finding was made. To the contrary—the magistrate judge ordered the production of Wells Fargo's litigation holds while explicitly declining to rule on spoilation issues. This drastic departure from precedent warrants reversal.

Relevant here and contrary to Plaintiffs' suggestions, discovery in this case has been and continues to be extensive—Wells Fargo has agreed to conduct searches for electronically stored information ("ESI") of more than forty custodians, utilizing more than three-hundred search terms, and has produced over 467,000 pages of documents with many more forthcoming. Throughout

this process, Wells Fargo has been fully transparent with Plaintiffs about its efforts with frequent meet and confer discussions spanning hours in total, and more than sixty pages of meet and confer emails in the past three months alone. These include detailed discussions about the location of documents, how documents are retained, and the massive volume of data involved.

Despite the extensive discovery and Wells Fargo's cooperation during the discovery process, Plaintiffs complained about the pace of discovery and made the speculative and unsupported assumption that certain documents they seek no longer exist. Plaintiffs then served a request for Wells Fargo's document retention policies and procedures. When Wells Fargo objected to this request, Plaintiffs noticed a discovery hearing to compel production of that sole request. But rather than argue why documents regarding Wells Fargo's retention policies and procedures should be produced, Plaintiffs instead used the hearing as a forum to air their unfounded grievances regarding other discovery in this matter, making suggestions of spoilation despite failing to identify any evidence of improper data destruction or a single document alleged to have been improperly deleted. Plaintiffs made these unfounded and speculative assertions, even though Wells Fargo has clearly informed them its document production is continuing and it expects to produce the documents Plaintiffs claim are missing, to the extent those documents were ever in Wells Fargo's possession.

The magistrate judge ultimately granted Plaintiffs' motion to compel Wells Fargo's retention policies as to the trust and securities intermediary business. While Wells Fargo disagrees, it does not seek review of that portion of the order. However, the magistrate judge also *sua sponte* ordered Wells Fargo to produce its litigation holds. That latter order was clear error for two reasons, both of which are independently sufficient to set aside the magistrate judge's order. First, Wells Fargo's litigation holds are protected by the work product doctrine and attorney-client

privilege and are categorically protected from discovery in the absence of a finding of spoilation. As specifically stated by Chief Magistrate Judge Goodman in his order, no spoliation finding has been made here and a spoilation determination would in any event be premature because document production is not complete. And if Judge Goodman had any doubt that the litigation holds contained protected work product and attorney-client communications, at a minimum he should have conducted an *in camera* review of the litigation holds to determine whether they were privileged before ordering their production. Second, the order erroneously ordered production of documents that are irrelevant and were never actually requested by Plaintiffs or properly the subject of the hearing. Accordingly, ordering Wells Fargo to produce its litigation holds relevant to this matter is contrary to law and should be set aside by this Court.

BACKGROUND

Plaintiffs' unfounded theory of the case. This litigation arises from a Ponzi scheme orchestrated by Marshall Seeman, Eric Holtz, and Brian Schwartz. The schemers solicited investor funds through various entities they created. Plaintiffs allege that the fraudsters promised investors that the notes they acquired would be paid back, with interest, from proceeds of life insurance policies that were supposedly pledged as collateral. At some point, the schemers diverted funds from the sale of notes away from the acquisition and payment of premiums on insurance policies to other purposes, primarily paying amounts owed to earlier investors. While Plaintiffs have conclusorily alleged Wells Fargo was aware of the scheme, there is no evidence to support that is true. Indeed, there is no evidence that Wells Fargo had any involvement in or knowledge of the note program. Although Wells Fargo was the depository bank for entities controlled by the schemers, that relationship did not provide Wells Fargo with actual knowledge of the schemers' conduct or that they were soliciting investors through a note program. Although Wells Fargo briefly served as a trustee on irrevocable life insurance trusts ("ILITs"), its role was administrative

in nature, and Wells Fargo had no knowledge that the policies in the ILITs had been pledged as collateral for the notes as Plaintiffs allege. In fact, at the time that Wells Fargo took on the role of trustee for the three policies identified in the Complaint, the fraudsters were not involved thus making the ILIT role irrelevant to Plaintiffs' claims.

Plaintiffs also ask the Court to assume that because Wells Fargo acted as a securities intermediary for certain life insurance policies that the schemers pledged as collateral for loans made by third parties, Wells Fargo necessarily had knowledge of the fraudulent note program. Once again, Plaintiffs' conclusory assertions are not supported by particularized factual allegations or evidence. Wells Fargo's role as a securities intermediary was purely custodial, and it was acting strictly in accordance with limited contractual obligations to perform ministerial actions related to the policies. These contracts make clear Wells Fargo had no duty to research or determine whether the assets for which it served as securities intermediary had been pledged to support any other obligation, such as the schemers' note program. And Plaintiffs' amended complaint contains no particularized factual allegations showing that, notwithstanding its contractually limited role, Wells Fargo somehow determined that the policies at issue were the exact same ones pledged to a note program in which Wells Fargo had no involvement.[1]

Discovery to date. Wells Fargo's production of documents and other data has been extensive. And Wells Fargo has been more than cooperative, agreeing to go back to 2009 to conduct ESI searches of more than 40 custodians and utilizing more than 300 search terms. ECF

[1] The assumptions Plaintiffs ask the Court to accept also make no sense. First, Wells Fargo had no incentive to invest resources in diligence-related activities that were not contractually mandated, since it earned a relatively small fee in its role as securities intermediary. Second, by Plaintiffs' own admission, the schemers actively concealed their fraud for a number of years, and therefore would have avoided providing Wells Fargo with information that might have exposed their nefarious activities.

No. 115 at 2. It has produced documents from more than twenty different systems, totaling more than 467,000 pages to date with likely as many more forthcoming.[2] *Id.*

Ongoing discovery efforts on life insurance policies. To attack Wells Fargo's document production, Plaintiffs have decided to focus on the life insurance policies that they inaccurately claim are the collateral for Plaintiffs' investments. Importantly, Plaintiffs concede they are only entitled to life insurance documents for the time period that those policies were held or controlled by the schemers. This is a critical and appropriate concession, since many of the life insurance policies were already in existence before the schemers acquired them making those documents non-responsive under Plaintiffs' own limitation. As a result, although Plaintiffs allege that the schemers eventually held 114 life insurance policies, they appear to concede that Wells Fargo does not have to produce all of the documents in Wells Fargo's possession for those 114 policies. Wells Fargo has produced or will produce all policy documents for the period in which the policies at issue were held or controlled by the schemers. Plaintiffs thus have no basis upon which to complain that policy documents are missing or that they have not received the documents to which they are entitled.

Plaintiffs' Request No. 230. Despite having no basis to substantiate a claim of spoilation, Plaintiffs attempted to obtain Wells Fargo's document retention policies. Specifically, one of Plaintiffs' three-hundred initial requests for production to Wells Fargo, Request 230, requested "[d]ocuments sufficient to show Wells Fargo's *policy or practice* related to the retention, destruction, disposal, and preservation of documents, including electronic data and records." (emphasis added). Wells Fargo objected to producing these documents, noting that the request

[2] Plaintiffs have also received millions of pages of third-party discovery. *Id.*

was for impermissible discovery on discovery as well as overly broad and unduly burdensome because it sought policies and procedures over a fifteen-year period.

The discovery hearing. Well after Wells Fargo lodged these objections, Plaintiffs noticed a discovery hearing before the magistrate judge to compel the production of documents responsive to Request 230. ECF No. 107. But at the hearing, rather than making their case for the limited category of documents sought by Request 230 (*i.e.*, Wells Fargo's document retention policies), Plaintiffs claimed that they had reason to believe that documents had been deleted, in contravention of Wells Fargo's preservation obligations.

The magistrate judge granted Plaintiffs' motion to compel Wells Fargo to produce the policies actually sought by Request 230, but then went beyond Plaintiffs' actual as noticed request, and the scope of appropriate discovery under the Rules, by ordering Wells Fargo to produce its litigation holds relevant to the issues present in this lawsuit, overruling Wells Fargo's attorney-client privilege and work product doctrine objections. ECF No. 119. The magistrate judge explicitly acknowledged that he was not making any findings on whether spoilation had occurred. *Id.* Wells Fargo's compliance deadline was set two weeks from the magistrate judge's order, but the parties have agreed that Wells Fargo need not produce its litigation holds unless this Court affirms the magistrate judge's order.

LEGAL STANDARD

In reviewing a magistrate judge's order regarding a nondispositive matter, the district judge "must consider timely objections and modify or set aside any part of the order that is clearly erroneous or is contrary to law." Fed. R. Civ. P. 72(a). "[A] finding is clearly erroneous when although there is evidence to support it, the reviewing court on the entire evidence is left with the definite and firm conviction that a mistake has been committed." *Butterworth v. Lab'y Corp. of Am. Holdings*, No. 8-cv-411, 2011 WL 13137953, at *1 (M.D. Fla. Oct. 14, 2011) (internal

quotations omitted) (quoting *Holton v. Thomasville Sch. Dist.*, 425 F.3d 1325, 1350 (11th Cir. 2005)). "A magistrate judge's order 'is contrary to law when it fails to apply or misapplies relevant statutes, case law, or rules of procedure.'" *Id.* (internal quotations omitted) (quoting *Botta v. Barnhart*, 475 F. Supp. 2d 174, 186 (E.D.N.Y. 2007)).

ARGUMENT

The magistrate judge's order compelling the production of Wells Fargo's litigation holds relevant to this matter is clearly erroneous and contrary to law, and this Court should set it aside. First, the order compels the production of information protected by the work product doctrine and attorney-client privilege. Second, the order compels the production of information that was not noticed for the motion to compel hearing and did not fall within the scope of the request at issue.

I. Wells Fargo's litigation holds are protected by the work product doctrine and the attorney-client privilege.

Wells Fargo's litigation holds are its counsel's work product and are therefore protected by the work product doctrine. "Work product protection extends to material obtained or prepared by counsel in the course of their legal duties provided that the work was done with an eye toward litigation" and "prevents most inquiries into an attorney's work files and mental impressions." *Drummond Co. v. Conrad & Scherer, LLP*, 885 F.3d 1324, 1334–35 (11th Cir. 2018). The purpose of the work product protection "is to protect the integrity of the adversary process by allowing a lawyer to work 'with a certain degree of privacy, free from unnecessary intrusion by opposing parties and their counsel.'" *Id.* at 1335 (quoting *Hickman v. Taylor*, 329 U.S. 495, 510 (1947)). Federal Rule of Civil Procedure 26(b)(3)(A) reiterates the work product doctrine, prohibiting discovery of "documents and tangible things that are prepared in anticipation of litigation."

"Litigation holds are protected by the attorney work product doctrine because they "relate exclusively to [a particular] litigation," are "created after [the] dispute arose," and "exist[] for the

sole purpose of assuring compliance with discovery that may be required." *Gibson v. Ford Motor Co.*, 510 F. Supp. 2d 1116, 1123 (N.D. Ga. 2007); *see also In re 3M Combat Arms Earplugs Prods. Liab. Litig.*, No. 19-md-2885, 2020 WL 1321522, at *8 (N.D. Fla. Mar. 20, 2020) ("Unlike normal business activities such as paying taxes, record keeping, and calculating accounts receivable, litigation hold notices are prepared because of the prospect of litigation. They are, therefore, textbook work product."); *Márquez-Marin v. Lynch*, No. 16-cv-1706, 2018 WL 1358214, at *12 (D.P.R. Mar. 15, 2018) ("The litigation hold notices are within the attorney-client and work product privileges.").

Separate, but relatedly, Wells Fargo's litigation holds are protected from discovery by the attorney-client privilege. The attorney-client privilege attaches to communications that are "(1) a communication (2) made between privileged persons (3) in confidence (4) for the purpose of obtaining or providing legal assistance for the client." *Diamond Resorts U.S. Collection Dev., LLC v. US Consumer Att'ys, P.A.*, 519 F. Supp. 3d 1184, 1197 (S.D. Fla. 2021). Litigation holds are communications from counsel to their client's employees to provide legal advice and assistance regarding document preservation and therefore fall at the heartland of the attorney-client privilege. *See Muro v. Target Corp.*, 250 F.R.D. 350, 361 (N.D. Ill. 2007) (after *in camera* review, noting that litigation hold notices were "communications of legal advice from corporate counsel to corporate employees regarding document preservation" and were therefore "on their face" privileged material); *Roytlender v. D. Malek Realty, LLC*, No. 21-cv-52, 2022 WL 5245584, at *4 (E.D.N.Y. Oct. 6, 2022) ("Instructions to preserve documents by way of formal litigation hold notices exchanged between attorneys and their clients are privileged communications and generally immune from discovery."); *Mcdevitt v. Verizon Servs. Corp.*, No. 14-cv-4125, 2016 WL 1072903, at *1 (E.D. Pa. Feb. 22), *report and recommendation adopted*, No. CV 14-4125, 2016

WL 1056702 (E.D. Pa. Mar. 17, 2016) ("Generally, 'litigation hold' letters exchanged between attorneys and their clients are privileged communications").

Accordingly, the majority view is that "litigation hold notices are discoverable only if there is a preliminary showing of spoliation." *In re 3M Combat Arms Earplugs Prods. Liab. Litig.*, 2020 WL 1321522, at *8. As the *Gibson* court observed, a contrary rule providing that litigation holds are generally discoverable "could dissuade other businesses from issuing such instructions in the event of litigation," even though "[p]arties should be encouraged, not discouraged, to issue such directives." *Gibson*, 510 F. Supp. 2d at 1123–24. This Court should enforce the general rule here. The magistrate judge's order explicitly stated that it was not addressing spoliation. ECF No. 119 at 2 n.1. Accordingly, the order compelling the production of Wells Fargo's litigation holds did not make the threshold finding required to overcome the work product protection or the attorney-client privilege.[3] Nor could Plaintiffs make a showing of spoliation—to date, they have failed to identify a single, specific document that they believe has been deleted. Accordingly, Wells Fargo's litigation holds are also shielded from discovery because they are not relevant as there has been no credible assertion, much less a finding, of spoliation in this case.

Indeed, Wells Fargo has been unable to locate a single case from this district ordering the production of litigation holds, much less a case ordering the production of litigation holds outside the spoliation context. To the contrary, courts in this district apply the general rule that a party need not produce litigation holds because they are privileged. *See Karhu v. Vital Pharms, Inc.*,

[3] By contrast, if the magistrate judge believed that the litigation holds may not be privileged material in the first instance, the magistrate judge should have reviewed the litigation holds *in camera* to consider this issue. *See In re 3M Combat Arms Earplug Prods. Liab. Litig.*, 2020 WL 1321522, at *7 (conducting an *in camera* review of the documents defendants claimed were protected by the work product protection before ruling on the motion to compel). Review of the documents at issue would reveal that they contain material prepared by counsel in anticipation of litigation and fall in the heartland of the work product protection.

No. 13-cv-60768, 2014 WL 11532403 (S.D. Fla. Feb. 4, 2014) ("Request No. 3 asks Defendant to produce documents demonstrating that it placed a litigation hold, and in response thereto Defendant asserted its privilege objections; that is all that is required."). Accordingly, the magistrate judge's order compelling the production of Wells Fargo's litigation holds is an extreme outlier as well as contrary to law and clearly erroneous, and this Court should set aside the order.

II. Request 230 does not encompass Wells Fargo's litigation holds.

Even if litigation holds were otherwise discoverable, Plaintiffs requested the production of documents showing Wells Fargo's "policy or practice" related to retention of documents. What that request does not seek is information or any work product specific to a particular case. Accordingly, by targeting Request 230, Plaintiffs were moving to compel the production only of the narrow category of generally applicable retention policies encompassed by the plain language of the request, not Wells Fargo's litigation holds prepared specifically for this matter.

Courts in this circuit have contrasted matter-specific litigation holds with generally applicable document retention policies, noting that "[o]nce a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a litigation hold to ensure the preservation of relevant documents." *In re Skanska USA Civil Se. Inc.*, 340 F.R.D. 180, 186–87 (N.D. Fla. 2021) (internal quotations omitted) (quoting *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 218 (S.D.N.Y. 2003)). In other words, Request 230 sought information related to Wells Fargo's *status quo* retention policies, not the steps it took to alter such policies once it anticipated litigation.

Parties seeking to compel the production of retention policies must satisfy a different standard than those seeking to compel litigation holds. In contrast to litigation holds, courts have taken varied positions on retention policies, ordering the production of retention policies in some cases even if there has not been a showing of spoilation. *Bay Point Turtlegrass Villas Ass'n v.*

Lexington Ins. Co., No. 20-cv-176, 2021 WL 12135389, at *4–5 (N.D. Fla. Jan. 20, 2021). Indeed, counsel for Plaintiffs admitted that he would need to review Wells Fargo's retention policies to determine if spoilation had occurred. Hearing Tr. 10:5–7 ("[T]hat's probably jumping the gun to the spoilation argument to some degree, but we only get to spoilation if we find out what exactly was lost."). Retention policies and litigation holds are thus fundamentally different documents, and Request 230 did not put Wells Fargo on notice that any request for a litigation hold was at issue before Plaintiffs made such an argument at the hearing. What is more, the magistrate judge expressly noted that Request 230 does not specifically mention litigation holds during the hearing. Hearing Tr. 11:22–25. And even Plaintiffs do not seem convinced that Request 230 covers litigation holds, as is evidenced by them serving interrogatories on May 27, 2025—nearly nine months after propounding Request 230—requesting detailed information regarding Wells Fargo's litigation holds relevant to this lawsuit.

Introducing a dispute over an unrequested document significantly prejudiced Wells Fargo.[4] First, Plaintiffs have never met and conferred with Wells Fargo about a request for the production of litigation holds, and by waiting until the discovery hearing regarding Request 230 to request production of a litigation hold, Plaintiffs violated both Local Rule 7.1(a)(3) and the Discovery Order governing this case. *See* S.D. Fla. Local Rule 8.1(a)(3); ECF No. 38 at 5. And Wells Fargo was not prepared to argue against (nor did it brief) the compelled production of its litigation holds, believing that only its document retention policies were at issue. Moreover, by attempting to shoehorn their request for litigation holds into their request for retention policies, Plaintiffs put the cart before the horse, requesting protected information that requires a showing of spoilation

[4] While Plaintiffs pre-hearing briefing referenced litigation holds in passing, the brief's request to the Court specifically asked for an order requiring Wells Fargo to produce only "the requested policies and procedures," consistent with Request 230.

without having received retention policies that would inform the analysis of whether spoilation occurred.

Accordingly, the magistrate judge's order compelling the production of Wells Fargo's litigation holds relevant to this matter was procedurally improper and clearly erroneous and should be set aside.

CONCLUSION

WHEREFORE, for the above reasons and authorities, Wells Fargo requests that this Court set aside Magistrate Judge Goodman's Post-Discovery Hearing Administrative Order ordering the production of its litigation holds relevant to the issues present in this lawsuit, and grant such other and further relief as this Court deems just and proper.

Dated: June 20, 2025

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 20, 2025, a true copy of the foregoing was filed with the Court using the CM/ECF system, which will send notice to counsel of record.

/s/ Emily Y. Rottmann
Attorney