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No. 68531-7-I

(King County Superior Court No. 10-2-36431-5)

IN THE COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN NORTON AND KRISTINE NORTON, individually, and derivatively on behalf of LARCO-BOLIVAR INVESTMENTS, LLC and SHELL LA PAZ, LLC; NORTHLAND CAPITAL, LLC, individually, and derivatively on behalf of NDG-BRYCON, LLC; and P.R.E. ACQUISITIONS, LLC,
Plaintiffs/Respondents,

v.

U.S. BANK NATIONAL ASSOCIATION,
Defendant/Appellant,

and

JOSE NINO DE GUZMAN and NDG INVESTMENT GROUP, LLC,
Non-Appearing Defendants.

APPELLANT U.S. BANK'S OPENING BRIEF

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I. INTRODUCTION

Appellant U.S. Bank National Association ("U.S. Bank") appeals the trial court's order requiring U.S. Bank to produce to Plaintiffs information that is absolutely prohibited from disclosure under the federal Bank Secrecy Act, 31 U.S.C. § 5311 *et seq.* and its implementing regulations (the "Bank Secrecy Act"), to the extent such information exists. Defendant Jose Nino de Guzman and his company, defendant NDG Investment Group, LLC (herein collectively referred to as "Nino de Guzman"), who have not appeared in nor defended this action, are former U.S. Bank banking customers who are alleged to have defrauded Plaintiffs. The principal discovery requests at issue relate to "suspicious activity" monitoring that U.S. Bank may have conducted pursuant to the Bank Secrecy Act of the checking accounts of Nino de Guzman. The law is clear that the Bank Secrecy Act creates an *unqualified* discovery and evidentiary *privilege* that *prohibits* banks from disclosing any such information. Put simply, production of such information is unlawful. This broad federal non-disclosure rule is intended to promote national crime-fighting efforts by encouraging full cooperation with and frank disclosure to law enforcement by banks, all without fear of reprisal in civil litigation.

In explicit reliance on these national bank secrecy requirements, U.S. Bank moved the trial court for a protective order to confirm that Plaintiffs were barred from seeking the legally prohibited discovery at issue. The trial court (King County Superior Court Judge Monica

Benton), however, denied U.S. Bank's motion in its entirety and ordered U.S. Bank to produce the information prohibited from disclosure under federal law. The trial court did not allow oral argument and did not issue an oral or written decision explaining the basis for its order. The trial court's order, requiring U.S. Bank to produce any such information that is absolutely privileged, was error, and this Court (Commissioner Neel) subsequently granted discretionary review pursuant to RAP 2.3(b)(2).

The issue now before this Court is whether the trial court erred in ordering U.S. Bank to produce: (1) documents or information generated in connection with any monitoring or investigation under the Bank Secrecy Act of the Nino de Guzman checking accounts, to the extent they exist,[1] and (2) U.S. Bank's methods and policies employed to comply with the Bank Secrecy Act's monitoring requirements. The scope of the Bank Secrecy Act privilege is an issue of first impression in Washington. However, *all* published case authority outside of Washington supports U.S. Bank's position here, and uniformly confirms that the Bank Secrecy Act protects all documents and information a bank generates as part of its efforts to monitor for and investigate suspicious activity. Moreover, the very same case authority upon which U.S. Bank relies here has been expressly cited by the federal agency responsible for regulating national

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[1] Federal law also requires that national banks not even disclose whether or not the requested documents actually exist. *Whitney Nat'l Bank v. Karam*, 306 F. Supp. 2d 678, 683 (S.D. Tex. 2004).

banks as accurately describing the scope of the Bank Secrecy Act privilege. There was no justification for the trial court to diverge from this uniform national authority and no legal basis for ordering U.S. Bank to produce information that is prohibited from disclosure by settled federal law and public policy.

Importantly, in contrast to documents generated as part of a bank's suspicious activity monitoring and other efforts to comply with the Bank Secrecy Act, which are absolutely privileged, documents created in the ordinary course of banking business, such as copies of customer checks or bank account statements, are not protected from disclosure under the Bank Secrecy Act. U.S. Bank has already produced thousands of pages of ordinary course documents involving the checking accounts of Nino de Guzman, and other account records responsive to Plaintiffs' discovery requests, including account statements showing *every* transaction in every account about which Plaintiffs have inquired. U.S. Bank has never asserted a privilege as to these ordinary course banking documents and they are not at issue here. Rather, this appeal narrowly concerns Plaintiffs' improper requests for highly confidential and privileged documents and information, to the extent they exist, concerning U.S. Bank's process for complying with the Bank Secrecy Act.

For the reasons set forth herein, U.S. Bank respectfully requests that this Court reverse the trial court's order and hold that the discovery that is the subject of this appeal and U.S. Bank's underlying motion for protective order is prohibited from disclosure under the Bank Secrecy Act.

Such a decision would harmonize Washington's interpretation of the Bank Secrecy Act with the interpretation of other courts across the country, and will protect national public policy and law enforcement interests, as well as federal law.

II. ASSIGNMENT OF ERROR

1. Whether the trial court erred in ordering U.S. Bank to produce discovery concerning any suspicious activity monitoring or investigation U.S. Bank may have conducted pursuant to the Bank Secrecy Act of the Nino de Guzman checking accounts because any such materials, to the extent they exist, are privileged and prohibited from disclosure under the Bank Secrecy Act.

2. Whether the trial court erred in ordering U.S. Bank to produce discovery concerning the methods and policies it employs to monitor for suspicious activity pursuant to the Bank Secrecy Act, because such methods and policies are privileged and prohibited from disclosure under the Bank Secrecy Act.

III. STATEMENT OF THE CASE

A. Background of this Action

In 2008, Plaintiffs John and Kristine Norton ("Nortons") gave $11 million to Nino de Guzman to engage in real estate speculation and development in Peru. CP 4-5. The Nortons were not U.S. Bank customers. CP 47. The Nortons wired nearly 90% of their funds ($9.8 million) directly from their bank to bank accounts in Peru (which also had

no connection to U.S. Bank whatsoever), as part of a joint venture they formed with Nino de Guzman.[2] CP 5. The Nortons paid some remaining amounts to Nino de Guzman, and he deposited the funds into checking accounts he held at U.S. Bank before the funds were used by Nino de Guzman. CP 4-5. The Nortons made these investments with Nino de Guzman with the admitted expectation of obtaining astronomical potential annual returns of 50% or more. CP 4.

The Nortons now allege that Nino de Guzman misled them, did not properly invest their money, and misappropriated funds for his own use or to pay back other investors. CP 6. Having to date been unable to recover all of their investment funds from the properties in Peru in which they own an interest, or from Nino de Guzman, the Nortons now seek to hold U.S. Bank liable for Nino de Guzman's alleged misconduct. CP 1-19. U.S. Bank first learned of the Nortons' investments and claims in late 2010 when the Nortons added U.S. Bank as a defendant to their suit against Nino de Guzman.[3] As noted above, neither Nino de Guzman nor NDG Investment Group, LLC are defending themselves in this action.

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[2] The joint venture was plaintiff P.R.E. Acquisitions, Inc. ("P.R.E."). CP 38. P.R.E. and the other individual corporate plaintiff, Northland Capital LLC, are both controlled by the Nortons. *Id.* For the limited purpose of this present appeal *only*, there is no distinction between the Nortons and the entities they control.

[3] Nino de Guzman had worked as a low-level employee at U.S. Bank, but had quit U.S. Bank about two years before Plaintiffs first invested with him. CP 3. Moreover, it was after Nino de Guzman left U.S. Bank that he started his company, NDG, to invest in real estate in Peru. CP 3-4.

B. Plaintiffs' Improper Discovery Demands And U.S. Bank's Motion For Protective Order

The Nortons contend that U.S. Bank should be held liable for Nino de Guzman's alleged fraud essentially because Nino de Guzman opened and used checking accounts at U.S. Bank. Plaintiffs allege U.S. Bank knew or should have uncovered that Nino de Guzman was involved in some type of misconduct. CP 11-12. This theory fails as a matter of law under Washington law because U.S. Bank had no duty to the Nortons (who were not customers of U.S. Bank) to protect them from Nino de Guzman's alleged misconduct. *See, e.g., Zabka v. Bank of America Corp.*, 131 Wn. App. 167, 172-174, 127 P.3d 722 (2005) (affirming CR 12(b)(6) dismissal of claims against bank because banks owe non-customers no duty of care and have no duty to prevent losses resulting from the misconduct of a bank customer).[4] Indeed, courts routinely dismiss claims, like those Plaintiffs have brought here, which are based upon the alleged failure of a bank to detect or prevent wrongful conduct by a customer. *Id.*[5]

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[4] *See also, e.g., Tokarz v. Frontier Fed. Sav. & Loan Ass'n*, 33 Wn. App. 456, 459, 656 P.2d 1089 (1982) (explaining well-settled principle that "the relationship between a bank and a depositor or customer does not ordinarily impose a fiduciary duty upon the bank," as "[t]hey deal at arm's length"); *Armstrong v. Am. Pallet Leasing Inc.*, 678 F. Supp. 2d 827, 874-75 (N.D. Iowa 2009) (dismissing breach of fiduciary duty claim because banks owe no such duties to customers).

[5] *See also, e.g., In re Agape Litig.*, 681 F. Supp. 2d 352, 360 (E.D.N.Y. 2010) (rejecting plaintiffs' claim that the bank breached a duty of care under the Bank Secrecy Act monitoring requirements because there is no such duty or right of action); *Hanninen v. Fedoravitch*, 583 F. Supp. 2d 322, 326 (D. Conn. 2008) ("Even if the Bank Defendants' [sic] had not objected to Ms. Hanninen's claims under the USA Patriot and Bank Secrecy Acts, the Court would dismiss these claims *sua sponte* because neither of these statutes appears to authorize a private right of action."); *cf.* 31 U.S.C. § 5318(g)(3) (expressly [continued on following page]

Nonetheless, to try to support this legally baseless theory, Plaintiffs served voluminous discovery requests seeking documents and information relating to any "suspicious activity" monitoring or investigation U.S. Bank may have conducted pursuant to the Bank Secrecy Act concerning the Nino de Guzman checking accounts. All discovery requests at issue are included in the record on appeal. CP 57-138. By way of example only, Plaintiffs made the following improper requests for documents and information prohibited from disclosure under the Bank Secrecy Act:

- "[S]pecifically . . . detail the internal procedures that the anti-money laundering (AML) and Bank Secrecy Act (BSA) division took in conducting any investigations." CP 127.

- "In connection with any [identified] bank account . . . , describe any efforts made by U.S. Bank to comply with any of its obligations under the Bank Secrecy Act[.]" CP 81-82.

- "Produce any and all documents reflecting U.S. Bank's policies, programs, and practices that relate to monitoring of customer accounts to detect possible fraud, money laundering, or other improper activity[.]" CP 69.

- "[P]roduce any and all documents . . . created as a result of any investigation into the activities that form the basis of this suit." CP 96.

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providing banks with immunity from suit arising from a report of suspicious activity); *Whitney National Bank v. Karam*, 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004) ("The statute [Bank Secrecy Act] and regulations prohibit disclosure, and the immunity provisions make the information [generated in connection with a SAR] irrelevant.").

- "Describe any . . . investigation . . . conducted by or on behalf of U.S. Bank regarding the background and/or conduct of Nino de Guzman and/or his Affiliated Entities." CP 84.

- "Produce any and all documents . . . which evidence any due diligence, investigation and/or inquiry conducted by U.S. Bank regarding the background and conduct of Nino de Guzman and/or his Affiliated Entities." CP 66.

- "Identify all individuals who, on behalf of U.S. Bank, were in any way involved with the . . . monitoring [or] investigation . . . of any bank account . . . associated with Nino de Guzman[.]" CP 80

Because the Bank Secrecy Act prohibits national banks from disclosing to the outside world the documents and information requested by Plaintiffs, on February 8, 2012, U.S. Bank timely filed its Motion for Protective Order from Plaintiffs' Discovery Seeking Irrelevant Information That U.S. Bank Is Legally Prohibited from Disclosing ("Motion"). CP 36-49. The Motion included ample statutory and case authority establishing that the requested discovery is *privileged and prohibited from disclosure* under the Bank Secrecy Act. *Id.* The Motion also demonstrated that the requested discovery was irrelevant and therefore improper because, as a matter of law, U.S. Bank's supposed failure to detect and/or stop Nino de Guzman's alleged fraud absolutely cannot form the basis for a claim against U.S. Bank. *Id.* The trial court refused U.S. Bank's request for oral argument and then, without explanation, denied the Motion and required U.S. Bank to produce the

privileged materials by order dated February 22, 2012, as modified by order dated March 7, 2012 ("Order"). CP 346-53.

U.S. Bank promptly moved for discretionary review of the Order. CP 354-60. On June 8, 2012, Commissioner Neel granted discretionary review on whether the Bank Secrecy Act prohibits disclosure of the discovery the trial court ordered U.S. Bank to produce, but did not grant discretionary review on the issue of irrelevance.[6] This timely appeal now follows.

IV. ARGUMENT

A. This Court Reviews the Scope of the Bank Secrecy Act Privilege De Novo.

Issues of statutory interpretation concerning privilege are issues of law reviewed by this Court de novo. *See, e.g., Jane Doe v. Corp. of the President of the Church of Jesus Christ of Latter-Day Saints*, 122 Wn. App. 556, 563, 90 P.3d 1147 (2004) (reviewing scope of statutory clergy-penitent privilege de novo); *State v. Vietz*, 94 Wn. App. 870, 872, 973 P.2d 501 (1999) ("This court reviews the trial court's interpretation of the privilege statute de novo."). Here, the sole issue on appeal is one of statutory interpretation – namely, whether the trial court erred in ruling that the Bank Secrecy Act does not prohibit disclosure of documents and

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[6] U.S. Bank continues to contend that the requested discovery is irrelevant as a matter of law and thus improper under Civil Rule 26(b)(1), and that the trial court's order was error for this additional reason as well. Because Commissioner Neel declined to grant discretionary review on this ground, however, U.S. Bank will not brief this issue here unless otherwise requested.

information that a bank creates as part of its efforts to monitor for suspicious activity pursuant to the Bank Secrecy Act.[7] Consequently, under settled Washington law this Court's review is de novo.

In opposing U.S. Bank's motion for discretionary review, Plaintiffs erroneously argued that this Court should review the trial court's Order for abuse of discretion because it is an order relating to discovery and because the trial court *may* have considered the facts of the case to determine whether the discovery at issue is privileged. Plaintiffs' position is not supported by Washington law. For example, in *Church of Jesus Christ of Latter-Day Saints*, the trial court ordered production of documents the defendant church claimed were protected from discovery under a statutory clergy-penitent privilege. 122 Wn. App. at 562. After discretionary review was granted, this Court reviewed de novo whether the discovery at issue was protected by the privilege. *Id.* at 563. This Court further explained that where a trial court considers documentary evidence to decide whether a privilege applies, the appellate court will review the evidence de novo. *Id.* Accordingly, it is clear that de novo review is the appropriate standard for this appeal. *Id.*; *see also*, *e.g.*, *Lowy v. PeaceHealth*, 159 Wn. App. 715, 716, 247 P.3d 7 (2011) (reviewing de

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[7] Although the trial court did not issue any opinion explaining the basis for its decision, the trial court's order denying U.S. Bank's Motion must necessarily be based on the trial court's interpretation of the scope of the Bank Secrecy Act privilege.

novo a trial court's order granting a motion for protective order based on a claim that the requested discovery was barred by statute).

In any event, the correct result here – reversal of the trial court's erroneous Order – would be no different under abuse of discretion review. It is well-settled that a trial court "necessarily abuse[s] its discretion if it based its ruling on an erroneous view of the law." *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wash. 2d 299, 339, 858 P.2d 1054 (1993). In ordering U.S. Bank to produce documents and information that is prohibited from disclosure under the Bank Secrecy Act, to the extent it exists, the trial court's ruling was necessarily based on an erroneous view of the Bank Secrecy Act and relevant case law, and therefore necessarily constituted an abuse of discretion. *Id.* Under either standard of review, the trial court's Order should be reversed.

B. U.S. Bank's Motion For Protective Order Should Have Been Granted Because The Requested Discovery Is Absolutely Prohibited Under Federal Law.

1. The Bank Secrecy Act Privilege Prohibits Disclosure of All Materials Generated as Part of a Bank's Suspicious Activity Monitoring and Reporting Process.

Under the Bank Secrecy Act, national banks, such as U.S. Bank, are required to monitor for and "report [to government authorities] any suspicious transaction relevant to a possible violation of law or regulation." 31 U.S.C. § 5318(g)(1); 12 C.F.R. § 21.11 (OCC regulation);

31 C.F.R. 1020.30 (similar FinCEN regulation).[8] It is undisputed that the suspicious activity reports ("SARs") that banks file with government authorities are not discoverable, without exception. *See, e.g., Lee v. Bankers Trust Co.*, 166 F.3d 540, 543-44 (2d Cir. 1999); *Int'l Bank of Miami v. Shinitzky*, 849 So.2d 1188, 1192-93 (Fl. App. Ct. 2003). Likewise, banks absolutely may not disclose documents or information that would reveal even the existence or non-existence of any such SAR. *See, e.g., Lee*, 166 F.3d at 544; 75 Fed. Reg. 75576-01 at 75578 (CP 278). Plaintiffs' discovery requests initially sought this information. In their response to U.S. Bank's Motion, however, Plaintiffs ultimately conceded that they were not entitled to any SARs. CP 264. The amendment to the Order clarified that such information is no longer at issue.[9] CP 352-53.

However, Plaintiffs continued to improperly seek, and the trial court improperly ordered U.S. Bank to produce, all other related documents and information that were generated as a part of U.S. Bank's

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[8] Two bureaus of the United States Treasury Department – the Financial Crimes Enforcement Network ("FinCEN") and the Office of the Comptroller of the Currency ("OCC") – have promulgated relevant regulations under the Bank Secrecy Act. FinCEN's "mission is to enhance U.S. national security, deter and detect criminal activity, and safeguard financial systems from abuse...." www.fincen.gov. The OCC's "primary mission is to charter, regulate, and supervise all national banks and federal savings associations." www.occ.treas.gov ("About the OCC").

[9] Despite the Plaintiffs' concession in their opposition papers that this information was not subject to discovery, the original order entered by the trial court nonetheless ordered U.S. Bank to produce SAR materials. CP 346-47 (original order). The amended order was thereafter proposed by the parties to clarify that U.S. Bank is not required to produce any SAR or any information that might reveal the existence of any such SAR, and also to clarify the specific discovery requests remaining in dispute. CP 348-49, 352-53 (amended order).

implementation of the Bank Secrecy Act in connection with any suspicious activity monitoring or investigation of the Nino de Guzman checking accounts. Except for its bare order, the trial court did not issue a written or oral decision explaining the basis for the order. Nonetheless, it appears to be based on Plaintiffs' contention that the Bank Secrecy Act privilege extends *narrowly* to SARs and documents that reveal the existence or non-existence of a SAR. That contention, however, is wrong. As the discussion below shows, courts have repeatedly held that documents and information generated in connection with fulfillment of a bank's obligation under the Bank Secrecy Act to monitor and report suspicious activity are *absolutely prohibited* from disclosure, regardless of whether such documents would expressly reveal the existence of a SAR.

For example, in *Whitney National Bank v. Karam*, 306 F. Supp. 2d 678 (S.D. Tex. 2004), the court rejected the type of argument Plaintiffs made here (trying to limit the privilege only to SAR materials), holding that such a fine "line" distinction is "not one the cases recognize," as "[t]he statute and regulation protects a *broader range of communications* from production." *Id.* (italics added). The court confirmed that the Bank Secrecy Act protects from disclosure a wide range of documents and information including all "communications preceding the filing of a SAR and preparatory or preliminary to it; communications that follow the filing of a SAR and are explanations or follow-up discussions; or oral communications or suspected or possible violations that did not culminate in the filing of a SAR." *Id.* at 682-83. Consequently, the court held that

banks "may not produce documents or information that could reveal whether a SAR or other report of suspected or possible violations has been prepared or filed . . . or the discussions leading up to or following the preparation or filing of a SAR or other form of report of suspected or possible violations." *Id.* at 683. Likewise, here, U.S. Bank may not be requested or compelled to "reveal" whether it generated any responsive documents as part of its monitoring of suspicious activity, and certainly may not produce any such documents to the extent they exist. *Id.*

The court in *Union Bank of California v. Superior Court*, 130 Cal. App. 4th. 378 (Cal. App. Ct. 2005) reached the same conclusion. As in the present case, the trial court there ordered a bank to produce internal documents which it generated to document monitored suspicious activity.[10] *Id.* at 386, 388, 400. The appellate court granted interlocutory review and reversed. The appellate court held that all "*documents a bank prepares for the purpose of investigating or drafting a possible SAR, including memos or emails drafted for that purpose*" are absolutely privileged from disclosure under the Bank Secrecy Act. *Id.* at 397 (italics added). Likewise, the court held that "memos or e-mails reporting or commenting on suspicious transactions are not discoverable if prepared as part of a bank's process of investigating and preparing SAR's." *Id.*

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[10] In the *Union Bank* case, the OCC notably had urged the trial court to protect from disclosure not only SARs, but also "the process of preparing a SAR – including the Form 244's utilized by Union Bank as well as documents generated by a financial institution as part of its internal process for filing SAR's." 130 Cal. App. 4th at 387.

The decision in *Cotton v. PrivateBank and Trust Company*, 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002) is similarly in accord. There, the court considered a motion to compel materials generated in connection with a bank's suspicious activity reporting process. The court properly denied the motion, holding that "documents representing drafts of SARs or other work product or privileged communications that relate to the SAR itself," and material "prepared for the purpose of investigating or drafting a possible SAR" are absolutely privileged from disclosure under the Bank Secrecy Act. *Id.* at 815-16.

Notably, these broad, unqualified protections from the disclosure of internal monitoring-related documents apply regardless of whether any SAR or other federal report is ever prepared. *See, e.g., Union Bank*, 130 Cal. App. 4th at 392 ("[I]t is immaterial that these preliminary documents are not communicated to federal authorities."). As the court confirmed in *Union Bank*: "Suspected or possible violations that did not culminate in the filing of a SAR' fall within the scope of the SAR privilege." *Id.* at 398 (*quoting Whitney Nat'l Bank*, 306 F. Supp. 2d at 683). The OCC has expressed the same principle in its own published interpretation of its regulations, stating:

> [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.*

75 Fed. Reg. 75576-01 at 75579 (emphasis added) (CP 279).

The *Whitney National Bank*, *Union Bank*, and *Cotton* cases on which U.S. Bank relies are the paramount authority on the scope of the Bank Secrecy Act privilege. The OCC itself has identified these cases as accurately describing the Bank Secrecy Act privilege. 75 Fed. Reg. 75576-01 at 75579 n.23 (CP 279). Notably, there is *no* precedential case authority to the contrary.

The trial court's Order here is directly contrary to this settled law. Requiring U.S. Bank to produce discovery concerning its compliance with the Bank Secrecy Act and any suspicious activity monitoring it may have undertaken of the Nino de Guzman accounts is inconsistent with the unqualified discovery and evidentiary privilege created under the Bank Secrecy Act, which absolutely *prohibits* such disclosure. *See Whitney Nat'l Bank*, 306 F. Supp. 2d at 678-83; *Union Bank*, 130 Cal. App. 4th. at 397; *Cotton*, 235 F. Supp. 2d at 815-16. The trial court's Order was error.

2. A Broad Application of the Bank Secrecy Act Privilege is Required by its Underlying Purposes.

Plaintiffs contend that the Bank Secrecy Act privilege should be construed narrowly to allow expansive discovery in civil litigation. The law and national public policy are to the contrary. Indeed, a broad application of the Bank Secrecy Act's strong prohibition on the disclosure

of suspicious activity monitoring and reporting activities is critical to upholding the Bank Secrecy Act's public policy purposes.

The Bank Secrecy Act privilege is designed to support federal crime-fighting efforts by encouraging full and frank disclosure of potential suspicious activity by banks to governmental authorities, without fear of reprisal by third parties.[11] *See*, *e.g.*, 75 Fed. Reg. 75576-01 at 75579 (CP 279). Plaintiffs' narrow interpretation of the privilege would compromise this national public policy and legislative purpose. The OCC, for example, has explained:

> [T]he OCC believes that even the occasional disclosure of a SAR could chill the willingness of a national bank to file SARs and to provide the degree of detail and completeness in describing suspicious activity in SARs that will be of use to law enforcement. If banks believe that a SAR can be used for purposes unrelated to the law enforcement and regulatory purposes of the BSA, the disclosure of such information could adversely affect the timely, appropriate, and candid reporting of suspicious transactions.

75 Fed. Reg. 75576-01 at 75578 (CP 278). Furthermore, "[t]hese [public policy] concerns are implicated not just by the release of a SAR, but also by the disclosure of preliminary reports to prepare a SAR." *Union Bank*, 130 Cal. App. 4th at 393. All documents generated as part of the "process of preparing a SAR" are absolutely privileged in part because "[i]f

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[11] As discussed below, another purpose of the Bank Secrecy Act privilege is to prevent others from learning information that could provide insight into how a bank uncovers potential criminal conduct, because that information could be used to circumvent detection. 75 Fed. Reg. 75576-01 at 75578 (CP 278).

financial institutions knew that draft SAR's or similar preliminary documents were subject to discovery . . . they would be less willing to engage in the process of investigating and filing SAR's." *Id.* at 398. Compelling banks in civil litigation to produce documents generated as part of suspicious activity monitoring and investigating "could undermine the cooperative effort between federal authorities and financial institutions to combat money laundering, identity theft, embezzlement, and fraud." *Id.* Indeed, the Bank Secrecy Act expressly provides immunity from suit arising from a report of suspicious activity specifically to "encourage financial institutions to report a wide range of possible criminal activity" without fear of reprisal by civil lawsuits. 31 U.S.C. § 5318(g)(3); *Cotton*, 235 F. Supp. 2d at 812.

In summary, the public policies behind the Bank Secrecy Act privilege support its broad application to all materials generated as part of any monitoring, investigating or reporting of suspicious activity. The trial court's Order threatens to undermine these important federal public policies and related law enforcement interests. Moreover, compliance with the trial court's erroneous Order, to the extent any responsive discovery exits, would put U.S. Bank in violation of federal law.

3. The Trial Court Erred in Ordering U.S. Bank to Produce Discovery Concerning Suspicious Activity Monitoring It May Have Conducted of the Nino de Guzman Accounts Pursuant to the Bank Secrecy Act.

The trial court ordered U.S. Bank to respond to numerous discovery requests concerning any suspicious activity monitoring, investigating, or reporting it may have conducted of the Nino de Guzman accounts. *Supra,* at pp. 7-8. To the extent any such information exists – and U.S. Bank cannot remain in compliance with the Act if it states whether or not that it exists – it is absolutely privileged and prohibited from discovery under the Bank Secrecy Act, and the Order requiring this improper discovery should be reversed.

Courts analyzing the application of the Bank Secrecy Act privilege have explained that there are two distinct categories of SAR-related materials. The first category "represents the factual documents which give rise to suspicious conduct" and "on which the report of suspicious activity was based." *Cotton*, 235 F. Supp. 2d at 815; *Whitney Nat'l Bank*, 306 F. Supp. 2d at 682. Such documents might include, for example, bank account statements, copies of checks, or wire transfer information. *See, e.g.*, 75 Fed. Reg. 75576-01 at 75579 (CP 279); *Union Bank*, 130 Cal. App. 4th at 391. These documents are "business records made in the ordinary course" of banking business – not as part of suspicious activity monitoring efforts – and it undisputed that such ordinary course banking documents are not protected by the Bank Secrecy Act privilege. *Cotton*, 235 F. Supp. 2d at 815; *see also Union Bank*, 130 Cal. App. 4th at 391.

The second category is documents "representing drafts of SARs or other work product or privileged communications that relate to the SAR itself," including materials "prepared for the purpose of investigating or drafting a possible SAR," which are not to be produced. *Cotton*, 235 F. Supp. 2d at 815 *see also Union Bank*, 130 Cal. App. 4th at 391. Notably, the OCC has expressly cited *Cotton* and *Whitney* as accurately describing which of the two types of "supporting documents" are discoverable (i.e., only those in the first category). 75 FR 75576-01 at 75579 n.22 (CP 279).

Here, it is absolutely clear that the discovery sought by Plaintiffs falls within the second category of non-discoverable documents.[12] For example, Plaintiffs requested that U.S. Bank (a) describe its efforts "to comply with . . . its obligations under the Bank Secrecy Act" in connection with the Nino de Guzman checking accounts (CP 81-82); (b) detail the "internal procedures that the anti-money laundering (AML) and Bank Secrecy Act (BSA) division took in conducting any investigation" of the accounts (CP 127); and (c) produce all documents "created as a result of any investigation into the activities that form the basis of this suit" (CP 96). According to Plaintiffs' "information and belief" allegations in their complaint, the "investigation into the activities that form the basis of this suit" was an investigation of de Guzman's checking accounts for *money*

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[12] In granting discretionary review, Commissioner Neel indicated that the "crux of the issue" here is whether the documents at issue fall within the first category or second category.

laundering (which is the original and principal target of the Bank Secrecy Act's monitoring and reporting requirements). CP 6-7 (Compl. ¶ 3.13). There are many more improper discovery requests propounded by Plaintiffs, but these examples demonstrate that the requests to which U.S. Bank has objected under the Bank Secrecy Act do *not* call for mere "ordinary course" (first category) materials. Rather, Plaintiffs are seeking – and the trial court erroneously ordered U.S. Bank to produce – materials specifically generated as part of U.S. Bank's efforts to comply with the monitoring and reporting requirements of the Bank Secrecy Act, to the extent such materials exist.

The monitoring, investigating, and reporting information sought by Plaintiffs here are the very type which courts have concluded are within the "second category" of SAR-related information; therefore, they are absolutely privileged from disclosure. As the *Union Bank* court explained, "[d]raft SAR's and similar documents *prepared in the process of complying with federal reporting requirements* are not supporting documents generated in the ordinary course of business that provide the factual support for suspicious activity." *Union Bank*, 130 Cal. App. 4th at 393 (italics added). "Unlike transactional documents [such as account statements], which are *evidence* of suspicious conduct, draft SAR's and other internal memoranda or forms that are part of the process of filing SAR's are created to *report* suspicious conduct." *Id.* at 391 (emphasis in original). Without question, the reporting and monitoring-related documents at issue "fall within the scope of the SAR privilege." *Id.*

By contrast, U.S. Bank did not seek a protective order under the Bank Secrecy Act to preclude discovery of documents in the first category, i.e., documents generated in the ordinary course of business concerning the underlying facts and transactions at issue. To the contrary, U.S. Bank has always agreed that documents created in the ordinary course of its banking business and *outside the context of suspicious activity monitoring* are not subject to the non-disclosure requirements of the Bank Secrecy Act. Long before it filed its motion for protective order, U.S. Bank had already produced thousands of pages of *factual* documents that were generated in the ordinary course of its banking business. Altogether, U.S. Bank has produced over 7,700 pages of documents to Plaintiffs, including approximately 3,230 pages of monthly account statements, 470 pages of copies of checks written on Nino de Guzman accounts, and over 300 pages of documents relating to wire transfers. CP 46. U.S. Bank produced *every* single account statement for *every* known account of Nino de Guzman during the relevant time period. *Id.* Plaintiffs have therefore already received information about *every single transaction* conducted by Nino de Guzman during the relevant time period.

The Bank Secrecy Act privilege, as interpreted by *all* published case authority, prohibits the discovery sought by Plaintiffs here of any suspicious activity monitoring that may have been conducted by U.S. Bank of the Nino de Guzman accounts. This is an extremely narrow category of materials and the assertion of this privilege has not prevented Plaintiffs from obtaining extensive discovery about the underlying facts

involved in this case. The trial court's ruling compelling disclosure of the second category of information – the privileged material, to the extent it exists – was erroneous and should be reversed.

4. The Trial Court Further Erred in Ordering U.S. Bank to Produce Discovery Concerning its Methods of and Policies for Suspicious Activity Monitoring Under The Bank Secrecy Act.

The trial court also ordered U.S. Bank to produce information and documents concerning the methods, policies, and procedures U.S. Bank employs to monitor for and detect suspicious activity. *See*, *e.g.,* CP 346-47, 352-53. U.S. Bank respectfully submits that this discovery also should be protected from disclosure here pursuant to the Bank Secrecy Act.

Plaintiffs contend that documents concerning the methods a bank employs to monitor for suspicious activity constitute documents created in the ordinary course of business and are therefore discoverable. However, the "ordinary course" "first category" of documents that courts have found to be discoverable are "factual documents which give rise to suspicious conduct" and "on which the report of suspicious activity was based." *Cotton*, 235 F. Supp. 2d at 815; *Whitney Nat'l Bank*, 306 F. Supp. 2d at 682. Anti-money laundering and Bank Secrecy Act-related policies and procedures certainly do not constitute *factual* documents evidencing allegedly suspicious banking activity. Rather, they are materials created by banks for the specific purpose of complying with and implementing their monitoring obligations under the Bank Secrecy Act. *See*, *e.g.*, 31

U.S.C. § 5318(h) (setting forth requirements to establish anti-money laundering programs); 12 C.F.R. § 21.11 (setting forth requirements to monitor for compliance with the Bank Secrecy Act). As such, they are much more analogous to "second category" materials (documents prepared in the process of complying with federal requirements), which are protected from disclosure under the Bank Secrecy Act.

No published case authority exists that expressly addresses the application of the Bank Secrecy Act privilege to a bank's anti-money laundering and related policies for monitoring suspicious activity and complying with the Bank Secrecy Act.[13] The public policy underlying the Bank Secrecy Act privilege, however, supports such an application under the circumstances here. One of the principal reasons the Bank Secrecy Act does not allow disclosure of SAR-related information is because such information could compromise ongoing law enforcement efforts or allow others to evade detection. The OCC, for example, has explained that a "compelling reason[]" for strict confidentiality is that disclosure of SAR-related information "may provide insight into how a bank uncovers potential criminal conduct that can be used by others to circumvent detection." 75 Fed. Reg. 75576-01 at 75578 (CP 278). Likewise, the court in *Cotton* explained that the statutory privilege protects against

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[13] This is in contrast to the substantial amount of case law that uniformly prohibits Plaintiffs' requested discovery concerning monitoring or investigation of the specific Nino de Guzman checking accounts.

disclosure of "the methods by which banks are able to detect suspicious activity." *Cotton*, 235 F. Supp. 2d at 815. Plaintiffs should not be allowed to demand the production of just this type of protected information.

Moreover, applying the privilege in this private civil litigation to policies implemented by U.S. Bank to comply with the Bank Secrecy Act is consistent with the substantive law that there is no private right of action against a bank for what it did or did not do pursuant to the Bank Secrecy Act and its monitoring provisions. *See, e.g., In re Agape Litig.*, 681 F. Supp. 2d 352, 360 (E.D.N.Y. 2010) (holding that no duty of care to private litigants arises under, and no private right of action exists for violating, the Bank Secrecy Act's monitoring provisions); 31 U.S.C. § 5318(g)(3) (providing a bank and its employees with immunity from suit arising from any reporting of suspicious activity). Because these policies cannot form the basis for any claim in civil litigation, this is yet another reason why these materials are covered by the scope of the Bank Secrecy Act privilege. *Cf. Whitney Nat'l Bank*, 306 F. Supp. 2d at 682 ("The [Bank Secrecy Act] and regulations prohibit disclosure, and the immunity provisions make the information irrelevant.").

Accordingly, the trial court's Order requiring U.S. Bank to produce information and documents concerning the methods, policies, and procedures it employs pursuant to the Bank Secrecy Act to monitor for suspicious activity, was error and should be reversed.

C. The Bank Secrecy Act Does Not Permit In Camera Review of Privileged Documents.

In response to U.S. Bank's motion for protective order, Plaintiffs sought to obtain information about the existence of any documents prohibited by disclosure under the Bank Secrecy Act by urging that the trial court, at a minimum, conduct an in camera review of the disputed documents. CP 267-68. To the extent that documents exist here that are prohibited from disclosure under the Bank Secrecy Act, an in camera review of those documents by the trial court would be improper under the Bank Secrecy Act and, in any event, unnecessary.[14] The Bank Secrecy Act creates "an unqualified discovery and evidentiary privilege that courts have held cannot be waived" and courts are "not authorized" to order discovery in violation of the privilege. *Whitney Nat'l Bank*, 306 F. Supp. 2d at 682-83. Indeed, it has been expressly recognized that the Bank Secrecy Act *prohibits* a court from making an in camera inspection of disputed documents. *Gregory v. Bank One, Indiana, N.A.*, 200 F. Supp. 2d 1000, 1003 (S.D. Ind. 2002).

This rule prohibiting in camera review is necessary to give full effect to the Bank Secrecy Act privilege. While in the ordinary privilege context an in camera review can sometimes be appropriate, here, the very act of submitting certain documents for review would violate the Bank Secrecy Act by revealing privileged information about the existence of

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[14] Commissioner Neel's June 8, 2012 order granting discretionary review directed the parties to address the role, if any, of in camera review.

such materials. *See, e.g., Whitney Nat'l Bank*, 306 F. Supp. 2d at 683 (holding that the bank "may not produce documents or information that could *reveal* whether a SAR *or other report of suspicious activity* had been prepared") (italics added).[15]

Plaintiffs have argued that Bank Secrecy Act privilege determinations must be subject to judicial review because the privilege could be abused. This concern is misplaced and overblown. First, given that private litigants are precluded by law from suing banks for suspicious activity monitoring activity under the Bank Secrecy Act, the type of civil litigation discovery requested by Plaintiffs here should be extraordinarily infrequent.[16] Second, in those rare instances where a bank does need to decide whether the Bank Secrecy Act applies to certain materials requested in discovery, that determination is no different from the decisions made frequently by parties to civil litigation about whether particular documents are responsive to discovery requests or protected by

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[15] The same inappropriate invasion of the Act's privilege arises in the creation of a privilege log. U.S. Bank could not log any documents created in connection with any monitoring or investigation of the Nino de Guzman checking accounts (if any exist), just as it could not submit them for in camera review, because doing so would reveal their existence in violation of the Bank Secrecy Act. If necessary, however, U.S. Bank could potentially create a general privilege log of the policies that have been withheld, given that the existence of such policies is of a slightly different character and not in dispute.

[16] Some additional comfort can be gained by recalling that governmental regulators have exclusive oversight over the anti-money laundering and Bank Secrecy Act operations of national banks. These areas are highly and closely regulated, and deficiencies in compliance can subject a bank to regulatory or enforcement action by the OCC and other regulators.

a privilege. These determinations are expected to be made in good faith and are almost never subject to judicial oversight; parties typically verify their discovery responses in writing and certify at the end of discovery that all responsive non-privileged documents have been produced (and U.S. Bank hereby re-certifies that it has made its determinations regarding applicability of the Bank Secrecy Act in good faith). Third, the determination of whether the Bank Secrecy Act prohibits disclosure will be straightforward for banks because the line between protected and non-protected documents under the Bank Secrecy Act is quite clear: factual documents generated in the ordinary course of banking business are not privileged (First Category Documents) and must be produced (as U.S. Bank has done here) whereas documents created as part of a bank's efforts pursuant to the Bank Secrecy Act to monitor for suspicious activity (Second Category Documents, if any) are privileged (as U.S. Bank has claimed here). In short, in camera review of Second Category Documents would undermine the Bank Secrecy Act privilege, is contrary to existing case law and is unnecessary in any event.

V. CONCLUSION

U.S. Bank respectfully requests that this Court reverse the trial court's February 22, 2012 and March 7, 2012 orders and hold that the discovery that is the subject of those orders is protected and privileged from disclosure under the Bank Secrecy Act.

Respectfully submitted this 23rd day of August 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on this date I caused to be served a copy of the foregoing on the following by the method indicated:

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