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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 REPLY BRIEF

Peter S. Ehrlichman, WSBA 6591
Shawn Larsen-Bright, WSBA 37066
DORSEY & WHITNEY LLP
701 Fifth Avenue, Suite 6100
Seattle, WA 98104-7043
Telephone: (206) 903-8800
Fax: (206) 903-8820
Attorneys for Appellant
U.S. Bank National Association

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I. INTRODUCTION

In its Opening Brief, U.S. Bank cited the three published cases recognized as the principal authority on the scope of the Bank Secrecy Act privilege – *Union Bank*, *Whitney*, and *Cotton*.[1] Each of these cases powerfully supports U.S. Bank's appeal on discretionary review here in holding, contrary to the trial court's erroneous ruling, that the Bank Secrecy Act privilege protects all materials a bank creates pursuant to its efforts under the Bank Secrecy Act to monitor for and report suspicious activity to federal law enforcement. Likewise, each of these cases rejects the overly narrow reading of the Bank Secrecy Act that Plaintiffs urge this Court to be the first to adopt. By contrast, *no* precedential case authority – not a single published case – supports Plaintiffs' position.

In their Respondents' Brief, Plaintiffs present a series of meritless arguments seeking to overcome their complete lack of published authority. Plaintiffs first offer incorrect interpretations of the governing *Union Bank*, *Whitney*, and *Cotton* decisions in an attempt to suggest that the cases do not apply or mean what they say. But the plain language of these cases reveals clearly that Plaintiffs' interpretations are wrong. Plaintiffs also suggest that these cases do not accurately reflect the state of the law. This argument fails as well. The three cited cases are *the* principal authority on the scope of the Bank Secrecy Act privilege. Indeed, less than two years

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[1] *Union Bank of California v. Superior Court*, 130 Cal. App. 4th. 378 (2005); *Whitney National Bank v. Karam*, 306 F. Supp. 2d 678 (S.D. Tex. 2004); *Cotton v. PrivateBank and Trust Company*, 235 F. Supp. 2d 809 (N.D. Ill. 2002).

ago, the OCC – U.S. Bank's primary federal regulator – cited these cases in an official pronouncement as accurately defining the privilege. Plaintiffs further argue that the OCC's Bank Secrecy Act regulation supports their overly narrow interpretation of the Bank Secrecy Act privilege. This argument, however, is contrary to the OCC's citation to *Union Bank*, *Whitney*, and *Cotton* and to the OCC's official statement that the privilege can apply to all materials prepared as part of a bank's process to detect and report suspicious activity. *See* 75 Fed. Reg. 75576, 75579 (Dec. 3, 2010) (CP 279).

Finally, lacking any real authority, Plaintiffs refer to two unpublished, non-precedential orders and improperly rely on discovery materials from two unrelated foreign lawsuits, in violation of General Rule ("GR") 14.1 and Title 10 of the Rules of Appellate Procedure ("RAP"). These citations offer no assistance to Plaintiffs. As discussed further below, neither of the unpublished orders provide any basis for rejecting the settled law cited by U.S. Bank. Moreover, as detailed in U.S. Bank's separately filed and fully briefed Motion to Strike Respondents' Improper Brief, this Court should not consider the materials submitted by Plaintiffs from the two unrelated judicial proceedings because they are not authority under Washington law and are outside of the record on review.[2] Even

[2] In response to U.S. Bank's Motion to Strike, the Commissioner ruled that this panel would be in a better position to determine whether to consider Plaintiffs' improper materials. *See* Notation Ruling (October 26, 2012). The Motion to Strike and the improper materials cited by Plaintiffs are discussed further infra at Section B and note 8.

were they to be considered, however, they do not support Plaintiffs' position. The unrelated California case actually reinforces U.S. Bank's appeal, as the trial court there held that materials generated as part of a bank's processes to monitor and report suspicious activity are protected from discovery. The unrelated Florida case is simply irrelevant. There, a bank apparently produced certain materials that may have been privileged. The facts as to what was produced and why are unclear. What is certain is that a document production by an unrelated party in any unrelated lawsuit has absolutely no bearing on U.S. Bank's proper assertion of the Bank Secrecy Act's unqualified discovery and evidentiary privilege here.

In summary, the Bank Secrecy Act privilege applies to all materials a bank creates pursuant to its efforts under the Bank Secrecy Act to monitor for and report suspicious activity. All precedential authority supports this interpretation. Plaintiffs' attempt to circumvent federal law to obtain discovery in this case that is absolutely privileged from disclosure and legally irrelevant should be rejected. Accordingly, and for the reasons stated in U.S. Bank's Opening Brief, the trial court's order was error and should be reversed.[3]

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[3] Plaintiffs appropriately concede in their Brief (at 11) that this Court will conduct a de novo review of the trial court's order. As Plaintiffs recognize, de novo is the appropriate standard of review because the trial court's ruling was based on its interpretation of the Bank Secrecy Act privilege. 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); *State v. Vietz*, 94 Wn. App. 870, 872, 973 P.2d 501 (1999).

II. ARGUMENT

A. The Bank Secrecy Act Privilege Prohibits Disclosure Of *All* Materials Generated As Part Of A Bank's Process For Monitoring Suspicious Activity Under The Bank Secrecy Act.

1. Plaintiffs Fail to Distinguish the Settled Case Authority Establishing a Broad Bank Secrecy Act Privilege.

Plaintiffs cannot dispute that the *Union Bank*, *Whitney*, and *Cotton* cases relied upon by U.S. Bank are recognized as the primary authority on the scope of the Bank Secrecy Act privilege. Nor can they dispute that the OCC has cited to these same cases as accurately defining the scope of the privilege. Instead, Plaintiffs attempt to suggest that these cases do not support the broad privilege applicable here that is articulated by their plain language. Plaintiffs' convoluted interpretation is wrong. As U.S. Bank has shown, each of these cases holds that the Bank Secrecy affords a broad privilege to all materials a bank creates in connection with its Bank Secrecy Act monitoring and reporting obligations.

First, Plaintiffs argue (at 14) that the court in *Whitney National Bank v. Karam*, 306 F. Supp. 2d 678 (S.D. Tex. 2004), narrowly held only that the Bank Secrecy Act privilege precludes the production of bank communications with law enforcement. However, by its own terms, the holding is far broader. The court also held that any "preliminary" or "preparatory" documents the bank prepared in connection with its communications with law enforcement were privileged from disclosure. *Id.* at 680. The court explained that the privilege applied not only to "communications [the bank] made to governmental agencies or officials

reporting [suspicious activity]," but also to *internal* bank communications "pertaining to such reports." *Id.* at 682. According to the court, the privilege extends to 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. In summary, the materials privileged under the Bank Secrecy Act are not limited to communications between a bank and law enforcement, as Plaintiffs contend, but rather also broadly include internal materials generated as part of the bank's efforts to detect and report suspicious activity. Indeed, the privilege specifically protects internal communications about "suspected or possible violations that did not culminate in the filing of a SAR," where no report to law enforcement was made. *Id.* Moreover, contrary to Plaintiffs' incorrect assertion (at 15), nowhere does the *Whitney* court imply, let alone hold, that documents that do not disclose whether a SAR was or was not filed should be produced, and its holding is to the contrary. *Id.*

Plaintiffs likewise wrongly argue (at 16) that *Cotton v. PrivateBank and Trust Company*, 235 F. Supp. 2d 809 (N.D. Ill. 2002), is not applicable here because, according to Plaintiffs, it dealt solely with the question of whether a SAR itself could be produced. Again, the plain language of the decision is otherwise. In *Cotton*, the plaintiffs sought discovery of not just the SAR itself but also all documents "relating to any inquiry or investigation or review" conducted by the bank of the accounts

at issue in that litigation. *Id.* at 811. The *Cotton* court held that such documents were not subject to discovery. *Id.* at 815. The court explained that "documents representing drafts of SARs or other work product or privileged communications that relate to the SAR itself" are privileged under the Bank Secrecy Act. *Id.* Here, Plaintiffs are requesting that U.S. Bank produce, among other materials, all documents concerning any "due diligence, investigation, and/or inquiry" conducted by U.S. Bank concerning the Nino de Guzman checking accounts. CP 66. In other words, Plaintiffs request here the identical information that the *Cotton* court found to be privileged from disclosure under the Bank Secrecy Act.[4]

With respect to *Union Bank*, notably, Plaintiffs do not dispute that the court there broadly 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. *Union Bank of California v. Superior Court*, 130 Cal. App. 4th. 378, 397 (2005). Nor do Plaintiffs dispute that the court further 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.* Instead, recognizing there is no way to distinguish the legal rulings in *Union Bank*, Plaintiffs

[4] Plaintiffs also assert (at 16) that because *Cotton* was decided in 2002 it does not reflect current law with respect to the scope of the Bank Secrecy Act privilege. Plaintiffs' assertion is belied by the OCC's official interpretation of its Bank Secrecy Act regulation in 2010, which expressly cites to and relies on the *Cotton* decision as accurately setting forth the scope of the Bank Secrecy Act privilege. 75 Fed. Reg. at 75579 n.23 (CP 279).

suggest that *Union Bank* simply may not apply. To that end, Plaintiffs make the utterly unsupported speculation that any monitoring of the Nino de Guzman bank accounts by U.S. Bank was not done to comply with the Bank Secrecy Act and thus is not privileged under *Union Bank*. Plaintiffs' speculation is misguided and wrong.

The issue before this Court is whether U.S. Bank must produce documents or information it may have created as part of its monitoring and reporting efforts under the Bank Secrecy Act, which is precisely the discovery sought by Plaintiffs.[5] For example, Plaintiffs requested that U.S. Bank "specifically . . . detail the internal procedures that the anti-money laundering (AML) and Bank Secrecy Act (BSA) division took in conducting any investigations." CP 127. Similarly, Plaintiffs requested that U.S. Bank "describe any efforts made by U.S. Bank to comply with any of its obligations under the Bank Secrecy Act" in connection with the Nino de Guzman bank accounts. CP 81-82. Plaintiffs' own purported

[5] Consistent with applicable law, and as discussed in U.S. Bank's Opening Brief (at 22) and infra at Section B.5, U.S. Bank has not asserted the Bank Secrecy Act privilege as to documents created in the ordinary course of banking business and has already produced thousands of pages of factual documents to Plaintiffs. Plaintiffs' assertion (at 18) that U.S. Bank is withholding a "mountain of documents" is unsupported. The discovery at issue here narrowly concerns U.S. Bank's monitoring and reporting obligations under the Bank Secrecy Act, which are absolutely privileged from disclosure. Importantly, any such discovery is also *irrelevant as a matter of law* because U.S. Bank had no duty to Plaintiffs to use its Bank Secrecy Act monitoring procedures 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 have no duty to prevent losses resulting from the misconduct of a bank customer); *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).

expert stated that Plaintiffs want "information on the bank's internal suspicious activity report (ISAR) process . . . for reporting suspicious activity to their BSA/AML [Bank Secrecy Act / Anti-Money Laundering] department." CP 331. Without question, Plaintiffs are asking for (and the trial court ordered U.S. Bank to produce) material U.S. Bank may have created as part of its monitoring and reporting efforts *pursuant to the Bank Secrecy Act.* Plaintiffs' misleading argument to the contrary is meritless.

In summary, all three of the principal case authorities on the Bank Secrecy Act privilege are on point and provide powerful support for U.S. Bank's appeal. Plaintiffs' attempt to distinguish or avoid application of this uniform authority is unsuccessful.

2. Plaintiffs' Two Unpublished Orders Do Not Provide Any Basis for Rejecting The Published Case Law.

Plaintiffs have not been able to locate even *one* precedential opinion that supports their overly narrow reading of the Bank Secrecy Act privilege. As a result, they rely on two *unpublished, non-precedential* trial court orders. Neither supports affirming the trial court's order here.

In *Freedman & Gersten, LLP v. Bank of America, N.A.*, No. 09-5351, 2010 WL 5139874, at *1 (D.N.J. Dec. 8, 2010), Bank of America referred a fraudulent check matter to its Corporate Security Department. The magistrate judge decided, in an *unpublished letter*, that plaintiffs were entitled to documents created by this department because its investigation was part of a standard business practice, i.e., *not* conducted as part of the bank's specific efforts to comply with the Bank Secrecy Act. *Id.* at *3.

The *Freedman* court did not order production of documents prepared in anticipation of filing a SAR, as Plaintiffs contend, but rather ordered production of documents created entirely outside of the context of the bank's SAR functions. *Id.* The second case cited by Plaintiffs, *In re Whitley*, No. 10-10426, 2011 WL 6202895 (Bkrtcy. M.D.N.C. Dec. 13, 2011), is no more persuasive. It is an *unpublished* bankruptcy court order that relied largely on *Freedman*, failed to address relevant authority, and provides no reasoned basis for this Court to affirm.

Here, Plaintiffs are *not* merely seeking the type of discovery at issue in *Freedman*, i.e., discovery relating to investigations that U.S. Bank may have conducted outside of the Bank Secrecy Act context. Rather, Plaintiffs are *expressly* seeking discovery concerning any monitoring or investigating U.S. Bank may have conducted directly pursuant to the Bank Secrecy Act relating to the checking accounts of Nino de Guzman and NDG. *See, e.g.,* CP 127 (requesting that U.S. Bank "detail the internal procedures that the anti-money laundering (AML) and Bank Secrecy Act (BSA) division took in conducting any investigations" of Nino de Guzman). Such information, if it exists, is privileged from disclosure.[6]

[6] Plaintiffs repeatedly assert that trial courts routinely order production of the types of documents held to be privileged in *Union Bank*, *Whitney*, and *Cotton*, and that these key cases are no longer followed in more "recent" case law. These assertions are unsupported and baseless. None of these three governing cases is more than a decade old, and more "recent" cases continue to follow the identical principles. *See, e.g., Regions Bank v. Allen*, 33 So. 3d 72, 75-77 (Fla. Ct. App. 2010) (reversing trial court order requiring production of materials inconsistent with the principles in *Union Bank*); *U.S. v. LaCost*, No. 10-20001, 2011 WL 1542072, at *7 (C.D. Ill. April 22, 2011) (citing *Cotton* and denying motion to compel production of bank's SAR-related documents).

3. The Bank Secrecy Act Privilege Is Not Limited to Documents that Would Reveal the Existence of a SAR.

Despite strong language in the governing case authority that the Bank Secrecy Act privilege protects all documents a bank prepares as part of its process of investigating and reporting suspicious activity, *see*, *e.g.*, *Union Bank*, 130 Cal. App. 4th. at 397, Plaintiffs attempt to narrow the scope of the privilege by referencing the text of an OCC regulation. That regulation provides that "[n]o national bank . . . shall disclose a SAR or any other information that would reveal the existence of a SAR." 12 C.F.R. § 21.11(k)(1)(i). Plaintiffs argue – based on the principle of statutory construction that to express one thing in a statute implies the exclusion of the other – that this regulation acts to limit the Bank Secrecy Act privilege only to materials that would reveal the existence of a SAR. However, Plaintiffs' argument is contrary to law and ignores the OCC's own official published interpretation of its regulation, which makes clear that the Bank Secrecy Act privilege is not so narrowly limited.

Washington courts "give great deference to an agency's interpretation of its own properly promulgated regulations." *Silverstreak, Inc. v. Wash. State Dep't of Labor & Indus.*, 159 Wn.2d 868, 884, 154 P.3d 891 (2007). Here, less than two years ago, the OCC stated in its official interpretation of the regulation cited by Plaintiffs that the Bank Secrecy Act privilege can apply 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. at 75579 (CP 279). Moreover, the OCC explained that its interpretation of the Bank

Secrecy Act privilege is consistent with relevant case law, citing the very same decisions on which U.S. Bank now relies (i.e., *Union Bank*, *Whitney*, and *Cotton*). *Id.*

Furthermore, it is a well-established principle of statutory construction that a regulation "will be presumed to be in line with the prior judicial decisions in a field of law" unless there is a clear indication that the regulation was "intended to overrule the common law." *Glass v. Stahl Specialty Co.*, 97 Wn.2d 880, 887-88, 652 P.2d 948 (1982); *see also Univ. of Wash. v. Jacobs*, 68 Wn. App. 44, 48, 842 P.2d 971 (1992) ("Rules of statutory construction also apply to administrative regulations."). Here, the OCC amended its regulation effective January 3, 2011 to "clarify the scope of the statutory prohibition on the disclosure by a financial institution of a SAR, as it applies to national banks." 75 Fed. Reg. at 75576-77 (CP 276-77). In amending its regulation, the OCC made clear that it was *not* overruling the common law with respect to judicial decisions interpreting the Bank Secrecy Act privilege. *Id.* at 75579 (CP 279). To the contrary, the OCC explained that its amended regulation was *consistent* with the existing case law (and in particular with *Union Bank*, *Whitney*, and *Cotton*) and could protect all materials prepared as part of a bank's efforts to detect and report suspicious activity. *Id.*

Finally, Washington courts interpret an agency's regulation so as to "give effect to its underlying policy and intent." *State Dep't of Licensing v. Cannon*, 147 Wn.2d 41, 56, 50 P.3d 627 (2002). The policy and intent of the Bank Secrecy Act and the implementing OCC regulation

is to support federal crime-fighting efforts by encouraging banks to provide full and frank disclosure of potential suspicious activities to government authorities, without fear of reprisal by third parties. *See, e.g.,* 31 U.S.C. § 5318(g)(1) & (3) (setting forth purpose of Bank Secrecy Act to provide for disclosure of suspicious activity and limit bank liability); 75 Fed. Reg. at 75579 (CP 279) (same). To fulfill that important federal policy, the Bank Secrecy Act protects from disclosure all materials a bank prepares to monitor and detect for suspicious activity. *See, e.g., Union Bank*, 130 Cal. App. 4th at 393, 398. U.S. Bank's position here regarding the broad scope of the Bank Secrecy Act privilege is therefore consistent not only with all published case authority and the OCC's official guidance but also the underlying purposes of the Bank Secrecy Act itself.

4. Contrary to Plaintiffs' Misleading Claims, Plaintiffs' Discovery Requests Plainly Seek Privileged Material.

Plaintiffs purport to provide a summary, in chart form, of their discovery requests and claim that the requests are proper because they do not call for the production of documents that would reveal the existence of a SAR. However, as discussed above and in U.S. Bank's Opening Brief, the Bank Secrecy Act privilege is not narrowly limited solely to documents that may reveal the existence of a SAR. Rather, it protects from disclosure *all* documents a bank generates as part of its efforts to monitor and report suspicious activity pursuant to the Bank Secrecy Act. *See, e.g., Union Bank*, 130 Cal. App. 4th. at 397.

Plaintiffs suggest that documents revealing the existence of a SAR can just be redacted. This suggestion is inappropriate because, again, the privilege covers much more than the existence of a SAR. Indeed, the very act of redacting could reveal the existence of a SAR or other information that is absolutely prohibited from disclosure under the Bank Secrecy Act. Even authority cited by Plaintiffs makes clear that "redaction will not be adequate to protect the confidentiality of a SAR investigation or the fact of a SAR's preparation" because "[r]edaction of a document does not change its character." *Regions Bank v. Allen*, 33 So.3d 72, 77 (Fl. App. Ct. 2010); *see also Whitney*, 306 F. Supp. 2d at 683 (holding that a bank may not "reveal whether a SAR or other report of suspected or possible violations has been prepared"). Plaintiffs' unworkable suggestion that U.S. Bank could redact privileged documents is contrary to the Bank Secrecy Act.

5. U.S. Bank Has Already Produced Responsive Documents Created in the Ordinary Course of Business.

As U.S. Bank detailed in its Opening Brief (Section B.3), courts analyzing the Bank Secrecy Act privilege have identified and carefully distinguished two separate categories of SAR-related materials: (1) factual documents created in the ordinary course of banking business which may give rise to suspicions about conduct, such as bank account statements and copies of checks; and (2) 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." *Cotton*, 235 F. Supp. 2d at 815;

Whitney, 306 F. Supp. 2d at 682. The first category (documents created in the ordinary course of banking business) is not privileged under the Bank Secrecy Act – and U.S. Bank has never argued to the contrary – while the second category of documents is absolutely privileged. *See*, *e.g.*, *Union Bank*, 130 Cal. App. 4th at 391; *Whitney*, 306 F. Supp. 2d at 682; *Cotton*, 235 F. Supp. 2d at 815. Accordingly, U.S. Bank has produced extensive responsive materials in the first category but has withheld documents in the second category, to the extent any exist, pursuant to the privilege.

Despite the uniform case law defining the line between these two categories, Plaintiffs deny that this distinction is appropriate and assert (at 32) that "[e]verything short of the bank's deliberations regarding the filing of a SAR are discoverable," vaguely referencing an official OCC Release. However, nowhere does the OCC make such a statement in its Release. Nor is there any statement in the Release even remotely similar to Plaintiffs' characterization. To the contrary, the OCC Release cited to *Cotton* and *Whitney* as accurately describing the "supporting documents" that are discoverable – i.e., documents in the first category. 75 Fed. Reg. at 75579 n.22 (CP 279). The Release provides no support for Plaintiffs' attempt to obtain discovery falling within the privileged second category.

Plaintiffs try to suggest that the decision in *U.S. v. Holihan*, 248 F. Supp. 2d 179 (W.D.N.Y. 2003) supports their view of the privilege. It does not. There, a bank received a subpoena for personnel files and objected to producing any SARs contained in the files. *Id.* at 185. The court agreed that the bank could not produce the SARs. *Id.* at 187. Citing

Cotton, the court also held that the bank could produce factual supporting documents created in the ordinary course of business (i.e., first category documents). *Id.*; *see also Union Bank*, 130 Cal. App. 4th. at 394 (explaining that the *Holihan* court did not order production of any documents that were created for investigating or filing a SAR). Here, there is no dispute that U.S. Bank has already produced responsive "first category" documents. Nothing in *Holihan* supports Plaintiffs' effort to gain access to privileged second category documents or is in any way inconsistent with U.S. Bank's position on appeal.[7]

6. Plaintiffs Do Not Dispute U.S. Bank's Contention that the Methods of and Policies for Suspicious Activity Monitoring under the Bank Secrecy Act are Privileged.

In Section B.4 of its Opening Brief, U.S. Bank cited authority establishing that the Bank Secrecy Act also protects from disclosure a bank's methods and policies for monitoring for suspicious activity. Plaintiffs notably do not dispute U.S. Bank's cited authority or otherwise make any specific contention that these policy materials are not privileged. In fact, the very authority cited by Plaintiffs supports U.S. Bank's position on this issue. In the unpublished *Freedman* case relied on by Plaintiffs, the court held that a bank's policies and procedures for filing SARs, i.e., for monitoring and detecting suspicious activity under the Bank Secrecy

[7] Plaintiffs also string-cite to *Weil v. Long Island Savings Bank*, 195 F. Supp. 2d 383 (E.D.N.Y. 2001), a case involving an Office of Thrift Supervision ("OTS") regulation, but it does not support their position either. Like the OCC (and U.S. Bank), the OTS has cited *Cotton* and *Whitney* as accurately describing the type of "supporting documentation" that is discoverable. 75 Fed. Reg. 75586, 75588 n.22 (Dec. 3, 2010).

Act, are privileged and protected from disclosure. *See Freedman*, 2010 WL 5139874 at *4-5, 7. The *Freedman* court reasoned that if a bank "produces its policies and procedures for filing a SAR, Plaintiff, or anyone else for that matter, can easily infer whether a SAR was filed." *Id.* at *4. The court further explained that "knowledge of what [the bank's] policies are for SARs could implicate [the bank] and its right to keep its decision to file a SAR out of the public eye by exposing its decision-making process." *Id.* The same reasoning is applicable here. For these reasons and those articulated in U.S. Bank's Opening Brief, U.S. Bank's methods, policies, and procedures for suspicious activity monitoring and reporting are privileged from discovery and may not be produced.

B. The Attorney Briefing and Unrelated Discovery Improperly Submitted by Plaintiffs From Two Unrelated Proceedings Cannot Be Considered by this Court, and Regardless, Do Not Support Plaintiffs' Position.

Recognizing that no published case authority supports their position, Plaintiffs violated settled Washington law and procedure by extensively discussing (and improperly appending to their brief) certain discovery-related materials from the trial court proceedings in two completely unrelated foreign lawsuits – *Casey v. U.S. Bank National Association* (California) and *Coquina Investments v. TD Bank* (Florida). As detailed in U.S. Bank's Motion to Strike Respondents' Improper Brief, these materials should not be considered because they are not proper authority, are outside of the record on review, and consist entirely of

papers from unrelated judicial proceedings.[8] Because these issues have already been thoroughly briefed in U.S. Bank's Motion to Strike (filed October 5, 2012) and Reply (filed October 18, 2012), U.S. Bank will not restate its arguments establishing that these materials should not be considered here. Pursuant to the Commissioner's ruling on U.S. Bank's Motion to Strike that this Panel would determine whether to consider or strike the improper materials, U.S. Bank respectfully requests that this Court review and grant its Motion to Strike and decline to consider the improper materials submitted by Plaintiffs in violation of Washington law and procedure. By responding to these improper materials herein, U.S. Bank does not waive its objection to their consideration.

Even if the improper materials submitted by Plaintiffs were to be in any way considered by this Court (and they should not be), they do not provide any basis for affirming the trial court's erroneous order.

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[8] *See* GR 14.1; RAP 10.3(a)(5); RAP 10.3(a)(6); RAP 9.1; *see also, e.g., Yousoufian v. Office of Ron Sims*, 168 Wn.2d 444, 469-70, 229 P.3d 735 (2010) (reversing decision denying motion to strike briefing that failed to comply with the RAP and granting motion to strike briefing about unpublished trial court orders); *Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Assoc.*, 156 Wn.2d 253, 278, 126 P.3d 16 (2006) (granting motion to strike briefing about recent federal Surface Transportation Board decision in separate proceeding); *Spokane Research & Defense Fund v. City of Spokane*, 155 Wn.2d 89, 97-99, 117 P.3d 1117 (2005) (refusing to consider records from unrelated judicial proceedings); *In re Adoption of B.T.*, 150 Wn.2d 409, 415, 78 P.3d 634 (2003) ("[W]e cannot, while deciding one case, take judicial notice of records of other independent and separate judicial proceedings."); *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 809, 828 P.2d 549 (1992) (holding that arguments unsupported by proper legal authority or citation to the record on review will not be considered); *Snedigar v. Hoddersen*, 114 Wn.2d 153, 164, 786 P.2d 781 (1990) (holding that the appellate record may not be supplemented by material that was not included in the trial court record).

With respect to the unrelated *Casey* matter, Plaintiffs cite to *attorney briefing* in connection with a discovery dispute that was at that time pending before a California trial court. Based on their inaccurate interpretation of this briefing, but without citing any court order, Plaintiffs try to imply that U.S. Bank there was ordered to produce the same materials Plaintiffs are seeking here. It was not. To the contrary, the *Casey* trial court *rejected* Plaintiffs' position here insofar as it ruled that U.S. Bank was *not* required to produce materials generated as part of its processes under the Bank Secrecy Act to monitor for suspicious activity. Citing *Union Bank*, the *Casey* trial court held that the SAR privilege protected responsive information "[t]o the extent that persons at the Banks developed suspicions as a result of their involvement in the Banks' processes for complying with the federal reporting requirements, and for the specific purpose of fulfilling the Banks' reporting obligations under [the Bank Secrecy Act]." *See* Order, Cal. Superior Court Case No. 02CC06597 (filed Feb. 1, 2007).[9] Likewise, in response to requests for information concerning actions U.S. Bank took to address any suspicions of misconduct, the *Casey* court again ruled that the SAR privilege extended to and prohibited discovery of any actions U.S. Bank may have taken as a result of its processes for complying with the Bank Secrecy Act.

[9] As discussed in U.S. Bank's Motion to Strike and Reply, U.S. Bank recognizes that this order is not authority under GR 14.1. U.S. Bank refers to it here *solely* to counter the false impression left by Plaintiffs' improper and misleading discussion of the *Casey* trial court proceedings.

Id. Accordingly, it is highly misleading for Plaintiffs to cite to and quote from attorney briefing in *Casey* to imply that the trial court ordered production of the same discovery at issue here. In fact, the ruling in *Casey* is consistent with and further supportive of U.S. Bank's position that the Bank Secrecy Act privilege protects all materials generated as part of a bank's monitoring and reporting obligations.[10]

Plaintiffs' discussion of the unrelated Florida trial court proceedings in *Coquina* likewise provides no basis for affirming the trial court's order here.[11] Plaintiffs argue (at 37) that, in that unrelated and factually inapposite lawsuit, TD Bank produced, "on the verge of trial," some of the same types of materials U.S. Bank contends are privileged. Even if that were true – and it is by no means clear precisely what documents TD Bank produced or why – TD Bank's document production in that matter is utterly irrelevant to this appeal. The fact that an unrelated party may have produced arguably privileged materials in an unrelated lawsuit has no bearing on U.S. Bank's ability to assert a privilege here.

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[10] Plaintiffs also wrongly assert (at 34) that U.S. Bank took a position in *Casey* different than the one it is taking now. As evidenced by the *Casey* court's order (and the briefing of U.S. Bank in that case), U.S. Bank made the same argument then that it is making now, i.e., that the Bank Secrecy Act privilege applies to all materials created as part of a bank's monitoring obligations under the Bank Secrecy Act.

[11] Plaintiffs assert (at 36) that *Coquina* represents "[a]nother recent example of a trial court requiring production of bank investigative records." Notably, Plaintiffs cite no clear order from the *Coquina* trial court in that regard, nor do they cite any other "example." Even if they had, unpublished trial court orders of this nature are "not legal authority and have no precedential value" to this Court, *Bauman v. Turpen*, 139 Wn. App. 78, 87, 160 P.3d 1050 (2007), and unrelated judicial proceedings may not be considered on appeal. *See, e.g., Spokane Research*, 155 Wn.2d at 97-99.

Indeed, 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*, 306 F. Supp. 2d at 682-83.

Plaintiffs improperly appended to their Brief various discovery materials including unverified copies of two letters purportedly sent by employees of the OCC in connection with the *Coquina* matter. Plaintiffs argue (at 38-40) that these letters support their position and should be given deference as an OCC interpretation of its regulations. However, these two ambiguous, unauthenticated letters – addressing issues raised by unrelated parties in unrelated judicial proceedings involving different facts – do not constitute an official interpretation by the OCC of its regulations (or any type of proper legal authority), and certainly are not entitled to deference. *See, e.g., Burton v. Lehman*, 153 Wn. 2d 416, 426 n.4, 103 P.3d 1230 (2005) (refusing to grant deference to an unofficial agency interpretation of a statute); *W. Telepage, Inc. v. City of Tacoma*, 95 Wn. App. 140, 146, 974 P.2d 1270 (1999) (refusing to grant deference to an article published in an agency newsletter because the article was not an official agency interpretation of its regulation). For these reasons, in addition to those offered in U.S. Bank's Motion to Strike, the attached papers should not be considered. *See, e.g., Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Assoc.*, 156 Wn.2d 253, 278, 126 P.3d 16 (2006) (granting motion to strike and refusing to consider a federal Surface Transportation Board ruling from separate judicial proceedings).

Even if the Court were to consider the two unverified letters, contrary to settled Washington law and procedure, they do not provide a basis for affirming. One letter simply recites certain basic, undisputed principles about the Bank Secrecy Act privilege. The other letter, from a different OCC employee, discusses particular redactions on certain documents, and indicates that the OCC would not prohibit certain information from being un-redacted under the facts of that case. The context of the letter and precisely what was actually at issue is entirely unclear (which is part of the reason why courts do not consider this type of material from other unrelated judicial proceedings). *Id.* In any event, the letter is neither part of the record on review here nor legal authority of any kind. Particularly in light of the OCC's official agency pronouncements on the scope of the Bank Secrecy Act privilege, which strongly support U.S. Bank's appeal, these improperly submitted materials from other unrelated proceedings do not support Plaintiffs' position.

C. The Bank Secrecy Act Does Not Permit In Camera Review of SAR-Related Documents.

As U.S. Bank explained in its Opening Brief (at 26-28), in camera review is not permitted under the Bank Secrecy Act and is unnecessary regardless. 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*, 306 F. Supp. 2d at 682-83. As a result, none of the principal case authority (*Union Bank*, *Whitney*, *Cotton*) suggest that an in camera review

is necessary or appropriate. Indeed, it has been expressly recognized that the Bank Secrecy Act *prohibits* a court from making an in camera inspection of privileged documents because the very production of materials for inspection would reveal privileged information about their existence. *Gregory v. Bank One, Indiana, N.A.*, 200 F. Supp. 2d 1000, 1003 (S.D. Ind. 2002); *see also, e.g.*, *Whitney*, 306 F. Supp. 2d at 683 (holding that banks are prohibited from revealing whether or not "a SAR or other report of suspected or possible violations" was prepared).

Plaintiffs cite a single published case in support of their request for in camera review, *Regions Bank v. Allen*, 33 So. 3d 72 (Fla. Ct. App. 2010).[12] Notably, the *Regions Bank* case is completely contrary to Plaintiffs' position on the merits of this appeal. The court there relied on *Union Bank* as the governing authority and as accurately defining the parameters of the Bank Secrecy Act privilege, and firmly rejected the argument (made by Plaintiffs here) that redaction is sufficient to protect the privilege. *Id.* at 75-77. The court further acknowledged that the bank would and could independently decide which documents were privileged under the standards articulated in *Union Bank*, but also indicated that the bank could submit the "few" documents that "may fall into a grey area of disclosure" for in camera review. *Id.* at 78. The limited potential review

[12] Plaintiffs also string-cite to the magistrate's unpublished, non-precedential letter in *Freedman*. There, however, it appears that the in camera inspection was ordered to evaluate claims under the attorney-client privilege and work product doctrine, neither of which are at issue here. *See* 2010 WL 5139874, at *7.

contemplated in *Regions Bank* in no way supports Plaintiffs' expansive request for in camera review here. To the extent the case could be interpreted as endorsing such a review, U.S. Bank respectfully submits that it is contrary to the weight of authority and was wrongly decided. *See Gregory*, 200 F. Supp. 2d at 1003; *Whitney*, 306 F. Supp. 2d at 683.

In any event, there is no reason for requiring in camera review because U.S. Bank is able in good faith to make the determination of whether any documents exist that are privileged under the Bank Secrecy Act. Plaintiffs do not dispute that U.S. Bank is able to make certain determinations; such as whether a document would or would not reveal the existence of a SAR. Nevertheless, Plaintiffs argue that U.S. Bank is not to be trusted to determine whether a document was prepared in connection with the bank's efforts to monitor for suspicious activity pursuant to the Bank Secrecy Act and therefore all such documents must be submitted for in camera review. However, if U.S. Bank can be counted upon to make a good faith determination of whether a document reveals the existence of a SAR, and thus is privileged, as Plaintiffs concede, U.S. Bank is also able to make the good faith determination of whether a document reveals monitoring or reporting activities conducted pursuant to the Bank Secrecy Act. Indeed, these types of decisions are no different than other decisions litigants are regularly trusted with and expected to perform in good faith without court in camera review (such as determining responsiveness to discovery requests). And, as even Plaintiffs' own authority acknowledges, the distinctions between privileged and non-privileged documents drawn

by the governing case law "are not difficult concepts to apply." *Regions Bank*, 33 So. 3d at 78. There is simply no basis for requiring U.S. Bank to submit documents for in camera review. Doing so would be unnecessary and would undermine the protections of the federal Bank Secrecy Act, contrary to settled law.

III. CONCLUSION

For the foregoing reasons and the reasons explained in U.S. Bank's Opening Brief, 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 16th day of November 2012.

DORSEY & WHITNEY LLP
Peter S. Ehrlichman, WSBA 6591
Shawn Larsen-Bright, WSBA 37066
701 Fifth Avenue, Suite 6100
Seattle, WA 98104-7043
Telephone: (206) 903-8800
Fax: (206) 903-8820
Attorneys for Appellant U.S. Bank National Association

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:

Stephen P. VanDerhoef
Cairncross & Hempelmann, P.S.
524 Second Avenue, Suite 500
Seattle, WA 98104-2323
SVanDerhoef@Cairncross.com

- ☒ Via Messenger
- ☐ Via ECF Notification
- ☐ Via Facsimile
- ☐ Via U.S. Mail
- ☒ Via Electronic Mail

Frank Hill (admitted pro hac vice)
Hill Gilstrap, P.C.
1400 West Abram Street
Arlington, TX 76013
Fhill@hillgilstrap.com

- ☐ Via Messenger
- ☐ Via ECF Notification
- ☐ Via Facsimile
- ☐ Via U.S. Mail
- ☒ Via Electronic Mail

Dated this 16th day of November, 2012.

Nancy Masterson