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COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

JOHN NORTON; KRISTINE NORTON;
and NORTHLAND CAPITAL LLC,

Appellants,

v.

U.S. BANK NATIONAL ASSOCIATION,

Respondents,

JOSE NINO DE GUZMAN, and NDG INVESTMENT GROUP, LLC,

Defendants.

APPEAL FROM THE SUPERIOR COURT
FOR KING COUNTY
THE HONORABLE BETH ANDRUS

BRIEF OF APPELLANTS

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TABLE OF CONTENTS

I.	INTRODUCTION	1
II.	ASSIGNMENT OF ERROR	2
III.	ISSUES RELATING TO ASSIGNMENT OF ERROR.....	2
IV.	STATEMENT OF FACTS.....	3
	A. Statement of the Case.....	3
	1. The Nortons were victimized in a Ponzi scheme created and run by de Guzman, a former U.S. Bank employee.....	3
	2. de Guzman enlisted the assistance of his co-workers at U.S. Bank to find investors in his Ponzi scheme.	5
	3. U.S. Bank employees opened multiple accounts for de Guzman, falsely representing that they were at “low risk” for money laundering, in which de Guzman deposited and withdrew millions of dollars through foreign wire transfers.	7
	4. U.S. Bank’s treatment of the NDG accounts breached industry standards of reasonable banking practices	10
	5. de Guzman used U.S. Bank accounts to perpetrate his fraud upon the Nortons.	11
	B. Procedural History	13
V.	ARGUMENT	15
	A. A jury could find that U.S. Bank, through its employees, knowingly participated in and facilitated de Guzman’s fraud.....	15

B.	A jury could find the Bank liable for its negligent supervision of its employees, in violation of its own policies and procedures.	19
C.	The Bank’s negligence was a proximate cause of Norton’s damages.	23
D.	This Court should hold under RAP 2.5(c)(2) that the Bank Secrecy Act’s discovery privilege does not bar disclosure of information compiled by the Bank in the ordinary course of business for risk management purposes.	25
VI.	CONCLUSION.	34

Appendices:

App. A:	Order Granting U.S. Bank's Motion for Summary Judgment, dated September 11, 2015. (CP 1893-95)
App. B:	Protective Order, dated November 19, 2014. (CP 2035-38)
App. C:	Order Granting in Part and Denying in Part U.S. Bank's Motion to Enforce Protective Order and Strike Plaintiffs' Improper Expert Opinions, dated June 15, 2015. (CP 2039-43)

TABLE OF AUTHORITIES

	Page(s)
Federal Cases	
<i>Cotton v. PrivateBank and Trust Co.</i> , 235 F. Supp. 2d 809 (N.D. Ill. 2002).....	31
<i>First Am. Title Ins. Co. v. Westbury Bank</i> , 2014 WL 4267450 (E.D. Wis. Aug. 29, 2014).....	33
<i>Fort Worth Employees’ Ret. Fund v. J.P. Morgan Chase & Co.</i> , 2015 WL 1726435 (S.D.N.Y. Apr. 15, 2015).....	32
<i>Freedman & Gersten, LLP v. Bank of America, N.A.</i> , 2010 WL 5139874 (D.N.J. Dec. 8, 2010).....	32
<i>In re Liberty State Benefits of Delaware, Inc.</i> , 541 B.R. 219 (Bankr. D. Del. 2015)	24
<i>In re Mongelluzzi</i> , 2015 WL 4389564 (Bankr. M.D. Fla. July 14, 2015).....	32
<i>In re Whitley</i> , 2011 WL 6202895*4 (Bankr. M.D.N.C. Dec. 13, 2011)	32
<i>McGraw v. Wachovia Sec. L.L.C.</i> , 756 F. Supp. 2d 1053 (N.D. Iowa 2010).....	21
<i>Pierce County, Wash. v. Guillen</i> , 537 U.S. 129, 123 S. Ct. 720, 154 L. Ed. 2d 610 (2003).....	29
<i>United States v. Westerfield</i> , 714 F.3d 480 (7th Cir. 2013)	18
<i>Whitney Nat’l Bank v. Karam</i> , 306 F. Supp. 2d 678 (S.D. Tex. 2004)	31
<i>Woods v. Barnett Bank of Ft. Lauderdale</i> , 765 F.2d 1004 (11th Cir. 1985).....	17

<i>Woodward v. Metro Bank of Dallas</i> , 522 F.2d 84 (5th Cir. 1975)	17
<i>Wultz v. Bank of China Ltd.</i> , 56 F. Supp. 3d 598 (S.D.N.Y. 2014).....	33
State Cases	
<i>Ang v. Martin</i> , 154 Wn.2d 477, 114 P.3d 637 (2005)	23
<i>August v. U.S. Bancorp</i> , 146 Wn. App. 328, 190 P.3d 86 (2008), <i>rev.</i> <i>denied</i> , 165 Wn.2d 1034 (2009)	15-16
<i>Bland v. Mentor</i> , 63 Wn.2d 150, 385 P.2d 727 (1963).....	17
<i>C.J.C. v. Corp. of Catholic Bishop of Yakima</i> , 138 Wn.2d 699, 985 P.2d 262 (1999)	29
<i>Cedell v. Farmers Ins. Co. of Washington</i> , 176 Wn.2d 686, 295 P.3d 239 (2013)	28
<i>First Small Bus. Inv. Co. of California v. Intercapital Corp. of Oregon</i> , 108 Wn.2d 324, 738 P.2d 263 (1987)	26-27
<i>Garrison v. SagePoint Financial, Inc.</i> , 185 Wn. App. 461, 345 P.3d 792, <i>rev. denied</i> , 183 Wn.2d 1009 (2015).....	20
<i>Gendler v. Batiste</i> , 174 Wn.2d 244, 274 P.3d 346 (2012).....	29
<i>Gutz v. Johnson</i> , 128 Wn. App. 901, 117 P.3d 390 (2005) <i>aff'd sub nom. Morin v. Burris</i> , 160 Wn.2d 745, 161 P.3d 956 (2007)	3
<i>Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.</i> , 162 Wn.2d 59, 170 P.3d 10 (2007)	23

<i>Intercapital Corp. of Oregon v. Intercapital Corp. of Washington</i> , 41 Wn. App. 9, 700 P.2d 1213, <i>rev. denied</i> , 104 Wn.2d 1015 (1985).....	26
<i>LaHue v. Keystone Inv. Co.</i> , 6 Wn. App. 765, 496 P.2d 343, <i>rev. denied</i> , 81 Wn.2d 1003 (1972).....	16
<i>Lowy v. PeaceHealth</i> , 174 Wn.2d 769, 280 P.3d 1078 (2012).....	29
<i>M.H. v. Corp. of Catholic Archbishop of Seattle</i> , 162 Wn. App. 183, 252 P.3d 914, <i>rev. denied</i> , 173 Wn.2d 1006 (2011).....	23
<i>McKown v. Simon Prop. Grp., Inc.</i> , 182 Wn.2d 752, 344 P.3d 661 (2015).....	21
<i>Niece v. Elmview Grp. Home</i> , 131 Wn.2d 39, 929 P.2d 420 (1997).....	20
<i>Norton v. U.S. Bank Nat. Ass'n.</i> , 179 Wn. App. 450, 324 P.3d 693, <i>rev. denied</i> , 180 Wn.2d 1023 (2014).....	14, 27, 31
<i>Schooley v. Pinch's Deli Mkt., Inc.</i> , 134 Wn.2d 468, 951 P.2d 749 (1998).....	24
<i>Sears v. Int'l Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of Am., Local No. 524</i> , 8 Wn.2d 447, 112 P.2d 850 (1941)	17
<i>Union Bank of California, N.A. v. Superior Court</i> , 130 Cal. App. 4th 378, 29 Cal. Rptr. 3d 894 (2005).....	31
<i>Zabka v. Bank of Am. Corp.</i> , 131 Wn. App. 167, 127 P.3d 722 (2005), <i>rev. denied</i> , 158 Wn.2d 1012 (2006).....	20-21
Statutes	
31 U.S.C. § 5318.....	13, 28

Federal Rules and Regulations

12 C.F.R. § 21.11..... 13, 27-29
75 Fed. Reg. 75576-01..... 30

State Rules and Regulations

RAP 2.5.....1, 3, 25-27
RAP 9.12..... 3
CR 1221

Other Authorities

37 Am. Jur. 2d Fraud and Deceit § 293.....16
Restatement (Second) of Agency § 213 (1958)..... 20
Restatement (Second) of Torts § 876 (1979).....16
WPI 15.01 24

I. INTRODUCTION

The Nortons are victims of a multi-million dollar Ponzi scheme involving Peruvian real estate run by an ex-employee of U.S. Bank, with the assistance of current U.S. Bank employees who received commissions for steering investors into the scheme and who opened dozens of accounts at U.S. Bank for the perpetrator of the fraud, which were then used to facilitate his scheme. The trial court dismissed Norton's claims for negligent supervision and for aiding and abetting the fraud on summary judgment for lack of direct evidence that the Bank ignored red flags and failed to close accounts that allowed de Guzman to shuffle millions of dollars in foreign wire transfers.

While the circumstantial and expert evidence that the Bank ignored reasonable banking standards and its own procedures should have been sufficient to defeat summary judgment, the dearth of direct evidence was an immediate consequence of this Court's previous decision that gave an unduly expansive interpretation to the Bank Secrecy Act, barring Norton from discovery of any of the Bank's risk management policies and procedures to detect and police fraud. Pursuant to RAP 2.5(c)(2), this Court should revisit that earlier decision and hold, as have recent federal courts that are primarily charged with enforcing the Bank Secrecy Act, that Norton has the

right to obtain in discovery the Bank's policies, procedures and any investigatory or risk management documents that exist independent of the Bank's reporting obligations under federal law.

II. ASSIGNMENT OF ERROR

A. The trial court erred in entering its Order Granting U.S. Bank's Motion for Summary Judgment. (CP 1893-95) (App. A)

B. The trial court erred in entering its Protective Order after remand. (CP 2035-38) (App. B)

C. The trial court erred in entering its Order Granting in Part and Denying in Part U.S. Bank's Motion to Enforce Protective Order and Strike Plaintiffs' Improper Expert Opinions. (CP 2039-43) (App. C)

III. ISSUES RELATING TO ASSIGNMENT OF ERROR

1. May a bank be held liable for aiding and abetting a fraudulent Ponzi scheme orchestrated by its former employee, who enlisted current bank employees to recruit investors and to facilitate the scheme by opening multiple accounts, improperly designated "low risk," that were then used to implement the scheme via frequent large international wire transfers?

2. Did U.S. Bank fail to reasonably supervise its employees, allowing them to violate industry standards and the

Bank's own conflict of interest procedures by failing to investigate and close accounts used to run a Ponzi scheme?

3. Should this Court review the prior appellate decision in this case pursuant to RAP 2.5(c)(2) and hold that the Bank Secrecy Act privilege prevents discovery of a bank's Suspicious Activity Reports and information that specifically mentions such a report, but not of a bank's policies for monitoring suspicious activity or information pertaining to the bank's supervision of its current and former employees who actively facilitated a Ponzi scheme compiled by the bank in the ordinary course of business?

IV. STATEMENT OF FACTS

A. Statement of the Case.

1. **The Nortons were victimized in a Ponzi scheme created and run by de Guzman, a former U.S. Bank employee.**¹

Appellants John and Kristine Norton were among the victims of Jose Nino de Guzman, who, for two years after leaving the employ

¹ In addition to the summary judgment pleadings cited under RAP 9.12, the facts related to de Guzman's Ponzi scheme are based upon the original Verified Complaint and Third Amended Verified Complaint, filed by the Nortons. (CP 1-34) The allegations in the complaint are verities as to de Guzman, against whom judgment was entered following his default. See *Gutz v. Johnson*, 128 Wn. App. 901, 917, ¶ 47, 117 P.3d 390 (2005) (allegations in complaint under unchallenged default judgment are verities on appeal) *aff'd sub nom. Morin v. Burris*, 160 Wn.2d 745, 161 P.3d 956 (2007). Respondent U.S. Bank conceded these facts in its motion for summary judgment. (CP 55)

of respondent U.S. Bank in August 2006, created and ran a Peruvian real estate investment Ponzi scheme through his companies NDG Investment Group, LLC, a Washington limited liability company purportedly selling and managing Peruvian real estate investments, and Grupo Innova S.A., a Peruvian company that purported to act as the developer for the properties that de Guzman claimed NDG sold and managed. (CP 20-21)

Between 2006 and 2009, de Guzman sold investment interests in residential and commercial real estate development projects in Lima, Peru, promising a 50% return on investment. (CP 3) By 2008, de Guzman was raising millions of dollars per month from U.S. investors, forming limited liability companies for each purported real estate investment project. (CP 4) de Guzman failed to complete the Peruvian real estate developments, transferring a significant amount of those funds back into the U.S. and into accounts that he opened and maintained at U.S. Bank. (CP 1745) In addition to diverting substantial sums to himself, de Guzman used investor funds to pay “returns” to other investors, to pay commissions to those bringing in new investors, and to “wine and dine” potential investors. (CP 5)

de Guzman obtained approximately \$11 million from the Nortons and their company, appellant Northland Capital LLC between May and November 2008. (CP 22) The Nortons and Northland Capital supplied the funds necessary to purchase membership interests in de Guzman's LLCs and properties in Peru through P.R.E. Acquisitions, LLC, which would serve as a land bank or fund to hold the properties until they would be sold at a higher price to NDG or an NDG related entity, ostensibly for development. (CP 1736-37)

2. de Guzman enlisted the assistance of his co-workers at U.S. Bank to find investors in his Ponzi scheme.

One of the factors that Mr. Norton considered before making his investments with de Guzman was NDG's long term and stable relationship with U.S. Bank. (CP 1734-35) Had NDG worked with a less reputable bank, "it would have given [him] pause." (CP 1735) U.S. Bank's Code of Ethics prohibits additional employment without prior Bank approval and bars employees from engaging in banking transactions with people or organizations with whom the employee has a financial interest. (CP 1193-95) But de Guzman enlisted his former colleagues, Charles Marza and Benjamin Copstead, to bring

him investors while they were still employed by U.S. Bank. (CP 1150-51)

Marza, an assistant relationship manager at U.S. Bank, “helped organize some investors” for de Guzman and arranged for investors to deposit funds into one of the U.S. Bank accounts set up by de Guzman. (CP 1520, 1525, 1541) de Guzman paid Marza a commission of between 2.5% and 3% for his “organizational tasks;” the commissions were transferred to Marza’s personal account at U.S. Bank. (CP 1526-27, 1532, 1534)

Copstead, a personal banker at U.S. Bank from 2006 until August 2007, also worked with de Guzman to obtain investors while employed at U.S. Bank. (CP 1150, 1548, 1555) de Guzman’s company NDG paid approximately \$140,000 in referral fees to BRC Enterprises, LLC, a limited liability company owned and controlled by Copstead, wiring money from one of its U.S. Bank accounts to BRC Enterprises. (CP 1150, 1550-51, 1558, 1560-62, 1587-90)

U.S. Bank failed to monitor its employees’ accounts to determine whether its employees were receiving funds outside of their employment. (CP 1194)

3. **U.S. Bank employees opened multiple accounts for de Guzman, falsely representing that they were at “low risk” for money laundering, in which de Guzman deposited and withdrew millions of dollars through foreign wire transfers.**

U.S. Bank employees were trained to screen new accounts for unusual activity, such as international wire transfers, to “determine if they are moderate or high risk for potential money laundering.” (CP 1163, 1597, 1604-05) As part of that screening, U.S. Bank employees were required to complete a checklist that, upon completion, assigned the new account a risk rating. (CP 1597, 1604-05) One of the risk factors was based on whether the account holder intended to send or receive international wire transfers. (CP 1596-97) Despite these restrictions, U.S. Bank allowed de Guzman to capitalize on his relationships with U.S. Bank employees to open a total of 37 high risk accounts at U.S. Bank between 2005 and 2009. (CP 1188, 1177-85)

With the assistance of U.S. Bank branch manager Jeffrey Behn (who received quarterly bonuses based on the profitability of his branch) (CP 1594-95, 1621), Marza, Copstead, and Darin Donaldson, a U.S. Bank employee who later went to work for de Guzman (CP 1577-78, CP 1619-20), de Guzman established business accounts in the names of NDG and the various LLCs and arranged

for investor funds to be deposited into these U.S. Bank accounts. (CP 1539, 1557, 1565, 1567-68, 1571-72)

On one occasion, for instance, one of Behn's subordinates marked on the checklist that the P.R.E. account opened by de Guzman would have more than five incoming and outgoing international wire transfers per month, indicative of a high risk account. (CP 1603, 1609) Behn altered the form to lower the number of both incoming and outgoing wire transfers per month to "up to 5." (CP 1602, 1609-10, 1636) Behn also changed from "yes" to "no" the answer to the question whether "you expect to deposit or withdraw currency in amounts greater than \$8,000 at one time." (CP 1614, 1636) Behn explained that he altered the risk level for de Guzman's accounts after he had "conversations with Jose about his activity," and based on his "knowledge of the bank account activity in Jose's accounts." (CP 1614-15)

As a result of Behn's alterations, the "Risk Level" of the P.R.E. account dropped from "High" to "Low." (CP 1610-13, 1718) In another new account checklist, Behn indicated that no international wire transfers would be sent into or from the account. (CP 1622-23) Just five weeks later, Behn's branch authorized a wire transfer for \$750,000 out of that account to Peru. (CP 1625)

Copstead also allowed de Guzman to open accounts after marking “no” on the account information form asking if the account contained actual or expected international wire transfers. (CP 1573) de Guzman deposited (and then withdrew) from these accounts millions of dollars of investor funds through international wire transfers. (CP 1690-1710)

U.S. Bank authorized de Guzman to open and maintain at least five accounts based on false statements that there would be no international wire transfers into or out of the accounts. (CP 1187) U.S. Bank did nothing further to monitor the frequency or amounts of international wire transfers after opening the accounts and did not conduct a site visit, as its policies respecting high or moderate risk accounts required. (CP 1761-62) U.S. Bank had no procedures to electronically store the account opening documents. Instead, its employees effectively buried the new account documents by placing hard copies of the account applications and risk ratings in the local branch’s customer file. (CP 1164-69) There is no evidence that these documents were ever reviewed by U.S. Bank’s risk management group, either when the accounts were opened or after large and frequent foreign wire transfers entered and exited de Guzman’s accounts. (CP 1761-64, 1164) Further, as detailed below (§IV.B,

infra), the court's protective order made it impossible for the Nortons to determine what U.S. Bank did with those account documents and falsified risk ratings.

4. U.S. Bank's treatment of the NDG accounts breached industry standards of reasonable banking practices

U.S. Bank violated not only standards in the banking industry, but also "sound risk management practices, and the bank's own policies and procedures." (CP 1173) Industry standards required the Bank to obtain documentation for all of the accounts, and to store those documents electronically, where they could be accessed for compliance review. (CP 1165) In breach of reasonable banking practices, U.S. Bank had no procedure in place for review of the account outside of the branch where it was opened. (CP 1170)

As its own checklist indicated, large or frequent international wire transfers to or from customer accounts are considered by bank examiners and the FDIC a warning sign of fraud and money laundering. (CP 1174) U.S. Bank's Operating Procedures required wire transfers in excess of \$50,000 to be reviewed by its Retail Risk Management prior to release. (CP 1193) A pattern of transfers between related accounts, transfers of similar amounts into and out of the same account the same day (uncollected funds) and

aggregation of wire transfers followed by the transfer of those funds to another account are also warning signs of fraud. (CP 1177-80) Accounts exhibiting such signs of bank fraud should be closed. (CP 1177, 1186)

de Guzman's accounts and the transfers into and out of his U.S. Bank accounts exhibited all of these warning signs. (CP 1186) Some of the wire transfer documentation contained originator and beneficiary information, such as "investor return," or reflected the payment of personal expenses from the LLC accounts. (CP 1192) Other transfers in excess of \$50,000 were not reviewed by the Bank's risk management division. (CP 1193) Having misdesignated these accounts as "low risk," U.S. Bank allowed de Guzman to continue operating his Ponzi scheme by making large international wire transfers into and out of its accounts, and by transferring funds between accounts. (CP 1186)

5. de Guzman used U.S. Bank accounts to perpetrate his fraud upon the Nortons.

The U.S. Bank accounts opened by de Guzman played a central role in facilitating de Guzman's Ponzi scheme and furthered his defrauding of the Nortons. The Nortons and Northland wired millions of dollars to Peru shortly before de Guzman received wire transfers of millions of dollars from Peru into his personal accounts

at U.S. Bank. For instance, Northland sent de Guzman over \$3 million to Grupo Innova on September 2, 2008. (CP 22, 64) Within days, wire transfers totaling almost half of those funds were deposited in de Guzman's personal account at U.S. Bank:

September 5, 2008	\$ 49,950
September 10, 2008	\$149,920
September 25, 2008	\$149,930
October 3, 2008	\$299,930
October 17, 2008	\$249, 920
October 27, 2008	\$349,930

(CP 1242-46)

On November 7, 2008, the Nortons wired \$3.7 million to Grupo Innova in Peru. (CP 22, 64) Within two weeks, Grupo Innova wired back over \$2 million to de Guzman's personal U.S. Bank account:

November 10, 2008	\$499,920
November 17, 2008	\$899,920
November 20, 2008	\$849,920

(CP 1247-49) The Nortons were precluded by the court's protective order from confirming what, if any, scrutiny U.S. Bank gave to these large and frequent wire transfers.

B. Procedural History

Following the collapse of de Guzman's Ponzi scheme, he was arrested and sentenced to prison on federal fraud charges. Norton brought this action against U.S. Bank for aiding and abetting de Guzman's fraud and for negligent supervision of its employees. (CP 8, 11-12) Norton's complaint alleged that U.S. Bank had initiated an investigation into Guzman's money laundering activities in 2008, but took no action while it continued to profit from the significant deposits obtained by Guzman and its former and current employees. (CP 7)

In discovery requests to U.S. Bank, the Nortons sought documents and information related to any internal monitoring, "red flags," internal investigations, and bank policies or methods of detecting fraud, as well as information regarding Bank employees involved in monitoring Guzman or his accounts. (CP 1939-51, 1953-67, 1969-92) Regulations promulgated under the Bank Secrecy Act, 31 U.S.C. § 5318(g)(1), require banks to report suspected money laundering or other violations of federal law to the Comptroller of the Currency by filing a Suspicious Activity Report ("SAR"). No bank may "disclose a SAR or any information that would reveal the existence of a SAR." 12 C.F.R. § 21.11(k)(1). Norton therefore

excluded and specifically disclaimed any intention of seeking any information regarding U.S. Bank's decision to file or not to file a SAR or "any information that would reveal the existence or contents of a S.A.R." (*See, e.g.*, CP 1974, 1976, 1982, 1986)

King County Superior Court Judge Monica Benton denied U.S. Bank's motion for a protective order, directing U.S. Bank to respond to the discovery requests, but providing that "U.S. Bank shall not produce a SAR, if any exist, or any information that would reveal the existence of a SAR." (CP 2017) Division One accepted discretionary review and reversed, holding that the Bank Secrecy Act created a broad and "unqualified discovery and evidentiary privilege" (Op. ¶ 11) that cannot be narrowly construed. (Op. ¶ 19; *see also* CP 2018-19) The privilege therefore barred discovery of "[a]ny internal system a bank has established for detecting and investigating money laundering . . . however it is labeled." (Op. ¶ 23); *Norton v. U.S. Bank Nat. Ass'n.*, 179 Wn. App. 450, 324 P.3d 693, *rev. denied*, 180 Wn.2d 1023 (2014).

On remand, Judge Beth Andrus ("the trial court") issued a protective order that barred Norton from obtaining direct evidence of the extent to which U.S. Bank, though its employees, had actual knowledge or suspicions of de Guzman's fraud or the extent of its

monitoring of his (or other) accounts. (CP 2035-43) Citing the absence of such direct evidence, the trial court then granted U.S. Bank's motion for summary judgment and dismissed the Norton's claims. (CP 1893-95) That summary judgment order became final following entry of default judgments against de Guzman and NDG, who were also named as defendants. (CP 2048-53) The Nortons appeal.

V. ARGUMENT

A. **A jury could find that U.S. Bank, through its employees, knowingly participated in and facilitated de Guzman's fraud.**

The trial court erred in dismissing on summary judgment the Nortons' claims against the Bank for aiding and abetting de Guzman's fraud. While the court's protective order precluded the Nortons from obtaining direct evidence, there is substantial circumstantial evidence that would allow a jury to find that U.S. Bank contributed to the Norton's losses by lending substantial assistance to de Guzman, with actual knowledge of his fraud.

This Court reviews the trial court's summary judgment order de novo, engaging in the same inquiry as the trial court. *August v. U.S. Bancorp*, 146 Wn. App. 328, 339, ¶ 27, 190 P.3d 86 (2008), *rev. denied*, 165 Wn.2d 1034 (2009). On summary judgment "[a]ll facts

and inferences are considered in the light most favorable to the nonmoving party.” *August*, 146 Wn. App. at 339, ¶ 27. “A summary judgment should be granted only when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *August*, 146 Wn. App. at 339, ¶ 27 (citing CR 56(c)). Here, the facts must be viewed in the light most favorable to the Nortons and Northland, the nonmoving parties.

One who “knowingly assists another in the commission of a tort, or who knowingly assists another in violating his fiduciary or trust obligation, is liable for losses proximately caused thereby.” *LaHue v. Keystone Inv. Co.*, 6 Wn. App. 765, 783, 496 P.2d 343, *rev. denied*, 81 Wn.2d 1003 (1972). *See* Restatement (Second) of Torts § 876 (1979) (defendant is liable to a third person for tortious conduct of another if defendant “knows that the other’s conduct constitutes a breach of duty and gives substantial assistance or encouragement to the other”). The extent of a defendant’s substantial assistance, as well as its knowledge, are questions of fact.

A defendant provides “substantial assistance” where the defendant “affirmatively assists, helps conceal, or fails to act when required to do so, thereby enabling the breach to occur.” 37 Am. Jur. 2d Fraud and Deceit § 293. “Substantiality is based upon all the

circumstances surrounding the transaction in question.” *Woods v. Barnett Bank of Ft. Lauderdale*, 765 F.2d 1004, 1013 (11th Cir. 1985).

A defendant’s knowledge of fraudulent conduct need not be shown by direct evidence. Assent to illegal activity is rarely amenable to direct proof and thus may be established by circumstantial evidence. *See Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963) (“[F]raud need not be established by direct and positive evidence. It may be proved, in whole or in part, by circumstantial evidence.”); *Sears v. Int’l Brotherhood of Teamsters, Chauffeurs, Stablemen & Helpers of Am., Local No. 524*, 8 Wn.2d 447, 452, 112 P.2d 850 (1941) (“Conspiracies need not be established by direct and positive evidence, and are seldom susceptible of such proof. They may be proven by circumstantial evidence, or be established by inferences like any other disputed fact.”). Compared with “transactions constituting the daily grist of the mill,” unusual or atypical business transactions allow the trier of fact to infer the knowledge necessary for aiding and abetting liability. *Woodward v. Metro Bank of Dallas*, 522 F.2d 84, 97 (5th Cir. 1975).

U.S. Bank certainly lent substantial assistance to de Guzman’s fraud. Its employees Copstead and Marza actively promoted de Guzman’s Ponzi scheme in return for referral fees. (CP 1150-51,

1526, 1532, 1534, 1550-51, 1558, 1560-62, 1587-90) The Bank opened 37 accounts for de Guzman, through which millions of dollars passed from de Guzman's investors into NDG accounts and back for de Guzman's personal benefit. U.S. Bank's branch manager Behn lowered the risk score on the newly opened P.R.E. account on November 12, 2008, only five days after the Nortons wired a total of over \$3.7 million to Grupo Innova. (CP 22, 1636-37)

The trial court erred in holding that the Nortons' aiding and abetting claim could not proceed in the absence of direct evidence that Marza, Copstead or Behn directly intervened on behalf of de Guzman to facilitate the Nortons' specific transactions with de Guzman. (RP 57) By enabling de Guzman to open and maintain, without any scrutiny, numerous accounts receiving large foreign wire transactions that were quickly disbursed to related de Guzman accounts, U.S. Bank allowed de Guzman's fraud to proceed undetected.

Similarly, the absence of direct evidence of U.S. Bank's knowledge of de Guzman's scheme is not a basis for dismissal of the Nortons' claims. A jury may find U.S. Bank's knowledge of de Guzman's fraudulent scheme based on its "indifference to the truth" in the face of suspicious circumstances. *See United States v.*

Westerfield, 714 F.3d 480, 485 (7th Cir. 2013) (affirming lawyer's conviction for aiding and abetting mortgage fraud). The circumstances here – where a bank's former employee enlists bank employees to solicit investors and open multiple accounts that are repeatedly used for large international wire transfers, along with steady deposits into the former employee's personal account at the bank – are sufficiently suspicious to raise an evidentiary inference of the Bank's deliberate participation and material assistance in de Guzman's Ponzi scheme.

B. A jury could find the Bank liable for its negligent supervision of its employees, in violation of its own policies and procedures.

The trial court also erred in dismissing Norton's claim for negligent supervision of its own employees in violation of its own procedures and policies. U.S. Bank failed to supervise and monitor its employees, including Benjamin Copstead and Charles Marza, who received commissions from de Guzman while employed at U.S. Bank, and Jeffrey Behn, who shielded the de Guzman accounts from scrutiny.

Regardless whether an employee is acting within the scope of his assigned duties, an employer has a duty to use reasonable care in supervising its employees to prevent the employee from using his

position and its instrumentalities to harm foreseeable victims. “[T]he relationship between employer and employee gives rise to a limited duty, owed by an employer to foreseeable victims, to prevent the tasks, premises, or instrumentalities entrusted to an employee from endangering others.” *Niece v. Elmview Grp. Home*, 131 Wn.2d 39, 48, 929 P.2d 420 (1997); *Garrison v. SagePoint Financial, Inc.*, 185 Wn. App. 461, 484, ¶ 30, 345 P.3d 792, *rev. denied*, 183 Wn.2d 1009 (2015); *see also* Restatement (Second) of Agency § 213 and cmt. g (1958) (“One who engages in an enterprise is under a duty to anticipate and to guard against the human traits of his employees which unless regulated are likely to harm others. He is likewise required to make such reasonable regulations as the size or complexity of his business may require.”).

The trial court held that the Bank owed no duty to the Nortons because they were not depositors or customers and “didn’t have any sort of a special relationship to the bank” (RP 57-58), relying on *Zabka v. Bank of Am. Corp.*, 131 Wn. App. 167, 171-72, ¶ 11, 127 P.3d 722 (2005) (“third party non-customers are not owed a duty of care by a bank, absent a direct relationship or statutory duty.”), *rev. denied*, 158 Wn.2d 1012 (2006). In *Zabka*, limited partner investors’ capital contributions were stolen by the general partner’s principals,

who directed the plaintiffs to wire their funds into accounts opened at Bank of America. This Court affirmed the dismissal of the investors' complaint under Rule 12(b)(6), on the ground that a bank owes no duty to a non-customer as a matter of law.

Zabka does not control here. The Supreme Court has recently clarified that the duty of supervision extends to reasonably foreseeable victims of the defendant's employees, and is not bounded by privity of contract. See *McKown v. Simon Prop. Grp., Inc.*, 182 Wn.2d 752, 764, ¶ 14, 344 P.3d 661 (2015). Instead, both the existence and the scope of the duty of supervision is limited by the doctrine of foreseeability. "[F]oreseeability can be a question of whether duty exists and also a question of whether the harm is within the scope of the duty owed." *McKown*, 182 Wn.2d at 764, ¶ 14.

Investors such as the Nortons, who were convinced to transfer funds to de Guzman's U.S. Bank accounts, are certainly foreseeable victims of de Guzman's use of the Bank to facilitate and lend legitimacy to his Ponzi scheme. Thus, in *McGraw v. Wachovia Sec. L.L.C.*, 756 F. Supp. 2d 1053, 1075 (N.D. Iowa 2010), the district court held that "'sufficiently suspicious' circumstances here may have placed the defendants on notice that [its employee] Lovegren was engaged in improper conduct as to them, giving rise to a duty to

monitor and investigate Lovegren's outside activities or private securities transactions" with non-customers.

Even though U.S. Bank's Code of Ethics prohibits additional employment without prior Bank approval and bars employees from engaging in banking transactions with people or organizations with whom the employee has a financial interest (CP 1193-95), its Bank's employees Copstead and Marza actively promoted de Guzman's investments, receiving commissions from this outside activity while employed by U.S. Bank. U.S. Bank failed to monitor its employees' accounts to determine whether its employees were receiving funds outside of their employment. (CP 1194)

Similarly, U.S. Bank failed to properly supervise Behn, who opened "low risk" accounts for de Guzman despite the high level of risky foreign transactions in his existing accounts. Behn's superiors had access to the account opening documents, but the Bank had no procedures to electronically store those documents, placing them in the customer file without any review. (CP 1761-63, 1170) U.S. Bank did not require its employees to engage in any further risk management review but to instead rely solely on its customer's benign assertions in documents used to open de Guzman's accounts. (CP 1761-64) U.S. Bank failed to monitor the amounts of

international wire transfers after its employees had opened the accounts for de Guzman, or take any steps to ensure that the representations of the accounts as “low risk” was accurate. (CP 1761-63) The lack of any review and inadequate supervision violated the bank’s own policies and procedures as well as sound risk management standards. (CP 1173)

C. The Bank’s negligence was a proximate cause of Norton’s damages.

The trial court also erred in holding that no act of any U.S. Bank employee was a proximate cause of Norton’s losses. The Bank gave de Guzman’s fraud an imprimatur of legitimacy, creating the environment in which these fraudulent activities could continue unabated.

The issue of causation is one of fact for the jury. “Cause in fact, or ‘but for’ causation, refers to ‘the physical connection between an act and an injury.’ ” *Ang v. Martin*, 154 Wn.2d 477, 482, ¶ 10, 114 P.3d 637 (2005); *M.H. v. Corp. of Catholic Archbishop of Seattle*, 162 Wn. App. 183, 194, ¶ 25, 252 P.3d 914, *rev. denied*, 173 Wn.2d 1006 (2011). The evidence presents an issue of fact whether Norton’s losses would have occurred “but for” the Bank’s assistance and negligent supervision. *See Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 83-84, ¶ 57, 170 P.3d 10

(2007); *Schooley v. Pinch's Deli Mkt., Inc.*, 134 Wn.2d 468, 478-79, 951 P.2d 749 (1998); WPI 15.01 (“There may be more than one proximate cause of an [injury].”).

Had U.S. Bank properly refused to allow de Guzman’s multiple accounts to be used for frequent foreign six figure wire transfers, de Guzman would not have been able to easily divert investor funds for his personal benefit. Within days of Norton’s investments with de Guzman, de Guzman’s companies had wired over \$3 million into de Guzman’s personal accounts at U.S. Bank. The fact that de Guzman may have been able to achieve his objectives using another commercial bank does not negate causation as a matter of law, but presents a disputed fact issue for the jury. *See In re Liberty State Benefits of Delaware, Inc.*, 541 B.R. 219, 238 (Bankr. D. Del. 2015) (rejecting argument that whether bank’s failure to take steps to close accounts in response to red flags was speculative: “the issue of proximate cause is one for the finder of fact to determine at a later stage of the litigation.”).

Further, that U.S. Bank continued to lend its services to de Guzman contributed to the veneer of legitimacy that Norton relied upon in entrusting his funds to de Guzman. Norton took de Guzman’s long term and stable relationship with an established

commercial bank into account in deciding to invest with de Guzman. (CP 1734-35) Had de Guzman been barred from establishing a relationship with a reputable bank, “it would have given [Norton] pause.” (CP 1735) This Court should allow the jury to resolve this disputed fact issue.

D. This Court should hold under RAP 2.5(c)(2) that the Bank Secrecy Act’s discovery privilege does not bar disclosure of information compiled by the Bank in the ordinary course of business for risk management purposes.

The trial court granted summary judgment in the absence of direct evidence that U.S. Bank had notice of de Guzman’s Ponzi scheme, or that its employees had been enlisted by de Guzman to recruit investors. While the circumstantial evidence of the Bank’s negligence and support of de Guzman was sufficient to raise a triable issue of fact, the absence of direct evidence was a direct consequence of the appellate court’s previous holding that broadly construed the Bank Secrecy Act to preclude discovery not just of a Suspicious Activity Report, but of U.S. Bank’s policies for monitoring suspicious activity, and information pertaining to the Bank’s supervision of its current and former employees. Pursuant to RAP 2.5(c)(2), this Court should revisit that earlier decision and hold that Norton has the right to obtain in discovery the Bank’s policies, procedures and any

investigatory or risk management documents that exist independent of the Bank's reporting obligations under federal law.

RAP 2.5(c)(2) provides an exception to the "law of the case" doctrine, allowing the appellate court to "review the propriety of an earlier decision of the appellate court in the same case and, where justice would best be served, decide the case on the basis of the appellate court's opinion of the law at the time of the later review." *See First Small Bus. Inv. Co. of California v. Intercapital Corp. of Oregon*, 108 Wn.2d 324, 333, 738 P.2d 263 (1987) ("the law of the case doctrine does not prevent the court from overruling a previous erroneous decision.").

In the first appeal in *FSBIC*, the Court of Appeals reversed a final judgment, holding that the plaintiff's law firm should have been disqualified from further representation based upon a conflict of interest. The Supreme Court denied review. *Intercapital Corp. of Oregon v. Intercapital Corp. of Washington*, 41 Wn. App. 9, 700 P.2d 1213, *rev. denied*, 104 Wn.2d 1015 (1985). After the trial court entered a disqualification order on remand, the Supreme Court accepted direct review and reversed, holding that the Court of Appeals erred in ordering disqualification and that the law of the case doctrine did not preclude correction of this erroneous previous

decision pursuant to RAP 2.5(c)(2). *FSBIC*, 108 Wn.2d at 332-33, 337-38.

In this case, citing the mandate from the Court of Appeals, the trial court broadly construed the privilege and narrowly construed its provision for disclosure of “underlying facts, transactions and documents” that exist for basic risk management purposes, independent of any mandate flowing from the Bank Secrecy Act. 12 C.F.R. § 21.11(k)(1)(ii)(A)(2). As a result, the trial court gave Norton access in discovery to only “transactional” documents, such as de Guzman’s account records, prohibiting discovery of any investigatory documents or supervisory policies that may reveal how a bank monitors suspicious accounts, investigates suspected fraud, or its employees. (CP 2035-38) *See Norton*, 179 Wn. App. at 457-58, ¶ 15.

By strictly limiting Norton’s right to discovery, the trial court made it virtually impossible for Norton to uncover direct evidence of the Bank’s facilitation of de Guzman’s fraud, thereby transforming the Bank Secrecy Act’s limited discovery privilege into a broad immunity provision for banks. This Court should review the Court of Appeals’ earlier decision and reverse the trial court’s protective order based on a more complete evidentiary record and recent

federal case law because the expansive protective order entered in this case is not supported by the language of the statute, its legislative history, or public policy.

The Bank Secrecy Act requires financial institutions to report money laundering or other suspicious activity to law enforcement, and requires that those reports remain confidential:

[N]either the financial institution, director, officer, employee, or agent of such institution (whether or not any such person is still employed by the institution), nor any other current or former director, officer, or employee of, or contractor for, the financial institution or other reporting person, may notify any person involved in the transaction that the transaction has been reported.

31 U.S.C. § 5318(g)(2)(A)(i). The Office of the Comptroller of the Currency's implementing regulation makes the existence of such Suspicious Activity Reports privileged from disclosure, but authorizes disclosure of the "underlying facts, transactions, and documents upon which a SAR is based." 12 C.F.R. § 21.11(k)(1)(ii)(A)(2).

This privilege must be narrowly, not broadly construed. "The right to discovery is an integral part of the right to access the courts embedded in our constitution." *Cedell v. Farmers Ins. Co. of Washington*, 176 Wn.2d 686, ¶ 12, 695, 295 P.3d 239 (2013). By contrast, privileges are narrowly, not broadly, construed because

they “impede[] the search for truth.” *Gendler v. Batiste*, 174 Wn.2d 244, 260, ¶ 36, 274 P.3d 346 (2012) (federal highway reporting privilege is “narrowly construed because it impedes the search for truth.”). *Accord, Lowy v. PeaceHealth*, 174 Wn.2d 769, 778, ¶ 14, 280 P.3d 1078 (2012); *C.J.C. v. Corp. of Catholic Bishop of Yakima*, 138 Wn.2d 699, 717, 985 P.2d 262 (1999) (legislative grants of privilege “strictly construed”). Federal evidentiary privileges are similarly narrowly construed. *Pierce County, Wash. v. Guillen*, 537 U.S. 129, 144-45, 123 S. Ct. 720, 730, 154 L. Ed. 2d 610 (2003). “[S]tatutory privileges . . . are not to be used as a mechanism to conceal from discovery otherwise discoverable information.” *Lowy*, 174 Wn.2d at 781, ¶ 20.

The plain language of the regulation prohibits only disclosure of “a SAR, or any information that would reveal the existence of a SAR,” 12 C.F.R. § 21.11(k)(1)(i), and makes clear that there is no bar to revealing “[t]he underlying facts, transactions, and documents upon which a SAR is based.” 12 C.F.R. § 21.11(k)(1)(ii)(A)(2). This Court should follow this plain language to allow discovery of information that does not reveal the existence of a SAR.

The Office of the Comptroller of Currency (“OCC”), which drafted the regulation, itself has rejected the expansive

interpretation given by the Court of Appeals in its first decision. The OCC has clarified that documents kept in the ordinary course of business, not just underlying account documents, are subject to disclosure:

[T]he OCC is revising the final rule's language at § 21.11(k)(2) to read '* * * [t]he underlying facts, transactions, and documents upon which a SAR is based, including but not limited to, disclosures expressly listed as illustrative examples in the rule.

Confidentiality of Suspicious Activity Reports, 75 Fed. Reg. 75576-01, at 75581. Thus neither the language of the regulation nor its drafting history supports the sweeping interpretation of the privilege or the extremely narrow scope of the "underlying facts, transactions and documents" under the protective order entered here.

Moreover, federal courts, which are primarily responsible for interpreting federal law, have rejected the expansive reading of the privilege adopted in this case. The Court of Appeals decision, upon which the trial court relied, espouses perhaps the most sweeping interpretation of the Bank Secrecy Act in the country, one that has

been rejected by numerous federal courts.² The most recent federal court decisions properly recognize that banks review customer accounts and produce investigative reports, monitor their employees, and monitor customer accounts as a matter of risk management that may be wholly unrelated to their obligation to report suspected money laundering to the federal government:

[A]lthough a bank may undertake an internal investigation in anticipation of filing a SAR, it is also a standard business practice for banks to investigate suspicious activity as a necessary and appropriate measure to protect the bank's interests, and the internal bank reports or memorandum generated by the bank regarding such an investigation are not protected by SAR privilege.

² The cases cited by the Court of Appeals do not support the sweeping view that any bank policies and supervision of bank employees are immune from discovery. See, e.g., *Whitney Nat'l Bank v. Karam*, 306 F. Supp. 2d 678, 682-683 (S.D. Tex. 2004) (protecting only "communications pertaining to a SAR or its contents; 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"); *Cotton v. PrivateBank and Trust Co.*, 235 F. Supp. 2d 809, 815 (N.D. Ill. 2002) ("drafts of SARs or other work product or privileged communications that relate to the SAR itself" are not to be produced); *Union Bank of California, N.A. v. Superior Court*, 130 Cal. App. 4th 378, 29 Cal. Rptr. 3d 894, 904 (2005) ("internal documents prepared in anticipation of the filing of a SAR are confidential to the extent they contain the same information as a SAR."). See *Norton*, 179 Wn. App. at 457-69, ¶¶ 14-19).

In re Whitley, 2011 WL 6202895*4 (Bankr. M.D.N.C. Dec. 13, 2011), citing *Freedman & Gersten, LLP v. Bank of America, N.A.*, 2010 WL 5139874, at *1 (D.N.J. Dec. 8, 2010).

Thus, more recent cases properly recognize that all documents generated or received in the ordinary course of business, including those that may have led up to the filing of a SAR, are discoverable, so long as they do not reference a SAR itself. These include investigatory documents concerning specific account activities, computer generated monitoring alerts, internal bank emails concerning the accounts, and the Bank's policies and procedures with respect to monitoring accounts and supervising its employees. See *In re Mongelluzzi*, 2015 WL 4389564, at *2 (Bankr. M.D. Fla. July 14, 2015); *Fort Worth Employees' Ret. Fund v. J.P. Morgan Chase & Co.*, 2015 WL 1726435, at *3 (S.D.N.Y. Apr. 15, 2015) ("fraud investigations that . . . would be conducted independent of whether they might result in the filing of a SAR"). Because "detecting fraud is a part of a bank's ordinary course of business . . . documents generated as part of this standard business practice of investigating potential fraud or other irregularities are discoverable . . . even if this fraud investigation parallels the process

of preparing a SAR.” *First Am. Title Ins. Co. v. Westbury Bank*, 2014 WL 4267450, at *3 (E.D. Wis. Aug. 29, 2014).

The Court of Appeals in its previous decision ignored the distinction between routine risk management and SAR investigations in holding that any indicia of a “red flag,” or the Bank’s procedures in determining whether one exists, is privileged because it could lead one to conclude that the Bank had filed a SAR. As the district court held in *Wultz v. Bank of China Ltd.*, 56 F. Supp. 3d 598, 601-02 (S.D.N.Y. 2014), “any bank . . . has its own reasons for investigating suspicious activity other than the statutory obligation to file a SAR—including to protect itself from fraud and to make sure it does not violate or abet the violation of other banking regulations and statutes, such as money laundering statutes. Thus, investigatory documents do not by themselves reveal the existence of a SAR.” This Court should review the initial decision of the Court of Appeals and adopt this reasoning.

The Nortons should have been allowed to review the Bank’s internal risk management and employee supervisory documents that could shed light on the Bank’s involvement in de Guzman’s Ponzi scheme. The court erred in holding that these internal Bank

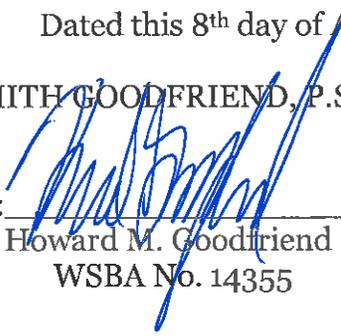
documents are shielded from discovery by the Bank's unchallenged assertion that they may in some way relate to the filing of a SAR.

VI. CONCLUSION.

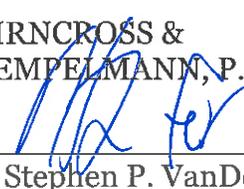
This Court should review the Court of Appeals' previous decision, which unduly expanded the Bank Secrecy Act beyond its express language, its intended purpose and the interpretation given to it by federal courts, to allow discovery of a bank's routine risk management procedures, policies and actions. Regardless, this Court should reverse the dismissal of the Norton's claims against U.S. Bank for negligent supervision and abetting de Guzman's fraud.

Dated this 8th day of April, 2016.

SMITH GOODFRIEND, P.S.

By: 
Howard M. Goodfriend
WSBA No. 14355

CAIRNCROSS &
HEMPELMANN, P.S.

By: 
Stephen P. VanDerhoef
WSBA No. 20088

HILL GELSTRAP, P.C.,

By: 
Frank Hill
Pro Hac Vice

Attorneys for Appellants

DECLARATION OF SERVICE

The undersigned declares under penalty of perjury, under the laws of the State of Washington, that the following is true and correct:

That on April 8, 2016, I arranged for service of the foregoing Brief of Appellants, to the court and to the parties to this action as follows:

Office of Clerk Court of Appeals - Division I One Union Square 600 University Street Seattle, WA 98101	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-File
Stephen P. VanDerhoef Cairncross & Hempelmann PS 524 Second Avenue, Suite 500 Seattle, WA 98104-2323 svanderhoef@cairncross.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Frank Hill Hill Gilstrap, P.C. 1400 W. Abram Street Arlington, TX 76013 Fhill@hillgilstrap.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail
Peter S. Ehrlichman Shawn J. Larsen-Bright Dorsey & Whitney LLP 701 5th Ave., Suite 6100 Seattle WA 98104-7043 ehrichman.peter@dorsey.com larsen.bright.shawn@dorsey.com	<input type="checkbox"/> Facsimile <input type="checkbox"/> Messenger <input checked="" type="checkbox"/> U.S. Mail <input checked="" type="checkbox"/> E-Mail

DATED at Seattle, Washington this 8th day of April, 2016.


Jenna L. Sanders

1 HONORABLE BETH ANDRUS
2 HEARING DATE: AUGUST 28, 2015, 1:30 P.M.
3 WITH ORAL ARGUMENT
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7 SUPERIOR COURT FOR THE STATE OF WASHINGTON
8 IN AND FOR THE COUNTY OF KING

9 JOHN NORTON; KRISTINE NORTON;
10 and NORTHLAND CAPITAL, LLC;

11 Plaintiffs,

12 vs.

13 U.S. BANK NATIONAL ASSOCIATION,
14 JOSE NINO DE GUZMAN, and NDG
INVESTMENT GROUP, LLC

15 Defendants.
16
17

NO. 10-2-36431-5 SEA

~~PROPOSED~~ ORDER GRANTING U.S.
BANK'S MOTION FOR SUMMARY
JUDGMENT

18 This matter came before the Court on Defendant U.S. Bank National Association's ("U.S.
19 Bank") Motion for Summary Judgment.

20 The Court heard the oral argument of counsel for U.S. Bank and counsel for Plaintiffs
21 Northland Capital LLC, John Norton, and Kristine Norton on August 28, 2015 and fully
22 considered the pleadings and records on file herein, including without limitation:

- 23 1. U.S. Bank's Motion for Summary Judgment, DKT 168;
24 2. Declaration of Shawn Larsen-Bright in Support of Defendant U.S. Bank's Motion for
25 Summary Judgment and exhibits attached thereto;
26 3. Statement of Non-Washington Authorities in U.S. Bank's Motion for Summary
27 Judgment;

ORDER GRANTING U.S. BANK'S MOTION FOR
SUMMARY JUDGMENT - 1
10-2-36431-5 SEA

DORSEY & WHITNEY LLP
701 FIFTH AVENUE, SUITE 6100
SEATTLE, WA 98104-7043
PHONE: (206) 903-8800
FAX: (206) 903-8820

CP 1893
App. A

- 1 4. Stipulation and [Proposed] Order Allowing Parties to File Over-Length Briefing in
- 2 Connection with Defendants U.S. Bank's Motion for Summary Judgment;
- 3 5. Plaintiffs' Response and Opposition to U.S. Bank's Motion for Summary Judgment;
- 4 6. Declaration of Stephen P. VanDerhoef and exhibits attached thereto;
- 5 7. Declaration of Catherine Ghiglieri in Opposition to Defendant U.S. Bank's Motion
- 6 for Summary Judgment and exhibit attached thereto;
- 7 8. Non-Washington Authorities re Plaintiff's Opposition to U.S. Bank's Motion for
- 8 Summary Judgment;
- 9 9. Errata to Citations in Plaintiffs' Response and Opposition to U.S. Bank's Motion for
- 10 Summary Judgment dated August 27, 2015;
- 11 10. Plaintiffs' Response and Opposition to U.S. Bank's Motion for Summary Judgment
- 12 (with Corrected Record Citations in Bold) provided to the Court on August 27, 2015;
- 13 11. U.S. Bank's Reply in Support of Its Motion for Summary Judgment;
- 14 12. Supplemental Declaration of Shawn Larsen-Bright in Support of Defendant U.S.
- 15 Bank's Reply in Support of Its Motion for Summary Judgment and exhibit attached
- 16 thereto;
- 17 13. Declaration of Richard George and exhibit attached thereto;
- 18 14. GR 17 Declaration of Shawn Larsen-Bright;
- 19 15. Declaration of Richard S. Pasley and exhibit attached thereto;
- 20 16. Statement of Non-Washington Authorities in U.S. Bank's Reply in Support of its
- 21 Motion for Summary Judgment; and
- 22 17. Plaintiffs' Motion for Voluntary Dismissal with Prejudice of Specified Claims, and
- 23 Proposed Order Granting the same (which the Court then entered, DKT 185).

24 The Court having considered the foregoing materials and the arguments of counsel, and
25 being otherwise fully apprised,

26 Now, therefore, it is hereby ORDERED, ADJUDGED and DECREED that:

27 U.S. Bank's Motion for Summary Judgment is hereby GRANTED. There is no genuine

1 issue of material fact and U.S. Bank is entitled to judgment of dismissal as a matter of law of all
2 remaining claims asserted in this action against U.S. Bank by Plaintiffs Northland Capital LLC,
3 John Norton, and Kristine Norton, including their claims for: aiding and abetting fraud, breach
4 of fiduciary duty, and conversion (Seventh, Eighth, and Ninth Causes of Action); and negligent
5 hiring, retention, and/or supervision (Tenth Cause of Action). All remaining claims asserted by
6 Plaintiffs Northland Capital LLC, John Norton, and Kristine Norton against U.S. Bank in this
7 action are hereby DISMISSED with prejudice. JUDGMENT shall be entered accordingly.

8
9 DONE IN OPEN COURT this 11th day of September, 2015.

10 Electronic signature attached

11
12

The Honorable Beth Andrus
King County Superior Court Judge

13 Presented by:

14 DORSEY & WHITNEY LLP

15 

16

Peter Ehrlichman, WSBA No. 6591

17 Shawn Larsen-Bright, WSBA No. 37066

18 *Attorneys for Defendant U.S. Bank, N.A.*

FILED

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THE HONORABLE ~~BYRON~~ ANDRUS
SUPERIOR COURT CLERK

E-FILED

CASE NUMBER: 10-2-36431-5 SEA

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

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,

10-2-36431-5 SEA

PROTECTIVE ORDER

Plaintiffs,

v.

U.S. BANK NATIONAL ASSOCIATION
d/b/a U.S. BANK, JOSE NINO DE
GUZMAN, and NDG INVESTMENT
GROUP, LLC,

Defendants.

This matter is before the Court on the Motion of Defendant U.S. Bank National Association (“U.S. Bank”) for a Protective Order from Plaintiffs’ Discovery Seeking Irrelevant Information that U.S. Bank is Legally Prohibited from Disclosing, and pursuant to the opinion of Division One of the Court of Appeals of the State of Washington in this matter dated February 18, 2014 (the “Court of Appeals Opinion”), which orders entry of a protective order as requested by U.S. Bank. The Court of Appeals issued its Mandate on August 6, 2014.

NOW, THEREFORE:

ORDER GRANTING U.S. BANK’S MOTION FOR
PROTECTIVE ORDER
10-2-36431-5 SEA

CP-2035

App. B

DORSEY & WHITNEY LLP.
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Phone: (206) 903-8800
Fax: (206) 903-8821

1 IT IS HEREBY ORDERED: Plaintiffs are hereby barred from seeking any discovery
2 relating to (a) information and documents created or prepared as part of any suspicious activity
3 monitoring, investigating or reporting by U.S. Bank, if any, including any information or
4 documents that would disclose the existence or non-existence of any suspicious activity
5 investigation or report that may have resulted from such monitoring; and (b) the methods,
6 policies and procedures U.S. Bank employs generally to monitor and detect for suspicious
7 activity. Without limitation, this Order specifically prohibits Plaintiffs from obtaining any
8 further discovery in response to the following prior discovery requests of Plaintiffs: Request
9 Nos. 11-14 and 27 of Plaintiffs' First Requests for Production to U.S. Bank; Interrogatory Nos.
10 4, 7-10 and 14 of Plaintiffs' First Set of Interrogatories to U.S. Bank; Request Nos. 19-22, 24-30
11 and 33-34 of Plaintiffs' Second Requests for Production to U.S. Bank; and Interrogatory Nos. 1-
12 10 of Plaintiffs' Second Set of Interrogatories to U.S. Bank.

13 Without in any way limiting the foregoing, this Order is intended to and shall provide all
14 protections from any and all discovery to which U.S. Bank is entitled consistent with the Court
15 of Appeals Opinion.

16 DATED: November 19, 2014

Beth M Andrus

Hon. Beth Andrus
King County Superior Court Judge

17 Presented by:

18 DORSEY & WHITNEY LLP

19 /s/ Shawn Larsen-Bright

20 Peter S. Ehrlichman #6591
21 Shawn Larsen-Bright #37066
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1 Notice of Presentation Waived:

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8 Seattle, WA 98104

9 and

10 /s/ Frank Hill (by email authorization)

11 Frank Hill, Texas State Bar No. 09632000

12 Hill Gilstrap

13 1400 West Abram Street

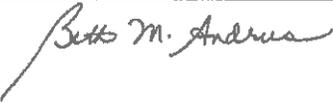
14 Arlington, TX 76013

15 *Attorneys for Plaintiffs*

King County Superior Court
Judicial Electronic Signature Page

Case Number: 10-2-36431-5
Case Title: NORTON ET AL VS US BANCORP NATIONAL ASSN DBA ET
AL
Document Title: ORDER PROTECTIVE ORDER

Signed by: Beth Andrus
Date: 11/19/2014 10:56:23 AM

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Judge/Commissioner: Beth Andrus

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O=KCDJA, CN="Beth
Andrus:dE53Hnr44hGmww04YYhwmw=="

Page 4 of 4

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

JOHN NORTON and KRISTINE NORTON
individually; and NORTHLAND CAPITAL,
LLC,

Plaintiffs,

v.

U.S. BANK NATIONAL ASSOCIATION
d/b/a U.S. BANK, JOSE NINO DE
GUZMAN, and NDG INVESTMENT
GROUP, LLC,

Defendants.

10-2-36431-5 SEA

**ORDER GRANTING IN PART AND
DENYING IN PART U.S. BANK'S
MOTION TO ENFORCE PROTECTIVE
ORDER AND STRIKE PLAINTIFFS'
IMPROPER EXPERT OPINIONS**

Defendant U.S. Bank National Association ("U.S. Bank") has filed a Motion to Enforce Protective Order and Strike Plaintiffs' Improper Expert Opinions ("Motion"). The Court has reviewed the Motion; the Declaration of Shawn Larsen-Bright (with exhibits) submitted in support of the Motion; Plaintiffs' Opposition to the Motion; the Declaration of Stefanie Klein (with exhibits) submitted in support of Plaintiffs' Opposition; the Declaration of Catherine Ghiglieri in Opposition to the Motion; and U.S. Bank's Reply in Support of its Motion; and other pertinent pleadings and papers on file with the Court. On June 5, 2015, after reviewing these materials, the Court heard oral argument of the parties on the Motion and issued an oral ruling. This Order is intended to confirm the Court's oral ruling and is not intended to conflict with the Court's prior oral ruling in any respect.

1 U.S. Bank moves to strike and preclude all opinions of Plaintiffs' expert Catherine A.
2 Ghiglieri, as expressed in her Expert Report dated May 15, 2015 ("Report"), related to the Bank
3 Secrecy Act, 31 U.S.C. § 5311, et seq., and all related and implementing laws, regulations,
4 manuals, and regulatory guidance relating to the Bank Secrecy Act and related anti-money
5 laundering (AML) obligations, including without limitation the U.S.A. Patriot Act and 12 C.F.R.
6 § 21.21 (collectively, the "Bank Secrecy Act"). U.S. Bank argues that these opinions concerning
7 the Bank Secrecy Act should not be admitted for various reasons, particularly because they
8 address topics that are subject to a discovery and evidentiary privilege under the Bank Secrecy
9 Act and applicable law, including the prior opinion of the Washington Court of Appeals in this
10 case, *Norton v. U.S. Bank Nat'l Assoc.*, 179 Wn. App. 450, 324 P.3d 693 (2014) (the "Opinion"),
11 and the Protective Order entered by this Court on November 19, 2014 (the "Protective Order").
12 Plaintiffs contend that Ms. Ghiglieri's opinions should be allowed.

13 Being fully apprised, the Court hereby orders that U.S. Bank's Motion is GRANTED IN
14 PART and DENIED IN PART. The Court concludes that the Bank Secrecy Act, the Opinion,
15 the Protective Order, and other applicable law establish both a discovery privilege and an
16 evidentiary privilege concerning the Bank Secrecy Act. Evidence relating to the Bank Secrecy
17 Act, what the Bank Secrecy Act requires, and whether or not the Bank Secrecy Act was violated
18 falls within this evidentiary privilege and will not be admitted. Plaintiffs' expert will not be
19 permitted to testify about any of these topics and cannot rely, for any of her opinions in this case,
20 on the Bank Secrecy Act or on any obligation imposed under the Bank Secrecy Act. More
21 specifically, Plaintiffs' expert will not be permitted to testify about: the requirements of the
22 Bank Secrecy Act; whether U.S. Bank complied with the Bank Secrecy Act; the duties or
23 standards arising under or in connection with the Bank Secrecy Act; whether U.S. Bank
24 complied with the duties or standards arising under or in connection with the Bank Secrecy Act;
25 what constitutes a "red flag" or "suspicious" activity under the Bank Secrecy Act, or any duties
26 or standards arising under or in connection with it; whether U.S. Bank sufficiently or properly
27 identified "red flags" or "suspicious" activity as required under the Bank Secrecy Act, or any

1 duties or standards arising under or in connection with it; or any other topic relating to the Bank
2 Secrecy Act, the monitoring, investigating, or reporting of suspicious activity as required by the
3 Bank Secrecy Act, or any duties or standards arising under or in connection with the Bank
4 Secrecy Act. Any and all such opinions of Plaintiffs' expert are hereby stricken and will not be
5 permitted at trial. To the extent such opinions are woven throughout the Report, Plaintiffs'
6 expert must separate them out and remove them. The Court also concludes that the Bank
7 Secrecy Act does not create a private cause of action and that the Bank Secrecy Act does not
8 create a standard of care running from U.S. Bank to noncustomers such as Plaintiffs.

9 Plaintiffs' expert's opinions as to whether conduct of U.S. Bank complied with U.S.
10 Bank's own policies or procedures will not be stricken at this time. To the extent Plaintiffs'
11 expert is relying for any of her opinions on standards of care independent from the Bank Secrecy
12 Act and independent from any duties and standards created under or in connection with the Bank
13 Secrecy Act, such opinions will not be stricken at this time. The Court will reassess Plaintiffs'
14 expert's opinions, if necessary, after Plaintiffs' expert provides a revised Report in compliance
15 with this Order.

16 It is further HEREBY ORDERED:

17 1. U.S. Bank's Motion is granted in part and denied in part as set forth herein.
18 Pursuant to the Court's discretion and ER 702, ER 402, ER 403, and other applicable law, the
19 Court hereby orders that all opinions of Ms. Ghiglieri relating to the Bank Secrecy Act or any
20 duties or standards arising under or in connection with the Bank Secrecy Act will not be
21 considered in this matter. Ms. Ghiglieri is precluded from testifying in this matter as to any
22 opinions or views she may have on such topics.

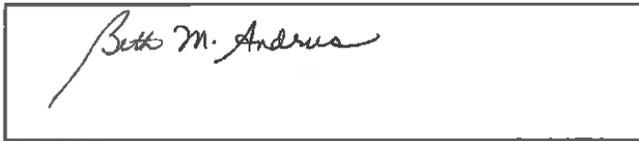
23 2. Plaintiffs shall obtain from Ms. Ghiglieri and disclose to U.S. Bank a revised
24 Report that removes all opinions inconsistent with this Order by no later than **June 19, 2015**.

25 3. U.S. Bank's request for revisions to the case schedule concerning remaining
26 expert discovery is granted. Expert discovery shall proceed in accordance with the following
27 amended schedule:

King County Superior Court
Judicial Electronic Signature Page

Case Number: 10-2-36431-5
Case Title: NORTON ET AL VS US BANCORP NATIONAL ASSN DBA ET
AL
Document Title: ORDER ON MTN TO ENFORCE PROTECTIVE ORDER

Signed by: Beth Andrus
Date: 6/15/2015 1:49:10 PM

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Judge/Commissioner: Beth Andrus

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Page 5 of 5