IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

WILLIAM T. WULIGER, RECEIVER,

Plaintiff,

vs.

OFFICE OF THE COMPTROLLER
OF THE CURRENCY, et al.,

Defendants.

Case No. 1:05CV0108

U.S. District Judge David A. Katz

STATEMENT OF INTEREST OF THE UNITED STATES

Pursuant to 28 U.S.C. § 517,[1] the United States Department of Justice, by its undersigned attorneys, hereby submits this Statement of Interest to protect from unauthorized disclosure any Suspicious Activity Reports (SARs) submitted by financial institutions under the Bank Secrecy Act, 31 U.S.C. § 5318(g)(1), from unauthorized disclosure.[2]

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[1] 28 U.S.C.§ 517 provides in pertinent part: "Any officer of the Department of Justice[] may be sent by the Attorney General to any . . . district of the United States to attend to the interests of the United States in a suit pending in a court of the United States[.]"

[2] The Board of Governors of the Federal Reserve, the Office of Thrift Supervision, the Federal Deposit Insurance Corporation, and the National Credit Union Administration concur with the arguments set forth herein.

Background

The Financial Crimes Enforcement Network ("FinCEN") is a bureau of the United States Department of the Treasury, whose mission is to safeguard the financial system from the abuses of financial crime, including terrorist financing, money laundering, and other illicit activity. Pursuant to a delegation of authority from the Secretary of the Treasury, FinCEN administers the recordkeeping, reporting, and anti-money laundering program requirements of the Bank Secrecy Act, 31 U.S.C. §§ 5311, et seq., and maintains a government-wide data access service that includes reports collected under this authority. See 31 U.S.C. § 310.

This litigation involves an attempt by a private party to compel FinCEN's fellow Treasury agency, the Office of the Comptroller of the Currency ("OCC"), to provide him with the most sensitive type of report collected under the Bank Secrecy Act – the Suspicious Activity Report ("SAR"). The Bank Secrecy Act provides specific limits on who may have access to any such reports collected under its authority (generally, certain government agencies) and the use to which any such reports may be put (criminal, tax, regulatory, and counter-terrorism). The Bank Secrecy Act extends special confidentiality protection to SARs and even to the fact that one has been filed. Under this authority, FinCEN, the OCC, and the four other federal banking regulators all have promulgated regulations strictly protecting the confidentiality of these highly sensitive reports. The complaint by its very nature calls into question FinCEN's SAR regulations, and places at risk one of the pillars of the Suspicious Activity Reporting system – its confidentiality. The United States, therefore, has an interest in protecting the SARs against unauthorized disclosure, as set forth in the Bank Secrecy Act.

Plaintiff in this action seeks declaratory and injunctive relief compelling the OCC to provide him with SARs, documentary material supporting any SARs, and any related information pertaining to persons and entities allegedly involved in a viatical fraud scheme. The issue presented by the OCC's motion for summary judgment is whether plaintiff, who is not within the class of entities statutorily entitled to such information, may nonetheless compel its production despite the statutory and regulatory prohibitions on its disclosure.

Statement of Facts

The United States adopts, and hereby incorporates by reference, the statement of facts from the OCC's brief in support of its motion to dismiss or, in the alterative, for summary judgment.

Summary of Argument

Plaintiff in this action may not compel the production of SARs, or even the acknowledgment of their existence or non-existence. The Bank Secrecy Act authorizes FinCEN (as the Secretary of Treasury's delegee) to require financial institutions to file reports, including reports of suspicious activity, for regulatory, tax, criminal, and counter-terrorism purposes. The Act further authorizes FinCEN to provide these reports to certain government agencies, to maintain them in a government-wide data access network, and to administer the network according to applicable legal guidelines and policies. Plaintiff's demand does not fall within these legal requirements.

SARs, moreover, are entitled to additional protection from disclosure. Financial institutions that file them are statutorily prohibited from disclosing to anyone involved in the transaction that the transaction has been reported. Pursuant to this authority, FinCEN, the OCC, and the other federal banking regulators have promulgated regulations prohibiting financial institutions from notifying anyone

other than appropriate law enforcement and regulatory agencies of the filing. Courts have upheld these regulations as reasonable interpretations of the statute because disclosure, for example in litigation, makes it more likely that the persons involved in the transaction will be notified of the filing, in derogation of the Act. In an attempt to end-run this prohibition, plaintiff has sought to compel disclosure from a governmental agency – the OCC. But that disclosure, too, is prohibited. The Bank Secrecy Act forbids governmental officials from making such disclosure, unless the disclosure is necessary to fulfill their official duties. Plainly, the fact that a plaintiff might find an SAR (or the fact of its existence or nonexistence) useful to its case has no bearing on the official need for a governmental official to disclose it. Were it otherwise, the disclosure prohibition would be rendered meaningless.

Congress did not enact the Bank Secrecy Act to provide tools for civil discovery, and there is no injustice in honoring that choice. As FinCEN, the OCC, and the courts have noted in the past, the disclosure prohibition on SARs does not extend to the underlying transactional documents (such as account records), and plaintiffs are free to seek such documents, question witnesses about them, and ultimately, to argue the inferences therefrom to the ultimate trier of fact. Accordingly, the OCC's motion to dismiss or, in the alternative, for summary judgment should be granted.

ARGUMENT

A. The Statutory and Regulatory Framework

Congress enacted the Bank Secrecy Act in 1970 to authorize the Secretary of the Treasury to require reporting and recordkeeping deemed to have a "high degree of usefulness" to governmental criminal, tax, or regulatory investigations or proceedings. See 31 U.S.C. § 5311 (declaration of

purpose).[3] The implementing regulations, found at 31 C.F.R. Part 103, create a system of reporting and recordkeeping obligations intended to provide a paper trail to enable government investigators to follow the money. See generally California Bankers Ass'n v. Shultz, 416 S. 21, 26-30 (1974) Section 5319 of the Bank Secrecy Act requires the Secretary to provide information contained in Bank Secrecy Act reports to a governmental agency upon request.[4] Implementing regulations prescribing those governmental entities entitled to seek access to Bank Secrecy Act information, and the methods for requesting it, are found at 31 C.F.R. § 103.53

The initial focus of the Bank Secrecy Act was the tracking of large currency transactions, and the initial regulations required reporting of various transactions over $10,000 in currency. See 3 C .R. § 103.22 (currency transaction reports); 31 C.F.R. §103.23 (reports of transportation of currency and monetary instruments); 31 C.F.R. § 103.24 (reports of foreign financial accounts) Congress expanded this focus in 1992 with the passage of the Annunzio-Wylie Anti-Money Laundering Act, Pub. L. 102-550, Title XV, § 1517 (1992), which added 31 U.S.C. § 5318(g) to the Bank Secrecy Act. This provision authorizes the Secretary of the Treasury to "require any financial institution, and any director, officer, employee or agent of any financial institution, to report any suspicious transaction relevant to a possible violation of law or regulation Recognizing both the

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[3] In the USA Patriot Act of 2001, Congress amended 31 U.S.C. 5311 to include as a purpose of the Bank Secrecy Act "the conduct of intelligence or counterintelligence activities, including analysis to protect against international terrorism." Pub. L. 107-56, Title III, Sec. 358(a) (October 26, 2001).

[4] The USA Patriot Act of 2001 amended this provision to include within the definition of "agency" a self-regulatory organization registered with the Securities and Exchange Commission or the Commodities Futures Trading Commission. Pub. L. 107-56, Title III, section 358(c) (October 26, 2001).

sensitive nature of the information and the need to encourage the filing of these reports by the provision of appropriate legal protection, Congress included in the new statutory authorization two important provisions. First, it provided that filers and their agents "may not notify any person involved in the transaction that the transaction has been reported." 31 U.S.C. § 5318(g)(2)(A)(i). Second, it provided a "safe harbor" for filers and their agents, under which they "shall not be liable to any person under any law or regulation of the United States [or] any constitution, law or regulation of any State for such disclosure or for any failure to provide notice of such disclosure to the person who is the subject of such disclosure or to any other person identified in the disclosure." 31 U.S.C § 5318(g)(3)(A)

In the Annunzio-Wylie Act, Congress further instructed the Secretary to designate a single agency or official to whom SARs shall be made. See 31 U.S.C. § 5318(g)(4). The Secretary designated FinCEN.[5] In 1996, FinCEN, along with the five federal banking regulators, promulgated Suspicious Activity Reporting rules for banks.[6] The rule requires that a bank file an SAR with FinCEN on any transaction conducted or attempted to be conducted through it, which aggregates at least $5,000, and which the bank knows, suspects or has reason to suspect: (i) involves funds

[5] The Secretary's delegation of Bank Secrecy Act authority to FinCEN is now embodied in Treasury Order 180-01 (available at Treasury's website, www.ustreas.gov).

[6] See 31 C.F.R. 103.18. The five federal banking regulators are: the Office of the Comptroller of the Currency, the Board of Governors of the Federal Reserve, the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, and the National Credit Union Administration. Each agency promulgated a separate rule, although the rules are substantially similar, with the main difference being special treatment for insider abuse in the banking agency rules. More recently, FinCEN has issued suspicious activity reporting rules for money services business; broker-dealers in securities; and commodities futures commission merchants, all with the same disclosure restrictions discussed herein.

derived from illegal activities; (ii) is designed to evade Bank Secrecy Act requirements; or (iii) has no business or apparent lawful purpose and is not the sort in which the customer should normally be expected to engage and the bank knows of no reasonable explanation for the transaction. 31 C.F.R. § 103.18(a)(2).

FinCEN's regulation places additional disclosure restrictions on SARs. Specifically, the rule requires that "any person subpoenaed or otherwise requested to disclose a SAR or the information contained in a SAR, except where such disclosure is requested by FinCEN or an appropriate law enforcement agency or bank supervisory agency, shall decline to produce the SAR or to provide any information that would disclose that a SAR has been prepared or filed," 31 C.F.R.§ 103.18(e). The OCC's suspicious activity reporting regulation contains similar language, see 12 C.F.R. § 21.11(k).

The USA Patriot Act codified FinCEN's role in administering the collection, use, and dissemination of Bank Secrecy Act reports. See 31 U.S.C. § 310. FinCEN is charged with maintaining a government-wide data network that includes Bank Secrecy Act reports, 31 U.S.C. § 310(b)(B)(1); analyzing and disseminating the material for certain purposes, 31 U.S.C. § 310(b)(C); and, as the Secretary's delegee, providing appropriate standards and guidelines for who is to be given access to the information and the uses to which it may be put, 31 U.S.C. § 310(c)(2).

At the same time, Congress strengthened the SAR confidentiality provisions, adding new subsection 5318(g)(2)(A)(ii), which provides that "no officer or employee of the Federal Government or of any State, local, tribal, or territorial government within the United States, who has any knowledge that such report was made may disclose to any person involved in the transaction that the transaction has been reported, other than as necessary to fulfill the official duties of such officer or employee."

Consistent with its regulatory interpretation of § 5318(g)(2)(A)(i), FinCEN interprets this provision to prevent governmental officers and employees from making disclosures likely to lead to a disclosure to a person involved in a reported transaction, with the added qualification of official necessity. FinCEN interprets official necessity to mean necessary to accomplish a governmental purpose entrusted to the officer or employee, for example, disclosure at trial required by statute (such as the Jencks Act), or the U.S. Constitution (such as exculpatory evidence).

B Judicial Development of the Unqualified Privilege for Suspicious Activity Reports

Not long after Suspicious Activity Reporting requirements became effective, plaintiffs in civil litigation sought to obtain such reports and to hold banks liable for filing (or not filing) them. The Second Circuit addressed the interplay between the SAR confidentiality provision and the safe harbor provision in Lee v. Banker's Trust Co., 166 F.3d 540 (2d Cir. 1999), affirming the district court's dismissal of a defamation claim against a bank based on its alleged filing of an SAR concerning the plaintiff. Noting the confidentiality provision of the Federal Reserve's regulation, 12 C.F.R. § 208.20(k), which is identical to that of FinCEN and the OCC, the court stated:

> Our conclusion based on the language of the Act [that the filing of the SAR is protected by the safe harbor] is bolstered by a common sense appraisal of the safe harbor's place within the Act. Financial institutions are required by law to file SARs, but are prohibited from disclosing either that an SAR has been filed or the information contained therein. See 12 C.F.R. 203.20(k) (1998). Thus, even in a suit for damages based on disclosures allegedly made in an SAR, a financial institution cannot reveal what disclosures it made in an SAR, or even whether it filed an SAR at all.

166 F.3d at 544 (emphasis added). This reasoning has been followed by a number of lower courts faced with motions to compel the production of SARs. In Weil v. Long Island Savings Bank, 195 F. Supp. 2d 383, 389 (E.D.N.Y. 2001), the court found that the Suspicious Activity Reporting rules

prohibit disclosure of SARs or their content, and that the confidentiality privilege created by the statute and implementing regulations is not qualified and is not subject to waiver. Accord, Gregory v. Bank One, Indiana, N.A., 200 F. Supp.2d 1000, 1003 (S.D. Ind. 2002) ("There is no provision in the [Bank Secrecy] Act or the Rule allowing a court-order exception to the unqualified privilege"); Cotton v. Private Bank and Trust Co., 235 F. Supp.2d 809, 815 (N.D. Ill. 2002); Whitney National Bank v. Karam, 306 F. Supp.2d 678, 682 (S.D. Tex. 2004).[7]

Courts have determined that, although the statute specifically bars the disclosure of the SAR only to the persons involved in the transaction, the regulations forbidding any disclosure are authorized by the statute because a disclosure in litigation would make it more likely that the report would be disclosed to the persons involved in the transaction. See, e.g., Cotton, 235 F. Supp.2d at 815 (citing In re Bankers Trust Co., 61 F.3d 465, 469 (6th Cir. 1995), and Chevron USA, Inc. v. National Resources Defense Council, 467 U.S. 837 (1984) ("federal regulations should be adhered to and given full force and effect whenever possible")). As Cotton noted, a judicially-created exception to the non-disclosure rule would harm the interests the Bank Secrecy Act was intended to promote, by compromising an ongoing investigation, revealing methods by which banks are able to detect suspicious activity, deterring banks from filing by subjecting SAR preparers to retaliation by customers, and harming the privacy interests of innocent third parties whose names may appear in a report. Id. Indeed, the harm from disclosure of

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[7] Although Cotton notes that in one Freedom of Information Act case a portion of a SAR was ordered to be produced, Dupre v. Federal Bureau of Investigation, 2002 U.S. Dist. LEXIS 9622 (E.D. La. May 22, 2002), after defendant filed an appeal and obtained a stay from the court of appeals, the plaintiff withdrew the request and the case was dismissed as moot. Although this information does not appear in the subsequent history, it can be found in that court's electronic case docketing system.

an SAR was recognized to be so serious, and the law protecting it to be so clear, that the Florida Court of Appeals issued the rarely granted writ of certiorari to vacate a discovery order issued by a state court. See International Bank of Miami v. Shinitzky, 849 So.2d 1188, 1191-93 (Fla. Ct. App. 2003).

As FinCEN and the regulators always have acknowledged and the courts have recognized, however, this prohibition does not extend to underlying transactional documents relevant to a claim or defense. Financial institution business records, such as account statements and wire transfer advices, are discoverable under the standards of the Federal Rules of Civil Procedure. See, e.g., Whitney, 235 F. Supp.2d at 682-83; Cotton, 235 F. Supp.2d at 815-16. Plaintiff is free to seek such documents. What he cannot do is invade the confidentiality of the Suspicious Activity Reporting system itself.

Perhaps recognizing the strength of this body of law, plaintiff has not sought SARs from banks, but from one of their regulators. If the confidentiality protections for SARs were held not to apply in such circumstances, then they would be rendered meaningless; a plaintiff could always circumvent these protections by asking the government, rather than the filers, for the reports. The reports would then routinely be obtainable in civil litigation. This would yield the type of absurd result forbidden by the principles of statutory construction. See, e.g., United States v. X-Citement Video, Inc., 513 U.S. 64, 69-70 (1994).

Section 5318(g)(2)(B) of Title 31 clarifies that this is not the result Congress intended. Rather, government officials are subject to the same disclosure restrictions as filers, except with respect to disclosures necessary to the performance of their official duties. There is no legal basis for finding that disclosure of an SAR to a plaintiff in a civil lawsuit is necessary to the performance of a bank regulator's official duties. Seeking a court order to convert such disclosure into an official duty is

bootstrapping in the extreme. Rather, this is a narrow category -- examples of necessary official disclosures would include prosecutorial disclosures mandated by statute or the U.S. Constitution, such as where a report may contain a statement of a government witness to be called at trial, impeachment material of such a witness, or material exculpatory of the defendant.

Plaintiff does not fall within the categories of persons entitled to disclosure of an SAR, nor does private civil litigation constitute a permitted use under the Bank Secrecy Act. SARs are not discoverable in civil litigation, either from the filers or from the government agencies that regulate the filers. In the Bank Secrecy Act, Congress carefully balanced the interests of the government users and filers to craft a reporting system that would provide the appropriate incentive to encourage reports of wrongdoing while protecting law enforcement confidentiality and individual privacy interests. These interests also have been carefully balanced by FinCEN and the bank regulators in issuing and interpreting the implementing Suspicious Activity Reporting regulations.

CONCLUSION

For the foregoing reasons, the United States respectfully requests that this Court protect against the unwarranted disclosure of SARs sought by plaintiff.

Respectfully submitted,

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