IN THE SUPREME COURT OF THE STATE OF NEVADA

LISA JOHNSON,

Appellant,

vs.

WELLS FARGO BANK NATIONAL ASSOCIATION,

Respondent.

Docket No. 66094

District Case No. A652995

APPELLANT LISA JOHNSON'S OPENING BRIEF

HUTCHISON & STEFFEN, LLC.

Michael K. Wall (2098)
Peccole Professional Park
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145

Attorneys for Appellant
Lisa Johnson

TABLE OF CONTENTS

AUTHORITIES CITED
RULES AND STATUTES

CASE LAW

OTHER

JURISDICTIONAL STATEMENT

This is an appeal from Findings of Fact, Conclusions of Law and Judgment entered by the district court following a bench trial. AA Vol. VII, 1669. Eighth Judicial District Court, Clark County, Department XXVI, District Court Case No. A655393, the Honorable Gloria Sturman, District Judge.

The judgment was final as to all claims and all parties. It was entered by the district court on June 9, 2014. *Id.* Notice of entry of the judgment was served by appellant Lisa Johnson on Wells Fargo Bank, National Association ("Wells Fargo") by mail on June 13, 2014. AA Vol. VII, 1667.

Lisa Johnson filed her notice of appeal on Monday, July 14, 2014. AA Vol. VII, 1678. The notice of appeal is timely pursuant to NRAP 4(a)(1).

Lisa appeals only from that portion of the final judgment that granted respondent Wells Fargo Bank, National Association's ("Wells Fargo") motion for judgment as a matter of law pursuant to NRCP 52 as to Lisa's claim for declaratory relief. Specifically, following the close of the presentation of evidence at trial, and before closing arguments, on February 7, 2014, the district court orally granted Wells Fargo's motion for judgment as a matter of law as to Lisa's claim for declaratory relief. AA Vol. VI, 1473. The district court memorialized its decision in the final judgment, AA Vol. VII, 1670, ¶ 5.

This appeal is authorized by NRAP 3A(b)(1) (final judgment) and *Sicor, Inc. v. Sacks*, 127 Nev. ___, 266 P.3d 618, 620 (2011) (recognizing "the general rule that interlocutory orders may be challenged on appeal from the final judgment").

No party appealed from the district court's judgment on the defamation claim. Therefore, no issues as to that claim are presently before this Court, except as they are related to Lisa's entitlement to declaratory relief. Specifically, pretrial discovery motions were denied that should have been granted, and the improper denial of these discovery motions, which were directly related to Lisa's

defamation claims, led to the dismissal of her claim for declaratory relief. Thus, in reviewing the dismissal of Lisa's claim for declaratory relief, this Court will necessarily need to review the pretrial discovery orders that resulted in that dismissal.

ROUTING STATEMENT

This case is not presumptively retained by the Nevada Supreme Court under NRAP 17. This case presents an issue of first impression and requests that a test for the application of federal banking law to Nevada cases be adopted. This case has far reaching implications for banking law in Nevada, and potentially affects thousands of Nevada citizens. Further, there is little case law directly on point outside of Nevada. Appellant therefore suggests that this Court should retain this case, rather than assigning it to the Nevada Court of Appeals.

STATEMENT OF THE ISSUES

I. Whether the District Court Erred in Denying Discovery to Appellant of Bank Documents Prepared in the Ordinary Course of the Bank's Business, Which Resulted in Denial of Appellant's Claim for Declaratory Relief.

STATEMENT OF THE CASE

This is a garden-variety defamation action. After Wells Fargo closed a joint account Lisa Johnson held with her life-partner of many years, Michael Kaplan, and two individual accounts in her own name, a bank employee defamed Lisa to Michael. Lisa sued Wells Fargo for defamation, false light and for a declaratory judgment. AA Vol. I, 1.

Claiming an absolute privilege not to participate in discovery at all, allegedly under the Patriot Act, Wells Fargo refused to produce any documents relevant to the defamation claim and to its defense of truthfulness of the defamatory statements. As set forth in the facts below, the discovery commissioner granted Wells Fargo a privilege against discovery far broader than

afforded by federal law, which thwarted Lisa's efforts to discover why the accounts were closed, and more importantly, the basis for the bank's claim that she had been engaged in criminal activity.[1]

Prior to trial, the district court granted summary judgment as to Lisa's claim of false light. AA Vol. VII, 1670, ¶ 5. Following the presentation of evidence at the bench trial, based on the same reasoning that led the district court to uphold the discovery commissioner's denial of discovery, the district court granted judgment as a matter of law, and dismissed Lisa's claim for declaratory relief. AA Vol. VII, 1670, ¶ 5. Lisa prevailed on her claim of defamation, but has still never been allowed to discover the documents that supposedly support the bank's accusations against her. This information could be used against her and could negatively impact her financially in the future.[2]

STATEMENT OF THE FACTS

A. Lisa and Michael.

Lisa Johnson and Michael Kaplan are unmarried but long term life partners.[3] They met in 1998 in New York (Michael was there on vacation). AA Vol. V, 1127. They had a long-distance relationship that blossomed.

---

[1]The bank may have the right to cancel any account at any time without cause, but it does not have the right to defame a customer, accuse the customer of criminal activity, and then hide behind privilege to prevent the customer from discovering the basis for its accusations.

[2]Lisa is an author and professional photographer whose book sales are doing well. She may need loans or financial support from banks in the future. Michael has aspirations for political office. The information that prompted a bank employee to accuse Lisa of criminal activity could affect both Lisa and Michael in the future, and they have legitimate cause to be concerned.

[3]The term partner here is not used to denote a business relationship or partnership.

Eventually, Lisa moved to Las Vegas to be closer to Michael. A year later, in 2001, they moved in together, and have been maintaining a joint household ever since. AA Vol. V, 1128. Further details of their relationship were presented at trial below, and are relevant particularly to the claims of damages as a result of the defamation. Because the district court's finding of liability for defamation and its award of damages has not been challenged by Wells Fargo by appeal, the details are not particularly relevant to this case, other than to provide context and background. Suffice it to say, Lisa and Michael had and have a loving and trusting relationship that was nonetheless rocked and damaged by the events underlying the defamation of Lisa. AA Vol. VI, 1317; 1337-1340.

B. Bank Account Closures.

This action involves Wells Fargo's closure of Lisa's bank accounts, and the subsequent defamation of Lisa by a bank employee. Lisa is the managing member of Guitarfile, LLC. AA Vol. VI, 1322. She opened three business accounts for Guitarfile at Wells Fargo on about May 12, 2010. AA Vol. VII, 1535-39. The lead account was a Wells Fargo account ending in number 7051 (the "Guitarfile business account"). *Id.* Lisa also opened a Guitarfile business credit card account prior to 2011 with an account number ending in number 2957 (the "Guitarfile credit card account"). AA Vol. VI 1326; AA Vol. VII, 1551. Lisa and Michael opened a Wells Fargo account ending in number 4164 on October 2, 2004 (the "joint account"). AA Vol. V, 1128-29; AA Vol VII, 1541. Michael was identified as the primary joint account holder and Lisa was identified as the secondary joint account holder. *Id.*

Between August 15, 2011, and August 18, 2011, Wells Fargo sent letters to Lisa stating that Wells Fargo would unilaterally close the Guitarfile business account, the Guitarfile credit card account, and the joint account in September 2011. AA Vol. VII, 1548-53 (Trial Exhibits 4, 5, and 6). Wells Fargo refused to

disclose to Lisa the reasons for the account closures. Instead, Wells Fargo stated in the letter noticing closure of the joint account that:

> Wells Fargo performs ongoing reviews of its account relationships in connection with the Bank's responsibilities to oversee and manage risks in its banking operations. We recently reviewed your account relationship and, as a result of this review, we have decided to close the above-referenced account(s). The account(s) will be closed at the end of business on September 22, 2011.
>
> The Bank's risk assessment process and the results of this process are confidential, and the Bank's decision to close your account(s) is final . . . .

AA Vol. VII, 1553. Wells Fargo's letter noticing closure of the Guitarfile Credit Card Account stated:

> Wells Fargo (the "Company") performs ongoing reviews of its account relationships in connection with the Company's responsibilities to oversee and manage risks in its business operations. We recently reviewed the Company's account relationship with Guitarfile LLC and, as a result of this review, we have decided to close the accounts referenced above, and terminate our relationship with Guitarfile LLC. The termination will be effective at the close of business on 9/16/2011.
>
> M22 Bank policy excludes lending to certain types of businesses.
>
> The Company's risk assessment process and the results of this process are confidential, and the Company's decision to close the subject accounts is final . . . .

AA Vol. VII, 1551. Wells Fargo's letter noticing closure of the Guitarfile Business Account stated:

> Wells Fargo performs ongoing reviews of its account relationships in connection with the Bank's responsibilities to oversee and manage risks in its banking operations. We recently reviewed your account relationship and, as a result of this review, we have decided to close the above-referenced account(s). The account(s) will be closed at the end of business on September 22, 2011.
>
> The Bank's risk assessment process and the results of this process are confidential, and the Bank's decision to close your account(s) is final . . . .

AA Vol. VII, 1549.

In September 2011, Wells Fargo closed the accounts. It should be noted that nothing in these letters indicates that Wells Fargo's decision to close the

accounts had anything to do with anything other that the banks exercise of its normal accounts assessment processes.

C. Wells Fargo Defames Lisa.

On October 6, 2011, Michael went into a Wells Fargo branch located in Malibu, California, to cash a check. AA Vol. V, 1135. Because Michael and Lisa planned to attend a concert later that evening, Michael went to the bank to cash an insurance refund check for concert purchases. (Transcript of Proceedings *Id.* Michael had no intention of discussing the closure of the joint account–or the closures of the other accounts–with Wells Fargo personnel at that time. Id.

While completing the transaction, the Wells Fargo teller reviewed Michael's account information and stated that Michael was leaving too much money in his personal checking account, that it was not safe to leave that much money in his account, and that he should have Wells Fargo open a new savings account for him, thereby increasing his business with Wells Fargo. AA Vol. V, 1136. Michael asked the teller why she would solicit him to open a new account in light of Wells Fargo's recent closure of his joint account. *Id.*

The teller engaged Arash Dounel–another Wells Fargo employee–who introduced himself as the teller's manager. *Id.* Dounel further identified himself to Michael as a Wells Fargo premier banker and brokerage associate. AA Vol. V. 1137. Dounel brought Michael to his desk, at which point Michael proceeded to tell Dounel about Wells Fargo's joint account closure letter. (Transcript of Proceedings February 5, 2014 at 33:1-25) AA Vol. V. 1138. Dounel and Michael conversed about Wells Fargo's closure of the joint account and the rationale for the closure. *Id.* Dounel asked Michael if he had the joint account closure letter with him. *Id.* Michael responded that he did not have the letter, as he did not go into the Malibu branch to discuss any of the closed accounts. *Id.*

At Dounel's request, Michael and/or Dounel[4] called Lisa and asked her to e-mail Dounel the closure letter, which Lisa did. AA Vol. V, 1138. After Lisa e-mailed Dounel the letter, Michael observed Dounel reading the letter, then reviewing information on his computer screen. AA Vol. V, 1141. While Dounel was reviewing his computer screen, he asked Michael questions about certain checks from the joint account. *Id.* Michael answered Dounel's questions as to the payees of those checks. (Transcript of Proceedings February 5, 2014 at 36:16-37:8) AA Vol. V, 1142. Dounel continued to examine the information on his computer screen. Michael could not see Dounel's computer screen. *Id.*

After Dounel reviewed his computer screen, he stated to Michael that Lisa must have been in jail or have arrest warrants and that was the reason the joint account was closed. AA Vol. V, 1142-44. However, Wells Fargo presented no evidence during discovery or at trial to support Dounel's statements that Lisa must have been in jail or have arrest warrants, or words to that effect, as being truthful. In fact, the district court ultimately determined that Dounel's statements defamed Lisa. AA Vol. VII, 1673-75.

Michael stated to Dounel that Dounel must be mistaken regarding Lisa's alleged criminal history, but Dounel replied that he was not mistaken, and since Michael was a person of means, Michael should hire a private investigator to thoroughly investigate Lisa. Dounel stated, "that's what I would do if it were me," or words to that effect. AA Vol. V, 1142.

Dounel's comments upset Michael,. It was clear to Michael that Dounel was making these remarks based on what Dounel saw on his computer screen. *Id.* Dounel then brought an additional Wells Fargo employee to his desk and introduced her to Michael as working in Wells Fargo's private wealth department. (Transcript of Proceedings February 5, 2014 at 39:4-11) AA Vol. V,

---

[4]The testimony was ambiguous as to who actually called Lisa.

1144. The Wells Fargo representatives then discussed with Michael the prospect of opening one or more new accounts for Michael with Wells Fargo. Michael stated that he did not understand how they could be talking about opening a new account if they just closed the joint account. Dounel stated that the joint account closure was because of Lisa, not Michael. (Transcript of Proceedings February 5, 2014 at 40:13-41:6) AA Vol. V, 1145.

D. The Fallout.

Later that day, Michael approached Lisa about Dounel's accusations and began questioning her in that regard. AA Vol. VI, 1337. Lisa responded to Michael by stating that Dounel's accusations were outrageous and that Lisa had never had any run-ins with the law. AA Vol. VI 1337; Vol. VII 1644, ¶ 20. Michael made various statements and asked multiple questions to Lisa such as, "is there stuff I need to know about or worry about?" AA Vol. VII 1644, ¶ 21. Lisa appeared defensive and essentially stated to Michael, "I have nothing to hide." AA Vol. VII 1645, ¶ 22. Both Michael and Lisa testified that this incident caused them embarrassment and humiliation, and placed stress on their relationship at that time and beyond. AA Vol. V, 1166-71; Vol. VI, 1337-41.[5]

Approximately two weeks after Dounel made his statements to Michael regarding Lisa's alleged criminal history, Dounel communicated with Michael and attempted to apologize for stating that Lisa must have been in jail or had arrest warrants, or words to that effect, and that Michael should hire a private investigator to investigate Lisa. AA Vol. V, 1147-48. Michael responded that

---

[5]The bank made it clear that the problem it had was with Lisa, not Michael. Indeed, the bank offered to let Michael open additional accounts, so long as Lisa was not associated with the accounts, and turned down Michael's offer to deposit millions of dollars into a new account that would have benefitted Lisa. AA Vol. V, 1159-62. This fact underscores Lisa's concern regarding the apparently false information the bank has or claims to have against her, and adds to the stress and impact of the bank's defamation of Lisa.

Dounel's comments had upset him and caused significant stress between Lisa and Michael. *Id.* Michael told Dounel that if Wells Fargo wanted to apologize, Wells Fargo should do so in writing. Dounel offered to send Michael an apology letter. AA Vol. V, 1148. But no apology letter was received. Therefore, Michael contacted Dounel to ask why. AA Vol. V, 1149. Dounel responded, "I have sent the letter to my management and our legal department cannot allow me to send an official letter of apology. I hope the apology that I have given you thus far verbally can suffice . . . ." AA Vol. V, 1150; Vol. VII, 1616.

On October 26, 2011, Lisa's attorney received a letter from Wells Fargo, which stated, "Wells Fargo performs ongoing reviews of its account relationships in connection with the Bank's responsibilities to oversee and manage risks in its banking operations. Our risk based assessment is confidential and as a result, we are unable to disclose the specific information and/or details leading to this decision . . . . We're confident that we have handled this situation appropriately and consider this matter closed." AA Vol. VII, 1602. So the bank's position was non-caring and callous to the last.

STATEMENT OF PROCEDURAL FACTS

A. Lisa's Complaint Against Wells Fargo.

On January 26, 2012, Lisa filed a complaint against Wells Fargo alleging defamation, false light, and declaratory relief. AA Vol. I, 1 (Complaint at ¶¶ 28-46). Lisa's declaratory relief claim states as follows:

43. NRS 30.030 provides:

> Courts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed. No action or proceeding shall be open to objection on the ground that a declaratory judgment or decree is prayed for. The declaration may be either affirmative or negative in form and effect; and such declarations shall have the force and effect of a final judgment or decree.

44. An actual controversy exists between Johnson and Wells Fargo as to its obligation to Lisa to disclose the reasons for closing her account and the accompanying statements and/or innuendos that she is or was involved in criminal activity.

45. Johnson is entitled to know why her accounts with Wells Fargo were closed as well as the basis for its defamatory statements against her.

46. Johnson is entitled to a declaration by this Court that Wells Fargo must provide Johnson a detailed explanation as to why the bank decided to close her accounts and why it alleged that she was/is involved in criminal activities.

AA Vol. I, 5-6. The focus of this claim is not a general desire to learn why Wells Fargo closed Lisa's accounts; it is a specific request to learn the basis for Wells Fargo's defamation of Lisa, not only because that information was critical to Lisa's defamation claim and Wells Fargo's defense, but because of the fact that the false accusation of criminal misconduct could have future and lasting consequences for Lisa and her business.

Wells Fargo answered on April 6, 2012, generally denying Lisa's allegations. AA Vol. I, 8. Wells Fargo set forth various affirmative defenses, including affirmative defense no. 26 that Lisa's claims "are barred, in whole or in part, by principles of truth . . . ." AA Vol. I, 14. On the eve of trial, Wells Fargo surrendered that affirmative defense. AA Vol. V, 1100.

B. Wells Fargo Stonewalls Lisa in Discovery.

Lisa's goal from the beginning of the litigation was to ascertain why Wells Fargo closed her accounts and made defamatory statements against her. Specifically, she is concerned about the allegations of criminal activity. Such allegations must not be made, and cannot be taken, lightly. Lisa desires to correct any misinformation that led to the unfortunate events triggering this lawsuit so that whatever false information is out there will not continue to harm her.

On May 15, 2012, Wells Fargo delivered to Lisa its early case conference disclosures in which it failed to produce a single document. AA Vol. I, 59.

During discovery, Lisa requested that Wells Fargo produce information concerning the reasons why it closed the Guitarfile accounts and the joint account and its risk assessment processes and analysis for closing these accounts. These requests are contained in Lisa's amended first set of interrogatories nos. 1-11 and amended first set of requests for production of documents nos. 2-10. AA Vol. I, 76; 98 (Wells Fargo's answers, including questions and requests). Wells Fargo objected to the requests and refused to produce responsive information aside from its terse written notices of account closures that it sent to Lisa before litigation commenced. *Id.* Wells Fargo objected that the requested information was irrelevant to Lisa's claims and sought privileged and confidential bank supervisory information and confidential proprietary and business information. *Id.*

C. Lisa's Motion to Compel and Wells Fargo's Counter-Motion for a Protective Order.

On August 31, 2012, Lisa filed a motion to compel Wells Fargo to produce responsive information, arguing that this information is relevant to ascertain the bases of Wells Fargo's defamatory statements against her. AA Vol. I, 17; 32. Further, Lisa stated that she was willing to entertain a protective order concerning any potentially sensitive materials from Wells Fargo, alleviating any concerns regarding potential dissemination of the information. AA Vol. I, 32.

That same day, Lisa served a notice of taking the NRCP 30(b)(6) witness deposition of Wells Fargo regarding Wells Fargo's rationale for closing Lisa's accounts. AA Vol. I, 126.

On September 18, 2012, Wells Fargo served amended responses to Lisa's amended first set of interrogatories and amended first set of requests for production of documents. AA Vol. I, 142; 168. However, the amended

responses contained no substantive additions. Instead, Wells Fargo merely added objections that: (1) the requests are subject to privilege under the Bank Secrecy Act; and (2) Lisa's requests for information regarding why Wells Fargo closed her accounts is "improper and/or premature" because Lisa had not obtained declaratory relief from the district court stating that she was entitled to that information. *Id.*

On September 26, 2012, Wells Fargo filed an opposition to Lisa's motion to compel and a counter-motion for a protective order to preclude Lisa from ascertaining why Wells Fargo closed her accounts. AA Vol. I, 107. Wells Fargo asked Discovery Commissioner Bonnie Bulla not to require it to respond to Lisa's discovery requests at all concerning these issues, and not to require it to produce an NRCP 30(b)(6) deponent to discuss them. AA Vol. I, 111. Wells Fargo argued that: (1) Lisa should be precluded from obtaining responsive information absent a finding that she is entitled to her requested declaratory relief concerning the reasons why Wells Fargo closed her joint account with Michael and the accompanying statements that she was involved in criminal activity; (2) Lisa has no legal right to information why Wells Fargo no longer maintains a banking relationship with her; and (3) the Bank Secrecy Act (31 U.S.C. § 5311, *et seq.*) bars Wells Fargo from disclosing whether or not suspicious activity reports ("SARs") of banking transactions have been filed with government entities; thus Wells Fargo allegedly cannot produce any information as to why it closed Lisa's joint account at Wells Fargo; (4) Lisa's discovery allegedly seeks confidential proprietary information regarding an ongoing investigation; and (5) Lisa's discovery seeks confidential banking information of non-party bank customers. AA Vol. I, 111-26).

An SAR is a report made by a financial institution about suspicious or potentially suspicious customer activity. According to an affidavit of Wells Fargo employee Raelynn Stockman, "[c]onsistent with the reporting requirements

of the Bank Secrecy Act (31 U.S.C. 5318), Wells Fargo has created an Anti-Money Laundering ("AML") investigation division. The purpose of this investigative division is to ensure compliance with [SAR] requirements under the Bank Secrecy Act. The AML investigative division would not exist but for the suspicious activity reporting requirements of the Bank Secrecy Act and the related federal regulations." AA Vol. I, 202 (Affidavit of Raelynn Stockman at ¶ 4).

Wells Fargo refused to state whether it produced an SAR regarding Lisa or if a potential SAR triggered the closures of Lisa's accounts. Lisa does not challenge this position taken by Wells Fargo. But Wells Fargo also refused to state whether it investigated Lisa's accounts solely because of its reporting obligations, or whether Wells Fargo evaluated and closed her accounts in full or in part based on general bank risk evaluation, loss prevention, customer service, account closure, and account control processes–as opposed to any SAR-based process.

In other words, the bank took the position that it could funnel any bank activity or investigation through its AML division, whether related in any way to an SAR or not, and because its AML division was created in response to the federal Act, and would not exist but for the federal Act, all activity funneled through its AML, no matter how ordinary and regardless of whether such activity would be undertaken by the bank absent the Act, is shrouded in a cloak of secrecy. See AA I, 117 (Wells Fargo's broad argument). It is this position of total secrecy taken by the Bank that Lisa challenges in this appeal. Lisa believes the Act does not give the Bank such a blanket veil of secrecy.

On September 28, 2012, Lisa filed a reply. AA Vol. I, 204. Lisa argued: (1) Wells Fargo defamed Lisa concerning the reasons why it closed her accounts, thus Wells Fargo is obligated to produce discovery regarding these issues; (2) SAR protection only applies to the SARs themselves and not to other reports or

documents evidencing suspicious activity, thus Wells Fargo should be required to disclose discovery related to documents and facts pertaining to alleged suspicious activity concerning Lisa's accounts that were created in the ordinary course of business; and (3) the fact that Wells Fargo designates the AML division to investigate an account in preparation of filing an SAR does not absolve the bank from producing responsive information–it only prevents the bank from disclosing SAR information; (4) the district court makes the ultimate ruling regarding the discovery issues in dispute and any objections to the discovery commissioner's report and recommendations, thus there was no need to await a separate hearing on Lisa's declaratory relief claim prior to compelling the discovery; and (5) Lisa facilitated the provision of a third-party authorization from Michael to disclose his account information and was willing to enter into a confidentiality order to protect Wells Fargo's allegedly confidential and proprietary information. AA Vol. I, 204-15. Wells Fargo filed a reply in support of its counter-motion for a protective order. AA Vol. II, 221.

On October 19, 2012, Discovery Commissioner Bonnie Bulla conducted a hearing on these issues. She stated, "[t]he problem of course is that under the banking laws and the Patriot Act, which is very far-reaching,[6] it looks to me, plaintiff's counsel, that this information is protected." AA Vol. II, 250. However, the commissioner noted that,

> The one thing that bothers me, and I just read it, and it seems to me to be a true inconsistency, and maybe it's you know – I mean, the defendant suggests it's because it never happened. But to me, if this teller who we – I think we've tracked him down now, right? His deposition is going to be taken. If he did, you know, the – in the motion work, the defendant's position is he didn't remember or doesn't – you know, he would not have known the reasons why the bank closed the account. Well, if that's true, then why would he have said what he said, if he did in fact say it. There's an inconsistency there that I think a jury is gonna go, wait a minute, or just – you know, I mean, I'm looking at it and going, wait a minute. So obviously there's something in the system, perhaps; I don't

[6]The language of the privilege is not "far reaching;" it is narrowly stated.

> know. You know, your position is the teller didn't know, but then how did the teller make – why did the teller make these statements. Now, either one of two things are true. Number one, he made the statements because he in fact had some information that he could access. Or number two, he didn't make the statements and the plaintiffs are making this up. And, you know, unfortunately we'll never ever, ever under these Patriot Act banking laws be able to know the answers to those questions.

AA Vol. II, 251-52. Ultimately, the discovery commissioner recommended granting in part and denying in part Lisa's motion to compel and Wells Fargo's counter-motion for protective order. The discovery commissioner recommended that, among other things:

> 3. Wells Fargo is not required to provide further responses to Plaintiff's Requests for Production of Documents.
>
> 4. Wells Fargo is not required to provide further answers to Plaintiff's interrogatories Nos. 1-11, and No. 13 (the latter of which is not at issue in this appeal).
>
> 5. Wells Fargo is required to provide copies of all records pertaining to the accounts of Plaintiff that are the subject of this action, except that Wells Fargo is not required to provide any all [sic.] documents pertaining to the reasons why Wells Fargo closed Plaintiff's accounts.
>
> 6. Upon receipt of a notarized consent signed by Michael Kaplan, Wells Fargo is required to provide copies of all records pertaining to the accounts of Mr. Michael, except that Wells Fargo is not required to provide any all [sic.] documents pertaining to the reasons why Wells Fargo closed Plaintiff's accounts.

AA II, 269-70. The commissioner further recommended:

> 1. Wells Fargo is not be [sic.] required to disclose the reasons why is [sic.] closed Plaintiff's accounts, as this information is protected under the Bank Secrecy Act and other federal law authorities.
>
> 2. Plaintiff is precluded from conducting discovery regarding the reasons Wells Fargo closed Plaintiff's accounts.

AA II, 270. Essentially, the commissioner allowed Lisa to obtain only the records of her own accounts that had already been sent to her as a customer, and precluded all discovery of the alleged basis for Wells Fargo's defamatory comments. The discovery commissioner recommended a protective order precluding Lisa from deposing Wells Fargo's N

RCP 30(b)(6) witness regarding its rationale for closing Lisa's accounts. AA Vol. II, 263-64. All other documents and discovery was denied on the basis of the Bank Secrecy Act.

D. Lisa's Objections to the Discovery Commissioner's Report and Recommendations.

On November 5, 2012, Lisa objected to the report and recommendations on the basis that the discovery commissioner's recommendations provided Wells Fargo overly-broad protection under the limited federal privilege related to SAR documents. AA Vol. II, 274. Lisa argued that the discovery commissioner's recommendations appeared to categorize jointly: (1) undiscoverable documents that Wells Fargo potentially prepared for the purpose of investigating or drafting a possible SAR against Lisa, and (2) discoverable documentation concerning general risk management, loss prevention, account closure, and customer service procedures and communications pertaining to Wells Fargo's decision to close Lisa's accounts that was independent of its SAR reporting obligations. AA Vol. II, 274-87.

Lisa argued that Wells Fargo's account closure letters demonstrate that Wells Fargo's decision to close Lisa's accounts was based, at least in part, on its own general risk management and loss prevention efforts, which are independent of its federal reporting requirements. AA Vol. II, 287. Further, one of the letters states that Wells Fargo closed the account(s) because, "[b]ank policy excludes lending to certain types of businesses." AA Vol. II, 339. Wells Fargo's own policies formed at least a partial basis for its decisions to close Lisa's accounts. The bank should have been required to produce its policy describing the "types of businesses" to which it would not lend. Those policies and deliberations are subject to discovery.[7]

---

[7]The implication is that the businesses the bank will not lend to are fraudulent or criminal, and that Lisa's business has been engaged in criminal activities,

At a hearing on January 11, 2013, the district court ordered additional responsive briefing from the parties concerning Lisa's written objections to the discovery commissioner's October 19, 2012 report and recommendations. The written order memorializing this oral order was filed on February 7, 2013, AA Vol. III, 614.

On January 28, 2013, Wells Fargo filed its responsive brief. AA Vol. II, 454. Wells Fargo argued that the discovery commissioner's report and recommendations were proper. *Id.*[8] Lisa filed a reply on January 31, 2013, emphasizing that Wells Fargo should not have blanket protection from disclosing the reasons for closing Lisa's accounts. AA Vol. III, 603.

On February 8, 2013, District Judge Gloria Sturman heard the objection to the discovery commissioner's October 19, 2012 report and recommendations. AA Vol. III, 616. Judge Sturman expressed concerns regarding the scope of Wells Fargo's claimed privilege: "How do you differentiate between . . . risk management procedures in place for detecting suspicious activity wholly apart from those for complying with Federal reporting obligations, where do you – where do you make that line and say that's discoverable, this isn't?" AA Vol. III, 663. Judge Sturman also stated, "'financial institutions may have risk management procedures in place for detecting suspicious activity wholly apart

---

increasing Lisa's concern about what false information the bank thinks it has against her. If the banks conclusions were themselves fraudulent, based on malfeasance or negligence, that would be relevant to Lisa's claim against the bank. The policies are most certainly discoverable, because the disclosure of the policy would not indicate whether an SAR was issued, was considered or was even involved in the analysis. It's a simple business record of the type routinely required to be disclosed in business litigation. Other investigatory documents are also routine business documents not related to an SAR.

[8]Wells Fargo noted that it had recently disclosed monthly bank account documents to Lisa in discovery. AA Vol. III, 467. These had nothing to do with its investigation or its reasons for closing the account or defaming Lisa.

from procedures for complying with Federal obligation.' How do we parse that?" AA Vol. III, 673 (quoting *Union Bank*, discussed *infra.*). The judge continued, "And so the question is, we have the affidavit,[9] but the typical procedure in Nevada is a privilege log, and I think that they're entitled to know we are invoking the privilege, where – and where that line is. I think they're telling [inaudible], I think it's – it's something that goes to the discovery commissioner. I would certainly suggest it could be in camera." AA Vol. III, 673.

District Judge Sturman described Wells Fargo's dilemma as follows: "How do you invoke a privilege by saying I can't invoke a privilege? It's ridiculous."[10] AA Vol. III, 674. Regarding the discovery commissioner's recommendations, Judge Sturman stated, "[i]f the issue is did the commissioner make an error of fact or law, I don't think she made an error of either. I think she interpreted it properly, but I think that they're–the one problem I have here is that she did it in a way that doesn't permit the plaintiff to know what is the protection of this communication, under what–on what grounds is it protected specifically?" AA Vol. III, 687.

Consequently, the district judge affirmed the discovery commissioner's October 19, 2012 report and recommendations but ordered Wells Fargo to provide a privilege log pertaining to the subject matter of the report and recommendations. AA Vol. IV, 711. The district judge cited extensively the non-

---

[9]Referring to the affidavit of Raelynn Stockman. AA Vol. I, 202.

[10]The bulk of the hearing considered Wells Fargo's claim that it could not even claim the privilege without violating the Act. That is still Wells Fargo's position, *i.e.*, that the SAR protection is so broad that even claiming you are invoking SAR protection is a violation of the Bank Secrecy Act. The bank's position is that it has blanket immunity from all discovery because any discovery might implicate an SAR or indicate that an SAR is not implicated, and either implication is a violation of the Act. The district court struggled with the logic of this riddle as well. We suggest this is an unfair and overly-broad reading of the Act.

binding California appellate court decision in *Union Bank of California, N.A. v. Superior Ct.*, 130 Cal.App.4th 378 (2005), in rendering her ruling. AA Vol. 663, 678, 684, 686, 688, 689. The judge remanded the subject matter of the report and recommendations to the discovery commissioner "for purposes of determining which privilege log requirements (*see, e.g., Alboum v. Koe, M.D.*, Discovery Commissioner Opinion No. 10, November, 2001) can be required without violating the provisions of the Bank Secrecy Act (31 U.S.C. § 5311 *et seq*). For clarification purposes, the District Court Judge is not specifically ordering the terms of any such privilege log." AA Vol. IV, 712.

E. Remand to the Discovery Commissioner.

On March 12, 2013, the parties' counsel appeared before Discovery Commissioner Bonnie Bulla to discuss the privilege log requirement. At the hearing, Lisa's counsel reiterated to the discovery commissioner that the matter was remanded by Judge Sturman to tailor a privilege log concerning Wells Fargo's allegedly privileged documents. The discovery commissioner responded, "[w]hat if I'm telling you I can't do that because of the nature of the act?" (Transcript of Proceedings dated March 12, 2013 at 9:12-17) AA Vol. IV, 721. Later in the hearing, the discovery commissioner asked Wells Fargo's counsel to supply her with the allegedly privileged documents for her *in camera* review. AA Vol. IV, 722. The discovery commissioner then stated:

> – no matter who order – I have to do the right thing and if that gets me into trouble, it gets me into trouble. Writ me. But I'm serious. I have to do the right thing and that's what I'm going to do. So let me take a look at those documents *in camera*. Let me see if there's a way to deal with this. Let me read the transcript so I fully make sure I understand what the Judge is asking me to do, and if necessary, I'll talk to her as well.

Id.

Later, however, Wells Fargo's counsel argued for the first time that the federal case of *Cotton v. PrivateBank and Trust Company*, 235 F.Supp.2d 809 (N.D.Ill. 2002), provides authority concerning the scope of Wells Fargo's

potential privilege log. Wells Fargo's counsel argued that the bank should be required "simply to label the documents for identification purposes. If there's a specific date, provide the specific date. If there's a whole bunch of dates, just state that, you know, there's a range of dates." (Transcript of Proceedings dated March 12, 2013 at 16:12-15) AA Vol. IV, 728. The discovery commissioner immediately agreed with Wells Fargo's counsel, continued the hearing for 30 days, and asked Wells Fargo's counsel to produce a privilege log in accordance with the *Cotton* case. AA Vol. IV, 730.

On March 26, 2013, and April 9, 2013, Wells Fargo produced a privilege log and an amendment thereto. AA Vol. IV 737. The privilege log generally identified memoranda, correspondence, policies and procedures, dates and Bates-number ranges of the documents, and general statements that Wells Fargo "is legally prohibited from describing [the documents] further." *Id.* Wells Fargo claimed that these documents were subject to privilege pursuant to: (1) the Bank Secrecy Act; (2) "Customer Account Agreements"; (3) NRCP 26(c)(7) (governing trade secrets and confidential research, development, or commercial information); and (4) the attorney-client privilege. *Id.* This was the equivalent of producing nothing.

On April 19, 2013, the parties reconvened with the discovery commissioner for the continued hearing. At that hearing, Lisa's counsel explained to the discovery commissioner that "*Cotton* does not describe the specific contents and it contains no analysis of the privilege log requirements. It discusses what ultimately must be produced." AA Vol. IV, 759, ln. 5-8. The discovery commissioner responded that she ordered a "modified privilege log under federal rule" and that, "[i]f you don't like it, I would suggest you write Senator Reid, Senator Heller and tell them to change the law." *Id.* ln. 10; 20.

The discovery commissioner concluded that the privilege log and amendment thereto were proper and adequate and that the documents identified

in the privilege logs were confidential and protected under the provisions of the Bank Secrecy Act and related federal regulations and case law. AA Vol. IV, 764-68 (Commissioner's Report and Recommendations dated May 1, 2013). After noting that she had reviewed the documents in the privilege log *in camera*,[11] the discovery commissioner reiterated that:

> 1. Documents which constitute an SAR, if any SAR exists, and/or the policies and procedures that are created to prepare a possible SAR are confidential and protected. Further, any documents that are prepared in conjunction with investigating or drafting a SAR (if one exists) or possible SAR are confidential and protected.
>
> 2. Factual supporting documentation that accompanied a SAR, if one exists, or possible SAR, which have been prepared in the ordinary course of business are not protected. . . .
>
> 3. Bank records of customers other than Plaintiff are not discoverable without the consent of that customer. In this regard, the records pertaining to the joint-account which Plaintiff opened at Wells Fargo with Michael Kaplan are discoverable inasmuch as Mr. Kaplan has signed a written consent authorizing the disclosure of these records.

Id. Further, the discovery commissioner recommended denying Lisa's motion to compel the production of documents identified in Wells Fargo's privilege log and amendment thereto. The discovery commissioner also granted Wells Fargo's motion for protective order. AA Vol. IV, 768. District Judge Sturman signed this report and recommendations on May 20, 2013. AA Vol. IV, 770. Despite the recognition that "[f]actual supporting documentation that accompanied a SAR . . . prepared in the ordinary course of business are not protected,"[12] the

---

[11]The *in camera* review by the discovery commissioner here give little comfort to Lisa, since the commissioner's standard for what is protected under federal law was so breathtakingly broad. This Court should impose a much narrower standard, and remand for a review under a correct standard.

[12]This requirement for production of business documents was construed by both the commissioner and Wells Fargo as requiring only the production of bank

commissioner and the district court required no discovery whatsoever from Wells Fargo.

F. Wells Fargo's Motion for Summary Judgment.

On November 26, 2013, as trial approached, Wells Fargo filed a motion for summary judgment as to each of Lisa's causes of action–defamation, false light, and declaratory relief. AA Vol. IV, 771. Wells Fargo argued that it was entitled to summary judgment on Lisa's declaratory relief claim because the district court had already determined that Wells Fargo could not be compelled to disclose the reasons for closing Lisa's accounts under the Bank Secrecy Act. AA Vol. 773. Although Lisa disagreed with the district court's ruling regarding the application of the Bank Secrecy Act, Lisa had no choice but to recognize the district court's prior ruling. Nevertheless, Lisa opposed the motion for summary judgment on other grounds, arguing that she was entitled to know the bases for Dounel's allegedly truthful statements against her regarding her alleged criminal conduct. AA Vol. IV, 875; 896. At that time, Wells Fargo still maintained that Dounel's statements to Michael regarding Lisa's alleged criminal conduct and history were true.[13] Thus, Lisa argued that Wells Fargo could not defend Dounel's statements against Lisa as truthful while at the same time claiming that Lisa was not entitled to know the bases for the allegedly truthful claims. AA Vol. IV, 896. In

---

documents that had been mailed to the customer previously, such as monthly bank statements, additional copies of which the bank graciously provided in case Lisa had misplaced hers. AA Vol. III, 467. All other bank documents were considered privileged under the commissioner's sweeping view of the reach of the protection of the Patriot Act.

[13]The bank always maintained that the statements were true, even after it abandoned the defense of truth, which it did solely because without discovery, it had no evidence to maintain the defense. AA Vol. V, 1027. So the case was always under the cloud of the allegation that Lisa was a criminal, but that the bank could not so prove based on federal restrictions.

response, Wells Fargo stated that it intended to abandon its affirmative defense of "truth" prior to or at trial. AA Vol. V, 1027.

On January 10, 2014, the district court heard Wells Fargo's motion for summary judgment. AA Vol. V, 1041. The district court denied Wells Fargo's motion concerning Lisa's defamation claim, but granted the motion as to Lisa's false light claim. AA Vol. V, 1061. During the hearing, Lisa's counsel stated with regard to Lisa's declaratory relief claim, "[w]e think that the bank could certainly say why they closed the account, as long as it doesn't fall within the parameters of an SAR, or documents underlying an SAR, or anything like that." AA Vol. V, 1057, ln. 8. Lisa's counsel continued:

> And the fact that [Wells Fargo's counsel] now says well, we're willing to withdraw that affirmative defense [of truth]. Why did you ever bring it to begin with? What facts did you have at your disposal that you claim that you had at your disposal by filing an answer and including a Rule 11 affirmative defense of truthfulness? What facts did you have at your disposal at that time that my client had been in jail, had arrest warrants out, was involved in criminal conduct? And we're entitled to a declaration from the Court concerning that belief by the bank concerning its position, Your Honor.

AA Vol. V. 1057-58.

Nevertheless, the district court stated, "[i]t seems to me that the ruling that is–to the extent that this is based on a SARs report you cannot disclose that because they are prohibited by law under the Patriot Act for some reason for making those disclosures." AA Vol. V. 1062, ln. 1. The court stressed that she was not inclined to revisit her previous rulings concerning SAR-protected communications. *Id.* However, the district judge stated that "the declaratory relief was somewhat broader." Thus, the district court denied Wells Fargo's motion for summary judgment concerning Lisa's declaratory relief claim. *Id.* ln. 18.

///

///

G. The Trial.

The parties proceeded to trial on February 5, 2014, on Lisa's defamation and declaratory relief claims. Lisa presented her case in chief, during which Lisa and Michael presented live testimony. Thereafter, Wells Fargo brought an NRCP 50(a) motion for judgment as a matter of law as to both of Lisa's claims. AA Vol. VI, 1411-12. This was later changed to an NRCP 52 motion for judgment as a matter of law. AA Vol. VII, 1670. The district court denied Wells Fargo's motion. AA Vol. VI, 1428, ln. 5.

Regarding Lisa's request for declaratory relief, Wells Fargo reiterated its claim that granting that relief "would be tantamount to compelling Wells Fargo Bank to violate federal law." AA Vol. VI, 1425, ln. 23. For Lisa's part, her counsel asked the district court to admit an amendment to the declaratory relief request to state that there was no evidence presented at trial that Lisa's accounts were closed as a result of any criminal conduct by Lisa. AA Vol. VI, 1423, ln. 17. The district court did not issue a ruling regarding Lisa's requested amendment to the declaratory relief claim at that time. The district court stated:

> It's a hard one, as I've – as we've said before. There's no – that the Court can compel the bank to disclose because certain information may have a privilege, so – and they don't have to disclose. So I guess that's a question, again, another one of these double negatives.
>
> If they have a privilege to not have to disclose certain information by entering the declaration that's been requested by the oral amendment, am I violating that privilege and protection that they have, that there's no evidence–well, I guess the careful phrasing that Mr. Kistler used, if there's no evidence presented at trial to establish that the bank account was closed as a result of criminal activity. So we've got that on the table. I'll take a look at it. Like I said, I'm not sure how much I can–how much I can do with any–any kind of declaration like that.

AA Vol. VI, 1430, ln. 4-18.

Wells Fargo then presented its case in chief, following which it renewed its NRCP 50(a) motion for judgment as a matter of law. AA Vol. VII, 1461, ln. 23. The district court denied Wells Fargo's motion as to Lisa's defamation claim.

AA Vol. VII, 1464, ln. 3. However, the district court granted Wells Fargo's motion as to Lisa's request for declaratory relief. The district court stated, "The Court cannot force a bank to do business with somebody they choose not to do business with. I cannot force parties to contract with individuals they wish to not be associated with. Can't do it." AA Vol. VII, 1464, ln. 14. Further, the district judge stated that Wells Fargo was precluded by statute from explaining why it ceased doing business with Lisa. AA Vol. VII, 1464, ln. 17-24.[14] Lisa's counsel responded that Lisa was not asking the district court to enjoin Wells Fargo to reopen Lisa's accounts. AA Vol. VII, 1465, ln. 8. Further, Lisa's counsel stated that Lisa was entitled to a declaration that Wells Fargo presented no evidence of criminal conduct involving Lisa at trial. *Id* at 19.

Nevertheless, Judge Sturman again ruled that Wells Fargo had no obligation to disclose the reasons for closing Lisa's joint account. AA Vol. VII, 1466, ln. 22. Judge Sturman also stated that Lisa was not entitled to know the basis for Wells Fargo's defamatory statements against her because Wells Fargo abandoned its affirmative defense that the statements were true. AA Vol. VII, 1467, ln. 9.

The district court continued, "I could certainly say that no evidence was presented that Lisa Johnson has any record of criminal conduct. I would certainly agree with you." AA Vol. VII, 1469, ln. 10. Nevertheless, the district court granted Wells Fargo's motion to dismiss Lisa's claim for declaratory relief. AA Vol. VII, 1473.

Following the district judge's ruling on Wells Fargo's renewed NRCP 50(a) motion, the parties presented closing arguments. Lisa's counsel argued that

---

[14]This is not correct. Federal law did not prohibit the bank from telling Lisa what evidence it had of her alleged criminal behavior so long as the bank did not disclose whether that evidence was in any way related to its federal reporting. The underlying factual documents were not privileged under federal law.

Wells Fargo waived any privilege regarding the disclosure of reasons why it closed Lisa's accounts under the Bank Secrecy Act because the bank defamed Lisa. AA Vol. VII, 1490.

After a three-day trial, the district court ruled that Wells Fargo defamed Lisa and awarded her $25,000 in special damages and $90,000 in general damages. AA Vol. VII, 1669; 1674-76 (Findings of Fact, Conclusions of Law, and Judgment).

H. The Appeal.

On July 14, 2014, Lisa filed a notice of appeal from the district court's June 9, 2014 findings of fact, conclusions of law, and judgment. AA Vol. VII, 1678. Specifically, Lisa appeals from the district court's order granting Wells Fargo's motion for judgment as a matter of law as to Lisa's declaratory relief claim. Wells Fargo did not cross-appeal.

SUMMARY OF ARGUMENT

The SAR privilege is not nearly so broad as it was construed to be by the discovery commissioner and the district court. It cannot be construed so broadly as to preclude a claimant with a legitimate cause of action from obtaining elementary discovery of documents and information prepared and kept in the ordinary course of business. The Patriot Act is merely a smokescreen intended to imbue the banks recalcitrance to participate in discovery with an air of urgency and national security. No such interests exist in this case. Therefore, a standard can be articulated by this Court that would allow discovery of garden variety documents and information in the possession of the bank without doing violence to the federal policies of protecting SARs.

Not all bank documents and processes can be shrouded in a veil of secrecy just because the bank has a department organized to comply with federal laws regarding SARs, and it funnels all of its document through that department. The

Court, in the interests of all Nevadans (we all bank), should define the standard for the exercise of the privilege regarding SARs, making sure that standard is no broader than necessary to comply with federal law, and is sufficiently limited to allow for garden variety discovery in a garden variety defamation suit such as this. Protection of the rights of Nevada citizens to redress of wrongs in Nevada courts requires no less.

DISCUSSION

I. Standard of Appellate Review.

Discovery orders are generally reviewed for an abuse of discretion. *Club Vista Fin. Servs., L.L.C. v. Eighth Judicial Dist. Court*, 128 Nev. ___, 276 P.3d 246, 249 (2012). However, the construction of a statute is a question of law subject to *de novo* review. *Kay v. Nunez*, 122 Nev. 1100, 1104, 146 P.3d 801, 804 (2006). This Court should declare the correct construction of the federal privilege under the Bank Secrecy Act as a matter of law.

II. The District Court Erred in Denying Basic Discovery to Appellant.

A. The Patriot Act is Not Relevant to this Case.

Below, when introducing its federal law defense to all discovery, Wells Fargo began with a patriotic invocation of the national security theme by stating, "[a]s a result of tragic events of September 11, 2001, and the subsequent financial crisis of 2008-2009, there has been heightened scrutiny of financial markets by the federal government . . . ." AA Vol. I, 114, ln. 17. Of course, the tragedy of September 11, 2001, and the financial crisis of 2008 had nothing to do with each other, and have nothing to do with this case, but the invocation of flag waiving and an appeal to national security is just too tempting to resist.

As noted by Wells Fargo, the Bank Secrecy Act, together with its imposition of an obligation on banks to report suspicious banking activities in the form of an SAR, was enacted in 1970. AA Vol. I, 114 n.1. The fact that the Act

was amended in 1992 and then again in 2001 as a part of the Patriot Act has little or nothing to do with the issues of this case. Although substantial changes to 31 U.S.C. § 5318 were made in 2001, those changes had nothing to do with the bank's obligation of secrecy. Instead, the Patriot Act required greater scrutiny by banks in a number of additional areas of concern to the federal government, but the language regarding non-disclosure has remained unchanged since 1992. *Compare* 1992 version of 31 U.S.C. § 5318 with 2001 version or present version (they are identical).

Wells Fargo did not refer below to any language of the 2001 amendments to the Bank Secrecy Act in any way relevant to its obligations of secrecy in this case, and it cannot do so. Nevertheless, as the case evolved in the court below, the fact that the Act relied on by the bank was the Bank Secrecy Act, not the Patriot Act, was lost sight of, and issues of national security as embodied in the Patriot Act carried the day. *See* discovery commissioner comments, set forth above.

This case has nothing to do with national security, the Patriot Act *per se*, or the recent economic difficulties suffered in this country. It is plainly and simply a discovery dispute that seeks to define the extent to which a bank's tortious activities are protected from disclosure by federal banking law.

B. The Federal Protection is Not Broad.

For all of its puffery about the supremacy of the Bank Secrecy Act and its restrictions on the bank's ability to participate in a lawsuit, it is odd that in the many papers filed below, the bank cited only a single sentence from that Act. That sentence states that a bank:

> may not notify any person involved in the transaction that the transaction has been reported.

31 U.S.C. 5318(g)(2)(A)(I). The scope of that prohibition is limited indeed. It prohibits a bank only from informing a customer that an SAR was made.

Nothing in that sentence would preclude the bank from even acknowledging to a customer that documents exist, let alone from producing documents created in the ordinary course of the business of a bank.

So the bank relies on a much broader statement of federal law found in a C.F.R., which most certainly is not a part of the Patriot Act and does not implicate national security issues. The C.F.R. precludes dissemination of SAR related information:

> No bank . . . shall disclose a SAR or any information that would reveal the existence of a SAR. Any bank . . . that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and U.S.C. 5318(g)(2)(A)(I), and shall notify FinCEN of any such request and response thereto.

31 C.F.R. 1020.320(e)(1)(I). So this Court is not called upon to construe the Bank Secrecy Act or the Patriot Act. It is merely called upon to construe the privilege set forth in 31 C.F.R. 1020.320(e)(1)(I).

The language of the C.F.R., like the Bank Secrecy Act, is narrow in scope. It requires a bank not to disclose an SAR or information that would reveal the existence of an SAR. It is the bank that construes that language to be so broad that it covers in a shroud of secrecy every document a bank produces in any investigation of any kind of any customer. Nothing in the language of the Rule requires that interpretation. Further, the case law cited by the bank below also does not require the extremely broad interpretation of the privilege argued for by the bank and imposed by the district court. The Act and the Rule are directed at SARs and information directly related to or revealing something about an SAR, not all bank documents from which one might surmise that an SAR may or may not have been contemplated, and certainly not every document a bank creates in the course of the ordinary conduct of a bank investigation, even if that information might obligate a bank to prepare an SAR. If the information is not an SAR, and is not "information that would reveal the existence of a SAR," it is

not protected under the plain language of the Rule.

Wells Fargo's position below was that all of its processes for investigating fraud are protected by because they filter all their investigations through their AML division. Wells Fargo believes that it has a blanket veil of secrecy to do as it pleases. It raises the specter that allowing its methods of investigation to be discovered will harm its efforts to protect its other customers from fraud.

What Wells Fargo fails to recognize is that its methods of investigation and its conclusions regarding fraud are not protected under the Bank Secrecy Act. All that is protected are SARs and documents directly related to SARs. Banks conduct investigations related to crime and fraud that are not necessarily related to SARs and their reporting obligation. The suggestion that no fraud investigations would be conducted absent the reporting obligation is absurd

What the bank also fails to acknowledge is that blanket secrecy also allows a bank to hide its own misconduct and misfeasance, whether intentional or negligent. The twin engines of discovery and cross-examination are the time-tested hallmarks of the law leading to the truth. A veil of secrecy as broad as the bank claims it is afforded by the Bank Secrecy Act is a clear threat to these policies of the law. A narrow construction of the privilege is consistent with the transparency we have come to expect of government and business.

C. The SAR Discovery Privilege Is Limited.

Lisa objects to the discovery commissioner's ruling that Wells Fargo is not required to disclose the reasons it closed her accounts. NRCP 26(b)(1) sets forth the broad scope of discovery:

> Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It

> is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably to lead to the discovery of admissible evidence . . . .

NRCP 34 allows a party to serve on another party requests for production of documents relating to matters that are within the scope of NRCP 26(b). Further, NRCP 33 allows a party to serve on another party written interrogatories relating to any matter that may be inquired into under NRCP 26(b).

Contrary to the discovery commissioner's ruling, the Bank Secrecy Act does not shield Wells Fargo from disclosing why it closed Lisa's accounts. The purpose of the Bank Secrecy Act is "to require certain reports or records where they have a high degree of usefulness in criminal, tax, or regulatory investigations or proceedings, or in the conduct of intelligence or counterintelligence activities, including analysis, to protect against international terrorism." 31 U.S.C. § 5311 (2011).[15] The Bank Secrecy Act provides that, among other things, a bank may not notify a person that it has reported a suspicious transaction to a government agency. 31 U.S.C. § 5318(g)(2)(A) (2011). Pursuant to 31 C.F.R. 1020.320(e)(1)(I), a bank is not allowed to disclose an SAR or information that would reveal the existence of an SAR. In other words, a bank is not required to disclose documents prepared by the bank

---

[15]This is not a case about terrorism. The purpose of the Act is to require reporting. Documents related to the reporting of the listed activities would be protected (*i.e.*, SARs and documents that would "reveal the existence of a SAR"). Documents are not protected simply because they are in some way related to the above subjects.

The bank's position was not that its documents were about any of the listed subjects, so that disclosure would reveal something about the investigation of an SAR. It was that all bank documents are privileged because the bank cannot even say whether it believes the documents are related to any of the listed subjects without violating federal law. The mere act of stating a basis for asserting the privilege violates the privilege in the bank's view. As the district judge stated, such a position is "ridiculous." AA Vol. III, 674.

for the purpose of investigating or drafting a possible SAR.

However, courts construe this privilege narrowly because it prevents otherwise admissible and relevant evidence from coming to light. *See Union Bank of California, N.A. v. Superior Ct.*, 130 Cal.App.4th 378, 392, 400, 29 Cal.Rptr.3d 894, 903, 909 (2005) (holding that a bank was not required to produce a specific form that the bank used to comply with its obligation under federal law to report suspicious activity and to file SARs, but requiring the production of other bank documents). Indeed, SAR protection only applies to the SARs themselves and not to other reports or documents evidencing suspicious activity. *See Gregory v. Bank One, Ind., N.A.*, 200 F.Supp.2d 1000, 1002 (S.D. Ind. 2002) (analyzing the Rule in the context of a defamation case and stating that the rule "requires confidentiality only of SARs and their contents, not of other reports of suspicious activity . . . . [The] requirement of confidentiality applies only to the SARs themselves and the information contained therein, but not to their supporting documentation."). Nor do documents become privileged because they may prompt the filing of an SAR or because they support the filing of an SAR or are referred to in an SAR. *See In re Whitley*, 2011 WL 6202895, at *4 (Bkrtcy. M.D.N.C. Dec. 13, 2011).

Consistent with this narrow construction, banks are required to disclose discovery related to documents and facts pertaining to suspicious activity at issue that was created in the ordinary course of business. *See Freedman & Gersten, LLP v. Bank of America, N.A.*, 2010 WL 5139874, at *3 (S.D.N.Y. Dec. 8, 2010). This includes transaction and account documents such as wire transfers, statements, checks, and deposit slips. *See Union Bank of California, N.A. v. Superior Ct.*, 130 Cal.App.4th, at 391.

Further, banks must disclose information related to procedures in place for detecting suspicious activity independent of procedures for complying with federal reporting obligations. *Id.* at 392. For example, documents designed to

fulfill general risk management functions are not subject to SAR privilege. *Id.* at 396. Further, "[a] bank may not cloak its internal reports and memoranda with a veil of confidentiality simply by claiming they concern suspicious activity or concern a transaction that resulted in the filing of a SAR." *Id.* at 392.

Although a bank may undertake an internal investigation in anticipation of filing an 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. *See In re Whitley*, 2011 WL 6202895, at *4, *citing Freedman & Gersten, LLP*, 2010 WL 5139874, at *1. "The letter and spirit of the limitation is served by shielding any SAR filed by a bank as well as any document that refers to a SAR having been filed or refers to information as being a part of a SAR or otherwise reveals the preparation or filing of a SAR."[16]

The *Whitley* court stated:

> [B]ased on this Court's liberal pretrial discovery standard, the Court grants Plaintiff's request for any memoranda or documents drafted in response to the suspicious activity at issue in this case. However, Defendants shall not produce any SARs or previous drafts of SARs, need not indicate if and when a SAR was produced, and shall not state what documents and facts were or were not included in any

---

[16] *Id.* (holding that, subject to the SAR restrictions, the bank must disclose, among other things: (1) bank documents relative to the accounts in question that were generated in the ordinary course of business, including computer-generated reports of suspicious and/or unusual, irregular or improper account activity, (2) documents relating to any investigation or inquiry by the bank or its agents of any account in question, (3) documents that would evidence any response to the investigation and the findings, or observation, notes of any such investigation relative to account activity of the individual in question, including suspicious activity, (4) documents that would evidence follow-up concerning suspicious activity, and (5) documents obtained by the bank from any source relating to any investigation the bank may have made into the account of the individual in question, including suspicious activity).

> SARs. Although BOA [Bank of America] may have undertaken an internal investigation in anticipation of filing a SAR, it is also a standard business practice for banks to investigate suspicious activity and BOA does not cite any binding precedent on this Court which bars the production of this relevant documentation. The documents and facts produced in the ordinary course of business are necessary and relevant for purposes of Plaintiff discovering and/or assessing the precise facts of this incident . . . ."

Id.

As here, the bank in *Whitley* argued that it was precluded from producing any information whatsoever because the bank's investigator who opened, prepared, and maintained the file, and prepared documents in response to a fraudulent crime, did so in anticipation of the potential filing of an SAR. However, the court rejected that argument and held that the bank was required to produce non-SAR information to the plaintiff. Further, the court held that the plaintiff was "entitled to discovery related to [the bank's] policies and procedures for handling suspicious activity and risk management, except for those policies and procedures specifically designated for SARs." *Id.*

D. The SAR Privilege Does Not Prevent the Disclosure of Discoverable Materials in this Litigation.

Below, the discovery commissioner correctly determined that Lisa was entitled to discovery concerning "all records pertaining to the accounts of Plaintiff that are the subject of this action . . . ." AA Vol. II, 331, ln. 28. However, the discovery commissioner incorrectly determined that Lisa was not entitled to any information pertaining to the reasons Wells Fargo closed her accounts. AA Vol. II, 332. The fundamental problem is that the discovery commissioner's recommendations categorized jointly: (1) undiscoverable documents that Wells Fargo potentially prepared for the purpose of investigating or drafting a possible SAR concerning Lisa, and (2) discoverable documentation concerning general risk management, loss prevention, account closure, and customer service procedures and communications pertaining to Wells Fargo's decision to close Johnson's accounts that was independent of its SAR reporting

obligations. The district court adopted the discovery commissioner's report, and compounded the error by dismissing Lisa's claim for declaratory relief based solely on the belief that the bank was exempt from all discovery.

Wells Fargo delivered three account closure letters to Lisa stating: "Wells Fargo performs ongoing reviews of its account relationships in connection with the Bank's responsibilities to oversee and manage risks in its banking operations. We recently reviewed your account relationship and, as a result of this review, we have decided to close the above-referenced account(s) . . . ." AA Vol. II, 337; 339; 341. Wells Fargo's Prevention Contact Center drafted two of these letters, while Wells Fargo's Business Direct department drafted the other. *Id.* As these letters demonstrate, Wells Fargo's decision to close Lisa's accounts was based, at least in part, on its own general risk management and loss prevention efforts, which are independent of its federal reporting requirements. Further, one of the letters states that Wells Fargo closed the account(s) because, "[b]ank policy excludes lending to certain types of businesses." AA Vol. II, 339. Accordingly, Wells Fargo's own policies (not those of the federal government) formed the bases for its decisions to close Lisa's accounts. These policies and deliberations are subject to discovery.

To suggest that Wells Fargo would not evaluate Lisa's accounts or make the decision to close her accounts absent a government reporting requirement is inconsistent with the evidence presented in this case and defies logic. Although Wells Fargo claims that all information concerning the reasons it closed Lisa's accounts is based on documentation that is subject to SAR privilege,[17] a bank "may not cloak its internal reports and memoranda with a veil of confidentiality simply by claiming they concern suspicious activity or concern a transaction that resulted in the filing of a SAR." *See Union Bank of California, N.A. v. Superior*

---

[17] *See* Affidavit of Raelynn Stockman at ¶¶ 3-6, AA Vol. I, 202.

Ct., 130 Cal.App.4th, at 392. As the court stated in *Freedman & Gersten, LLP v. Bank of America*, it is a standard business practice for banks to investigate allegedly suspicious activity. *See In re Whitley*, 2011 WL 6202895, at *4, *citing Freedman & Gersten, LLP*, 2010 WL 5139874, at *1. The fact that Wells Fargo may have designated a division or an individual (as was the case in *Freedman & Gersten, LLP v. Bank of America*) to investigate an account in preparation of filing an SAR does not absolve Wells Fargo from producing responsive information. It only prevents Wells Fargo from disclosing SAR information.

Further, Wells Fargo's alleged actions to investigate and prepare an SAR against Lisa[18] are distinct from its actions to defame Lisa and to close her accounts. Wells Fargo's suggestion that it cannot disclose information concerning the defamatory statements against Lisa or the closure of her accounts without disclosing that an SAR has been filed with the government is wrong. The banks in *In re Whitley* and *Freedman & Gersten, LLP v. Bank of America, N.A.* made similar arguments that the disclosure of bank documents concerning internal investigations of suspicious activity of an account-holder would violate the Bank Secrecy Act. *Id.* at *3; *see also Freedman & Gersten, LLP v. Bank of America, N.A.*, 2010 WL 5139874, at *4. In both cases, the courts rejected the banks' blanket pleas for confidentiality and held that the banks must disclose all responsive non-SAR information. *Id.* These holdings are consistent with the case law Wells Fargo cited in its Opposition and Counter-Motion before the discovery commissioner. *See In re Mezvinsky*, 2000 WL 33950697, at *3 (Bkrtcy. E.D. Pa. Sept. 7, 2000) (holding that the Bank Secrecy Act and related regulations did not apply to documents that were predecessors to SARs or to

---

[18]If there were any such actions. The bank consistently took the position that it could neither admit nor deny that any of its actions (or documents) were in any way related to an SAR without violating federal law. Surely, this kind of reasoning cannot be accepted.

other specified reports); *Union Bank of California, N.A. v. Superior Court*, 130 Cal.App.4th 378, 390, 392, 29 Cal.Rptr.3d 894, 901, 903 (2005) (stating that supporting documentation underlying an SAR that is generated or received in the ordinary course of a bank's business, as well as various internal reports and memoranda of suspicious activity, are discoverable).

Ironically, Wells Fargo's arguments below concerning SAR privilege relied chiefly on the holding of a single California court of appeals, *Union Bank of California, N.A. v. Superior Court*, 130 Cal.App.4th 378, 29 Cal.Rptr.3d 894 (2005) We have already cited to this Court the many statements in *Union Bank* that contradict Wells Fargo's position. Further, *Union Bank* is distinguishable from this case.

In *Union Bank*, plaintiff investors alleged that a bank was complicit with a customer in operating a Ponzi scheme. *Id.* at 384. The plaintiffs primarily requested the production of information concerning a specific form the bank used to comply with its obligation under federal law to report suspicious activity and to file SARs. *Id.* at 386. Although the plaintiffs argued that the form was used for general risk management purposes, the court held that there was no evidence that the form was designed to fulfill a general risk management function or that it served any purpose other than to fulfill the bank's obligations to file SARs. *Id.* at 397-97. Ultimately, the court held that, pursuant to the SAR privilege, the bank was not required to produce the form or to respond to any discovery requests concerning the contents of the form. *Id.* at 400.

In this case, however, Lisa was not seeking to compel production of any forms or other documents that Wells Fargo used specifically to investigate or draft a potential SAR. Instead, Lisa sought to compel information concerning the closure of her accounts from non-SAR sources (*e.g.*, information from general risk management, loss prevention, account closure, and customer service sources). Unlike the plaintiffs in *Union Bank*–who specifically sought to learn

whether the bank had filed an SAR concerning a customer–Lisa was not seeking to learn whether Wells Fargo filed an SAR against her. Her discovery was directed at the reasons Wells Fargo closed her accounts specifically in light of their false accusations that she was guilty of criminal activity, not whether she was reported to a government agency. Lisa wanted to protect herself from false information that could hurt her personally, and could hurt her business. She wanted to discover what prompted the bank to defame her, not to discover whether the bank had reported anything to federal authorities. The bank could have produced all the information it had allegedly showing Lisa's criminal conduct without producing any document directly related to whether or not an SAR existed. In other words, in the course of normal discovery–as conducted in every other case–the bank could have produced redacted documents and documents unrelated to an SAR, and claimed privilege with respect to SAR documents, without violating federal law. The catch-22 imagined by the district court simply does not exist.

Accordingly, Wells Fargo should be required to produce documents and other information concerning the closure of Lisa's accounts that were not prepared by Wells Fargo for the purpose of investigating or drafting an SAR. More specifically, Lisa is entitled to information concerning: (1) the contents of, and basis for, bank employee Dounel's defamatory statements against Lisa made to Michael concerning the closure of Lisa's accounts, (2) communications between other Wells Fargo employees and Michael concerning the closure of these accounts, and (3) non-SAR information concerning the review, risk assessment, and closure of Lisa's accounts. All of this information is relevant to evaluate the basis of Dounel's defamatory statements against Lisa, as well as Wells Fargo's affirmative defense that these statements are true.

///

///

CONCLUSION

The decision of the district court should be reversed, a standard for applying the federal privilege should be adopted, and this matter should be remanded for further proceedings.

DATED this 26 day of May, 2015.

HUTCHISON & STEFFEN, LLC

Michael K. Wall (2098)
Peccole Professional Park
10080 West Alta, Suite 200
Las Vegas, Nevada 89145

Attorneys for Appellant

ATTORNEY'S CERTIFICATE

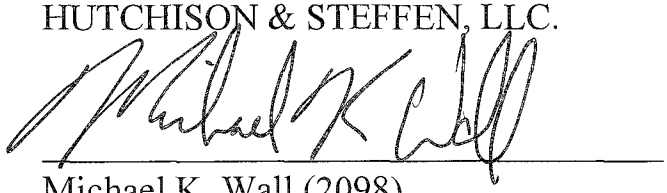
1. I certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because it has been prepared in a proportionally spaced typeface using WordPerfect X4 in 14 point Times New Roman font.

2. I further certify that this brief complies with the type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is proportionately spaced, has a typeface of 14 points and contains 12,836 words.

3. Finally, I certify that I have read this appellate brief, and to the best of my knowledge, information and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 26 day of May, 2015.

HUTCHISON & STEFFEN, LLC.



Michael K. Wall (2098)
Peccole Professional Park
10800 Alta Drive, Suite 200
Las Vegas, Nevada 89145

Attorney for Appellant

CERTIFICATE OF SERVICE

I certify that I am an employee of HUTCHISON & STEFFEN, LLC and that on this date **APPELLANT LISA JOHNSON'S OPENING BRIEF** was filed electronically with the Clerk of the Nevada Supreme Court, and therefore electronic service was made in accordance with the master service list as follows:

Kent F. Larsen (3463)
Paul Haire, Esq. (5656)
SMITH LARSEN & WIXOM
Hills Center Business Park
1935 Village Center Circle
Las Vegas, NV 89134
kfl@slwlaw.com
pmh@slwlaw.com
Facsimile 702-252-5006

Attorneys for Defendants

DATED this 26th day of May, 2015.

An employee of Hutchison & Steffen, LLC