IN THE SUPREME COURT OF THE STATE OF NEVADA

LISA JOHNSON,

Appellant,

v.

WELLS FARGO BANK, NATIONAL ASSOCIATION,

Respondent.

Case No. 66094

APPEAL

From the Eighth Judicial District Court, Clark County
Honorable Gloria Sturman, District Judge
District Court Case No. A-12-655393-C

RESPONDENT'S ANSWERING BRIEF

Kent F. Larsen, Esq.
Nevada Bar No. 3463
Paul M. Haire, Esq.
Nevada Bar No. 5656
SMITH LARSEN & WIXOM
1935 Village Center Circle
Las Vegas, Nevada 89134
(702) 252-5002

Attorneys for Respondent

NRAP 26.1 Disclosure

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Respondent **Wells Fargo Bank, National Association** is a national bank providing personal and commercial banking services. It operates as a subsidiary of **Wells Fargo & Company**, a publicly traded banking and financial services holding company. Respondent is represented in this appeal by the law firm of **Smith Larsen & Wixom**, which law firm also represented Respondent in the district court proceeding.

DATED: August 17, 2015

SMITH LARSEN & WIXOM

/s/ Paul M. Haire

By: _____

KENT F. LARSEN, ESQ.
Nevada Bar No. 3463
PAUL M. HAIRE, ESQ.
Nevada Bar No. 5656
1935 Village Center Circle
Las Vegas, Nevada 89134

Table of Contents

Table of Authorities

Cases **Page**

Statutes

Rules

Regulations

Other

Statement of Jurisdiction

Respondent Wells Fargo Bank, N.A. ("Wells Fargo") agrees this Court has jurisdiction for Johnson's appeal pursuant to NRAP 3A(b) and that Appellant Lisa Johnson ("Johnson") filed a timely Notice of Appeal. Wells Fargo rejects the assertions, characterizations and arguments contained in Johnson's jurisdictional statement that exceed the requirements of NRAP 28(a)(4)(A)-(C).

Routing Statement

This appeal may be presumptively retained by the Nevada Supreme Court pursuant to NRAP 17(a)(13) as Johnson raises an issue the Court may deem a principal issue presenting a question of first impression. Johnson argues on appeal that the district court erred in denying her declaratory relief, which she contends emanated solely from its application of the federal Bank Secrecy Act. [AA Vol. II: AA000268-73; Vol. IV: AA000711-12; Vol. IV: AA000764-70]. The Supreme Court has never addressed the Bank Secrecy Act.

Issues Presented

Johnson appeals the denial of her two-parted claim for declaratory relief. [Op. Brf. 1:12-15]. The primary issues are:

1. Did the district court abuse its discretion in not allowing Johnson to learn the specific reason why Wells Fargo closed her bank accounts even though the bank is not required to provide the reason and moreover the

reason lies in information that cannot be disclosed pursuant to the Bank Secrecy Act[1]?

2. Despite the at-will relationship between bank and customer and the Bank Secrecy Act's prohibitions, should the district court have nevertheless allowed Johnson to learn the specific reason her accounts were closed because a bank employee made defamatory remarks insinuating her criminality, but where the employee admitted he had no evidence of criminality and the bank did not defend his defamatory remarks as truthful?

[1] Non-specific use of the terms "Bank Secrecy Act" and "Act" is intended to refer broadly to 31 U.S.C. § 5318(g)(1), and its companion federal regulations, and amendments of the Act through Title III of U.S. Patriot Act of 2001 (See 31 USC 5311-5330 and 31 CFR Chapter X [formerly 31 CFR Part 103]) and through the Annunzio-Wylie Anti-Money Laundering Act of 1992.

Statement of the Case

Wells Fargo exercised its legal discretion to close Johnson's bank accounts, including one she held jointly with her boyfriend. The bank declined to provide details for why it closed the accounts. Later, during a discussion with Johnson's boyfriend about the joint account's closure, a Wells Fargo employee made remarks suggesting Johnson had a criminal background.

Johnson sued the bank for defamation and false light invasion of privacy. She also petitioned for declaratory judgment that she was entitled to know specifically why the bank closed her accounts and why the bank's employee made the disparaging remarks about her.[1] Before trial, the district court dismissed the false light claim. During trial, the court dismissed the declaratory relief claim because (1) Wells Fargo was not legally obligated to provide any reason for closing the accounts, (2) an *in camera* review of bank records found that disclosure of the bank's reason for closing the accounts would require disclosures prohibited by the Bank Secrecy Act, and (3) because Wells Fargo did not pursue truth as a defense to the defamation claim any inquiry into why the bank's employee made

[1] Johnson characterizes the focus of her declaratory relief claim as "not a general desire to learn why Wells Fargo closed [her] accounts; it is a specific request to learn the basis for Wells Fargo's defamation of [her]." [Op. Brf. 10:9-12]. This characterization belies the plain language of the claim's allegations as well as Johnson's later statement that "[her] goal from the beginning of the litigation was to ascertain why Wells Fargo closed her accounts and made defamatory statements against her." [Op. Brf. 10:21-22]. Wells Fargo presumes Johnson's appeal challenges dismissal of the whole of her declaratory relief claim as pled.

the disparaging remarks was neither required nor relevant. Johnson ultimately prevailed on her defamation claim and was awarded damages.

In this appeal Johnson challenges only the district court's at-trial dismissal of her declaratory relief claim. She argues exclusively that the district court barred discovery of "garden variety" bank information and denied her declaratory relief based on an overly broad interpretation and application of the Bank Secrecy Act's prohibitions.

Statement of Facts

1. Wells Fargo closes Johnson's bank accounts and a bank employee makes disparaging, but admittedly unfounded, remarks about Johnson.

The relevant facts giving rise to the litigation are mostly contained in the district court's Findings of Fact, Conclusions of Law, and Judgment. [AA Vol. VII: AA001669-001677]. Johnson is the managing member of Guitarfile, LLC and the long-time girlfriend of Kaplan. [AA Vol. VII: AA001670, ¶¶ 6, 9]. In 2004, Kaplan and Johnson opened a joint bank account at Wells Fargo (the "Joint Account") with Kaplan. [AA Vol. VII: AA001670-71, ¶¶ 10, 15]. In 2010, Johnson opened multiple bank accounts, and a credit card account, for Guitarfile at Wells Fargo (collectively the "Guitarfile Accounts").[2] [AA Vol. VII: AA001670, ¶¶ 7-8].

[2] The Joint Account and Guitarfile Accounts are collectively referred to as the "Accounts."

In August 2011, Wells Fargo sent letters to Johnson (and to Kaplan relative to the Joint Account) notifying her that in approximately 30 days it was closing the Accounts. [AA Vol. VII: AA001671, ¶¶ 11-13; AA001549, 001551, 001553]. The letters indicated the closures were based on a review of the bank's account relationships in connection with its risk assessment process, the results of which were confidential. [Id.]. Johnson requested that Wells Fargo tell her why it had elected to close her Accounts, but the bank refused to identify the specific reasons. [AA Vol. VII: AA001671, ¶ 14]. The Accounts were closed in late September 2011. [AA Vol. VII: AA001671, ¶¶ 13, 16].

In October 2011, Kaplan, who had other accounts of his own with Wells Fargo, went to a Wells Fargo branch in Malibu, California to cash a check. [AA Vol. V: AA001136; AA Vol. VII: AA001671, ¶¶ 17-18]. While there Kaplan was invited to meet with Arash Dounel, a Wells Fargo premier banker and brokerage associate, to discuss the possibility of Kaplan opening additional accounts. [AA Vol. VII: AA001671, ¶¶ 18-19]. During their conversation Kaplan told Dounel about Wells Fargo's closure of the Joint Account. [AA Vol. VII: AA001671-72, ¶ 20]. Dounel asked if Kaplan had a copy of the closure letter. Kaplan responded that he did not, but that Johnson, who was not present, had it. Kaplan contacted Johnson and had her email the closure letter to Dounel. [AA Vol. VII: AA001671-72, ¶ 20-21].

When he received the letter Dounel examined it and his computer screen, which Kaplan could not see. [AA Vol. VII: AA001672, ¶ 21]. In his position with the bank Dounel was able through his computer to verify the Joint Account was closed, but did not have access to why the account was closed. [AA Vol. VI: AA001439-40]. At Kaplan's insistence to know the reason for the Joint Account's closure Dounel made remarks suggesting that Johnson must have a criminal background or must be involved in criminal activity, and that Kaplan should consider hiring a private investigator to look into Johnson's background. [AA Vol. VII: AA001672-73, ¶¶ 22, 27]. Dounel admittedly had no information to suggest Johnson in fact was or had been involved in criminal activity. [AA Vol. VII: AA001672-73, ¶ 27].

2. Johnson sues Wells Fargo for defamation, false light and declaratory relief.

In January 2012, Johnson sued Wells Fargo alleging defamation and false light invasion of privacy based on Dounel's disparaging statements to Kaplan. [AA Vol. I: AA000001-7]. The complaint included a separate claim for declaratory relief, which after referencing NRS 30.030 of Nevada's Uniform Declaratory Judgments Act added the following:

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

> Johnson is entitled to know why her accounts with Wells Fargo were closed as well as the basis for its defamatory statements against her.
>
> 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: AA000006]. Wells Fargo answered Johnson's complaint in April 2012. It denied all material allegations of the complaint and asserted various affirmative defenses, including (1) preemption under the Bank Secrecy Act; (2) truth with respect to the alleged defamatory statements; and (3) lack of a justiciable or ripe controversy, and lack of a legally protected interest. [AA Vo. I: AA0000014-15].

3. The district court rules the Bank Secrecy Act prohibits Wells Fargo's disclosure of the information that guided its decision to close Johnson's accounts, and thus orders the bank is not required to disclose why it closed the Accounts.

During discovery Wells Fargo declined to respond to Johnson's interrogatories and document requests aimed at determining the reasons why the bank closed the Accounts and the basis for Dounel's disparaging, but admittedly unfounded, remarks about Johnson. [AA Vol. I: AA000030-35]. In August 2012, Johnson moved the discovery commissioner to compel Wells Fargo's responses to the demanded discovery. [AA Vol. I: AA000017-106]. Wells Fargo opposed the motion, and requested a protective order on grounds that (1) Johnson had no legal right to know why the bank elected to close the Accounts because the bank-

customer relationship is at will; and (2) the information sought "[fell] within the strict confidentiality provisions of section 5318(g) of the Bank Secrecy Act (31 U.S.C. § 5318(g)) and related federal regulations." [AA Vol. I: AA000107-203; AA Vol. II: AA000221-248].

After a hearing in October 2012 the discovery commissioner recommended (1) that Wells Fargo not be required to disclose the reason for closing the Accounts, as that information was protected under the Bank Secrecy Act; (2) that no discovery be conducted into the reason why Wells Fargo closed the Accounts; but (3) that Wells Fargo be required to disclose regular account records not pertaining to its reason for closing the Accounts. [AA Vol. II: AA000268-273]. At the hearing the commissioner remarked that "based on the banking law, the Federal law, I don't think [the bank] can give up the reasoning, or their rationale for closing her accounts" and "basically I can't give over any of the documents; those are all protected" and "I am really confident that [Wells Fargo] cannot give over the documents showing the rationale for them closing the account[s]," and finally "the reasons why the bank has chosen to discontinue business with one of its customers remains protected." [AA Vol. II; AA000252-53, 255, 264]. The commissioner also indicated that Dounel's statements "alone may form a basis for [the] defamation claim" and "*what* he said cannot be protected by the Federal banking laws," but the *validity* of the statements is protected. [AA Vo. II:

AA000260-61 (emphasis added)]. The hearing also alerted both parties to the prospect that the ruling placed at risk Wells Fargo's truth defense to Johnson's defamation claim, a matter for the district court judge's consideration. [AA Vo. II: AA000254-57].

Johnson appealed the October 2012 discovery commissioner rulings to the district court judge. [AA Vol. II: AA000274-342; AA Vol. II: AA000426-429]. After a hearing in February 2013 the judge in March 2013 affirmed the commissioner's rulings. [AA Vol. III: AA000616-710; AA Vol. IV: AA000711-712]. However, the judge remanded the matter back to the commissioner for the purpose of having Wells Fargo produce an appropriate privilege log and for the purpose of conducting an *in camera* review of the documents claimed to be privileged. [AA Vol. IV: AA000711-12; AA Vol. IV: AA00766, ¶ 7]. Later that month the commissioner ordered Wells Fargo to prepare and serve a privilege log of documents it believed were privileged under the Bank Secrecy Act, and to submit the documents for *in camera* review. [AA Vol. IV: AA000729-730]. The bank complied with both orders. [AA Vol. IV: AA000732-747].

At a hearing in April 2013 the discovery commissioner acknowledged she had reviewed the transcript of the parties' February 2013 hearing before the district court judge, and acknowledged she had reviewed both the privilege logs and Wells Fargo's documents submitted for *in camera* review. [AA Vol. IV: AA000758,

760]. Based on her review the commissioner upheld her prior ruling and determined that Wells Fargo's privilege log was appropriate under the confidentiality provisions of the Bank Secrecy Act, and that Wells Fargo's documents reviewed *in camera* were confidential and protected under the Act. [AA Vol. IV: AA000758-763; AA Vol. IV: AA000764-770]. The commissioner remarked that the matter was one "of federal substantive law that this Court is required to enforce." [AA Vol IV: AA000759].

Specifically, without acknowledging the existence or non-existence of a suspicious activity report ("SAR"), the commissioner recommended the following in her May 2013 written report: (1) documents constituting a SAR, bank policies and procedures used in preparing any SAR, and any documents prepared in conjunction with the investigation of any SAR-related matter, are protected; and (2) ordinary account records (e.g., deposit slips) that may have been included with a SAR or SAR-related investigation are not protected. [AA Vol. IV: AA000758; AA Vol. IV: AA00764-770].

Johnson did not object to the discovery commissioner's May 2013 written report and recommendations relating to the April 2013 hearing. The district court

judge therefore affirmed and adopted the recommendations as the order of the district court.[3] [AA Vol. IV: AA000764-770].

4. The district court grants partial summary judgment.

In November 2013 Wells Fargo moved for summary judgment as to each of Johnson's claims. [AA Vol. IV: AA000771-874]. Regarding declaratory relief Wells Fargo argued the claim was moot. The court had already determined that the Bank Secrecy Act prevented Wells Fargo from disclosing why it closed the Accounts. [AA Vol. IV: AA000785-86]. Also, Wells Fargo had abandoned truth as a defense to Johnson's defamation claim. Thus, why Dounel may have made the disparaging remarks about Johnson was no longer relevant. [AA Vol. V: AA001027].

In January 2014 the district court dismissed the false light claim, but denied summary judgment as to the declaratory relief and defamation claims. [AA Vol. V: AA001041-1070]. The court determined the scope of the declaratory relief requested was broad enough that issues of fact *may* remain for trial. [AA Vol. V: AA001061-1064]. Thus, the court deferred until trial the issue of whether

[3] The net effect of the commissioner's May 2013 recommendations was to clarify her October 2012 recommendations to the extent that the documents identified in Wells Fargo's privilege log, and any SAR-related information pertaining to the documents would not be produced. The commissioner's prior recommendations that Wells Fargo is not required to disclose why it closed the Accounts, and that discovery into why the Accounts were closed would be precluded, remained unaffected.

Johnson's declaratory relief was cognizable. Nevertheless, the court made clear that by preserving the claim until trial the court was not inclined to revisit its prior rulings related to the Bank Secrecy Act. [AA Vol. V: AA001062].

5. The remaining case proceeds to bench trial, the district court dismisses Johnson's declaratory relief claim, but awards damages for defamation.

Bench trial on Johnson's claims for defamation and declaratory relief was held February 5, 2014 to February 7, 2014. [AA Vol. V-VI: AA001106 – AA Vol. VII; AA001530]. At the close of Johnson's case in chief Wells Fargo renewed its earlier motion for directed verdict as to both claims. [AA Vol. VI: AA001462; AA Vol. VI: AA001412-1430]. The bank's motion relative to defamation was denied. [AA Vol. VII: AA001473]. The court however granted judgment as a matter of law relative to the declaratory relief claim. The court first explained as follows:

> The Court cannot force a bank to do business with somebody they choose not do business with. I cannot force parties to contract with individuals they wish to not be associated with. Can't do it. The unfortunate thing about these...statutes [Bank Secrecy Act] is that they place an organization in a position where they have to take certain action and they can't explain it. [AA Vol. VII: AA001464].

Moving to Johnson's specific declaratory requests the court next stated:

> The first thing is, is she entitled to know why her accounts were closed. Again, I don't believe she is. The second I think is a totally different issue, and that is, is she entitled to know the basis for defamatory statements. If you assume there's a defamatory statement, is she entitled to know what it's based on[?] Well, if [Wells Fargo] were still going forward on truth, then yeah, guess so, because that would be part of having to defend it on the basis of truth. If we're not going forward on that it's true, then is it sufficient that Mr. Dounel

> testifies I know of no evidence...that would support the fact that Ms. Johnson either does or has had in the past criminal warrants, whatever - however it was Mr. Kaplan termed it. And so I don't know that we can - you know, again I just - I'm not sure that we can go there. [AA Vol. VII: AA001467].

Johnson then pivoted and requested her declaratory relief claim be amended; that the court "declare that there was no evidence presented at [the] trial to support the conclusion that Ms. Johnson's accounts and the joint account were closed as a result of her criminal conduct." [AA VII: AA001466] At that the court reiterated Wells Fargo is not obligated to disclose its reason for closing the Accounts [AA Vol. VII: AA001466] and added the following:

> We don't know what led to the closure[s]. We can't inquire into that. Our hands are tied there...[AA Vol. VII: AA001470]. [T]here we're getting into this whole point of what's the Court's jurisdiction under Chapter 30 to enter declaratory relief. To say the Court should declare that Ms. Johnson has no criminal record, I don't see that that falls within declaratory relief. That's not a controversy that I can tell between the Bank and Ms. Johnson that this Court has jurisdiction to enter any findings on and it is in part because we are barred by federal law from inquiring into certain things. As a result, [the Bank] has dropped the defense. I just - I don't see that there's - that this was really something that was in controversy in this case. It's entirely separate from the whole issue of defamation. [AA Vol. VV: AA001472]. I just don't see that there's anything with respect to the relationship between the parties that I can enter a declaration about.[4] [AA Vol. VII: AA001473]

[4] Johnson's appeal does not directly challenge the district court's findings and conclusions related to her oral motion at trial to amend the claim.

Ultimately the district court concluded Dounel's statements, while merely negligent, were still slanderous per se and that Johnson had suffered damages. [AA Vol. VII: AA001675, ¶¶ 8-9]. As a result the court awarded Johnson $115,000 in compensatory damages.[5] [AA Vol. VII: AA001676]. On June 6, 2014 the district court judge signed her own crafted findings of fact, conclusions of law and judgment. [AA Vol. VII: AA001669-77].

Summary of Argument

Johnson's declaratory relief claim comprises two approaches to the same aim – the reason why Wells Fargo closed her Accounts. The district court did not abuse its discretion in dismissing the claim because neither of the claim's approaches is legally cognizable. Her approach in having the court straightly declare her entitlement to Wells Fargo's reason for closing the Accounts fails for two distinct reasons. First, the legal relationship between the bank and Johnson, as it relates to closure of the Accounts, is not uncertain or in need of clarification. The bank can close accounts any time and it is not required to disclose why. Second, the district court's *in camera* review of Wells Fargo's records confirms that requiring disclosure of the bank's reason for closing the Accounts concomitantly requires disclosures prohibited by the Bank Secrecy Act.

---

[5] Wells Fargo has paid the defamation judgment in full.

Johnson's alternative approach to learning why her Accounts were closed piggybacks on her defamation claim. This approach fails because there is no relevant legal interest to be declared or protected by requiring Wells Fargo's explanation for its employee's defamation. First, why a person defames is relevant only when truth is asserted as a defense to the defamation. Here it was not, and Johnson demonstrates no compelling, independent basis for requiring the information. Second, Dounel admitted he had no actual evidence of Johnson's criminality when he made the remarks. He also lacked access to bank information describing why the Accounts were closed. There is no legitimate purpose in requiring Wells Fargo to postulate about Dounel's motivation for defaming Johnson except to provoke the bank's violation of the Bank Secrecy Act.

Standards of Review

Whether a determination is proper in an action for declaratory relief is a matter within the district court's discretion and will not be disturbed on appeal unless the district court abused its discretion. *El Capitan Club v. Fireman's Fund Ins.*, 89 Nev. 65, 68, 506 P.2d 426, 428 (1973). The district court may abuse its discretion by a clearly erroneous interpretation or application of a statute. *State v. Eighth Judicial Dist. Court*, 127 Nev. Adv. Op. 84, 267 P.3d 777, 780 (2011) (citing *Jones Rigging and Heavy Hauling v. Parker*, 347 Ark. 628, 66 S.W.3d 599, 602 (2002) (stating that a manifest abuse of discretion "is one exercised

improvidently or thoughtlessly and without due consideration"). The district court may abuse its discretion also if its factual findings are clearly erroneous or not supported by substantial evidence; otherwise the court's factual findings are given deference. *International Fid. Ins. v. State of Nevada*, 122 Nev. 39, 42, 126 P.3d 1133, 1134-35 (2008). Similarly, discovery matters are generally within the district court's sound discretion, and discovery rulings will not be disturbed unless the court clearly abused its discretion. *Club Vista Financial Servs. v. Dist Court*, 128 Nev. Adv. Op. 21, 276 P.3d 246, 249 (2012).

Argument

Johnson's exclusive focus on the Bank Secrecy Act obscures the holistic support for dismissal of her declaratory relief claim. Despite Johnson's characterization,[6] the claim comprises two approaches to the same relief: a direct approach and an indirect approach to her learning why her Accounts were closed. The direct approach is represented by the part of the claim seeking a declaration that Johnson is straightway entitled to know why Wells Fargo closed her Accounts. The indirect approach is linked to Johnson's defamation claim by seeking a declaration that she is entitled to know why Dounel made the defamatory remarks about her. The district court was, in its discretion, correct to deny any declaratory relief because neither Johnson's direct or indirect approach is legally supported.

[6] See footnote 1, supra.

1. The district court did not abuse its discretion in rejecting Johnson's direct approach to learning why Wells Fargo closed her Accounts.

A. Declaratory relief was not appropriate because the legal relationship between the bank and Johnson was not uncertain or in need of clarification.

Declaratory relief is appropriate when the judgment will serve a useful purpose in clarifying and settling the legal relations in issue. *McGraw-Edison Co. v. Preformed Line Products Co.*, 362 F.2d 339, 342 (9th Cir. 1966) (quoting Borchard, Declaratory Judgments 299 (2d ed. 1941)); *see also Bilbrey by Bilbrey v. Brown*, 738 F.2d 1462, 1470 (9th Cir. 1984). Where the legal relations between the parties are not uncertain or in need of clarification there is no ground for declaratory relief. *Guerra v. Sutton*, 783 F.2d 1371, 1376 (9th Cir. 1986).

The legal relationship between Wells Fargo and Johnson as it related to the closure of the Accounts was neither uncertain nor in need of clarification. The bank-customer relationship is "at-will" and may be terminated at the discretion of either party. *Kiley v. First National Bank of Maryland*, 102 Md. App. 317, 329-330, 649 A.2d 1145, 1150-51 (1994); *Groos National Bank v. Comptroller of Currency*, 573 F.2d 889, 897 (5th Cir. 1978) ("It is well established at common law that a bank may decline or terminate a deposit relationship"). "[A bank] may receive a general deposit today, and tomorrow, *for reasons of its own*, it may return the amount deposited, and refuse absolutely to transact business further with such depositor." *Elliott v. Capital City State Bank*, 128 Iowa 275, 103 N.W. 777, 778

(1905) (emphasis added).

No law or contract prohibited Wells Fargo's closure of Johnson's Accounts, and no law or contract required the bank to explain why. Because the nature of the legal relations was certain and clear there was no basis for the district court to declare otherwise. In short, the declaratory relief claim was moot. *See Pacific Livestock Co. v. Mason Valley Mines Co.*, 39 Nev. 105, 153 P. 431, 433 (1915) ("A 'moot case' is one which seeks to get a judgment on a pretended controversy, when in reality there is none.").

B. Declaratory relief was not appropriate because, as the district court confirmed based on *in camera* review of salient bank documents, Wells Fargo's disclosure of its reason for closing the Accounts necessarily required disclosures prohibited by the Bank Secrecy Act.

Johnson's declaratory relief claim is fatally impacted by the Bank Secrecy Act because it bars Wells Fargo's disclosure of information that would reveal its reason for closing the Accounts.

(1) The Bank Secrecy Act prohibits Wells Fargo's disclosure of material responsive to Johnson's discovery requests.

The Bank Secrecy Act of 1970 was enacted to require national banks, such as Wells Fargo, to assist the government in monitoring for financial crimes.[7] In 1992, Congress gave the Comptroller of the Currency ("OCC") the power to

[7] The Act has been amended several times, including by the Annunzio-Wylie Anti-Money Laundering Act in 1992 and the U.S. Patriot Act in 2001.

require banks to report suspicious transactions to the federal government. 31 U.S.C. § 5318(g)(1); *Union Bank of Calif. v. Superior Court*, 130 Cal.App.4th 378, 389, 29 Cal.Rptr.3d 894 (2005). The statute provides that banks may not notify persons involved in the suspicious transaction that it has been reported. 31 U.S.C. § 5318(g)(2)(A).

Under federal regulations, banks are required to "develop and provide for the continued administration of a program reasonably designed to assure monitoring compliance with the recordkeeping and reporting requirements" of the Act. 12 C.F.R. § 21.21(c)(1). When a bank detects a known or suspected violation of federal law or a suspicious transaction related to money laundering, the bank must complete and submit a SAR on a prescribed OCC form (21 C.F.R. § 21.11) to the Financial Crime Enforcement Network ("FinCEN"), which administers the recordkeeping, reporting and anti-money laundering program requirements of the Bank Secrecy Act and maintains a government-wide data access service that includes reports collected under its authority. 31 U.S.C. § 310.

As provided by regulation, SARs themselves are confidential. Banks are prohibited from responding to a discovery request for a SAR or any information that would reveal the existence of a SAR. 12 C.F.R. § 21.11(k)(1)(i). The prohibition constitutes an "unqualified discovery and evidentiary privilege" that cannot be waived. *Whitney Nat'l Bank v. Karam*, 306 F.Supp.2d 678, 682

(S.D.Tex. 2004); *see also Lee v. Bankers Trust Co.*, 166 F.3d 540, 544 (2d Cir. 1999); *Gregory v. Bank One*, 200 F.Supp.2d 1000, 1002 (S.D. Ind. 2002); *Weil v. Long Island Sav. Bank*, 195 F.Supp.2d 383, 389-90 (E.D.N.Y. 2001); *Norton v. U.S. Bank Nat. Ass'n*, 179 Wash.App. 450, 455, 324 P.3d 693, 696 (2014).

Courts have refused to limit the coverage of the Act's privilege to just documents that explicitly refer to a SAR. Documents generated through a bank's SAR review process, both pre- and post-filing, including documents relating to any decision not to file, are not subject to disclosure. Drafts of SARs or "other work product or privileged communications that relate to the SAR itself" is not discoverable. *Cotton v. PrivateBank & Trust Co.*, 235 F.Supp.2d 809, 815 (N.D.Ill. 2002). The privilege extends to "documents prepared by a bank 'for the purpose of investigating or drafting a possible SAR.'" *Union Bank*, 130 Cal.App.4th at 392, 29 Cal.Rptr.3d 894 (citing *Cotton*, 235 F.Supp.2d at 816). Protected communications consist of a SAR itself, communications pertaining to a SAR or its contents, communications preceding the filing of a SAR and preparatory or preliminary to it, communications that follow the filing of a SAR and are explanations or follow-up discussions, or communications of suspected or possible violations that did not culminate in the filing of a SAR.[8] *Whitney Nat'l Bank*, 306 F.Supp.2d at 682-83.

[8] Courts have also recognized as inadequate safeguards common in other litigation. For example, the Act's privilege cannot be enforced merely by redacting explicit references to the existence of a SAR. *Norton*, 179 Wash.App. at 461, 324 P.3d at

However, bank records made in the ordinary course of business are discoverable. These include "transactional and account documents such as wire transfers, statements, checks and deposit slips." *Union Bank*, 130 Cal.App.4th at 391, 29 Cal.Rptr.3d 894 (citing *Cotton*, 235 F.Supp.2d at 814).

Against this background, Johnson baldly argues the district court construed the Act's prohibitions too broadly. She argues the information she sought was simply "garden variety." While not specifically defined, presumably she means the contested interrogatories and document requests that were the subject of her August 2012 motion to compel. [Op. Brf. 11:3-8]. While offering a perfunctory nod of recognition to the SAR privilege, Johnson's arguments do not comport with the clear implications of the case law addressing its scope and application. Her attempt to circumvent the privilege by casually labeling her demanded discovery "garden variety" urges a narrow disavowed reading of the Bank Secrecy Act and its regulations.

The nature of Johnson's discovery requests are hardly "garden variety" when evaluated against the Bank Secrecy Act's strict prohibitions and policy considerations.[9] Plain and simple, disclosure of Wells Fargo's reason for closing

---

699. Also, judicial *in camera* inspection of documents claimed to be privileged is not required absent reasonable belief the bank is withholding discoverable documents. *Id.* at 463.

[9] Johnson's statement "Wells Fargo fails to recognize that its methods of

Johnson's Accounts cannot be made without revealing privileged information. Johnson's need for the information is outweighed by the public interest in maintaining the information's confidentiality.

(2) Johnson offers no evidence that the district court's *in camera* review of the bank's documents was arbitrary, capricious or otherwise improperly conducted, nor any evidence that the court overreached in protecting the documents from disclosure.

Johnson's arguments relating to the Bank Secrecy Act fundamentally ignore the fact that the district court conducted an *in camera* review of the information that guided Wells Fargo's decision to close the Accounts. Based on the documents before it and the Bank Secrecy Act's prohibitions, the court unequivocally concluded the bank could not divulge its reason for closing the Accounts as doing so would cause the disclosure of information prohibited by the Act. Johnson points to no evidence suggesting the district court's *in camera* review or review process was arbitrary, capricious, biased, an abuse of discretion, or otherwise not in accordance with law.

//

//

---

investigation and its conclusions regarding fraud are not protected under the Bank Secrecy Act" [Op. Brf 30:7-8] presumes the bank's reason for closing the Accounts was fraud-related. Regardless, the bank's methods of investigation are irrelevant to the precise relief requested – the reason the Accounts were closed and the reason Dounel defamed her.

(3) The district court's discovery order required Wells Fargo's disclosure of account records prepared in the ordinary course of business that may have been included with a SAR or SAR-related investigation but which did not reference the same.

In the main, Johnson complains she was denied "garden variety discovery," including "elementary discovery of documents and information prepared and kept in the ordinary course of business." [Op. Brf. 26:17-25]. The record confirms that the district court protected, consistent with Bank Secrecy Act standards described above, only documents constituting a SAR, bank policies and procedures used in preparing any SAR, and any documents prepared in conjunction with the investigation of any SAR-related matter. Contrary to Johnson's argument, the district court in fact ordered the bank's disclosure of ordinary records that may have been included with a SAR or SAR-related investigation but which do not reference a SAR or SAR investigation.[10] Wells Fargo complied with the order. [AA Vol. IV: AA000758; AA Vol. IV: AA00764-770].

//

//

//

[10] Johnson also complains that "Wells Fargo fails to recognize that its methods of investigation and its conclusions regarding fraud are not protected under the Bank Secrecy Act." [Op. Brf 30:7-8]. This statement baselessly presumes the bank's reason for closing the Accounts was fraud-related. Regardless, the bank's methods of investigation are irrelevant to the precise relief requested – the reason for closure of Johnson's Accounts and Dounel's defamatory statements.

2. The district court did not abuse its discretion in rejecting Johnson's indirect or defamation-linked approach to learning why Wells Fargo closed her Accounts.

A. Declaratory relief was not appropriate because *why* Dounel made the defamatory statements was irrelevant and unrelated to Johnson's defamation claim.

To prove defamation, a plaintiff must establish the following: (1) that the defendant made a false and defamatory statement concerning the plaintiff; (2) that an unprivileged publication of the statement was made to a third person; (3) that the defendant was at least negligent in making the statement; and (4) that the plaintiff sustained actual or presumed damages as a result of the statement. *Pope v. Motel 6*, 121 Nev. 307, 315, 114 P.3d 277, 282 (2005). *Why* the defendant made a false and defamatory statement is not among the elements a plaintiff must prove. Nevertheless, *why* a defamatory statement is made may be relevant when the defendant asserts truth as a defense. Because Wells Fargo abandoned its truth defense the basis for Dounel's defamatory statements was irrelevant. Johnson presents no authority for adding elements of proof to one claim to make another cognizable.

B. Declaratory relief was not appropriate because requiring Wells Fargo's postulation about why Dounel made the defamatory statements served no interest but Johnson's illegitimate interest in provoking Wells Fargo's violation of the Bank Secrecy Act.

The district court in effect found that Dounel made the defamatory statements in order to assuage Kaplan and satisfy his insistent request for why the

Joint Account was closed. [AA Vol. VII: AA001672, ¶ 27]. The court further recognized Dounel's admission that he had no actual evidence of Johnson's criminality when he made the defamatory statements. [Id.] Also, Johnson produced no evidence that Dounel had access to bank information that would have disclosed either Johnson's alleged criminality or why the Joint Account was closed. The only value in having Wells Fargo weigh in with its speculative view of why Dounel may have made the statements would have been to wrongly provoke the bank's disclosure of information the Bank Secrecy Act prevents.

C. The district court's discovery order became moot by dismissal of the declaratory relief claim and by the court's judgment in Johnson's favor on the defamation claim.

The district court's dismissal of Johnson's defamation-linked approach to declaratory relief claim based on Wells Fargo's abandonment of truth as a defense caused the discovery issues previously addressed to become moot. The issues to be probed through the demanded discovery all went to matters unnecessary to the defamation claim, and the claim having been determined in Johnson's favor the discovery was no longer necessary. Johnson fails to show how the discovery she sought would have precluded dismissal of the declaratory relief claim. *See, e.g. Studin v. Allstate Ins. Co.*, 152 Misc.2d 221, 224-25, 575 N.Y.S.2d 1001, 1003 (1991).

//

3. The district court did not abuse its discretion in denying declaratory relief to Johnson based on either her direct or indirect approach to learning why her Accounts were closed because her claimed damage is illusory.

A declaratory judgment is inappropriate to remotely contingent, abstract, or uncertain situations. Indeed, declaratory relief is "is unavailable when the damage is merely apprehended or feared." *Kress v. Corey*, 65 Nev. 1, 28-29, 189 P.2d 353, 365 (1948). "[L]itigated matters must present an existing controversy, not merely the prospect of a future problem." *Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986).

Johnson's claim for declaratory relief is apparently motivated solely by her fear that the information supporting Wells Fargo's decision to close her Accounts "could be used against her and could negatively impact her financially in the future" and that Dounel's "false accusation of criminal misconduct could have future and lasting consequences for [Johnson] and her business." [Op. Brf. 3:11-12; 10:13-14]. These "damages" give no indication of an imminent or even realistic threat of actual harm. Johnson presents no evidence that Dounel published his disparaging remarks to anyone other than Kaplan. Moreover, Johnson can point to no action by Wells Fargo to publish its reason for closing her Accounts to the general public. Johnson's claim of damage is speculative, abstract and illusory. Any fear of imminent harm associated with the denial of declaratory relief emanates not from Wells Fargo, but from Johnson or Kaplan.

Conclusion

Based upon the foregoing reasons, Wells Fargo requests that the district court's judgment as a matter of law relating to Johnson's declaratory relief claim be upheld.

DATED: August 17, 2015

SMITH LARSEN & WIXOM

/s/ Paul M. Haire

By: _____

Kent F. Larsen, Esq.
Nevada Bar No. 3463
Paul M. Haire, Esq.
Nevada Bar No. 5656
1935 Village Center Circle
Las Vegas, Nevada 89134
Attorneys for Respondent

Certificate of Compliance

1. I hereby 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:

[X] This brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman;

2. I further certify that this brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it is either:

[X] Proportionally spaced, has a typeface of 14 points or more and contains 6,249 words;

///

///

///

///

///

///

///

///

///

3. Finally, I hereby certify that I have read this 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 and volume number, if any, 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 that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED: August 17, 2015

SMITH LARSEN & WIXOM

/s/ Paul M. Haire

By: _____

Kent F. Larsen, Esq.
Nevada Bar No. 3463
Paul M. Haire, Esq.
Nevada Bar No. 5656
1935 Village Center Circle
Las Vegas, Nevada 89134

Certificate of Service

I certify that I am an employee of SMITH LARSEN & WIXOM; and that on August 17, 2015, **Respondent's Answering 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:

Michael K. Wall, Esq.
HUTCHISON & STEFFEN, LLC
10080 Alta Drive, Suite 200
Las Vegas, Nevada 89145
Attorney for Appellant

An employee of SMITH LARSEN & WIXOM