PREPARED BY THE COURT

HARRY KUSKIN 2008 IRREVOCABLE TRUST by SUSAN DWORKIN, TRUSTEE, ANNA KUSKIN 2008 IRREVOCABLE TRUST by SUSAN DWORKIN, TRUSTEE Plaintiff, vs. PNC FINANCIAL GROUP, INC, PNC BANK, PNC WEALTH MANAGEMENT, and STEVEN DWORKIN Defendants.	SUPERIOR COURT OF NEW JERSEY LAW DIVISION: UNION COUNTY DOCKET NO.: UNN-L-383-17 CIVIL ACTION **OPINION**

Lawrence N. Lavigne, Esq., Lawrence N. Lavigne, Esq., LLC, for Plaintiff Harry Kuskin 2008 Irrevocable Trust by Susan Dworkin, Trustee, Anna Kuskin 2008 Irrevocable Trust by Susan Dworkin, Trustee

Andrew J. Cevasco, Esq., Archer & Greiner, P.C., for Defendant PNC Financial Group, Inc, PNC Bank, and PNC Wealth Management.

Opinion By: The Hon. Robert J. Mega, J.S.C

The present matter is before the Court on Plaintiffs' Motion to Compel Production of Documents and More Specific Answers to Interrogatories from defendant, PNC Financial Group, Inc. ("PNC"). Plaintiffs' Motion is opposed.

I. Statement of Facts

In the underlying matter, Plaintiffs allege that PNC breached its fiduciary duty when the former trustee of the Trusts – Steven Dworkin ("Dworkin") – removed significant funds from the trusts for his own use in his business, the Auto Toy Store.

On or about April 8, 2014, Dworkin, in his capacity as Trustee of the Trusts executed PNC Wealth Management Investment Management Agreements. After the Investment Agreements

were signed, investment management accounts were opened with PNC. Dworkin transferred some, but not all, of the trust funds held in PNC checking accounts to the new investment management accounts. The Investment Agreements authorize PNC, among other things, to manage the assets of the Trusts held in the investment management accounts.

PNC argues that Plaintiffs' allegations are factually inaccurate. Instead, PNC contends that Dworkin, his capacity as Trustee, transferred trust funds from the investment management accounts to the checking accounts that held assets of the Trusts. PNC states that Dworkin had full authority as the Trustee to withdraw the assets of the Trusts from the investment management accounts and/or the checking accounts. PNC contends that it was never the Trustee of the Trusts, and had no authority to question those transactions, nor was it under an obligation to disclose Dworkin's transfers to Plaintiffs. PNC ultimately concludes that it had no legal duty nor contract with Plaintiffs and is therefore not liable for Dworkin's actions.

II. Procedural and Discovery History

Plaintiffs filed their complaint on or about January 30, 2017. On or about July 5, 2017, defendants PNC Financial Group, Inc, PNC Bank, and PNC Wealth Management ("PNC") filed their answer and cross claims. PNC responded to plaintiffs' First Set of Interrogatories and Document Demands on or about August 14, 2017, and on September 6, 2017, PNC received a letter from plaintiffs' counsel demanding more specific discovery requests. PNC responded to these requests by requesting a meeting to discuss the discovery issues. Thereafter, PNC responded to plaintiffs' September 6, 2017 letter by producing extensive supplemental documents, reports, and answers to Interrogatories. PNC also attached a privilege log noting documents that were withheld because of the attorney-client privilege.

On January 22, 2018, the Honorable Camille M. Kenny, J.S.C. entered a protective order as to discovery and confidentiality. Judge Kenny's protective order controls the use of all "Confidential Information", which is defined in the order as "any information that is designated for good cause as 'Confidential' by any party, including documents, information contained in documents, electronically stored information, information revealed revealed during depositions, information contained in interrogatory responses, information contained in responses to requests for admissions, and information otherwise used, disclosed or produced during the Action." January 22, 2018 Protective Order at ¶1(a). The protective order prohibits "Confidential Information" from being used or disclosed to anyone "other than to the parties to this Action, and their respective employees, agents, counsel, representatives, and experts, this Court and Court personnel (including court reporters), and witnesses (including deponents, whether or not they are parties or employees, agents, counsel or representatives of a party)." Id. at ¶1(b). The protective order further states that it:

> shall be without prejudice to the right of any party to bring before the Court at any time the question of whether any particular information is or is not 'Confidential Information.' The burden of establishing that a document or portion of a document is properly designated as 'Confidential Information' rests with the party making the confidentiality designation. Nothing in this Order shall prevent any party from objecting to discovery that it believes to be otherwise improper.

Id. at ¶10.

Judge Kenny's Order "shall not enlarge or affect the proper scope of discovery in this or any other litigation, nor shall [it] imply that 'Confidential Information' is properly discoverable, relevant or admissible in this or any other litigation." Id. at ¶11. Moreover, the Order mandates that if

> a party is served with, or receives notice of, any subpoena or Court Order that seeks production of another party's 'Confidential Information', notice shall

> immediately be provided to the other party and no production shall be made before the end of any period of time within which a motion to quash or for a protective order may be made.

Id. at ¶14.

PNC thereafter responded to plaintiffs' Second Set of Interrogatories on January 23, 2018, and on February 5, 2018, PNC produced policies and procedures in response to plaintiffs' discovery request and a privilege log containing the confidential documents that were withheld based on the SAR privilege. On April 24, 2018, plaintiffs filed a Motion to Compel Discovery and More Specific Answers to Interrogatories and Deposition. Defendants opposed the motion, arguing that defendant PNC Bank had already provided responses and documents to plaintiff's requests, and objecting to the requests on the basis of privilege and confidentiality, including under the federal "Suspicious Activity Report" ("SAR") privilege, or that the requests were not reasonably calculated to lead to the discovery of admissible evidence, and were overbroad, and unduly burdensome. On May 29, 2018, through a Case Management Order issued by the Honorable Robert J. Mega, J.S.C., plaintiffs agreed to withdraw this motion without prejudice, as Judge Mega requested plaintiffs produce an expert witness report indicating the documents requested by plaintiff but not produced by defendant PNC. On or about June 28, 2018, plaintiffs served their Second Set of Document Demands on PNC, to which PNC responded to on August 14, 2018.

Plaintiff sought and obtained a preliminary expert witness report from Peter Leibundgut, Esq., and on August 14, 2018, plaintiff re-filed their April 24, 2018 motion, which is currently before the court.

III. Legal Argument

A. Plaintiff's Motion to Compel Production of Documents, More Specific Answers to Interrogatories, and Deposition.

Plaintiffs contend that the discovery it has requested from defendants can be placed

into the following discrete categories: document demands and interrogatories seeking discovery of PNC's internal policies, procedures and processes concerning the risk management, compliance, auditing investigations (as well as those investigations), fraud detection and/or disclosure of information regarding accounts managed or maintained by defendant PNC. Plaintiff contends that defendant PNC has previously interposed an objection to that information as being protected from disclosure by the Bank Secrecy Act, 31 U.S.C. 5318, 31 C.F.R. 1020.320 and 12 C.F.R. 21.11, commonly referred to as the "SARs" Privilege. Plaintiffs note that Mr. Leibundgut's preliminary expert report set forth that the documents requested by the plaintiffs are not confidential, and that Mr. Leibundgut indicates that it is possible that PNC does not want to produce these important documents because its employees failed to comply with them. Thus, plaintiff argues that PNC should be ordered to provide the discovery sought by document demands 3, 4, 39, 40, 41 and Interrogatories 4, 5, 6, 24, 25.

Plaintiff disagrees with PNC's contentions that the requested documents are subject to the SARs privilege as set forth in the Bank Secrecy Act. Plaintiff cites to case law that holds that the existence of a SAR or information that would indicate whether or not a SAR was filed is not discoverable. In Re JP Morgan Chase Bank, N.A., 799 F.3d 36, 37-39 (1st Cir. 2015). Plaintiff concedes that federal law prohibits financial institutions from disclosing such information, and thus does not seek an order compelling more specific responses to discovery demands directly requesting SARs.

However, plaintiffs argue that defendant PNC has hidden behind the SARs confidentiality privilege to claim that any investigation into fraud, theft or other wrongdoings as well as policy and procedures concerning auditing accounts, etc. somehow implicate SARs. Plaintiffs contend that numerous Federal cases at both the Circuit and District Court level rebut PNC's argument. In

In Re JP Morgan Chase Bank, N.A., the U.S. Court of Appeals for the First Circuit denied JP Morgan Chase's mandamus action to protect documents from disclosure based on the SARs privilege. The First Circuit recognized that not all documents surrounding an investigation of suspicious activity and the creation of a SAR (or the decision not to file one) are protected from disclosure.

The plaintiffs further cite to additional federal case law where the court has come to a similar conclusion as the First Circuit. In Freedman & Gersten, LLP v. Bank of America, N.A., 2010 WL 5139874 (D.N.J. 2010), then-U.S. Magistrate Judge Michael A. Shipp ordered Bank of America to produce documents related to the internal investigation into the alleged fraud, and held that Bank of America's interpretation of the SARs privilege was overbroad. Moreover, Judge Shipp held that the plaintiff was entitled to discovery relating to Bank of America's policies and procedures for handling suspicious activity and risk management, except as to those policies and procedures specifically designed for SARs. In Wultz v. Bank of China, 56 F. Supp. 3d 598 (S.D.N.Y. 2014), the court held that documents generated in a bank's standard business practices, "such as investigating potential fraud and other irregularities, remained discoverable even when the 'fraud investigation parallels the process of preparing a SAR.'" Id. at 601.

Thus, in light of the above case law, the plaintiffs contend that in this present case, defendant PNC must be compelled to produce documents sought in demands 15-18, 29, 30, 50, 52 and 54; as well as interrogatories 2, 7, 8, 26, 42, 45, 46, 50, and 52, as they are not privileged under the "SARs privilege". Further, plaintiffs disagree with PNC's contentions that terms like "revenues", "profit", "audit" are ambiguous, as these words are plain words that have common meanings which should be applied. Furthermore, plaintiffs assert that PNC has objected to other discovery demands, or the documents have been heavily retracted to the point that they are

unreadable, such as in Document Demands 8 and 9, where PNC has redacted the plaintiffs' account number and information. On a similar note, plaintiffs similarly contend that PNC has wrongly withheld demanded discovery (Document Demands 39-41) regarding defendant Steven Dworkin and his business, the Auto Toy Store. While PNC cites privacy in its objection, plaintiffs note that Steven Dworkin is a defendant in this case, and while he has not answered the complaint, he was served and made a *pro se* appearance. Thus, plaintiffs argue that PNC must release all information relating to defendant Dworkin and the Auto Toy Store.

Plaintiffs have also requested from PNC information on the fees charged to the trusts by PNC (Interrogatories 17-19). While PNC has responded to the requests, plaintiffs contend that PNC's response requires the plaintiffs to sort through thousands of pages of documents to discern the information which is clearly readily available to defendant. Plaintiffs argue that this violates R. 4:17-4(d), which states in pertinent part that "the burden of deriving or ascertaining the answer is substantially the same for the party serving the interrogatory as for the party first served." Id.

Plaintiffs further requested (Document Demands 34 and 35) information from PNC about prior complaints made against PNC to governmental entities from 2004-present, and complaints against PNC in any court concerning its handling of wealth management accounts from 2014-present. Although PNC objected to these demands as "vague, overbroad, and unduly burdensome", plaintiffs argue that prior similar complaints are routinely demanded and provided in discovery, and that these documents should be provided given the liberal discovery standard set forth in R. 4:10-2. Finally, plaintiffs contend that PNC must provide the information requested in Interrogatory 23, which requests information about communications between PNC and law enforcement agencies including the Fort Lauderdale, Florida Police Department and the Florida State Attorney's Office and any other law enforcement agency. PNC objected, claiming that the

information is privileged, confidential, and protected because it involves highly sensitive policies and practices. Plaintiffs argue PNC's objection is improper, as (1) PNC did not identify a privilege in their objection; (2) Judge Kenny's protective order would cover the confidential aspects; and (3) the boilerplate objection is unsustainable. Thus, plaintiffs contend that it is entitled to the requested discovery from PNC as outlined above.

B. Defendants' Opposition to Plaintiffs' Motion

In opposition, defendant PNC contend that rather than providing the court with a more focused motion to compel discovery, the plaintiffs have simply resubmitted their April 24, 2018 motion with an attached expert report, which PNC argues contains factual inaccuracies and provides no basis for its findings. Essentially, PNC's argument is that plaintiffs are on a fishing expedition for confidential policies and procedures that are not relevant to their allegations and that plaintiffs' motion should be denied because (1) the documentation/information requested is not relevant to plaintiffs' case and not reasonably calculated to lead to the discovery of admissible evidence; (2) plaintiffs' expert report is a net opinion, which contains factual and legal inaccuracies, and the court should not rely on it; (3) PNC has already sufficiently answered plaintiffs' Interrogatories and Document Requests; (4) plaintiffs are seeking information that is confidential and otherwise protected from disclosure by the attorney-client privilege; and (5) plaintiffs are seeking information protected by the SARs privilege.

1. Relevancy of Internal Policies and Procedures

Defendant PNC argues that their internal policies and procedures are irrelevant, as the documentation and information plaintiff is requesting is not relevant to plaintiffs' case and is not reasonably calculated to lead to the discovery of admissible evidence. PNC notes that it was never the Trustee of the Trusts, Dworkin was at the time, and as such it had no authority to determine

the propriety of Dworkin's action and it owed no duty to a non-customer of the bank. PNC contends that plaintiffs obtaining these policies and procedures will not assist plaintiff in proving her case, because a company's departure from its own policies and procedures does not create a legal duty to a non-customer. PNC cites to Wolens v. Morgan Stanley Smith Barney, LLC, 449 N.J Super. 1 (App. Div. 2017), as the Appellate Division held that the law:

> has not recognized that a financial institution owes a legal duty to injured third parties who are not their customers unless a statute, regulation, or other codified provision imposed such a duty, or where a contractual or 'special relationship' has been established between the non-customer third party and the financial institution.

Id. at 8. PNC further relies on Pennsylvania Nat. Turf Club, Inc. v. Bank of W. Jersey, 158 N.J. Super. 196 (App. Div. 1978), where the Appellate Division concluded that "[i]n the absence of evidence of any agreement, undertaking or contract between plaintiff and defendant from which any special duty can be derived, the improper handling of the account cannot in the abstract serve as a stepping stone for liability to plaintiff." Id. at 203. Thus, as PNC's contractual relationship was with defendant Dworkin, and not to the trusts or any third parties, PNC argues that it did not have a duty to any of the plaintiffs. Moreover, PNC contends that since a financial institution's failure to follow its internal procedures is not a basis for imposing liability, discovery on the issue of PNC's policies and procedures for fraud detection, compliance or risk management is not reasonably calculated to lead to the discovery for admissible evidence. PNC further argues that it had no actual knowledge of defendant Dworkin's breach of his fiduciary duty, and PNC's internal policies and procedures would shed no light on this issue. PNC's internal policies would not create duty to trust and PNC argues that plaintiffs have not demonstrated how they would be relevant to the inquiry.

2. Plaintiffs' Expert Report:

PNC contends that plaintiffs' expert report is a net opinion, and that it contains factual and legal inaccuracies, and the court should not rely on it. PNC cites to case law stating that an expert's opinion "must relate to generally accepted … standards, not merely to standards personal to the witness." Taylor v. Delosso, 319 N.J. Super. 174, 180 (App. Div. 1999); see also Daubert v. Merrell Dow Pharm., Inc, 509 U.S. 579, 590 (1993). While PNC notes that Mr. Leibundgut's expert report asserts that PNC violated "industry standards", PNC argues that his report does not define the term "industry standards", identify any industry standards supporting this blanket assertion, and fails to indicate how disclosure of the policies and procedures of PNC would assist in establishing a breach of such "Standards." Furthermore, PNC questions how Mr. Leibundgut was able to conclude that PNC breached "industry standards" without reviewing PNC's internal policies and procedures.

Moreover, PNC contends that Mr. Leibundgut's expert report contains factual and legal inaccuracies, and that these actual and legal inaccuracies are the basis for plaintiffs' request for PNC's internal policies and procedures, while not being relevant to the instant matter or likely to lead to relevant evidence. PNC argues that the biggest misunderstanding is that the Trusts were PNC's clients, rather than defendant Dworkin, the trustee of the trusts. PNC contends that a trust is not a legal entity with the capacity to be sued, but rather, the trustee is the proper party to bring or defend claims involving the trusts. Defendant Dworkin, as Trustee of the Trusts, signed agreements with PNC to open the IMA and demand deposit checking accounts for each of the Trusts. Thus, defendant Dworkin became the client of PNC, and PNC notes that no other party or witness in this matter contends that they even asked PNC to do anything during the relevant time period.

PNC further argues that it was never a trustee of the trusts, and Mr. Leibundgut's report incorrectly states that PNC owed a fiduciary duty to the plaintiffs. PNC asserts that it was under no obligation to evaluate or disclose defendant Dworkin's actions to any plaintiff or other third party, as they were not the customers of PNC. Thus, based on the above, PNC argues that plaintiffs' expert does not provide any persuasive support for production of the internal policies related to fraud detection or administration of the Trusts.

3. PNC's Previous Responses to Plaintiffs' Interrogatories and Document Demands

PNC asserts that it has already provided responses to plaintiffs' Second Set of Document Demands. Many of those requests were for the policies and procedures generally requested in plaintiffs' expert report, such as those relating to compliance and code of conduct. Further, PNC contends that many of these requests overlap with the Interrogatories and Document Demands plaintiffs are seeking more specific answers to. Specifically, PNC contends that plaintiffs requested the following and PNC answered as follows:

First Set of Document Demands:

3. "Copies of all internal policies, procedures and processes (including, but not limited to, risk management, compliance, audit, reporting and/or disclosure) for the handing of accounts managed by Defendants or any one of them."

4. "Copies of all internal policies, procedures, and processes (including, but not limited to, risk management, compliance, audit, reporting and/or disclosure) for the handling of accounts owned by a trust managed by Defendants or any one of them."

INITIAL RESPONSE BY PNC: "Objection, since this Request is vague, overly broad, and seeks information that is privileged and confidential."

However, once Judge Kenny's Protective Order was entered, PNC contends it produced responsive, non-privileged policies in response to these requests.

Interrogatories:

4. "Set forth with particularity all policies, procedures, protocols and/or processes for the handing of accounts managed by defendants."

5. "Set forth with particularity all policies, procedures, protocols and/or processes for the handling of accounts managed by defendants owned by a trust."

6. "Set forth with particularity your quality control procedures."

25. "Set forth all procedures you have in place to monitor wealth management accounts."

INITIAL RESPONSE BY PNC: "Objection, since this Interrogatory is vague, overly broad, and seeks information that is privileged and confidential."

However, once Judge Kenny's Protective Order was entered, PNC contends it produced responsive, non-privileged policies and procedures relevant to this litigation in response to these requests.

PNC maintains that it has produced appropriate responses and documents in reply to Document Requests 3 and 4 and Interrogatories 4, 5, 6 and 25, and to the extent it has not responded it is because the requests are overbroad and undefined, and the documents sought are confidential and privileged, as indicated in the privilege log provided and should not be disclosed. PNC further contends that these requests are overbroad and unduly burdensome, because PNC has thousands of pages of internal policies and procedures, most of which are not relevant to this matter.

First Set of Document Demands:

26. "Copies of all documents reflecting, relating to or concerning all revenues generated by defendants in connection with the management of, advice provided to, and from trades made on

behalf of the Harry Kuskin 2008 Irrevocable Trust. This is to include without limitation to fees charged/collected, commissions or other revenues. Each category should be set forth individually."

27. "Copies of all documents reflecting, relating to or concerning all revenues generated by defendants in connection with the management of, advice provided to, and from trades made on behalf of the Anna Kuskin 2008 Irrevocable Trust. This is to include without limitation to fees charged/collected, commissions or other revenues. Each category should be set forth individually."

RESPONSE BY PNC: "Objection, since this Request is vague, in that the term "revenues" is undefined. Subject to and notwithstanding this objection, PNC will provide responsive, non-protective information, if any, upon further clarification as to the scope and definition of the information requested."

50. "Copies of any and all audits of any accounts in the name of the Harry Kuskin 2008 Irrevocable Trust."

51. "Copies of any and all audits of any accounts in the name of the Anna Kuskin 2008 Irrevocable Trust."

RESPONSE BY PNC: "Objection, since this Request is vague in that the term "audit" is undefined. Subject to and notwithstanding this objection, PNC will provide responsive, non-protected information, if any, upon further clarification as to the scope and definition of the information requested."

Interrogatories:

17. Set forth by year, all fees that you charged for management of the HKIT.

RESPONSE BY PNC: "Objection, PNC never managed the HKIT. Subject to and without waiver of these objections, PNC responds as follows: PNC was the investment advisor for the HKIT and all fees for PNC's services as investment advisor were/are disclosed on the HKIT investment

account monthly statements. See the pertinent documents attached to PNC's responses to plaintiff's request for documents, subject to the objections raised in response to that Request and to these Interrogatories."

18. Set forth by year, all fees that you charged for management of the AKIT.

RESPONSE BY PNC: "Objection, PNC never managed the AKIT. Subject to and without waiver of these objections, PNC responds as follows: PNC was the investment advisor for the AKIT and all fees for PNC's services as investment advisor were/are disclosed on the AKIT investment account monthly statements. See the pertinent documents attached to PNC's responses to plaintiff's request for documents, subject to the objections raised in response to that Request and to these Interrogatories."

19. Set forth all revenues generated by your management of the HKIT.

RESPONSE BY PNC: "Objection, PNC never managed the HKIT. PNC was the investment advisor for the HKIT. Further, this Interrogatory is vague, in that the term "revenues" is undefined, and overly broad, unduly burdensome and not proportional to the needs of this case. Subject to and notwithstanding this objection, PNC will provide responsive, non-protected information, if any, upon further clarification as to the scope and definition of the information provided."

20. Set forth all revenues generated by your management of the AKIT.

RESPONSE BY PNC: "Objection, PNC never managed the AKIT. PNC was the investment advisor for the AKIT. Further, this Interrogatory is vague, in that the term "revenues" is undefined, and overly broad, unduly burdensome and not proportional to the needs of this case. Subject to and notwithstanding this objection, PNC will provide responsive, non-protected information, if any, upon further clarification as to the scope and definition of the information provided."

21. Set forth all profits you realized from your management of the HKIT.

RESPONSE BY PNC: "Objection, PNC never managed the HKIT. PNC was the investment advisor for the HKIT. Further, this Interrogatory is vague, in that the term "profits" is undefined, and overly broad, unduly burdensome and not proportional to the needs of this case. Subject to and notwithstanding this objection, PNC will provide responsive, non-protected information, if any, upon further clarification as to the scope and definition of the information requested."

22. Set forth all profits you realized from your management of the AKIT.

RESPONSE BY PNC: "Objection, PNC never managed the AKIT. PNC was the investment advisor for the HKIT. Further, this Interrogatory is vague, in that the term "profits" is undefined, and overly broad, unduly burdensome and not proportional to the needs of this case. Subject to and notwithstanding this objection, PNC will provide responsive, non-protected information, if any, upon further clarification as to the scope and definition of the information requested."

PNC contends that despite never receiving clarification of the requests, it supplemental its interrogatories through letters to plaintiffs' counsel on October 31, 2017 and November 9, 2017.

4. Attorney-Client Privilege

PNC argues that the plaintiffs are seeking information that is protected by the attorney-client privilege, particularly these Interrogatories:

2. "Did you conduct any investigation into the claim that Steven Dworkin improperly transferred funds from the trusts?"

RESPONSE BY PNC: "Objection, since this interrogatory is vague in the term "investigation" is undefined and the time frame is undefined. Subject to and notwithstanding this objection, PNC will provide responsive, nonprotected information, if any, upon further clarification as to the scope and definition of the information requested."

24. "Set forth with particularly all investigation(s) you conducted or were conducted on your behalf concerning any claim made by plaintiffs in the complaint in this matter."

RESPONSE BY PNC: "Objection, since this interrogatory is vague in the term "investigation" is undefined and the time frame is undefined. Moreover, this Interrogatory seeks information that is privileged and confidential. Subject to and notwithstanding this objection, PNC will provide responsive, nonprotected information, if any, upon further clarification as to the scope and definition of the information requested."

PNC contends that it later confirmed with plaintiffs that no investigations were conducted until after plaintiffs' claims were received. Thus, since plaintiffs are seeking information about investigations after the litigation was filed, those investigations are protected from disclosure by the attorney-client privilege. PNC notes that "communications between lawyers and clients 'in the course of their relationship and in professional confidence' are privileged and therefore protected from disclosure." N.J.S.A. 2A:84A-20(1); N.J.R.E. 504(1). The attorney-client privilege generally applies to communications "(1) in which legal advice is sought; (2) from any attorney acting in his capacity as a legal advisor; (3) and the communication is made in confidence; (4) by the client." Hedden v. Kean Univ., 434 N.J. Super 1, 10 (App. Div. 2013).

5. Requests for Account Information Regarding Non-Party Auto Toy Store

Plaintiffs have requested that PNC produce account information regarding non-party Auto Toy Store, namely Document Requests 39-41. PNC argues that has no authorization from its client to produce the financial records because the Auto Toy Store is not a party to this case and there is no indication that it has notice of this request. Thus, PNC contends that fundamental fairness and due process requires that notice be provided to the account holder and that it be given an opportunity to respond.

6. Redaction of Active Account Numbers

PNC cites to R. 1:38-7(a), which holds that parties are prohibited from disclosing such personal identifiers in litigation, except active financial accounts subject to the litigation can be identified by the last four digits. While PNC contends that it incorrectly redacted some of the account numbers in full, it disagrees with plaintiffs' assertions that certain redacted documents are "unusable", and is frivolous as to the objection of the redaction of plaintiffs' own account numbers.

7. Request for All Prior Complaints Made Against PNC to Government Entities

PNC maintains that its objections to Document Requests 34, seeking all prior complaints made against PNC to governmental entities from 2014-present; and 35, seeking all prior complaints against PNC in any court concerning its handling of wealth management account for trusts from 2014-present are not reasonably calculated to lead to the discovery of admissible evidence, and are overbroad and unduly burdensome. PNC argues that plaintiffs have failed to demonstrate how such "complaints made against PNC … concerning its handling of wealth management account for trusts", which would likely be completely unrelated to the present matter, will have any bearing on plaintiff's instant claims against PNC. PNC contends that this is part of plaintiffs unfocused, fishing expedition, and they should not be compelled to disclose this information.

8. SARs Privilege

PNC argues that the SARs privilege in the Bank Secrecy Act, 31 U.S.C. 5318, 31 C.F.R. 1020.320 and 12 C.F.R. 21.11, prohibits disclosure of the documentation and information requested herein by the plaintiff in Document Requests 15-18, 29-30, 50-52; and Interrogatory questions 7-8, 23, 26, 42, 45-46, 50-52. Under the federal Bank Secrecy Act, PNC contends that it is required to file a Suspicious Activity Report when it detects "a known or suspected violation

of Federal law or a suspicious transaction relating to a money laundering activity or a violation of the Bank Secrecy Act", and further banks are required to establish internal policies, procedures, and controls to detect and report money laundering or to comply with the obligation to report suspicious activity to the government. See 31 U.S.C. 5318(h). PNC argues that the Bank Secrecy Act imposes nearly a total prohibition on disclosing information relating to a SAR, including "any information that would reveal the existence of a SAR." 12 C.F.R. 21.11(k), known as the "SARs Privilege". PNC maintains that the SARs privilege limits the disclosure of any fraud protection policies, citing Norton v. U.S. Bank Nat. Ass'n, 179 Wash App. 450 (2014), review denied, 180 Wash. 2d 1023 (2014), which holds the following:

> The privilege is not limited to documents that contain an explicit reference to a Suspicious Activity Report. It covers documents related to a bank's internal inquiry or review of accounts at issue, communications between a bank and law enforcement agencies relating to transactions conducted by the person suspected of criminal activity, and internal forms used in a bank's process for detecting suspicious activity that must be reported.

Id. at 461. Thus, PNC argues that the types of policies that the plaintiffs are seeking – PNC's fraud detection policies, procedures and training; employees involved in fraud detection and investigations related to fraud – if revealed, can be used by individuals to circumvent detection. PNC disagrees with plaintiffs' contentions that the requested discovery is admissible. PNC notes that Freedman & Gersten, LLP v. Bank of Am., N.A., 2010 WL 5139874 (D.N.J. Dec. 8, 2010), which plaintiffs rely on in support of their argument, limits the release of these policies to instances where the plaintiff shows good cause. See Id. at *3. Thus, as PNC argues that because the plaintiffs' expert report is inadequate and unspecific, plaintiffs have failed to show good cause to

compel the discovery of the internal policies and procedures that they are seeking. Thus, considering the big picture and the high security risk that comes with the release of these policies, PNC argues that plaintiffs have not shown good and necessary cause for the release of this requested discovery, and plaintiffs' request to compel discovery should be denied.

Legal Analysis and Discussion

IV. Pre-Trial Discovery

Pre-trial discovery is to be accorded the broadest latitude possible. *See* Harmon v. Great Atl. & Pac. Tea Co., Inc., 273 N.J. Super. 552, 557 (App. Div. 1994). Accordingly, discovery rules are to be "liberally construed." Blumberg v. Dornbush, 139 N.J. Super. 433, 437 (App. Div. 1976).

The discovery rules are "designed to insure that the ultimate outcome of litigation will be dependent on the merits of an individual matter in light of all available facts." Shanley & Fisher, PC v. Sisselman, 215 N.J. Super. 200, 216 (App. Div. 1987); *See also* Abtrax Pharms., Inc. v. Elkins-Sinn Inc., 139 N.J. 499, 512 (1995) (stating that discovery rules are meant to eliminate "concealment and surprise in the trial of lawsuits to the end that judgments rest upon real merits of the causes and not upon the skill and maneuvering of counsel.") (quotation omitted); In re Liquidation of Integrity Ins. Co., 165 N.J. 72, 82 (2000) (holding that "[j]ustice is more likely to be achieved when there has been full disclosure and all parties are conversant with all available facts."); Abtrax, 139 N.J. at 521-522 ("Prevention of unfair advantage is a basic premise of our discovery rules.")

V. Motion to Compel

R. 4:23-5(c) permits the Court to issue an order compelling discovery when it is not forthcoming. The Rule states that "[p]rior to moving to dismiss pursuant to subparagraph (a)(1) of this rule, a party may move for an order compelling discovery demanded pursuant to R. 4:18-1 [production of documents] or R. 4:19 [physical and mental examination of persons]. An order granting a motion to compel shall specify the date by which compliance is required. If the delinquent party fails to comply by said date, the aggrieved party may apply for dismissal or suppression pursuant to subparagraph (a)(1) of this rule by promptly filing a motion to which the

order to compel shall be annexed, supported by a certification asserting the delinquent party's failure to comply therewith."

A trial court has broad discretion in granting the motion to compel discovery, and in determining the scope of discovery. Axelrod v. CBS Publications, 185 N.J. Super. 359, 372 (App. Div. 1982). It is a "well-established principle that requests for discovery are to be liberally construed and accorded the broadest possible latitude to ensure that the ultimate outcome of litigation will depend on the merits in light of the available facts." Piniero v. N.J. Div. of State Police, 404 N.J. Super. 194, 204 (App. Div. 2008) (citing Shanley & Fisher, P.C. v. Sisselman, 215 N.J. Super. 200, 216 (App. Div. 1987)). R. 4:10-2(a) states that "[p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action," regardless of whether or not it will be admissible at trial; see also Shanley, 215 N.J. Super. at 216 (finding information sought in discovery must be relevant and not privileged). Relevant evidence is that which has a "tendency in reason to prove or disprove any fact of consequence to the determination of the action." N.J.R.E. 401. Moreover, to be relevant, the information sought must be useful and relate to substantive issues in the case. Myers v. St. Francis Hospital, 91 N.J. Super. 377, 385-386 (App. Div. 1966). Determination of relevance is up to the sound discretion of the Court. Ibid.

While discovery rules are liberal, they are not limitless. The rules of discovery do not permit parties to embark on "fishing expeditions," but rather, there must be "[s]ome reasonable belief that discovery will produce the meaningful information." Lee v. Gilberti, 2012 N.J. Super. Unpub. LEXIS 1287, *27 (App. Div. May 29, 2013). Furthermore, discovery requests cannot be used to "annoy, harass, or burden a litigant." Gensollen v. Pareja, 416 N.J. Super. 585, 590 (App. Div. 2010).

A. Relevance of Plaintiffs' Discovery Request

R. 4:10-2(a) states in pertinent part: "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, electronically stored information, 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 time of trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence; nor is it ground for objection that the examining party has knowledge of the matters as to which discovery is sought." The general standard of discoverability as prescribed by R. 4:10-2(a) does not, of course, refer only to matters which would necessarily be admissible in evidence but includes information reasonably calculated to lead to admissible evidence respecting the cause of action or its defense. See, eg Pfenninger v. Hunterdon Central, 167 N.J. 230, 237 (2001); Payton v. New Jersey Turnpike Authority, 148 N.J. 524 (1997); Connolly v. Burger King Corp., 306 N.J. Super. 344, 348-349 (App. Div. 1997); Serrano v. Underground Util. Corp., 407 N.J. Super. 253, 268 (App. Div. 2009). Thus, relevancy for the purposes of this rule has been defined as congruent with relevancy under N.J.R.E. 401, namely, a "tendency in reason to prove or disprove any fact of consequence to the determination of this action." See Payton, 148 N.J. at 524; K.S. v. ABC Professional Corp., 330 N.J. Super. 288, 291 (App. Div. 2000), leave to appeal denied 174 N.J. 411 (2000); Bayer v. Township of Union, 414 N.J. Super. 238, 272 (App. Div. 2010).

Plaintiffs, in their complaint, allege allegations that defendant PNC mismanaged the funds belonging to both the Harry Kuskin Irrevocable Trust and the Anna Kuskin Irrevocable Trust by

failing to detect theft of the funds by a convicted felon, defendant Steven Dworkin, and as a result, is alleging that PNC committed both negligence and gross negligence. Plaintiffs further contend that PNC violated industry standards in failing to identify and stop the alleged suspicious activity by defendant Dworkin. Thus, the plaintiffs are seeking information about defendant PNC's policies and procedures to prove and prosecute the *prima facie* case that they have established against PNC in their complaint.

Defendant PNC, in opposition to these requests, questions the relevancy of plaintiffs' requests, arguing that PNC did not have a duty to the trusts as defendant Steven Dworkin was the customer of PNC Bank, not the trusts themselves. PNC cites to New Jersey case law in support of their argument in opposition. However, PNC's argument is misplaced. R. 4:10-2(a) clearly states that "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** … [and] [i]t is not ground for objection that the information sought will be inadmissible at the time of trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence." (emphasis added). Plaintiffs have established a *prima facie* case that PNC violated industry standards, and committed negligence and gross negligence in violation of these standards. Plaintiffs are entitled to discovery from PNC that will enable them to prosecute their complaint, just as PNC is entitled to relevant discovery that will enable them to provide a defense to plaintiff's complaint. The arguments that PNC raises are more appropriately suited for a summary judgment or other dispositive motion, not a motion to compel discovery that plaintiffs are entitled to under R. 4:10-2(a). Thus, the court finds no merit in PNC's arguments on this point, and that the plaintiffs' requested discovery is relevant to plaintiffs' prosecution of their complaint.

B. Plaintiffs' Expert Report

N.J.R.E. 702 prescribes that "[i]f scientific, technical, or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education may testify thereto in the form of an opinion or otherwise." The United States Supreme Court, in Daubert v. Merrell Dow Pharms, Inc., 509 U.S. 579 (1993), imposes a test that requires trial courts to engage in a "preliminary assessment of whether the reasoning or methodology underlying the scientific testimony is scientifically valid and of whether that reasoning or methodology properly can be applied to the facts in issue." Id. at 592-93. The Supreme Court extended the Daubert standard to all expert testimony in Kuhmo Tire Company v. Carmichael, 526 U.S. 137 (1999).

N.J.R.E. 703 states that "[t]he facts or data in the particular case upon which an expert bases an opinion or inference may be those perceived by or made known to the expert at or before the hearing. If of a type reasonably relied upon by experts in the particular field in forming opinions or inferences upon the subject, the facts or data need not be admissible in evidence." A net opinion is an opinion that is based on "an expert's bare opinion that has no support in factual evidence or similar data." Pomerantz Paper Corp. v. New Community Corp., 207 N.J. 344, 372 (2011). Rather, the expert witness must "'give the why and wherefore' that supports the opinion, rather than a 'mere conclusion.'" Id. Furthermore, "if an expert cannot offer objective support for his or her opinions, but testifies only to a view about a standard that is 'personal', it fails because it is a mere net opinion." Id. at 373. The net opinion standard "is not a standard of perfection. The rule does not mandate that an expert organize or support an opinion in a particular manner that opposing counsel deems preferable. An expert's proposed testimony should not be excluded merely 'because it fails to account for some particular condition or fact which the adversary considers relevant.'"

Townsend v. Pierre, 221 N.J. 36, 54-55 (2015). Rather, the expert's opinion must be based on "facts or data derived from (1) the expert's personal observations; or (2) evidence admitted at the trial; or (3) data relied upon by the expert which is not normally admissible in evidence but which is the type of data normally relied upon by experts." Id. at 53.

The expert report in question is one submitted by plaintiff from Peter W. Leibundgut, Esq., the managing partner of PD&J Associates, LLC. In his expert report, Mr. Leibundgut opines on whether or not the defendants administered the Trusts and their respective accounts with Defendants in keeping with industry customs, practices and standards, regulatory guidance, and PNC's internal policies and procedures for (1) general trust account administration; and (2) fraud and suspicious activity detection, recognition and reporting. Mr. Leibundgut concluded in his report that

(1) the production of the policies will not violate any regulation;

(2) the policies are not confidential;

(3) production of the policies will not impair defendants' competitive edge in the industry;

(4) SARs reporting is but one component of risk management and compliance as same pertains to the internal control, oversight, and safety and soundness of a financial institution;

(5) production of the policies is routinely done in the ordinary course of discovery in a case of this nature;

(6) the policies requested are extremely important to determine whether or not PNC complied with the policies and governing regulations in administering the Trusts' investment and deposit accounts;

(7) that PNC knew, or should have known that Dworkin was diverting the Trusts' assets;

(8) that PNC failed to detect and disclose significant and industry standard "fraud red flags" regarding Dworkin's breach of the fiduciary duty he owed plaintiffs;

(9) PNC was willfully blind to the felonious conduct of Dworkin;

(10) PNC aided and abetted the theft perpetrated by Dworkin by failing to detect, report and mitigate readily detectible unusual and suspicious activity in a timely fashion in keeping with Industry standards;

(11) Prior trust activity and loans made by Richard Kuskin to Dworkin and his company are irrelevant to this case.

Mr. Leibundgut reviewed the following documents in support of his opinion:

- Deposition Transcript of Michael T. Bird, May 22, 2018, and all exhibits produced in connection therewith.
- Deposition Transcript of Janet S. Elinoff, February 20, 2018, and all exhibits produced in connection therewith.
- Deposition Transcript of Gail Horvath, April 4, 2018, and all exhibits produced in connection therewith.
- Deposition Transcript of Marco G. Crespi, February 21, 2018, and all exhibits produced in connection therewith.
- Deposition Transcript of Melinda Smith, February 23, 2018, and all exhibits produced in connection therewith.
- Deposition Transcript of Michelle Nicastro, February 22, 2018, and all exhibits produced in connection therewith.
- Deposition Transcript of Richard Kuskin, March 27, 2018, and all exhibits produced in connection therewith.

- All Pleadings
- PNC's policy produced through August 13, 2018
- All documents produced by Plaintiff and Defendant in response to discovery proceedings, through August 13, 2018
- The Specific exhibits, documents, and authorities referenced in the footnote of the report.

Mr. Leibundgut concludes that production of the requested policies will not violate any regulation; the policies are not confidential; and their production will not impair PNC's ability to compete in the industry. CCRM documents establish the parameters within which a regulated financial institution conducts business within the sectors it operates. Bank examiners regularly review these documents. All of this information is in the public domain, and it is not confidential or a factor in a compliant bank's marketing and sales efforts and its ability to compete in the marketplace. Without these documents, it becomes difficult to identify the personnel within a particular institution's hierarchy who are ultimately responsible for the required internal oversight and control over any risk, potential liability or facts or circumstances which have a bearing on a particular account relationship. Production of the policies should not be the subject of contentious and protracted litigation in a case where compliance is the nexus of the dispute.

Mr. Leibundgut further states that bank's SARs policy and procedure is not confidential, but one of many CCRM Document components. It is generally a regurgitation of the regulations and pulled either directly from the source or a myriad of agency and professional association literature. This information was requested specifically to ascertain whether or not Dworkin's conduct as detected by the defendants in April 2014 should have been the subject of SARs reporting. The Auto Toy Store loan request should have raised red flags and never been considered by PNC. Further, the PNC Team's management and oversight of the trusts and IMAs violated

industry standards. Ultimately, Mr. Leibundgut concludes that PNC could have and should have taken measures to prevent the fraud that occurred.

Defendant PNC contends that the plaintiff's expert report is a net opinion, as (1) Mr. Leibundgut fails to identify any industry standards supporting this blanket assertion; (2) does not even define the term "industry standards"; and (3) fails to indicate how disclosure of the policies and procedures of PNC would assist in establishing a breach of such standards. The expert report is based on factual and legal inaccuracies that are apparently the basis for plaintiff's request for PNC's internal policies and procedures. Steven Dworkin was not PNC's client, rather, the trusts were the clients. Thus, PNC was under no obligation to evaluate or disclose Steven Dworkin's actions to plaintiff or any other third-party. PNC did not administer the trust, and cannot provide support for plaintiff's claim that it is entitled to PNC's internal policies and procedures relating to fraud protection.

Here, plaintiffs' counsel states in its brief that the court requested that plaintiffs provide this expert report in support of its motion to compel discovery before the Court would consider its motion. This assertion is correct, based upon this Court's case management order dated May 29, 2018. Plaintiffs' counsel himself notes that Mr. Leibundgut's expert report is preliminary, and is based upon the information that was available to him at the time before this instant motion was filed. Mr. Leibundgut has sufficiently established the basis for his preliminary opinion. Mr. Leibundgut bases his preliminary opinion in his report on thirty-five (35) years of legal and consulting experience working with financial services institutions, including advising banks and government agencies in "best practices" risk management and compliance. Mr. Leibundgut performed a comprehensive review of the documentation filed in and relating to this case, including pleadings, deposition transcripts, and all PNC policies produced through the serving of

the report. Mr. Leibundgut relied on his extensive experience in the financial services industry to conclude that the documents of the type being requested by the plaintiffs' are routinely produced in litigation, and that production of these documents will not violate any privilege or are contrary to any regulations. This court also takes note of plaintiffs' contentions that the expert report is preliminary, and is based on only the documents produced through the serving of the report.

C. Plaintiffs' Request for Non-Party Auto Toy Store's Account Information

R. 4:18-1 prescribes that "any party may serve on **any other party** a request to produce and permit the party making the request, or someone acting on behalf of that party, to inspect, copy, test, or sample any designated documents … that are in the possession, custody or control of the party on whom the request is served." (emphasis added). On the other hand, document requests for non-parties are subject to the requirements under R. 4:14-7(c).

Here, Plaintiffs have requested all documents which reference or relate to the Auto Toy Store, "copies of all documents relating to, referencing or evidencing transfers of funds from any account in the name of the Harry Kuskin Irrevocable Trust to the Auto Toy Store", as well as "copies of all documents relating to, referencing or evidencing transfers of funds from any account in the name of the Anna Kuskin Irrevocable Trust to the Auto Toy Store." Although PNC Bank is a party to this action, the Auto Toy Store is not, and thus the Auto Toy Store must be put on notice that plaintiffs are requesting their bank account records and information from PNC stemming out of their bank accounts. Plaintiffs must follow the procedures under R. 4:14-7(c) in their attempt to obtain the requested bank records from PNC relating to the Auto Toy Store's accounts. Therefore, plaintiffs' request to compel Document Requests 39-41 is denied because it is subject to the requirements under R. 4:14-7(c).

D. The Suspicious Activity Report ("SARs") Privilege

This court must consider whether the Document and Interrogatory requests that plaintiffs have made on PNC are subject to the Suspicious Activity Report, or SARs, privilege. The Bank Secrecy Act, 31 U.S.C. 5318(g)(2) states that "[i]f a financial institution or any director, officer, employee, or agent of any financial institution, voluntarily or pursuant to this section or any other authority, reports a suspicious transaction to a government agency, (i) neither the financial institution, director, officer, employee, or agent of such institution (whether or not any such person is still employed by the institution), nor any other current or former director, officer, or employee of, or contractor for, the financial institution or other reporting person, may notify any person involved in the transaction that the transaction has been reported; and (ii) no current or former officer or employee of or contractor for of the Federal Government or of or for any State, local, tribal, or territorial government within the United States, who has any knowledge that such report was made may disclose to any person involved in the transaction that the transaction has been reported, other than as necessary to fulfill the official duties of such officer or employee." Federal regulations interpreting the statute further prescribe the following: "[a] SAR, and any information that would reveal the existence of a SAR, are confidential, and shall not be disclosed except as authorized in this paragraph", and that "no national bank, and no director, officer, employee, or agent of a national bank, shall disclose a SAR or any information that would reveal the existence of a SAR." 12 C.F.R. 21.11(k)-(k)(1).

However, the regulations contain a caveat which states that "[p]rovided that no person involved in any reported suspicious transaction is notified that the transaction has been reported, this paragraph (k)(1) shall not be construed as prohibiting . . . [t]he disclosure by a national bank,

or any director, officer, employee or agent of a national bank of . . . [t]he underlying facts, transactions, and documents upon which a **SAR** is based." 12 C.F.R. 21.11(k)(1)(ii)(A)(2).

Federal case law interpreting the statute and the regulations have interpreted the SARs privilege narrowly. In Weil v. Long Island Savings Bank, 195 F.Supp. 2d 383 (E.D.N.Y. 2001), the United States District Court for the Eastern District of New York held that the SARs privilege does not apply to supporting documentation relating to the filing of a SAR. Id. at 389. The Weil court focused on the legislative history of the Bank Secrecy Act, concluding that is "takes the position that only the SAR and the information on the SAR are confidential under 31 U.S.C. 5318(g), not the supporting documentation." Id., citing 61 Fed. Reg. 6100 at 6104.

Moreover, the Northern District of Illinois divided supporting documents into two categories – "factual documents which give rise to suspicious conduct" and "documents representing drafts of SARs or other work product or privileged communications that relate to the SAR itself." Cotton v. Privatebank & Trust Co., 235 F.Supp. 2d 809, 815 (N.D. Ill. 2002). The Cotton court held that documents in the former category are discoverable as business records made in the ordinary course of business, while those in the latter category are not discoverable under the SARs privilege. Id.

The Southern District of New York, in Wultz v. Bank of China, 56 F.Supp. 3d 598 (S.D.N.Y. 2014), found that documents that were part of the Bank of China's ("BOC") investigatory process were not subject to the SARs privilege. Id. at 600. Magistrate Judge Gabriel W. Gorenstein writes that

> here, as might be expected, there was no evidence of any process for investigating suspicious activity other than the process that might ultimately lead to a presentation to the SAR committee to decide whether to file a SAR. But any bank, including the BOC,

> has its own reasons for investigating suspicious activity other than the statutory obligation to file a SAR – including to protect itself from fraud and to make sure it does not violate or abet the violation of other banking regulations and statutes, such as money laundering statutes. Thus, investigatory documents do not by themselves reveal the existence of a SAR.

Id. at 601-02. Judge Gorenstein did, however, invite the BOC to point out any documents that contain a discussion of SAR requirements, and that reflected the BOC's decision making process specifically as to whether to file a SAR, because these documents may be withheld if they reveal the existence of a SAR, and that the BOC should present them to the court for an in camera review. Id. at 602-03.

The District of New Jersey, in Freedman & Gersten, LLP v. Bank of Am., N.A., 2010 WL 5139874 (2010), granted the Freedman & Gersten LLP's request for Bank of America's ("BOA") policies and procedures for handling suspicious activity and risk management, with the exception of those polices and procedures specifically designated for SARs. Id. at *12. The court also held, similarly to the Southern District of New York, that Freedman & Gersten LLP's request for any internal memoranda or documents drafted in response to the suspicious activity in this case, as long as the documents do not contain any SARs or previous draft of SARs, need not indicate whether a SAR was produced, and shall not state what documents or facts were or were not included in any SARs. Id. at *9.

Judge Shipp's decision provides clarification as to whether documents prepared in response to an internal investigation are subject to the attorney client privilege. The District of New Jersey held that "the attorney client privilege and the work product doctrine do not apply to documents produced in the ordinary course of an internal investigation", as long as the documents are not created in the anticipation of a subsequent litigation. Id. at *15-16, citing Payton v. N.J. Tpk. Auth.,

148 N.J. 524, 552-53 (1997). Similarly, Judge Shipp held that the "work product doctrine does not apply when an attorney undertakes an internal investigation to comply with internal policy", because "the work product doctrine only applies where the materials in question were prepared in anticipation of litigation and not in the course of an investigation to discover the precise facts of a particular incident." Id. at *19

This court agrees with the Eastern District of New York, the Southern District of New York and the District of New Jersey that the SARs privilege in the Bank Secrecy Act is to be interpreted narrowly, and that the discovery that the plaintiffs are seeking to compel is discoverable to the extent that they do not request or reveal the existence of a SAR. This court recognizes that our court rules stipulate that the scope of discovery and the discovery rules are to be construed liberally in favor of broad pretrial discovery of all relevant evidence. The guidance from numerous federal courts leads this court to agree that documents and information relating to PNC's internal investigation, as well as PNC's investigatory policies and procedures, are admissible as long as they do not reveal the existence of a SAR. The legislative history of the Bank Secrecy Act and its related regulations also favors interpreting the SARs privilege narrowly. Thus, it is in the spirit of the law for this court to find that the information plaintiffs are requested to be discoverable, so long as the same do not request or reveal the existence of SARs. If any document sought will reveal the existence of a SAR, or contain information explicitly related to SAR requirements, it is not discoverable. Furthermore, this court stipulates that all discovery deemed confidential in this matter will continue to be subject to Judge Kenny's January 22, 2018 Protective Order.

This court further holds that documents prepared in the course of an internal investigation are not necessarily subject to the attorney-client privilege, even if the documents are prepared by in-house counsel or other attorneys. The New Jersey Supreme Court, in Payton, stated that a

> fine line exists between an attorney who provides legal services or advice to an organization and one who performs essentially non-legal duties. An attorney who is not performing legal services or providing legal advice in some form does not qualify as a "lawyer" for the purposes of the privilege. Thus, when an attorney conducts an investigation not for the purpose of preparing for litigation or providing legal advice, but rather for some other purpose, the privilege is inapplicable.

Id. at 550-51, citing United Jersey Bank v. Wolosoff, 196 N.J. Super 553, 563 (App. Div. 1984). Thus, unless a document is explicitly prepared in anticipation of litigation, or in the course of providing legal advice, it is not protected by the attorney-client privilege and thus is discoverable. This court will remind the parties again that all discovery deemed confidential continues to be subjected to Judge Kenny's January 22, 2018 Protective Order.

This court is not persuaded by PNC's reliance on Norton v. U.S. Bank National Association, 179 Wn. App. 450 (Wash. Ct. App. 2014) in support of their position that the information plaintiffs are requested is automatically subjected to the SARs privilege. The Norton court has interpreted the SARs privilege rather broadly, holding that US Bank's internal investigations, policies and monitoring of suspicious activity is covered under the SARs privilege. Id. at ¶25. This holding is contradictory to the case law of the District of New Jersey, Southern District of New York, Eastern District of New York and other federal courts throughout the country. In fact, the Southern District of Florida notes that Norton "appears to be an outlier that more broadly interprets the privilege than the majority of courts." Ackner v. PNC Bank, N.A., 2017 U.S. Dist. LEXIS 60500, n.1. This court agrees with the Ackner court's assessment of Norton, and is not persuaded by Norton's holding.

Therefore, for the reasons stated herein:

1. Plaintiffs' motion demanding defendants provide more specific answers to plaintiffs' interrogatories is **GRANTED** so long as no information revealing the existence of a SAR is requested or released; and
2. Plaintiffs' motion to compel documents contained in plaintiff's First Set of Document Demands is **GRANTED** so long as no information revealing the existence of a SAR is requested or released; and
3. Plaintiffs' motion to compel the documents contained in requests 39, 40 and 41 in plaintiffs' First Set of Document Demands is **DENIED** as same relates to non-party Auto Toy Store. Plaintiffs, however, may use subpoena power on a non-party.

/s/ Robert J. Mega

The Hon. Robert J. Mega, J.S.C.

Dated: October 17, 2018