UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 18-1884

———

AER ADVISORS, INC.; WILLIAM J. DEUTSCH; PETER E. DEUTSCH,
Plaintiffs-Appellants,

v.

FIDELITY BROKERAGE SERVICES, LLC,
Defendant-Appellee,

FMR LLC
Defendant.

———

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MASSACHUSETTS

———

MOTION FOR LEAVE TO FILE BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION (SIFMA) AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE SUPPORTING AFFIRMANCE OF JUDGMENT

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Dated: December 21, 2018

Counsel for Amicus Curiae Securities Industry and Financial Markets Association

RULE 26.1 CORPORATE DISCLOSURE STATEMENT

Amicus curiae states that it has no parent corporation and no publicly held corporation owns ten percent or more of its stock.

The Securities Industry and Financial Markets Association (SIFMA) respectfully moves this Court for leave to file a brief as *amicus curiae* in support of the Defendant-Appellee and affirmance.[1]

SIFMA is a securities industry trade association that is dedicated to supporting a strong financial industry. SIFMA's membership includes hundreds of securities firms, broker-dealers, and banks that each year collectively file thousands of suspicious activity reports ("SARs"). SIFMA members file SARs concerning a vast array of potentially illegal activity as required by federal law to assist law enforcement in protecting the public. Each year for the past 18 years, SIFMA has hosted an Anti-Money Laundering & Financial Crimes Conference attended by industry leaders, compliance personnel, and representatives from regulatory and law enforcement agencies. In addition, SIFMA hosts a variety of Anti-Money Laundering ("AML") compliance events, including luncheons and panel discussions attended by industry compliance personnel and regulators.

Regulatory officials charged with enforcing reporting obligations have spoken at SIFMA events and otherwise communicated to SIFMA members about

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[1] SIFMA files this motion pursuant to Fed. R. App. P. 29(a)(3), which requires SIFMA to file a motion accompanied by its proposed *amicus* brief stating SIFMA's interest in this case, as well as the reasons why the proposed *amicus* brief is desirable and relevant to the disposition of the case. SIFMA's proposed *amicus* brief is submitted herewith as Exhibit A.

the importance of the information contained in SAR filings, and have encouraged member firms to consider the need to file *more* SARs and, when in doubt, to err on the side of filing a SAR. SIFMA members are committed to meeting their reporting obligations and assisting law enforcement in serving the public interest. Unqualified immunity from civil liability under 31 U.S.C. § 5318(g)(3), referred to herein as the "safe harbor provision," is essential to achieving those goals by ensuring that firms can feel comfortable meeting their obligations to call out suspicious activity regardless of whether enforcement authorities ultimately conclude that there was wrongdoing. In particular, limiting the protection of the safe harbor provision in any way would place financial institutions between the proverbial "rock" (potential regulatory criticism -- or even an enforcement action -- for determining not to file particular SARs) and a "hard place" (facing potentially costly and protracted civil litigation for those same SARs).

SIFMA respectfully submits that its brief offers this Court an informative analysis of those policy concerns, which are relevant to the resolution of the instant appeal. First, Stoutt should be re-affirmed because the broad immunity of § 5318(g) encourages the reporting of potentially suspicious activity, and aligns with law enforcement objectives and financial firms' desire to meet their SAR-filing obligations. (See Proposed SIFMA Br., attached hereto as Ex. A, at Part I.) Second, Stoutt should be re-affirmed because, without the broad immunity

afforded by § 5318(g), firms would be placed in a position of erring on the side of filing SARs to satisfy regulators while also facing the risk of costly nuisance litigation brought by disgruntled SAR subjects. (See Ex. A at Part II.)

Defendant-Appellee has consented to the filing of SIFMA's *amicus* brief, but Plaintiffs-Appellants have withheld their consent. Although Plaintiffs have withheld their consent, footnote 1 of their opening brief purports to state SIFMA's views on SAR filings and the safe harbor. Plaintiffs' statements concerning SIFMA are incorrect,[2] but in any event show that Plaintiffs themselves believe that SIFMA's views on this case may assist the Court. As set forth in its proposed *amicus* brief, SIFMA's view is that 31 U.S.C. § 5318(g)(3) provides unqualified immunity from civil liability and that the Court's decision in Stoutt v. Banco Popular de Puerto Rico, 320 F.3d 26, 30-32 (1st Cir. 2003), correctly confirmed that interpretation of the statute. The unqualified immunity articulated

[2] The Plaintiffs purport to cite a statement made at a SIFMA roundtable, incorrectly attribute the statement to SIFMA, and inaccurately assert that the statement supports the Plaintiffs' position that the safe harbor provision provides something less than unqualified immunity. See Brief for Plaintiffs-Appellants at 2 n.1. Although the Plaintiffs attribute the statement to SIFMA, the statement was actually made by a regulator. See SEC Roundtable on Combating Retail Investor Fraud, SIFMA (Sept. 26, 2018), https://www.sifma.org/resources/general/sec-roundtable-on-combating-retail-investor-fraud/. As stated in the accompanying proposed brief, SIFMA's position is that 31 U.S.C. § 5318(g)(3) provides unqualified immunity from civil litigation concerning the filing of SARs.

by Stoutt is precisely what allows SIFMA members to file SARs in compliance with their federal obligations without fear of potential civil liability.

For the foregoing reasons, and for those described in the attached brief, SIFMA's motion for leave to file a brief as *amicus curiae* should be granted.

Dated: December 21, 2018
Boston, Massachusetts

Respectfully submitted,

/s/ James R. Carroll

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CERTIFICATE OF SERVICE

I, James R. Carroll, hereby certify on December 21, 2018, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF filers and that they will be served by the CM/ECF System:

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BRIEF OF THE SECURITIES INDUSTRY AND FINANCIAL MARKETS ASSOCIATION (SIFMA) AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANT-APPELLEE SUPPORTING AFFIRMANCE OF JUDGMENT

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STATEMENT OF IDENTITY AND INTEREST OF THE *AMICUS CURIAE*[1]

The Securities Industry and Financial Markets Association (SIFMA) is a securities industry trade association that is dedicated to supporting a strong financial industry. SIFMA's membership includes hundreds of securities firms, broker-dealers, and banks that each year collectively file thousands of suspicious activity reports ("SARs"). SIFMA members file SARs concerning potentially illegal activity as required by federal law to assist law enforcement in protecting the public. Each year for the past 18 years, SIFMA has hosted an Anti-Money Laundering & Financial Crimes Conference attended by industry leaders, compliance personnel, and representatives from regulatory and law enforcement agencies. In addition, SIFMA hosts a variety of Anti-Money Laundering ("AML") compliance events, including luncheons and panel discussions attended by industry compliance personnel and regulators. More information about SIFMA is available at https://www.sifma.org.

Regulatory officials charged with enforcing reporting obligations have spoken at SIFMA events and otherwise communicated to SIFMA members about the importance of the information contained in SAR filings, and have encouraged

[1] Pursuant to Fed. R. App. P. 29(a)(4)(E), no party's counsel in this case authored this brief in whole or in part, and no party, no party's counsel, nor any other person, other than SIFMA, its members, or its counsel, contributed money intended to fund the preparation or submission of this brief.

member firms to consider the need to file *more* SARs and, when in doubt, to err on the side of filing a SAR. SIFMA members are committed to meeting their reporting obligations and assisting law enforcement in serving the public interest. Unqualified immunity from civil liability under 31 U.S.C. § 5318(g)(3), referred to herein as the "safe harbor provision," is essential to achieving those goals by ensuring that firms can feel comfortable meeting their obligations to call out suspicious activity regardless of whether enforcement authorities ultimately conclude that there was wrongdoing. In particular, SIFMA members have a direct and immediate interest in avoiding being placed in the position of (1) erring on the side of filing more SARs to meet regulators' expectations, and at the same time, (2) fending off costly nuisance suits brought by disgruntled SAR subjects.

Accordingly, SIFMA seeks leave to file this amicus brief urging this Court to affirm the District Court's dismissal of the Plaintiffs' claims and to re-affirm the Court's own holding in Stoutt v. Banco Popular de Puerto Rico, 320 F.3d 26 (1st Cir. 2003).[2]

[2] By accompanying motion, SIFMA seeks leave of the Court to file this brief in accordance with Fed. R. App. P. 29(a)(3).

PRELIMINARY STATEMENT

Financial institutions -- including SIFMA members -- file hundreds of thousands of suspicious activity reports ("SARs") every year,[3] helping law enforcement detect and investigate a vast array of potential financial crimes, ranging from elder financial exploitation to embezzlement, from insider trading to identity theft, and from market manipulation to money laundering for criminal enterprises. Financial institutions report potentially suspicious activity pursuant to their obligations under 31 U.S.C. § 5318 and its implementing regulations, and in reliance upon the safe harbor provision of § 5318(g)(3) and its implementing regulations. Under § 5318(g)(3), financial institutions that disclose "any possible violation of law or regulation to a government agency . . . pursuant to this subsection or any other authority . . . shall not be liable to any person under any law or regulation."

In Stoutt, this Court correctly held that the safe harbor provision grants unqualified immunity from civil liability to a financial institution for filing a SAR.[4] See Stoutt, 320 F.3d at 29-32; accord Lee v. Bankers Trust Co., 166 F.3d

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[3] See Suspicious Activity Report Statistics (SAR Stats), Fin. Crimes Enf't Network, https://www.fincen.gov/reports/sar-stats. Last year, for example, financial institutions collectively filed more than 2,000,000 SARs. Id.; see also infra Part II.A.

[4] This Court came to that conclusion for three principal reasons: *first*, the *(cont'd)*

540 (2d Cir. 1999). Stoutt, however, did not leave SAR subjects without protection. The reports themselves are confidential, so they do not become public records of possible misconduct, and, indeed, disclosure to the SAR subjects and others is prohibited. Further, as Stoutt highlighted, the government agency receiving the report then has the power to investigate and to decide whether any illegal activity occurred. Also, the government may impose fines and other penalties on financial institutions for improper reporting. See Stoutt, 320 F.3d at 32. This Court's decision in Stoutt has guided other federal courts in this circuit and beyond.[5]

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statute's plain language includes no good faith exception to immunity, see id. at 30-31; *second*, the statute's legislative history demonstrates that Congress did not intend to limit the broad immunity of the safe harbor provision with a good faith requirement, id. at 31; and *third*, reading a good faith requirement into the safe harbor provision would cause practical problems, creating "a risk of second guessing" those who file SARs and "exposing reporters to an increased risk of trial" by requiring them to prove their subjective good faith before receiving immunity from liability. Id. at 31-32; see also Brief for Defendant-Appellee ("Fidelity's Br.") at 14.

[5] Numerous federal courts have followed Stoutt in preserving the safe harbor provision consistent with the statute's plain language, legislative history, and policy objectives. See, e.g., Quiles-Gonzalez v. United States, No. CIVIL 09-1401CCC, 2010 WL 1415993, at *5 (D.P.R. Mar. 31, 2010); Coffman v. Cent. Bank & Tr. Co., No. 5:11-cv-00388-KKC, 2012 WL 4433293, at *3-4 (E.D. Ky. Sept. 25, 2012); Martinez-Rodriquez v. Bank of Am., No. C 11-06572 CRB, 2012 WL 967030, at *12 (N.D. Cal. Mar. 21, 2012); Nieman v. Firstar Bank, No. C03-4113-MWB, 2005 WL 2346998, at *5-6 (N.D. Iowa Sept. 26, 2005). But see Lopez v. First Union First Nat'l Bank of Fla., 129 F.3d 1186 (11th Cir. 1997) (factually-inapposite from the instant appeal, not involving a SAR filing pursuant to 31

(cont'd)

SIFMA agrees with the legal arguments in Defendant-Appellee's Brief that the District Court properly applied Stoutt in dismissing Plaintiffs' complaint and will not repeat those arguments here.[6] This *amicus* brief instead focuses on the important policy reasons why this Court's holding in Stoutt should be re-affirmed and Plaintiffs' arguments in favor of diluting it or creating exceptions to it should be rejected. Limiting the protection of the safe harbor provision -- whether by carving out cases where a plaintiff alleges that a violation of law was "impossible," by importing a "good faith" requirement, or otherwise -- would place financial institutions between the proverbial "rock" (potential regulatory criticism or even an enforcement action for determining not to file particular SARs) and a "hard place" (facing potentially costly and protracted civil litigation for those same SARs).

First, Stoutt should be re-affirmed because the plain and unambiguous language of § 5318(g) provides broad immunity, encourages the reporting of potentially suspicious activity, and aligns with law enforcement objectives and financial firms' desire to meet their SAR-filing obligations. (See infra Part I.) The safe harbor is part of a coherent legislative scheme that requires firms to file SARs

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U.S.C. § 5318(g), and not adopted by the 1st Circuit, but nonetheless relied on by Plaintiffs for the proposition that the safe harbor provision provides less than unqualified immunity); see also Fidelity's Br. at 15.

[6] See Fidelity's Br. at 12-21.

under a variety of circumstances and is consistent with statutory provisions that bar firms from disclosing the existence or contents of any SAR. Relying on the safe harbor, firms have built robust AML compliance departments with sophisticated means of detecting, investigating, and reporting potentially suspicious activity, and regulators have further encouraged firms -- through public statements at industry events and other means -- to err on the side of filing a SAR when faced with a "close call." In recent years, regulators have reinforced that message by bringing enforcement actions and imposing penalties when they disagreed with a firm's decision not to file a SAR in particular instances.

Second, Stoutt should be re-affirmed because, without the broad immunity afforded by § 5318(g), firms would be placed in a position of erring on the side of filing SARs to satisfy regulators while also facing the risk of costly nuisance litigation brought by disgruntled SAR subjects. (See infra Part II.) A SAR subject's allegations about the propriety of any given filing would be fact intensive and exceedingly difficult to dismiss on the lenient standard of review applicable to motions to dismiss under Fed. R. Civ. P. 12. Further, disputes of material fact concerning a SAR filer's state of mind would likely render summary judgment unavailable under Fed. R. Civ. P. 56. Such allegations could likewise require extensive and costly discovery, including expert discovery, because financial crimes are often complex and technical. Worse, financial institutions

would be required to defend themselves despite being statutorily barred from producing evidence that would tend to reveal whether or not a SAR was even filed, including the SAR itself. This is a predicament that the safe harbor provision was sensibly intended to prevent.

Accordingly, SIFMA respectfully requests that this Court again hold that 31 U.S.C. § 5318(g)(3) provides unqualified immunity from civil liability.[7]

ARGUMENT

I. *STOUTT* SHOULD BE RE-AFFIRMED BECAUSE THE BROAD IMMUNITY OF § 5318(g) ENCOURAGES REPORTING OF POTENTIALLY SUSPICIOUS ACTIVITY

A. The Safe Harbor Provision Is Integral To A Regulatory Framework That Requires A SAR Where There Is Merely "Reason To Suspect" That A Transaction "Has No Business Or Apparent Lawful Purpose"

Under the Bank Secrecy Act ("BSA"), financial institutions are required to establish reasonably-designed AML policies, procedures, and controls, including procedures designed "to report any suspicious transaction relevant to a possible violation of law or regulation." 31 U.S.C. § 5318(g)(1) (emphasis added).

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[7] The Plaintiffs purport to cite a statement made at a SIFMA roundtable, incorrectly attribute that statement to SIFMA, and inaccurately assert that the statement supports the Plaintiffs' position that the safe harbor provision provides something less than unqualified immunity. See Brief for Plaintiffs-Appellants at 2 n.1. They are incorrect. As stated herein, SIFMA's position is that 31 U.S.C. § 5318(g)(3) provides unqualified immunity from civil litigation concerning the filing of SARs.

Under the implementing regulations, a firm must file a SAR when certain criteria are met. These are often referred to as "mandatory SARs." For example, broker-dealers like Defendant must file a mandatory SAR whenever there is a transaction that (i) was "conducted or attempted by, at, or through" the broker-dealer, (ii) "involves or aggregates funds or other assets of at least $5,000," and (iii) the broker-dealer "knows, suspects, or has reason to suspect" that the transaction meets certain enumerated criteria.[8] Those criteria include instances where a firm has not determined that a transaction was in fact illegal, but merely determined that the transaction "[h]as no business or apparent lawful purpose . . . and the broker-dealer knows of no reasonable explanation for the transaction after examining the available facts."[9] Broker-dealers are required to file mandatory SARs "no later than 30 calendar days after the date of the initial detection . . . of facts that may constitute a basis for filing a SAR."[10] In addition, even in circumstances where the criteria for a mandatory SAR are not met, the BSA encourages firms to file a SAR if a firm simply "believes" that a transaction "is relevant to the possible violation of

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[8] 31 C.F.R. § 1023.320(a)(2) (2018) (regulation for broker-dealers) (emphasis added); see also 31 C.F.R. § 1024.320(a)(2) (2018) (parallel regulation for mutual funds) and 31 C.F.R. § 1020.320(a)(2) (2018) (parallel regulation for banks).

[9] 31 C.F.R. § 1023.320(a)(2)(iii) (2018) (emphasis added); see also 31 C.F.R. § 1024.320(a)(2)(iii) (2018) and 31 C.F.R. § 1020.320(a)(2)(iii)(2018).

[10] 31 C.F.R. § 1023.320(b)(3) (2018) (emphasis added); see also 31 C.F.R. § 1024.320(b)(3) (2018) and 31 C.F.R. § 1020.320(b)(3).

any law or regulation."[11] These are often referred to as "voluntary SARs." Once a SAR is filed with FinCEN, numerous government agencies may review and evaluate it in connection with new or ongoing investigations.[12]

The safe harbor provision is integral to that regulatory framework. Because, for example, firms need only have "reason to suspect" that a transaction "[h]as no business or apparent lawful purpose . . . " to file a mandatory SAR, and because firms may otherwise file a voluntary SAR if they believe a transaction may be "relevant" to a "possible" violation of law, firms unsurprisingly file numerous SARs where it may turn out that no violation of law has in fact occurred. Recognizing that it would discourage firms from filing mandatory, let alone voluntary, SARs if firms could face civil liability from subjects who felt their

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[11] 31 C.F.R. § 1023.320(a)(1) (2018) (emphasis added); see also 31 C.F.R. § 1024.320(a)(1) (2018) and 31 C.F.R. § 1020.320(a)(1) (2018).

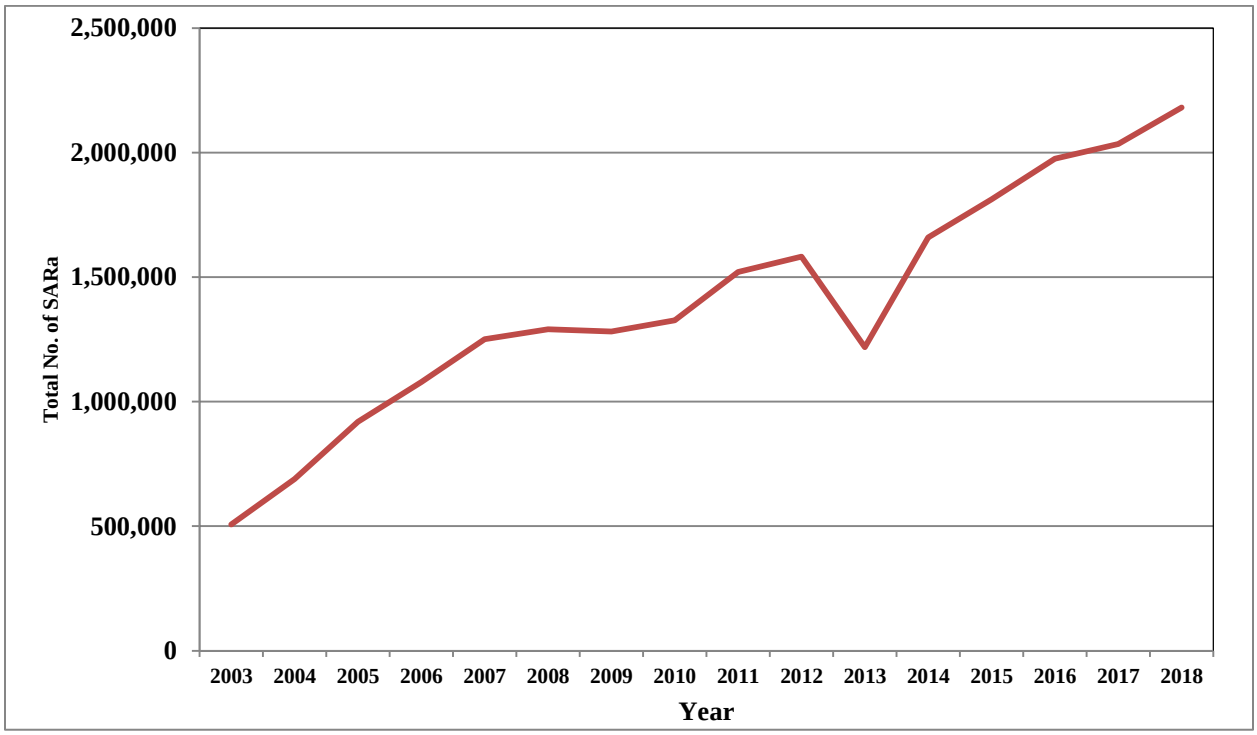
[12] See, e.g., Kenneth Blanco, Director, FinCEN, Prepared Remarks delivered at the 2018 Chicago-Kent Block (Legal) Tech Conference (Aug. 09, 2018) (transcript available at https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-delivered-2018-chicago-kent-block) ("Nearly 500 federal, state, and local law enforcement and regulatory agencies have access to FinCEN's database . . . . This includes 149 SAR Review Teams located all around the country."); Supervisory Insights: Connecting the Dots…The Importance of Timely and Effective Suspicious Activity Reports, FDIC (Dec. 7, 2007), https://www.fdic.gov/regulations/examinations/supervisory/insights/siwin07/article03_connecting.html (noting that SAR Review Teams may include representatives from the U.S. Attorney's Office, the Internal Revenue Service's Criminal Investigations Division, the FBI, the DEA, the Bureau of Immigration and Customs Enforcement, the Bureau of Alcohol Tobacco, Firearms, and Explosives, the U.S. Secret Service, and state and local law enforcement).

transactions should not have been reported, Congress enacted § 5318(g) to provide broad protection from civil liability. As this Court noted in Stoutt, a "good faith" requirement was removed from an earlier draft of the provision. 320 F.3d at 31 (citations omitted). In finding that there was no "good faith" requirement, this Court correctly gave "great[] weight" to a statement by the bill's author, Congressman Frank Annunzio. Id. Specifically, Congressman Annunzio stated that he "was deeply concerned that financial institutions should be free to report suspicious transactions without fear of civil liability." 139 Cong. Rec. E57-02 (daily ed. Jan. 5, 1993). According to Congressman Annunzio, the Act was intended "to provide the broadest possible exemption from civil liability for the reporting of suspicious transactions," so "that financial institutions which report[] suspicious transactions should not be held liable to any person." Id. That broad immunity is consistent with the SAR-filing thresholds set in the implementing regulations and furthers the purposes of the BSA.

B. Financial Firms Have Relied On The Safe Harbor To File Millions Of SARs

As financial crimes have become increasingly sophisticated, so too have firms' means of detecting potentially suspicious activity. As an indication of how seriously firms have taken their SAR-filing obligations, firms have filed hundreds of thousands of SARs each year, and the trend is increasing:

Table 1. FinCEN SAR Filing Data[13]



For example, there were approximately 690,000 SARs collectively filed by financial industry firms in 2004; last year, there were more than 2,000,000 SARs collectively filed by such firms. This year, based on data through October 31, 2018, financial industry firms are collectively on track to file approximately

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[13] The total comprises the sum of SARs filed by financial industry firms, including, among others, Depository Institutions, Money Services Businesses, Securities & Futures Industries, insurance companies, and casinos. The data for 2018 is extrapolated to a full year based on SAR filings as of 10/31/2018, the last date the database was updated as of the filing of this brief. Data prior to 2013 was acquired from The SAR Activity Review – By The Numbers, Issue 18 (Apr. 30, 2013) at 4, https://www.fincen.gov/sites/default/files/sar_report/sar_by_numb_18.pdf. Data after 2013 was acquired from FinCEN's SAR Stats tool, available at https://www.fincen.gov/reports/sar-stats (accessed on Nov. 28, 2018).

2,200,000 SARs. These filings reflect financial firms' commitment to assisting law enforcement and maintaining public trust in the country's financial system.

C. Regulators Have Relied On The Safe Harbor In Providing Guidance About How Firms Should Structure Their AML Programs And Report Potentially Suspicious Activity

Regulators have been vocal in their encouragement of firms to file more SARs, particularly as the government's technological tools for sorting through large volumes of SAR data have improved.[14] In remarks delivered at a SIFMA conference, Kevin Goodman, the SEC's then-National Associate Director, Broker-Dealer Examination Program, Office of Compliance Inspections and Examinations, encouraged firms to file a SAR even if such a filing would be redundant or where there is no definitive proof of misconduct:

> Finally, and perhaps most importantly – always consider the need to file SARs. Don't fail to file because you believe that the activity has been reported by someone else or that you don't have definitive proof that illegal activity has occurred or you have reported the activity

[14] See, e.g., Andrew Ceresney, Director, Div. of Enf't, Sec. & Exch. Comm'n, Remarks at SIFMA's 2015 Anti-Money Laundering & Financial Crimes Conference (Feb. 25, 2015) (transcript available at https://www.sec.gov/news/speech/022515-spchc.html) ("It also is worth mentioning some of our other efforts to use the SAR data to support our Enforcement efforts. The BSA Review Group uses BSA data on a broader scale, to support ongoing Division initiatives, to identify patterns of securities-related issues, and to identify potential BSA compliance concerns in the industry.").

> through other channels – you are still required to file a SAR in these instances.[15]

As Kenneth Blanco, FinCEN Director, remarked at a conference earlier this year when discussing the importance of SAR filings: "FinCEN will aggressively pursue individuals and companies who do not take their obligations under U.S. law seriously, whether by targeting victims or enabling those who do."[16]

Reinforcing these public statements about the importance of reporting potentially suspicious activity to the government, regulators such as FinCEN, the SEC, and FINRA[17] have imposed penalties for deficient AML programs and for

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[15] Kevin Goodman, Nat'l Assoc. Dir., Broker-Dealer Examination Program, Office of Compliance Inspections and Examinations, Anti-Money Laundering: An Often-Overlooked Cornerstone of Effective Compliance, Speech Before the Securities Industry and Financial Markets Association (June 18, 2015) (transcript available at https://www.sec.gov/news/speech/anti-money-laundering-an-often-overlooked-cornerstone.html); see also Thomas Ott, Assoc. Director for Enf't, Fin. Crimes Enf't Network (FinCEN), Remarks Delivered at the National Title 31 Suspicious Activity & Risk Assessment Conference and Expo at 13 (Aug. 17, 2016) (transcript available at https://www.fincen.gov/sites/default/files/2016-09/Ott%20August%202016%20Speech.pdf) (encouraging the filing of SARs).

[16] Kenneth Blanco, Director, FinCEN, Prepared Remarks delivered at the 2018 Chicago-Kent Block (Legal) Tech Conference (Aug. 09, 2018) (transcript available at https://www.fincen.gov/news/speeches/prepared-remarks-fincen-director-kenneth-blanco-delivered-2018-chicago-kent-block).

[17] For broker-dealers, the BSA requirements are administered and enforced civilly by the Financial Crimes Enforcement Network ("FinCEN"), the Securities and Exchange Commission ("SEC"), and by self-regulatory organizations ("SROs"), particularly the Financial Industry Regulatory Authority ("FINRA") See 31 U.S.C. § 5321 (FinCEN); 31 C.F.R. § 1010.820 (2018) (FinCEN); 17

(cont'd)

the failure to file SARs. Historically, the gravamen of such cases was usually that the firm had systemic compliance issues, rather than that the firm had failed to file a SAR in any particular instance.[18] But more recently, the SEC has brought a number of enforcement actions solely based on the non-filing of SARs concerning certain transactions.[19] In 2016, for example, the SEC brought its first enforcement

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C.F.R. § 240.17a-8 (2018) (SEC); FINRA Manual Rule 3310 (2018) (formerly NASD Rule 3011).

[18] See, e.g., Oppenheimer & Co., No. 2005-4, Assessment of Civil Money Penalty at 3-6 (Fin. Crimes Enf't Network Dec. 29, 2005), https://www.sec.gov/about/offices/ocie/aml2007/fincen-oppenheimer-2005-4.pdf (FinCEN and the New York Stock Exchange assessed a $2.8 million civil monetary penalty against a broker-dealer for lacking "adequate internal controls for collecting customer information that was critical to its ability to monitor customer activity," failing to implement an adequate system to independently test for BSA compliance, failing to adequately staff its AML department, and failing to train appropriate personnel); Scottrade Inc., No. 2007009026302, Letter of Acceptance, Waiver and Consent at 2, 5-7 (Fin. Indus. Reg. Auth. Oct. 26, 2009), https://www.sec.gov/about/offices/ocie/aml/finra-awc-scottrade.pdf (FINRA fined a broker-dealer $600,000 determining that the firm "failed to establish and implement reasonable AML policies, procedures, and internal controls tailored to its business model" and thereby violated the BSA); Wedbush Sec. Inc., Exchange Act Release No. 73652, Order at 2, 20 (Nov. 20, 2014), https://www.sec.gov/litigation/admin/2014/34-73652.pdf (SEC fined a broker-dealer $2.4 million for failing to implement reasonable policies and procedures "to ensure compliance with applicable regulatory requirements – such as those for preventing naked short sales, wash trades, manipulative layering and money laundering" and, as a result, failing to report suspicious and potentially manipulative trades).

[19] The SEC presaged this pivot in 2015. In remarks delivered at SIFMA's 2015 Anti-Money Laundering & Financial Crimes Conference, the SEC's then-Director, Division of Enforcement stated:

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action solely for failure to file SARs. See Albert Fried & Co., Exchange Act Release No. 77971, Order at 2 (June 1, 2016), https://www.sec.gov/litigation/admin/2016/34-77971.pdf. Since then, the SEC has brought additional enforcement actions where the focus included, among other things, the failure to file SARs in particular instances.[20]

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> Historically . . . [w]hen we have found BSA violations, we have brought that as an additional charge, usually together with other charges. This makes sense because as I have discussed, the SAR reporting obligations do not exist in a vacuum. . . .
>
> [T]he information I have described above concerning the [seemingly low] incidence of SAR reporting suggests there is a need to pursue standalone BSA violations to send a clear message to the industry about the need for compliance.

Andrew Ceresney, Director, Div. of Enf't, Sec. & Exch. Comm'n, Remarks at SIFMA's 2015 Anti-Money Laundering & Financial Crimes Conference (Feb. 25, 2015) (transcript available at https://www.sec.gov/news/speech/022515-spchc.html); see also Office of Compliance Inspections & Examinations, Sec. & Exch. Comm'n, Examination Priorities for 2015 at 4, http://www.sec.gov/about/offices/ocie/national-examination-program-priorities-2015.pdf.

[20] SEC v. Alpine Sec. Corp., 308 F. Supp. 3d 775, 781 (S.D.N.Y. 2018); see also id. at 789-95 (holding that the SEC had authority to enforce the BSA regulations governing the filing of SARs by broker-dealers and that the firm breached its duty to file SARs); see also SEC v. Alpine Sec. Corp., No. 17-4179 (S.D.N.Y. Dec. 11, 2018); Aegis Capital Corp., Exchange Act Release No. 82956, Order at 2-3, 17 (Mar. 28, 2018), https://www.sec.gov/litigation/admin/2018/34-82956.pdf (requiring firm to pay $750,000 penalty for allegedly failing to file SARs on a number of transactions involving potential market manipulation); S.E.C. v. Charles Schwab & Co., No. 18-cv-3942 (N.D. Cal. Jul. 2, 2018), (ECF Nos. 1, 11) (requiring firm to pay $2,800,000 penalty for allegedly failing to file SARs when it terminated certain investment advisers from its platform); TD

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Regulators have likewise been vocal about the importance of the safe harbor in encouraging firms to file SARs. Indeed, certain regulatory authorities have submitted amicus briefs in other matters discussing the importance of maintaining a broad safe harbor provision to ensure the safety and soundness of the country's financial system.[21] As an interagency release issued in the wake of court decisions upholding unqualified immunity stated: "[T]he agencies remain confident that financial institutions . . . should be fully protected by the safe harbor provisions of the law."[22] Former Treasury Under Secretary David Cohen has also

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Ameritrade, Inc., Exchange Act Release No. 84269, Order at 1-2, 5 (Sept. 24, 2018), https://www.sec.gov/litigation/admin/2018/34-84269.pdf (requiring firm to pay a $500,000 civil money penalty for allegedly failing to file SARs when it terminated certain investment advisers from its platform); UBS Financial Services Inc., Exchange Act. Release No. 84828, Order at 2, 8 (Dec. 17, 2018), https://www.sec.gov/litigation/admin/2018/34-84828.pdf (requiring firm to pay a $5,000,000 penalty for allegedly failing to file SARs to report certain transactions or patterns of transactions).

[21] See, e.g., Brief for the Board of Governors of the Federal Reserve System as Amicus Curiae at 2, Stoutt, 320 F.3d 26 (1st Cir. 2002) ("If financial institutions become reluctant to file such reports because of a perceived risk of civil liability, this reluctance would . . . threaten the ability of bank supervisory authorities to ensure the safety and soundness of the country's financial system."); Brief for the Federal Deposit Insurance Corporation as Amicus Curiae, Bank of Eureka Springs v. Evans, 353 Ark. 438, 2002 WL 32625039, at*4-5 (2003) ("Any impediments to the willingness of financial institutions to report suspicious activity would . . . threaten the ability of bank supervisory authorities to protect the safety and soundness of the country's financial system.").

[22] Board of Governors of the Federal Reserve System, Federal Deposit Insurance Corporation, Financial Crimes Enforcement Network, National Credit

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expressed his support for broad immunity under the safe harbor provision, and has even suggested codifying this Court's holding in Stoutt in order to stamp out the possibility of an errant interpretation of that statute.[23]

Overall, the current regulatory landscape makes increasingly clear the wisdom of this Court's broad interpretation of the safe harbor provision in Stoutt, a decision that has allowed firms to focus singularly on reporting potentially suspicious activity to the government, without regard to whether they may be exposed to costly civil litigation brought by disgruntled SAR subjects.

II. WITHOUT THE BROAD IMMUNITY AFFORDED BY *STOUTT*, FIRMS WOULD BE IN THE POSITION OF ERRING ON THE SIDE OF FILING SARS TO SATISFY REGULATORS WHILE ALSO FACING THE RISK OF COSTLY NUISANCE LITIGATION BY DISGRUNTLED SAR SUBJECTS

If the unqualified immunity provided under the safe harbor provision were eroded in any way, SAR subjects -- particularly those who expended significant time and resources addressing subsequent regulatory investigations or enforcement actions -- would seek to file complaints against the firms they

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Union Administration, Office of the Comptroller of the Currency, Office of Thrift Supervision, Interagency Advisory, Federal Court Reaffirms Protections For Financial Institutions Filing Suspicious Activity Reports (May 24, 2004), https://www.fdic.gov/news/news/financial/2004/fil6704a.html.

[23] Treasury Under Secretary David Cohen, Remarks at the ABA/ABA Money Laundering Enforcement Conference (Nov. 10, 2014) (transcript available at https://www.treasury.gov/press-center/press-releases/Pages/jl2692.aspx).

believed improperly reported them. As discussed below, such a result would (i) lead to costly and protracted civil litigation with potentially thousands of alleged SAR subjects, and (ii) place firms in an unfair evidentiary bind because they would be statutorily barred from confirming or denying whether they filed any SAR and from producing such SAR.

A. Without Broad Immunity, Firms Would Face Substantial Risk Of Costly And Protracted Litigation For Complying With Their Reporting Obligations

Reading any limitation into the safe harbor provision would be costly and needlessly disruptive for two principal reasons:

First, without the broad immunity provided under § 5318(g), financial industry firms could face potential civil litigation with thousands of SAR subjects. Financial industry firms -- including broker-dealers like Defendant -- collectively are now filing more than two million SARs a year. (See supra Section I.A.) Many individual broker-dealer firms alone file hundreds or thousands of SARs each year, and, as discussed above, the SEC has encouraged them to file even more. See, e.g., Alpine, 308 F. Supp. 3d at 783 (Alpine Securities, a single broker-dealer firm, had filed thousands of SARs during the relevant period). It is likely that -- as Plaintiffs allege happened to them -- a considerable number of SARs lead to law enforcement investigations but to no charges against any SAR subjects. Hundreds or thousands of such SAR subjects might turn to the courts in the hopes of

extracting quick settlements or other monetary relief from the firms that allegedly filed the SARs.

Second, each civil case concerning allegedly improper SARs -- absent settlement -- would likely require costly discovery and be difficult to dismiss on a dispositive motion prior to trial. A SAR subject's claim could survive a Rule 12(b)(6) motion to dismiss simply by plausibly pleading that the SAR filing described an "impossible" violation, was made in bad faith, or was otherwise improper, as courts are required to take all well-pleaded allegations as true. See Fed. R. Civ. P. 12(b)(6); In re Loestrin 24 Fe Antitrust Litigation, 814 F.3d 538, 549 (1st Cir. 2016) ("For the purposes of our review, we accept as true all well-pled facts alleged in the complaint and draw all reasonable inferences in [the plaintiffs'] favor.").

This would expose a firm to months of fact discovery concerning whether a SAR was properly filed or whether there was any bad intent in filing a SAR. In the course of that discovery, SAR subjects might attempt to seek sensitive information concerning the firm's policies and procedures for filing SARs, as well as the firm's highly confidential means of detecting suspicious activity. They might attempt to seek disclosure of SARs or other information protected by

statutory privilege that could reveal whether or not a SAR was filed.[24] They might also attempt to seek to depose numerous witnesses, including AML and compliance professionals, which could implicate significant confidentiality and attorney-client privilege issues. Such discovery requests would inevitably lead to extensive and costly motion practice, including motions to compel and motions for protective orders, concerning the propriety of such requests and the scope of what information and documents may be disclosed.

Civil litigations concerning alleged SAR filings might also require expert testimony regarding complex financial transactions, or whether the firm's actions were consistent with industry custom and practice. Indeed, at oral argument concerning Defendant's motion to dismiss, the District Court acknowledged that discovery in this case could be extensive should it survive a motion to dismiss: "So what [Plaintiff is] saying is that I need to have discovery conducted and have a full-blown inquiry to see whether or not it was possible, a possible violation." See Hearing Trans., AER Advisors, Inc. v. Fid. Brokerage Servs., Inc., No. 1:17-CV-12214 (D. Mass. Apr. 3, 2018), (ECF No. 91), at 32 (A-

[24] See infra Section II.B. In addition, the governing regulations would require firms receiving requests for SARs to notify FinCEN, which could add complexity to the litigation as government lawyers may seek to intervene. See, e.g., 31 C.F.R. 1023.320(e)(1).

140-142); see also id. ("[I]t certainly would take a lot of discovery and expert reports to get me to what you just said.").

Moreover, even after discovery, such cases might not be susceptible to disposition at summary judgment. For example, the determination of whether a SAR filing was made in "good faith," or in fact reported a possible violation of law, could implicate a disputed issue of material fact concerning the firm's state of mind and require trial for adjudication. See Fed. R. Civ. P. 56(a); Farthing v. Coco Beach Resort Mgmt., LLC, 864 F.3d 39, 43 (1st Cir. 2017) (vacating the district court's grant of summary judgment because issues of material fact remained disputed concerning, among other things, the defendant's state of mind); Deetz Family, LLC v. Rust-Oleum Corp., No. 16-10790-TSH, 2018 WL 5555072, at *3 (D. Mass. Oct. 29, 2018) (denying the defendant's motion for summary judgment because a "genuine dispute of fact as to the intent of the parties" precluded summary judgment). Simply by filing a SAR, a firm could essentially find its entire AML program on trial, an inappropriate outcome that is inconsistent with the regulatory framework governing SARs.[25]

[25] The potential collateral impact of such civil litigation also cannot be overstated. AML professionals participating in such litigation would have their time and attention diverted from their critical work of detecting, investigating, and reporting potentially suspicious activity. Further, the integrity of firms' AML programs may be compromised if bad actors learn from evidence in litigation

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B. Without Broad Immunity, Firms Would Be Placed In An Unfair Evidentiary Bind

As a practical matter, eroding the safe harbor provision beyond the statutory language as Plaintiffs suggest would also place financial industry firms in the position of not being able to fully defend themselves in any subsequent civil proceeding because they would be prohibited from disclosing the SAR filing itself, and from disclosing any information that would indirectly suggest the existence or nonexistence of a SAR filing. As this Court acknowledged in In re JPMorgan Chase Bank, N.A., 799 F.3d 36 (1st Cir. 2015), SAR filings and information that would tend to reveal whether or not a SAR was filed are statutorily shielded from discovery.[26] Id. at 38. In particular, under 31 U.S.C. § 5318(g)(2)(A)(i), a firm that has filed a SAR is prohibited from "notify[ing] any person involved in the

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about firms' confidential processes and procedures for detecting potentially suspicious transactions.

[26] In particular, this Court's analysis turned in part on whether the documents in question expressly stated the existence of a SAR or "indirectly suggest[ed] the existence or nonexistence of a SAR." Id. at 43; see also Confidentiality of Suspicious Activity Reports, 75 Fed. Reg. 75593, 75595 (Dec. 3, 2010) ("Clearly, any document or other information that affirmatively states that a SAR has been filed constitutes information that would reveal the existence of a SAR and should be kept confidential. By extension, an institution also should afford confidentiality to any document stating that a SAR has not been filed. Were FinCEN to allow disclosure of information when a SAR is not filed, institutions would implicitly reveal the existence of a SAR any time they were unable to produce records because a SAR was filed.").

transaction that the transaction has been reported." Financial institutions cannot waive this prohibition.[27] The implementing regulation for broker-dealers further provides that "any broker-dealer that is subpoenaed or otherwise requested to disclose a SAR or any information that would reveal the existence of a SAR, shall decline to produce the SAR or such information, citing this section and 31 U.S.C. 5318(g)(2)(A)(i) . . . ." 31 C.F.R. § 1023.320(e)(1)(i) (2018); see also 31 C.F.R. § 1024.320(d)(1)(i) (2018) (parallel regulation for mutual funds); 31 C.F.R. § 1020.320(e)(1)(i) (2018) (parallel regulation for banks). A firm that discloses the existence of a SAR may even be held criminally liable. 31 U.S.C. § 5322(a).[28]

In Lee v. Bankers Trust Co., 166 F.3d 540 (2d Cir. 1999), a decision favorably cited by this Court in Stoutt, the Second Circuit described the predicament that any limitation on the safe harbor would have on financial firms engaged in civil litigation concerning the contents of a SAR:

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[27] See JPMorgan, 799 F.3d at 39-40 ("District courts have extrapolated from the statute and regulations 'an unqualified discovery and evidentiary privilege that . . . cannot be waived'") (citing Whitney Nat. Bank v. Karam, 306 F. Supp. 2d 678, 682 (S.D. Tex. 2004)).

[28] FinCEN has stated that "the strong public policy that underlies the SAR system as a whole - namely, the creation of an environment that encourages financial institutions to report suspicious activity without fear of reprisal - leans heavily in favor of applying SAR confidentiality not only to a SAR itself, but also in appropriate circumstances to material prepared by the financial institution as part of its process to detect and report suspicious activity, regardless of whether a SAR ultimately was filed or not." Confidentiality of Suspicious Activity Reports, 75 Fed. Reg. 75593, 75595 (Dec. 3, 2010) (footnotes omitted and emphasis added).

> Financial institutions are required by law to file SARs, but are prohibited from disclosing either that an SAR has been filed or the information contained therein. . . . Thus, even in a suit for damages based on disclosures allegedly made in an SAR, a financial institution cannot reveal what disclosures it made in an SAR, or even whether it filed a SAR at all. . . . It flies in the face of common sense to assert that Congress sought to impale financial institutions on the horns of such a dilemma.

166 F.3d at 544 (citation omitted and emphasis added). Firms would be in the impossible position of arguing, in effect, that they could neither confirm nor deny whether a SAR was filed, but if one were filed, it would have been proper and filed in good faith, which is a particularly fact intensive inquiry. And they would have to make that argument without producing the very documents that would support it. Indeed, even if a firm did not file a SAR against a plaintiff as alleged in a complaint, the firm would potentially be prohibited from stating that basic fact in an effort to dismiss the case against it. To require firms to litigate such matters with one hand tied behind their back undermines judicial efficiency and truly "flies in the face of common sense." Id.

CONCLUSION

For the reasons stated herein, SIFMA respectfully requests that this Court re-affirm Stoutt and the unqualified immunity from civil liability provided under 31 U.S.C. § 5318(g)(3), and affirm the judgment of the District Court.

Dated: December 21, 2018
Boston, Massachusetts

Respectfully submitted,

/s/ James R. Carroll

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CERTIFICATE OF COMPLIANCE WITH
FEDERAL RULE OF APPELLATE PROCEDURE 32(a)

1. This brief complies with the type-volume limitations of Federal Rule of Appellate Procedure 29(a)(5) because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 5,994 words.

2. This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type-style requirements of Federal Rule of Appellate Procedure 32(a)(6) because it has been prepared in a proportionally spaced typeface (Times New Roman, 14 point), using Microsoft Word 2010.

Dated: December 21, 2018

/s/ James R. Carroll
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CERTIFICATE OF SERVICE

I, James R. Carroll, hereby certify on December 21, 2018, I electronically filed the foregoing document with the United States Court of Appeals for the First Circuit by using the CM/ECF system. I certify that the following parties or their counsel of record are registered as ECF filers and that they will be served by the CM/ECF System:

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