



Honorable Mike K. Nakagawa  
United States Bankruptcy Judge



Entered on Docket  
September 19, 2018

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF NEVADA

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In re:	)	Case No.: 11-21014-MKN
	)	Chapter 11
NIGRO HQ LLC,	)	
	)	
Debtor.	)	Date: September 14, 2018
	)	Time: 10:30 a.m.
	)	

**ORDER REGARDING MOTION TO COMPEL WELLS FARGO BANK, N.A. TO PRODUCE IMPROPERLY WITHHELD, NON-PRIVILEGED DOCUMENTS AND REVISE PRIVILEGE LOG<sup>1</sup>**

On September 14, 2018, the court heard the Motion to Compel Wells Fargo Bank, N.A. to Produce Improperly Withheld, Non-Privileged Documents and Revise Privilege Log (“Motion to Compel”). The appearances of counsel were noted on the record. After arguments were presented, the matter was taken under submission.

**BACKGROUND**

On July 13, 2011, three separate voluntary Chapter 11 reorganization proceedings were commenced by Nigro HQ LLC (“Nigro HQ”), Beltway One Development Group, LLC (“Beltway One”), and Horizon Village Square, LLC (“Horizon Village”).<sup>2</sup> For all three Chapter

<sup>1</sup> In this Order, all references to “ECF No.” are to the number assigned to the documents filed in the case as they appear on the docket maintained by the clerk of court. All references to “Section” are to the provisions of the Bankruptcy Code, 11 U.S.C. §§ 101-1532.

<sup>2</sup> These three Chapter 11 proceedings were denominated, respectively, Case No. 11-21014-MKN, Case No. 11-21026-MKN, and Case No. 11-21034-MKN.

1 11 debtors in possession, the primary secured creditor is Wells Fargo Bank, N.A. (“Wells  
2 Fargo”), which made separate real estate secured loans to each debtor. Each of the loans is  
3 personally guarantied by the principals of each entity.<sup>3</sup> Each of the loan agreements includes a  
4 provision requiring the borrower to pay an additional three percent interest in the event of default  
5 (“Default Interest”). Each of the loans matured prior to commencement of the Chapter 11  
6 proceedings and had not been paid in full.

7 On July 27, 2011, Nigro HQ filed its schedules of assets and liabilities (“Schedule”).<sup>4</sup>  
8 (Nigro HQ ECF No. 32). In its Schedule “A,” Nigro HQ listed an interest in real property  
9 located at 9115 W. Russell Rd., Las Vegas, NV (“Russell Road Property”). Nigro HQ also listed  
10 a value of \$5,500,000, which it clarified as being “the estimated going concern value of Debtor’s  
11 business and includes Debtor’s real property, furniture, and equipment, which valuation may be  
12 revised upon further review and analysis.” In Schedule “D,” Nigro HQ listed Wells Fargo as  
13 holding a claim of \$5,016,476.99 secured by collateral with a value of \$5,500,000, which  
14 presumably was the Russell Road Property.

15 On November 15, 2011, Wells Fargo filed a proof of claim asserting a secured claim in  
16 the amount of \$5,044,667.69, as well as a right to prepetition and post-petition legal fees, in  
17 addition to post-petition default interest Default Interest, late fees, and other charges.

18 On April 7, 2015, in connection with proceedings to confirm Nigro HQ’s proposed  
19 Chapter 11 plan of reorganization, Wells Fargo and Nigro HQ entered into a stipulation to  
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22 <sup>3</sup> A fourth voluntary Chapter 11 petition also was filed on July 13, 2011, by Ten Saints,  
23 LLC (“Ten Saints”), denominated Case No. 11-21028-MKN. Wells Fargo was the primary  
24 secured creditor that had made a real estate loan to the debtor entity. The loan was personally  
25 guarantied by the principals and the loan matured prior to the commencement of the Chapter 11  
26 proceeding. The debtor in possession and Wells Fargo reached a consensual treatment of the  
27 latter’s claim that was incorporated in a Second Amended Plan of Reorganization. (Ten Saints  
ECF No. 317). On September 9, 2013, an order was entered confirming that amended plan.  
(Ten Saints ECF No. 324). On November 18, 2013, a final decree was entered and the case was  
closed. (Ten Saints ECF Nos. 354, 355).

28 <sup>4</sup> Pursuant to FRE 201(b), the court takes judicial notice of its docket.

1 reserve any dispute over legal fees and Default Interest claimed by Wells Fargo, until after  
2 determination of plan confirmation (“Confirmation Stipulation”). (Nigro HQ ECF No. 392)

3 On March 31, 2016, in connection with the Beltway One proceeding, the Bankruptcy  
4 Appellate Panel for the Ninth Circuit (“BAP”) published an opinion reversing the bankruptcy  
5 court’s confirmation of a Chapter 11 plan of reorganization in that proceeding. See Wells Fargo  
6 Bank, N.A. v. Beltway One Dev. Group, LLC (In re Beltway One Dev. Group, LLC), 547 B.R.  
7 819 (B.A.P. 9th Cir. 2016). The BAP reversed this court’s determination with respect to Wells  
8 Fargo’s entitlement to Default Interest under its loan agreement as a result of the borrower’s  
9 default. The BAP remanded the Beltway One proceeding so that this court could make the  
10 appropriate findings as to whether the Default Interest claimed by Wells Fargo is unenforceable  
11 under Nevada law based on equitable considerations.<sup>5</sup>

12 On April 11, 2016, the court entered a memorandum decision and order confirming Nigro  
13 HQ’s third amended plan of reorganization that, in pertinent part, incorporated the Confirmation  
14 Stipulation. (Nigro HQ ECF Nos. 503, 504).

15 On May 3, 2016, the effective date of the confirmed Nigro HQ plan occurred. (Nigro HQ  
16 ECF No. 512).

17 On January 3, 2017, Nigro HQ filed a “Limited Objection to Wells Fargo’s POC 5-2”<sup>6</sup>  
18 (“Claim Objection”) disputing Wells Fargo’s claim for post-petition, pre-confirmation Default  
19 Interest. (Nigro HQ ECF No. 539). According to Nigro HQ, such Default Interest is  
20 unenforceable under Nevada law and/or should be reduced or eliminated based on equitable  
21 considerations.<sup>7</sup>

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24 <sup>5</sup> On April 29, 2016, Beltway One appealed the BAP decision to the Ninth Circuit Court  
25 of Appeals. On May 2, 2017, that appeal was voluntarily dismissed.

26 <sup>6</sup> In POC #5-2, filed on August 3, 2015, Wells Fargo asserted a secured claim of  
27 “\$5,697,173.70+ . . . .”

28 <sup>7</sup> The Claim Objection essentially mirrors the determinations on remand set forth in the  
BAP’s Beltway One opinion.

1 On January 25, 2017, Wells Fargo filed a response to the Claim Objection. (Nigro HQ  
2 ECF No. 543).

3 On February 1, 2017, Nigro HQ filed a reply in support of the Claim Objection. (Nigro  
4 HQ ECF No. 546).

5 On April 7, 2017, the court entered an initial “Order on Limited Objection to Wells  
6 Fargo’s POC 5-2” (“Initial Order”) (Nigro HQ ECF No. 560) pursuant to which the court, in  
7 conformity with the opinion in Beltway One, noted its obligations to make factual findings  
8 regarding the enforceability of Default Interest and the equities of the case:

9 In the Beltway One Memorandum Decision, this court failed to  
10 make the factual findings required to determine the enforceability  
11 of the default interest provision under Nevada law. The court also  
12 failed to make the findings necessary to determine whether  
13 equitable considerations are sufficient to rebut the presumption in  
14 favor of enforcement of the default interest provision of the loan  
15 agreement. The court is persuaded that a limited evidentiary  
16 hearing is required to make such findings, addressing only the  
17 factual issues material to resolution of this dispute.

18 Initial Order at 10.

19 On May 2, 2017, a “Joint Report Re: Stipulated Facts, Discovery, and Trial Related  
20 Matters” was filed by the parties (“Joint Report”). (Nigro HQ ECF No. 567). The parties asked  
21 the court to provide guidance regarding certain discovery topics, including, in pertinent part,  
22 “Wells Fargo’s valuation of the Real Property pre- and post-petition” (the “Valuation Topic”).  
23 Joint Report at 4. Both parties shared their perspective on this particular discovery topic in the  
24 Joint Report:

- 25 • Wells Fargo’s position: Real property valuation was  
26 determined at the time of plan confirmation. Wells Fargo  
27 is willing to stipulate that the Property has increased in  
28 value since the time of plan confirmation. To the extent  
valuation is a component of the equities of the case, current  
appraisals will be required. In addition, discovery would  
fail to meet the proportionality standard under Civil Rule  
26(b) [sic].
- Debtor’s response: This Court determined that Wells Fargo  
was undersecured at the first confirmation hearing. The  
date that Wells Fargo became an oversecured creditor is

1 relevant to the equities analysis. Further, as the topic is  
2 relevant and discovery requests can be appropriately  
3 tailored, Wells Fargo's blanket proportionality objection  
4 fails.

5 Joint Report at 4-5.

6 On May 17, 2017, Wells Fargo filed a separate objection to the proposed discovery topics  
7 ("Wells Initial Objection") (Nigro HQ ECF No. 569), essentially repeating the same argument it  
8 made in the Joint Report:

9 Real property valuation was determined at the time of plan  
10 confirmation and has only increased in value since that time. The  
11 Reorganized Debtor has not cited any legal authority, nor  
12 explained any rationale, for its assertion that prior real-property  
13 [sic] valuations are necessary for the "equities of the case"  
14 analysis. To the extent valuation information is needed, current  
15 appraisals should be required. Wells Fargo requests that discovery  
16 be limited accordingly.

17 Wells Initial Objection at 14.

18 On May 24, 2017, Nigro HQ filed a response to Wells Fargo's objection ("Nigro HQ  
19 Initial Objection Response") (Nigro HQ ECF No. 570) stating, in pertinent part:

20 Value is relevant to the equities analysis. Specifically, Wells  
21 Fargo's valuations of the Debtor's property at various stages goes  
22 to the good or bad faith of Wells Fargo's actions prior to and  
23 during the Chapter 11 Case. It is also relevant to the equities  
24 analysis as this Court determined that as of the first confirmation  
25 hearing, Wells Fargo was *not* over-secured. As such, when Wells  
26 Fargo became over-secured is relevant to when default interest  
27 should commence. It is further relevant to (1) whether Wells  
28 Fargo ever faced a realistic risk of nonpayment of its debt either  
before or during the bankruptcy proceedings and (2) whether there  
is any justification for an increased rate to compensate for an  
assumed increased risk following default. See Jack Kline Co., 440  
B.R. at 745. Thus, Debtor cannot be precluded valuation discovery  
simply because the "[r]eal property valuation was determined at  
the time of plan confirmation and has only increased in value since  
that time." See Objection at p. 14, ll. 8-9. Debtor is entitled to  
Wells Fargo's valuation of the real property both prior to and  
during the Chapter 11 Case so that this Court may determine Wells  
Fargo's actual and perceived risk of default and when Wells Fargo  
became over-secured.

Nigro HQ Initial Objection Response at 11-12) (emphasis in original).

1  
2 On May 31, 2017, the court presided over a hearing regarding the discovery topics and  
3 provided the parties with the following guidance<sup>8</sup> regarding the Valuation Topic:

4 With respect to the sixth topic, which was the valuation of the real  
5 property both pre-petition and post-petition, I think the point made  
6 clear by Debtor's or Debtor in possession's counsel or I guess re-  
7 vested Debtor in possession's counsel was that they are looking to  
8 what Wells Fargo believed the value of the subject properties to be  
9 at particular points in time. Whether or not there is evidence in  
10 Wells Fargo's records of what they knew and when they knew it as  
11 to the value of the subject properties, only discovery can find that  
12 out. It certainly isn't asking for a revaluation of any of the  
13 properties at this time. So therefore, that is a fair ground for  
14 discovery.

15 May 31, 2017 Hearing Transcript at 37:9-20 (Nigro HQ ECF No. 573).

16 On July 17, 2017, an order was entered approving a stipulation that, *inter alia*, scheduled  
17 an evidentiary hearing ("Evidentiary Hearing") on the Claim Objection to be conducted on  
18 November 13 and 14, 2017. (Nigro HQ ECF No. 576). That order also established a deadline  
19 for completion of discovery of September 28, 2017 ("Discovery Bar Date").

20 On July 25, 2017, Wells Fargo propounded a first request for production of documents  
21 encompassing 15 separate inquiries.

22 On July 25, 2017, Wells Fargo's counsel sent to Nigro HQ's counsel a letter requesting a  
23 stipulation that Wells Fargo was an oversecured creditor at all times during the bankruptcy case:

24 Based on clarifications made at the May 31 hearing, we understand  
25 that none of the Reorganized Debtors intends to submit new  
26 appraisals or conduct a valuation trial in connection with the  
27 default interest issue. Rather, the valuation issues, if any, will be  
28 limited to "what [Wells Fargo's] belief was" regarding valuation  
and how that related to "their strategy in the case" with respect to  
valuation issues. *See* 5/31/17 Transcript at 25. Wells Fargo agrees  
that the upcoming evidentiary hearings must be limited as  
specified by the Bankruptcy Court.

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<sup>8</sup> The court was clear at the May 31 hearing that it was simply providing guidance, and not making a definitive ruling, on any of the discovery topics.

1 There can be no dispute that Wells Fargo was oversecured at all  
2 relevant times. As a threshold matter, the Reorganized Debtors  
3 waived any objection to the payment of default interest based on  
4 alleged under-security by failing to timely raise that issue in their  
5 claim objections. In addition, any contrary characterization is  
6 false, as Wells Fargo's collateral package also included all of the  
7 Debtor's cash consisting of rents.

8 Because the claim-objection litigation is now proceeding, and the  
9 time to engage any experts and complete discovery is short, we  
10 need to ensure that any issues regarding valuation are properly  
11 limited, as clarified at the May 31 hearing. Accordingly, we  
12 propose that the parties stipulate that Wells Fargo held an  
13 oversecured claim at all relevant times between the bankruptcy  
14 petition date and the plan effective date in each of the bankruptcy  
15 cases.

16 Exhibit "A" at 2 to Wells Fargo Bank, N.A.'s Motion for Clarification Regarding Scope of  
17 Evidentiary Hearing ("Wells Fargo Clarification Motion"). (Nigro HQ ECF No. 588).

18 On August 1, 2017, Nigro HQ's counsel rejected Wells Fargo's proposed stipulation  
19 because, in pertinent part, the bankruptcy court found that Wells Fargo was undersecured in  
20 connection with a prior plan confirmation proceeding.

21 On August 8, 2017, Nigro HQ propounded a first request for production of documents  
22 ("First Document Request") encompassing 18 separate inquiries.

23 On August 14, 2017, Wells Fargo filed a motion for partial summary judgment on the  
24 enforceability of the Default Interest rate. (Nigro HQ ECF No. 580).

25 On September 5, 2017, Wells Fargo filed the Wells Fargo Clarification Motion regarding  
26 the matters to be addressed at the Evidentiary Hearing. (Nigro HQ ECF No. 588). On the same  
27 date, Wells Fargo filed a motion for a protective order regarding its response to the First  
28 Document Request. (Nigro HQ ECF No. 589).

On September 6, 2017, an order was entered approving a stipulation between the parties  
to continue the Evidentiary Hearing to February 5 and 6, 2018. (Nigro HQ ECF No. 595). That  
order also extended the Discovery Bar Date from September 28, 2017, to December 22, 2017.

On October 3, 2017, a hearing was conducted on Wells Fargo's motion for partial  
summary judgment.



1 On January 8, 2018, an order was entered denying Wells Fargo's motion for partial  
2 summary judgment. (Nigro HQ ECF No. 614).<sup>9</sup> On the same date, an order was entered  
3 granting in part and denying in part Wells Fargo's motion for protective order ("Protective  
4 Order"). (Nigro HQ ECF No. 616).<sup>10</sup> On the same date, an order was entered denying Wells  
5 Fargo's motion for clarification. (Nigro HQ ECF No. 618).

6 On February 9, 2018, an order was entered approving a stipulation between the parties to  
7 continue the Evidentiary Hearing to August 17, 20 and 21, 2018. (Nigro HQ ECF No. 628).

8 On April 3, 2018, an order was entered approving a stipulation between the parties to  
9 continue the Evidentiary Hearing to October 9, 15 and 16, 2018, and for a pretrial conference to  
10 be held on September 6, 2018. (Nigro HQ ECF No. 633).

11 On April 9, 2018, an order was entered approving a stipulation between the parties that  
12 amended various deadlines for documents to be filed by the parties, but did not alter the trial and  
13 pretrial conference dates. (Nigro HQ ECF No. 638). That order also re-set the Discovery Bar  
14 Date at July 13, 2018.

15 On July 18, 2018, an order was entered approving a stipulation to extend the Discovery  
16 Bar Date to August 15, 2018. (Nigro HQ ECF No. 649).

17 \_\_\_\_\_  
18 <sup>9</sup> The order denying summary judgment in the Nigro HQ proceeding incorporated by  
19 reference the order denying Wells Fargo's motion for partial summary judgment in the Beltway  
20 One proceeding ("Beltway One Partial Summary Judgment Order"). (Beltway One ECF No.  
21 541). As it did in all three Chapter 11 proceedings, Wells Fargo sought a summary  
22 determination that the Default Interest it seeks is enforceable under Nevada law. Because there  
23 is no controlling decision on the "equitable considerations" sufficient under Nevada law to  
24 overcome the presumption in favor of enforcement of a contractual Default Interest provision,  
25 and genuine disputes of material fact were found in the record, the court denied Wells Fargo's  
26 motion. See Beltway One Partial Summary Judgment Order at 10:21 to 12:13.

27 <sup>10</sup> In the Protective Order, the court addressed seven specific inquiries encompassed by  
28 the First Document Request. In that order, the court granted relief to Wells Fargo with respect to  
certain requests (5, 6 and 15), granted partial relief as to others (4 and 14), and denied relief as to  
the remainder (9 and 10). Although certain relief was granted in the Protective Order, in no  
instance did the court conclude that the First Document Request sought materials that are not  
relevant to the issues to be addressed at the Evidentiary Hearing, or which may not lead to  
relevant evidence.



1 On July 31, 2018, an order was entered approving a stipulation between the parties that  
2 Wells Fargo was oversecured from and after November 10, 2011. (Nigro HQ ECF No. 651).<sup>11</sup>

3 On September 5, 2018, Nigro HQ filed the instant Motion to Compel and a supporting  
4 declaration.<sup>12</sup> (Nigro HQ ECF Nos. 656, 657). In addition to the Motion to Compel, Nigro HQ  
5 filed an ex parte motion to have the matter heard on an expedited basis because of an impending  
6 deadline of September 18, 2018, for counsel to file witness and exhibit lists, alternate direct  
7 testimony declarations, and trial statements. (Nigro HQ ECF No. 658).

8 On September 6, 2018, the pretrial conference was conducted at which the court was  
9 informed that Wells Fargo intended to file a motion in limine (“Wells Fargo Limine Motion”)  
10 that also would impact the materials to be filed by the September 18, 2018 deadline. At the  
11 pretrial conference, the court agreed to a hearing date of September 14, 2018, as well as an  
12 expedited briefing schedule, for both the Motion to Compel and the Wells Fargo Limine Motion.  
13 Additionally, the court agreed that the deadline for counsel to file witness and exhibit lists,  
14 alternate direct testimony declarations, and trial statements would be extended to September 25,  
15 2018.

16 On September 11, 2018, Wells Fargo filed an opposition to the Motion to Compel  
17 (“Opposition”) along with the declaration of its counsel, Bryce A. Suzuki (“Suzuki  
18 Declaration”). (Nigro HQ ECF Nos. 669 and 670).

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21 <sup>11</sup> On the same date, an order was entered in the Horizon Village proceeding that Wells  
22 Fargo was oversecured from and after the Chapter 11 petition date through the effective date of  
23 the confirmed plan. (Horizon Village ECF No. 670). In its memorandum decision on Chapter  
24 11 plan confirmation in the Beltway One proceeding, the court previously determined that Wells  
25 Fargo’s claim was fully secured. (Beltway One ECF No. 320).

26 <sup>12</sup> The Declaration of Teresa M. Pilatowicz (“First Pilatowicz Declaration”)  
27 accompanying the Motion to Compel includes 1158 pages of exhibits, consisting primarily of  
28 two separate privilege logs provided by Wells Fargo in response to the Nigro HQ Request for  
Production of Documents. Exhibit “C” to the First Pilatowicz Declaration is a copy of a  
privilege log dated July 20, 2018, consisting of 554 pages with an additional 7 pages dated  
August 6, 2018 (561 total pages for document productions that occurred on those dates). Exhibit  
“G” is another privilege log consisting of 516 pages that accompanied a letter from Wells  
Fargo’s counsel dated August 31, 2018.

1 On September 12, 2018, Nigro HQ filed a reply as well as a supplemental declaration of  
2 Teresa M. Pilatowicz, Esq. (“Second Pilatowicz Declaration”). (Nigro HQ ECF Nos. 675 and  
3 676).<sup>13</sup>

4 On September 14, 2018, the court held a hearing on the Motion to Compel at which  
5 various documents were marked as exhibits for informational purposes, but were not admitted  
6 into evidence.<sup>14</sup> Because the copies of the various privilege logs were in font sizes that are  
7 illegible to the court, Wells Fargo was directed to supply digital or electronic copies of the  
8 various logs.<sup>15</sup> After arguments were presented, the court took the matter under submission.<sup>16</sup>

### 9 DISCUSSION

10 The instant Motion to Compel encompasses the First Document Request and only the  
11 First Document Request. The First Document Request was propounded by Nigro HQ on August  
12 8, 2017, and apparently there are no other similar discovery requests propounded by Nigro HQ.  
13 Both prior to the initiation of discovery in connection with the Claim Objection and after  
14 discovery commenced, hearings were conducted regarding the scope of discovery in this matter.  
15 Because there are no controlling decisions on the equitable considerations that would deny  
16 enforcement of a Default Interest provision under Nevada law, see note 9, supra, both Nigro HQ

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18 <sup>13</sup> Along with the reply, Nigro HQ filed an ex parte motion to file a document under seal.  
19 (Nigro HQ ECF No. 674). On September 13, 2018, an order was entered granting the seal  
20 motion. (Nigro HQ ECF No. 678).

21 <sup>14</sup> Marked as Exhibit “1” is another privilege log as of September 13, 2018, i.e., the day  
22 before the hearing, provided by Wells Fargo.

23 <sup>15</sup> Before the end of the day of the hearing, Wells Fargo provided copies by email of its  
24 initial privilege log as well as the most recent privilege log in PDF and Excel spreadsheet form.  
25 The following Monday, Wells Fargo transmitted additional portions of the initial privilege log  
26 that were omitted from the prior email.

27 <sup>16</sup> The Wells Fargo Limine Motion was filed on September 10, 2018. (Nigro HQ ECF  
28 No. 663). An order granting Wells Fargo’s ex parte motion to file a document under seal, in  
connection with the Wells Fargo Limine Motion, was entered on September 11, 2018. (Nigro  
HQ ECF No. 667). Nigro HQ filed an opposition to the Wells Fargo Limine Motion on  
September 12, 2018. (Nigro HQ ECF No. 672). The Wells Fargo Limine Motion was heard  
concurrently with the Motion to Compel and is the subject of a separate order.

1 and Wells Fargo have been permitted to seek discovery of information relevant to the equitable  
2 considerations, even if the information is not admissible at the Evidentiary Hearing. Compare  
3 FED.R.CIV. P. 26(b)(1), effective December 1, 2015 (“Parties may obtain discovery regarding  
4 any nonprivileged matter that is relevant to any party’s claim or defense and proportional to the  
5 needs of the case...Information within this scope of discovery need not be admissible in  
6 evidence to be discoverable.”) with FED.R.CIV. P. 26(b)(1), effective until December 1, 2015  
7 (“Relevant information need not be admissible at trial if the discovery appears reasonably  
8 calculated to lead to the discovery of admissible evidence.”). Indeed, the Protective Order  
9 addressed the proportional needs of the case and narrowed the requirements for Wells Fargo to  
10 respond to the First Document Request.<sup>17</sup> No suggestion is made that the documents  
11 encompassed by the instant Motion to Compel are in any way precluded by the prior Protective  
12 Order.

13 Against this backdrop, the parties have presented a series of privilege logs from Wells  
14 Fargo, the latest of which (generated the day before the hearing) consists of 572 pages, each page  
15 of which appears to contain from two to eleven line items of materials responsive to the First  
16 Document Request.<sup>18</sup> For each of the line items, Wells Fargo asserts an attorney-client, attorney  
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19 <sup>17</sup> In response to the instant Motion to Compel, Wells Fargo argues that the  
20 proportionality considerations under FRCP 26(b)(1) effective after December 1, 2015, should  
21 now impact its obligation to provide an adequate privilege log in response to the First Document  
22 Request. See Opposition at 8:17 to 9:22. The court previously addressed the proportionality  
concerns required by FRCP 26(b)(1), see Protective Order at 5:3 to 6:4, and granted appropriate  
relief to Wells Fargo.

23 <sup>18</sup> Wells Fargo’s 9/13/2018 Supplemental Comprehensive Privilege Log includes a  
24 “Date” column for each page. The first line item on page 1 begins with the date of 12/20/2009  
25 and the items are then listed in substantially chronological order until it gets to page 147. On  
26 page 147, the second line item has a date of 7/18/2018, and then the third line item has a date of  
27 2/10/2012. The fourth line item has a date of 12/2/2009, and the remaining line items thereafter  
28 proceed again in substantially chronological order. Page 571 of this privilege log contains the  
last entry in the Date column as 3/7/2017. So the first 147 pages of the latest privilege log covers  
documents dated from 12/20/2009 to 7/18/2018, while the remaining pages of the same log  
covers documents dated from 2/10/2012 to 3/7/2017.

1 work product, and/or “bank examiner” privilege. Having received a large portion of the  
2 privilege log from Wells Fargo as early as July 20, 2018, another portion on August 6, 2018, and  
3 a revised version of both prior portions on August 31, 2018, Nigro HQ filed the instant Motion to  
4 Compel on September 5, 2018. Allegedly because of the sheer volume of the privilege log,  
5 Nigro HQ asserts that it is only able to offer a “sampling” from the privilege log to demonstrate  
6 the assertions of privilege are inadequately stated. See Motion to Compel at 3:7 to 4:1. On that  
7 basis, Nigro HQ argues that the entire privilege log is inadequate and that Wells Fargo, therefore,  
8 should be compelled to amend its privilege log to provide sufficient information on which the  
9 privilege assertions can be evaluated. See id. at 20:7-23.<sup>19</sup>

10 Inasmuch as the total number of items in the latest 572 page privilege log would range  
11 from a low of approximately 1,144 items to a high of approximately 6,292, the court inquired of  
12 Wells Fargo whether it agreed that the sampling offered by Nigro HQ is representative of the  
13 entire privilege log. Wells Fargo did not agree, however, and it appears that the court’s  
14 consideration of only the sampled items therefore might not necessarily apply to the entire  
15 privilege log.

16 In addition to its objection to the entire privilege log, Nigro HQ’s “sampling” reflects  
17 objections to certain specific items. See Motion to Compel at 12:23 to 20:5. At the hearing,  
18 however, Nigro HQ agreed that certain of the specific objections were moot because Wells Fargo  
19 subsequently produced or agreed to produce the subject documents. For example, Nigro HQ  
20 objected to Wells Fargo’s privilege claims with respect to a certain “Boykin Agreement,” a  
21 certain email string that occurred on 3/8/2010, and a certain “Krenek Memo” and related email  
22 string. See Motion to Compel at 12:21 to 13:21, 13:23 to 15:16, and 15:7 to 17:13. There is no  
23 question that Wells Fargo has produced those items or has agreed to produce the items. See  
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26 <sup>19</sup> Wells Fargo suggests that there is a degree of gamesmanship by Nigro HQ with respect  
27 to its objections to the Wells Fargo privilege logs. Wells Fargo refers to certain correspondence  
28 from Nigro HQ’s counsel suggesting that a privilege log is unnecessary in connection with its  
response to the document request propounded by Wells Fargo. See letter dated October 18,  
2017, attached as Exhibit “C” to Suzuki Declaration.

1 Opposition at 12:3-22, 12:24 to 13:22, and 14:11-20.<sup>20</sup>

2 In spite of its responses to these specific items, Wells Fargo continues, of course, to  
3 otherwise assert its attorney-client, attorney work product, and bank examiner privileges. See  
4 Opposition at 14:22 to 16:3. As to the latter, the bank examiner privilege (“BEP”) appears on  
5 the privilege log with respect to certain documents. As a national banking institution, Wells  
6 Fargo’s operations are subject to regulation by, amongst others, the federal Office of the  
7 Comptroller of Currency (“OCC”). To promote candor in the communications between the  
8 regulator and a bank, the materials exchange between the parties are subject to a privilege from  
9 disclosure to third parties. See Wultz v. Bank of China Ltd., 61 F.Supp.3d 272, 282 (S.D.N.Y.  
10 2013). The subject privilege log apparently includes at least 100 documents encompassed by the  
11 assertion of a BEP.<sup>21</sup> Compare Suzuki Declaration at ¶ 20 (“my office undertook ...a review of  
12 all 100 documents identified in the privilege log with the Bank Examiner Privilege”) with  
13 Motion to Compel at 18:2-3 (“As Wells Fargo has improperly withheld over 100 documents on  
14 the improper assertion of the bank examiner privilege, all of these documents must be  
15 produced.”). There appears to be no dispute that the regulator is the holder of the BEP. See  
16 Motion to Compel at 9:13-27; Opposition at 9:25-27. While the parties point fingers as to which  
17 of them was responsible for notifying the OCC of the document request,<sup>22</sup> the court was  
18 informed at the hearing that the OCC was not contacted by Wells Fargo until September 13,  
19 2018, i.e., the day before the hearing. Moreover, the court was informed at the September 14,

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22 <sup>20</sup> Nigro HQ’s counsel attests that as of September 12, 2018, Wells Fargo still had not  
23 produced various documents that were erroneously withheld or redacted. See Second Pilatowicz  
24 Declaration at ¶ 4.

25 <sup>21</sup> Some of the documents in the privilege log identify the privilege as “BEP-FRB” rather  
26 than BEP-OCC. See, e.g., 9/13/2018 Supplemental Comprehensive Privilege Log at page 298,  
27 dated 8/6/2012 (two items) and page 526, dated 3/14/2016. The parties have not indicated  
28 whether the “FRB” acronym refers to the Federal Reserve Board or other federal agency or body  
having any regulatory authority over a national banking institution.

<sup>22</sup> At first blush, the responsibility to contact the appropriate regulator appears to lie with  
the banking institution, not the third party requesting the documents.

1 2018, hearing that no information is available as to when the OCC would respond.

2 If the OCC waives the assertion of a BEP with respect to the 100 or so documents  
3 appearing on the latest privilege log, Wells Fargo indicated that it would produce the documents.  
4 From what the court can discern from the latest privilege log, however, that indication may not  
5 be correct inasmuch as Wells Fargo also has asserted attorney-client and/or attorney work  
6 product privileges with respect to certain BEP documents. See, e.g., 9/13/2018 Supplemental  
7 Comprehensive Privilege Log at page 3, Bates WFB DI\_00032677- WFB DI\_00032675; page 4,  
8 Bates WFB DI\_00032701-WFB DI\_00032698; and page 4, Bates WFB DI\_00032709-WFB\_DI  
9 00032706.

10 As it now stands, there allegedly are at least 100 documents encompassed by the latest  
11 privilege log that Wells Fargo has not produced because the appropriate agency or agencies  
12 holding the BEP were only recently notified of the document request. There also may have been  
13 some documents on the initial privilege log that were subject to the assertion of a BEP, but which  
14 do not appear on the latest privilege log. Compare, e.g., Wells Fargo's July 20, 2018 Production  
15 at page 4, Bates WFB DI\_00024775-WFB DI\_00024863, dated 3/18/10, with 9/13/2018  
16 Supplemental Comprehensive Privilege Log at page 3 (listing non-BEP items dated from  
17 3/8/2010 through 7/8/2010) and at pages 182-83 (listing four non-BEP items dated on 3/18/10).

18 In addition to the BEP, Wells Fargo also asserts the attorney-client and/or attorney work  
19 product privileges throughout the privilege log. In this district, the requirements for an adequate  
20 privilege log was discussed by the court in In re Hotels Nevada, LLC, 458 B.R. 560 (Bankr. D.  
21 Nev. 2011). As the court explained:

22 In order to raise a competent privilege claim and avoid waiver, a privilege log  
23 must have sufficient detail to allow the court to make a reasoned decision on the  
24 privilege claim. As stated in Attorney-Client Privilege:

25 A proper claim of privilege requires a specific designation and  
26 description of the documents within its scope as well as precise  
27 and certain reasons for preserving their confidentiality. Unless the  
28 affidavit is precise to bring the document within the rule, the Court  
has no basis on which to weigh the applicability of the claim of  
privilege. An improperly asserted claim of privilege is no claim of  
privilege at all.

1 Attorney–Client Privilege, *supra*, § 11:11 (quoting *Int'l Paper Co. v. Fibreboard*  
2 *Corp.*, 63 F.R.D. 88, 94 (D.Del.1974)). *See, e.g., Diamond State Ins. Co. v. Rebel*  
3 *Oil Co., Inc.*, 157 F.R.D. 691, 698 (D.Nev.1994) (“This demonstration [of  
4 attorney-client privilege] is generally accomplished by the submission of a  
5 privilege log which identifies (a) the attorney and client involved, (b) the nature of  
6 the document, (c) all persons or entities shown on the document to have received  
7 or sent the document, (d) all persons or entities known to have been furnished the  
8 documents or informed of its substance, and (e) the date the document was  
9 generated, prepared, or dated.”).

7 Against these standards, SDW's privilege log is fatally deficient. Two items—  
8 item 1 regarding billing statements, and item 4 regarding “emails and  
9 attachments”—are insufficiently detailed. “A party claiming the privilege must  
10 identify specific communications and the grounds supporting the privilege as to  
11 each piece of evidence over which privilege is asserted.” *United States v. Martin*,  
12 278 F.3d 988, 1000 (9th Cir.2002) (citing *United States v. Osborn*, 561 F.2d 1334,  
13 1339 (9th Cir.1977)). That obligation is not met by broad, generic description of  
14 types of documents of unknown quantity. “Blanket assertions are ‘extremely  
15 disfavored.’” *Id.* (quoting *Clarke v. Am. Commerce Nat'l Bank*, 974 F.2d 127,  
16 129 (9th Cir.1992)).

14 458 B.R. at 574 (emphasis added).

15 The initial privilege logs provided by Wells Fargo consisted of eleven columns disclosing  
16 the beginning and ending pages of the document, its date, author, email to, email from, email  
17 CC, file name, privilege type, privilege basis, and subject. See Wells Fargo’s July 20, 2018  
18 Production (passim). The latest privilege log provided by Wells Fargo consists of fifteen  
19 columns reflecting the addition of four more columns to the privilege log: privileged, redactions,  
20 type of communication, and source of legal advice. See Wells Fargo’s 9/13/2018 Supplemental  
21 Comprehensive Privilege Log (passim).

22 While the latest privilege log provides additional categories of information, it still  
23 provides no information or no complete information of the persons or entities known to have  
24 been provided the subject documents or informed of their substance. Documents and  
25 communications can be transmitted or shared through email, but email has never been nor will it  
26 ever be the exclusive means by which documents and information is shared. The obvious  
27 consequence of sharing a document or communication with an outside party is that an otherwise  
28 valid privilege may be waived.



1 It also appears that many of the documents in the latest privilege log have redactions  
2 where the attorney-client and/or work product privilege is asserted by Wells Fargo. See, e.g.,  
3 Wells Fargo's 9/13/2018 Supplemental Comprehensive Privilege Log, at page 65, Bates WFB  
4 DI\_00045276-WFB DI\_00045276. If the entire document is privileged, then redaction  
5 presumably would not be required. If only part of the document is privileged and therefore  
6 redacted, then a "blanket assertion" of the privilege would be inappropriate.

7 It is clear that at least 100 documents to which Nigro HQ may otherwise be entitled  
8 through discovery will not be available until the applicable agency responds or a hearing on  
9 adequate notice to the agency is conducted. As to the latter, no such hearing has been scheduled  
10 and no opportunity for the appropriate agency or agencies to appear has been provided. As a  
11 result, neither Nigro HQ nor Wells Fargo can be expected to file a complete witness and exhibit  
12 list, nor the alternate direct testimony declarations and trials statements, by the September 25,  
13 2018 extended deadline.

14 It also is clear that some of the objections to the latest privilege log were resolved at or  
15 prior to the hearing. It also is unfortunately clear that unresolved objections raised by Nigro HQ  
16 by way of sampling cannot be applied to the remainder of privilege log. As discussed above, at a  
17 minimum, the latest privilege log is deficient because it does not provide complete information  
18 as to the persons or entities that have been provided the documents or communications, or  
19 informed of their substance.<sup>23</sup>

20 Under these circumstances, the court will require Wells Fargo to provide Nigro HQ with  
21 a revised privilege log that reflects only the items that remain in dispute and addresses the court's  
22 concerns discussed above. Additionally, the court will require that the documents in any revised  
23 privilege log be listed in chronological order (unless otherwise requested). Moreover, all  
24 documents listed in the revised privilege log must be assigned a number and listed in sequence.

25 **IT IS THEREFORE ORDERED** that the Motion to Compel Wells Fargo Bank, N.A. to  
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27 <sup>23</sup> Whether this means simply adding another column or additional columns to the  
28 existing form of the privilege log need not be addressed. It is, of course, Wells Fargo's burden to  
provide the information in the proper form and substance to establish its privilege claims.

1 Produce Improperly Withheld, Non-Privileged Documents and Revise Privilege Log, brought by  
2 Nigro HQ LLC, Docket No. 656, be, and the same hereby is, **GRANTED**.

3 **IT IS FURTHER ORDERED** that no later than September 24, 2018, counsel for Nigro  
4 HQ LLC and Wells Fargo Bank, N.A., shall contact the courtroom deputy, Cathy Shim, by email  
5 or telephone, to arrange a telephonic status conference to be held no later than September 28,  
6 2018. At the telephonic status conference, counsel must be prepared to address a deadline for  
7 submission of the revised privilege log discussed above, as well as continued trial dates in  
8 connection with the underlying matter.

9 **IT IS FURTHER ORDERED** that the current deadlines for submission of witness and  
10 exhibit lists, alternate direct testimony declarations, and trial statements, as well as any other  
11 applicable deadlines in anticipation of trial, are **STAYED** until further order of this court.

12 Copies sent via CM/ECF ELECTRONIC FILING

13  
14 Copies sent via BNC to:

15 EDWARD M ZACHARY  
16 ONE RENAISSANCE SQUARE  
17 TWO NORTH CENTRAL AVE, STE 2200  
18 PHOENIX, AZ 85004-4406

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